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From: election-law-bounces@mailman.lls.edu [<mailto:election-law-bounces@mailman.lls.edu>]

On Behalf Of Lowenstein, Daniel

Sent: Tuesday, January 08, 2008 2:17 PM

To: Smith, Brad; Election Law

Subject: [EL] Bauer and Smith on Crawford

Warning: This is one of my long messages, and will not go on the syllabus as required reading.

Brad Smith makes some interesting points but he does not address what I understand to be Bob Bauer's central point on the voter ID controversy. Brad's arguments address the constitutional calculus in Crawford and other voter ID cases. Bob's point, as I understand it, goes more to the politics of the issue than to the constitutional law.

Bob is willing to acknowledge, perhaps only for the sake of argument, that in fact there is little evidence of people being prevented from voting by voter ID laws. But his argument is based on the premise that whatever the actual effects, the agitation in favor of voter ID laws is driven by the desire on the part of Republican politicians to prevent some portion of Democratic voting blocs from voting. Given that impetus behind the push for these laws, Republicans should not be surprised that Democrats--or fair-minded people generally--react with strong hostility. And the hostility is not greatly tempered, even if there is doubt whether the Republicans' hopes for suppressing Democratic votes are actually being fulfilled.

It seems likely to me that some Republican politicians have agitated for these laws for the reason Bob states. At least, I am willing to assume so for the sake of argument. Nevertheless, I find Bob's argument insufficient and troubling. Even on the plausible assumption that part of the motivation and causation for adoption of voter ID laws is the nasty one Bob mentions, he is unjustified in assuming it is the sole motivation and causation. The bare desire of some people in one party to take votes away from the other party is not usually sufficient for the enactment of legislation, especially when the legislation is as visible as the photo ID laws have been. There are at least two important reasons that supporters--including badly motivated supporters--have been able to succeed in some states:

1. A lot of the support for these laws, especially early on, was generated by a good faith belief that in-person voter fraud was a significant problem. John Fund's book and various anecdotal forms of evidence that circulated in the press and elsewhere undoubtedly were persuasive to many and probably most people who encountered them. Later, many of the incidents reported were shown either to be unsubstantiated or to reflect problems that photo ID will not address. But this does not cast doubt on the sincerity of those who were initially persuaded.

Even those who have persisted in claims that photo ID is needed to prevent voter fraud are not necessarily engaging cynically in a plot to steal votes. Once people form a position, they have a tendency to stick to it, and to selectively filter or interpret evidence to support the initial

position. This is not an especially admirable human trait but it is one that afflicts all of us and it is not the same as cynicism, political greed, or trickery. The tendency is especially strong for politicians who have taken public positions, because our political system is not kind to those who show signs of thoughtfulness and flexibility on public issues.

2. I believe it is the case that when members of the public are asked, they support photo ID requirements by strong majorities, including Democratic members of the public. Perhaps if they were told beforehand that there does not seem to be much fraud in in-person voting and that photo ID requirements probably create enough inconvenience for some people to prevent them from voting, they would give a different answer. But only perhaps. People tend to form their opinions on the basis of their own experience. For most people, photo ID requirements are pervasive, not even a minor nuisance, and seem to be a common-sensical precaution. Public opinion matters in a democracy, though it matters to different degrees and in different ways under different circumstances. In this case, public opinion encourages legislators to support photo ID laws. If they do, there is no obvious way in which an opponent can use the issue against them. If they don't, and if there should !

happen to be a voter fraud scandal, the anti-ID vote could be used against them effectively in a campaign. Even without a scandal, an anti-ID vote could put the legislator slightly on the defensive in various forums.

Therefore, though I agree with Bob that part of the motivation for the photo ID laws is nasty, I am not persuaded that this is true to an unusual degree. Furthermore, and this is my reason for going on at such length, I think Bob engages in a form of argument that is very much overused in our election-law constitutional debates. It is akin to the kind of populism being peddled generally by candidates like Huckabee and Edwards. (I admit it, I deplore populism.) In our election-law debates it takes the form of assuming that it is a sufficient reason for opposing or striking down laws that they are badly motivated. As in the case of Bob's photo ID argument, assumptions about motivation are usually greatly oversimplified. The popular version of this nowadays is that laws favoring incumbents are suspect. In the campaign finance debates, for example, I think some skeptics of regulation--Scalia for one--have placed much too much emphasis on the self-serving effects!

of regulation that supposedly motivate the support for regulation in Congress and in state legislatures. The skeptics are better served, I believe when they emphasize the genuine imposition on free speech and other political liberties that regulations often entail. As both Bob Bauer and Brad Smith are disposed to do, in their better moments.

Best,
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From: election-law-bounces@mailman.lls.edu on behalf of Smith, Brad
Sent: Tue 1/8/2008 8:58 AM
To: Election Law
Subject: Re: [EL] Electionlawblog news and commentary 1/8/08

If I may, I am going to use this listserve to briefly address arguments Bob Bauer makes in his recent post at his blog, re my comments at the ACS briefing on the Crawford case. Bob's comments are here: <http://www.moresoftmoneyhardlaw.com/news.html?AID=1169> I am using the list to comment because this dispute is not something in which the Center for Competitive Politics, which I chair and where I normally blog on campaign finance issues, is involved - CCP (www.campaignfreedom.org <<http://www.campaignfreedom.org/>>) has specifically avoided issues of vote fraud and voting rights - and this debate is probably too arcane to be of interest at other sites where I sometimes blog.

As always, Bob's argument is respectfully made and made persuasively so as to be worthy of great respect. Before reading this you should read Bob's comments first. (BTW, you can watch the ACS event here: <http://www.americanconstitutionsociety.org/node/5840>.)

The problem with opposition to voter photo ID laws, in my mind, is largely that the plaintiffs have simply failed to make a case that these laws - even the Indiana law, the most stringent of the bunch - disenfranchise many people. I have agreed that there is not, to my eye, much fraud of the type that these laws can prevent (there are others who vehemently disagree). But that is not the same as saying there is no such fraud - clearly there is, just as there clearly are isolated incidents of corruption through, for example, campaign finance. But Constitutional analysis begins with demonstrating that constitutional rights are violated, a case that is obvious in the context of campaign finance, where it is easy to identify people whose speech is restricted, but much less clear here (hence the absence of plaintiffs actually denied the right to vote by the Indiana law).

In this context, it is tempting nonetheless to hold that we should err on the side of protecting the right to vote, especially given the importance of that power. But that argument has a problem that is absent in the context of most other election disputes, and it is this: to err in favor of "protecting the right to vote" is to simultaneously err in favor of violating the right to vote. How so? Because to the extent people are voting fraudulently, this represents vote dilution of legitimate votes - a clear and long recognized and understood violation of the right to vote.

This is not a case of simply balancing a government "interest" with individual "rights." True, the government has at least some interest - perhaps not terribly strong in the case of these laws - in managing and operating elections. That interest is, to a large extent, the "broken windows" part of my argument, and given the equipoise of "rights" involved, even that mild government interest is perhaps decisive. I develop that argument a bit more fully here: <http://www.pennumbra.com/debates/debate.php?did=12>. But the bigger point is, until plaintiffs make a better case that these laws are actually preventing more legitimate ballots from being cast

than they are preventing fraudulent ballots from being cast, they haven't demonstrated that on balance, the right to vote will be better vindicated by striking down the Indiana law (and less restrictive photo ID laws in other states, that they also oppose) than by upholding the Indiana law.

Nor is this a case of a real right - the right to vote - being in contest with some unrecognized "right." This is an argument we see often in campaign finance - that somehow one person's right to speak - a right specifically in the Constitution - conflicts with another's "right to equal political influence." But there is no such "right to equal political influence." "Equal political influence" has never been recognized as a Constitutional right (at least not to the extent one would take it beyond the actual act of voting). Indeed, the First Amendment presumes the opposite - that the Government cannot limit speech for the purpose of equalization of influence. In the voter ID cases, though, the Constitutional right posed against the plaintiffs' claimed right - the right not to have one's legitimate ballot diluted by fraudulent ballots - is a long-standing Constitutional right, and well understood.

So plaintiffs have to demonstrate 1) that the right to vote is being violated, and 2) that the cure they propose will not lead to a greater violation of the same right to vote, through the vote dilution caused by fraudulent voting that these laws might otherwise prevent. And it is the latter in particular that is simply missing in Crawford. On the first issue, I am not sure that the plaintiffs have carried their burden. Despite the lack of actual plaintiffs unable to vote, almost surely some legitimate voters find these laws to be enough to prevent them from voting. But voter registration also has that effect. Closing the polls at 6:00 p.m. rather than 9:00 p.m. has that effect. Again, this is different from campaign speech - my speech limits no one else's. But at some point the polls must close, and that will be a burden to some people. One can argue, I think, that our registration laws are needlessly strict and do violate the right to vote. But the plaintiffs here! , I think, have failed to deal with such issues - what would a decision in their favor mean for other elements of the law? They have identified no stopping point. The Court will be wise to consider the ramifications of its action on such issues. On the second issue, however, the plaintiffs have clearly failed to demonstrate that the solution they seek will not constitute a greater violation of the right to vote (by allowing fraudulent ballots to dilute legitimate ballots) than leaving the law standing.

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