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Election Law: Foreword

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FOREWORD

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I. INTRODUCTION.....	473
II. DYSFUNCTION	474
III. REMEDIES.....	477
IV. HOPE FOR THE FUTURE.....	479
V. CONCLUSION	480

I. INTRODUCTION

A course correction is sorely needed, and Americans know it. They sense there is something wrong with the way the public’s business is being carried out. The evidence can be traced to Ross Perot’s surprising insurgency in the 1992 presidential election.¹ It can be found in Congress’s abysmal approval ratings.² It can be

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1. See, e.g., David Firestone, *Election ’92 The Presidency: Perot Charts New Political Course*, *NEWSDAY*, Nov. 5, 1992, at 28.

2. Susan Page, *A Year Before Voting, A Nation of Discontent*, *USA TODAY*, Nov. 1, 2007, at 1A (citing that only twenty-nine percent of Americans approve of Congress’s job performance, a historic low that places Congress even below President Bush’s historically low approval rating of only thirty-two percent, and

found in numerous opinion polls citing the distrust and disgust that voters feel toward government and politicians.³ There is a sense among the electorate that neither major party is putting the public good ahead of its own partisan interests. Citizens see interest groups driving the policy agenda and causing gridlock. They recognize that big money is dominating our political system at the expense of the average voter. They feel very powerfully that serious issues are not being honestly addressed and, worse, that attack-style politics are impeding our ability to discuss thoughtfully the real issues. Voters sense all of these things, but they cannot quite figure out what is at the core of this political dysfunction.

II. DYSFUNCTION

Under the U.S. Constitution, election laws are left to the various states.⁴ Each can construct its own election process, decide when polls open and close, decide who qualifies to vote, and determine the cutoff point for eligibility.⁵ With the exception of the proscriptions enacted by the Voting Rights Act of 1965,⁶ which were designed to counteract racial barriers to voting, the federal government does not dictate how elections are to proceed; that is up to each state. There are advantages to this arrangement, but there are also real problems that result from it.

Primary among the problems is that, gradually and imperceptibly, election rules became dominated by the two major political parties, which control state legislatures and dictate election rules to suit themselves.⁷ Most election law as written perpetuates the dominance of two political parties, entities that have no basis for asserting their dominance under the U.S. Constitution. Worse, sometimes these laws are fashioned simply to

noting that the ratings indicate the nation's unhappiness with its current political situation).

3. THE PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, HOW AMERICANS VIEW GOVERNMENT: DECONSTRUCTING DISTRUST (Mar. 10, 1998), <http://people-press.org/reports/display.php3?ReportID=95>.

4. U.S. CONST. art. I, § 4.

5. See, e.g., Note, *Toward a Greater State Role in Election Administration*, 118 HARV. L. REV. 2314, 2323–25 (2005).

6. Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006).

7. See Jeffrey G. Hamilton, Comment, *Deeper Into the Political Thicket: Racial and Political Gerrymandering and the Supreme Court*, 43 EMORY L.J. 1519, 1542 (1994).

stake out the predominance of just one political party in a particular state through gerrymandering.⁸

Gerrymandering is the act of drawing the boundaries of legislative districts to the advantage of one political party or another. In the United States, the practice has been with us at least since the time of its namesake, Massachusetts Governor Eldridge Gerry, who created a district with such a peculiar geographic shape that it was caricatured as a dragon that was dubbed the “Gerrymander.”⁹ Unfortunately, in recent years, the problem has gone from bad to worse. Today, North Carolina’s 12th Congressional District looks like nothing so much as a lightning bolt. The shape of Texas’s 30th is indescribable; nothing but a Rorschach test even comes close to its formless shape. And these are just the most egregious examples. All of the districts of Illinois, California, Florida, and Texas, for example, are carved up in bizarre patterns that have nothing to do with the geographic congruity of their states. They are drawn to weigh their districts down in favor of one party or the other in order to secure “safe seats.”¹⁰ Both dominant parties engage in this process, more brazenly now than at any point in our nation’s history.¹¹ The process, quite literally, allows candidates to pick their voters rather than the other way around. It effectively disenfranchises entire communities.

Many scholars have concluded that there is a need for independent, nonpartisan reapportionment commissions in all fifty states.¹² Presently, very few states use them.¹³ An effort by

8. BLACK’S LAW DICTIONARY 708 (8th ed. 2004).

9. Neil A. Capobianco, Note, *Political Gerrymandering—The Unconstitutional Threat to Fair Representation*, 33 N.Y.L. SCH. L. REV. 673, 677 (1988).

10. Charlie Cook, *Safe Seats Stunting Skills of Lawmakers*, NAT’L J. (Dec. 1, 2001), available at The Cook Political Report, <http://cookpolitical.com/column/2001/120101.php> (tracing the competitiveness of House seats; explaining why most are always safe for a particular party, even during years that are considered to be partisan watersheds; noting that in the 1990s, the average “safe seat” rate for any given election year was ninety-six percent).

11. See Hamilton, *supra* note 8, at 1543–44.

12. See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 641–48 (2002) (suggesting that state legislatures should be required to create nonpartisan districting bodies).

13. See ELIZABETH GARRETT, REPORT FROM THE INITIATIVE & REFERENDUM INSTITUTE, REDISTRICTING: ANOTHER CALIFORNIA REVOLUTION?, 31 (Feb. 2, 2005), <http://www.iandrinstitute.org/Apportion.htm> (click on “Download: IRI Report”). Currently, only twelve states (Alaska, Arizona, Arkansas, Colorado, Hawaii, Idaho, Missouri, Montana, New Jersey, Ohio, Pennsylvania, and Washington) use

California Governor Arnold Schwarzenegger to institute one in his own state, managed by retired judges, was crushed by big-money resistance from groups that wanted to maintain a safe status quo for California's Democratic congressional delegation.¹⁴ In addition, recent U.S. Supreme Court decisions, ruling in favor of states' rights in this regard, unfortunately gave states the green light to gerrymander all they want.¹⁵

Gerrymandering is a serious concern. But perhaps even more concerning is that in almost every state, the chief election officer—the secretary of state—is a partisan politician.¹⁶ Former Florida Secretary of State Katherine Harris, of the *Bush v. Gore*¹⁷ debacle, is only the most egregious example of the partisan powers of this office.¹⁸ Few states have an impartial referee overseeing their election laws. In subtle (and not so subtle) ways, Democratic and Republican secretaries of state are using their offices for partisan purposes.

Our political process fails the public interest in other ways. For example, consider the special interest pressures that dominate life in our nation's capitol. K Street is more than just a location on the Washington, D.C. city map. It is the lobbying locus of America.¹⁹ It is the place to find PACs with ties to lobbying firms, trade associations, and corporate interests. It is the other side of the revolving door for people leaving Capitol Hill, both elected officials and staffers, who glom onto high-paid positions with lobbying firms.²⁰

commissions as the primary institution to draw state legislative boundaries. *Id.* Three (Iowa, Maine, and Vermont) use similar commissions in an advisory capacity, and five (Connecticut, Illinois, Mississippi, Oklahoma, and Texas) use backup commissions if the legislation to redistrict fails. *Id.* The Iowa commission deals with both state and federal districts. *Id.*

14. *See id.*

15. *See, e.g.,* League of United Latin Am. Citizens v. Perry, 547 U.S. 1017 (2006) (holding that a Texas redistricting plan comported, for the most part, with constitutional standards and declining to determine whether partisan gerrymandering claims present justiciable political questions).

16. *See generally* *Umpires Still Taking Sides*, N.Y. TIMES, Feb. 14, 2005, at A20 (noting the increasing partisanship of secretaries of state).

17. *Bush v. Gore*, 531 U.S. 1046 (2000).

18. Ann Shorstein, *Politicizing the Election Process: "The Katherine Harris Effect,"* 2 FLA. COASTAL L.J. 373, 376–78 (2001).

19. *See, e.g.,* MATTHEW CONTINETTI, *THE K-STREET GANG: THE RISE AND FALL OF THE REPUBLICAN MACHINE* (2006).

20. *See, e.g.,* Jeffrey H. Birnbaum, *The Road to Riches Is Called K Street*, WASH. POST., June 22, 2005, at A01.

A *National Journal* survey in December 2006 revealed that one out of six senior congressional staffers (107 out of 635) who worked on Capitol Hill in 2003 left for positions in lobbying and advocacy firms.²¹ It is not surprising, then, that corporate interests now maintain a full-time presence in Washington, where they leverage their Capitol Hill associations and relationships to look out for themselves in a variety of ways.²² The present system has become an insider's game, driven by special interests and corporations, often rewarding elected officials who make immoral choices.

This insider's game sometimes leads to real scandal. The 2006 election, in which the Republican Congress lost its well-guarded majority status, is said to have turned on ethical issues.²³ This may be true, but it is not the whole story. Report after report of unethical behavior by members of the Republican majority—including the corruption indictments of Congressmen Duke Cunningham²⁴ and Bob Ney;²⁵ the seemingly limitless reach of the Jack Abramoff lobbying scandal;²⁶ and charges against House Majority Leader Tom Delay²⁷—appeared for the longest time to have no traction with voters. As long as their congressional representative was “right” on abortion, or simply remained a reliable Republican, he or she still seemed better than anyone from the other party. It took the most unsavory and sensational of scandals—the abuse of young pages by an elected predator—to make ethics an important issue in 2006.²⁸

III. REMEDIES

Perhaps the most practical suggestion for fixing what ails America starts with registering voters. Registration is one of the

21. Gregg Sangillo, *K Street Moves*, NAT'L J. (Dec. 2, 2006).

22. *See id.*

23. *See, e.g.*, Mark Lange, Opinion, *Get Real on Ethics Reform*, CHRISTIAN SCI. MONITOR, June 28, 2007, at 9.

24. *See, e.g.*, John M. Broder, *Representative Quits, Pleading Guilty in Graft*, N.Y. TIMES, Nov. 29, 2005, at A1.

25. *See, e.g.*, Jack Torry & James Nash, *Ney Quits, 'Seven Weeks Too Late,' Convicted Congressman Infuriates Ohio Republicans*, COLUMBUS DISPATCH (Ohio), Nov. 4, 2006 at 01A.

26. *See, e.g.*, Scott Shepard, *Powerful Lobbyist Pleads Guilty*, ATLANTA JOURNAL-CONST, Jan. 4, 2006, at 1A.

27. *See, e.g.*, Richard A. Serrano & Scott Gold, *Delay Indicted*, L.A. TIMES, Sept. 29, 2005, at A1.

28. *See, e.g.*, Noam Levey & Richard Simon, *Hastert Says Any Coverup in Foley Scandal Merits Firing*, L.A. TIMES, Oct. 11, 2006, at A14.

most significant determinants of whether someone will vote on election day.²⁹ Trying to get more people registered to vote is an imperative if we hope to correct the flaws in the American democracy. The two dominant parties usually pay lip services to these goals, but their election advertising campaigns are such bludgeoning affairs³⁰ that, in practice, they might be turning off a crucial sliver of the electorate, causing key voters to stay home.

More states should adopt election day registration.³¹ There is also a need for more uniformity in the rules guiding elections and voting, and more uniform polling-place hours, across the nation, during presidential contests.³² As digital technologies become more prevalent in precincts across the country, a verifiable paper trail is vitally important so that we know that every vote is not only being cast but also counted and counted accurately.³³

Other reforms can improve our system. For example, instant run-off balloting would allow more fairness to minor-party candidates by allowing voters to re-designate their vote if their candidate happens to finish last.³⁴ Instant run-off balloting is being used in several locations³⁵ and is worth further study. This reform would void the “wasted vote syndrome” that prevents many voters from voting their conscience, for fear that they will be effectively handing the election to the candidate they like least.³⁶

Finally, voters should not tolerate misbehavior from public officials. In the past, the theory seems to have been that as long as he’s our crook, he’s not such a bad crook. That is the wrong

29. See, e.g., Timothy Rusch, Press Release, CommonDreams.org News Center, *Low Income Americans Failed by States That Ignore Federal Voter Registration Law* (Oct. 31, 2006), available at <http://www.commondreams.org/news2006/1031-13.htm>.

30. See, e.g., Susan Page, *Nasty Ads Close Out a Mud-Caked Campaign*, U.S.A. TODAY, Nov. 3, 2006, at 11A.

31. Monique L. Dixon, *Minority Disenfranchisement During the 2000 General Election: A Blast from the Past or a Blueprint for Reform*, 11 TEMP. POL. & CIV. RTS. L. REV. 311, 320 (2002) (arguing that same-day registration is “widely viewed by voting rights experts to be a highly desirable reform”).

32. See Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 OHIO N.U. L. REV. 467, 479 (2007).

33. See generally Audra L. Wassom, *The Help America Vote Act of 2002 and Selected Issues in Election Law Reform*, 29 T. MARSHALL L. REV. 357, 383–87 (2004).

34. See, e.g., Rochelle Olson, *Minneapolis May Get to Weigh Instant-Runoff Voting*, STAR TRIB. (Minneapolis), May 31, 2006, at 1B.

35. See, e.g., Terry Collins, *Much Work Ahead for Instant-Runoff Voting*, STAR TRIB. (Minneapolis), Nov. 15, 2006, at 1B.

36. See Richard Halicks, *Q&A with Ryan Griffin: A Better Way to Run a Runoff?*, THE ATLANTA JOURNAL-CONSTITUTION, Aug. 6, 2006, at 4E.

attitude. If an elected official acts in an unethical manner, that official should not be given a partisan pass. In that sense, we are all partly guilty for the way things are in Washington because we aid and abet party members, regardless of their ethics. Behavior that would not be tolerated for a day in the workplace is tolerated for the duration of some politicians' careers, at least until they get too sloppy to even bother covering their tracks. Voters seem to believe that character and performance in politics are separate and mutually exclusive issues. But private behavior does tell us something about a politician's true values, and it should weigh in our judgment of their public performance.

IV. HOPE FOR THE FUTURE

Tom Brokaw is right—the “greatest generation” has come and gone.³⁷ But another greatest generation is needed to strengthen our democratic system. We need to do whatever we can to nurture our young people so that they can reinvigorate our democracy. There is good data to suggest that this will happen, that it actually is happening. Civic volunteerism among the young, for example, is at historically high levels.³⁸ But that is not matched by young people's voter participation rates.³⁹ It is no accident that Urban Outfitters had a best seller on its hands when the retailer marketed a T-shirt emblazoned with the words, “Voting is for old people.” For young people, there is a stigma attached to voting that needs to be overcome. Even in 2004, when young people voted in the greatest numbers ever in American history,⁴⁰ participation among the youngest voters barely reached fifty percent, ten percent behind the rest of the population as a whole.⁴¹ So, the axiom that “voting is for old people” is essentially true. Typically, about

37. See generally TOM BROKAW, *THE GREATEST GENERATION* (2000).

38. See, e.g., *Spurt of Volunteerism After 9/11 Takes a Dip*, THE STAR-LEDGER (Newark, N.J.), Apr. 16, 2007, at 2 (citing a Corporation for National and Community Service report showing that volunteer rates among young people have almost doubled over the last seventeen years; the title reflects a small dip in other groups following a huge spike after 9/11).

39. See CTR. FOR INFORMATION & RESEARCH ON CIVIC LEARNING & ENGAGEMENT, *THE 2004 YOUTH VOTE* (2004), http://www.civicyouth.org/PopUps/2004_vote_report_final.pdf (acknowledging a recent increase in participation by younger voters).

40. *Id.*

41. *Id.*

seventy percent of seventy-year-olds vote, while only about thirty percent of thirty-year-olds vote.⁴²

Regardless, youth are the impetus for progress and reform. They have always been the element in our society that has challenged us to do better. We need that infusion of youth now. America has no choice: we must count on the young people of today to turn us around because too many of us older voters are caught up in the current system. Aging baby boomers in particular do not seem to have escaped the '60s myth that they represent the "Me Generation." We are simply part of the problem. The under-thirty crowd seems more independent minded, and, thus, far less likely to consider themselves either Democrats or Republicans.⁴³ That is truly a hopeful sign. Leadership from a generation driven by problem solving and not party loyalty may be able to more effectively deal with the partisan pitfalls of our current system.

V. CONCLUSION

It has been nearly two centuries since white, male landowners defined our democracy. Over the course of our two-hundred-year history, we have worked to improve our democracy. For example, several constitutional amendments have broadened democracy. They have granted voting rights to blacks,⁴⁴ then women,⁴⁵ then to residents of the District of Columbia,⁴⁶ and finally, in the early 1970s, to eighteen-year olds.⁴⁷ The Voting Rights Act of 1965 put an end to poll taxes, literacy tests, and other obstacles to electoral participation in the Deep South.⁴⁸ But those improvements are not inevitable. They take effort. They take action. To ensure a well-functioning system, improving our democracy is every generation's obligation.

42. The Nation's Voters, U.S. Census Bureau, Oct. 13, 2004, http://factfinder.census.gov/jsp/saff/SAFFInfo.jsp?_pageId=tp16_government.

43. YOUNG VOTER STRATEGIES, PARTISANSHIP: A LIFELONG LOYALTY THAT DEVELOPS EARLY I (2007), <http://www.youngvoterstrategies.org> (follow "Research" link; then follow "Youth Registration & Turnout").

44. U.S. CONST. amend. XV.

45. U.S. CONST. amend. XIX.

46. U.S. CONST. amend. XXIII.

47. U.S. CONST. amend. XVI.

48. Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006); *see also* Scott Gluck, *Congressional Reaction to Judicial Construction of Section 5 of the Voting Rights Act of 1965*, 29 COLUM. J.L. & SOC. PROBS. 337, 345-46 (1996).

The Constitution was designed to allow for change and growth, and it insulates us from the harsh byproducts of radical politics. But it was not designed for a passive or detached citizenry. We have to practice what the Constitution preaches, not just in the large historical moments to alter the document to improve the democracy, but also in small, vital moments, like when it is time to visit the voting booth. Fundamentally, the structure of the U.S. Constitution gives us all the tools we need. It includes the right to free speech,⁴⁹ the right to assembly,⁵⁰ and a system of institutional checks and the balances.⁵¹ If we hold ourselves to the standards established by our Constitution and follow them assiduously, it is a self-correcting document.

Remember Pogo, the cartoon? “We have met the enemy and he is us.”⁵² So it is with our democracy. We are our own worst enemies. But we are also our best allies. We are never going to make progress if we remain the same kind of electorate that we are: an unstable mix of the aligned, ambivalent, apathetic, and alienated. We all must be more engaged. We all must become and remain more attentive. We must increase the rate of electoral participation. Ultimately, if we are to make our democracy do the greatest good for the greatest number of our citizens, we have to take charge. This is, after all, a democracy, and we the people can fix it. We have had highs and lows over the nation’s history. We may be in a low now, but we can, and must, rise again.

49. U.S. CONST. amend. I.

50. *Id.*

51. See, e.g., Thomas O. Sargentich, *The Contemporary Assault on Checks and Balances*, 7 WIDENER J. PUB. L. 231, 233 (1998).

52. See, e.g., *Blame Ads on Public*, SUN-SENTINEL (South Florida), Nov. 10, 2006, at 32A (citing the cartoon as an explanation of how the public should blame itself for negative campaigning).