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ELECTION PROTECTION AND DEMOCRACY EXPANSION: A CONSTITUTIONAL REFORM AGENDA FOR THE NEW CENTURY

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Remarks by John Bonifaz, Founder and General Counsel, National Voting Rights Institute, for the panel discussion: "Do We Need a Constitutional Amendment Guaranteeing the Right to Vote?"

In his new book, *don't think of an elephant!*, cognitive linguist George Lakoff discusses the importance of reframing for social change work.

"Frames," he says, "are mental structures that shape the way we see the world. As a result, they shape the goals we seek, the plans we make, the way we act, and what counts as a good or bad outcome of our actions. In politics our frames shape our social policies and the institutions we form to carry out policies. To change our frames is to change all of this. Reframing *is* social change."

By proposing to amend the United States Constitution to guarantee the right to vote, we are engaged in the process of reframing the way we see our current political system. What does our right to vote mean today? Is it protected in our Constitution? Why do 108 democratic nations in the world have explicit language guaranteeing the right to vote in their constitutions, and the United States – along with only ten other such nations -- does not? How can we claim to have an equal right to vote when the way we administer our elections changes from state to state, from county to county, from locality to locality? Thirteen thousand different systems. Thirteen thousand different standards.

A proposed constitutional amendment to guarantee the right to vote serves as a critical vehicle for creating a national dialogue in this country on the state of our right to vote and the state of our democracy. The nation has just witnessed another presidential election tainted by voter disenfranchisement, voter suppression, and widespread irregularities in the counting of the votes. Millions of citizens believe that this election, like the 2000 election, was not free and fair. A crisis of public confidence underlies the crisis in our democracy. This is a moment in history. Our response must go to the foundation of our political system: the US Constitution – that social contract between we the people and our government, that supreme legal document which establishes the consent by which we agree to be governed.

On December 12, 2000, this nation watched as the Supreme Court, for the first time in our history, stopped the counting of the votes and selected the president of the United States. In that ruling, *Bush v. Gore*, a 5-4 majority of the Court stated that the "individual citizen has no federal Constitutional right to vote for electors for President of the United States..." The right, the Court held, emanated from the states. Justice John Paul Stevens,

one of the four dissenting justices, wrote, in his dissent, of the damage the ruling would inflict on “the Nation’s confidence in the judge as an impartial guardian of the rule of law.”

The *Bush v. Gore* ruling is not the only decision in Supreme Court jurisprudence that contravened the basic principles of our Constitution and our democracy. The nation’s highest court has, unfortunately, done that before. *Dred Scott v. Sandford* (denying citizenship to all people of African ancestry and thereby upholding slavery), *Plessy v. Ferguson* (upholding the “separate but equal” doctrine), and *Korematsu v. United States* (upholding the internment of Japanese-Americans during World War II) are among the Court’s rulings that belong on that list.

In the context of this constitutional amendment discussion, let us consider one such ruling and the history of how it eventually was overturned.

In 1937, the Supreme Court heard a constitutional challenge to the one-dollar poll tax in the state of Georgia, a fee charged to voters in order to vote and a barrier which existed throughout the Deep South. The Supreme Court in that case, *Breedlove v. Suttles*, upheld the poll tax as constitutional. “The payment of poll taxes as a prerequisite to voting,” the Court ruled, “is a familiar and reasonable regulation long enforced in many States and for more than a century in Georgia.” “Privilege of voting,” the Court stated, “is not derived from the United States, but is conferred by the state and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the state may condition suffrage as it deems appropriate.”

In 1939, two years after the *Breedlove* ruling, an effort began in the US Congress to eliminate the poll tax in federal elections via a constitutional amendment. The effort would take a quarter of a century.

In the interim, the Court, in 1951, would hear a second challenge to the poll tax (*Butler v. Thompson*) and, once again, would uphold the poll tax as constitutional.

Then, from 1962-1964, in the heat of the Civil Rights Movement, Congress passed and the states ratified the Twenty-Fourth Amendment to the US Constitution, forever banning poll taxes in our federal elections.

That same year that ratification was completed for the Twenty-Fourth Amendment, Annie Harper and a group of poor Virginia voters with her challenged Virginia’s poll tax in state elections. By the time her case reached the Supreme Court two years later, there remained four Southern states that held onto the poll tax for their state elections. And Virginia was one of them.

The Supreme Court’s landmark 1966 ruling in *Harper v. Virginia Board of Elections*, reversing its own precedent and striking down the poll tax as unconstitutional, must be seen in concert with the Twenty-Fourth Amendment. While the majority opinion did not reference the amendment, Justice John Harlan did in his dissent, calling the Court’s

abolition of the poll tax in state elections a “coup de grace...” “Property qualifications and poll taxes have been a traditional part of our political structure,” Harlan wrote.

...It is certainly a rational argument that payment of some minimal poll tax promotes civic responsibility, weeding out those who do not care enough about public affairs to pay \$1.50 or thereabouts a year for the exercise of the franchise. It is also arguable...that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens.

But the majority in the *Harper* ruling recognized that the Court had been wrong in its 1937 and 1951 rulings upholding the poll tax and that the nation had progressed since that time. The ratification of the Twenty-Fourth Amendment, clearly in the minds of the justices, provided key evidence of this progress.

“[T]he Equal Protection Clause,” Justice William O. Douglas wrote for the majority, “is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality...Notions of what constitute equal treatment for purposes of the Equal Protection Clause do change.”

“[W]ealth or fee paying,” Justice Douglas continued, “has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.”

The poll tax story is a story of reframing and the Twenty-Fourth Amendment played a crucial role in changing the frame. Today, a proposed constitutional amendment to guarantee the right to vote – to preserve the franchise with affirmative language in the Constitution – provides the nation with a powerful opportunity to change the frame for our time and to help move us toward the democracy that we promise to be.

The National Voting Rights Institute is a non-profit, non-partisan organization dedicated to protecting the right of all citizens to vote and to participate in the electoral process on an equal and meaningful basis. For more information, see www.nvri.org.