U.C.L.A. Law Review

Questioning Questions in the Law of Democracy: What the Debate Over Voter ID Laws' Effects Teaches About Asking the Right Questions

Emily Rong Zhang

ABSTRACT

Voter identification laws ("voter ID laws"), laws that require voters to present identification when voting, launched the modern Voting Wars. After the Supreme Court blessed Indiana's voter ID law in *Crawford v. Marion County*, voter ID laws proliferated across the country. Their prevalence belies their notoriety. They remain one of the most hotly contested category of election laws and are often referred to as a voter suppression law, if not the modern voter suppression law.

While these laws first served as a rallying cry for the election law, they have become a sore spot for what is historically a collaborative and close community of social scientists, lawyers, and legal scholars. Many social scientists have concluded that voter ID laws have had negligible effects, if any, on voter turnout. That conclusion may seem surprising—even difficult to believe—given how many eligible voters lack IDs. It has raised uncomfortable questions about whether the progressive legal alarm over voter ID laws—including litigation challenging those laws—has been warranted.

By harmonizing the causal social science literature and descriptive evidence unearthed in the course of litigation, this Article is the first to offer an account of why empiricists have consistently failed to detect a turnout effect from voter ID laws. Upon investigation, what is surprising is not that a turnout effect has not been detected, but why an effect should have been expected in the first place. Evidence from litigation suggests that more than 99 percent of registered voters who habitually vote may have the requisite ID for voting, even though large numbers of eligible (but not registered) citizens lack IDs. It is therefore unsurprising that the best causal studies suggest that voter ID laws decreased turnout (that is, voting conditional on registration) by no more than 2 percent. Those studies should not have expected any other result: existing causal studies sought to detect an effect that descriptive evidence did not support. Thus, the discord in the literature results not from the sidelining of important causal findings, but rather from the lack of interaction between the causal academic literature and litigation-derived descriptive evidence.

Resolution of the debate on the turnout effects of voter ID laws has far reaching implications for the election law community. For legal scholars in particular, doing so highlights important responsibilities in maintaining an interdisciplinary relationship with social scientists. The traditional notion of the interdisciplinary relationship between empiricists and lawyers in the field of election law is one of answering questions and questioning answers, in which social scientists

offer empirical answers to questions posed by lawyers, and lawyers in turn question the relevance, importance, and weight of the empirical answers provided by social scientists. Resolution of the dbate over voter ID laws' effects suggests that election law scholarship should also question questions: lawyers should not only question the empirical answers that social scientists offer, but also their hypotheses and methods in reaching those answers.

The voter ID debate supplies two additional examples of questions worth questioning. First, is the estimated effect big or small? Social scientific assumptions in interpreting empirical effect sizes do not hold for legal evaluation. While social scientists are interested in comparing the effect of election laws against all other drivers of turnout, legal interest is limited to how an election law compares to other laws. Second, is the law in question a voter suppression law? In assuming that laws that do not depress turnout are not voter suppressive, social scientists measure *vote* suppression, which is not the same as *voter* suppression. Understanding an election law's suppressive effects solely through turnout evidence ignores burdens that voters take on to comply with onerous laws, as well as mounting barriers that further discourage disaffected individuals from voting.

Questioning questions also helps clarify doctrine. I consider how courts hearing challenges to voter ID laws have applied—and misapplied—turnout evidence in conducting the burden inquiry in the *Anderson/Burdick* standard governing federal constitutional protections for the right to vote. The *Anderson/Burdick* standard balances the burdens imposed by the challenged law on the right to vote against the state's justification for the law. Causal evidence of turnout effects is a clearly efficient—but also radically incomplete—measure of burdens on the right to vote. Conceptual clarity of both what turnout estimates measure and what the doctrine asks ensures not only that all relevant evidence is presented and considered in voting-rights cases, but also that the social science literature is better positioned to produce doctrinally responsive research.

AUTHOR

Assistant Professor, UC Berkeley School of Law. I wrote this piece after returning to graduate school after working as a Skadden Fellow at the ACLU Voting Rights Project, where I learned what I know about procuring, producing, and presenting social science evidence in voting rights cases from my colleagues and the experts we worked with. I am grateful to them all: from VRP, Orion Danjuma, Dale Ho, Sophia Lakin, Theresa Lee, and Alora Thomas, and the experts we worked with, Stephen Ansolabehere, Matt Barreto, Barry Burden, Wendy Tam Cho, Bill Cooper, Lisa Handley, Eitan Hersh, Michael McDonald, Lorrie Minnite, Dan Smith, Alex Street, and Chris Warshaw (many of whom also provided helpful feedback on this Article). I am also grateful for helpful comments and suggestions from Abhay Aneja, Rabia Belt, Bruce Cain, John Donohue, Nick Eubank, Jacob Goldin, Rick Hasen, David Hausman, Dan Ho, Sam Issacharoff, Hakeem Jefferson, Hajin Kim, Pam Karlan, Mohsin Mirza, Anne O'Connell, Lisa Ouellette, Nate Persily, Rick Pildes, Jonathan Rodden, and participants of the Stanford Legal Research in Progress workshop and faculty workshops at Pittsburgh, Denver, Loyola LA, UCLA, Nebraska, SMU, Cardozo, UVA, Florida, Texas A&M, Illinois, GW, Penn, Northeastern, Duke, Berkeley, Columbia, and Cornell. I am grateful to Susan Plum, Leti Volpp, and the Skadden Fellowship Foundation for a writing stipend that supported me

while I was writing this Article. Finally, I thank my diligent and accommodating student editors at the *UCLA Law Review* for all their help and understanding with getting this article published. Disclosure: I was, but no longer am, counsel on several of the cases cited in this Article. All mistakes are my own.

TABLE OF CONTENTS


THE UNIVERSITY OF CALIFORNIA
UCLA
SCHOOL OF LAW

INTRODUCTION

The field of the law of democracy[1] depends on interdisciplinary conversation between social scientists, lawyers, and legal scholars. As many in the field have long observed,[2] this conversation is not mere small talk. Not only are questions answered, but answers are also questioned.[3] Under ideal circumstances, the conversation produces law that is informed by social scientific facts and research that is positioned to address consequential policy issues.

The modern Voting Wars,[4] in which states have passed novel restrictions on voting and legal protections for voting have come under attack, have given the conversation an urgent tone. In particular, voter identification ("voter ID") requirements have become a fixture of that conversation. This Article considers how the interactions that social scientists, lawyers, and legal scholars have had about voter ID laws exemplify, challenge, and ultimately expand conventional notions of how the field of the law of democracy might be strengthened by longstanding interdisciplinary ties and the kind of dialogue such ties can and should facilitate.

At first glance, the interdisciplinary conversations about voter ID laws appear to function as desired. Much of the litigation challenging voter ID laws has been fueled by actual conversations that social scientists, lawyers, and judges have had in depositions, in meetings with attorneys, and in courtrooms. But these litigation partnerships obscure a deep fissure in the field writ large, originating from a persistent failure in the academic literature to find that voter ID laws have an effect on voter turnout.

---

1. SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (5th ed. 2016). I refer to the Law of Democracy and Election Law interchangeably in this Article for the sake of variety, and also to recognize that the field welcomes a diversity of approaches. *See* DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN, DANIEL P. TOKAJI & NICHOLAS STEPHANOPOULOS, ELECTION LAW: CASES & MATERIALS (6th ed. 2017).
2. *See generally* Richard H. Pildes, *Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1518 (2002) (describing law and social science as "perhaps nowhere more mutually dependent than in the voting-rights field"); Bruce E. Cain, *Election Law as a Field: A Political Scientist's Perspective*, 32 LOY. L.A. L. REV. 1105 (1999). As Cain's own career attests, Cain's description that political scientists "contribute" to the election law field is rather an understatement. *Id.* at 1105. For a Freudian perspective of the field, see Heather K. Gerken, *Keynote Address: What Election Law Has to Say to Constitutional Law*, 44 IND. L. REV. 7, 9 n.14 (2010).
3. *See generally* Pamela S. Karlan, *Answering Questions, Questioning Answers, and the Roles of Empiricism in the Law of Democracy*, 65 STAN. L. REV. 1269 (2013).
4. This evocative—and descriptive—term is courtesy of RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN (2012).

The question posed to quantitative social scientists by the introduction of strict voter ID laws—and made more urgent by the U.S. Supreme Court's decision upholding Indiana's voter ID law in *Crawford v. Marion County*[5]—was: how much do these laws impact voting? The surprising answer, seemingly reinforced over time by new waves of research, is: maybe not much at all. Social scientists' repeated null findings threw into question whether widespread fears of voter ID laws' suppressive effects were indeed justified, and whether the efforts undertaken to prevent voter ID laws' implementation were worthwhile. It turned the conversation about voter ID laws from a dialogue into a debate—a heated controversy, even—in the field of election law.

This Article offers a resolution of that debate by bringing together evidence on voter ID laws' effects from two too-often-separate knowledge-generating domains: (1) academic literature and (2) expert discovery in the course of litigation. Academic studies attempting to estimate the effects of voter ID laws on voter turnout are unable, to detect effect sizes smaller than 2 percent, given statistical constraints. While these studies lay to rest claims of apocalyptic voter suppression at the hands of voter ID laws, they are also not in a position to detect an effect smaller than 2 percentage points. Small as such an effect might seem, it could swing many elections. At the same time, expert discovery in litigation, benefiting from access to vast and restricted administrative data, has revealed that less than 1 percent of registered voters who frequently vote lack voter ID. Thus, while a large number of individuals are potentially affected by voter ID restrictions, those directly impacted make up only a small proportion of individuals expected to vote. This explains the "disjuncture"—long identified by legal scholar Sam Issacharoff —between the clear evidence that voter ID requirements have disproportionate effects on racial minorities and the failure of the literature to detect suppressive effects exceeding 2 percent.[6]

Thus, the voter ID debate is less an example of social science arriving at uncomfortable answers than of social science asking imprecise questions. The hypothesis at the heart of the causal literature was premised on expected effect sizes of voter ID laws on turnout that were not supported by descriptive evidence.

Harmonizing the debate over the effects of voter ID laws points to broader lessons about the role of election law scholarship. Besides answering questions and questioning answers, there is also occasion for election law scholarship to question questions. Questionable questions are not limited to those about the size of anticipated effects. The debate over voter ID laws suggests two additional

5. 553 U.S. 181 (2008).
6. *See* Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1380 (2015).

questions that election law scholarship should interrogate: (1) Is the effect of voter ID restrictions on turnout—an effect of under 2 percent—small? (2) Given the size of that effect, do these laws constitute voter suppression?

Social scientists' dismissal of a 2 percent estimated effect as "small" is premised on comparing the suppressive effect of election laws to that of demographic and electoral factors underlying whether an individual is likely to vote. Instead, to properly contextualize and evaluate the effect of restrictions on voting, I argue that we should compare the magnitude of their effects on voter turnout against that of valid election laws like same day registration or voter registration deadlines. As for normative conclusions that voter ID laws are not voter suppressive, they depend on a particular—and ultimately cramped—view of vote suppression. Normative evaluations of election laws' effects must consider not only whether the law caused registered voters to not cast their ballots but also whether the law made it less likely that citizens eligible to vote will become actual voters.

These same questions may be worth questioning outside of the context of voter ID laws as well. Questioning them will help ensure that quantitative estimates produced by the social science literature are properly contextualized, and that all individuals affected by changes in voting laws are accounted for. Reserving a place in election law scholarship for questioning questions also challenges longstanding assumptions about the division of labor in the election law community, in which social scientists are in charge of facts and evidence, and legal scholars are in command of the law and theory.

Finally, questioned questions can and should be applied to doctrinal analysis. This Article considers how causal estimates in the social science literature of election laws on voter turnout relate to the federal constitutional doctrine protecting the right to vote, also known as the *Anderson/Burdick* standard. *Anderson/Burdick* is a balancing test that asks whether the burdens on voters that the challenged election law imposes are justified. In evaluating burdens, courts consider both the character and magnitude of injury posed to affected individuals. While turnout estimates clearly address a relevant magnitude (how many votes are suppressed), they only capture injuries of a particular character (failure to vote). Understanding the limitations of turnout estimates broadens an already rich discussion about the proper role for turnout evidence in the context of Section 2 vote denial claims.[7] At a practical level, it also counsels facilitating the discovery of evidence that complements turnout estimates.

7. See articles and cases discussed *infra* in Subpart III.A.

The rest of this Article proceeds as follows. In Part I, I explain and resolve the debate over the effect of voter ID laws on voter turnout by considering, in turn, evidence from the causal social science literature and from discovery. Null findings in the social science literature do not rule out a true suppressive effect of voter ID laws of 2 percent, and discovery about individuals who do not have the requisite ID to comply with voter ID laws suggests that they do not comprise more than 2 percent of registered and habitual voters.

In Part II, I question two additional questions. First, I ask whether a true suppressive effect of 2 percent should be considered small. Second, I ask whether the causal estimates of voter suppression capture the full set of expected harms to voters from restrictions like voter ID requirements.

In Part III, I lay out the immediate doctrinal rewards to all this questioning. I consider how the estimated causal effects relate to the *Anderson/Burdick* standard that protects the federal constitutional right to vote. I find that it is significantly limited in the face of *Anderson/Burdick*'s rich consideration of the many "characters" that burdens on the right to vote can take. Thus, I suggest more robust data discovery in voting rights litigation to help uncover the weighty burdens imposed by election laws that are not measured by turnout estimates.

BACKGROUND

Voter ID laws—requirements that voters present photo identification when voting—are at the heart of controversies over access to the franchise in the modern era. As voter ID requirements have been debated at the federal and state legislative levels, they have also been litigated in federal and state courts, including the U.S. Supreme Court and several state Supreme Courts. In the meantime, the academic fights in the voter ID literature have been no less vicious than those occurring in state legislatures and courtrooms around the country.[8]

These laws first rose to prominence in the early 2000s. Discussion of the desirability of voter ID requirements was given a high profile by the Commission on Federal Election Reform's report released in 2001.[9] At the time, Republican Senators, notably Kit Bond and Mitch McConnell, sought to implement

8. *See, e.g.*, Andrew Gelman, *A New Controversy Erupts Over Whether Voter Identification Laws Suppress Minority Turnout*, WASH. POST: MONKEY CAGE (June 11, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/11/a-new-controversy-erupts-over-whether-voter-identification-laws-suppress-minority-turnout [https://perma.cc/MN7M-UGV5].

9. NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS (2001). As the commission was co-chaired by Presidents Ford and Carter, it is also referred to as the Ford-Carter Commission.

nationwide voter ID requirements.[10] These initial demands were resolved through compromises in the Help America Vote Act, which required only that first time registrants by mail show identification when they present themselves at a polling location.[11] Many states went further, adopting in-person photo identification requirements for every time voters cast a vote.[12] That these requirements were adopted by Republican legislatures and opposed by Democrats added the familiar partisan flavor characteristic of the modern Voting Wars.[13]

The voter ID bills that made it through the legislative process were challenged in court time and again. One of the first states to implement a strict statewide voter ID law was Indiana,[14] and the legal challenge to that law resulted in the Supreme Court's decision in *Crawford v. Marion County*.[15] The Court, in a decision that has since been described by its author as "fairly unfortunate,"[16] considered whether the law infringed on the constitutional right to vote under the familiar standard from *Anderson/Burdick*.[17] The *Anderson/Burdick* balancing test asks whether the burdens imposed by the challenged election practice on voters are

10. *See* Brief for the United States Senator Mitch McConnell et al. as Amici Curiae in Support of Respondents, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (Nos. 07-21, 07-25) at 14–15 (describing Senator Bond as the "primary author of the voter identification provision" and citing a statement of Senator McConnell in support of voter ID requirement for first-time registrants).
11. 52 U.S.C. § 21083(b)(2)(A).
12 *See Voter I.D. Laws*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 7, 2022), https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx [https://perma.cc/FL6E-27LM].
13. *See* HASEN, *supra* note 4. For a nuanced treatment of the partisan valence of voter ID laws, see William D. Hicks, Seth C. McKee, Mitchell D. Sellers & Daniel A. Smith, *A Principle or a Strategy? Voter Identification Laws and Partisan Competition in the American States*, 68 POL. RSCH. Q. 18 (2015).
14. Although the Indiana voter ID law became the focal point of controversy, Georgia was the first to implement a voter ID law during this period. *See* Benjamin Highton, *Voter Identification Laws and Turnout in the United States*, 20 ANN. REV. POL. SCI. 149, 157–58 (2017). The Georgia law was also challenged unsuccessfully in court. *See* Common Cause/Georgia v. Billups, 554 F.3d 1340 (11th Cir. 2009).
15. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).
16. Robert Barnes, *Stevens Says Supreme Court Decision on Voter ID Was Correct, but Maybe Not Right*, WASH. POST (May 15, 2016), https://www.washingtonpost.com/politics/courts_law/stevens-says-supreme-court-decision-on-voter-id-was-correct-but-maybe- not-right/2016/05/15/9683c51c-193f-11e6-9e16-2e5a123aac62_story.html [https://perma.cc/XLJ6-BN58?type=image] (quoting Justice Stevens, who authored the opinion); *see also* John Schwartz, *Judge in Landmark Case Disavows Support for Voter ID*, N.Y. TIMES (Oct. 15, 2013), https://www.nytimes.com/2013/10/16/us/politics/judge-in-landmark-case-disavows-support-for-voter-id.html [https://perma.cc/7379-ALRJ] (quoting Judge Posner, who heard *Crawford* when it was before the Seventh Circuit, 472 F.3d 949 (7th Cir. 2007), disavowing his vote upholding the law).
17. The Anderson/Burdick balancing test comes from the twin cases of *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992).

justified by legitimate state concerns in election administration.[18] Put simply, it prevents disenfranchising practices from being implemented unless the state's rationales justify them.

Failing to find that the law imposed "excessively burdensome requirements on any class of voters," the *Crawford* Court upheld the law.[19] Plaintiffs' burden of persuasion was high because they brought a facial, not an as-applied, challenge,[20] and the record they amassed was thin.[21] Critically, the Court lacked evidence—including social science evidence—of the nature and severity of the burdens the law imposed on voters. *Crawford*'s holding, seeming to bless the constitutionality of voter ID laws, became all the more important a few years later, when the Supreme Court decided *Shelby County v. Holder*.[22] In *Shelby County*, the Court struck down the centerpiece of the Voting Rights Act, the preclearance regime, which required states with a history of racial discrimination in voting to submit proposed changes to election laws to the Department of Justice for approval before the changes could be implemented.[23]

Emboldened by *Crawford*[24] and enabled by *Shelby County*, states passed even more draconian voter ID laws.[25] For instance, Texas and North Carolina, two of the most prominent adopters of voter ID requirements in the modern era, passed restrictive voter ID laws that limited the kinds of IDs that could be used to satisfy the ID requirement. Legal challenges swiftly followed, engaging virtually all of the most sophisticated voting rights advocates in the country, including those from the United States Department of Justice.[26] As other states passed restrictions as

18. *See Crawford*, 553 U.S. at 190 (quotations omitted).
19. *Id.* at 202 (quotations omitted).
20. *See id.* at 200.
21. *See, e.g.*, *id.* at 200–01 (noting that the "evidence in the record does not provide us with the number of registered voters without photo identification," nor was there "any concrete evidence of the burden imposed on voters who currently lack photo identification").
22. 570 U.S. 529 (2013).
23. *See id.*
24. For more context of how *Crawford* (and subsequent cases and actions) fits into the Court's broader election law jurisprudence, see Richard L. Hasen, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn but With Speed Bumps and Surprising Twists*, 68 STAN. L. REV. 1597, 1609 (2016).
25. *See* Highton, *supra* note 14, at 158 fig.1 (showing, in a figure borrowed from the NCSL, a significant increase in strict ID laws between 2012 and 2014).
26. The litigation over both voter ID laws was protracted. For a view of what the litigation looked like when it was first brought, see *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014) *aff'd in part, vacated in part, remanded sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), and *N.C. State Conf. of NAACP v. McCrory (McCrory I)*, 997 F. Supp. 2d 322 (M.D.N.C. 2014).

well, these challenges were brought across the country in both federal[27] and state courts.[28]

Litigation first served as a rallying cry for social science research: the thin evidentiary record in *Crawford*, including the absence of any research measuring the suppressive effect that voter ID laws have on voter turnout, galvanized a generation of election law scholars and spurred a burning research interest that endures to this day. The breadth of the plaintiff bench in the subsequent voter ID litigation was matched only by the depth of expert witness talent it showcased.[29] The deep engagement of social scientists both in producing research relevant to litigation and in generating evidence in the course of litigation makes the voter ID experience especially apt for our discussion here.

I. HOW MUCH DO VOTER ID LAWS SUPPRESS VOTING?

How much do voter ID laws suppress voting? Legal and policy determinations of the laws' validity depend critically on the answer to this question. In the course of challenging these laws, voting rights lawyers and the experts they retained sought to uncover the answer. This Part compares the answers to this question offered by social scientists to those presented by voting rights lawyers and their expert witnesses during litigation. It first canvasses the academic literature estimating the causal effect that voter ID laws have had on voter turnout and finds that null effects in the literature do not rule out a true suppressive effect of up to 2 percent. It then seeks additional evidence about what the true effect might be from a different kind of literature: expert reports authored in the course of litigation to aid courts in factfinding. That evidence, garnered from one of the few contexts in which plaintiffs could analyze restricted data, suggested that among registered voters who frequently vote, less than 1 percent lack the necessary ID to vote. Academic and litigation evidence in concert makes clear that these laws do disenfranchise, but not as much as many had feared.

27. *See, e.g.*, ACLU of N.M. v. Santillanes, 546 F.3d 1313 (10th Cir. 2008); Lee v. Va. State Bd. of Elections, 843 F.3d 592 (4th Cir. 2016); Frank v. Walker, 768 F.3d 744 (7th Cir. 2014) (challenging the Wisconsin voter ID law).

28. *See, e.g.*, Applewhite v. Commonwealth, 54 A.3d 1 (Pa. 2012); Martin v. Kohls, 444 S.W.3d 844 (Ark. 2014); City of Memphis v. Hargett, 414 S.W.3d 88 (Tenn. 2013).

29. *See* North Carolina NAACP v. McCrory (*McCrory II*), 831 F.3d 204, 212–13 (4th Cir. 2016) (listing as plaintiffs no less than 3 voting rights groups and the Department of Justice); *see also McCrory I*, 997 F. Supp. 2d 322 (noting testimony from illustrious plaintiff experts Drs. Theodore Allen, Barry Burden, J. Morgan Kousser, Alan Lichtman, Lorraine Minnite, and Charles Stewart).

A. Understanding the Literature

The following table lists the major studies estimating the causal effect of voter ID laws on overall turnout[30]—i.e. how much the introduction of voter ID laws caused turnout to change–and their derived estimates (** denote that the estimate is statistically significant):

Study	*Estimate of Voter ID Laws' Effect*
Eagleton Institute (2006)[31] (and Vercellotti & Anderson (2006))[32]	-4% (max estimate) **
Vercellotti & Anderson (2009)[33]	(probit estimate not easily translated)
Mycoff et al. (2009)[34]	-.29% (max estimate)

30. I do not address, in this Article, the evidence on voter ID laws' disparate racial impact, a core aspect of a vote denial claim under Section 2 of the Voting Rights Act. Such evidence, that minority voters are much less likely to possess qualifying ID than white voters (and therefore, in the parlance of Section 2, that voter ID laws produce the result of denying racial minorities an equal opportunity to participate in the political process), is virtually uncontroverted. *Perry*, 71 F. Supp. 3d at 695 (S.D. Tex. 2014) (crediting expert testimony finding that Black and Latino registered voters and eligible voters in Texas were far less likely than their white counterparts to possess qualifying ID); *McCrory II*, 831 F.3d at 233 (noting that African Americans in North Carolina "disproportionately lack acceptable photo ID"); *Frank*, 17 F. Supp. 3d at 870–76 (discussing similar evidence for Black and Latino voters in Wisconsin); *Lee*, 188 F. Supp. 3d at 606 (acknowledging that the evidence at least shows that "African Americans, as a demographic block, are by a slim statistical margin less likely to have a form of valid identification" while declining to find a violation of Section 2). Academic studies confirm, across a broad set of contexts, that minorities are much less likely than their white counterparts to possess qualifying voter ID. *See, e.g.*, Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 POL. SCI. & POL. 111 (2009); Matt Barreto, Univ. Wash., Seattle, Stephen A. Nuño, Univ. Cal., Irvine & Gabriel R. Sanchez, Univ. N.M. Albuquerque, Voter ID Requirements and the Disenfranchisements of Latino, Black and Asian Voters, Presentation at the American Political Science Association Annual Conference (2007).

31. EAGLETON INST. OF POL. & MORITZ COLL. OF L., REPORT TO THE U.S. ELECTION ASSISTANCE COMMISSION ON BEST PRACTICES TO IMPROVE VOTER IDENTIFICATION REQUIREMENTS PURSUANT TO THE HELP AMERICA VOTE ACT OF 2002, at 28 tbl.3 (2006) [hereinafter EAGLETON INST. REP.].

32. Timothy Vercellotti, Rutgers Univ., & David Anderson, Rutgers Univ., Protecting the Franchise, or Restricting It? The Effects of Voter Identification Requirements on Turnout, Presentation at the American Political Science Association Annual Conference 22 tbl.2 (2006). This article is substantially similar the Eagleton Institute report. *Compare id.*, *with* EAGLETON INST. REP., *supra* note 31.

33. Timothy Vercellotti & David Anderson, *Voter-Identification Requirements and the Learning Curve*, 42 PS: POL. SCI. & POL. 117, 119 (2009).

34. Jason D. Mycoff, Michael W. Wagner & David C. Wilson, *The Empirical Effects of Voter-ID Laws: Present or Absent?*, 42 PS: POL. SCI. & POL. 121, 125 tbl.2 (2009).

Alvarez et al. (2011)[35]	~-2%** (max estimate)
Dropp (2013)[36]	-4%** (max estimate)
Cantoni & Pons (2019)[37]	-0.1%

At first glance, efforts to estimate the causal effect of voter ID laws appear to produce mixed results: most studies fail to detect a suppressive effect on overall turnout, although a few do. But first impressions are misleading. If we give more weight to better studies, the answer from the social scientific community on the effects of voter ID laws appears to be that they have none.

1. Reading Studies in Light of Their Subsequent History

Like cases, some studies have subsequent histories that limit their value. Some studies that have found a statistically significant effect, for instance Kyle Dropp,[38] were never published, casting doubt on the validity of their findings. But more common are methodological criticisms. Two such criticisms are particularly relevant in the literature on the effects of voter ID laws: criticisms of cross-sectional research designs and of the failure to cluster standard errors (to adjust for the fact that individuals subject to the same state laws respond to them in ways that are correlated).

Early works based on cross-sectional analysis (those written before 2013) do not meet current social scientific causal inference standards. I refer here to studies that compare outcomes across states and attempt to detect the effect of a voting restriction based on the fact that it is present in some states and not others. These studies have fallen out of favor for good reason: states with and without the election law of interest may differ in turnout for many other reasons. Statisticians and social scientists have demonstrated this fallacy in many ways,[39] but one intuitive way of understanding it is to consider an egregiously fallacious example:

35. R. Michael Alvarez, Delia Bailey & Jonathan N. Katz, *An Empirical Bayes Approach to Estimating Ordinal Treatment Effects*, 19 POL. ANALYSIS 20, 28 fig.2 (2011).
36. Kyle A. Dropp, Voter Identification Laws and Voter Turnout 23 tbl.2 (May 28, 2013) (unpublished manuscript) (on file with author).
37. Enrico Cantoni & Vincent Pons, *Strict ID Laws Don't Stop Voters: Evidence From a U.S. Nationwide Panel, 2008–2018*, 16 tbl.1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25522, 2019).
38. Dropp, *supra* note 36.
39. An especially influential piece on the fallacy of cross-sectional studies of election law is Luke Keele & William Minozzi, *How Much Is Minnesota Like Wisconsin? Assumptions and Counterfactuals in Causal Inference With Observational Data*, 21 POL. ANALYSIS 193 (2013). The contributions of the article are plenty: in addition to identifying the flaws of cross-sectional causal inference, the article also contains careful analysis of alternatives and applies those alternatives to a specific election law example. The exposition of theory through practice makes the article both accessible to beginners, and rewarding for seasoned researchers.

that caviar consumers are significantly healthier than those who do not consume it does not prove that caviar is a health food.[40] It is much more plausible that another trait possessed by caviar-consumers (wealth, maybe?) is responsible for their better health. Applying this principle to election law, states adopting a particular law—such as voter ID requirement—may have lower or higher voter turnout for reasons unrelated to the voter ID law itself.[41]

The second problem, the failure to cluster standard errors, follows from the fact that the standard errors associated with estimates of turnout effects are inappropriately large because of the relatively small number of states that have passed voter ID laws. Standard errors determine the range of uncertainty produced by any statistical estimate. The standard errors used in many of these studies were not—and should have been—clustered. The need to cluster standard errors relates to the fundamental point that the changes to be estimated (the effects of voter ID laws) are occurring at the state, not individual voter, level. Failure to cluster standard errors by state produces smaller ranges of uncertainty than are

40. This fallacy is most commonly on display in popular health news articles, for instance, in those stating that individuals who eat chocolate are healthier than those who do not. *See* Nicholas Bakalar, *Why Chocolate May Be Good for the Heart*, N.Y. TIMES (May 23, 2017), https://www.nytimes.com/2017/05/23/well/why-chocolate-may-be-good-for-the-heart.html [https://perma.cc/ACK8-3MHL] (summarizing a study finding an association between chocolate consumption and better heart health).

41. Moreover, the known fixes for this problem are unsatisfying. The conventional solution is to include control variables in the cross-sectional regressions. But in order for controls to adequately address the problem, the researcher must control for *all* covariates that cause states with and without a particular election law to adopt different election laws in the first place and to have different turnouts. A convincing cross-sectional study of voter ID requirements would have to control for every single factor that might cause states with voter ID to have different turnout from those without voter ID. *See* Keele & Minozzi, *supra* note 39, at 195 (describing how unattainable this specification assumption is "in most applications with observational data"); Donald P. Green & Alan S. Gerber, *The Underprovision of Experiments in Political Science*, 589 ANNALS AM. ACAD. POL. & SOC. SCI. 94, 98–99 (2003) (discussing the specification—and other—problems with a cross-sectional strategy). That is impossible. For example, some important covariates, for instance political culture and history, simply cannot be reliably measured and accounted for. Green & Gerber, *supra*, at 98 (calling it a "dubious assumption" that "most political science applications" of independent and control variables can be measured without error). Indeed, the political science literature is replete with factors that affect turnout, a classically complex and multicausal outcome. Every factor, from the size of campaign expenditures and the competitiveness of elections to the weather, has a role to play in voter turnout. The interaction between the various possible inputs to turnout presents a further mystery. Accounting holistically and accurately for all controls is a near impossibility. And even if such a thing were possible, it is impossible to verify with observational data whether a cross-sectional model is correctly specified. In other words, whether or not all controls necessary were included and included in the right form are both crucial to whether a causal conclusion can be drawn from the data—and utterly unknowable at the same time. In election law research, causal claims from cross-sectional designs are unlikely to be convincing.

warranted; replacing the normal standard errors with clustered ones tends to make the range larger.

Robert Erikson and Lorraine Minnite[42] first argued that robust standard errors had to be introduced to estimates of voter ID laws' effects. The immediate consequence of this important statistical fix was that Alvarez et al.'s[43] statistically significant finding that voter ID laws reduce turnout was no longer statistically significant. This reminder that standard errors should be clustered also signaled deeper structural constraints with causal inference using a cross-state design: underpowering issues will necessarily produce large standard errors associated with estimates of voter ID laws' effects and thus large confidence intervals. I consider these issues in more detail in Part I.A.3. below.

2. Recent, Sophisticated Study as Controlling Authority

Old and new studies are not similarly situated. While the early literature's failure to detect statistically significant suppressive effects might reflect methodological problems, modern studies' failure to do the same has led social scientists to doubt the prevailing belief that voter ID laws suppress voting.

For a while, empiricists could attribute the failure to detect a suppressive effect to poor methods, inadequate data, and insufficient time.[44] Cross-state comparisons were hampered by a chronic underpowering problem. Newly available individual-level data on turnout turned out to be unsuited for cross-state comparisons.[45] Studies were written soon enough—almost too soon—after the

42. Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification—Voter Turnout Debate*, 8 ELECTION L.J. 85 (2009).

43. Alvarez, Bailey & Katz, *supra* note 35, at 28 fig.2 (2011).

44. An additional reason empiricists found persuasive was the idea that aggregate turnout did not necessarily decrease as a result of voter ID laws due to the counter-mobilization effect. There is some recent evidence to suggest that counter mobilization efforts have in part countered the suppressive effect of voter ID laws. *See* Nicholas A. Valentino & Fabian G. Neuner, *Why the Sky Didn't Fall: Mobilizing Anger in Reaction to Voter ID Laws*, 38 POL. PSYCH. 331 (2017). But our ability to isolate the countermobilization from the suppressive effect of voter ID laws is limited. Ultimately, it is through analyzing causal evidence with descriptive evidence that I arrive at the most persuasive estimates of voter ID laws' suppressive effects.

45. For a discussion on how CCES survey data was used to estimate racial effects of voter ID laws, see generally Zoltan Hajnal, Nazita Lajevardi & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363 (2017). See generally Justin Grimmer, Eitan Hersh, Marc Meredith, Jonathan Mummolo & Clayton Nall, *Obstacles to Estimating Voter ID Laws' Effect on Turnout*, 80 J. POL. 1045 (2018) for criticisms relating to the limitations of the CCES data (and other issues). For discussion on the authors' response, see generally Zoltan Hajnal, John Kuk & Nazita Lajevardi, *We All Agree: Strict Voter ID Laws Disproportionately Burden Minorities*, 80 J. POL. 1052 (2018). For a discussion of the data and conceptual issues that this dispute teed up, see generally Barry C. Burden, *Disagreement Over ID Requirements and Minority Voter Turnout*, 80 J. POL. 1060 (2018).

laws were implemented that there was arguably an insufficient amount of time for the harmful effects of voter ID laws to be estimable from the data.

Time eroded the persuasiveness of these explanations. Social scientists grew impatient waiting for evidence that voter ID laws actually have a large suppressive effect. Many began to adjust their expectations. In 2017, Ben Highton canvassed the literature in an attempt to determine the true suppressive effect of voter ID laws.[46] By evaluating the existing findings alongside the credibility of the methodology applied, Highton determined that the effect likely does not "exceed[] four percentage points."[47]

Skepticism of the vote-suppressive effect of voter ID laws veered into complete doubt after a recent paper that utilized the most fine-grained data (individual-level data from voter files) and credible causal inference model (diff-in-diff)[48] found no suppressive effect on turnout.[49] The paper appeared to refute widespread claims that these laws cause "millions of voters" to be "turned away at the polls" made by, among others, "Democrats and civil rights groups,"[50] national political leaders (collectively[51] and individually[52]), and by the media.[53] That political parties and politically motivated groups[54] were among those pushing the mass disenfranchisement narrative further fueled suspicions that such claims were

46. *See generally* Highton, *supra* note 14.
47. Highton, *supra* note 14, at 163.
48. *See* JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHKE, MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST'S COMPANION 227 (2009).
49. *See* Cantoni & Pons, *supra* note 37, at 25. To be sure, the authors are careful to note that, as voter ID laws are in their relative infancy, they "cannot rule out that [suppressive] effects will arise in the future." *Id.* at 26. Nevertheless, their confidence in the substantive contribution of their null results is evident from the paper's title, "Strict ID Laws Don't Stop Voters," and its conclusion that "the fears that strict ID requirements would disenfranchise disadvantaged populations have not materialized." *Id.* at 25.
50. Deborah Barfield Berry, *Debate Heats up Over Voter ID Laws*, ABC NEWS (Nov. 10, 2011, 5:10 PM), https://abcnews.go.com/Politics/debate-heats-voter-id-laws/story?id= 14929152 [https://perma.cc/23SE-ESV9].
51. *See, e.g.*, Letter from Michael F. Bennet et al., U.S. Sen., to Eric Holder, Att'y Gen., U.S. Dept. Just. (June 29, 2011) (on file with UCLA L. REV.).
52. *See, e.g.*, Press Release, Chris Coons, U.S. Sen., Statement From Senator Coons on Decision on Pennsylvania's Controversial Voter ID Law (Oct. 2, 2012), https://www.coons.senate.gov/news/press-releases/statement-from-senator-coons-on-decision-on-pennsylvanias-controversial-voter-id-law [https://perma.cc/9TY2-XJKR]; *see, e.g.*, Tammy Baldwin (@tammybaldwin), TWITTER (May 17, 2017, 7:18 PM), https://twitter.com/tammybaldwin/status/865028784856150018 [https://perma.cc/ 8LBR-ABUF].
53. *See, e.g.*, Anna Fifield, *Voter ID Laws Could Sway US Elections*, FIN. TIMES (Aug. 5, 2012), https://www.ft.com/content/c50b1f7a-df0f-11e1-97ea-00144feab49a [https://perma.cc/7X8Q-7YEU].
54. *See, e.g.*, Memorandum from Guy Cecil, Chairman of Priorities USA Civis Analytics, Voter Suppression Analysis (May 3, 2017) (on file with the UCLA L. REV.).

politically motivated, rather than empirically grounded. The lack of credible estimates of suppressive effect seems to suggest that, while voter ID laws serve as narratives for partisan mobilization or excuses by sore losers,[55] they do not actually disenfranchise.

3. Synthesizing the Causal Literature

Before concluding that voter ID laws have had no effect on turnout, a closer look at the results from Cantoni & Pons is warranted. While the paper fails to detect a statistically significant effect, the size of its confidence interval spans +2 and -2 percent.[56] In other words, the paper is consistent with a true effect of anywhere between plus or minus 2 percent. The relatively large size of this confidence interval reflects the constraints on statistical power inherent in the cross-state design.

A more formal way of interpreting the force of Cantoni & Pons's findings—that is, to understand whether it really means that voter ID laws have no effect on turnout—is to conduct a post-hoc design analysis.[57] The name derives both from the retrospective nature of the analysis and from the fact that it evaluates not the results obtained but the design that produced the research. The analysis produces a likelihood measure that the research design would have accurately estimated a true non-null effect. It does so by asking whether the design would have been sufficiently statistically powered to detect a range of plausible effect sizes. Put simply, the analysis probes: now that you have failed to reject the null, let us find out how much of a shot your research design gave you to reject the null in the first place.

To understand the analysis, a short introduction to the concept of statistical power is worthwhile. Power in statistical analysis, as in other areas of life, is a source of confidence. Formally, it asks how likely it is that a given test will correctly reject the hypothesis that the studied intervention had no effect.[58] In other words, power confers confidence in the results obtained. Power is a function of three

55. *See* Trip Gabriel & Manny Fernandez, *Voter ID Laws Scrutinized for Impact on Midterms*, N.Y. TIMES (Nov. 18, 2014), https://www.nytimes.com/2014/11/19/us/voter-id-laws-midterm-elections.html [https://perma.cc/7QLS-PFZR].

56. *See* Cantoni & Pons, *supra* note 37, at ii, 16.

57. I adopt Gelman and Carlin's method in this Article for ease of reference and implementation. The entirety of the methodology is laid out in the article, along with explanations and the underlying code needed to compute key measures of interest. It is also widely used to conduct post-hoc design analysis in similar contexts. *See, e.g.*, Jonathan R. Brauer, Jacob C. Day & Brittany M. Hammond, *Do Employers "Walk the Talk" After All? An Illustration of Methods for Assessing Signals in Underpowered Designs*, 50 SOCIO. METHODS & RSCH. 1801, 1810 (2019).

58. *See* Jacob Cohen, *Statistical Power Analysis*, 1 CURRENT DIRECTIONS PSYCH. SCI. 98, 98 (1992).

elements: degrees of freedom, the estimated effect size, and its variance.[59] Degrees of freedom, a statistical term for the number of independent pieces of information that factor into calculating the estimate, is what was at issue in the earlier discussion about robust standard errors. Even when we have many data points from each state, the data are not independent of each other since they are all affected by the state environment. This basic point limits the degrees of freedom in cross-states analyses: not enough states have implemented the law we are interested in studying.[60]

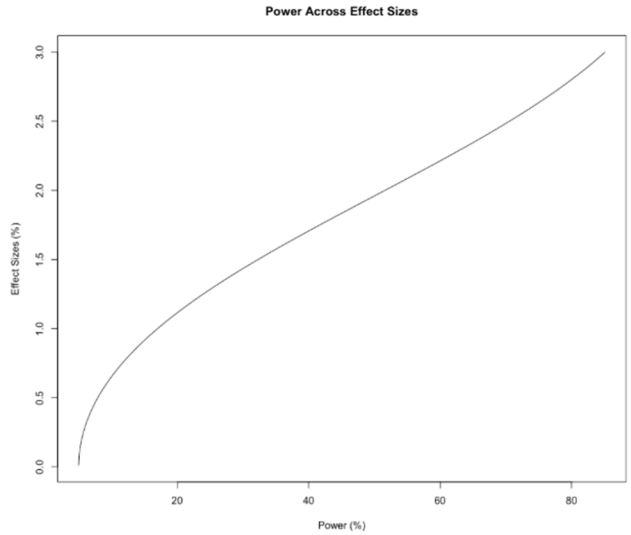
Since our analysis is post-hoc, we take the degrees of freedom as given and simply ask how big the effect had to be for the research design to detect it correctly and confidently.[61] The role that effect size (in other words, the magnitude of the effect detected) plays in statistical power is easy to intuit: even in a small sample, if the difference between treated and control groups is very large (say twenty percent), the design is likely to detect that difference between the two groups (even if the size of the difference cannot be accurately estimated). Conversely, if the difference between the groups is small (say two percent), a small sample size may prevent the difference from being detected at all. The role of the estimated effect size in statistical power is no less important than that of degrees of freedom.

I consider a range of effect sizes up to three percent on turnout in my post-hoc design analysis. I adopt this range in recognition of the fact that Cantoni & Pons's results (with a confidence interval that extends to a suppressive effect of two percent) functionally exclude any significant possibility that the true effect is larger than three percent. Based on these inputs, I plot the power of the Cantoni & Pons design against my range of possible effect sizes (up to three percent) to obtain the following graph:

59. *See* Andrew Gelman & John Carlin, *Beyond Power Calculations: Assessing Type S (Sign) and Type M (Magnitude) Errors*, 9 PERSPS. ON PSYCH. SCI. 641, 643 (2014).

60. An intuitive way to understand the desirability for degrees of freedom is to imagine not having any: one cannot estimate the effect of voter ID laws if no state has implemented one. Voter ID studies are constrained in degrees of freedom by the fact that few states have implemented voter ID laws, especially the strict variety that raises the most acute concerns.

61. I adopt the conventional significance threshold of 0.05.



As expected, when the true effect size increases (up the y-axis), the likelihood that the study will correctly detect that effect increases (the power increases along the x-axis). Pay particular attention to what the effect size would have to be for the study to have 80 percent power, the conventional threshold adopted for sufficient power: the effect size would have to be somewhere between 2.75 percent and 3 percent. For a true effect size below that, the study lacks power. Indeed, it is only at a two percent effect size that the study would have a 50-50 chance of detecting the effect.

To be sure, Cantoni & Pons put to rest the best estimate of these laws as late as 2017 of around -4 percent.[62] Some might consider a suppressive effect of up to two percent to be as good as zero. But for those seeking a precise estimate, or at least as close to one as possible, Cantoni & Pons do not provide a conclusive answer. The paper leaves open a range within which the true effect remains elusive.

B. The Shadow Literature: Expert Discovery

To obtain more precision than what the causal literature offers, I now turn to a very different kind of social science evidence: expert testimony offered in the course of litigation.

62. *See* Cantoni & Pons, *supra* note 37.

1. Differences From Causal Literature

Before delving into the findings from voter ID litigation, it is important to first consider how those findings are different from the academic literature surveyed above. I organize the differences between findings from the academic literature and expert discovery from litigation along two axes. The first axis, along which evidence varies from general to specific, is borrowed from the legal tradition.[63] The second axis, along which evidence varies from descriptive to causal, is borrowed from the social scientific tradition.[64]

The results previously canvassed are general, in the sense that the results concern the class of policies being challenged and hence offer evidence on the effects of voter ID restrictions anywhere in the country. Social science research is often general: social scientists collect data across instances of implementation in the hopes of generating generalizable conclusions about the effects of a policy (like voter ID laws or same day voter registration). A core focus of the current literature is on estimating the average effects of voter ID laws across the states where they are in force. Discovery in the course of litigation, by contrast, tends to be specific, in that the evidence relates to the particular law being challenged.

The second key distinction is between descriptive and causal social science evidence. Causal evidence makes a claim about cause and effect, while descriptive evidence illustrates something about the state of the world. Estimates of the number of people in a state who do not have an ID are descriptive. Those estimates describe how many people a voter ID law could affect. By contrast, estimates of the suppressive effect that voter ID laws have on turnout are causal. Their goal is to measure how much of a dent in voter turnout results from the imposition of ID requirements.[65]

63. I acknowledge that the legal use of the general and specific dichotomy is not to distinguish between different kinds of evidence, but rather, between statutory and contractual provisions. *See* 80 AM. JUR. 2D *Wills* § 985 (2019); 17A C.J.S. *Contracts* § 416 (2019); 82 C.J.S. *Statutes* § 438 (2019). I borrow the dichotomy to take advantage of both the legal familiarity with the terminology and the intuitions about the relevancy of social science evidence.

64. *See, e.g.*, Gary Goertz, *Descriptive-Causal Generalizations: "Empirical Laws" in the Social Sciences?*, *in* THE OXFORD HANDBOOK OF PHILOSOPHY & SOCIAL SCIENCE 85, 85–86 (2012).

65. The difference between these two kinds of evidence is not that only causal claims depend on assumptions. Descriptive statistics often rely on assumptions as well, although likely relating to data quality and coverage. Nor is the difference that only causal estimates make an argument. Descriptive claims can be argumentative in nature as well, insofar as the persuasiveness of their truth is contingent on how they are derived. The difference is what the argument is in service of: a causal claim about what caused what by how much, or a descriptive one about the state of the world. The methodology applied to producing causal and descriptive evidence also differs. But methodology is a feature of, not a reason for, the argumentative purpose of the evidence.

Identification of these two axes on which the causal literature differs from case-specific discovery explains their differing strengths. The social science literature puts a premium on high quality general causal evidence for a reason. The ability to estimate causal effects, not simply in one context but across the board, is a powerful one. By contrast, discovery in litigation is by definition confined to a particular case or controversy. Even if the laws in other states are relevant to a particular challenge, discovery does not typically extend to those other states' laws. While descriptive evidence might shed light on causal mechanisms, its connection to causal impacts cannot be easily established, and if asserted, is not easily falsifiable. On the other hand, causal claims can only be made when certain conditions are present. The strengths—and weaknesses—of specific, descriptive evidence from discovery are worth bearing in mind as we consider the particulars of what it conveys about the likely effects of voter ID laws.

2. What Specific, Descriptive Evidence Tells Us

Experts involved in voter ID litigation harnessed time-honored research techniques and unleashed the firepower of the Big Data revolution to furnish courts with many basic—but useful—facts. These include the size and features of the affected community (how many people do not have an ID, and what are their characteristics), and how they differ from voters generally (racial disparities in access to ID). While these facts seem foundational to the litigation, gathering them required methodological sophistication. In some cases, experts sampled individuals from the population and administered phone surveys about ID possession.[66] Others conducted database matching between voluminous lists of registered voters and DMV records, allowing them to estimate the number of registered voters who possess a DMV-issued license.[67]

To be sure, none of these quantities estimated in descriptive evidence are causal estimates like those produced in the academic social science literature. But the descriptive results provide a basis for guessing what the causal estimates might

66. Expert Report of Matt A. Barreto Submitted on Behalf of Plaintiffs in Applewhite v. Commonwealth of Pennsylvania, No. 330 MD 2012, at 20, http://www.pubintlaw.org/wp-content/uploads/2012/05/Voter-ID-expert-report-Matt-Barreto.pdf [https://perma.cc/79T6-GRQZ]

67. For an in-depth discussion of the matching methodology used, see generally Declaration of Stephen D. Ansolabehere, Veasey v. Perry, 71 F. Supp. 3d 627 (S.D. Tex. 2014), *aff'd in part, vacated in part, remanded sub nom.* Veasey v. Abbott, 796 F.3d 487 (5th Cir. 2015). For additional detail of the methodological contributions see generally Stephen Ansolabehere & Eitan D. Hersh, *ADGN: An Algorithm for Record Linkage Using Address, Date of Birth, Gender, and Name*, 4 STAT. & PUB. POL. 1 (2017).

be. Moreover, because these analyses were conducted in lawsuits across the country, considering them collectively begins to move us beyond the specific towards the general.

The evidence collectively suggests that a substantial number of individuals cannot comply with voter ID requirements.[68] Among eligible citizens, comprised of registered and unregistered voters, ID possession rates are far from universal. In Indiana and Pennsylvania, survey results suggest that around 15 percent of eligible citizens surveyed did not have ID; that number is higher for minorities.[69] Possession rates are higher, but also not universal, among registered voters; they are also disproportionately lower among minority voters.[70] In Indiana, from the same survey as that cited above, up to 11 percent of white registered voters did not have a valid ID; that number increased to 18 percent for Black registered voters.[71] In Georgia, matching analysis of registered voters to DMV records indicates that about 6 percent of registered voters lacked valid ID to vote, a disproportionate number of whom were minority voters.[72]

When the specter of "millions" of impacted individuals is invoked, it refers, presumably, to the large numbers of individuals in states with voter ID laws who do not possess the requisite ID to vote. Affected communities of up to 10 percent of eligible citizens—in major states like Indiana, Pennsylvania, North Carolina, and Texas—easily add up to millions of individuals. To the extent that these are all individuals whose ability to vote is impacted by the law, the numbers are informative. But for our purposes here, of refining the causal estimate from the range left open by Cantoni & Pons, we must further narrow these estimates to individuals who do not possess ID and who would have voted. Only some proportion of the millions of individuals who do not have ID are registered to vote, and even among those who are registered, only some would have voted if not for the law.

68. To be sure, the academic literature also supplies descriptive evidence on voter ID requirements' effects as well. For this reason, in this section, I blend information obtained from litigation discovery and that published in the academic literature.

69. *See* Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence From Indiana*, 42 PS: POL. SCI. & POL. 111, 113, tbl.1 (2009); Expert Report of Matt A. Barreto, *supra* note 66.

70. *See, e.g.*, Hannah Walker, Gabriel Sanchez, Stephen Nuño & Matt Barreto, *Race and the Right to Vote: The Modern Barrier of Voter ID Laws*, *in* TODD DONOVAN, CHANGING HOW AMERICA VOTES 26, 34 tbl.3.1 (2018) (using national data and data from several states to find that ID possession rates among white registered voters vary between 85 to 95 percent, and that the estimates are universally lower for voters of color); Charles Stewart III, *Voter ID: Who Has Them? Who Shows Them?*, 66 OKLA. L. REV. 21, 25–27 (2013).

71. *See* Barreto, *supra* note 69, at 113 tbl.2.

72. *See* M.V. Hood III & Charles S. Bullock III, *Worth a Thousand Words? An Analysis of Georgia's Voter Identification Statute*, 36 AM. POL. RSCH. 555, 566–68 (2008).

To obtain the most precise estimates of the number of individuals impacted by a voter ID law and who would likely have voted but for the law, I consider the expert testimony provided in the Texas voter ID litigation. Texas's law was considered one of the strictest in the country,[73] and the lawsuit against it mobilized a large contingent of lawyers and experts. The District Court noted that it had a "clear and reliable demographic picture" of impacted individuals thanks to the "meticulously prepared figures" produced by "abundantly qualified" experts.[74]

Specifically, I consider the expert analysis in that case, conducted by Dr. Stephen Ansolabehere, who used matching analysis to determine the numbers of registered voters who lacked identification. Because of the United States' participation as a plaintiff in the lawsuit, Dr. Ansolabehere had access not only to the Texas ID databases (because Texas was the defendant), but also federal databases. He found estimates similar to those in other expert reports and descriptive studies of registered voters: about 4.5 percent of Texas registered voters lacked IDs.[75]

The Texas analysis helps us achieve more precision in causal estimates because it additionally focused on individuals who voted in the last two federal elections. To get a sense of how many fewer votes were cast because of voter ID laws, it is imperative to know how many habitual voters—individuals who would likely have voted—do not have ID. The Texas analysis found that 1.5 percent of habitual voters failed to match to either state or federal databases.[76] These habitual voters without IDs constituted approximately 0.5 percent of all registered voters.

While this figure of 0.5 percent is not causally derived, it serves as a useful anchoring estimate. After all, it tells us the percentage of registered voters who could not comply with the Texas law. To be sure, the actual number of individuals causally impacted might be higher or lower. The 0.5 percent estimate only includes individuals who did not have the ID necessary to comply with the law. Some might not have chosen to vote even in the absence of the law. There might have been additional voters who in fact could have complied with the law, but did not realize that they could. Other voters who had ID might have been induced to vote as a result of voter ID laws because they felt more motivated to show up.[77]

73. *See* Richard L. Hasen, *Softening Voter ID Laws Through Litigation: Is It Enough?*, 2016 WIS. L. REV. FORWARD 100, 103–04 (2016).
74. Veasey v. Perry, 71 F. Supp. 3d 627, 680 (S.D. Tex. 2014), *aff'd in part, vacated in part, remanded sub nom.* Veasey v. Abbott, 796 F.3d 487 (5th Cir. 2015).
75. Declaration of Stephen D. Ansolabehere, *supra* note 67, at 94 tbl.VI.2.
76. Declaration of Stephen D. Ansolabehere, *supra* note 67, at 98 tbl.VI.4.B.
77. Note that both voters who support and oppose voter ID laws might be additionally motivated to vote because of the passage of these laws. For a discussion of mobilization in opposition to voter ID laws, see generally Valentino & Neuner, *supra* note 44. For a discussion of

Moreover, the 0.5 percent estimate is only a snapshot in time. Individuals might have later obtained the necessary ID. Valid IDs might have expired, and personal information contained therein, like names and addresses, might have changed before upcoming elections.

Whether the 0.5 percent estimate is an underestimate or overestimate depends on the relative magnitudes of all of the above factors. But the anchoring estimate of 0.5 percent nevertheless provides more precision within the range of possible effect sizes left open by Cantoni & Pons. It also explains why voter ID studies over the years have failed to detect an effect. Given the underpowering issues inherent in cross-state designs and the large standard errors associated with estimates, none of these studies, not even the most recent and high-powered ones, were positioned to detect the true likely effect.

C. Descriptive Evidence and Causal Hypotheses

It is unsurprising that the combined powers of the causal literature and descriptive evidence from litigation should shed more light on the effects of voter ID laws than each does alone. After all, they offer different kinds of factual knowledge, operate at different levels of generality, and supply facts from different knowledge-generating domains. It is also unsurprising that those on all sides of the debate over voter ID laws got some things right—while also being (at least a little) imprecise. Those sounding the alarm about millions of disenfranchised voters were correct to the extent that voter ID laws created large numbers of people who could not vote if they wanted to. In this sense, voter ID laws prevent many from voting. Those believing such fears to be inflated were also right that many impacted individuals were unlikely to vote in the first place. Millions were not turned away from the polls, and a significant portion of those millions never would have showed up to the polls in the first place, regardless of whether an ID was required.

Reconciling knowledge from these two different areas does more than simply vindicate views. It suggests that the conversation internal to the field of election law might not be flowing as intended. I began this inquiry by consulting the causal literature because the surprising findings in the causal literature motivated me. I only turned to descriptive evidence to make sense of what the causal literature found.

mobilization in support of voter ID laws, see Richard L. Hasen, *Keynote Address of Prof. Richard L. Hasen Given to* The Voting Wars *Symposium, March 23, 2013*, 28 J.L. & POL. 417, 430–38 (2013).

But that is not the direction in which the conversation in the field should have flowed. Before estimating causal effects, researchers make hypotheses about what the effect size might be and determine whether their methods are up to the task of estimating it. In light of descriptive evidence suggesting that 0.5 percent of registered voters might not vote because of voter ID laws, attempts to estimate the effect of voter ID laws—premised on the ability of research designs to detect suppressive effects exceeding 2 percent—were exercises in futility. Furthermore, since descriptive evidence was unearthed before many of the more recent causal studies were written, those studies' attempts to estimate effects of any magnitude that was not supported by descriptive evidence were all the more troubling.

It is for this reason that the debate over the effects of voter ID laws offers less of an example in the tradition of answering questions in the law of democracy field, and more as an occasion for questioning the questions that social scientists have asked. The inquiry so far suggests that an entire research agenda has been premised on assumed, instead of known, facts. It also challenges conventional notions of how the interdisciplinary conversation in the field should go. In the stylized version of how the conversation between law and social science flows, lawyers and social scientists fall into the familiar camps of theory and evidence, law, and fact. Social scientists appear to be in charge of the facts: learning them, analyzing them, and disseminating them. But the exercise of questioning questions suggests that lawyers should not entirely cede the domain of facts to social scientists. The interdisciplinary dialogue should be as much over facts as between law and facts.[78] To be sure, social scientists and lawyers[79] generate knowledge about the world in different ways (statistical analysis v. discovery) and often in different forms (causal v. descriptive; general v. case-specific). But it is precisely because they find facts differently, and because they find different facts, that dialogue is not only fruitful but necessary to fully understand important election laws.

78. This is hardly a new idea. For an earlier rally cry, see generally Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359 (1995) (reviewing CHANDLER DAVIDSON & BERNARD GROFMAN, QUIET REVOLUTION IN THE SOUTH (1994)).

79. It is no accident that the specific, descriptive evidence that I cite from Texas, *supra* note 74, was proffered by an expert for the Department of Justice (DOJ), enforcing the Voting Rights Act on behalf of the United States. It is additionally telling that the report I cite is both voluminous and as purely factual as imaginable for an expert report for litigation. Generally, plaintiffs in cases challenging voter ID laws may have had little reason to inquire about the underlying propensity to vote of registered voters possessing or not possessing voter ID. For instance, evidence of disparate rates of ID possession among racial groups furnished claims under Section 2 of the Voting Rights Act. See cases discussed *supra* note 30. But the DOJ is no ordinary plaintiff. The unusually nonnarrative and exhaustive report that it submitted to the court may reveal some self-imposed higher standards for disclosure and candor.

II. QUESTIONS TO QUESTION

Questioning the assumptions driving social scientific inquiry into the effects of voter ID laws should not stop at the empirical hypotheses, but should also extend to how scientific findings are evaluated and what policy implications are derived from them. I consider the two main conclusions that have flowed from the causal literature on voter ID laws—and question their assumptions. Faced with a true estimate of voter ID laws' suppressive effect on turnout of under 2 percent, I ask: is this true effect small? And is it fair to characterize voter ID laws as voter suppression laws?

A. Is a 1 to 2 Percent Effect Small?

Implicit in the hypotheses embedded in causal studies, and explicit in the legal analysis courts undertake when considering the legality of voter ID laws, is a normative question. Is the empirically estimated effect size big (and hence concerning), or small (and thus acceptable)? Recall that in the course of conducting a literature review of existing voter ID studies, Highton settled on 4 percent as his best guess of what the suppressive effect was.[80] On that basis, he concluded that "the claim that voter identification laws depress turnout to a substantial degree is difficult to sustain based on existing evidence."[81] Highton considered a 4 percent suppressive effect to be "minimal."[82] The author of one of the four studies Highton highlighted was somewhat less dismissive of his estimated effect of "between one and three percentage points overall."[83] He considered it to be "modest but meaningful."[84]

The more recent suite of papers estimating turnout effects within individual states by leveraging differences among voters poses this question more starkly.[85] Notwithstanding differences in estimation strategies among these papers, they

80. Highton, *supra* note 14, at 163.
81. *Id.*
82. *Id.*
83. Dropp, *supra* note 36, at 4.
84. *Id.*
85. *See* Justin Grimmer & Jesse Yoder, *The Durable Differential Deterrent Effects of Strict Photo Identification Laws*, POL. SCI. RSCH. & METHODS 1, 2 (2021). *See generally* Bernard L. Fraga & Michael G. Miller, *Who Does Voter ID Keep From Voting?*, 84 J. POLITICS 1 (2022); Phoebe Henninger, Marc Meredith, & Michael Morse, *Who Votes Without Identification? Using Individual-Level Administrative Data to Measure the Burden of Strict Voter Identification Laws*, 18 J. EMPIRICAL LEGAL STUD. 256 (2021); Frances Maria Esposito, Diego Focanti & Justine S. Hastings, *Effects of Photo ID Laws on Registration and Turnout: Evidence From Rhode Island* (Nat'l Bureau Econ. of Rsch., Working Paper No. 25503, 2019).

estimate turnout effects significantly shy of 1 percent. How should these numbers be interpreted? How should the numerical size of these effects translate into policy concerns?

One mode of interpretation, implicit in social scientific inquiry, considers the magnitude of explanatory power. Scholars of turnout effects have compared the results of voter ID studies against those of other factors that affect the same dependent variable: turnout. When considering the effect of voter ID laws on turnout, empiricists are considering the explanatory leverage that the independent variable, voter ID restrictions, has on voter turnout. In this context, it might appear "small" or "minimal."

But the effect of almost any election law is dwarfed by other factors. Such factors include electoral circumstances particular to the election, such as whether an incumbent is running, whether the race is competitive, and how much money is spent during the campaign. These factors also include socioeconomic determinants of participation: education, age, income, and race. It is therefore a foregone conclusion that "socio-demographic and political motivational factors are far more determinative of voting than the imposition of voter identification laws."[86]

Yet while social scientists might compare the effect of election laws to the effect of electoral competition or demographics, these other factors are not, in fact, valid comparators.[87] The field of election law provides no contribution to public understanding of legal effects when we compare election law against demographic or electoral factors. That election-specific factors can do much to boost turnout also does nothing to excuse any suppressive effect the law is estimated to have. It is

86. Mycoff, Wagner & Wilson, *supra* note 34, at 121. The voter ID literature has also evolved alongside a movement away from focusing on statistical significance and instead on evaluating the size of the estimated effect. This is a laudable trend in the social sciences. A prior trend elevated the statistical significance of findings (frequently denoted with eye-catching asterisks, tellingly dubbed "stars") to an exalted status, at the expense of evaluating the actual size of the effect detected. Since the effect size is what determines explanatory power—and the substantive importance—of the independent variable assessed, effect size is more properly the focus in the social science literature aimed at ever more fulsome and satisfying explanations for why things are the way they are.

87. Though not about numerical effect sizes, Kate Fetrow makes a similar argument about how abortion restrictions should be compared to analogous medical procedures. Kate L. Fetrow, *Taking Abortion Rights Seriously: Toward a Holistic Undue Burden Jurisprudence*, 70 STAN. L. REV. 319, 338–47 (2018). Both her point—and mine—is that we need to use a legally valid baseline against which to understand and analyze burdens on individuals' ability to exercise rights. *Id.* at 344. While we discuss this need in two different legal contexts, there are more similarities than meet the eye between voting rights and abortion law. *See* Pamela S. Karlan, *Undue Burdens and Potential Opportunities in Voting Rights and Abortion Law*, 93 IND. L.J. 139 (2018).

almost meaningless to note that any election law has significantly less effect than demographics on whether a person votes or not; who the voter is and what election is at issue matter significantly more. To contribute to public understanding, the field of the law of democracy must offer a proper context for evaluating any estimated effect size.

I suggest one appropriate context for evaluating the effect of electoral rule changes is its peers: other electoral rule changes.[88] Doing so, one asks: compared to all the things the government could legally do to affect turnout—changing a polling location, purchasing voting machines, permitting early voting, and the like—how much does this change affect turnout? While much of the literature on explanatory variables for voter turnout is irrelevant to public understanding about the effect of a controversial election law, a narrow slice of it focused on the effect that election laws have provides relevant basis for comparison. It would be reasonable to contextualize the effect detected for an election law against the effects of its peers in the literature.

What does this literature find about the effect of election laws? For context, the single most effective voting reform known to social scientists—election day registration—likely increases turnout by about 3 to 9 percent.[89] That effect is still dwarfed by the overwhelming turnout effects of demographics and the competitiveness of a given election.[90] An effect size of 4 percent, or even of 1 percent, when compared to that figure, no longer appears minimal. To be clear, I do not mean to suggest an accounting approach to voter suppressive effect. I only mean to clarify the flaws of measuring election laws' effects against the effects of factors that the government cannot control.

There are surely other ways to provide proper context to analyze the magnitude of estimated empirical effects from causal and descriptive evidence. But instead of taking quantitative empiricists' word on what is a big or small effect, the law of democracy field should converse about how best to contextualize and understand empirical effects. Doing so will aid the public, courts and lawmakers in making political, judicial, and legislative decisions. It is perhaps by questioning

88. These changes must be legal. It would not be right, for instance, to compare the effect of voter ID laws against that of poll taxes or literacy tests.

89. Marjorie Randon Hershey, *What We Know About Voter-ID Laws, Registration, and Turnout*, 42 PS: POL. SCI. & POL. 87, 87 (2009). To the extent the effect sizes of election day registration or other election reforms are implicated by the same methodological issues discussed in Part I.A, they would offer an even more compelling basis of comparison.

90. *See supra* note 85.

the magnitude question that we might begin to resolve line-drawing questions in various voting rights doctrines.[91]

B. Does Turnout Measure Voter Suppression?

The debate over voter ID laws also presents an occasion to question how social science frames normative policy discussions. The modern gloss for debates about appropriate election regulation is voter suppression. Although social scientists claim to shy away from normative questions, the assumption behind social scientific research measuring turnout effects of election laws is that the quantity measured is synonymous with a law's voter suppressive effects.

That assumption—that suppression of votes is what makes a law a voter suppression one—is one that I question here. The purpose of this Article is not to offer my own theory of what voter suppression might mean and what a voter suppression law is.[92] Voter suppression is not (yet) a concept with legal force.[93] But as the phrase has come to confer normative judgment,[94] I use it as a vehicle to consider, more broadly, how empirical estimates should inform normative evaluations of election laws. In doing so, I question the wisdom of an approach that only considers turnout, and suggest an alternative that focuses instead on impacted individuals. Vote suppression and voter suppression are often used interchangeably, but they should not be. Lost votes and lost voters are not equally regrettable.

It is lost votes that the social science literature focuses on:[95] the central dependent variable under inquiry is voter turnout. Social scientists' implicit

91. *See e.g.*, Samuel Issacharoff, *Voter Welfare: An Emerging Rule of Reason in Voting Rights Law*, 92 IND. L.J. 299 (2016) (describing an emerging trend of judges developing a contextually based rule of reason in voting cases to protect voter welfare).

92. For work devoted to actually fleshing out what vote suppression might mean and what it entails, see, for example, Bertrall L. Ross II & Douglas M. Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disfranchisement of the Poor*, 114 NW. U. L. REV. 633 (2019); GILDA R. DANIELS, UNCOUNTED: THE CRISIS OF VOTER SUPPRESSION IN AMERICA (2020); TOVA ANDREA WANG, THE POLITICS OF VOTER SUPPRESSION: DEFENDING AND EXPANDING AMERICANS' RIGHT TO VOTE (2012).

93. *See, e.g.*, Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 8 SUP. CT. REV. 213 (2018) (suggesting the introduction of a legal claim of intentional voter suppression).

94. The phrase is widely used in politics and by the media descriptively and judgmentally. *See, e.g.*, *Our Story: About Fair Fight Action*, FAIR FIGHT, https://fairfight.com/about-fair-fight [https://perma.cc/C54F-M8M9]; *Voter Suppression Tag*, NEW YORKER, https://www.newyorker.com/tag/voter-suppression [https://perma.cc/6XF9-PDKH].

95. A subset of the literature has focused on analyzing provisional ballots. But that does not suggest that those social scientists only consider provisional ballots as evidence of voter suppression. Rather, they use provisional ballot data to extrapolate to a broader set of voters who are

understanding of vote suppression is thus a literal one: vote suppression occurs when a law causes fewer votes to be cast than otherwise would be absent said law. The effect on turnout is what causal studies estimate. Two assumptions underlying the lost votes view of voter suppression are worth questioning. The first assumption is that turnout should be the dependent variable of interest. The second is that the law negatively affects only marginal voters, individuals who the law causes not to vote.

1. Turnout as Dependent Variable

Analysis of voter ID laws' effects on turnout among registered voters ignores these laws' effect on unregistered voters. For a variety of reasons,[96] turnout in social science articles is often measured as voting conditional on registration. This data choice[97] reflects that view that votes can only be suppressed among individuals

impacted. *See, e.g.*, Michael J. Pitts & Matthew D. Neumann, *Documenting Disenfranchisement: Voter Identification During Indiana's 2008 General Election*, 25 J.L. & POL. 329 (2009); Daniel J. Hopkins, Marc Meredith, Michael Morse, Sarah Smith & Jesse Yoder, *Voting but for the Law: Evidence From Virginia on Photo Identification Requirements*, 14 J. EMPIRICAL LEGAL STUD. 79, 87–88 (2017); Fraga & Miller, *supra* note 85; Henninger, Meredith & Morse, *supra* note 85, at 16.

96. There is a long tradition in election law research of using individual-level survey data to study turnout effects. *See generally* RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? (1980) (pioneering the methodological approach to studying the effects of election laws). When survey data is used, scholars sometimes restrict turnout measures to voting conditional on voter registration. *See, e.g.*, Alvarez, Bailey & Katz, *supra* note 35 at 27. As voter files became a more prominent data source for political scientists, they have also been used to study the effects of election laws. The many attractions of voter files for election-related research notwithstanding, their use for studying the effect of election laws has foreordained, at least thus far, focus on registered voters. As voter files by definition only contain registered voters, there isn't even the possibility of including non-registered voters in one's scope of study. To be sure, scholars are aware of this data gap, and have attempted to use commercial files to obtain information on non-registered voters as well. *See* Cantoni & Pons, *supra* note 37, at 3. But whether commercial files are representative of unregistered voters remains to be seen, given the significant differences along many demographic and socio-political dimensions between registered and unregistered voters. Simon Jackman & Bradley Spahn, *Politically Invisible in America*, 54 PS: POL. SCI. & POL. 623, 623–24 (2021).

97. Other data sources of turnout outcomes also suffer from flaws of their own. Aggregate turnout data (counts of ballots cast) potentially captures myriad effects on total voter turnout, but may be too diluted and coarse to detect effects. While aggregate data would potentially capture both effects among registered voters and changes in the base number of registered voters, its aggregate nature means that minute (but nevertheless concerning) changes to the total number of registered voters casting ballots would hardly be felt. Moreover, aggregate data suffers from granularity issues, which is in part what drove the enthusiasm for individual-level data like voter files to begin with. As such, studies that use aggregate-level data tend to be older. *See, e.g.*, EAGLETON INST. REP., *supra* note 31, at 22 (summarizing county-level aggregate turnout); Alvarez, Bailey & Katz, *supra* note 35 (providing aggregate analysis at state level).

who are registered to vote. But one might expect voter ID restrictions to affect both registered and unregistered potential voters. The suppressive effect of voter ID laws among habitual registered voters is expected to be small. Recall descriptive evidence from voter ID litigation indicating that there are relatively few registered voters who do not have IDs.[98] The many socioeconomic factors supporting voter registration also predict ID possession.

To see what these studies treating turnout as the dependent variable miss, one need look no further than the social science literature itself, which is now beginning to shed light on the effect that voter ID laws have had on registration. For now, the results are contradictory. On the one hand, Cantoni & Pons drew on commercial databases of unregistered voters and failed to find a suppressive effect on registration.[99] On the other, a working paper uses proprietary data from the state of Rhode Island and finds that the state's relatively lax voter ID restrictions have a large negative effect on voter registration.[100] It adopts a convincing difference-in-differences[101] model in finding that the Rhode Island law reduced turnout by 2.7 percentage points, and reduced voter registration by 7.6 percentage points in presidential elections and 5.1 percentage points in midterm elections.[102] This finding depends on the enviable and rare data the researchers had access to: Rhode Island anonymized highly restricted proprietary data,[103] giving researchers a rare chance to study the effect of voter ID laws on non-registered voters who are especially vulnerable segments of society normally excluded from election law research. I raise the Rhode Island paper not to suggest that others should have used the same methodology and data—they could not have—but simply to suggest what might be lost when only voting conditional on registration is considered.[104]

Any suppressive effect of voter ID laws on voter registration should factor into normative judgments about these laws. Reductions in voter registration would show that these laws have a large impact on eligible citizens' decision on whether to become voters, as evidenced by their failure to take perhaps the most

98. See *supra* Subpart I.B.
99. Cantoni & Pons, *supra* note 37, at 6.
100. Esposito, Focanti & Hastings, *supra* note 85.
101. *See* Angrist & Pishke, *supra* note 48.
102. Esposito, Focanti & Hastings, *supra* note 85, at 11, 24.
103. Esposito, Focanti & Hastings, *supra* note 85, at 2, 7–8.
104. My point here is an extension of the critique by Ross & Spencer, *supra* note 92, of how modern political campaigns now singularly focus on enhancing turnout conditional on registration instead of persuading the disaffected to vote. Some of the same Big Data drivers for campaigns' focus on registered voters explain that same focus in the social science literature. But even if it is excusable for campaigns to overlook low-propensity voters, it is not excusable for those in the election law/law of democracy community, committed to enhancing and broadening political participation, to do the same.

important step towards becoming one. While a voter-centric view of voter suppression would take such harms into account, a turnout-centric one does not.

2. Marginal Voters Are Not the Only Possible Voters

The lost-votes view is flawed not only because it fixates on "votes," but also because of how it measures votes that are "lost." A social scientist might describe a law's effect on turnout as the number of individuals for whom the marginal cost of voting imposed by the election law is so great as to change their behavior from voting to not voting. A more succinct social scientist might describe a turnout effect as the number of individuals who would have voted had the law not been in effect. Notice that the estimate collapses two essential questions into one: how many voters are affected by the law, and which are affected *so much* that they decide not to vote in a given election. It quantifies affected voters mediated by behavioral change. Notice, too, that the estimate measures the but-for effect that a law has on voting.

Thus, turnout effects only quantify a subset of effects on affected voters: marginal voters in a given election. These are voters for whom the marginal cost of voting imposed by the election law outweighs the benefit of voting in that election. But affected voters who are uncounted in turnout estimates include those whom the election law did not prevent from voting in that election, either because they voted in spite of heightened burdens or because they would not have voted anyway.

First, consider voters who, despite heightened costs to voting, cast a ballot anyway. Turnout effects do not measure, in any way, the efforts undertaken or resources expended to meet the election law's requirements. We might think of these individuals as especially devoted voters (or always voters), who for whatever reason, are able to withstand the costs that challenged election laws impose.

Those costs faced by such individuals should not be ignored.[105] That burdens were overcome indicates little about how onerous they were. Severe restrictions on the franchise, such as poll taxes or literacy tests, would not survive scrutiny even if many affected voters paid the tax or aced the test. While votes were not successfully suppressed, voters nevertheless experienced higher costs to voting—and even if those voters voted in this election despite the law, they might not vote in the next one because of it.

105. Social scientists are not unaware of the importance of considering the burdens on voters who are able to overcome them. *See, e.g.*, Highton, *supra* note 14, at 164 (noting that those who take the necessary steps to obtain identification to vote face "a higher barrier to voting" that is "real, nontrivial, and unequal in impact").

Next, we turn to the individuals who would face more difficulty in voting but who would not have voted in this election anyway. We might call this group persistent nonvoters (or almost never voters). Again, as with devoted voters, the effect that election laws have on persistent nonvoters is not captured by turnout studies and is not a part of a lost votes approach to voter suppression. Yet there are reasons why it should matter.

First, persistent nonvoting in the past does not necessarily mean persistent nonvoting in the future. Estimates of turnout are based on previous elections, and the suppressive effect of a policy may be different in every election, given different candidates, issues, and voters. The possibility that a future election might be different enough from previous ones to cause persistent nonvoters to vote is no mere abstraction. Elections are characterized as much by novelty as by regularity. When estimates are based on a small handful of elections, as they often must be, those estimates may mistake sometimes nonvoters for persistent nonvoters.[106]

In other words, persistent nonvoters might still vote. Indeed, we may need them to guard against antidemocratic outcomes. Persistent nonvoters might be thought of as the body politic's conscience, not called upon for quotidian elections but whose activation in critical elections is imperative. The possibility that persistent nonvoters could turn out might deters brazen violations of democratic norms. Preserving the right of persistent nonvoters to vote protects these democratic norms—and no normative theory of voting posits that persistent failure to vote should cause people to lose their right to vote.

The 2020 U.S. presidential election offers an example that is both recent and close to home, although others abound from the past[107] and from abroad.[108] Even

106. This mistake is most obviously made regarding young voters. Past failure to vote indicates little about future propensity to vote. The periodic surges in youth voting demonstrate this point well. *See, e.g.*, *Election Night 2018: Historically High Youth Turnout, Support for Democrats*, CTR. FOR INFO. & RSCH. ON CIVIC LEARNING & ENGAGEMENT (Nov. 7, 2018), https://circle.tufts.edu/latest-research/election-night-2018-historically- high-youth-turnout-support-democrats [https://perma.cc/8LEX-NYB5] (showing an "extraordinary increase" in percentage of youth voting in the 2018 midterms). That many states' voter ID laws exclude student IDs also underscores how evaluating voter suppression laws should depend on the particular contours of the law in question and which kinds of voters it might suppress. *See Voter ID Laws*, *supra* note 12 (indicating the specific valid voter IDs in every state).

107. For other domestic examples of elections with unprecedented turnout, see, e.g., Daniel E. Bergan, Alan S. Gerber, Donald P. Green & Costas Panagopoulos, *Grassroots Mobilization and Voter Turnout in 2004*, 69 PUB. OP. Q. 760 (2005); FRANCES FOX-PIVEN & LORRAINE MINNITE, *Voter Participation*, *in* ENCYCLOPEDIA OF SOCIAL WORK (2013) (describing the unprecedented mobilization of minority voters in the 1982 midterm election).

108. For foreign examples of elections with unprecedented turnout, see, e.g., Felix K.G. Anebo, *The Ghana 2000 Elections: Voter Choice and Electoral Decisions*, 6 AFR. J. POL. SCI. 69 (2001); Marco A. Gandásegui, Jr., *The 1998 Referendum in Panama: A Popular Vote Against Neoliberalism*, 26 LATIN AM. PERSPS. 159 (1999); Keith Bradsher, Austin Ramzy & Tiffany May, *Hong Kong*

amidst a historic epidemic, the immense stakes of the 2020 election drew the nation's highest turnout in 120 years.[109] Indeed, turnout increased most among groups who have historically voted at lower rates,[110] reminding us that it would be a mistake to write off persistent nonvoters as permanent nonvoters.

Finally, persistent nonvoting reflects the entrenched socioeconomic, informational, and institutional barriers that exist to discourage and alienate those on the margins from participating. The lost votes view fetishizes the act of casting a ballot while ignoring the suite of attitudes and behaviors necessary for a ballot to ever be cast, voter registration being only one among many. Voter ID laws may deflate already fragile expectations about how easy it is to vote, and how welcoming a state is to new voters. The scattered presence of voter ID laws across the states can give rise to a widespread sense, even in states without ID requirements, that voter eligibility must be demonstrated with a physical ID. In addition to the possibility of cross-jurisdictional contagion effects,[111] each new voting restriction may feed on the perceptions created by the others. The accretive effect of laws making it harder to vote may erode willingness to participate. For instance, confusion about registration status caused by voter purges may interact with concern over voter ID requirements to form a formidable barrier to the ballot box.

Understanding the act of voting as a product of behavioral persuasion requires broadening one's concept of vote suppression to extend beyond the suppression of votes in an individual election to include the long-term stifling of conditions that give rise to the willingness and ability to vote. Voting restrictions may make voting less likely by engendering a sense of apprehension about interacting with the government. Instead of conveying social desirability,[112] voting

Election Results Give Democracy Backers Big Win, N.Y. TIMES (Sept. 24, 2021), https://nyti.ms/2ribbeX [https://perma.cc/48AB-WFHY].

109. Scott Clement & Daniela Santamariña, *What We Know About the High, Broad Turnout in the 2020 Election*, WASH. POST (May 13, 2021), https://www.washingtonpost.com/politics/2021/05/13/what-we-know-about-high-broad-turnout-2020-election [https://perma.cc/Q2EB-UQTZ]; *see also* Jacob Fabina, *Despite Pandemic Challenges, 2020 Election Had Largest Increase in Voting Between Presidential Elections on Record*, U.S. CENSUS BUREAU (Apr. 29, 2021), https://www.census.gov/library/stories/2021/ 04/record-high-turnout-in- 2020-general-election.html [https://perma.cc/A5RL-J6JE].

110. Fabina, *supra* note 109.

111. *See, e.g.*, Emily Rong Zhang, *New Tricks for an Old Dog: Deterring the Vote Through Confusion in Felon Disenfranchisement*, 84 MO. L. REV. 1037 (2019) (discussing how the discouraging effects of a state's felon disenfranchisement regime for voting can spread to other jurisdictions to create widespread confusion over voter eligibility for individuals with criminal records).

112. The problem of social desirability bias in self-reported voting and registration behavior in survey research is well known. *See, e.g.*, Allyson L. Holbrook & Jon A. Krosnick, *Social Desirability Bias in Voter Turnout Reports: Tests Using the Item Count Technique*, 74 PUB. OP.

might instead induce social anxiety. The ballot box might become yet another place in life where the state makes things harder, not easier, for citizens. Especially vulnerable individuals might start to think: people like me do not vote.

To take into account all individuals affected by voter ID laws, one must look beyond vote suppression to voter suppression. The former focuses on how a law affects the ballots cast, the latter on how a law affects whether citizens become voters. Thankfully, in the law of democracy, one need not "know the dancer from the dance."[113] The field is used to accommodating different concepts of the right to vote.[114] As with the exercise of the right to vote, suppression of the same might do well to accommodate more than one definition.

III. BURDENS ON THE RIGHT TO VOTE

Interrogating assumptions in the social science literature not only shifts and expands academic and political debates, but also helps to articulate the law of democracy. In this Part, I consider the implications of questioned questions about voter ID laws for the constitutional standard protecting the right to vote—the *Anderson/Burdick* standard. I conclude on a broader note: evaluating the evidentiary weight of social scientific findings can also contribute to better laws of democracy, not only those we already have, but also those that we still need.

The *Anderson/Burdick* standard is a balancing test. It asks whether the burdens imposed by the challenged election practice on voters are justified by legitimate state concerns in election administration.[115] Put simply, it prevents disenfranchising practices from being implemented unless the state's rationales justify them. I do not take up the state justification part of the test[116] as it rarely engages the social science literature (though it is voter ID laws' failure to satisfy the state justification prong that most dispositively renders them constitutionally

Q. 37 (2010). While voting over-reporting presents problem for survey researchers, from the perspective of our democracy, it might be considered a socially beneficial social desirability bias.

113. In a piece that so frequently references questions, I cannot resist making reference to this most inimitable of rhetorical question at the conclusion of William Butler Yeats's "Among School Children." William Butler Yeats, *Among School Children*, *reprinted in* THE COLLECTED POEMS OF W.B. YEATS 183, 183 (Richard J. Finneran ed., 1989).

114. Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709–12 (1993).

115. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190 (2008) (quotations omitted).

116. Emily Rong Zhang, *Voting Rights Lawyering in Crisis*, 24 CUNY L. REV. 123 (2021) (describing the toothlessness of the state justification prong of the *Anderson/Burdick* analysis).

suspect)[117]. I focus instead on the meaning and measurement of burden for the *Anderson/Burdick* test.

Perhaps counterintuitively, I bracket the Voting Rights Act for this discussion. To be sure, federal litigation challenging voter ID laws has achieved the most success by relying on Section 2 of the Voting Rights Act, both because of uncontroverted evidence of racial disparities[118] and because the principle of constitutional avoidance asks that statutory claims be resolved before constitutional claims are addressed.[119]

Nevertheless, I consider turnout-suppressive evidence in light of the *Anderson/Burdick* standard for several reasons. First, as the constitutional standard protecting the right to vote, it is the normative reference point for evaluating election regulations. Second, the standard's burden inquiry matches up most closely with popular and social scientific notions of vote/voter suppression discussed in Part II.B. Two central features of the doctrine make it preternaturally appealing to social scientists: it is outcome-oriented (so there is something to measure) and largely intent-agnostic (thereby sidestepping evidentiary difficulties about what was in lawmakers' minds). Moreover, the *Anderson/Burdick* doctrine has similarities with classic cost-benefit analysis in the social science tradition. Modern election law research on turnout is

117. While the empirical support for turnout effects of voter ID laws has been the focus of academic debates, it is the lack of empirical support for the state's justifications for these laws that is most normatively troubling. *Anderson/Burdick* tolerates burdens on voters based on the strength of the state's justification for imposing them. Even if a law imposes few burdens, or if there are significant empirical uncertainties about the extent of those burdens, such a law would be unconstitutional if there is no adequate justification for imposing those slight or uncertain burdens. And ample evidence refutes states' justifications for voter ID laws. *See* Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 664–65 (2007). The primary justification for these laws, in-person voter fraud, has never had empirical support. For a more in-depth look at the lack of empirical evidence on in-person voter fraud, see JUSTIN LEVITT, BRENNAN CTR. FOR JUST., THE TRUTH ABOUT VOTER FRAUD (2007), https://www.brennancenter.org/sites/default/files/2019-08/Report_Truth-About-Voter-Fraud.pdf [https://perma.cc/X7F6-BP2A]; LORRAINE C. MINNITE, THE MYTH OF VOTER FRAUD (2010). The secondary justification, improving public confidence in elections, has also been empirically interrogated. *See* Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737 (2008).

118. *See* EAGLETON INST. REP., *supra* note 31. For a consideration of whether harms produced by voter ID and other election laws should be addressed through an anti-discrimination legal approach, see Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741 (2006).

119. State constitutions sometimes offer more robust protections for the right to vote than the federal constitution does. State constitutional protections for the right to vote may differ from those articulated in *Anderson/Burdick*. In those states, state constitutional litigation is more attractive than its federal analogue.

grounded in a Downsian approach to voting: election laws affect voting either by increasing or decreasing the cost of voting.[120] As such, there is resonance between the legal concept of burdens and the social scientific understanding of costs imposed on voters by a challenged election regulation. The seemingly close relationship between *Anderson/Burdick*'s burden inquiry and what turnout-suppressive studies measure thus presents the best opportunity to interrogate the role that social science literature ought to have in defining legal claims. Third, I consider *Anderson/Burdick* because of the central role it played in the controversy over voter ID laws. After all, it was the perceived lack of empiricism in the Court's assessment, under *Anderson/Burdick*, of burdens imposed by Indiana's voter ID law in *Crawford* that motivated the creation of the social science literature on voter ID laws' effects in the first place. Finally, and perhaps most importantly, courts considering *Anderson/Burdick* challenges to voter ID laws have required evidence of turnout suppression in finding that voter ID laws impose a burden on voters. Clarification of what turnout evidence does—and does not show—thus has direct doctrinal implications.

A. Relevance of Turnout Evidence

Turnout measures surely are relevant for measuring burdens on voters as part of an *Anderson/Burdick* burden inquiry, which asks about the "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate."[121] But how relevant are they? In this Part, I answer this question specifically with respect to the causal estimates of changes in voter turnout resulting from election laws discussed before. I show why a law's effect on turnout is a useful but highly incomplete measure of the burden that that law imposes on the right to vote.

Recall from Part II.B that estimates of effects on turnout implicitly assume that individuals are affected only if they changed their behavior, specifically whether they failed to vote, as a result of the law. In the context of voter ID laws, these estimates convey how many people voter ID laws caused not to vote. In essence, the estimates condense the two questions of "how many individuals are affected" and "who did the law cause not to vote" into one estimate.

120. ANTHONY DOWN, AN ECONOMIC THEORY OF DEMOCRACY (1957).
121. Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Anderson v. Celebrezze, 460 U.S. 780, 788–89 (1983)).

Both of these questions are central to *Anderson/Burdick*'s burden inquiry.[122] The cases map onto the two aspects of burdens on voters that *Anderson/Burdick* considers: the "magnitude" and "character" of legal injury.[123] The magnitude of injury imposed by a challenged law can refer to the number of individuals impacted. In the *Anderson/Burdick* cases (including *Anderson* and *Burdick* themselves), the merits of the case depended in part on how many individuals' right to vote was implicated by the challenged law. This is not to say that the Court had (or required) precise estimates of impacted individuals at hand and relied on them; it did not. But the decisions display a sensitivity to who is impacted by the challenged law and how many similar situated individuals there might be. In *Anderson*, the Court struck down the early filing deadline for independent candidates in part because the law placed "a particular burden on an identifiable segment of Ohio's independent-minded voters."[124] Although the *Burdick* Court upheld Hawaii's exclusion of write-in ballots because political candidates continued to have "easy access to the ballot," Justice Kennedy dissented in part because he believed a concerning number of Hawaii voters were "dissatisfied with the choices available to them" and thus the law prevented them casting a ballot in a meaningful manner.[125] In *Crawford*, the Court also analyzed the burdens imposed by the law by considering the impact of the law on eligible voters without voter IDs. Essentially, if the record in an *Anderson/Burdick* case demonstrates that eligible voters without ID are numerous, that finding factors in the Court's analysis.

But while the Court, like the social science literature, is interested in the scope of impact (numerical or otherwise), the scope of its inquiry on the character of legal injury imposed on affected voters is far broader. There is no legal or theoretical reason for the doctrine to only be concerned about measurable behavioral change or behavioral change at the ballot box specifically. The doctrine addresses burdens imposed by a wide variety of laws of democracy, many of which do not affect the act of casting a ballot, but do affect voting-related behaviors, attitudes, and expectations. The challenged law in *Anderson* was a candidate filing deadline in Ohio. The challenged law in *Burdick* prohibited write-in candidates in Hawaii. It is possible that both of these laws might reduce voter turnout, but whether Ohio and Hawaii voters actually decided not to vote as a result of the law

122. For an in-depth discussion of how courts consider burdens imposed by voter ID laws, see Ellen D. Katz, *What the Marriage Equality Cases Tell Us About Voter ID*, 2015 U. CHI. LEGAL F. 211, 215–22 (2015).
123. *Anderson*, 460 U.S. at 789.
124. *Anderson*, 460 U.S. at 792.
125. *Burdick*, 504 U.S. at 436, 442–43 (Kennedy, J., dissenting).

is plainly of only cursory relevance. *Anderson/Burdick* does not require that individuals actually be deterred from voting in its accounting of legal injuries that the challenged law imposes on voters.

To be sure, as evidence goes, these estimates are an especially efficient kind: they condense the two central components of the *Anderson/Burdick* test into a single numerical estimate. But while they are relevant, they are far from complete. *Anderson/Burdick* considers relevant the many other possible harms emanating from voter ID laws—but are not captured by turnout-suppressive estimates—described in Part II.B. As part of a constitutional challenge to a voter ID law, evidence that eligible voters were less inclined to become voters as a result of the law would certainly be relevant. Such evidence would shed light on the chilling effect of the law. Other evidence (whether statistical in nature or not) that eligible voters were less likely to consider becoming registered to vote or voting would also suggest that the law had a chilling effect on protected First (and Fourteenth) Amendment activity.

Moreover, suppressive-turnout estimates also fail to shed any light on a central feature relating to the character of burdens imposed by the challenged law: affected voters' "ability to comply."[126] The "ability to comply" analysis was central the Court's decision in *Crawford*. The decision turned not only on the Court's skepticism that affected individuals were identifiable or numerous, but also on a likely underestimate of how much it would take for affected voters to comply with the law as not "a significant increase over the usual burdens of voting."[127] The Court also tolerated the "somewhat heavier burden" the law placed on the elderly, poor people, the homeless, and individuals with religious objections to being photographed because they could vote by casting a provisional ballot.[128]

To be sure, turnout-suppression evidence would have been relevant in *Crawford* if it had been in the record. The magnitude of the estimated effect should have been evaluated at least in part in accordance with the recommendation in Part II.A: against the turnout effects produced by other election laws. The point here is not that turnout-suppressive effects would not have a role to play, but rather that the research question behind turnout-suppressive evidence is markedly narrower than the legal question posed by the doctrine. The doctrine asks a broad question about the magnitude of voters whose right to vote (and all its constituent

126. I borrowed this concept from Nick Stephanopoulos's characterization of the approach taken by some courts in the Section 2 vote denial context that also describes the *Crawford* Court's approach to burdens imposed by voter ID laws. Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE LMN,.J. 1566, 1584–85 (2019).

127. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 198 (2008).

128. *Id.* at 199.

parts) are affected. That the estimates of turnout changes are easier to derive statistically than the facts the Court sought does not make those estimates legally sufficient.

Clarification of how turnout evidence sheds light on burdens on the right to vote is no mere academic exercise. Social scientists are not alone in privileging turnout-suppression evidence; courts have done the same. As has been observed by other voting rights scholars, courts hearing vote denial claims pursuant to Section 2 of the Voting Rights Act have begun to require evidence of turnout-related effects.[129] Prominent voices have criticized these decisions for reasons similar to those presented here:[130] turnout-related evidence, while relevant, does not definitively answer the legal question posed.

Judicially created requirements to present turnout-suppression evidence in the context of Section 2 vote denial claims may merely be a symptom of a more ingrained inclination to approach voting rights through the perspective of lost votes. The voter ID cases supply other examples. When Indiana's voter ID law was before the district court in the case that would eventually become known as *Crawford v. Marion County*, the judge dismissed the possible deleterious effects of the law by, in part, relying on the observation that in two of the municipalities turnout increased after the law came into effect.[131]

The court surely committed an inferential fallacy in crediting the increase in turnout between elections before and after the challenged law was implemented. It had no basis for attributing the increase in turnout to the non-effect of the voter ID law. In one of the municipalities, turnout increased by 98 percent to around 202 total votes;[132] there is simply no way of knowing based on the turnout

129. *See, e.g.*, Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439 (2015).

130. Dale E. Ho, *Voting Rights Litigation After* Shelby County*: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 675, 693–94 (2014); Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763, 774 (2016); Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since* Shelby County, 127 YALE L.J. F. 799, 809–15 (2018). For more broad-based critiques of the doctrinal approach taken in Section 2 vote denial cases, see Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579 (2013); Franita Tolson, *What is Abridgement?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433 (2016); Stephanopoulos, *supra* note 126, at 1587–88.

131. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 795 (S.D. Ind. 2006).

132. *Town of Montezuma: Election for Town Council Members, 2005 Small Town Elections*, IND. SEC'Y OF STATE'S OFF., https://www.in.gov/sos/elections/election-commission/election-results/2005-small-town-elections/town-of-montezuma-election-for-town-council-members [https://perma.cc/X9KJ-2UKZ]. I cannot determine, based on the election returns, exactly how many votes were cast. I simply tallied up all the votes cast for the at-large members as an estimate.

comparison alone what the effect of the law was. Indeed, turnout might have increased more if the voter ID law had not been in effect.

It is the premise behind the court's inferential error that is noteworthy for our discussion here. By reasoning that because turnout increased, the burdens imposed on voters could not have been very severe, the court was essentially adopting a lost-votes approach towards the burden inquiry—albeit a lite version. It did not cite the increase in turnout as dispositive to its decision, but rather as corroborating evidence that reassured the court it had correctly determined that the burdens imposed by the challenged law were not severe.

The lost-votes approach that other courts took in voter ID cases was not so lite. A stronger version was adopted in the district court opinion in a challenge to an omnibus set of laws that made voting more difficult, including a voter ID component, in North Carolina.[133] Unlike for the Indiana court, turnout evidence was not merely corroborating for the North Carolina court; it relied heavily and often on the fact that turnout—aggregate and among racial minority subgroups—increased in the elections after the challenged laws went to effect in finding that they were lawful.[134] The "almost dispositive weight the court gave to the fact that African American aggregate turnout increased" after the challenged laws came into effect was an "error" warranting the Fourth Circuit's reversal of its decision.[135]

The Seventh Circuit's opinion in a challenge to Wisconsin's voter ID law displays perhaps the harshest judicially applied version of the lost-votes approach.[136] It reversed the district court's decision striking down Wisconsin's voter ID law after noting that the district court did not make any findings about "what happened to voter turnout in Wisconsin" during the primary election that occurred immediately after the challenged law came into effect,[137] nor did it "reveal what has happened to voter turnout in the other states (more than a dozen) that require photo IDs for voting."[138] The decision effectively requires vote suppression evidence to demonstrate burdens on the right to vote. It does not simply elevate turnout evidence—efficient but by no means adequate evidence of burdens on voting—above all others, but enshrines it as a legal requirement. By making burdens on voting synonymous with those that actually result in lost votes,

133. N.C. State Conf. of the NAACP v. McCrory, 997 F. Supp. 2d 322 (M.D.N.C. 2014), *rev'd and remanded sub nom.* N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016).
134. *McCrory I*, 997 F. Supp. 2d at 349–50.
135. *McCrory II*, 831 F.3d at 232.
136. Frank v. Walker, 768 F.3d 744 (7th Cir. 2014).
137. *Id.* at 747.
138. *Id.*

the decision significantly ratcheted up the legal standard for proving unconstitutional burdens on the right to vote.

Indeed, the Seventh Circuit opinion appears to require not only Wisconsin-specific evidence of lost votes but also causal social science evidence that voter ID laws generally result in lost votes. The earlier Parts of this Article make clear why causal social scientific findings cannot be required for demonstrating legal claims. A lesson of Parts I.A and II.B is that social science research is constrained by methodological and data challenges. For instance, causal inference can only thrive in the right research conditions. The voter ID literature presents only one example of how such conditions can fall short. Lack of data and an inability to satisfy assumptions underlying statistical models are among many other factors that could defeat the ability to make causal inferences. Requiring that turnout-suppressive effects be demonstrated in the context of the *Anderson/Burdick* doctrine (or indeed any other voting rights doctrine) could make legal success hinge on factors unrelated to the merits of the case.

That the lost-votes approach has bled across voting rights doctrines highlights the stakes of clarifying what turnout evidence does—and does not—prove. Put simply, clarity internal to the law of democracy community about how social scientific quantities of interest relate to legal inquiries can have important and direct doctrinal implications. Questioning questions not only advances the field of law of democracy, but also helps articulate the law of democracy.

B. Probativeness of Turnout Evidence

The limited probativeness of turnout-suppression evidence suggests that in voting rights cases, lawyers and courts should facilitate discovery of a more probative kind of evidence: the specific, descriptive evidence discussed in Part I.B. To the extent that courts are tempted to unduly rely on turnout evidence out of a misplaced desire for empiricism, elevation of other types of high-powered statistical evidence helps guard against outsized reliance on one type of evidence in particular.

The utility of specific, descriptive evidence in the voter ID context depends on expert witnesses' access to valuable data sources. More should be done to facilitate data discovery. One of the central contributions of the Big Data revolution is in opening up vast new data terrains to answering pressing and important societal questions.[139] Ensuring that social scientists can continue to

139. *See, e.g.*, Justin Grimmer, *We Are All Social Scientists Now: How Big Data, Machine Learning, and Causal Inference Work Together*, 48 PS: POL. SCI. & POL. 80 (2015).

provide probative descriptive social science evidence in voting rights litigation will depend on securing their access to data needed to discover statistical facts central to judicial decision-making.

An especially frustrating aspect of the Voting Wars is that while much descriptive information is knowable about newly enacted voting restrictions, relatively little is actually known. While much painstaking work has been done by experts in voter ID cases to quantify the number of affected voters and disproportionate racial effects, our state of knowledge about who is impacted by voter ID laws is still relatively modest compared to what could be known with the state's cooperation.[140] For instance, whether the requirement that IDs not be expired disenfranchises many individuals depends on how frequently and promptly individuals renew their ID. The state also has vast amounts of data on nonregistered voters, who might be uniquely vulnerable in the face of voter ID laws. The likelihood of non-registered citizens' coming into contact with governmental agencies—and obtaining ID—can be estimated.

As things currently stand, states' willful ignorance of the answers to critical questions about the effects of challenged laws and the characteristics of impacted communities terminates the inquiry. States could easily learn, as they possess the richest data sources to do so, about the characteristics of vulnerable populations who are most likely to feel the effect of electoral changes. But once states conduct any study, the contents of such a study are discoverable. States therefore have an incentive not to know.[141] Lawmakers may have background knowledge that allows them to suspect, maybe even hope, that an enacted law will affect a particular population in a way that would serve their interests.[142] But there is no incentive for legislators to transform their mental impressions into concrete estimates. As a matter of public policy, this is regrettable because relevant facts are

140. See *supra* Subpart I.B.

141. Unlike in the vote denial cases, where there is plausible deniability as to the knowledge or purpose of the challenged law, redistricting cases involve a slightly different question. Linedrawers tend to want to know ex-ante, in great detail, the anticipated electoral effect of a redistricting plan. As such, they gather granular data in order to most accurately predict likely outcomes. The core inquiry in redistricting cases is thus not a matter of whether the linedrawers acted with knowledge or purpose, but rather, which knowledge or purpose, race, or party, was at play. *See generally* Easley v. Cromartie, 532 U.S. 234, 241 (2001).

142. To be sure, evidence of discriminatory intent is legally relevant, see, for example, N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016). But such evidence can be hard to unearth for a variety of reasons, among them the doctrine of legislative privilege. The appeal of *Anderson/Burdick* claims (and Section 2 vote denial claims) is that they look at effect, not intent. To the extent they excuse incompetent vote suppressors, they also protect against unintentional vote suppressors. But that makes discovering effect evidence all the more important.

lacking. Basic information about challenged laws may not be known until plaintiffs hire experts.

To be sure, more searching data discovery implicates countervailing interests, most significantly privacy interests embedded in granular, sensitive, and individual-level data.[143] There is much work ahead to ensure that the truth-seeking goals of statistical discovery do not compromise important privacy interests. I note here, simply, that there is a vibrant discussion devoted to resolving these issues (in the legal and wider research community),[144] and they can likely be overcome because courts are only interested in aggregate (and hence by nature anonymized) results.

C. Evidentiary Weight of Social Scientific Findings

The exercise of interpreting turnout-suppressive evidence in the context of the *Anderson/Burdick* doctrine also informs broader debates in the field about what laws of democracy we need. Legal scholars have observed (and in some cases participated in) the escalating Voting Wars with increasing alarm. Increased partisan polarization has made the manipulation of electoral rules indispensable in the toolkit for political warfare.[145] Without the preclearance regime under the Voting Rights Act (which required jurisdictions with a history of suppression to seek permission from the Department of Justice before changing voting rules),[146] such manipulations face no ex-ante constraints on enactment into law.

143. Stewart III, *supra* note 70, at 24.

144. *See, e.g.*, Frederik Zuiderveen Borgesius, Jonathan Gray & Mireille van Eechoud, *Open Data, Privacy, and Fair Information Principles: Towards a Balancing Framework*, 30 BERKELEY TECH. L.J. 2073 (2015); Marijn Janssen & Jeroen van den Hoven, *Big and Open Linked Data (BOLD) in Government: A Challenge to Transparency and Privacy?*, 32 GOV'T INFO. Q. 363 (2015); PRIVACY, BIG DATA, AND THE PUBLIC GOOD: FRAMEWORKS FOR ENGAGEMENT (Julia Lane, Victoria Stodden, Stefan Bender & Helen Nissenbaum eds., 2014); NAT'L ACAD. OF SCI., ENG'G, & MED., INNOVATIONS IN FEDERAL STATISTICS: COMBINING DATA SOURCES WHILE PROTECTING PRIVACY, PANEL ON IMPROVING FED. STAT. FOR POL'Y. AND SOC. SCI. RSCH. USING MULTIPLE DATA SOURCES AND STATE-OF-THE-ART ESTIMATION METHODS (Robert M. Groves & Brian A. Harris-Kojetin eds., 2017).

145. *See, e.g.*, HASEN, *supra* note 4; Justin Levitt, *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 ELECTION L.J. 97 (2012); Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867 (2016); Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837 (2018).

146. Shelby Cnty. v. Holder, 570 U.S. 529, 550–56 (2013) (striking down the coverage formula in the Voting Rights Act, rendering the preclearance regime inoperative).

The legal community has channeled its despair over the large and growing rights-remedy gap in voting rights into a profusion of legal proposals. Lawyers and scholars have proposed adapting existing doctrines,[147] unearthing old standards,[148] and charting new legal territory,[149] all in the service of producing a denser net of protections for the right to vote.

As we continue to debate which reforms are feasible and necessary to better protect voting rights, attention should be paid to what social scientific research serves as the evidentiary basis for new legal claims and regimes. Just as legal rights are only as good as the remedies for their violation,[150] legal claims are only as useful as the evidence that can prove them. To the extent that doctrinal proposals involve line-drawing questions that could depend in part on turnout-suppressive

147. For a list of works articulating how to adapt Section 2 to vote denial cases, see *supra* note 130. *See also* Ellen D. Katz, *Section 2 After Section 5: Voting Rights and the Race to the Bottom*, 59 WM. & MARY L. REV. 1961 (2018). For works that shore up the legality of the remaining portions of the Voting Rights Act, see, for example, Christopher S. Elmendorf, *Advisory Rulemaking and the Future of the Voting Rights Act*, 14 ELECTION L.J. 260 (2015) (suggesting DOJ guidelines that would strengthen the legitimacy of the VRA); Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549 (2020) (bolstering the Voting Rights Act by way of recognizing broader constitutional authorization of congressional enforcement from the Fifteenth, instead of Fourteenth, Amendment).

148. *See, e.g.*, Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009); Mannheim & Porter, *supra* note 93 (suggesting resuscitation of doctrinal attention to the harm of voter suppressive laws like voter purges); Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, 108 GEO. L.J. 27 (2020) (arguing that a correct—and synthetic—reading of the relevant authority would provide a thicker conception of the Nineteenth Amendment's protections for the right to vote).

149. *See, e.g.*, Pildes, *supra* note 118; Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289 (2011) (explicating individual interest in voting and demonstrating why doctrine should take it seriously); Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013) (harnessing the Elections Clause to advocate for an administrative approach to manipulations of the political process); Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 101 (2013) (proposing that courts explicitly consider whether election regulations were adopted for partisan advantage); Hasen, *supra* note 145 (offering a legal realist critique of the artificiality of the race or party inquiry in election law jurisprudence in light of the intertwined nature of race and party in our history, and suggesting a remedy involving a more robust application of *Anderson/Burdick* or more heightened standards that resemble retrogression under the Voting Rights Act); Daniel P. Tokaji, *Responding to* Shelby County*: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71 (2014) (proposing a federal legislative bargain that would expand voter registration and impose a voter ID requirement); Issacharoff, *supra* note 6 (proposing neutral election administration to address the root problem of principal-agent problem in American election administration). For a critique of some of these approaches, see Samuel R. Bagenstos, *Universalism & Civil Rights (with Notes on Voting Rights After* Shelby*)*, 123 YALE L.J. 2838 (2014).

150. *See generally* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

estimates (for example, when an illegal effect has occurred, or when legal action is warranted), this Article provides some reasons for caution, both because of the methodological contingency of high quality causal evidence and because of the limitations of what that evidence captures.

Beyond the specifics of turnout-suppressive evidence, questioning questions from the social science wing of the field helps to ensure that there is evidentiary support underlying new legal protections. Clarity about the evidence necessary to prove legal claims will also ensure that evidentiary preferences do not become legal requirements. Clarity about questions will also send a clearer message to empiricists about how existing research falls short and where they should channel their creativity.[151]

This aligns with my earlier suggestion that social scientific research engage more with descriptive findings from election law litigation; the valuable interdisciplinary conversations at the beating heart of the field should occur more often and earlier in the research process. That conversation is valuable when research is being designed. That conversation is also valuable when legal solutions are first being designed, as limitations of social science evidence may be nonobvious but critical.

In summation, questioning questions in social science research creates a better understanding of social science research's contributions to the field of law of democracy, the law of democracy itself, as well as of its role as evidence in law of democracy cases. Turnout-suppression estimates should not bleed from evidence into law. Revealing the modesty of voter-suppression estimates in proving voting-rights claims also helps elevate other types of more probative evidence and facilitate their discovery. More broadly, new doctrines in the law of democracy would benefit from closer examination of social scientific findings.

151. A good example of how creativity is mobilized when doctrine motivates research can be found in the area of partisan gerrymandering, see generally Nicholas Stephanopoulos & Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties*, 45 LEG. STUD. Q. 609 (2020). The results of the paper—on, as the paper's title suggests, how partisan gerrymandering harms political parties—spoke directly to Justice Kagan's powerful concurrence in *Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring), signaling the importance of demonstrating First Amendment-related harms on political parties. Despite the rich literature on partisan gerrymandering, social scientific findings relating specifically to harms imposed on party functions were lacking. While the Court soon decided that partisan gerrymandering claims were non-justiciable after all, Rucho v. Common Cause, 139 S. Ct. 2484 (2019), this piece nevertheless serves as a useful example of doctrinally motivated and novel social science research.

CONCLUSION

The persistent failure in the academic social science literature to causally detect statistically significant effects of voter ID laws on turnout raises uneasy questions for the law of democracy field. Yet social scientists only expected a larger effect of voter ID laws on turnout than what their research designs could detect because they were not familiar with the descriptive evidence. In fact, as revealed through expert discovery in the Texas voter ID litigation, fewer than 1 percent of habitual voters in Texas lack an ID. Thus, it is not surprising that the best studies of the effect of voter ID laws find that those laws do not reduce turnout by more than 2 percentage points. Had social scientists questioned their questions, they would not have been surprised by the answers.

Questioning questions also clarifies the implications of this non-puzzle. Had social scientists compared the effect of voter ID laws to the effect of other election laws—rather than to demographic variables, for example—they might not have described a 1 to 2 percent effect as small. Had social scientists considered effects beyond those on marginal voters in a given election, they might have uncovered evidence that voter ID laws not only suppress votes cast, but also suppress voters' willingness to participate in elections over the course of their lives.

Finally, questioning how the social science literature fits in with the law maintains clarity in the doctrine protecting the right to vote. Under the Constitution, courts must weigh any burdens that states impose on the franchise against the justifications for those burdens. Effects on turnout, although relevant, offer a radically incomplete estimate of those burdens, even if they are relevant to the burden inquiry. Questioning the evidentiary weight of turnout estimates also helps the field identify where progress relating to the discovery of important social scientific facts will come from. My reference to expert discovery in voting rights cases as the shadow academic election law literature likely overstates both how frequently perused and well-regarded it is. That should not be the case. Indeed, more should be done to facilitate data discovery to yield otherwise hard-to-discover and probative descriptive facts.

The heated debates over the true effects of voter ID laws are regrettable not only because of how heated they became, but because of how unnecessary they are. Questioning other questions, for instance those relating to the magnitude of social scientific findings and how they relate to normative determinations and legal doctrine, helps ensure that the time-honored interdisciplinary conversations in the field are reserved for the right and the important debates.