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VOTER ID: WHO HAS THEM? WHO SHOWS THEM?

CHARLES STEWART III*

This article is motivated by a desire to better understand three questions. First, how many voters possess the identification required under the various voter identification laws in the states? Second, when voters present themselves at the polls (on Election Day or during the early voting period), what forms of identification do they actually show? Third, how many voters are deterred from voting because they do not have the requisite identification?

I provide answers to these questions—and to the important subsidiary questions that follow from them (such as whether identification possession or identification-showing varies by race)—using responses to a nationwide survey of over 10,000 voters, conducted in the days immediately following the 2012 presidential election. These answers provide the first attempt to quantify at the national level important empirical questions that arose in the aftermath of the 2008 decision in *Crawford v. Marion County Election Board*.¹

While possession of some form of identification is widespread among American voters, there are significant disparities in identification possession by race. Furthermore, it matters whether the requisite identification must be currently valid or contain a picture. The greater mobility of African American and Hispanic voters can multiply racial disparities if the address on the identification in question must agree with the address of the voter on file with election authorities.²

What voters are actually required to produce in order to vote also varies. Mostly this variation is simply a matter of state law. Yet in a significant minority of cases, it appears that this variety is due to deviations from state law. For instance, Hispanics who live in states that do not require voters to show photo identification in order to vote nonetheless reported that they

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1. 553 U.S. 181 (2008).

2. See NAACP LEGAL DEF. & EDUC. FUND, INC. & NAACP, DEFENDING DEMOCRACY: CONFRONTING MODERN BARRIERS TO VOTING RIGHTS IN AMERICA 35 (n.d.), available at http://naacp.3cdn.net/67065c25be9ae43367_mlbrsy48b.pdf.

were required to produce a driver's license (or other government-issued photo identification) at rates significantly greater than white voters. Finally, while few non-voters attribute their failures to vote to their lack of identification, the type of voter-identification regime does matter—non-voters in states with strict photo identification laws are twice as likely to state they failed to vote due to the lack of identification, compared to non-voters in states in which such laws are less strict (or even non-existent).

Part I of this article provides a background to the empirical studies that have previously addressed the issue of voter identification possession in the states. Part II describes the public opinion survey on which the empirical results rely: the 2012 Survey of the Performance of American Elections (SPAЕ). Part III tackles the question of who possesses different types of identification required under state laws; and Part IV analyzes who actually shows identification when they vote. The issue of whether the lack of identification possession deters voters from turning out at the polls is addressed in Part V.

I. Background

The three questions posed by this article arise out of the Supreme Court's decision in *Crawford*.³ Rejecting a facial challenge to the strict Indiana voter photo identification law, the Court opened the door instead to as-applied challenges.⁴ In particular, Justice Stevens's opinion for the Court chastised the plaintiffs for offering inadequate evidence about the number of Indiana voters who failed to possess the requisite identification and about the degree of burden imposed on those who would have to acquire the requisite identification should they wish to vote.⁵ This criticism could be read as a full-employment act for social scientists interested in empirical issues surrounding the effects of election laws on voting behavior.

Indeed, in the aftermath of *Crawford*, legal scholars and political scientists have applied empirical tools to the task of quantifying the burden imposed by voter identification laws passed by various states.⁶ While the

3. See 553 U.S. 181.

4. See *id.* at 202-03.

5. *Id.* at 198-202.

6. See, e.g., Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 PS: POL. SCI. & POL. 127, 128 (2009); 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); Lonna Rae Atkeson et al., *A New Barrier to Participation: Heterogeneous Application of Voter Identification Policies*, 29 ELECTORAL STUD. 66, 68

burdens cannot be measured directly, they can be measured indirectly. The first lens through which the burdens imposed by voter identification laws can be viewed is by studying who does not possess the requisite identification under the applicable state laws. Courts have shown particular interest in classes of voters who fail to possess these identifications—mostly racial groups in federal cases under the Voting Rights Act,⁷ and income groups in state cases brought under various state constitutions.⁸ The main question here is one of disparate impact. Are minority group members less likely to possess the requisite identification than white voters? What about poor voters, compared to middle-class and wealthy voters?

The second lens is turnout. If it can be shown that the imposition of strict photo identification laws leads to a reduction in voting among disadvantaged groups—racial or income—that, too, would seem to be evidence that these laws are unduly burdensome.

A. Documenting Disparate Impacts

As far as the first lens is concerned, documenting disparate effects of strict identification laws has proven more difficult than it would first seem.

(2010); Matt A. Barreto et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS: POL. SCI. & POL. 111, 112 (2009); Rachael V. Cobb et al., *Can Voter ID Laws Be Administered in a Race-Neutral Manner? Evidence from the City of Boston in 2008*, 7 Q.J. OF POL. SCI. 1, 2-3 (2012); M.V. Hood III & Charles S. Bullock III, *Much Ado About Nothing? An Empirical Assessment of the Georgia Voter Identification Statute*, 12 ST. POL. & POL'Y Q. 394, 399 (2012); Roger Larocca & John S. Klemanski, *U.S. State Election Reform and Turnout in Presidential Elections*, 11 ST. POL. & POL'Y Q. 76 (2011); Jason D. Mycoff et al., *The Empirical Effects of Voter-ID Laws: Present or Absent?*, 42 PS: POL. SCI. & POL. 121, 122 (2009); Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1 (2009); Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Balloting*, 24 J.L. & POL. 475, 477-80 (2008); Michael J. Pitts & Matthew D. Neumann, *Documenting Disfranchisement: Voter Identification During Indiana's 2008 General Election*, 25 J.L. & POL. 329, 330 (2009).

7. See, e.g., *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012); *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012), *vacated*, 133 S. Ct. 2886 (2013).

8. See, e.g., *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012); *Milwaukee Branch of the NAACP v. Walker*, No. 2012AP557-LV, 2012 WL 1020254 (Wis. Ct. App. Mar. 28, 2012).

Because of privacy laws, independent academic research in this area is virtually impossible. In particular, the federal Driver's Privacy Protection Act of 1994 generally prohibits academics from receiving driver's license lists in order to conduct research in this area.⁹ The states have conducted direct matches between driver's license and voter registration lists,¹⁰ but these exercises are hardly independent and usually impossible for outsiders to verify.

Thus, independent investigation into the disparate possession of driver's licenses among registered voters has been carried out almost exclusively by expert witnesses within the context of litigation.¹¹ This litigation has further revealed the hurdles in reaching accurate estimates of the different rates in identification possession across racial and income groups. First, not all voter registration lists have Social Security numbers that can be matched against those in the driver's license list.¹² Second, only six states record racial information in the voter registration files,¹³ which limits severely the ability to directly measure the racial characteristics of registered voters who do not possess licenses.¹⁴ Third, it is rare for available databases (regardless of how technically deficient) to cover all forms of allowable government-issued photo identification under many state laws. For instance, in the Texas case, experts were only able to match election rolls against state

9. See Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725 (2012).

10. See Barreto et al., *supra* note 6, at 112; Hood & Bullock, *supra* note 6, at 399-402.

11. In the interest of full disclosure, the author was an expert witness for the United States Department of Justice in the South Carolina voter identification case styled *South Carolina v. United States*. To view the author's full report, see Plaintiff's Motion to Exclude Testimony of Charles Stewart, *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012) (No. 1:12-cv-203 (CKK) (BMK) (JDB)), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/PlaintiffsMotiontoExcludeTestimonyofCharlesStewart.pdf>. Opposing expert testimony in that case was provided by Professor M.V. Hood III of the University of Georgia. See Supplemental Declaration of M.V. Hood III, *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012) (No. 1:12-cv-203 (CKK) (BMK) (JDB)).

12. See Rebuttal Declaration of Charles Stewart III at 9, *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012) (No. 1:12-CV-203-CKK-BMK-JDB).

13. Eitan Hersh, *The Public Code of Racialized Electioneering* 12 (Feb. 8, 2012) (unpublished Ph.D. dissertation, Harvard University), available at http://www.eitanhersh.com/uploads/7/9/7/5/7975685/racialized_electioneering.pdf.

14. The expert report of Professor Stephen Ansolabehere attempted to get around this shortcoming of the Texas voter registration roll in *Texas v. Holder* through the use of racial information contained in the registration rolls maintained by a private political consulting firm, Catalist, LLC. See Declaration of Stephen D. Ansolabehere at 4-8, *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012) (No. 1:12-CV-00128 (RMC-DST-RLW)), ECF No. 260-7.

driver's license and license-to-carry databases when the law allowed a wider range of government-issued identification such as passports.¹⁵ The district court decision criticized the failure to match the voter rolls against these other databases, despite the fact that these lists were outside the control of the parties and unavailable to the experts.¹⁶

Finally, when it comes to economic status, it is impossible to compare directly the incomes of identification holders with those of non-holders because income is part of neither identification files nor registration rolls. At best, income can be imputed from Census Bureau data available by zip codes or other geographic divisions.

Despite the challenges facing the database-matching enterprise, these reports generally reach the same conclusions: there are racial and income disparities in the possession of identification. For instance, in the case of Texas, Professor Ansolabehere concluded that of whites on the voter registration rolls, 10.85% could not be matched to the driver's license or license-to-carry records; of blacks and Hispanics, the no-match rates were 20.71% and 17.49%, respectively.¹⁷ In South Carolina, my research concluded that 3.9% of whites on the voter registration rolls lacked either the state or federal photo identification required under state legislation, compared to 8.3% of African Americans and 6.7% of Hispanics.¹⁸ Using a different method, Professor Hood, the expert for South Carolina in the case, similarly estimated that 4.32% of non-Hispanic whites on the South Carolina active voter list lacked the requisite identification, compared to 6.22% of blacks and 7.13% of Hispanics.¹⁹

15. See *Texas v. Holder*, 888 F. Supp. 2d at 115-18, *vacated*, 133 S. Ct. 2886 (2013).

16. *Id.* at 132-34.

17. Declaration of Stephen D. Ansolabehere, *supra* note 14, at 22-23, 31.

18. Rebuttal Declaration of Charles Stewart III, *supra* note 12, at 33.

19. Supplemental Declaration of M.V. Hood III, *supra* note 11, at 8. As comparison, note that Professor Kenneth Mayer, in his expert report in *Milwaukee Branch of the NAACP v. Walker*, cited an earlier study by Professor John Pawasarat that placed the percentage of Wisconsin adults without a driver's license at 20% for males and 19% for females, compared to the African American rates of 55% for males and 49% for females, and the Hispanic rates of 46% for males and 59% for females. See Order Granting Motion for Temporary Injunction, *Milwaukee Branch of NAACP v. Walker*, No. 11 CV 5492 (Wis. Cir. Mar. 6, 2012), 2012 WL 739553; see also Supplemental Report to Report on the Effects of Wisconsin Act 23, at 1, *Milwaukee Branch of NAACP*, No. 11 CV 5492.

Professors M.V. Hood and Charles Bullock, in their study of the effects of the Georgia photo identification law, engaged in database-matching indirectly by relying on the results of a matching exercise conducted by the Georgia Department of Motor Vehicles at the request of the state elections board in June 2006.²⁰ Even after controlling for a host of demographic factors, Professors Hood and Bullock found that all minority groups in their analysis—blacks, Hispanics, Asian Americans, and a residual “[o]ther race or ethnicity” category—lacked driver’s licenses at a statistically greater rate than whites.²¹ Using white voters as a baseline, blacks were 3.3 percentage points more likely to lack a license, Hispanics 3.7 percentage points more likely, and Asian Americans 0.5 percentage points more likely.²²

In a follow-up study, Professors Hood and Bullock analyzed a 2007 report produced by the State of Georgia in the course of defending its identification law in court.²³ Overall, they documented a suppressive effect of the latest version of the Georgia voter identification law.²⁴ Yet, they failed to find racial differences in these suppressive effects.²⁵ Whether this is due to the special character of the 2008 presidential election—in which African American voters in Georgia, an otherwise non-competitive state in the presidential election, were energized to turnout at unusually high rates due to the historic candidacy of Barak Obama—remains to be tested directly.

Because database-matching is a method that is unavailable to most independent researchers, scholars have employed different strategies for addressing the empirical questions of who holds identification, and how the lack of sufficient identification is distributed across the population. The most common strategy is to rely on survey research.

20. M. V. Hood III & Charles S. Bullock III, *Worth a Thousand Words?: An Analysis of Georgia’s Voter Identification Statute*, 36 AM. POL. RES. 555, 563 (2008), available at <http://apr.sagepub.com/content/36/4/555>.

21. *Id.* at 566.

22. *See id.* at 567.

23. Hood & Bullock, *supra* note 6, at 399. For additional information regarding the underlying litigation that produced some of the data that Professors Hood and Bullock analyzed, see *Common Cause/Ga. v. Billups*, 554 F.3d 1340 (11th Cir. 2009).

24. *See* Hood & Bullock, *supra* note 6, at 402-04. The simplest way of seeing this effect is to compare the *change* in turnout rates of those who lacked licenses in 2004 and in 2008 (a drop of 8.0 percentage points) with those who possessed licenses in those same years (a drop of 2.9 percentage points). *Id.* at 402. The difference in these two differences is 5.1 percentage points, which is the raw “differences-in-differences” estimate of the effect of imposing a new voter identification requirement.

25. *Id.* at 407.

In October 2007, Professor Matt Barreto and his colleagues conducted a telephone survey of registered and unregistered voters in Indiana.²⁶ They found that among all eligible voters, 83.2% of whites and 71.7% of blacks had the correct credentials to vote in the Hoosier State.²⁷ Furthermore, they discovered that “the lowest income category of voters [was] significantly less likely to have acceptable photo ID” than the other categories.²⁸ However, in an expert report filed on behalf of the plaintiffs in a Pennsylvania voter identification case,²⁹ Professor Barreto found no disparities in valid driver’s license possession between whites and blacks; however, he did find disparities between Hispanics and other racial/ethnic groups.³⁰

An alternative strategy to public opinion surveys has been analysis of provisional ballots. This is the approach followed by Professor Michael Pitts in examining the number of Indiana voters turned away from the polls in elections soon after the adoption of the state’s strict photo identification law.³¹ Studying the 2008 state primary (the first state election after the *Crawford* decision) and the 2008 general election, Professor Pitts surveyed county election officials to ascertain the number of provisional ballots cast in each county due to the lack of identification and the numbers eventually counted.³² In the 2008 primary, an estimated 399 provisional ballots were cast because the prospective voter lacked photo identification, seventy-eight of which were eventually counted.³³ In the ensuing general election, 1039 prospective voters lacked proper identification and cast provisional ballots, only 137 of whom had their ballots eventually counted.³⁴ This research did not examine the racial distribution of these ballots, though such analysis would, at best, be provisional because of the lack of racial identifiers in the Indiana voter file.

Notable in Professor Pitts’s research is the fact that the disenfranchising effects of the Indiana voter identification law seem to be considerably less

26. Barreto et al., *supra* note 6, at 112.

27. *Id.* at 113.

28. *Id.* at 114.

29. *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012).

30. See Matt A. Barreto et al., Rates of Possession of Valid Photo Identification, and Public Knowledge of the Voter ID Law in Pennsylvania 28 (July 16, 2012), available at <http://www.aclupa.org/downloads/BarretoReport.pdf>.

31. Pitts, *supra* note 6, at 477-80; Pitts & Neumann, *supra* note 6, at 330.

32. Pitts, *supra* note 6, at 486-88 & n.59.

33. *Id.* at 480.

34. Pitts & Neumann, *supra* note 6, at 330.

than would be predicted, given the percentage of registered voters who lack driver's licenses. This fact only raises issues, rather than settling them. On the one hand, it could be that the Indiana identification law kept a significant number of voters away from the polls due to their lack of identification; thus they did not appear at the polls even to cast a provisional ballot. On the other hand, it could be that registered voters who lacked driver's licenses procured them in the wake of *Crawford*; while they were burdened by the photo identification law, the burden was not sufficient to keep them from voting. The truth probably lies somewhere between these two possibilities, but without further research (for instance, studying driver's license acquisition directly among those lacking licenses pre-*Crawford*), it is impossible to know precisely where the truth lies.

B. The Effect of Identification Laws on Turnout

The other research path is to study the effect of identification laws on turnout. The most frequently cited article on this topic is a 2008 working paper by Professors Alvarez, Bailey, and Katz.³⁵ Analyzing data from the Voting and Registration Supplement (VRS) of the Current Population Survey from 2000 to 2006, they discovered:

[T]hat the strictest forms of voter identification requirements—combination requirements of presenting an identification card and positively matching one's signature with a signature either on file or on the identification card, as well as requirements to show picture identification—have a negative impact on the participation of registered voters relative to the weakest requirement, stating one's name.³⁶

They also noted that this depressive effect is the strongest for the less educated and lower income individuals; there is, however, no direct depressive effect by race.³⁷

The most recent published research that relies on the VRS is by Professors Larocca and Klemanski and examines the 2000, 2004, and 2008

35. R. Michael Alvarez, Delia Bailey & Jonathan N. Katz, *The Effect of Voter Identification Laws on Turnout* (Caltech/MIT Voting Tech. Project, Working Paper No. 57, Version 2, 2007), available at http://vote.caltech.edu/sites/default/files/vtp_wp57.pdf; see also R. Michael Alvarez, Delia Bailey & Jonathan N. Katz, *An Empirical Bayes Approach to Estimating Ordinal Treatment Effects*, 19 POL. ANALYSIS 20 (2011), available at <http://pan.oxfordjournals.org/content/19/1/20.full.pdf>.

36. Alvarez, Bailey & Katz, *The Effect of Voter Identification Laws on Turnout*, *supra* note 35, at 3.

37. *Id.*

elections.³⁸ Professors Larocca and Klemanski are interested not only in voter identification laws, but also in a full array of convenience-affecting reforms that have been enacted in the past decade, such as permanent absentee voting.³⁹ Here, they discovered that strict photo identification laws are actually associated with an *increase* in voter turnout among some groups, though the results are inconsistent across the range of elections studied.⁴⁰

In contrast, Professor Ansolabehere's analysis of the turnout effects of voter identification laws relied on another survey—the Cooperative Congressional Election Study (CCES)—and focused on the 2006 general election and the 2008 Super Tuesday primary.⁴¹ In both elections, respondents were asked if they were “asked to show a photo ID” in order to vote; those answering affirmatively were then probed on whether they were allowed to vote.⁴² The 2006 survey results showed that only twenty-five out of 22,211 voters (0.1%) who were asked to show voter identification were ultimately denied access to a ballot.⁴³ Similarly, in 2008 only three out of 2564 respondents (0.1%) were similarly denied the opportunity to vote after being asked for photo identification.⁴⁴

Professors Mycoff, Wagner, and Wilson also relied on data from the 2006 CCES to examine the relationship between the stringency of voter identification laws and turnout.⁴⁵ Unlike the Ansolabehere study, the Mycoff study imbedded a measure of a voter's state identification laws into a standard multivariate statistical analysis aimed at predicting whether a respondent would turn out to vote.⁴⁶ The effect of the variable measuring voter identification laws paled in comparison with more classically important turnout factors—age, race, sex, income, education, party affiliation, etc.—and failed to reach statistical significance.⁴⁷ Consistent with the other early research into the topic, the presence of strict identification laws was shown to be negligible.⁴⁸

38. Larocca & Klemanski, *supra* note 6, at 77.

39. *Id.* at 78-81.

40. *See id.* at 90, 94, 97.

41. Ansolabehere, *supra* note 6, at 128.

42. *Id.*

43. *Id.* at 129.

44. *Id.*

45. Mycoff et al., *supra* note 6, at 122.

46. *Id.* at 122-24.

47. *See id.* at 124-25.

48. *See id.* at 121, 124-25.

In a second prong of their analysis of the 2004 and 2006 general elections in Georgia, Professors Hood and Bullock found that failure to possess a driver's license reduced the probability of turning out to vote by thirty-two percentage points in 2004 and thirty-seven percentage points in the 2006 general election.⁴⁹

Professors Erikson and Minnite's study of the effect of voter identification on turnout provides a methodological commentary on this first generation of turnout studies.⁵⁰ Focusing on the Alvarez research, but applicable to the entire body of research to date, Professors Erikson and Minnite argue that previous research was inattentive to statistical issues that are involved in calculating the standard errors that are produced in the various statistical estimations that are at the core of the analysis⁵¹—standard errors being one of the two components that are used to calculate the degree of statistical significance associated with an estimate. Accounting for these technical issues, Professors Erikson and Minnite found no basis for concluding that strict voter identification laws have had a depressive effect on turnout by any group, either racial or income.⁵² As they note: “The effects may be there. By all tests there is nothing to suggest otherwise. But the data are not up to the task of making a compelling statistical argument.”⁵³

C. *The Uneven Implementation of Identification Laws*

A final empirical question that has received research attention in the realm of voter identification has been whether poll workers in the precincts actually follow the requirements of state laws.⁵⁴ Election workers are the “street-level bureaucrats” who ensure the effective application of voter identification laws with little effective oversight on Election Day.⁵⁵ If poll workers are lax in strict-identification states, the intentions of state

49. See Hood & Bullock, *supra* note 20, at 569-70.

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

51. *Id.* at 87-88, 92-93.

52. *Id.* at 98.

53. *Id.*

54. One strand of research not reviewed here is whether the presence of voter identification laws increases confidence in the electoral process. On this topic, see Ansolabehere & Persily, *supra* note 6.

55. Thad Hall et al., *Poll Workers and the Vitality of Democracy: An Early Assessment*, 40 PS: POL. SCI. & POL. 647 (2007) (internal quotation marks omitted); see also MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (2010).

legislatures can be thwarted; if poll workers are overly zealous in non-identification states, the intentions of legislatures are similarly undermined.

Within the context of civil rights laws, there is an additional concern here: the unequal implementation of laws, regardless of their degrees of stringency. Either a strict or lenient identification law can have a discriminatory effect if poll workers implement state identification laws differently depending on the race of the voter who presents herself at the polls.

The two principal studies to examine the on-the-ground implementation of voter identification laws have focused on particular states. The first of these, by Professor Atkeson and collaborators, studied the first congressional district of New Mexico in the 2006 election through the use of a mixed-mode public opinion survey in the aftermath of the election.⁵⁶ In addition to the survey of voters, the authors conducted a survey of poll workers in Bernalillo County, which substantially overlapped the first district.⁵⁷ Unlike most state-specific studies of voter identification laws, New Mexico's law was on the permissive side, allowing a wide variety of forms of identification, with or without a photograph.⁵⁸

The findings of Atkeson et al. reveal considerable variation in the application of the state's identification law to voters. First, over one-third of voters reported showing no identification at all, despite the law's requirement that *some* form of identification be shown.⁵⁹ Second, less than half of the poll workers interviewed reported asking for identification "all of the time."⁶⁰ In a follow-up question, in which the poll workers were asked *why* they asked for identification, less than half answered "[i]t's required by law to verify the identity of the voter."⁶¹ Third, Hispanic and male voters were asked to show identification at a significantly higher rate than white and female voters.⁶² Finally, no differences were found in the self-reported rates at which poll workers of various demographic categories asked for identification.⁶³ In other words, variation from the requirements of the law seemed likely due to the poll workers' conceptions of what the law *should* be.

56. Atkeson et al., *supra* note 6, at 68.

57. *Id.*

58. *See id.*

59. *Id.* at 68-69.

60. *Id.* at 69-70.

61. *Id.*

62. *Id.* at 70-71.

63. *Id.* at 71.

The other geographically specific study of voter identification law implementation is also the most highly controlled. Professors Cobb, Greiner, and Quinn conducted a study in the City of Boston in the 2008 general election that was designed not only to see whether poll workers varied in whom they asked for identification, but also to test whether rigorous training in the law would forestall discrimination based on race.⁶⁴ The research was based on an exit poll conducted on Election Day.⁶⁵ A total of 2399 voters responded to the poll.⁶⁶ The findings were discouraging.

First, the raw difference in the rates at which voters were asked for identification showed significant differences by race.⁶⁷ After controlling for a series of other demographic variables, along with a control for congestion at the polls, blacks had a baseline probability of being asked for identification of 0.37 and Hispanics a baseline probability of 0.40, compared to a baseline probability of 0.27 for whites.⁶⁸ In a dismaying finding for those who pin hopes for unbiased election administration on robust training programs, the study also found that when a control was entered for whether the poll worker had undergone the “improved” training program, the results as related to the race and education of the voter did not substantively change.⁶⁹ Echoing conclusions made by Professors Page and Pitts,⁷⁰ the Cobb study concluded that the poll workers studied were influenced by implicit racial bias—bias that appeared immune to training.⁷¹

Taken as a whole, the existing literature provides three major expectations concerning the present study. First, minority voters, particularly African Americans and Hispanics, are likely to possess photo identification at a lower rate than whites. Second, minority voters are more likely to be required to show identification than white voters, particularly in states in which the voter identification regime is the least prescriptive. Third, the effect of strict photo identification laws on turnout is expected to be slight.

64. Cobb et al., *supra* note 6, at 2-3, 7-8.

65. *Id.* at 2-3.

66. *Id.* at 14.

67. *See id.* at 16.

68. *Id.* at 18-22.

69. *See id.* at 23.

70. *See* Page & Pitts, *supra* note 6, at 21-39.

71. Cobb et al., *supra* note 6, at 28.

II. Survey of the Performance of American Elections

The remainder of this article is based on data drawn from the 2012 Survey of the Performance of American Elections (SPAЕ).⁷² The 2012 SPAЕ involved 200 interviews of registered voters in each state and the District of Columbia, for a total of 10,200 observations.⁷³ The survey, conducted by YouGov,⁷⁴ used “state-level matched random samples in each of the states. Although respondents were recruited through a variety of techniques, the resulting sample matched the nation on important demographic characteristics, such as education, income, race, and partisanship.”⁷⁵ Statistical weights were applied, in addition, so that the sample analyzed matched the nation on these demographic characteristics.⁷⁶

The core interest of the SPAЕ is a “voter’s-eye view” of Election Day—that is, is the voting process convenient? All respondents were asked whether they voted.⁷⁷ If a respondent answered “no,” a follow-up question asked about factors that contributed to the non-voting.⁷⁸ If the respondent answered “yes,” he was asked what mode he used to vote (in-person on Election Day, early, or absentee/by-mail).⁷⁹ A series of follow-up questions then queried the respondent about the quality of experience when he went to vote. An in-person voter, for instance, was asked how easy it was to find his polling place, whether he encountered any registration problems when he went to vote, and how long he had to wait to vote.⁸⁰ An absentee voter

72. The 2012 Survey of the Performance of American Elections (SPAЕ) was conducted by the author and funded through the generosity of the Pew Charitable Trusts, which bears no responsibility for the following analysis. Further information about the SPAЕ may be found in the 2012 Survey of the Performance of American Elections: Final Report. See CHARLES STEWART III, 2012 SURVEY OF THE PERFORMANCE OF AMERICAN ELECTIONS: FINAL REPORT (Feb. 25, 2013 draft) (forthcoming 2013) (on file with author) [hereinafter 2012 SPAЕ].

The 2012 SPAЕ instrument was largely a repetition of the same instrument used in the 2008 SPAЕ. This paper’s analysis relies exclusively on the 2012 study. Some statistics reported in this paper are not included in the *Final Report* of the SPAЕ. Additional information and data for these non-cited statistics are available by contacting the author.

73. *Id.* at ii.

74. For additional information on YouGov, see *About YouGov America*, YOUGOV, <http://today.yougov.com/about/> (last visited Aug. 25, 2013).

75. See 2012 SPAЕ, *supra* note 72, at 9.

76. See *id.*

77. See *id.* at 137.

78. See *id.* at 138.

79. See *id.* at 139.

80. See *id.* at 140-46.

was asked whether he had problems filling out his absentee ballot, among other questions.⁸¹

In addition to questions that ascertained the voting experience from a convenience or “customer service” perspective, other questions inquired about factors such as the time of day the respondent voted, the type of place the respondent voted, and what form of identification was shown when the voter checked in at the polling place.⁸² Finally, respondents were asked a series of questions about demographics and other factors that might provide context for their experiences.⁸³

Most relevant to this article, each respondent, whether or not he voted, was asked whether he possessed a driver’s license and passport. Follow-up questions for one who possessed a driver’s license ascertained whether the license had the same name under which the respondent was registered to vote, the same address at which the respondent was registered to vote, and whether the license had expired.⁸⁴ A similar set of follow-up questions was given to a respondent who reported that he had a passport.⁸⁵

A less-involved set of questions was asked of all voters about the possession of a range of other forms of identification. In particular, all respondents were asked whether they possess the following types of identification:

- A public assistance identification card issued by the individual’s state of residence,
- A military identification card,
- An identification card issued by a state or local government outside of the individual’s state of residence,
- An identification card from a Native American tribe,
- An identification card from a private college or university within the individual’s state of residence,
- An identification card from a private college or university outside of the individual’s state of residence,
- An identification card from a state college or university within the individual’s state of residence,
- An identification card from a state college or university outside of the individual’s state of residence,

81. *See id.* at 147-50.

82. *See id.* at 140-46.

83. *See id.*

84. *See id.* at 155-56.

85. *See id.* at 156-57. There was no follow-up question about whether the passport had the correct address because a passport does not record the respondent’s address.

- A license to carry a firearm issued by the individual's state of residence,
- A voter registration card issued by the individual's state of residence,
- An identification card issued by an agency or department of the federal government that the individual has not already indicated,
- An identification card issued by an agency or department of the individual's state of residence that the individual has not already indicated, and
- An identification card issued by an agency of a local government in the individual's state of residence that the individual has not already indicated.⁸⁶

If the respondent did possess one of the forms of identification listed, he was asked whether it had a photograph on it.⁸⁷ Each respondent was finally asked whether he had "an official copy of [his] birth certificate that [he] can easily locate."⁸⁸

A set of questions then addressed the voting experience. Non-voters were asked which, of fourteen different reasons, played a major or minor role in their failures to vote in 2012.⁸⁹ One of these excuses was "I did not have the right kind of identification."⁹⁰

Each voter was asked two sets of questions about his interaction with the poll workers in the transaction that identified the voter at the polls. The first question was asked of all in-person voters: "When you first checked in at the polling place to vote, which of the following statements most closely describes how you were asked to identify yourself?"⁹¹ The response options were:

- 1 I gave my name and address, but did not show any identification of any kind.
- 2 I showed a letter, a bill, or something else with my name and address on it, but it was not an identification card of any sort.
- 3 I showed my voter registration card.

86. *See id.* at 158.

87. *See id.*

88. *Id.* at 116, 157.

89. *See id.* at 138.

90. *See id.* at 69, 138.

91. *See id.* at 143 (emphasis omitted).

- 4 I showed my driver's license or state-issued photo ID.
- 5 I showed my passport.
- 6 . . . I showed a military ID card.
- 7 . . . I showed some other form of identification. . . .
- 8 I don't remember.⁹²

A respondent to this question who stated that he showed a driver's license or state-issued photo identification, a passport, or a military identification card—that is, a card with a photograph on it⁹³—was then given a probe: “Did you show picture identification because you were asked for it specifically, or because a picture ID was the most convenient form of identification for you to show?”⁹⁴ This follow-up was necessary because of the common observation that voters frequently present driver's licenses to the election workers checking-in voters without being asked in order to help speed along the process of recording voters' names and addresses. The intent of this follow-up probe was to separate voters who were *required* to show identification in order to vote from voters who simply did so for their own convenience.

III. Who Has Identification?

The first empirical question to address is who possesses the types of identification called for in the voter identification laws across the United States. According to the survey responses, the best estimate is that 91% of registered voters possess a driver's license and 41% possess a passport, the two most commonly allowed forms of photo identification in state laws.⁹⁵

92. *Id.* (emphasis omitted).

93. Some voter registration cards also have photographs on them—21%, according to respondents to the 2012 SPAE. *See id.* at 133 (indicating that of 6471 respondents who indicated they had a voter registration card issued by their state or residence, 1356 had a voter registration card with a picture on it). The design of the questionnaire unfortunately did not allow for the follow-up probe to be given to a respondent who showed a voter registration card that included a photo. A cross-tabulation of the type of identification shown to vote with the question about whether the respondent had a voter registration card suggests that the number of people showing a voter registration card *with* a picture accounts for approximately 7% of all photo voter identification cards shown at the polls; driver's licenses account for 91% of these cards.

94. *Id.* at 144.

95. *Id.* at 51. Because of worries about misreporting data, it is natural to ask whether the responses to the SPAE match actual driver's license statistics reported by the states. Unfortunately, an examination of state-supplied driver's license statistics reveals there is

There is considerable dispersion in possession rates across states. For driver's licenses, estimated possession rates range from 80% in the District of Columbia to 98% in Wyoming; passport possession rates range from 24% in Alabama to 64% in Hawaii.

Beyond driver's licenses and passports, state laws vary considerably in the types of photo identification that are either required or preferred.⁹⁶ Table 1 reports rates of possession of identification cards of different types, distinguishing between those that contain a picture and those that do not. Here, the voter registration card, either with or without a photo, appears as the second-most common form of potential voter identification, after the driver's license. Beyond the voter registration card, no other card is possessed by more than a quarter of the registered population.

likely a large amount of deadwood in driver's license lists, as there is in many voter registration rolls. For instance, according to data reported by the Federal Highway Administration, there were 208,396,012 licensed drivers ages eighteen and older in 2011 in the fifty states and the District of Columbia. *Highway Statistics 2011*, U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., <http://www.fhwa.dot.gov/policyinformation/statistics/2011/dl22.cfm> (last visited June 6, 2013). The United States Census Bureau's 2011 American Community Survey (ACS) estimates that there were 237,681,218 residents ages eighteen and older in the United States that year. *ACS Demographic and Housing Estimates*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_YR_DP05&prodType=table (last visited June 6, 2013) (filtering results to entire United States). This would produce an estimate that 87.7% of eligible voters possess a driver's license. However, a closer investigation of driver's license statistics at the state level suggests that some states have "too many" driver's licenses issued for the adult population. For instance, Indiana is listed as having issued 6,551,218 driver's licenses to drivers ages eighteen and older. *Highway Statistics 2011*, *supra*. However, the ACS estimates that Indiana's adult population was 4,919,665. *ACS Demographic and Housing Estimates*, U.S. CENSUS BUREAU, <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?fpt=table> (last visited June 6, 2013) (filtering results to the State of Indiana). Similar calculations reveal that the following other states were reported as having a license-to-resident ratio of greater than 100%: Alabama, Connecticut, and Vermont.

The United States Department of State does not report the number of passports in circulation broken down by age. The Bureau of Consular Affairs reports that in 2011 there were 109,780,364 passports in circulation. *Passport Statistics*, U.S. DEP'T OF STATE, http://travel.state.gov/passport/ppi/stats/stats_890.html (last visited June 6, 2013). With a national population estimated at 311,591,919 by the ACS for 2011, this works out to a national passport possession rate of 35.2%. Thus, it appears that the survey estimates are in the same ballpark as the actual identification possession statistics.

96. For a summary of state voter identification requirements, see *Voter Identification Requirements*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> (last updated June 27, 2013).

Table 1. Estimate of Registered Voters who Possess Different Forms of Identification, Other than Driver's Licenses and Passports

	Have with a picture	Have without a picture	Have either
Voter registration card	13%	49%	63%
Identification card issued by other state agency	16%	4%	20%
Public assistance identification card	10%	4%	14%
Identification card issued by other federal agency	8%	5%	13%
Out-of-state government-issued identification card	11%	1%	12%
In-state public college-issued identification card	10%	2%	12%
Firearm license	6%	3%	9%
Military identification card	8%	1%	9%
Identification card issued by other local agency	6%	2%	8%
In-state private college-issued identification card	6%	1%	7%
Out-of-state private college-issued identification card	4%	1%	5%
Out-of-state public college-issued identification card	3%	1%	4%
Native American tribe-issued identification card	1%	1%	2%

The types of cards listed in Table 1 are typically included as a failsafe feature of identification laws to account for the unusual circumstances when voters do not possess a driver's license or passport. Therefore, it is of some interest to learn what forms of identification listed in Table 1 tend to be held by registered voters who lack one of those two common forms of government-issued photo identification. Table 2 reports the percentage of registered voters who lack both a driver's license and a passport who nonetheless possess one of the alternative forms of identification. (For comparison, the corresponding percentages among all voters, taken from Table 1, are also reported.)

Table 2. Forms of Identification Held by Registered Voters Who Do Not Possess Either a Driver's License or Passport

	All voters	Voters without driver's license or passport
Voter registration card	63%	58%
Identification card issued by other state agency	20%	30%
Public assistance identification card	14%	35%
Identification card issued by other federal agency	13%	10%
Out-of-state government-issued identification card	12%	25%
In-state public college-issued identification card	12%	8%
Firearm license	9%	3%
Military identification card	9%	3%
Identification card issued by other local agency	8%	9%
In-state private college-issued identification card	7%	5%
Out-of-state private college-issued identification card	5%	1%
Out-of-state public college-issued identification card	4%	1%
Native American tribe-issued card	2%	3%

Not surprisingly, non-possessors of driver's licenses and passports are less likely to possess college identification cards (of any type), military identification cards, and firearm licenses. Thus, these forms of identification are unlikely to serve as a frequent substitute for a driver's license. At the same time, some cards are more likely to be held by registered voters who lack a driver's license and passport. Most notable of these are public assistance identification cards and "other" out-of-state government-issued identification cards. Thus, it appears that these cards do serve as somewhat of a backstop for non-drivers and non-possessors of passports. However, even here, the possession rates are low—35% for public assistance cards and 25% for out-of-state government-issued identification cards.

A. Possessing Valid Identification Cards

One of the ways that photo voter identification laws vary across the states is whether the prescribed forms of identification must be currently

valid. There are three ways in which an identification card in the possession of a registered voter might not function as proper identification for the purposes of voting: it could be expired, it could list an address that is not where the voter is registered, or it could show a name that is not the one under which the voter is registered.

To gain insight into how often identification cards in the possession of voters might run afoul of one of these problems, the SPAE asked respondents who possessed driver's licenses and passports whether they were expired and whether they showed the name under which the voter was registered.⁹⁷ In addition, holders of driver's licenses were also asked whether their license listed their current address.⁹⁸

Among driver's license holders, 1.6% reported having an expired license, 1.3% reported a license with a different name than the one registered under, and 9.7% reported a license with a different address.⁹⁹ When we account for licenses with at least one of these infirmities, the rate of driver's license possession falls from 91% to 80%.¹⁰⁰ Similarly, among passport holders, 12.5% reported an expired passport and 3.2% did not have their legal name on the passport.¹⁰¹ Thus, the rate of valid passport possession (at least under some state laws) falls from 41% to 35% when we consider expiration dates and the matching of names.¹⁰²

As these results indicate, the precise form of a strict photo voter identification law matters. Laws that require the identification card to show the voter's current address run the risk of doubling the number of voters who run afoul of the identification law. And, these voters do not mirror a random sample of the voting population. Among the voters studied in the SPAE, 26% of license holders who had lived at their current address for less than four years had a license without their current address; among everyone else, that rate was 2.7%.¹⁰³ Among African Americans the rate was 16%, compared to 9% for whites.

B. Racial Disparities in the Possession of Identification

Undoubtedly the most critical issue in recent litigation over photo voter identification laws, especially in the states covered by section 5 of the

97. See 2012 SPAE, *supra* note 72, at 155.

98. See *id.* at 156.

99. *Id.* at 52.

100. See *id.* at 51-52.

101. See *id.* at 52.

102. See *id.* at 51-52.

103. *Id.* at 52.

Voting Rights Act,¹⁰⁴ has been that of racial disparities in the possession of the requisite identification. Database-matching studies in particular cases have demonstrated racial disparities in Texas, South Carolina, Georgia, and Wisconsin.¹⁰⁵

The question remains whether such racial disparities occur more generally across the country, and especially whether they extend beyond the section 5-covered states or states not subject to recent litigation. To answer this question, this section examines the rate of identification possession by various demographic categories, especially race.

We begin with the possession of driver's licenses and passports because we can distinguish the possession of *any* form of these documents from the possession of a license or passport that may have an infirmity, such as being expired. Table 3 reports the basic results.

Table 3. Racial Disparities in the Possession of Driver's Licenses and Passports

	Possess driver's license		Possess passport	
	Any license	Valid license	Any passport	Valid passport
White	93%	84%	41%	35%
Black	79%	63%	28%	25%
Hispanic	90%	73%	49%	42%
Racial differences ¹⁰⁶				
White – Black	14	19	12	11
White – Hispanic	4	11	-8	-7

The upper part of Table 3 reports the estimated fractions of registered voters who possess a driver's license or passport, whether currently valid or not ("Any license" or "Any passport") or currently valid as discussed above ("Valid license" or "Valid passport"). For instance, 93% of white registered voters report having a driver's license, which falls to 84% when we screen for name, address, and expiration date. For blacks, the corresponding percentages are 79% and 63%; for Hispanics, they are 90% and 73%. The lower part of Table 3 reports the difference between white possession rates

104. Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (2012); *see also infra* note 108.

105. *See supra* Part I.

106. Racial differences do not appear to exactly correspond to values reported in the upper part of Table 3 only due to rounding.

on the one hand, and black or Hispanic rates on the other. So, for instance, the percentage point difference in possession of any driver's license between whites and blacks is fourteen points (93% – 79%).

The bottom part of Table 3 reveals that, regardless of how driver's license and passport possession is defined, whites are more likely to possess them than blacks. The white-Hispanic difference shows a different pattern. Whites are more likely to possess a driver's license (valid or invalid). Though the table reports that Hispanics are more likely to possess passports than whites, a chi-squared statistical test shows this difference is not statistically significant at the traditional levels accepted in the social sciences.¹⁰⁷ Thus, it is safer to conclude that whites and Hispanics possess passports (of whichever type) at the same rates nationwide.

Because cases attacking photo voter identification laws are more likely to be subject to federal proceedings—either in the Department of Justice or in federal court—in states covered under section 5 of the Voting Rights Act, it is natural to ask whether racial disparities in the possession of driver's licenses are greater in the covered jurisdictions than in the non-covered jurisdictions.

Here, we find a surprising answer: the racial disparities are roughly equal, on the whole, in the non-covered states and in the covered states.¹⁰⁸

107. This level would be the $p < .05$ standard, or the “95% confidence” criterion.

108. Here, a covered state is defined as one entirely covered by section 5, at least before particular jurisdictions began “bailing out”: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. *Section 5 Covered Jurisdictions*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Aug. 25, 2013). The states that are partially covered—California, Florida, Michigan, New York, North Carolina, and South Dakota—are treated as non-covered for the sake of this analysis. *Id.* This particular decision does not affect the substance of this paper's analysis.

This article was originally written before the decision in *Shelby County, Alabama v. Holder*, striking down the pre-clearance formula in section 4(b), was handed down by the Supreme Court. 133 S. Ct. 2612, 2631 (2013). A major issue that surrounded the case—which had emerged during the renewal of the Voting Rights Act in 2006—was whether the coverage formula was outdated. *See id.* A related question was whether covered states continued to perform more poorly in the participation of minority voters compared to non-covered states—a point driven home by Chief Justice Roberts in oral argument when he claimed that Massachusetts was the state with the worst ratio of white turnout to African American turnout. *See* Transcript of Oral Argument at 32, *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96), 2013 WL 705522. The finding about the equal disparity in driver's license possession across covered and non-covered states is the type of pattern that skeptics of the struck-down coverage formula might point to. On the question of what a new coverage formula might look like, see, for example, Michael P. McDonald, *Who's Covered: Coverage Formula and Bailout*, in *THE FUTURE OF THE VOTING RIGHTS ACT 255* (David L. Epstein, et al. eds., 2006); Nathaniel Persily, *Options and Strategies for Renewal*

Considering the white-black difference in driver's license possession, for instance, the racial differences in the possession of any driver's license are fourteen percentage points in covered jurisdictions (96% – 82%) and sixteen percentage points in non-covered jurisdictions (93% – 77%). The white-Hispanic differences are four percentage points in covered jurisdictions (93% – 89%) and three percentage points in non-covered jurisdictions (96% – 93%).

IV. Who Shows Identification?

Alongside the issue of who possesses the requisite form of identification under various state laws is the issue of who is actually required to show identification in order to vote. It is well recognized that poll workers who check-in voters—especially those working in precincts on Election Day—have a great deal of discretion in implementing election law. They are the classic example of “street level bureaucrats” whose on-the-spot decisions determine how or even whether laws are actually enforced.¹⁰⁹ Academic studies devoted specifically to the issue of identification at the precinct level have documented the existence of such discretion and, in particular, disparities in whom election workers demand show identification in order to vote.¹¹⁰

As valuable as these studies are, they are limited by their geographic coverage to New Mexico and Boston, respectively. Answers to the SPAE can help to quantify the degree to which these particular findings generalize to the rest of the country.

Before exploring the issue of who actually shows identification in order to vote, it is necessary to take into account the fact that state laws governing voter identification vary considerably. Whether poll workers are acting outside of the prescriptions of the law requires us first to designate what the law is. In order to perform any sort of general analysis of this topic at the national level, we need a scheme that helps us to group states according to the legal regimes governing their prescribed use of voter identification. For the analysis here, we will rely on the classification scheme published by the National Conference of State Legislatures (NCSL).¹¹¹ This scheme divides the states into four groups:

of Section 5 of the Voting Rights Act, 49 HOWARD L.J. 717 (2006); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174 (2007).

109. *See supra* note 55 and accompanying text.

110. *See supra* Part I.

111. *See Voter Identification Requirements, supra* note 96.

Strict Photo. Requires a voter to show a photo identification card in order to vote. A voter without proper identification may cast a provisional ballot, which is only counted if the voter later produces the requisite identification within a given number of days following the election.¹¹²

Photo. Also requires the voter to show photo identification. However, a voter without proper identification has more options available that would allow her to vote using a regular ballot on Election Day.¹¹³

Non-Photo. Requires the voter to show identification in order to vote, though the form of identification need not contain a photograph. In three of these states, voters without any form of identification are required to vote a provisional ballot, which is counted only if the voter later produces some form of identification within a set period of time.¹¹⁴ In sixteen other states, such a voter has more options for the casting of a regular ballot, rather than a provisional ballot.¹¹⁵

No Voter ID Law. Other than the “HAVA minimum,”¹¹⁶ the remaining twenty states and the District of Columbia generally do not require any form of identification in order to vote, except perhaps if the voter is challenged.¹¹⁷

This classification scheme is necessarily crude and glosses over differences within categories. However, as we shall see, the dynamics regarding the display of identification in order to vote are different as we move from one category to the other.

We first turn our attention to how voters identified themselves when they went to the polls in 2012. Table 4 summarizes the different ways that voters identified themselves. In the four strict photo identification states, 89.7% identified themselves with a driver’s license or state identification card,

112. *Id.* For 2012 these states were Georgia, Indiana, Kansas, and Tennessee. *Id.*

113. *Id.* For 2012 these were Florida, Hawaii, Idaho, Louisiana, Michigan, New Hampshire, and South Dakota. *Id.* This paper also references these states as “non-strict photo identification.”

114. *Id.* In 2012 these were Arizona, Ohio, and Virginia. *Id.*

115. *Id.* In 2012 these were Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Kentucky, Missouri, Montana, North Dakota, Oklahoma, Rhode Island, South Carolina, Texas, Utah, and Washington. *Id.*

116. Under section 303(b) of the Help America Vote Act of 2002 (HAVA), a voter who (1) registered to vote in a jurisdiction by mail, (2) is a first-time voter in the state, and (3) votes in a county that does not have a voter registration list that complies with HAVA must show identification the first time he or she votes. Help America Vote Act of 2002, 42 U.S.C. § 15483(b) (2012). In practice, this often equates to a requirement that first-time voters show identification.

117. See *Voter Identification Requirements*, *supra* note 96.

8.2% with a voter registration card,¹¹⁸ and the remaining 0.9% with a scattering of other forms of identification. A tiny 0.4% stated they showed no identification at all.

Table 4. Identification Shown to Vote, by Voter Identification Regime, 2012

	Photo Identification Regime			
	Strict Photo	Photo	Non-Photo	No Voter ID Law
Name and address, but no identification	0.4%	1.2%	3.1%	56.4%
Letter or bill, but no identification	0.0%	0.6%	1.0%	1.9%
Voter registration card	8.2%	10.3%	30.8%	11.5%
Driver's license or state identification card	89.7%	84.3%	63.6%	26.4%
Passport	0.3%	0.2%	0.2%	0.9%
Military identification	0.5%	1.7%	1.0%	0.8%
Other	0.1%	0.0%	0.1%	0.4%
Do not remember	0.8%	1.7%	0.3%	1.7%
Total	100.0%	100.0%	100.0%	100.0%

At the next level of identification stringency, non-strict photo identification, 84.3% stated they showed a driver's license or state identification card, 10.3% showed a voter registration card,¹¹⁹ and nearly 2% showed a military identification card; 1.2% of these voters stated that they simply announced their name at the check-in table.

Among voters who lived in states with non-photo identification requirements, 63.6% showed a driver's license or state identification card,

118. It should be noted that among those who stated they showed a voter registration card, 58% stated elsewhere in the survey that they had a voter registration card but did not have a photo on it, 27% said they had a registration card with a photo, and 15% said they did not have a voter registration card.

119. Of these, 66% stated they had a voter registration card without a photo on it, 32% said they had a registration card with a photo, and 2% said they did not have a voter registration card.

30.8% a voter registration card,¹²⁰ and 3.1% simply identified themselves orally.

Finally, in states with no photo identification requirements, most voters, 56.4%, indicated they simply stated their name and address in order to vote. However, it is also the case that over a quarter of voters from these states, 26.4%, stated they showed a driver's license or state identification card in order to vote.

It is the quarter of voters in non-identification states who showed a driver's license in order to vote that draws our greatest attention in Table 4. It could be that poll workers failed to follow a state's photo identification laws by demanding a driver's license or other form of photo identification, but there are more innocent explanations as well. First, those showing photo identification in these states could be predominantly first-time voters who had registered by mail and thus were required to identify themselves when they voted under HAVA.¹²¹ Second, voters in these states could be showing driver's licenses because it is convenient to them—for instance, because it would clarify the spelling of the voter's name or make it easier for the poll worker to look up the voter's address.

The HAVA explanation does not seem to account for this phenomenon. Breaking down the responses reported in Table 4 according to whether the respondent was a first-time voter reveals that 32% of first-time voters stated they showed a driver's license, whereas 26% of non-first-time voters showed a license. Not only is this difference relatively small—only six percentage points—the difference fails to reach statistical significance at the 95% confidence level.¹²² Furthermore, 43% of first-time voters in non-identification states indicated they simply stated their name and address to vote, despite the fact that HAVA would have required most of these first-time voters to at least show letters with their names and addresses.¹²³ Thus, it does not appear that HAVA helps explain why a significant minority of voters in non-identification states showed a driver's license in order to vote in 2012.

120. Of these, 75% stated they had a voter registration card without a photo on it, 18% said they had a registration card with a photo, and 6% said they did not have a voter registration card.

121. *See supra* note 116.

122. A *t*-test of the difference in the rate of driver's license showing between new and old voters yields a test statistic of 1.56, $p = .12$.

123. *See* 42 U.S.C. § 15483(b) (2012). The exception to this identification requirement would be voters who had registered in-person. *See id.*

This leaves the convenience argument. Voters in all states who reported they showed a driver's license, military identification, or passport were posed a follow-up question, which asked whether they had done so because it was convenient or because they were specifically requested to show photo identification.¹²⁴ The answers given by residents of non-identification states split approximately 50/50: 54% of these voters stated they showed photo identification because it was convenient, while the remaining 46% stated they were specifically asked to show photo identification in order to vote. When we apply this finding to the results reported in Table 4, this means that 12% of voters in non-identification states were still required to show photo identification in order to vote.

As an aside, it is interesting to contrast the responses to the "convenience" question in the non-identification states to those given by respondents from the strict photo identification states. In the latter four states, 30% stated they showed photo identification because it was convenient, not because they were asked specifically to produce the identification. There were no follow-up questions in the survey instrument to help understand why voters in these states experienced the photo identification requirement as a matter of convenience, rather than as a matter of state law. The important point is that many voters in these states do not experience the strict photo identification requirement as a *requirement* when they go to vote.¹²⁵

Returning to respondents from states without photo identification requirements—either because the states have no identification requirements at all or because they allow non-photo identification to serve for the purposes of identification—important questions arise about whom is being requested to show photo identification and in particular, whether this varies by race.

This question is answered in Table 5, which reports the percentage of voters who were required to show photo identification in order to vote, broken down by race and photo identification regime. The most important pattern in the table is that, for the most part, there are no reported racial

124. See 2012 SPAE, *supra* note 72, at 144.

125. These findings are consistent with those reviewed above in New Mexico, where a significant number of poll workers reported a justification other than state law when asked why they requested voters to show identification at the polls. See Atkeson et al., *supra* note 6, at 68-70. In addition, Professor Barreto's expert report in *Applewhite* revealed that a significant number of Pennsylvania voters were unaware of the state's new photo identification law, despite the intense controversy surrounding it. See Barreto et al., *supra* note 30, at 22.

differences in being required to show identification. The one exception is in the non-identification states, where African American and Hispanic voters were much more likely to be required to show identification than were white voters—1.6 times more likely, in the case of black voters, and more than 2.5 times more likely in the case of Hispanics.

Table 5. Relationship Between Race and Probability of Being Required to Show Photo Identification in Order to Vote

	Photo Identification Regime			
	Strict Photo	Photo	Non-Photo	No Voter ID Law
White	62.4%	57.65	31.5%	10.8%
Black	64.0%	55.7%	33.5%	17.3%
Hispanic	62.8%	67.8%	21.5%	27.9%

This final finding raises troubling questions in the practical realities of photo voter identification laws, especially for those who oppose them. Painting with a broad brush, it appears that stricter forms of photo identification are being implemented without regard to race in the states that have them—although there are likely pockets of non-compliance. In states without a photo identification requirement, it appears that some poll workers take the lack of a requirement to be a license to substitute their own judgments about what constitutes proper practice. The empirical findings here suggest that voting rights groups and others interested in the fair and impartial treatment of voters would do well to increase monitoring of polling places in non-identification states for compliance with state identification laws.

V. Are Identification Laws a Deterrent to Voting?

A frequently expressed concern about strict photo voter identification laws is that such laws will deter voters from going to the polls in the first place. To address this concern, we turn to questions at the beginning of the SPAE which probe this issue. The initial screening question asked the respondent if she voted in the 2012 presidential election. Response choices to this question were:

1. I did not vote in the election this November
2. I thought about voting this time, but didn't
3. I usually vote, but didn't this time
4. I tried to vote, but was not allowed to when I tried
5. I tried to vote, but it ended up being too much trouble
6. I definitely voted in the November General Election.¹²⁶

As indicated in Table 6, which reports answers to this question as a function of whether the respondent later reported having a driver's license (even an invalid one), there is a strong relationship between possessing a driver's license and voting. Among respondents, 92.4% with a driver's license voted, compared to a 76.7% turnout rate among those without one. Going down the list of responses, respondents who lacked driver's licenses were more likely to give each of the "no-vote" responses than those who possessed driver's licenses.

Table 6. Relationship Between Driver's License Possession and Voting in the 2012 Election

	Driver's License	No License
Did not vote	3.5%	11.8%
Thought about voting, but didn't	1.4%	3.7%
Usually vote, but didn't this time	1.9%	5.4%
Tried to vote, but not allowed to	0.4%	0.7%
Tried to vote, but it was too much trouble	0.4%	1.8%
Definitely voted	92.4%	76.7%
N	9,277	916

This relationship does not establish causation between the lack of a driver's license (or other identification) and the failure to vote. It is likely that adults who lack driver's licenses are also generally less engaged in activities that would draw them into an interest in politics. This is confirmed when we examine the relationship between driver's license possession and answers to a question on the SPAE that probed respondents' levels of interest in news and public affairs. Among those who answered that they followed news and public affairs "nearly all the time," 95% had a

126. See 2012 SPAE, *supra* note 72, at 137.

license and 97% voted; among those who answered “hardly at all,” 80% had a license and 67% voted. Thus, the relationship shown in Table 6 may be driven, in part, by a spurious correlation.

After the initial screening question, non-voting respondents were asked to review a list of factors that may have contributed to their not voting.¹²⁷ One of these factors was “I did not have the right kind of identification.”¹²⁸ Among the non-voting respondents, 15.1% listed this as either a minor (6.5%) or major (8.6%) factor.¹²⁹ Among those lacking a driver’s license, not having the right kind of identification was named as a factor among 14% of non-voters. Among respondents in strict photo identification states who reported they did not have a driver’s license, 44% said that not having the right kind of identification was a factor in not voting. However, this last finding is based on the answers of just ten respondents, and so should be approached with extreme caution.

Table 7. Influence of Photo Identification Regime on Non-voting, 2012

	Not a factor	Minor factor	Major factor	N
Strict photo	79.6%	4.9%	15.5%	79
Photo	72.8%	19.1%	8.1%	129
Non-Photo	88.5%	4.3%	7.2%	268
No Voter ID Law	87.9%	3.9%	8.2%	343
Total	84.9%	6.5%	8.6%	819

Thus, there is some support within the SPAE for the notion that photo voter identification laws may have a depressive effect on turnout. However, findings in this area must be treated with great caution because of the small number of observations on which these findings rest. Also, as noted by Professor Barreto,¹³⁰ and confirmed here, even if voter identification laws do have an effect on turnout rates, it is a minor effect, possibly overcome by the larger set of dynamics associated with political campaigns.

VI. Conclusion

The Help America Vote Act had visible effects in upgrading America’s decrepit voting machines and modernizing its antiquated voter registration

127. *See id.* at 138.

128. *Id.*

129. *See id.* at 45.

130. *See* Barreto et al., *supra* note 6.

systems. But HAVA also had less visible effects. One of these was to bring to the fore the issue of voter fraud and its most popular “remedy”: voter identification.¹³¹ The renewed energy around voter identification has led to increasing levels of partisan tensions around the issue and increased litigation. With this increased policy attention and litigation has come an interest in the empirical questions surrounding voter identification. Who lacks the requisite identification, who is required to show identification, and who is deterred from voting by identification laws are important questions to policymakers and those who pursue the issue in court.

Answering these questions is a more difficult task than it initially would seem. In most cases, administrative hurdles preclude answering directly questions about who possesses identification. The relatively small number of voters who might be deterred from voting because of identification laws makes it important that tests of the effects of identification laws be conducted with great statistical power. The fact that each state’s identification law is subtly different from the next makes reasoning about the effects of these laws fraught with other challenges.

In light of these challenges, it is clear that a multi-method approach to understanding the effects of voter identification laws is called for. Among the weapons in the research arsenal is public opinion surveying. Public opinion research, such as the SPAE, has the benefit of reaching a wide variety of voters in a diversity of situations. The greatest advantage here is that we can get a view of the voting public as a whole, not just pockets where controversy over the issue is particularly intense.

The findings reported here have confirmed many of the worries expressed by opponents of strict voter identification laws. Most importantly, viewed nationally, the burdens of strict identification laws clearly fall heaviest on minority voters. However we choose to measure possession of identification, blacks and Hispanics are generally more likely to lack identification than whites. Furthermore, while the findings must be treated cautiously due to the small number of respondents, we have seen evidence that strict photo identification laws had an effect in reducing turnout in the 2012 election.

Beyond these worries, though, the findings from the SPAE complicate the picture a bit. In particular, the survey evidence suggests that a significant minority of voters in states with the least strict identification

131. See Charles Stewart III, *What Hath HAVA Wrought? Consequences, Intended and Not, of the Post-Bush v. Gore Reforms*, in *ELECTION ADMINISTRATION IN THE UNITED STATES: THE STATE OF REFORM AFTER BUSH V. GORE* (R. Michael Alvarez & Bernard Grofman eds., forthcoming Dec. 2013).

laws—the category of states that still contains nearly half of American voters—is asked for identification more frequently than anticipated under those states’ laws. Voters from racial minority groups, particularly Hispanics, are asked for identification in these states at a higher level than whites.

For opponents of voter identification laws, the most active being voting rights and civil rights groups, this finding concerning the non-identification states presents a challenge in thinking through the equal protection issues related to identification laws. Is it better to have a strict law that is strictly enforced, or a lenient law that is leniently enforced? The answer to this question is, at least in part, an empirical one. Survey evidence regarding photo identification laws in non-identification states is only the beginning of a research path that probes the degree to which poll workers in individual precincts are implementing these laws in a discriminatory fashion. However, the evidence presented here strongly suggests that this is a topic that deserves stricter empirical scrutiny than it has been given to date.