Foreword: Demosprudence Through Dissent

Lani Guinier

Appendix

Consider this possible framing of a Crawford demosprudential dissent:

The photo ID requirement is a solution in search of a problem. There is no demonstrable connection between Indiana’s vague ambition of ensuring “election integrity” and the requirement of showing a photo ID at the polls. This law prevents only the least likely and most primitive type of election fraud: fraud by in-person voter impersonation. The state is apparently worried about the voter who enters the polling booth once to cast a ballot as himself and then puts on a fake moustache and returns to the polls to vote as his dead grandfather. If this phenomena were happening in massive numbers, then it would be understandable and, in fact, laudable for Indiana’s legislature to take action to prevent this. However, as this Court itself has acknowledged, there has been not one single reported incident of this type of fraud in Indiana. So while Justice Stevens is correct that the state has an interest in “counting only the votes of eligible voters,” Indiana’s law targets the wrong people. To the extent that election fraud is an issue today, it is an insider job: election officials are almost wholly responsible for flawed election outcomes through sloppiness, administrative errors, and outright manipulation.

Imagine that the State of Indiana, instead of worrying about election fraud, is worrying about fraud on high school graduation exams. These exams are important both because schools are rated on their cumulative exam performance and because each student must pass the exam in order to graduate and receive her high school diploma.

1 I am indebted to the outstanding work of Kimberly Liu and Sandra Pullman who spent many hours brainstorming, researching and drafting the demosprudential proffer that follows.


In the past, some schools’ test scores were dishonestly inflated. The falsified results were due to school officials doctoring the answer sheets after the students had taken the exam, as well as scantron machine malfunctioning. Having identified the problem broadly as “some type of cheating,” the State decides to place the burden for the remedy on the students: it requires every student to obtain a state-issued ID and present it at the exam site to prevent students from having someone else take the exam for them. As many students are too young to drive or too poor to own cars, they do not have drivers’ licenses. Others come from broken homes and can’t get access to their birth certificates in time to sit for the test. Some students bring their school IDs, but their own principal rejects them at the door, insisting they obtain a particular state-issued ID. “Tough luck,” says the principal. “Find a way to get a license, and you can try again next year.” Maybe the students return the next year with an ID, maybe not. For the thousands who do not return, the photo ID law has effectively rendered them high school dropouts. And the benefit that justified this denial? Because student impersonation is not a source of the “cheating,” the integrity of the process has not been improved. In fact, while the legislature was focusing a non-existent problem, the real source of the fraud went ignored.

Under the lead opinion’s reasoning, such a scenario represents a “precise interest” that justifies putting up unnecessary barriers to our citizens’ exercise of a significant ritual. In all likelihood, the photo ID law is not a misunderstanding about how to prevent fraud, but a restriction actually intended to make it more difficult for some Americans to vote. The lead opinion acknowledges that partisanship likely played “a significant role” in the decision to enact this law. All of the Republicans in the General Assembly voted in favor of the law and the Democrats were unanimous in opposing it. It is no coincidence that many of the groups unlikely to have photo ID, and thus be barred from voting, tend to vote Democrat. Self-interested politicians have used the specter of voter fraud to shape a more favorable electorate and manipulate political outcomes for nearly two centuries. The winners in these strategies have sometimes been Democrats and sometimes Republicans; the loser is always democracy.

II.

No available evidence suggests that voters are intentionally corrupting the electoral process, let alone in numbers that offset this law’s injury to voters. The Indiana law has the undeniable effect of making it more difficult for some people to vote. The district court conservatively estimated that 43,000 of Indiana’s residents do not have the requisite ID. This number is likely even larger: national surveys estimate that roughly 6-10% of voting-age Americans lack a state-issued photo ID. In addition, those residents without IDs are disproportionately members of already vulnerable groups: the elderly, the disabled, the poor, and racial minorities. For example, 36% of Georgians over age 75 do not have a driver’s license according to the Georgia

7 See Lorraine C. Minnite, The Politics of Voter Fraud 14, available at http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf (detailing how “the specter of voter fraud has been manipulated by elites to restrict and shape the electorate for nearly two centuries”).
chapter of AARP. Nearly 10 percent of the 40 million Americans with disabilities lack any form of state-issued identification. In Wisconsin, the rate of driver’s license possession among African Americans has been found to be half that for whites, and in 2005 only 22% of black males age 18 to 24 had a driver’s license. A Department of Justice study of Louisiana residents in 1994 revealed that African Americans were four to five times less likely than whites to have driver’s licenses or other picture identification cards.

The Court finds this unequal impact irrelevant in determining the weight of the burden on voters. Instead, it reduces the inquiry to asking, but how inconvenient would it be for those people to get the proper identification card? Well, the necessary efforts can be substantial: they include acquiring a birth certificate, traveling to a distant BMV office to get the ID, taking time off work to make these trips, and paying the fees and expenses associated with getting the necessary documentation. Indiana’s offer of a provisional ballot for those who show up at the polls without a photo ID is no consolation. The voter must return to the election board by noon ten days after the election with proof of identification. This makes the provisional ballot a meaningful remedy only for people who forgot their ID at home, not for those persons who don’t already possess one. For the latter, ten extra days does little to ease the underlying burden.

But it is simply not enough to try to weigh the inconvenience involved in overcoming this barrier. Such an analysis treats the right to vote as little more than a privilege or a gift. If voting is fundamental and, I believe that it is, a claimed injury to this right deserves special consideration. These burdens involved in obtaining a photo ID may not be insurmountable, but the voters of Indiana should not be the ones to bear them. If the State of Indiana really believes that photo IDs are necessary, then the burden should be on the State of Indiana to ensure that each of its eligible citizens has the requisite ID to vote.

This law does more than inconvenience, it excludes. The State of Indiana draws a line to separate its deserving citizenry: Those who possess the requisite ID can vote. Those without it cannot, and are unceremoniously excluded from “we the people.” In a society based on democratic principles, denial of the franchise by any means is not a mere inconvenience, but a humiliation. At this nation’s founding, men without property could hope to own enough property to vote one day. Yet the property-based restrictions on the franchise let those excluded know they were not first-class members of this country and were, in fact, perhaps not capable of self-governance. It’s no coincidence that the photo ID law falls disproportionately on some of our already marginalized groups.

Our history of restricting the franchise should have made my colleagues more attentive to state-imposed obstacles to the exercise of our fundamental obligation as citizens. In treating the right to vote so casually, the Court too soon forgets our two-hundred year history of disenfranchised
groups struggling just to be able to cast a ballot and have that ballot counted. The fight in this country for the right to vote has been fundamentally one for inclusion. Perhaps, the members of today’s majority should go back and listen to Fannie Lou Hamer’s testimony at the 1964 Democratic National Convention, where she recounted laying down her livelihood and her body all because she wanted to register to vote, to become a first-class citizen, and to live as “a decent human being.” Perhaps, they should recall this Court’s words from that very same year: “Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . . .” Has the right actually become less important as we have moved forward in history? When did a right fought for so strongly become little more than a privilege subject to the caprice of the legislature? We fought a revolution for self-governance, that ought to mean something.

These considerations did not register at all in the Court’s balancing test. Finding that neither the burden to voters nor the state’s interest could be exactly “quantified,” the majority deferred wholly to the state legislature and ruled against the voter. In reaching this outcome, this Court announces that the right to vote is of so little consequence that it may be cast away without ceremony or adequate justification. Those Indiana residents who do not possess photo IDs have now suffered an indignity twice. First, they were told by their own State that they are no longer worthy of the ballot, and now they are told by this Court that this exclusion barely registers on the scales of justice.

III.

Today’s decision is a stark reminder that the fundamental right to vote is largely mythological. There is actually no provision of federal law that affirmatively guarantees citizens the right to vote. While we have staged wars abroad to guarantee non-Americans the right to cast a ballot, it is not even a right that we guarantee our own people. Both the Afghan Constitution and the Interim Iraqi Constitution explicitly confer the right to vote-- the U.S. Constitution does not.

We can add this decision to the disturbing trend set in Bush v. Gore, in which this Court asserted that “[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States.” In other words, Florida’s state right to administer the election took precedence over counting every individual vote. And today, Indiana’s unfounded interest in preventing election fraud trumps the right of those otherwise eligible voters without state-issued IDs to cast a ballot.

Because there is no federal guarantee of the right to vote, states have complete control to enact arbitrary rules with vast consequences both for election outcomes and for individuals trying to cast ballots. The right to vote in federal elections is controlled by 50 states and 13,000 separate jurisdictions.
and unequally administered voting jurisdictions. Indiana, along with Georgia, has the most restrictive identification requirement in the country. Forty-eight other states manage to run their elections without this type of disfranchisement. Residents of Indiana now have less of a right to vote for President than their neighbors in Illinois and Ohio.

In all its talk of burdens, and interests, and balancing, and numbers, this Court forgets the simple truth that the right of all citizens to elect their representatives is a fundamental tenet of inclusion in society, and the most basic sign of our equal human dignity within a polity of which we are a part. Today, it’s the poor, the elderly, and minorities who are excluded. Who will be next? Voting should be a right guaranteed to all American citizens, not a privilege dispensed at the whim of politicians. If this is something our state governments and this Court cannot or will not protect without an explicit constitutional mandate, then perhaps we need one.

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Alternatively, a successful Crawford demosprudential dissent, had it been read from the bench, might have brought tears to some of those in the room as it reminded listeners of the struggles that people like Fannie Lou Hamer experienced in order to gain the basic right not to be treated the way the State of Indiana is now treating its indigent, infirm and elderly voters. Such a dissent might have taken a strong stance of righteous indignation:

Today’s decision, for all that it rejects the promises of our Constitution, should not come as a surprise. Voting restrictions have regularly designated some groups as powerful and some as powerless. Indeed, the promise of political rule by “we the people” has often been exposed as a myth. Yet the original consent community envisioned by the framers, which was limited to property-owning white males, has purportedly been expanded. Voting rights activists in the 1960s brought our democracy’s promises to bear, as disenfranchised communities organized to claim their rights to full citizenship. Fannie Lou Hamer, a Mississippi sharecropper and civil rights activist, has described her attempts to register to vote.

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21 Advancement Project, supra note Error! Bookmark not defined.


23 At this point the dissenter might play the audio of Hamer’s testimony before the Democratic National Convention in Atlantic City in 1964:

It was the 31st of August in 1962 that eighteen of us traveled twenty-six miles to the county courthouse in Indianola to try to register to become first-class citizens. We were met in Indianola by policemen, Highway Patrolmen, and they only allowed two of us in to take the literacy test at the time. After we had taken this test and started back to Ruleville, we was held up by the City Police and the State Highway Patrolmen and carried back to Indianola where the bus driver was charged that day with driving a bus the wrong color. After we paid the fine among us, we continued on to Ruleville, and Reverend Jeff Sunny carried me four miles in the rural area where I had worked as a timekeeper and sharecropper for eighteen years. I was met there by my children, who told me that the plantation owner was angry because I had gone down to try to register. After they told me, my husband came, and said the plantation owner was raising Cain because I had tried to register. Before he quit talking the plantation owner came and said, “Fannie Lou, do you know—did Pap tell you what I said?” And I said, “Yes, sir.” He said, “Well I mean that.” He said, “If you don’t go down and withdraw your registration, you will have to leave.” Said, “Then if you go down and withdraw,” said, “you still might have to go because we are not ready for that in Mississippi.” And I addressed him and told him and said, “I didn’t try to register for you. I tried to register for myself.” I had to leave that same night.

Hamer, supra note Error! Bookmark not defined.