QUESTIONING QUESTIONS IN THE LAW OF DEMOCRACY: WHAT THE DEBATE OVER VOTER ID LAWS' EFFECTS TEACHES ABOUT ASKING THE RIGHT QUESTIONS

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The study of the law of democracy rests on a close relationship between lawyers and social scientists. As Pam Karlan has explained, this close relationship involves answering questions and questioning answers. In the ideal, the partnership between empiricists and legal scholars ensures that the best answers are given and the right questions are asked.

This Article explores this partnership in the context of the controversy over laws that require voters to present identification when voting ("voter ID laws"). There is a raging political, legal, and academic debate over the effect of voter ID laws on voter turnout. Many social scientists have concluded that voter ID laws have had negligible effects on voter turnout. That conclusion may seem surprising—even difficult to believe—given how many eligible voters lack IDs. And that surprising conclusion has raised uncomfortable questions about whether the progressive legal alarm over voter ID laws—including litigation challenging those laws—was warranted.

But the social scientists' conclusion should not have been surprising. First, this Article resolves the debate on voter ID laws by harmonizing null findings in the causal literature with descriptive evidence unearthed in the course of litigation. Evidence from litigation suggests that more than 99% of registered voters who habitually vote

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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 (i.e. voting conditional on registration) by no more than 2%. 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.

Second, this Article addresses the implications of the dispute over the empirical effects of voter ID laws for the field of the law of democracy. In addition to answering questions and questioning answers, election law scholarship should question questions. I pose three questions about questions related to voter ID laws in this Article: (1) what is the expected size of the empirical effects of a given voting restriction? (2) is the estimated effect big or small? and (3) is the law in question a voter suppression law? Questioning questions contributes to better research by allowing social scientists to form reasonable hypotheses. It also ensures that attention—in research, policy, and litigation—is paid to all of the effects that these laws have on communities.

Third, this Article uses the questioned questions to help clarify how the causal election law literature relates to the burden inquiry in the *Anderson/Burdick* standard governing federal constitutional protections for the right to vote. *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 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.

INTRODUCTION

The field of the law of democracy[2] depends on interdisciplinary conversation between social scientists, lawyers, and legal scholars. And as many in the field have long observed,[3] this conversation is no mere small talk: not only are questions answered, but answers are also

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[2] Samuel Issacharoff et al., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (5th ed. 2016). I refer to the Law of Democracy and Election Law, *see* Lowenstein et al., ELECTION LAW: CASES & MATERIALS (6th ed. 2017) interchangeably in this Article for the sake of variety, and also to recognize that the field welcomes a diversity of approaches.

[3] Richard 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 as "perhaps nowhere more mutually dependent than in the voting-rights field"); Bruce 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 Gerken, *Keynote Address: What Election Law Has to Say to Constitutional Law*, 44 IND. L. REV. 7, 9, n. 14 (2010).

questioned.[4] In the ideal, 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,[5] in which states have passed novel restrictions on voting while 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 received notions of how the field 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 conference rooms (for depositions), in war-rooms (for meetings with attorneys), and in courtrooms (for testimony). 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.

The question posed to quantitative social scientists by the introduction of strict voter ID laws, and made more urgent by the Supreme Court's decision upholding Indiana's voter ID law in *Crawford v. Marion County*,[6] was: how much do these laws impact voting? And the surprising answer, seemingly reinforced over time and by new waves of research, is: maybe not much at all. The lack of an estimated effect throws 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. And it has 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) the academic literature and (2)

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[4] Pamela Karlan, *Answering Questions, Questioning Answers, and the Roles of Empiricism in the Law of Democracy*, 65 STAN. L. REV. 1269 (2013).

[5] This evocative—and descriptive—term is courtesy of Rick Hasen, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN (2013).

[6] 553 U.S. 181 (2008).

expert discovery in the course of litigation. Academic studies attempting to estimate the effects of voter ID laws on voter turnout are unable, given statistical constraints, to detect effect sizes smaller than 2%. While they 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 two percentage points, which small though it might sound, 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% of *registered voters who frequently vote* lack 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 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%.[7]

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. 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.

Questionable questions are not limited to those about the size of anticipated effects. The debate over voter ID laws suggests two additional questions that election law scholarship should interrogate: Is the effect of voter ID restrictions on turnout—an effect of under 2%—small? And given the size of that effect, do these laws constitute voter suppression?

Social scientists' dismissal of a 2% 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

[7] Sam Issacharoff, *Ballot Bedlam*, 64 DUKE L. J. 1363, 1380 (2015).

suppressive, they depend on a particular—and ultimately cramped—view of *vote* suppression, not *voter* suppression. Normative evaluations of election laws' effects must consider not only whether the law caused registered voters not to cast ballot but also whether the law made it less likely that citizens eligible to vote will become actual voters.

These same questions are 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-related estimates broadens an already rich discussion about the proper role for turnout evidence in the context of Section 2 vote denial claims. At a practical level, it also counsels facilitating the discovery of evidence that complements turnout-related estimates.

The rest of this Article proceeds as follows. Part I explains and resolves 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%. 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% of registered and habitual voters.

Part II questions two additional questions. First, it asks whether a true suppressive effect of 2% should be considered small. Second, it asks whether the causal estimates of voter suppression capture the full

set of expected harms to voters from restrictions like voter ID requirements.

Part III contains the immediate rewards to all this questioning. I consider how the estimated causal effects relates 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 identification 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 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 as part of 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 nationwide voter ID requirements.[10] These initial demands were resolved through

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[8] *See, e.g.*, Andrew Gelman, *A new controversy erupts over whether voter identification laws suppress minority turnout*, Monkey Cage, Washington Post (June 11, 2018), available at https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/11/a-new-controversy-erupts-over-whether-voter-identification-laws-suppress-minority-turnout/

[9] The National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process* (Aug. 2001). As the commission was co-chaired by Presidents Ford and Carter, it is also referred to as the Ford-Carter Commission.

[10] Amicus Br. United States Senator Mitch McConnell, Robert Bennett, Christopher S. "Kit" Bond and United States Representatives Roy Blunt, Lamar Smith and Vernon Ehlers in Support of Respondents, Crawford v. Marion County, 7th Cir., available at https://www.brennancenter.org/sites/default/files/legacy/Democracy/CrawfordvMarionCountyElectionBoard%20-%2012-10-07%20Amicus%20Brief%20of%20Senators%20McConnell%20et%20al.pdf at 14-15 (describing Senator Bond as the "primary author of the voter identification provision"), 15

compromises in the Help America Vote Act, which requires 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 every time voters cast a vote. That these requirements were adopted by Republican legislatures and opposed by Democrats added the familiar partisan flavor characteristic of the modern Voting Wars.[12]

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,[13] and the legal challenge to that law resulted in the Supreme Court's decision in *Crawford v. Marion County*.[14] The Court, in a decision that has since by described by its author as "fairly unfortunate,"[15] considered whether the law infringed on the constitutional right to vote under the familiar standard from *Anderson/Burdick*.[16] The *Anderson/Burdick* balancing test asks whether the burdens imposed by the challenged election practice on voters are justified by legitimate state concerns in election administration.[17] 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

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(citing 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 *supra* note 5. For a nuanced treatment of the partisan valence of voter ID laws, *see* William Hicks, Seth McKee, Mitchell Sellers, & Daniel Smith, *A Principle or a Strategy? Voter Identification Laws and Partisan Competition in the American States*, 68 POL. RESEARCH Q. 18 (2015).

[13] 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. Highton, *infra* note 42 at 157-58. The Georgia law was also challenged unsuccessfully in court. *See* Common Cause/Georgia v. Billups, 554 F.3d 1340 (11th Cir. 2009).

[14] *Supra* note 6.

[15] Robert Barnes, *Stevens says Supreme Court decision on voter ID was correct, but maybe not right*, The Washington Post (May 15, 2016), available at 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 (the quote is from Justice Stevens, who authored the opinion); *see also* John Schwartz, Judge in Landmark Case Disavows Support for Voter ID, The New York Times (Oct. 15 2013), available at https://www.nytimes.com/2013/10/16/us/politics/judge-in-landmark-case-disavows-support-for-voter-id.html (Judge Posner, who heard *Crawford* when it was before the 7th Circuit, 472 F.3d 949 (7th Cir. 2007), disavowing his vote upholding the law).

[16] The Anderson/Burdick comes from the twin cases of Anderson v. Celebrezze, 460 U.S. 780 (1983) and Burdick v. Takushi, 504 U.S. 428 (1992).

[17] Crawford, *supra* note 6 at 190 (quotations omitted).

law.[18] Plaintiffs' burden of persuasion was high because they brought a facial, not an as-applied, challenge,[19] and the record they amassed was thin.[20] 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*.[21] 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 any proposed changes to election laws to the Department of Justice for approval before they could be implemented.[22]

Emboldened by *Crawford*[23] and enabled by *Shelby County*, states passed even more draconian voter ID laws.[24] For instance, Texas and North Carolina, two of the most prominent adopters of voter ID 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.[25] As other states passed restrictions as well, these challenges were brought across the country in both federal[26] and state courts.[27]

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[18] *Id.* at 202 (quotations omitted).

[19] *Id.* at 200.

[20] *See, e.g.* Crawford, *supra* note 6 at 200 (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").

[21] 570 U.S. 529 (2013).

[22] *Id.*

[23] For more context of how Crawford (and subsequent cases and actions) fits into the Court's broader election law jurisprudence, *see* Rick 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).

[24] *See* Highton, *infra* note 42 at 158 (Figure 1, borrowed from the NCSL, shows a significant increase in strict ID laws between 2012 and 2014).

[25] 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), and N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322 (N.D. N.C. 2014).

[26] *See, e.g.,* A.C.L.U. of New Mexico v. Santillanes, 546 F.3d 1313 (10th Cir. 2008); Lee v. Virginia State Board 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).

[27] *See, e.g.*, Applewhite v. Commonwealth, 617 Pa. 563 (2012); Martin v. Kohls, 2014 Ark. 427 (2014); City of Memphis v. Hargett, 414 S.W.3d 88 (Tenn. 2013).

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. 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 answers to this question. And in the course of challenging these laws, voting rights lawyers and the experts they retained also sought to answer to this question. This Section compares the answers to this question offered by social scientists to those presented by voting rights lawyers and their expert witnesses in the course of litigation. It first canvasses the academic literature seeking to estimate 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%. 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 fact-finding. That evidence, garnered from one of the few contexts in which plaintiffs could analyze restricted data, suggests that among registered voters who frequently vote, fewer than 1% lack the necessary ID to vote. Considering academic and litigation evidence in concert makes clear that these laws do disenfranchise, but not as much as many had feared.

A. UNDERSTANDING THE LITERATURE

The following table lists the major causal studies attempting to estimate the causal effect of voter ID laws on overall turnout[28] and their derived estimates (** denote that the estimate is statistically significant):

[28] I do not analyze, in this Article, the evidence on the racially disparate impact of voter ID laws because there is virtually no controversy over it.

Study	**Estimate of Voter ID Laws' Effect**
Eagleton Institute (2006)[29]; Vercellotti & Anderson (2006)[30]	-4% (largest estimate) **
Vercellotti & Anderson (2009)[31]	(probit estimate not easily translated)
Mycoff et al. (2009)[32]	-.29%
Alvarez et al. (2011)[33]	~-2%** (max estimate)
Dropp (2013)[34]	-4%** (an approximated average of various estimates)
Cantoi & Pons (2019)[35]	-0.7%

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: 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 finding a statistically significant effect, for instance Dropp (2013), were never published, casting doubt on the validity of their findings. But more common are methodological criticisms. Two

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[29] Eagleton Institute, *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* (June 28, 2006) at 28 (Table 3).

[30] Timothy Vercellotti & David Anderson, *Protecting the franchise, or restricting it? The effects of voter identification requirements on turnout*, Paper presented at the American Political Science Association (2006). This paper is a more fleshed out version of the Eagleton Institute report, *id.*

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

[32] Jason Mycoff, Michael Wagner, & David Wilson, The Empirical Effects of Voter-ID laws: Present or Absent?, 42 PS: Pol. Sci. & Politics 121, 125 (2009).

[33] Michael Alvarez, Delia Bailey, & Jonathan Katz, *An Empirical Bayes Approach to Estimating Ordinal Treatment Effects*, 19 POL. ANALYSIS 20, 28 (2011).

[34] Kyle Dropp, *Voter Identification Laws and Voter Turnout*, Working Paper (May 28, 2013).

[35] Eric Cantoni & Vincent Pons, *Strict ID Laws Don't Stop Voters: Evidence from a U.S. Nationwide Panel, 2008-2016*, NBER Working Paper (Feb. 2019).

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 work based on cross-sectional analysis (those written before 2013) does 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,[36] but one intuitive way of understanding it is to consider an egregiously fallacious example: that caviar consumers are significantly healthier than those who do not consume it does not prove that caviar is a health food.[37] It is much more plausible that another trait possessed by caviar-consumers (wealth, maybe?) is what is responsible for better health. Bringing this discussion back to election law, states that adopt a particular law—such as voter ID requirement—may have lower or higher voter turnout for reasons unrelated to the voter ID law.[38]

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[36] 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.

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

[38] 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. Keele & Minozzi, *supra* note 36 at 195; Donald Green & Alan Gerber, *The Underprovision of Experiments in Political Science*, 589 ANNALS AM. ACADEMY POL. & SOC. SCI. 94, 98-99 (2003) (for a discussion of 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

The second problem follows from the fact that the errors associated with estimates of turnout effects are relatively 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 need to cluster standard errors relates to the fundamental point that the changes to be estimated (i.e. 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 warranted; replacing the normal standard errors with clustered ones tends to make the range larger.

Erickson and Minnite[39] 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 the disappearance of Alvarez et al. (2011)'s statistically significant finding that voter ID laws reduce turnout. 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

Like cases, old and new studies are not similarly situated. While the early literature's failure to detect statistically significant suppressive effect might reflect methodological problems, more modern studies' failure to do the same has social scientists doubting the prevailing belief that voter ID laws suppress voting.

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be reliably measured and accounted for. Green & Gerber, *supra* note **Error! Bookmark not defined.**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 multi-causal outcome. Every factor, from the size of campaign expenditures, the competitiveness of elections, to the weather, has a role to play in voter turnout. And 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 is 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.

[39] Robert Erikson & Lorraine Minnite, *Modeling Problems in the Voter Identification—Voter Turnout Debate*, 8 ELEC. L. J. 85 (2009).

For a while, empiricists could attribute the failure to detect a suppressive effect to poor methods, inadequate data, and insufficient time.[40] Cross-state comparisons were hampered by a chronic underpowering problem. Newly available individual level data on turnout turned out to be unsuited to cross-state comparisons.[41] And studies were written soon enough after the laws were implemented that there was arguably not enough 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 over the wait 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 law.[42] By evaluating the existing findings alongside the credibility of the methodology applied, Highton determined that the effect likely does not "exceed[] four percentage points."[43]

Skepticism of the vote-suppressive effect of voter ID laws veered into all-out doubt after a recent paper that harnesses the most fine-grained data (individual-level data from voter files) and credible causal inference model (diff-in-diff[44]) found no suppressive effect on turnout.[45] The paper appeared to refute widespread claims that these

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[40] 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 Valentino & Fabian Neuner, *Why the Sky Didn't Fall: Mobilizing Anger in Reaction to Voter ID Laws*, 38 POL. PSYCH. 331 (2016). But our ability to isolate the countermobilization from the suppressive effect of voter ID laws is limited. Ultimately, it is through analyzing causal with descriptive evidence that I arrive at the most persuasive estimates of the laws' suppressive effects.

[41] CCES survey data was used to estimate racial effects of voter ID laws in Zoltan Hajnal, Nazita Lajevardi, & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POLITICS 363 (2016). Criticisms relating to the limitations of the CCES data (and other issues) were made in Justin Grimmer, Eitan Hersh, Marc Meredith, Jonathan Mummolo & Clayton Nall, *Obstacles to Estimating Voter ID Laws' Effect on Turnout*, 80 J. POLITICS 1045 (2018). The authors respond in Zoltan Hajnal, John Kuk, & Nazita Lajevardi, *We All Agree: Strict Voter ID Laws Disproportionately Burden Minorities*, 80 J. POLITICS 1052 (2018). For a discussion of the data and conceptual issues this dispute teed up, *see* Barry Burden, *Disagreement over ID Requirements and Minority Voter Turnout*, 80 J. POLITICS 1060 (2018).

[42] Benjamin Highton, *Voter Identification Laws and Turnout in the United States*, 20 ANNU. REV. POL. SCI. 149 (2017).

[43] *Id.* at 163.

[44] *See* Joshua Angrist & Jorn-Steffen Pischke, Mostly Harmless Econometrics (2009).

[45] *Supra* note 35. 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 13-14. Nevertheless, their confidence in the substantive contribution of their null

laws cause "millions of voters" to be "turned away at the polls" made by, among others, "Democrats and civil rights groups,"[46] national political leaders (collectively[47] and alone[48]), and by the media.[49] That political parties and politically motivated groups[50] were among those pushing the mass disenfranchisement narrative further fueled suspicions that such claims were 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,[51] they do not actually disenfranchise.

3. Synthesizing the causal literature

Before adopting these views, however, 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%.[52] In other words, the paper is consistent with a true effect of anywhere between plus and minus 2%. 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

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results is evident from the paper's title, "Strict ID Laws Don't Stop Voters," *id.* at 1, and its conclusion that "the fears that strict ID requirements would disenfranchise disadvantaged populations have not materialized," *Id.* at 13.

[46] Deborah Barfield Berry, *Debate heats up over voter ID laws*, ABC News (Nov. 10, 2011), available at https://abcnews.go.com/Politics/debate-heats-voter-id-laws/story?id=14929152

[47] Letter from Michael Bennet et al. to Attorney General Eric Holder (June 29, 2011), available at https://www.brown.senate.gov/imo/media/doc/SB_VoterPhotoID_Holder_062911.pdf

[48] *See, e.g.*, Statement from Senator Coons on decision on Pennsylvania's controversial voter ID law (Oct. 2, 2012), available at https://www.coons.senate.gov/news/press-releases/statement-from-senator-coons-on-decision-on-pennsylvanias-controversial-voter-id-law; Tweet of Sen. Tammy Baldwin (D-Wis) (May 17, 2017), available at https://twitter.com/tammybaldwin/status/865028784856150018

[49] Anna Fifield, Voter ID laws could sway US elections, Financial Times (Aug. 5, 2012), available at https://www.ft.com/content/c50b1f7a-df0f-11e1-97ea-00144feab49a

[50] Memo of Guy Cecil, Chairman, Priorities USA re: Voter Suppression Analysis (May 3, 2017), available at https://priorities.org/press/priorities-usa-unveils-findings-voter-suppression-study-showing-significant-decrease-voter-turnout-2016-election-states-strict-id-laws/

[51] Trip Gabriel & Manny Fernandez, Voter ID Laws Scrutinized for Impact on Midterms, NYTimes (Nov. 18, 2014), available at https://www.nytimes.com/2014/11/19/us/voter-id-laws-midterm-elections.html

[52] *Supra* note 35 at 16.

laws have no effect on turnout—is to conduct a post-hoc design analysis. 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. And 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 asks: 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 intuition behind the analysis, a short introduction to the concept of statistical power is worthwhile. Power, in research (as in other areas of life), is a source of confidence. But power has a formal definition in the statistical context. It refers to the probability that a given test will correctly reject the null hypothesis—the hypothesis that the studied intervention had no effect.[53] In other words, power confers confidence in the results obtained. Power is a function of three elements: degrees of freedom, the estimated effect size, and its variance.[54] The earlier discussion about robust standard errors is based on the limited degrees of freedom in cross-states analyses: not enough states have implemented the law we are interested in studying.[55]

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. [56] [57] The role that effect size 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

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[53] Jacob Cohen, *Statistical Power Analysis*, 1 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 98 (98).

[54] Andrew Gelman & John Carlin, *Beyond Power Calculations: Assessing Type S (Sign) and Type M (Magnitude) Errors*, 9 PERSPECTIVES PSYCH. SCI. 641 (2014).

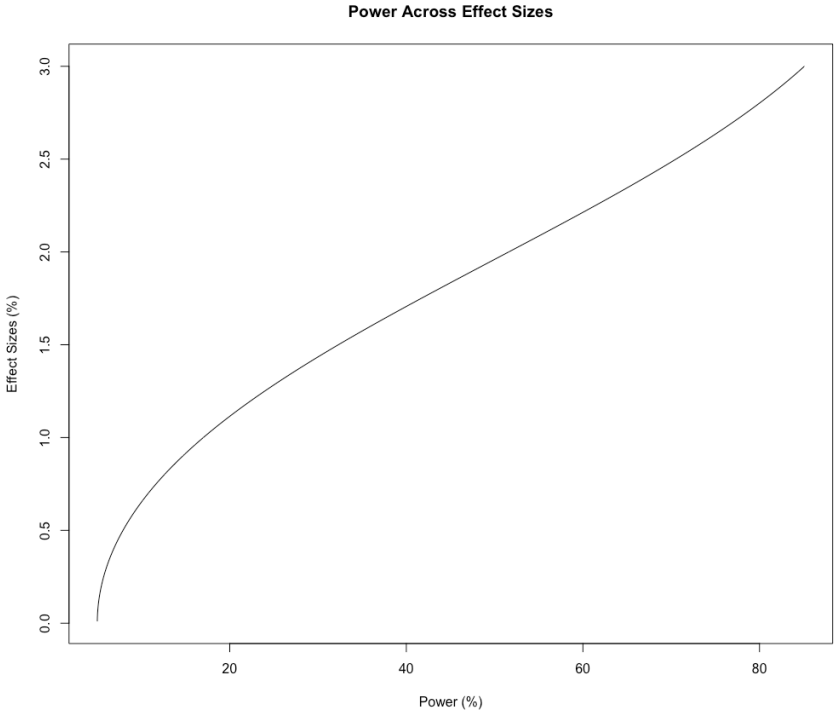
[55] An intuitive way to understand the desirability for degrees of freedom is to imagine not having any: one cannot estimate the effect of voter ID laws if no state has implemented one. And the voter ID studies are constrained in degrees of freedom by the fact that few states have implemented voter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

[56] I adopt Gelman & 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 Brauer, Jacob Day, and Brittany Hammond, *Do Employers "Walk the Talk" After All? An Illustration of Methods for Assessing Signals in Underpowered Designs*, 20 SOCIOLOGICAL METHODS & RESEARCH 1, 10 (2019).

[57] I adopt the conventional significance threshold of 0.05.

20%), the design is likely to detect that difference between the two groups (although the size of the difference might not be accurately estimated). Conversely, if the differences between the groups are small (say 2%), 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 3% 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 2%) functionally excludes any significant possibility that the true effect is larger than 3%. Based on these inputs, I plot the power of the Cantoni & Pons design against my range of possible effect sizes (up to 3%) to obtain the following graph:



As is to be expected, when the true effect size increases (as we move 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% power, the conventional threshold adopted for sufficient power: the effect size would have to be somewhere between 2.75% and 3%.

For a true effect size below that, the study lacks power. Indeed, it is only at a 2% effect size that the study would have a 50/50 chance of detecting the effect.

To be sure, Cantoni & Pons puts to rest the best estimate of these laws as late as 2017 of around -4%.[58] And some might consider a suppressive effect of up to 2% to be as good as 0 (more on that below). But for those seeking a precise estimate, or at least as close to one as possible, Cantoni & Pons does not provide a conclusive answer. It 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.

1. Differences from Causal Literature

Before delving into the findings from the voter ID litigation, consider first how those findings are different from the academic literature we just surveyed. 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.[59] The second axis, along which evidence varies from descriptive to causal, is borrowed from the social scientific tradition.[60] Clarification of the precise type of social science evidence at issue helps with evaluating the contribution that the evidence makes.

The results previously canvassed are *general*. By general, I mean that the results concern the class of policies being challenged—they 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 (e.g.

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[58] *See supra* note 42.

[59] Acknowledging 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 both to take advantage of legal familiarity with the terminology and intuitions about the relevancy of social science evidence.

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

voter ID laws, same day voter registration). A core focus of the current literature is on estimating the effects of voter ID laws generally across the states in which they are in force. Discovery in the course of litigation, by contrast, tends to be *specific*. By specific, I mean 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 could be affected by a voter ID law. 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. [61]

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. And 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 evidence is a powerful but ultimately one-trick pony. It is also a sensitive one: it can perform its powerful trick only when conditions are favorable. The strengths—and weaknesses—of specific, descriptive evidence from discovery are worth bearing in mind as we consider the particulars of what they convey about the likely effects of voter ID laws.

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[61] 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.

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 important—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. 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. [62]

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 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 there are substantial numbers of individuals who cannot comply with voter ID requirements.[63] 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% of eligible citizens surveyed did not have an ID; that number is higher for minority eligible citizens.[64] Possession rates are higher, but also not

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[62] For an in-depth discussion of the matching methodology used, *see* Decl. Stephen D. Ansolabehere, *Veasey v. Perry*, available at https://moritzlaw.osu.edu/electionlaw/litigation/documents/Veasey6552.pdf. The methodological contributions are additionally detailed in Stephen Ansolabehere & Eitan Hersh, *ADGN: An Algorithm for Record Linkage Using Address, Date of Birth, Gender, and Name*, 4 STATISTICS AND PUB. POL. 1 (2017).

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

[64] Matt Barreto, Stephen Nuno, Gabriel Sanchez, *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS: POLITICAL SCIENCE & POLITICS 111, 113 (2009) (Table 1); Expert Report of Matt Barreto on behalf of Plaintiffs Applewhite, et al. v. Commonwealth of Pennsylvania, et al., No. 330 MD 2012 at 20, available at http://www.pubintlaw.org/wp-content/uploads/2012/05/Voter-ID-expert-report-Matt-Barreto.pdf

universal, among registered voters; they are also disproportionately lower among minority voters.[65] In Indiana, from the same survey as that cited above, up to 11% of white registered voters did not have a valid ID; that number increased to 18% for Black registered voters.[66] In Georgia, matching analysis of registered voters to DMV records indicates that about 6% of registered voters lacked valid ID to vote, a disproportionate number of whom were minority voters.[67]

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 ID. Affected communities of up to 10% 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 not inaccurate. But for our purposes here, of refining the causal estimate from the range left open by Cantoni & Pons, we need to narrow these estimates further 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.

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. The Texas law was considered one of the strictest in the country,[68] 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. [69]

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[65] *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 (ed.) Changing How America Votes. New York: Rowman & Littlefield at 28 (Table 1)(using national data and data from several states to find that ID possession rates among white registered voters vary between 85% to 95%, and that the estimates are universally lower for voters of color), available at http://www.mattbarreto.com/papers/Walker_et_al_chapter.pdf; Charles Stewart III, Voter ID: Who has them? Who shows them?, 66 OKLA. L. REV. 21, 24 (2013).

[66] *Supra* note 64.

[67] M.V. Hood III & Charles Bullock III, *Worth a Thousand Words? An Analysis of Georgia's Voter Identification Statute*, 36 AM. POLITICS RESEARCH 555, 565 (2008)

[68] Richard Hasen, *Softening Voter ID Laws through Litigation: Is it Enough?*, 2016 WIS. L. REV. FORWARD 100, 103-04 (2016).

[69] Veasey, *supra* note 25 at 680.

Specifically, I consider the expert analysis in that case, conducted by Dr. Stephen Ansolabehere, that used matching analysis to determine the numbers of registered voters who lacked identification. And because of the participation of the United States as a plaintiff in the lawsuit, Dr. Ansolabehere had access not only to Texas ID databases (because Texas was the defendant), but also federal databases. He found, first, estimates similar to those in other expert reports and descriptive studies of registered voters: about 4.5% of Texas registered voters lacked IDs.[70]

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, we want to know how many habitual voters—individuals who would likely have voted—do not have ID. The Texas analysis found that 1.5% of habitual voters failed to match to either state or federal databases.[71] These habitual voters without IDs constituted about 0.5% of all registered voters.

While this estimate of 0.5% 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% estimate only includes individuals who did not have the ID necessary to comply with the law. Some might not, in fact, have chosen to vote even in the absence of the law, even if they did vote in prior federal elections. 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.[72] Moreover, the 0.5% 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 address might have changed before upcoming elections.

Whether the 0.5% estimate is an under- or overestimate depends on the relative magnitudes of all of those factors. But the anchoring estimate of 0.5% nevertheless provides more precision within the

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[70] *Supra* note 62 at 91.

[71] *Id.* at 98.

[72] 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* Valentino & Neuner, *supra* note 40; for a discussion of mobilization in support of voter ID laws, *see* Rick Hasen, *Keynote Address to Voting Wars Symposium, March 23, 2013*, 28 J.L. & POL. 417, 430 (2013).

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 what the true effect likely is.

C. DESCRIPTIVE EVIDENCE AND CAUSAL HYPOTHESES

It is unsurprising that the powers of the causal literature and specific evidence from litigation combined should shed more light on the effects of voter ID laws than each 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: 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.

But reconciling knowledge from these two different areas does more than simply vindicate views. It indicates 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 were what motivated me. I only turned to descriptive evidence to make sense of what the causal literature found.

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 them. In light of descriptive evidence suggesting that 0.5% 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%, were in fact exercises in futility. And since descriptive evidence was unearthed before many of the more recent causal studies were written, the attempt to estimate effects of a

magnitude that was not supported by descriptive evidence is all the more troubling.

It is for this reason that the debate over the effects of voter ID laws offers less an example in the tradition of answering questions in the law of democracy field, and more an occasion for questioning the questions that social scientists have asked. The inquiry so far suggests that an entire research agenda was 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.[73] To be sure, social scientists and lawyers 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 and their effects.

II. QUESTIONS TO QUESTION

The debate over the effects of voter ID laws does not simply tee up questions about how social scientists form their hypotheses, but also raise questions pertaining to the evaluation and normative impact of their findings as well. Faced with a true estimate of voter ID laws' suppressive effect on turnout of under 2%, one might ask these follow-up questions: is this true effect *small*? And is it fair to characterize voter ID laws as voter suppression laws?

A. IS A 1-2% 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

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[73] This is hardly a new idea. For an earlier rally cry, *see* Richard Pildes, *Review: The Politics of Race*, 108 HARV. L. REV. 1359 (1995).

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% as his best guess of what the suppressive effect was.[74] 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."[75] Highton considered a 4% suppressive effect to be "minimal."[76] (The author of one of the four studies Highton highlighted was a little less dismissive of his estimated effect of "between one and three percentage points overall."[77] He considered it to be "modest but meaningful."[78]) More recently, authors of a working paper on North Carolina's voter ID law, estimating that the law caused a 1 percentage point decrease in the 2016 primary election, considered the effect to be "non-negligible, but small."[79]

To understand why quantitative empiricists made such normative determinations (without recognizing them as normative), consider the context within which they work. They compare effect sizes based on explanatory power. Scholars of turnout effects compare 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: whether an incumbent is running, whether the race is competitive, and how much money is spent. These factors also include socio-economic 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."[80]

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[74] Highton, *supra* note 42 at 163.

[75] *Id.*

[76] *Id.*

[77] Dropp, *supra* note 34 at 4.

[78] *Id.*

[79] Justin Grimmer & Jesse Yoder, *The Durable Deterrent Effects of Strict Photo Identification Laws*, Working Paper at 1, 3, (2019).

[80] Mycoff et al., *supra* note 32 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

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, the valid comparators. 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 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 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.[81] 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 focusing on the effect that election laws have provides relevant basis for comparison. And it would be reasonable to contextualize the effect detected for an election law against the effects of its peers in the literature.

And 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 3-9%.[82] That effect is still dwarfed by the overwhelming turnout effects of demographics and the competitiveness of a given election.[83] An effect size of 4%, or even of 1%, 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 make

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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.

[81] 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 of literacy tests.

[82] Marjorie Randon Hershey, *What We Know about Voter-ID Laws, Registration, and Turnout*, 42 PS: POL. SCI. & POLITICS 87 (2009). To the extent the effect sizes of EDR 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.

[83] *See supra* note **Error! Bookmark not defined.**.

clear the flaws of measuring the effects of election laws 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 and 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. And it is perhaps by questioning the magnitude question that we might begin to resolve line-drawing questions in various voting rights doctrines or failing that, develop contextually based assessments.[84]

B. DOES TURNOUT MEASURE VOTER SUPPRESSION?

The debate over voter ID laws also presents an occasion to question how social science frames normative policy debates. Although social scientists claim to shy away from normative questions, their approach implies that the estimated turnout effects of election laws determine whether these laws are voter suppression laws. I suggest here that the right question is whether a law suppresses *voters*—not just whether it suppresses *votes* in a given election.

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. [85] Voter suppression is not (yet) a concept with legal force.[86] But as the phrase has come to confer normative judgment, 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 I 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.

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[84] *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)

[85] For work devoted to actually fleshing out what vote suppression might mean, *see, e.g.*, Bertrall Ross & Douglas Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disfranchisement of the Poor*, 114 N.W. L. REV. 633 (2019).

[86] *See, e.g.* Lisa Mannheim & Elizabeth 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).

It is lost votes that the social science literature focuses on:[87] the central dependent variable under inquiry is voter turnout. Social scientists' implicit 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 the 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 only marginal voters, i.e. individuals who the law causes not to vote, are negatively affected by the law.

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,[88] turnout in social science articles is often measured as voting conditional on registration, i.e. whether registered voters vote. This

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[87] 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 impacted. *See, e.g.*, Michael Pitts and Matthew Neumann, *Documenting Disenfranchisement: Voter Identification During Indiana's 2008 General Election*, 25 J. L. POL. 329 (2009); Daniel Hopkins, Marc Meredith, Michael Morse, Sarah Smith, and Jesse Yoder, *Voting But for the Law: Evidence from Virginia on Photo Identification Requirements*, 14 J. EMPIRICAL L. STUDIES 79, 87-88 (2017); Bernard Fraga & Michael Miller, *Who does Voter ID Keep from Voting?*, Working Paper (2018); and Phoebe Henninger, Marc Meredith, and Michael Morse, *Who Votes Without Identification? Using Affidavits from Michigan to Learn About the Potential Impact of Strict Photo Voter Identification Laws*, Working Paper (2018).

[88] There is a long tradition in election law research of using individual-level survey data to study turnout effects. Raymond Wolfinger and Steven 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 et al., *supra* note 33**Error! Bookmark not defined.** 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 35 at 3. But whether commercial files are representative of unregistered voters remains to be seen given the significant differences between registered and unregistered voters. Simon Jackman & Bradley Spahn, Unlisted in America, Working Paper (2015), available at http://images.politico.com/global/2015/08/20/jackman_unlisted.pdf.

data choice[89] reflects that view that votes can only be suppressed among individuals 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. 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 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 draws on commercial databases of unregistered voters and fails to find a suppressive effect on registration.[90] 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.[91] It adopts a convincing difference-in-differences model in finding that the Rhode Island law reduced turnout by 1.3 percentage points, and reduced voter registration by 8.5 percentage points in presidential elections and 5.6 percentage points in midterm elections.[92] This finding depends on the enviable and rare data the researchers had access to: Rhode Island anonymized highly restricted proprietary data,[93] giving researchers a rare chance to study the effect of voter ID laws on especially vulnerable segments of society not normally included in election law research. I raise the Rhode Island paper not to suggest that others should have used the same methodology and

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[89] Other data sources of turnout outcomes also suffer from flaws of their own. Aggregate turnout data, i.e. 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 Institute, *supra* note 29 at 22 (county-level aggregate turnout); Alvarez et al., *supra* note 33 (aggregate analysis at state level).

[90] Cantoni & Pons, *supra* note 35 at 6.

[91] Frances Maria Esposito, Diego Focanti, & Justine Hastings, *Effects of Photo ID Laws on Registration and Turnout,* Working Paper (Dec. 2017).

[92] *Id.* at 11, 24.

[93] *Id.* at 2, 7-8.

data—they could not—but simply as an indication of what might be lost when only voting conditional on registration is considered.

Any suppressive effect of voter ID laws on voter registration should factor into normative judgments about these laws. It would show that these laws make it less likely that eligible citizens choose to become voters, as evidenced by the failure to take perhaps the most important step towards becoming one. And 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*. Turnout estimates quantify affected voters mediated by behavioral change.

Thus, turnout effects only quantify a subset of 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, 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. [94] That burdens were overcome indicates little about how onerous they were. Severe restrictions on the franchise, such 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 because of it.

Next, we turn to the individuals who would face more difficulty in voting but who would not have voted in this election any way. We might call this group persistent non-voters. Again, as with devoted voters, the effect that election laws have on persistent non-voters are not captured by turnout studies and not a part of a lost votes approach to voter suppression. Yet there are reasons why it should matter.

First, persistent non-voting in the past does not necessarily mean persistent non-voting 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. The metaphor of change elections as waves captures both elements well. When estimates are based on a small handful of elections, as they often must be, those estimates may mistake sometimes non-voters for persistent nonvoters.[95]

In other words, persistent non-voters might still vote. Indeed, we may need them to guard against anti-democratic outcomes. Persistent non-voters might be thought of as the body politic's conscience, not called upon for quotidian elections but whose activation in critical

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[94] Social scientists are not blind to importance of considering the burdens on voters who are able to overcome them. *See, e.g.* Highton, *supra* note 42 at 164 (noting that those who take the necessary steps to obtain identification to vote face "a higher barrier to vote" that is "real, non-trivial, and unequal in impact.")

[95] 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.*, CIRCLE, *Election Night 2018: Historically High Youth Turnout, Support for Democrats* (Nov. 7, 2018), available at https://circle.tufts.edu/latest-research/election-night-2018-historically-high-youth-turnout-support-democrats (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*, NCSL, Voter Identification Requirements (July 9, 2020), available at https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx (indicating the specific valid voter IDs in every state).

elections is imperative. The possibility that persistent non-voters 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.

A comparative perspective illuminates this principle. I offer one example, but there are many others, at home[96] and abroad.[97] The struggle to preserve democracy in Hong Kong, a special administrative region of China that was formerly a British colony, has resulted in significant social upheaval.[98] A regularly scheduled election for municipal offices was held in November 2019, amidst sustained protests in response to efforts by the region's government to erode civil liberties.[99] And this election was the first scheduled since the protests first intensified in early 2018.[100] The municipal offices at stake were relatively insignificant and irrelevant to the political struggles at issue in the protests. But turnout was nonetheless historic.[101] While municipal elections traditionally see little more than 40% turnout, in November 2019, 71% of eligible voters cast a ballot and delivered a decisive win to the parties sympathetic to the reform movement.[102] The Hong Kong example reminds us of the costs—and dangers—of treating persistent non-voters as permanent non-voters.

Finally, persistent non-voting 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 the state is to new voters. The scattered presence of

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[96] *See, e.g.*, Daniel Bergan, Alan Gerber, Donald Green, & Costas Panagopoulos, *Grassroots Mobilization & Voter Turnout in 2004*, 69 PUB. OP. QUARTERLY 760 (2005); Frances Fox-Piven & Lorraine Minnite, Voter Participation, Encyclopedia of Social Work (2013) (describing unprecedented mobilization of minority voters in 1982 midterm election).

[97] *See, e.g.*, Felix Anebo, *The Ghana 2000 Elections: Voter Choice and Electoral Decisions*, 6 AFRICAN J. POL. SCI. 69 (2001); Marco Gandsegui, Jr., *The 1998 Referendum in Panama*, 26 LATIN AM. PERSPECTIVES 159 (1999).

[98] Daniel Victor, *Why Are People Protesting in Hong Kong?*, NYTimes (Nov. 18, 2019), available at https://nyti.ms/33KNji7.

[99] Keith Bradsher, Austin Ramzy, & Tiffany May, Hong Kong Election Results Give Democracy Backers Big Win, NYTimes (Nov. 25, 2019), available at https://nyti.ms/2ribbeX.

[100] *Id.*

[101] *Id.*

[102] *Id.*

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,[103] 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 franchise.

Understanding the act of voting as a product of behavioral persuasion requires broadening one's conception 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,[104] voting 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. And especially vulnerable individuals might start to think: people like me don't vote.

To take into account all affected individuals in understanding voter suppression, one needs to look beyond *vote* suppression to *voter* suppression. The former focuses on how the law affects the ballots cast, the latter on how the law affects whether citizens become voters. Thankfully, in the law of democracy, one need not "know the dancer from the dance."[105] The field is used to accommodating different concepts of the right to vote.[106] As with the exercise of the right to vote, suppression of the same might do well to accommodate more than one definition.

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[103] *See, e.g.*, Emily Rong Zhang, *New Tricks for an Old Dog: Deterring the Vote Through Confusion in Felon Disenfranchisement*, MISSOURI L. REV. (forthcoming 2019) (discussing how can be contagious across jurisdictions to create widespread confusion that eligible voters face about the particularities of the felon disenfranchisement regime in their state).

[104] The problem of social desirability bias in self-reported voting and registration behavior in survey research is well known. *See, e.g.*, Allyson Holbrook & Jon Krosnick, *Social desirability bias in voter turnout reports: Tests using the item count technique*, 74 PUB. OP. 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.

[105] 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."

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

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 Section, 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.[107] 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 as it rarely engages the social science literature (though that fact is itself worthy of critique[108]). 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[109] and because the principle of constitutional avoidance asks that statutory claims be resolved before constitutional claims are addressed.[110]

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[107] Crawford, *supra* note 6 at 190 (quotations omitted).

[108] *See* Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631 (2007); for a more in-depth look at the lack of empirical evidence on in-person voter fraud, *see* Justin Levitt, *The Truth about Voter Fraud*, Brennan Center for Justice (2007), available at https://core.ac.uk/download/pdf/71340541.pdf. For an in-depth examination of whether states' arguments that perceived voter fraud reduces public confidence in voting has empirical support, *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).

[109] 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 Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOWARD L. J. 741 (2006).

[110] 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.

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 Section 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, *Anderson/Burdick* doctrine has similarities with classic cost-benefit analysis in the social science tradition. Modern election law research on turnout is grounded in a Downsian approach to voting: election laws affect voting either by increasing or decreasing the cost of voting. 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. Finally, 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.

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."[111] But how relevant are they? This next Section answers this question specifically with respect to the turnout-suppression estimates discussed before, i.e. causal estimates of changes in voter turnout resulting from election laws. It demonstrates 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.

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[111] Burdick v. Takushi, 504 U.S. 428, 434 (1992) (citing Anderson v. Celebrezze, 460 U.S. at 788-89).

Recall from Section 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 two questions, "how many individuals are affected" and "who did the law cause not to vote" into one estimate.

Both of these questions are central to *Anderson/Burdick*'s burden inquiry.[112] And they map on to the two aspects of burdens on voters that *Anderson/Burdick* considers: the "magnitude" and "character" of legal injury. The magnitude of injury imposed by a challenged law refers 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."[113] And although the *Burdick* Court upheld Hawaii's exclusion of write-in ballots because political candidates continued to have "easy access to 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.[114] And 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. If the record had demonstrated that eligible voters without ID were numerous, that fact would have factored 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.

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[112] For an in-depth discussion of how courts consider burdens imposed by voter ID laws, *see* Ellen Katz, *What the Marriage Equality Cases Tell Us About Voter ID*, 2015 U. CHI. L. F. 211, 215-22 (2015). For a closer look at what burdens, particularly undue burdens, might look like in the voting context, *see* Pamela Karlan, *Undue Burdens and Potential Opportunities in Voting Rights and Abortion Law*, 93 IND. L. J. 39 (2018).

[113] Anderson, 460 U.S. at 792.

[114] Burdick, 504 U.S. at 442-43 (Kennedy, J., concurring).

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. And 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 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* 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 Section 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 protected activity.

Moreover, suppressive-turnout estimates also fail to shed any light on a central question relating to the character of burdens imposed by the challenged law: affected voters' "ability to comply."[115] 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."[116] The Court also tolerated the "somewhat heavier

[115] 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. Disparate Impact, Unified Law, 128 YALE L. J. 1566, 1984-85 (2019).

[116] Crawford at 198.

burden" the law placed on the elderly, poor, homeless, and individuals with religious objections to being photographed because they could vote by casting a provisional ballot.[117]

To be sure, turnout-suppression evidence would have been relevant in *Crawford* if it had been in the record. (And the magnitude of the estimated effect should have been evaluated at least in part in accordance with the recommendation in Section 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 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 parts) are affected. That estimates of turnout changes are easier to derive statistically than the facts the Court sought does not make those estimates legally sufficient.

Clarifying the limited role that turnout-suppression evidence plays in *Anderson/Burdick* claims has implications for the field of law of democracy, doctrine and voting-rights litigation.

For the field, clarification of how turnout-suppressive evidence relates to the burden inquiry serves as a reminder that while all participants in the interdisciplinary conversation may be motivated by the same issues and same election laws, their approaches differ based on disciplinary demands, conventions, and constraints. These differences will not reconcile themselves; they need to be identified. Moreover, popular or academic normative approaches[118] to ills like vote/voter suppression do not necessarily match legal standards.

The clarification also helps guard against judicial temptations to enshrine evidence as doctrine. The concern that courts may ratchet up legal standards by adding evidentiary requirements is not an abstract one, especially because some have already done so with turnout-related evidence in another area of voting rights doctrine. In the context of Section 2 vote denial[119] cases, some courts have expanded the doctrine to require that plaintiffs provide evidence of turnout-related effects. Prominent voices have criticized these decisions for reasons similar to

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[117] Crawford at 199.

[118] I focus primarily on methodological constraints in the academic social science literature that shape normative assumptions. But I make room for the possibility that there may be other forms of biases, overt or latent, that shape the orientation of the academic literature. *See, e.g.*, Heather Gerken, *The Loyal Opposition*, 123 YALE L. J. 1958 (2014) (questioning the academic orientation in the federalism literature).

[119] Daniel Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439 (2015).

those presented here:[120] turnout-related evidence, while relevant, does not definitively answer the legal question posed.

Moreover, the constraints on social science evidence that this Article describes furnish additional reasons to be wary of doctrinally enshrining social scientific evidentiary requirements, especially those that pertain to turnout-suppressive effects. A lesson of Sections I.A & 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 *Anderson/Burdick* doctrine (or indeed any other voting rights doctrine) could make legal success hinge on factors unrelated to the merits of the case.

B. PROBATIVENESS OF TURNOUT EVIDENCE

As for voting-rights litigation, the limited probativeness of turnout-suppression evidence suggests that lawyers and courts should do more to facilitate discovery of a more probative kind of evidence: the specific, descriptive evidence I discussed and found useful in Section I.B. The utility of specific, descriptive evidence in the voter ID context depended 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.[121] Ensuring that social scientists can continue to 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.

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[120] Dale 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, 693-694 (2014); Pam Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OH. ST. L. J. 763, 774 (2016); Dale 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 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); Nicholas Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L. J. 1566, 1587-88 (2019).

[121] Justin Grimmer, *We are All Social Scientists Now: How Big Data, Machine Learning, and Causal Inference Work Together,* 48 PS: POL. SCI. & POLITICS 80 (2015).

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. For instance, 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. 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 non-registered 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. State therefore has an incentive not to know.[122] 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.[123] 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 lacking. As for litigation, basic information about challenged laws may not be known until plaintiffs hire experts.

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[122] 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, what 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. *Easley v. Cromartie*, 532 U.S. 234 (2001).

[123] To be sure, evidence of discriminatory intent is legally relevant, *see, e.g., 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.

To be sure, more searching data discovery implicates countervailing interests, most significantly privacy interests embedded in granular, sensitive, and individual-level data.[124] 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),[125] 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 this particular doctrine in the law of democracy, *Anderson/Burdick*, 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.[126] And 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),[127] such manipulations face no ex-ante constraints on enactment into law.

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

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[124] Charles Stewart III, *Voter ID: Who has them? Who shows them?*, 66 OKLA. L. REV. 21, 24 (2013).

[125] Frederik Zuiderveen Borgesius, Jonathan Gray, & Mireille van Eechoud, *Open Data, Privacy, and Fair Information Principles: Towards a Balancing Framework*, 30 BERK. 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. INFO. Q. 363 (2015); Julia Lane, Victoria Stodden, Stefan Bender, & Helen Nissenbaum, PRIVACY, BIG DATA, AND THE PUBLIC GOOD: FRAMEWORKS FOR ENGAGEMENT (2014); Panel on Improving Federal Statistics for Policy and Social Science Research Using Multiple Data Sources and State-of-the-Art Estimation Methods, INNOVATIONS IN FEDERAL STATISTICS: COMBINING DATA SOURCES WHILE PROTECTING PRIVACY (2017).

[126] *See, e.g.*, Rick Hasen, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN (2012); Justin Levitt, *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 ELEC. L. J. 97 (2012); Bruce Cain & Emily Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L. J. 867 (2016); Rick 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).

[127] Shelby County v. Holder, 570 U.S. 529 (2013) (striking down the coverage formula in the Voting Rights Act, rendering the preclearance regime inoperative).

doctrines,[128] unearthing old standards[129] and charting new legal territory, [130] all in the service of producing a denser net of protections for the right to vote.

As we continue to debate which reforms are necessary and feasible reforms to better protect voting rights, attention should be paid to the social scientific evidentiary basis for new legal claims and regimes. Just as legal rights are only as good as the remedies for their violation,[131] legal claims are only as useful as the evidence that can prove them. To

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[128] *See supra* note 120 for a list of work articulating how to adapt Section 2 to vote denial cases. *See also* Ellen Katz, *Section 2 After Section 5: Voting Rights and the Race to the Bottom*, 59 WM. & MARY L. REV. 1961 (2018). For work that shore up the legality of the remaining portions of the VRA, see, e.g., Christopher Elmendorf, *Advisory Rulemaking and the Future of the Voting Rights Act*, 14 ELEC. 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 VRA by way of recognizing broader constitutional authorization of congressional enforcement from the Fifteenth, instead of Fourteenth, Amendment);

[129] *See, e.g.* Rick Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009); Lisa Marshall Mannheim & Elizabeth Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. R. 213 (2019) (suggesting resuscitation of doctrinal attention to the harm of voter suppressive laws like voter purges); Rick Hasen & Leah Litman, *Thick and Thin Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, 108 GEORGETOWN L. J. (2020) (forthcoming) (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).

[130] *See, e.g.* Richard Pildes, The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote, 49 Howard L. J. 741 (2006) (early call to move beyond anti-discrimination framework in voting rights cases given looming threats to voting from many fronts); 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 administrative approach to manipulations of the political process); Edward Foley, Voting Rules and Constitutional Law, 81 Geo. Wash. L. Rev. 1836 (2013) (proposing that courts explicitly consider whether election regulations were adopted for partisan advantage); Rick Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 56 (2014) (offering a legal realistic 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 more robust application of *Anderson/Burdick* or more heightened standards that resemble retrogression under the Voting Rights Act); Daniel 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 voter ID); Sam Issacharoff, *Ballot Bedlam*, 64 DUKE L. J. 1363 (2015) (proposing neutral election administration to address root problem of principal-agent problem in American election administration). For a critique of some of these approaches, *see* Sam Bagenstos, *Universalism & Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L. J. 2838 (2014).

[131] Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

the extent that doctrinal proposals involve line-drawing questions that could depend in part on turnout-suppressive estimates (e.g. 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.[132]

This matches 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. And that conversation is also valuable when legal solutions are first being designed as limitations of social science evidence may be nonobvious but critical.

In sum, questioning questions in social science research creates a better understanding of that scholarship'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 to 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.

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[132] A good example of how creativity is mobilized when doctrine motivates research can be found in the area of partisan gerrymandering, Nicholas Stephanopoulos & Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties*, 0 LEG. STUD. Q. 1 (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, *Common Cause v. Rucho*, 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 one 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 two 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 1-2% effect as small. And 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 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 were. 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.