PHOTO ID, PROVISIONAL BALLOTING, AND INDIANA'S 2012 PRIMARY ELECTION

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It probably is not too much hyperbole to say that photo identification was *the* election administration story of the 2012 election cycle.[1] Following the Republican tidal wave takeover of numerous state legislatures in 2010, several state legislatures either passed new photo identification laws or upgraded existing voter identification laws to require photo identification.[2] To take one example, Pennsylvania (which may well have been the eye of the photo identification hurricane) featured a high-profile court battle over its adoption of a photo identification requirement.[3]

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1. Throughout this article, I generally use the term "photo identification" rather than "voter identification." The reason I do so is that there is actually very little controversy about voter identification generally. Rather, the flashpoint of dispute in relation to voter identification is when states adopt laws that essentially exclusively require a government-issued photo identification as a condition of casting a "regular" (as opposed to a "provisional") ballot at a polling place.

2. In 2011, Kansas, Rhode Island, and Wisconsin enacted photo identification laws, citizens in Mississippi adopted a photo identification law through referendum, and Alabama, South Carolina, Tennessee, and Texas tightened their existing voter identification laws. *See Voter ID: Where Are We Now*?, 29 THE CANVASS 1, 2 (Apr. 2012), *available at* www.ncsl.org/documents/legismgt/elect/canvass_Apr_2012_No_29.pdf. In 2012, Pennsylvania added a new photo identification law and Minnesota placed a constitutional amendment to add a photo identification requirement on the 2012 ballot. *See id.* One exception to the general rule—that photo identification laws only generally get adopted by states when Republicans hold both the executive and legislative branches—is Rhode Island, where a photo identification law was adopted even though Democrats controlled the state legislature. Philip Marcelo, Katherine Gregg & Randal Edgar, *R.I. Voter-ID Law Hailed at U.S. Senate Hearing*, PROVIDENCE J., Sept. 12, 2011, at 5; *Rhode Island Governor Signs Voter ID Bill*, REUTERS, July 6, 2011, http://www.reuters.com/article/2011/07/06/us-rhodeisland-voterid-idUSTRE7656RS20110706.

3. Karen Langley, *Voting Law Experts Keep Close Eye on Pennsylvania*, PITTSBURGH POST-GAZETTE (Aug. 11, 2012) www.post-gazette.com/stories/local/state/voting-law-experts-keep-close-eye-on-pennsylvania-648506/ (mentioning state court battle over Pennsylvania's photo ID law).

With all the hullabaloo over photo identification around the nation in the past couple of years—from Pennsylvania to Texas to Wisconsin and elsewhere—it is easy to forget that the crossroads of photo identification is Indiana. Indiana was on the forefront of adopting photo identification—doing so in 2005—meaning that Indiana has implemented photo identification at its polls since 2006.[4] In addition, the basic framework of Indiana's photo identification law has served as the model for other state photo identification laws.[5] For these reasons, Indiana perhaps presents the best laboratory for examining a photo identification law's impact on an electorate.

This article represents the continuation of a series of studies that measure the impact of photo identification on the electorate by examining provisional ballots cast and not counted because prospective voters lacked photo identification. Prior studies examined provisional balloting at Indiana's 2008 primary and 2008 general elections.[6] This article will present results from the 2012 primary and will proceed in two parts. Section I will briefly discuss the details of Indiana's photo identification law, the various methods used to measure the impact of photo identification laws generally, and the research methods employed for this study. Section II will present and analyze the empirical data generated in this study and, notably, compare the impact of the photo identification law at Indiana's 2008 primary election with the impact of the photo identification law at Indiana's 2012 primary election.

I. MEASURING THE EFFECTS OF PHOTO IDENTIFICATION GENERALLY AND IN INDIANA

The first thing that's important in assessing the impact of Indiana's photo identification law is to understand how the photo identification law works. I have previously provided very detailed

4. Act of Apr. 27, 2005, P.L. 109-2005, 2005 Ind. Acts 2005. Georgia adopted a photo identification law almost simultaneously with Indiana. Act of Apr. 22, 2005, no. 53, 2005 Ga. Laws 253.

5. *See* Michael J. Pitts & Matthew D. Neumann, *Documenting Disfranchisement: Voter Identification During Indiana's 2008 General Election*, 25 J.L. & POL. 329, 331 (2009) (citing ALEC EWALD, THE WAY WE VOTE 135 (2009)).

6. *See generally id.* at 329; Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Balloting*, 24 J.L. & POL. 475 (2008) [hereinafter *Assessing the Impact*].

synopses of the mechanics of Indiana's law elsewhere,[7] and I will not extensively repeat those details. For present purposes, the most important aspects of Indiana's photo identification law are as follows:

 With only very limited exceptions, prospective voters who present themselves at Indiana's polls on Election Day must show a photo identification issued by the State of Indiana or the federal government that:

* Has an expiration date and is not expired or is only very recently expired;[8] and,

* Contains the prospective voter's name, with the name on the photo identification conforming to the name in the poll book (i.e., an exact match between the name on the photo identification and the name in the poll book is not required).[9]

 If a prospective voter appears at Indiana's polls without a valid photo identification, the prospective voter may cast a provisional ballot.[10]

 If a prospective voter casts a provisional ballot due to a lack of photo identification, the prospective voter has a ten-day window after the election to have the ballot counted in the final tally of votes by either:[11]

* Returning to the county election office and showing a valid photo identification;[12] or

* Returning to the county election office and signing an affidavit that asserts inability to obtain a photo identification because of indigency or because of a religious objection to being photographed.[13]

 While most prospective voters on Election Day must show a

7. *See, e.g.*, *Assessing the Impact*, *supra* note 6, at 481–85; *see also* Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1, 14–20 (2009).

8. IND. CODE § 3-5-2-40.5(a)(3) (Repl. Vol. 2012).

9. *Id.* § 3-5-2-40.5(a)(1)–(2).

10. *Id.* § 3-11-8-25.1(c)–(d) (Repl. Vol. 2011).

11. *Id.* § 3-11.7-5-2.5(a)–(b) (Repl. Vol. 2011).

12. *See id.*

13. *Id.* § 3-11.7-5-2.5(a), (c).

photo identification, persons who cast an absentee ballot by mail do not have to present photo identification.[14] While not every registered voter is eligible to vote absentee by mail, two major categories of such eligible voters are the elderly and persons with disabilities.[15]

In short, as a general matter, to cast a countable ballot on Election Day in Indiana, a person must show a valid photo identification or, in the alternative, a prospective voter can cast a provisional ballot and journey to the local election office within a short time after the election to validate that provisional ballot.

In addition to Indiana's photo identification law, there is another identification requirement in play at Indiana's polls on Election Day that is necessary for a complete understanding of the research presented here. The federal Help America Vote Act ("HAVA") essentially requires first-time voters who register by mail (and who do not provide proof of identification as part of their registration application) to provide proof of identification at the polls.[16] However, the HAVA identification requirement differs from Indiana's photo identification requirement in a number of key ways. First, the HAVA identification requirement applies to a much more limited class of prospective voters—first-time registrants by mail rather than *all* prospective voters who appear at a polling place.[17] Second, the HAVA identification requirement can be fulfilled by a prospective voter providing something other than a *photo* identification, allowing, among other things, a prospective voter to satisfy the requirement by showing a government check or a utility bill.[18] Third, the HAVA identification requirement requires the identification presented by the prospective voter to have an address that *exactly matches* the address in the poll book;[19] in contrast, Indiana's photo identification law contains no such address match requirement. Importantly, the bottom line is that it is possible (though perhaps unlikely) for a prospective voter at an election in Indiana to be able to meet the state photo

14. *Id.* § 3-11-10-24(c) (Repl. Vol. 2011) (laying out the requirements for voters who cast absentee ballots by mail).

15. *Id.* § 3-11-10-24(a)(4)–(5).

16. 42 U.S.C. § 15483(b)(1)–(2)(A) (2006).

17. *Id.* § 15483(b).

18. *See id.* § 15483(b)(2)(A).

19. *Id.*

identification requirement but not the HAVA identification requirement or vice versa.[20]

For several years now, debate has raged over the impact of photo identification laws, such as Indiana's, on the electorate. Supporters of photo identification laws (who generally are Republican politicians and their supporters) assert that photo identification laws act as a bulwark to prevent voter fraud.[21] Opponents of photo identification laws (who generally are Democratic politicians and their supporters) assert that photo identification laws target a non-problem—in-person voter fraud—and lead to vast disfranchisement.[22] Obviously, the finer points of the debate become more nuanced, but these are the broad strokes of the contentions made by the sides engaged in what Professor Richard Hasen calls the "Voting Wars."[23]

For the past several years, this debate has raged (and continues to rage) in somewhat of an empirical vacuum. Supporters of photo identification laws have generally not been able to generate many examples of in-person voter fraud, either in recent elections or historically. For instance, in the most prominent United States Supreme Court case on photo identification, the lead opinion authored by Justice John Paul Stevens struggled to cite to firm examples of in-person voter fraud.[24] On the other side of the coin, opponents of photo identification laws have had trouble proving that there are actual persons who would be disfranchised by photo identification laws.[25]

This article expands empirical knowledge on the access (i.e., disfranchisement) side of the access versus integrity (i.e., fraud) photo identification debate. Before describing this particular study though, it is useful to briefly survey the other types of empirical research that have been employed in an attempt to measure the disfranchising impact of photo identification laws.

20. For more details and examples of how this works, see *Assessing the Impact*, *supra* note 6, at 485.

21. *See, e.g.*, RICHARD L. HASEN, THE VOTING WARS 6 (2012).

22. *See id.*

23. *See generally id.*

24. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 195 nn.11–12 (2008) (plurality opinion) (citing just a single modern example of in-person voter fraud in the State of Washington and one historical example of in-person voter fraud from the 1860s).

25. *Id.* at 200–02 (citations omitted).

One possible method to assess the disfranchising impact of photo identification laws is through analysis of voter turnout data. For instance, one study analyzed Indiana elections and found that turnout actually increased after implementation of the photo identification law.[26] In contrast, other studies, while not necessarily focused on photo identification laws or Indiana in particular, have suggested that stricter voter identification requirements do reduce turnout.[27] However, these studies of overall voter turnout may not be very helpful in assessing the impact of photo identification laws, because there may be insurmountable difficulties in using voter turnout data to estimate the impact of voter identification laws.[28]

The main empirical data used by opponents of photo identification laws to determine these laws' disfranchising impact measures access to identification among the potential electorate. The expert report submitted on behalf of plaintiffs in the Pennsylvania photo identification litigation serves as a paradigmatic example of such a study.[29] That report contained the results of a survey of Pennsylvania voters that had three primary goals: first, to determine the number of potential voters who did not have a photo identification that would meet the requirements of Pennsylvania's law; second, to determine the number of registered voters who did not have a photo identification that would meet the requirements of the law; and, third, to determine the number of persons who cast ballots in 2008 who did not have a photo identification that would meet the requirements of Pennsylvania's law.[30] The report concluded that in Pennsylvania, 14.4% of eligible voters (1,364,433 persons), 12.8% of registered voters (1,055,200 persons), and 12.6% of those who voted in 2008 (757,325 persons) lacked proper photo identification.[31]

26. JEFFREY MILYO, INST. OF PUB. POLICY, THE EFFECTS OF PHOTOGRAPHIC IDENTIFICATION ON VOTER TURNOUT IN INDIANA: A COUNTY-LEVEL ANALYSIS 4–5 (2007).

27. EAGLETON INST. OF POLITICS & MORITZ COLL. OF LAW, REPORT TO THE U.S. ELECTION ASSISTANCE COMMISSION ON BEST PRACTICES TO IMPROVE VOTER IDENTIFICATION REQUIREMENTS PURSUANT TO THE HELP AMERICA VOTE ACT OF 2002, PUBLIC LAW 107–252, at 23 (2006).

28. *See generally* Robert S. Erikson & Lorraine Minnite, *Modeling Problems in the Voter Identification–Voter Turnout Debate*, 8 ELECTION L.J. 85, 87 (2009).

29. *See* Expert Report Submitted on Behalf of Plaintiffs at 11, Applewhite v. Commonwealth, No. 330 M.D. 2012, 2012 WL 3332376 (Pa. Commw. Ct. July 16, 2012).

30. *Id.* at 2.

31. *Id.* at 4.

There is a decent chance, however, that these studies overstate the amount of disfranchisement caused by photo identification laws. For starters, these surveys tend to overstate the number of persons who lack photo identification because many such laws such as Pennsylvania's (and Indiana's as well) do not require an exact match of the name on the photo identification with the name in the poll book and only require that the name on the photo identification conform to the name in the poll book.[32] However, the Pennsylvania expert report classifies persons who fail to have an *exact* name match as not having a photo identification that meets the law's requirements.[33] In addition, these types of studies rely on voters to self-report their registration status and voting history, and such surveys tend to be less than reliable.[34] Finally, these studies do not indicate how many persons can utilize any of the exceptions or work-arounds that can be available for prospective voters who do not have adequate photo identification. For instance, in Pennsylvania (as well as in Indiana) elderly voters who lack photo identification can avoid the requirement by casting an absentee ballot by mail.[35]

A similar method of examining the impact of photo identification on the electorate is to compare voter registration lists to state photo identification databases. For instance, consider evidence proffered in *Texas v. Holder*, in which the federal government sought to prove that Texas' photo identification law violated section 5 of the Voting Rights Act.[36] In that case, the United States presented expert testimony that compared Texas' voter registration lists with Texas' identification card and concealed carry databases in an effort to determine whether persons on the voter registration list had one of these forms of photo identification.[37]

32. 25 PA. CONST. STAT. ANN. § 2602(z.5) (West 2005); IND. CODE § 3-5-2-40.5(a)(1)–(2) (Repl. Vol. 2012).

33. Expert Report Submitted on Behalf of Plaintiffs, *supra* note 29, at 9.

34. *See, e.g.*, Richard Sobel, *Voter-ID Issues in Politics and Political Science*, 42 PS: POL. SCI. & POL. 81, 83 (2009) ("[P]eople do not always accurately report voting . . . .").

35. Bob Warner, *Absentee Ballots May Offer A Way Around Pennsylvania Voter ID Law*, PHILA. INQUIRER, Aug. 5, 2012, at B01; *see supra* note 15 and accompanying text (discussing Indiana's law).

36. No. 12-cv-128 (DST, RMC, RLW), 2012 WL 3743676, at *1, *7 (D.D.C. Aug. 30, 2012).

37. *Id.* at *19. Voter identification litigation in Wisconsin also used a similar type of evidence to assess photo identification's potential impact in that state. *See* NAACP v.

The federal district court, however, was skeptical of this evidence and ultimately rejected the expert testimony.[38] For starters, the district court rejected this evidence because it failed to compare the voter registration list with all the potential identifications that could be used to satisfy Texas' photo identification requirement.[39] For example, the expert testimony failed to determine whether a registered voter who did not have a state photo identification also did not have, say, a United States passport or military identification.[40] Second, these databases often need to be cleaned prior to performing a match and sometimes the cleaning of these databases does not make sense.[41] For instance, in the Texas case, deceased persons were removed from the state identification database but not from the registration list.[42] Third, the database matching often requires an exact match between the name in the voter registration list and the name in the state identification database; however, the photo identification laws generally do not require an exact match between the name on the state photo identification and the name in the voter registration list.[43] In short, trying to assess disfranchisement by determining how many registered voters do not have a qualifying photo identification is difficult.

Yet another way of studying the amount of disfranchisement caused by photo identification laws would be to gauge the number of persons who were deterred *from even going to the polls in the first place* by photo identification laws. These studies, which rely on voter surveys, tend to be few and far between. One such study is the *2008 Survey of the Performance of American Elections*.[44] In a prior article, I extensively critiqued this particular study,[45] so I will only repeat one of those critiques here: that study did not find a single person in Indiana who reported that not having proper voter identification was the reason for avoiding the polls,[46]

Walker, No. 11 CV 5492, slip op. at 6 (Wis. Cir. Ct. Mar. 6, 2012).

38. *Texas*, 2012 WL 3743676, at *20–21.

39. *Id*. at *20.

40. *See id*.

41. *See id*. at *21.

42. *Id*.

43. *Id*.

44. R. MICHAEL ALVAREZ ET AL., 2008 SURVEY OF THE PERFORMANCE OF AMERICAN ELECTIONS 59 (2009).

45. Pitts & Neumann, *supra* note 5, at 344–45 (footnotes omitted).

46. ALVAREZ ET AL., *supra* note 44, at 66. I previously noted that one of the difficulties

despite the fact that Indiana's photo identification law is considered to be one of the strictest in the United States.[47]

As will be described in a bit more detail momentarily, the approach used in assessing disfranchisement in this article is different from these other research approaches in that this research examines disfranchisement by assessing provisional ballots cast and not counted at an election because of the prospective voter's failure to produce identification. While concededly this approach has its own flaws,[48] my view is that this type of research provides the most solid evidence of actual disfranchisement caused by photo identification laws. That said, none of this discussion of the various attempts to measure the disfranchising impact of photo identification laws in Indiana or elsewhere is intended to sully other types of research. Indeed, all of these different approaches merit consideration as part of the empirical puzzle of assessing the disfranchising impact of photo identification. My main point is that there are many pieces to the empirical puzzle and, to the extent that we are seeking the *most concrete* evidence of disfranchisement, that evidence would seem to be found in provisional ballots cast and not counted because the prospective voter lacked photo identification.

This study examines the impact of a photo identification law by examining provisional ballots cast at the May 8, 2012, primary election in Indiana. In conducting this research, the following basic steps were followed:

 The CEB-9 form filed by each of Indiana's ninety-two counties was obtained from the Indiana Election Division. The CEB-9 form is a report filed by each county after an election that provides basic data for the election. For purposes of this study, the CEB-9

with these surveys is that they generally do not isolate photo identification as the *sole* reason for the prospective voters being deterred from going to the polls. Pitts & Neumann, *supra* note 5, at 345 (footnote omitted). For instance, persons will respond that they did not cast a ballot because they both did not like the candidates and because they lacked photo identification. Indeed, a federal court also recently recognized this very problem with these sorts of surveys. *Texas*, 2012 WL 3743676, at *17 (citations omitted).

47. *See* Frederic Charles Schaffer & Tova Andrea Wang, *Is Everyone Else Doing It? Indiana's Voter Identification Law in International Perspective*, 3 HARV. L. & POL'Y REV. 397, 397 (2009) (noting that "opponents believe that the Indiana [photo identification] law will inflict the most widespread disfranchisement" of any state's voter identification law).

48. For instance, this approach does not capture those persons without a photo identification who were not offered a provisional ballot by a poll worker or who did not accept a provisional ballot offered by a poll worker.

form contains three important pieces of information for each county: (1) the total number of ballots cast; (2) the total number of provisional ballots cast; and (3) the total number of provisional ballots counted. The numbers provided by each county on its CEB-9 are reported in Appendix A.[49]

 A public records request was made to each of Indiana's ninety-two county clerks to request all documents related to provisional balloting.[50]

 Follow-up emails and phone calls were made to secure responses to the public records request from each county.[51] In some instances, there were discrepancies between what a county reported to the state on its CEB-9 form regarding the total provisional ballots cast and/or counted and what the county provided in terms of documents in response to the public records request. When discrepancies arose, attempts were made to contact county officials to resolve those discrepancies. Ultimately, we obtained responses from all ninety-two counties.[52]

 I undertook a review of the provisional balloting documents obtained from the counties to determine (1) the total number of provisional ballots cast, (2) the total number of provisional ballots counted, (3) the total number of photo identification-related provisional ballots cast, (4) the total number of photo identification-

49. For the primary election, ninety-one of Indiana's ninety-two counties filed a CEB-9. Blackford County did not.

50. There are three basic documents related to provisional balloting in Indiana: the PRE-4, PRO-10, and PRO-2 forms. The PRE-4 form is filled out by the prospective voter and the poll workers. *Assessing the Impact*, *supra* note 6, at 515–16. Importantly for purposes of this research, the PRE-4 contains a box that a poll worker can check off to indicate that the reason for the casting of the provisional ballot is a lack of photo identification or a lack of HAVA identification. *Id.* at 515. The PRO-10 form is filled out by a prospective voter who has returned to the county election office within the ten-day post-election window to validate a provisional ballot cast because of a lack of photo identification. *Id.* at 519. The top half of the PRO-2 form is initially filled out by the prospective voter to provide the prospective voter's name, address, and other information. *Id.* at 514. After the election, the bottom half of the PRO-2 form is filled out by the county election board to indicate whether the provisional ballot was counted and, if not counted, to indicate the reason the provisional ballot was not counted. *Id.*

51. In addition to specifically requesting all PRE-4, PRO-10, and PRO-2 forms, if a county had created a spreadsheet for the purpose of tracking provisional ballots, we also sometimes received a spreadsheet. A few counties also provided minutes from meetings of the local election board at which provisional ballots were discussed.

52. We obtained provisional balloting documents from all the counties that reported to the State as having provisional ballots at the primary election. For those counties who had reported to the State as having no provisional ballots at that election, we obtained confirmation that no provisional balloting documents were available.

related provisional ballots counted, (5) the total number of HAVA identification-related provisional ballots cast, and (6) the total number of HAVA identification-related provisional ballots counted.

 Notably, a fairly conservative approach was adopted in determining what constituted a photo identification-related provisional ballot (or HAVA identification-related provisional ballot) and what constituted a provisional ballot that had been counted. A provisional ballot was not determined to be related to photo identification (or HAVA identification), or to have been counted, unless the documents obtained from the county clearly indicated the provisional ballot had been cast for photo identification-related (or HAVA identification-related) reasons or been counted by the local election board as part of the county's final canvass of votes.

Before moving on to a presentation of the results, one thing to highlight is the unique nature of this research approach. To the best of my knowledge, this is the first statewide examination of the impact of a photo identification law on the electorate that relies *entirely* on provisional balloting documents themselves.[53] Previous studies that have measured the impact of photo identification laws by relying on provisional balloting have all been generated, at least in part, by using survey data or self-reported data at the county or state level.[54] In contrast, the data gathered here relies on the documents themselves. This is important because actually examining the documents likely provides a more accurate empirical picture.[55]

53. In the fall of 2012, the *Atlanta Journal-Constitution* published a news article that provided data on the number of provisional ballots not counted due to Georgia's photo identification law, although it's not clear what the underlying basis was for this data. Shannon McCaffrey, *Voter Turnout Surges Amid Five-Year ID Law,* ATL. J.-CONST., Sept. 3, 2012, at 1A (reporting that since its implementation in 2007, the ballots of 1586 Georgians did not count because of the photo identification law, while there were 13.6 million overall votes cast during that period).

54. *See generally* Pitts & Neumann, *supra* note 5; *see also* THE PEW CTR. ON THE STATES, PROVISIONAL BALLOTS: AN IMPERFECT SOLUTION 5 (2009).

55. In the vast majority of instances, there is not much of a difference between what the counties report to the state on their CEB-9 in terms of provisional ballots cast and counted, and what the documents show. However, on occasion, there is a large difference. For instance, in its CEB-9 report to the state for the 2012 primary election, Marion County reported having 130 total provisional ballots, of which 18 were not counted. However, a review of the actual documents showed 116 provisional ballots, of which *101* were not counted.

II. DATA AND ANALYSIS OF PHOTO IDENTIFICATION AND PROVISIONAL BALLOTS AT THE 2012 INDIANA PRIMARY

The results of the research from the 2012 primary are shown in Table A. Table A also includes a comparison of those results with data previously obtained from the 2008 primary.[56] Discussion of these results follows. In addition, individual data for all ninety-two counties is included in Appendix A.

56. The 2008 primary data is taken from Pitts & Neumann, *supra* note 5, at 352–53 (footnotes omitted).

Table A

Category	**2012 Primary**	**2008 Primary**
Total Ballots[57]	957,272	1,727,023
Total Provisional Ballots	605	2,771
Total Provisional Ballots Counted	98	752
Total ID Provisional Ballots[58]	122	446
Total ID Provisional Ballots Counted[59]	27	94
Provisional Ballots Cast as Percentage of Total Votes	0.06%	0.16%
ID Provisional Ballots Cast as Percentage of Total Votes	0.012%	0.026%
ID Provisional Ballots as a Percentage of Total Provisional Ballots	20.1%	16.1%
Total Provisional Ballots Counted as a Percentage of Total Provisional Ballots Cast	16.1%	27.1%
ID Provisional Ballots Counted as a Percentage of ID Provisional Ballots Cast	22.1%	21.1%

There are a number of ways in which the data from the 2008 primary and the 2012 primary elections are substantially similar. First, in relation to the total number of ballots cast at the election, the overall number of provisional ballots cast and the overall number of identification-related provisional ballots cast was quite

57. The total number of ballots cast comes from the CEB-9 forms filed with the state with the exception of the total number of ballots cast from Blackford County which comes from the Indiana Secretary of State's website. ELECTION DIV., IND. SEC'Y OF STATE, PRIMARY ELECTION TURNOUT AND REGISTRATION (2012), *available at* http://www.in.gov/sos/elections/primary12/2012PrimaryElectionTurnoutandAbsenteeChart.pdf

58. The total ID provisional ballots combines the number of photo identification-related provisional ballots cast with the number of HAVA identification-related provisional ballots cast. At the 2008 primary, there were 47 HAVA identification-related provisional ballots cast. *Assessing the Impact*, *supra* note 6, at 499. At the 2012 primary, there were 10 HAVA identification-related provisional ballots cast.

59. The total ID provisional ballots counted combines the number of photo identification-related provisional ballots counted with the number of HAVA identification-related provisional ballots counted. At the 2008 primary, there were 16 HAVA identification-related provisional ballots counted. *Assessing the Impact*, *supra* note 6, at 499. At the 2012 primary, there were 2 HAVA identification-related provisional ballots counted.

small. Second, the majority of provisional ballots cast were not related to identification; they were cast for some other reason, such as the voter's name not appearing on the registration list. Third, most provisional ballots cast were not counted, and most identification-related provisional ballots cast were not counted. Fourth, the rate at which identification-related provisional ballots were counted was very similar across the two elections with about 22% of the identification-related provisional ballots counted in 2012 and about 21% of those provisional ballots counted in 2008.

The differences in the data from each election, though, are perhaps more interesting. For starters, the overall number of provisional ballots cast at the 2012 primary in relation to the total number of ballots cast was far less than one would have predicted if one had made an estimate based off the 2008 primary. While the 2012 primary had a little more than half as many total voters as the 2008 primary, the 2012 primary had only about one-fifth of the total number of provisional ballots cast at the 2008 primary. In short, the rate of provisional balloting was much lower in 2012 than it was in 2008. More specific to voter identification, the number of identification-related provisional ballots cast also decreased dramatically in relation to the overall number of ballots cast. Based upon what happened at the 2008 primary, one would have expected a little less than 250 identification-related provisional ballots to be cast at the 2012 primary. Yet, less than half that many (122) identification-related provisional ballots were actually cast.

Lots of things might explain why the overall rate of provisional ballots and the overall rate of identification-related ballots fell from the 2008 primary to the 2012 primary. For instance, the reduced rate of provisional ballots might be explained by better maintenance of voter registration lists by the state, by poll workers taking extra steps to avoid the use of provisional ballots by directing prospective voters to the correct precinct, or by prospective voters being less likely to take the time to fill out a provisional ballot. The reduced rate of identification-related provisional ballots might be explained by more persons obtaining photo identification, by more prospective voters deciding to stay home because they knew they did not have proper identification, or by more persons without photo identification casting absentee ballots by mail.

While it is not possible to definitively know what caused the reduced rate of provisional ballots and voter identification ballots at the 2012 primary when compared with the 2008 primary, one obvious explanation might come from differences in the makeup of the electorate at these elections. More specifically, perhaps the vast partisan differences in the electorate between these elections would explain any shifts in provisional balloting rates. The 2008 primary was overwhelmingly Democratic because the highest-profile primary contest was the Obama-Clinton Democratic presidential primary. In that primary election, there were 1,725,951 total voters with 1,278,355 (approximately 74%) votes cast in the Democratic presidential primary.[60] In contrast, the 2012 primary was overwhelmingly Republican because the highest-profile primary contest[61] was the Lugar/Mourdock Republican Senate contest. In that primary election, there were 957,510 total voters[62] with 661,606 (69%) votes cast in the Republican Senate contest.[63]

The vast difference in partisan makeup of the electorate—heavily Democratic in 2008 in comparison to heavily Republican in 2012—suggests two things. First, Democratic voters are more likely to cast a provisional ballot than Republican voters. In other words, leaving voter identification issues aside, for whatever reason (name not on registration list, etc.), Democrats are more likely to cast provisional ballots than their Republican counterparts. Second, Democrats are more likely to have voter identification issues than Republicans. While this has generally been the conventional wisdom when it comes to photo identification laws—that they bear more heavily on Democratic voters than Republican voters[64]—to the best of my knowledge this is the research that

60. ELECTION DIV., IND. SEC'Y OF STATE, 2008 INDIANA ELECTION REPORT (2008), *available at* http://www.in.gov/sos/elections/files/AR-M550N_20120404_152743.pdf.

61. *See* Michael Finnegan, *Lugar Loss Tempers Romney Primary Victories for GOP Establishment*, DAILY HERALD (May 8, 2012).

62. ELECTION DIV., IND. SEC'Y OF STATE, PRIMARY ELECTION TURNOUT AND REGISTRATION (2012), *available at* http://www.in.gov/sos/elections/primary12/2012PrimaryElectionTurnoutandAbsenteeChart.pdf.

63. *Election Results*, IND. SEC'Y OF STATE, http://www.in.gov/apps/sos/primary/sos_primary12?page=office&countyID=-1&partyID=-1&officeID=4&districtID=-1&districtshortviewID=-1&candidate= (last visited Feb. 18, 2013).

64. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting) ("Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.").

most suggests this skew when it comes to *actual voters at an election*.

Moving outside of an analysis of how the numbers differed from the 2008 primary election, the research generated from the 2012 election suggests several other things. For starters, the level of actual disfranchisement caused by photo identification laws is not all that high in relation to the total number of votes cast. To be fair, it is true that an examination of provisional ballots alone does not conclusively establish the rate of actual disfranchisement at an election. For instance, prospective voters without photo identification may have, for example, just not shown up at the polling place because they knew they did not have proper identification.[65] However, at least at this point, there is not a lot of solid evidence to suggest that thousands upon thousands of voters in Indiana are knowingly staying away from the polls due to a lack of photo identification. Indeed, the available evidence suggests that many Indiana residents have taken advantage of the free identifications being handed out by the State, as the State has issued more than 800,000 free photo identification cards since 2007.[66]

On the other hand, even though the evidence of actual disfranchisement remains low in relation to the total number of ballots cast, there continue to be individuals who are unable to cast a countable ballot due to the photo identification law. Moreover, with the lack of evidence of actual instances of in-person voter fraud,[67] it's quite possible that even though the actual disfranchisement caused by photo identification on the overall electorate is slight, the actual disfranchisement is vastly higher than the

65. Prospective voters may also either not have been offered a provisional ballot by the poll workers or may have refused to engage in the provisional balloting process due to the length of time that process can take. In addition, some provisional balloting materials do not provide the reason why the provisional ballot was cast and some of these "mystery" provisional ballots may have been cast due to a lack of photo identification.

66. Press Release, Ind. Sec'y of State, Media Information guide for Indiana 2012 General Election 7 (Oct. 30, 2012), *available at* http://www.in.gov/sos/files/2012_General_Election_With_Attachments_10-30.pdf.

67. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 194 (2008) (plurality opinion) ("The only kind of voter fraud that [Indiana's photo ID law] addresses is in-person voter impersonation at polling places. The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history.").

amount of in-person voter fraud that would occur. From this perspective, one could easily conclude that a photo identification law does much more harm than good.

One last point related to the count rate for identification-related ballots in Indiana. The count rate for identification-related provisional ballots is very low—about 80% of identification-related provisional ballots do not get counted. This would not seem to be a problem if one thought that most of these provisional voters were illegitimate fraudsters. However, it seems unlikely that persons who are engaging in voter fraud would leave a paper trail of their fraud by filling out provisional ballots. This suggests that perhaps the burden on the prospective voter of validating an identification-related provisional ballot is too high and that Indiana should amend this portion of its photo identification law to reduce this burden. For example, instead of requiring a prospective voter to come back to the election office after the election to validate the provisional ballot, perhaps local officials could create a mechanism to validate these ballots, such as signature-matching, to streamline this process. In other words, it may make sense to put more of the post-election burden of validation on election administrators rather than on the voters themselves.

III. CONCLUSION: MORE WORK TO DO

When it comes to photo identification, the empirical argument is often based on theory rather than actual reality. For instance, those who support photo identification laws theorize that there is a vast opportunity for in-person voter fraud because of invalid names on the registration list.[68] On the other side, those who oppose photo identification laws theorize that there is a vast opportunity for disfranchisement because some registered voters do not have photo identification.[69] This article is part of a continuing project to move beyond arguments of the *opportunity* for harm and toward the *actuality* of the harm. Hopefully, more researchers on both sides of the debate will move in this direction.

68. *Id.* at 194–98 (discussing the state's fraud prevention justification for photo ID). Indiana's lists of registered voters included "the names of thousands of persons who had either moved, died, or were not eligible to vote because they had been convicted of felonies.'" *Id.* (citation omitted).

69. *Supra* notes 26–28 and accompanying text.

Appendix A

County	Total Ballots	CEB-9 Total Provisionals	CEB-9 Counted Provisionals	Documents Total Provisionals	Documents Counted Provisionals	Photo ID-Related Provisionals	Photo ID-Related Counted	HAVA Total Provisionals	HAVA Counted
Adams	5449	3	0	3	0	0		0	0
Allen	46823	21	3	21	3	1	0	0	0
Bartholomew	12115	1	1	1	1	0	0	0	0
Benton	1779	1	0	1	0	1	0	0	0
Blackford	2,057	Not reported	Not reported	0	0	0	0	0	0
Boone	15226	15	15	14	1	0	0	0	0
Brown	3537	8	1	6	1	2	1	0	0
Carroll	3663	3	0	1	0	1	0	0	0
Cass	6149	6	4	6	3	4	2	0	0
Clark	13001	28	17	24	13	2	1	0	0
Clay	4885	0	0	0	0	0	0	0	0
Clinton	5730	2	1	2	0	0	0	0	0
Crawford	1871	0	0	0	0	0	0	0	0
Daviess	4417	0	0	0	0	0	0	0	0
Dearborn	6831	0	0	0	0	0	0	0	0
Decatur	4487	0	0	0	0	0	0	0	0
DeKalb	6036	1	1	1	1	1	1	0	0
Delaware	19724	11	Not reported	10	0	2	0	0	0
Dubois	5809	1	0	1	1	0	0	0	0
Elkhart	23135	37	7	37	6	2	2	0	0
Fayette	3565	2	0	3	0	3	0	0	0
Floyd	9605	6	2	6	2	3	1	0	0
Fountain	3172	8	0	8	0	0	0	0	0
Franklin	3738	5	3	5	3	3	2	1	1
Fulton	2889	1	1	1	1	0	0	0	0
Gibson	5023	1	0	1	0	1	0	0	0
Grant	10566	4	1	3	1	1	1	0	0
Greene	5104	0	0	0	0	0	0	0	0
Hamilton	47250	1	0	1	0	1	0	0	0
Hancock	13431	11	2	9	1	1	0	0	0
Harrison	6764	15	5	14	5	0	0	1	0
Hendricks	21863	11	1	9	1	1	0	0	0
Henry	8769	2	0	2	0	2	0	0	0
Howard	23607	10	0	7	0	1	0	0	0
Huntington	6334	0	0	0	0	0	0	0	0
Jackson	6282	2	1	3	1	1	1	0	0
Jasper	5928	0	0	0	0	0	0	0	0
Jay	3288	5	1	5	1	1	1	0	0
Jefferson	5311	2	0	2	0	0	0	0	0
Jennings	4740	11	9	2	0	0	0	0	0
Johnson	23350	0	0	0	0	0	0	0	0
Knox	6559	0	0	0	0	0	0	0	0
Kosciusko	11940	7	2	7	0	3	0	0	0
LaGrange	3952	2	1	1	0	0	0	0	0
Lake	61270	47	5	30	2	9	0	0	0

LaPorte	13386	5	1	4	1	0	0	1	0
Lawrence	7911	7	3	5	0	4	0	0	0
Madison	21201	10	2	9	1	5	0	0	0
Marion	129288	130	112	116	15	1	0	1	0
Marshall	6259	2	1	3	1	2	0	0	0
Martin	1916	2	0	2	0	1	0	0	0
Miami	4879	8	0	10	0	1	0	0	0
Monroe	15530	42	6	39	1	5	0	2	0
Montgomery	8073	1	0	1	0	1	0	0	0
Morgan	12874	17	3	18	3	3	2	0	0
Newton	2566	2	2	2	0	0	0	0	0
Noble	6724	2	0	2	0	0	0	0	0
Ohio	769	1	0	2	0	1	0	0	0
Orange	3561	13	0	13	0	0	0	0	0
Owen	3973	2	0	2	0	0	0	1	0
Parke	3329	6	1	6	1	3	1	0	0
Perry	2750	3	1	3	1	1	1	0	0
Pike	2730	2	0	2	0	0	0	0	0
Porter	23571	11	1	11	1	5	1	0	0
Posey	3786	7	0	7	0	1	0	0	0
Pulaski	2483	0	0	0	0	0	0	0	0
Putnam	5692	2	0	2	0	0	0	0	0
Randolph	5203	3	0	3	0	0	0	1	0
Ripley	4130	1	0	1	0	0	0	0	0
Rush	3889	1	0	1	0	1	0	0	0
St. Joseph	32729	9	2	9	2	5	1	1	1
Scott	3995	4	1	3	1	1	0	0	0
Shelby	7040	1	0	1	0	0	0	0	0
Spencer	2591	1	0	5	0	1	0	0	0
Starke	3693	14	3	13	3	12	2	0	0
Steuben	5847	6	4	6	4	3	3	0	0
Sullivan	3621	0	0	0	0	0	0	0	0
Switzerland	1669	0	0	0	0	0	0	0	0
Tippecanoe	16449	21	9	21	9	2	0	0	0
Tipton	3646	0	0	0	0	0	0	0	0
Union	919	0	0	0	0	0	0	0	0
Vanderburgh	17647	9	0	9	0	0	0	0	0
Vermillion	3211	1	0	1	0	0	0	0	0
Vigo	15401	20	7	19	5	4	1	0	0
Wabash	5609	0	0	0	0	0	0	0	0
Warren	1584	0	0	0	0	0	0	0	0
Warrick	8463	3	0	2	0	2	0	0	0
Washington	3604	0	0	0	0	0	0	0	0
Wayne	10446	3	2	0	0	0	0	0	0
Wells	5871	2	0	2	0	0	0	0	0
White	4191	2	0	2	0	0	0	1	0
Whitley	5549	1	1	1	1	0	0	0	0
Totals	**957272**	**668**	**246**	**605**	**98**	**112**	**25**	**10**	**2**