

DEMOCRACY RESTORATION ACT OF 2009

HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

ON

H.R. 3335

MARCH 16, 2010

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DEMOCRACY RESTORATION ACT OF 2009

TUESDAY, MARCH 16, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:06 p.m., in room 2141, Rayburn House Office Building, the Honorable Robert C. “Bobby” Scott, acting Chairman of the Subcommittee presiding.

Present: Representatives Scott, Conyers, Watt, Cohen, Jackson Lee, Chu, Sensenbrenner, and Franks.

Staff present: (Majority) Keenan Keller, Counsel; David Lachman, Subcommittee Chief of Staff; and (Minority) Paul Taylor, Minority Counsel.

Mr. SCOTT. The Subcommittee will come to order.

Today, the Subcommittee examines one of the cornerstones of our democracy, the right to vote in a free and fair election. That right is denied an estimated 5.3 million Americans because of felony convictions. As many as four million of these have already completed their sentences.

Chairman Conyers of the full Committee has introduced legislation to deal with that problem. H.R. 3335, the “Democracy Restoration Act of 2009,” of which I am a proud sponsor, would restore the franchise of people who have paid their debt to society.

Disenfranchisement has real consequences. Although this Committee has been in the forefront of efforts to reintegrate ex-offenders into society, these disenfranchisement laws stand as a major impediment to that important goal.

Excluding people who have paid their debts to society from the mainstream of our Nation serves no useful purpose, but it does undermine the legitimacy of our elections and runs against our goals of returning people to the community and helping them leave behind the wrongdoing of their past.

In the last Congress, President Bush signed the Second Chance Act. It represents a bipartisan recognition that we must do more to reintegrate ex-offenders into the community. Voting rights legislation is an important step in that direction.

This Committee was also the driving force behind the extension of the Voting Rights Act, which stands as a crowning achievement in this Nation’s march to full participation in our democracy. Unfortunately, we still have work to do. Not only are ex-offenders disenfranchised, but efforts to purge ex-offenders from the rolls

have resulted in thousands of qualified voters losing their right to vote.

Confusion over these laws—for example, whether they apply to people on probation or parole, or whether misdemeanors may be involved—and criminal penalties for people who get it wrong intimidates people with every right to vote from exercising that right.

Disenfranchisement of ex-offenders has a disproportionate impact on minority communities. Nationwide, 13 percent of African Americans have lost their right to vote, and that is seven times the national average. In eight States, more than 15 percent of African Americans cannot vote due to felony convictions, and in three of those States, more than 20 percent of the African American voting age population has lost the right to vote.

These statistics have consequences far beyond the rights of the disenfranchised individual. It can marginalize the entire community. In fact, many elections are decided by the margin of who is disenfranchised.

The voice of these communities and our system of self-government are diminished. The entire community is disenfranchised. And, in fact, they also prevent those who are disenfranchised from having a voice in policies that led to the disenfranchisement. By not being able to vote, they have no voice in democracy.

They have no vote in the appropriations and how we appropriate money for education, for example. They have no vote in criminal justice laws, and no voice in the selection of the police, prosecutors and judges. And in fact, in many areas, there is a political imperative to use disenfranchisement to win elections.

And so, we need to make sure that everyone has the right to vote, so that everyone's voice is heard.

States have begun to recognize the injustice of the ex-offender disenfranchisement. Since 1997, 19 States have expanded voter eligibility for ex-offenders.

These reforms have restored the franchise to over 750,000 citizens. Republican governors in Louisiana, Florida and Rhode Island, as well as Democratic governors in Iowa, Maryland, North Carolina and Washington State have worked to advance the reform of ex-offender franchises.

Now, we know that, from a Federal point of view, this is a complicated, constitutionally complicated matter, because the Constitution specifically allows States to disenfranchise voters. But under the Voting Rights Act, even legal procedures can be proscribed, if they are utilized in an intentionally discriminatory way, or in a way that has a discriminatory effect.

So, we are going to see what the options are. Even though this may be legal, we may be able to restore some rights.

So, today, we are joined by a distinguished panel of witnesses, and I look forward to their testimony, and now recognize the former Chair of the full Committee, the gentleman from Wisconsin, Mr. Sensenbrenner.

[The bill, H.R. 3335, follows:]

111TH CONGRESS
1ST SESSION

H. R. 3335

To secure the Federal voting rights of persons who have been released
from incarceration.

IN THE HOUSE OF REPRESENTATIVES

JULY 24, 2009

Mr. CONYERS (for himself, Mr. NADLER of New York, Mr. GRAYSON, Mr. GRIJALVA, Mr. STARK, Ms. WATERS, Mr. PAYNE, Ms. NORTON, Mr. DAVIS of Illinois, Mr. FRANK of Massachusetts, Mr. HINCHEY, Ms. JACKSON-LEE of Texas, Ms. KILPATRICK of Michigan, Mr. LEWIS of Georgia, Mr. RANGEL, Ms. LEE of California, Ms. FUDGE, Mr. MEEK of Florida, Mr. COHEN, Mr. THOMPSON of Mississippi, Ms. CLARKE, Mr. RUSH, Ms. SCHAKOWSKY, Mr. JACKSON of Illinois, Mr. MORAN of Virginia, Mr. HASTINGS of Florida, Mr. JOHNSON of Georgia, Mr. SCOTT of Virginia, and Mr. HONDA) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To secure the Federal voting rights of persons who have
been released from incarceration.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the “Democracy Restoration
5 Act of 2009”.

1 **SEC. 2. FINDINGS.**

2 The Congress makes the following findings:

3 (1) The right to vote is the most basic constitu-
4 tive act of citizenship. Regaining the right to vote
5 reintegrates offenders into free society, helping to
6 enhance public safety.

7 (2) Article I, section 4 of the Constitution of
8 the United States grants Congress ultimate super-
9 visory power over Federal elections, an authority
10 which has repeatedly been upheld by the Supreme
11 Court.

12 (3) Basic constitutional principles of fairness
13 and equal protection require an equal opportunity
14 for Americans to vote in Federal elections. The right
15 to vote may not be abridged or denied by the United
16 States or by any State on account of race, color,
17 gender or previous condition of servitude. The 14th,
18 15th, 19th, 24th, and 26th Amendments to the Con-
19 stitution empower Congress to enact measures to
20 protect the right to vote in Federal elections.

21 (4) There are three areas where discrepancies
22 in State laws regarding felony convictions lead to
23 unfairness in Federal elections: (A) there is no uni-
24 form standard for voting in Federal elections which
25 leads to an unfair disparity and unequal participa-
26 tion in Federal elections based solely on where a per-

1 son lives; (B) laws governing the restoration of vot-
2 ing rights after a felony conviction vary throughout
3 the country and persons in some States can easily
4 regain their voting rights while in other States per-
5 sons effectively lose their right to vote permanently;
6 and (C) State disenfranchisement laws dispropor-
7 tionately impact racial and ethnic minorities.

8 (5) Disenfranchisement results from varying
9 State laws that restrict voting while under some
10 form of criminal justice supervision or after the com-
11 pletion of a felony sentence in some States. Two
12 States do not disenfranchise felons at all (Maine and
13 Vermont). Forty-eight States and the District of Co-
14 lumbia have disenfranchisement laws that deprive
15 convicted offenders of the right to vote while they
16 are in prison. In 35 States, convicted offenders may
17 not vote while they are on parole and 30 of these
18 States disenfranchise felony probationers as well. In
19 10 States, a conviction can result in lifetime dis-
20 enfranchisement.

21 (6) An estimated 5,300,000 Americans, or
22 about 1 in 41 adults, currently cannot vote as a re-
23 sult of a felony conviction. Nearly 4,000,000 (74
24 percent) of the 5,300,000 disqualified voters are not
25 in prison, but are on probation or parole, or are ex-

1 offenders. Approximately 2,000,000 of those individ-
2 uals are individuals who have completed their entire
3 sentence, including probation and parole, yet remain
4 disenfranchised.

5 (7) In those States that disenfranchise ex-of-
6 fenders, the right to vote can be regained in theory,
7 but in practice this possibility is often granted in a
8 nonuniform and potentially discriminatory manner.
9 Offenders must either obtain a pardon or order from
10 the Governor or action by the parole or pardon
11 board, depending on the offense and State. Offend-
12 ers convicted of a Federal offense often have addi-
13 tional barriers to regaining voting rights.

14 (8) State disenfranchisement laws dispropor-
15 tionately impact racial and ethnic minorities. Eight
16 percent of the African-American population, or
17 2,000,000 African-Americans, are disenfranchised.
18 Given current rates of incarceration, approximately
19 one in three of the next generation of African-Amer-
20 ican men will be disenfranchised at some point dur-
21 ing their lifetime. Hispanic citizens are also dis-
22 proportionately disenfranchised based upon their dis-
23 proportionate representation in the criminal justice
24 system.

1 (9) Disenfranchising citizens who have been
2 convicted of a felony offense and who are living and
3 working in the community serves no compelling
4 State interest and hinders their rehabilitation and
5 reintegration into society.

6 (10) State disenfranchisement laws can sup-
7 press electoral participation among eligible voters by
8 discouraging voting among family and community
9 members of disenfranchised persons. Future elec-
10 toral participation by the children of disenfranchised
11 parents may be impacted as well.

12 (11) The United States is the only Western de-
13 mocracy that permits the permanent denial of voting
14 rights to individuals with felony convictions.

15 **SEC. 3. RIGHTS OF CITIZENS.**

16 The right of an individual who is a citizen of the
17 United States to vote in any election for Federal office
18 shall not be denied or abridged because that individual has
19 been convicted of a criminal offense unless such individual
20 is serving a felony sentence in a correctional institution
21 or facility at the time of the election.

22 **SEC. 4. ENFORCEMENT.**

23 (a) ATTORNEY GENERAL.—The Attorney General
24 may, in a civil action, obtain such declaratory or injunctive
25 relief as is necessary to remedy a violation of this Act.

1 (b) PRIVATE RIGHT OF ACTION.—

2 (1) A person who is aggrieved by a violation of
3 this Act may provide written notice of the violation
4 to the chief election official of the State involved.

5 (2) Except as provided in paragraph (3), if the
6 violation is not corrected within 90 days after receipt
7 of a notice under paragraph (1), or within 20 days
8 after receipt of the notice if the violation occurred
9 within 120 days before the date of an election for
10 Federal office, the aggrieved person may, in a civil
11 action, obtain declaratory or injunctive relief with re-
12 spect to the violation.

13 (3) If the violation occurred within 30 days be-
14 fore the date of an election for Federal office, the
15 aggrieved person need not provide notice to the chief
16 election official of the State under paragraph (1) be-
17 fore bringing a civil action to obtain declaratory or
18 injunctive relief with respect to the violation.

19 **SEC. 5. NOTIFICATION OF RESTORATION OF VOTING**
20 **RIGHTS.**

21 (a) STATE NOTIFICATION.—

22 (1) NOTIFICATION.—On the date determined
23 under paragraph (2), each State shall notify in writ-
24 ing any individual who has been convicted of a
25 criminal offense under the law of that State that

1 such individual has the right to vote in an election
2 for Federal office pursuant to the Democracy Res-
3 toration Act and may register to vote in any such
4 election.

5 (2) DATE OF NOTIFICATION.—

6 (A) FELONY CONVICTION.—In the case of
7 such an individual who has been convicted of a
8 felony, the notification required under para-
9 graph (1) shall be given on the date on which
10 the individual—

11 (i) is sentenced to serve only a term
12 of probation; or

13 (ii) is released from the custody of
14 that State (other than to the custody of
15 another State or the Federal Government
16 to serve a term of imprisonment for a fel-
17 ony conviction).

18 (B) MISDEMEANOR CONVICTION.—In the
19 case of such an individual who has been con-
20 victed of a misdemeanor, the notification re-
21 quired under paragraph (1) shall be given on
22 the date on which such individual is sentenced
23 by a State court.

24 (b) FEDERAL NOTIFICATION.—

1 (1) NOTIFICATION.—On the date determined
2 under paragraph (2), the Director of the Bureau of
3 Prisons shall notify in writing any individual who
4 has been convicted of a criminal offense under Fed-
5 eral law that such individual has the right to vote
6 in an election for Federal office pursuant to the De-
7 mocracy Restoration Act and may register to vote in
8 any such election.

9 (2) DATE OF NOTIFICATION.—

10 (A) FELONY CONVICTION.—In the case of
11 such an individual who has been convicted of a
12 felony, the notification required under para-
13 graph (1) shall be given on the date on which
14 the individual—

15 (i) is sentenced to serve only a term
16 of probation by a court established by an
17 Act of Congress; or

18 (ii) is released from the custody of the
19 Bureau of Prisons (other than to the cus-
20 tody of a State to serve a term of impris-
21 onment for a felony conviction).

22 (B) MISDEMEANOR CONVICTION.—In the
23 case of such an individual who has been con-
24 victed of a misdemeanor, the notification re-
25 quired under paragraph (1) shall be given on

1 the date on which such individual is sentenced
2 by a State court.

3 **SEC. 6. DEFINITIONS.**

4 For purposes of this Act:

5 (1) **CORRECTIONAL INSTITUTION OR FACIL-**
6 **ITY.**—The term “correctional institution or facility”
7 means any prison, penitentiary, jail, or other institu-
8 tion or facility for the confinement of individuals
9 convicted of criminal offenses, whether publicly or
10 privately operated, except that such term does not
11 include any residential community treatment center
12 (or similar public or private facility).

13 (2) **ELECTION.**—The term “election” means—

14 (A) a general, special, primary, or runoff
15 election;

16 (B) a convention or caucus of a political
17 party held to nominate a candidate;

18 (C) a primary election held for the selec-
19 tion of delegates to a national nominating con-
20 vention of a political party; or

21 (D) a primary election held for the expres-
22 sion of a preference for the nomination of per-
23 sons for election to the office of President.

24 (3) **FEDERAL OFFICE.**—The term “Federal of-
25 fice” means the office of President or Vice President

1 of the United States, or of Senator or Representa-
2 tive in, or Delegate or Resident Commissioner to,
3 the Congress of the United States.

4 (4) PROBATION.—The term “probation” means
5 probation, imposed by a Federal, State, or local
6 court, with or without a condition on the individual
7 involved concerning—

8 (A) the individual’s freedom of movement;

9 (B) the payment of damages by the indi-
10 vidual;

11 (C) periodic reporting by the individual to
12 an officer of the court; or

13 (D) supervision of the individual by an of-
14 ficer of the court.

15 **SEC. 7. RELATION TO OTHER LAWS.**

16 (a) STATE LAWS RELATING TO VOTING RIGHTS.—
17 Nothing in this Act shall be construed to prohibit the
18 States from enacting any State law which affords the right
19 to vote in any election for Federal office on terms less
20 restrictive than those established by this Act.

21 (b) CERTAIN FEDERAL ACTS.—The rights and rem-
22 edies established by this Act are in addition to all other
23 rights and remedies provided by law, and neither rights
24 and remedies established by this Act shall supersede, re-
25 strict, or limit the application of the Voting Rights Act

1 of 1965 (42 U.S.C. 1973 et seq.) or the National Voter
2 Registration Act (42 U.S.C. 1973–gg).

3 **SEC. 8. FEDERAL PRISON FUNDS.**

4 No State, unit of local government, or other person
5 may receive or use, to construct or otherwise improve a
6 prison, jail, or other place of incarceration, any Federal
7 grant amounts unless that person has in effect a program
8 under which each individual incarcerated in that person's
9 jurisdiction who is a citizen of the United States is noti-
10 fied, upon release from such incarceration, of that individ-
11 ual's rights under section 3.

12 **SEC. 9. EFFECTIVE DATE.**

13 This Act shall apply to citizens of the United States
14 voting in any election for Federal office held after the date
15 of the enactment of this Act.

○

Mr. SENSENBRENNER. Thanks very much, Mr. Chairman.

A core provision of this bill provides the States can only deny felons currently serving their sentences the right to vote, and that ex-felons, along with all people who are subject to parole or probation, must be allowed to vote, the laws of their States to the contrary notwithstanding.

This legislation would thereby void the laws in 48 out of 50 States, as well as the District of Columbia, that forbids felons from voting in varying degrees. Those States include my own State of Wisconsin, where people lose their voting rights if they are incarcerated, or on parole, or on probation.

As former Judge Henry Friendly said, someone who “breaks the law may fairly be thought to have abandoned the right to participate in making them, and that it scarcely can be deemed unreasonable for a State that the perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce them and the prosecutors who must try them for further violation, or the judges who are to consider their cases.”

When the 11th Circuit, speaking en banc, upheld Florida’s felon voting roll, it said that felon disenfranchisement laws are deeply rooted in this Nation’s history. Between 1776 and 1821, 11 States disenfranchised persons convicted of serious crimes. And by the time of the Civil War, more than two dozen out of the then 34 States had enacted similar laws.

By the time the 14th Amendment was adopted, 29 States had long since established felon disenfranchisement laws.

This long history clearly refutes any suggestion that those laws were racially motivated. As the en banc 11th Circuit observed, at that time, the right to vote was not extended to African Americans. And therefore, they could not have been the targets of any felon disenfranchisement law.

Indeed, the 14th Amendment itself explicitly permits States to adopt such laws. The framers of the Civil War amendment expressly included in Section 1 of the 14th Amendment terms that provide for a State’s denial of voting rights “for participation in rebellion or other crime,” and made clear that such laws could not serve as the basis for reducing their representation in Congress.

As the Supreme Court held in *Richardson v. Ramirez*, Section 2 is an affirmative sanction by the Constitution of the exclusion of felons from the vote, including felons like the plaintiff in that case, who had finished their sentences. And a unanimous Warren era court decision recognized that a criminal record is one of the factors which a State may take into consideration in determining the qualifications of voters.

As the 6th Circuit has said, felons are not disenfranchised because of an immutable characteristic such as race, but rather because of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment.

The majority opinion among the Federal circuits also reject the notion that the Voting Rights Act of 1965 can invalidate felon disenfranchisement statutes on the grounds that such laws have a racially disproportionate impact on minorities, while the 9th Circuit—which is the most overturned circuit in the country—held

that the VRA can cover felon disenfranchisement laws. The en banc 11th Circuit and the 2nd Circuit have soundly rejected that claim.

As the 11th Circuit stated, the Voting Rights Act—an entirely one-sided legislative history on that point—is supported by subsequent congressional acts. Since 1982, Congress has made it easier for States to disenfranchise felons. For example, the National Voter Registration Act of 1993, which was signed into law by President Clinton, not only provides that a felony conviction may be the basis for cancelling a voter’s registration, but it also requires Federal prosecutors to notify State election officials of Federal felony convictions.

The Help America Vote Act of 2002 also instructs State election officials to purge disenfranchised felons from their computerized voting lists on a regular basis.

Finally, regardless of the merits of this bill, it is doubtful that Congress even has the constitutional authority to enact it, because doing so would exceed Congress’ enforcement powers under the 14th and 15th Amendments. In the 1997 case of *City of Boerne v. Flores*, the Supreme Court held that Congress cannot enact laws in support of the constitutional equal protection requirement, unless Congress has first developed a legislative record that demonstrates a history and pattern of unconstitutional State conduct.

Not only has that legislative record not been compiled, but for the reasons outlined above, it does not appear that it ever could be compiled, considering the vast weight of countervailing historical evidence.

Still, I look forward to hearing from all our witnesses today. And I think those who are in support of this bill had better answer this.

Mr. SCOTT. Thank you.

And we are joined by the gentleman from Tennessee, Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chairman. I appreciate the opportunity to make an opening statement, for this has been an issue very close to my heart during most of my legislative career.

In 1986 as a State senator, I passed a bill in Tennessee that changed the voting rights in Tennessee, and allowed for people who had previously been declared infamous not to have voting rights, to get their voting rights restored in a simple process, in a simple procedure. And from 1986 to 1996, that law rested on the books, and it was known as the “Cohen period.”

In 1996, because of the Tennessee district attorney generals conference, the law was changed. Over my vote, and maybe one other person’s, it was changed. It made me realize at that time that part of the impetus, besides the racial implications—which I think are clear, *de facto*, not *de jure*, necessarily racism—was that the D.A.s who put these people in jail did not want to see those people come back to vote, because they would not vote for that D.A.

And that is not right either. It is politically covering your rear. And that is what happened when they changed the law in Tennessee.

And then, in 2006, we changed the law again. And we changed it back to a simple procedure similar to what it was in 1986 to 1996.

However, an individual from East Tennessee—a Republican in the house—put an amendment on, to say that you could not get

your voting rights restored if you were behind in your child support. Well, spend some time in prison. I think you are going to be behind in your child support, because you are not earning any money.

And we know that that was another effort, and that it was challenged. But it was accepted in the house, which is something I wish would not have happened, but I was in the senate. The ACLU challenged that action, but I think the courts said that it was not—that they were not successful in their court challenge. So, we still have that problem in Tennessee.

The bottom line is, Mr. Chairman, this is a vestige of Jim Crow. And I do not care if it is in Wisconsin, if it is in Utah, if it is in Alaska. It is a vestige of Jim Crow. And it needs to go. And if the Constitution—if there is a problem, we need to find a way to get around it.

And while the distinguished former Chairman of this Committee submits that the 9th Circuit is the most overturned circuit, I think that is a condemnation of the Supreme Court of the United States, not a condemnation of the 9th Circuit, that is more likely on point, correct and moving this country forward. So, because it is overturned, that is a badge of honor.

And the fact is, Mr. Chairman, this is an important hearing. We need to make sure that all these type of laws, that in their heart and their soul are evil and trying to put a scarlet letter—Hester Prynne does not have the A on her chest anymore. We have grown since Hester Prynne and “The Scarlet Letter.”

And this is an eternal scarlet letter put on people, which is contrary to all Christian, Judeo-Christian types of theories, that people can be recovered, can be redeemed, should have an opportunity and should be given a stake in society.

And if people cannot vote, they do not have a stake. And so, they are going to stay out of society and they are going to be recidivists. It is just wrong.

And I appreciate Mr. Conyers’ bill, and we need to do all we can to pass it.

Thank you so much.

Mr. SCOTT. Thank you.

We have a distinguished panel with us today.

The first speaker will be Hilary Shelton, director of the NAACP’s Washington bureau, senior vice president for advocacy and policy. In this capacity he has advocated on behalf of crucial civil rights legislation such as the Civil Rights Act of 1991, the reauthorization of the Voting Rights Act, the Help America Vote Act. He holds degrees in political science, communications and legal studies at Howard University, University of Missouri at St. Louis and Northeastern University, respectively.

Roger Clegg is the president and general counsel for the Center for Equal Opportunity. From 1982 to 1993, he held a number of positions with the Department of Justice, including assistant solicitor general, and has served in the Civil Rights Division and Environmental Division. He is a graduate of Rice University and Yale Law School.

Burt Neuborne is a professor of civil liberties at New York University School of Law. He has served as the legal director of the

Brennan Center for Justice at NYU since its founding in 1995. In addition to his work at the Brennan Center, he served on the New York City Human Rights Commission from 1988 to 1992, and as the national legal director of the ACLU from 1981 to 1986.

Hans Spakovsky is a senior legal scholar at the Center for Legal and Judicial Studies at the Heritage Foundation. He served in the Department of Justice as counsel to the assistant attorney general for civil rights from 2002 to 2005, and as a commissioner of the Federal Elections Commission in 2006 and 2007. He is a graduate of Vanderbilt University School of Law and received his B.S. from MIT.

Carl Wicklund is the executive director of the American Probation and Parole Association. He has over 37 years of experience in justice and human service fields that includes corrections program development and management. At the APPA he has been a member of the National Program Committee, chaired the Juvenile Justice Committee and served on the board of directors. He holds a B.A. in psychology from Gustavus Adolphus College.

Ion Sancho is a supervisor of elections for Leon County, Florida, serving since January 1989. He has been re-elected to five additional terms. He is one of only three out of 67 supervisors of elections in Florida without a party affiliation. He has devoted special attention to studying voting technology as an increasing participation in our electoral system. He received a J.D. from Florida State University Law School and B.A. from Stetson University.

Andres Idarraga is a native of Rhode Island. He was convicted of a felony when he was 20 and spent 6.5 years in prison. Since his release in June of 2004, he has worked hard to overcome his past, becoming a full-time student at Brown University while maintaining full-time employment and advocating on behalf of those disenfranchised due to felony conviction.

He is currently in his second year at Yale Law School, and I have learned that he is going to be joining the office of the full Judiciary Committee as an intern later this year.

I am pleased to welcome all of you. Your written statements in their entirety will be made part of the record, and I ask each of you to summarize your testimony in 5 minutes or less.

To help you stay within that time, there is a timing device at the table that is right behind the water pitcher. So, that would help you stay within the time. The light will start green, switch to yellow when there is 1 minute remaining, and will turn red when 5 minutes are up.

It is customary in this Subcommittee to swear in the witnesses, but we are going to skip that this time and just go with—starting with Mr. Shelton.

**TESTIMONY OF HILARY O. SHELTON, DIRECTOR,
NAACP WASHINGTON BUREAU, WASHINGTON, DC**

Mr. SHELTON. Thank you very much. And good afternoon, Chairman Scott, Chairman Nadler, Ranking Member Sensenbrenner, Congressman Cohen and esteemed Members of this Subcommittee.

Thank you so much for calling this important hearing and for asking me here today to share with you the NAACP's position on this crucial piece of legislation.

The NAACP strongly supports H.R. 3335, the “Democracy Restoration Act of 2009,” and urges its immediate enactment. At the heart of this debate, Mr. Chairman, is a question of rehabilitation, democracy and basic fairness. Currently, an estimated 5.3 million Americans across our Nation are denied the right to vote because of the laws that prohibit or restrict voting by people with felony convictions.

Three-fourths of these Americans are no longer in jail. The Democracy Restoration Act would permit men and women to register and vote in Federal elections once they have been released from prison.

The question as to whether or not these people should be allowed to vote is not a partisan question. Since 1997, 19 States that are considered both blue and red have amended felony disenfranchisement policies in an effort to restore voter eligibility.

Felony disenfranchisement laws have had a racially and ethnically disparate effect on minority Americans in general, and on African Americans quite specifically. Nationwide, an estimated 13 percent, or one out of every eight African American men cannot vote, because of a prior felony conviction. This is seven times the national average.

And while the majority of those Americans who are disenfranchised because of prior felony convictions are Caucasian, African Americans, who make up about 13 percent of the U.S. national population, constitute about one-third, or 33 percent, of those disenfranchised.

Furthermore, given the current rates of incarceration, three in 10 of the next generation of African American men can expect to lose their right to vote at some point in their lifetime. In States that disenfranchise ex-offenders, as many as 40 percent of African American men may effectively and permanently lose their right to vote.

One question that is frequently asked is, how many of these men and women would vote if they had an opportunity? It is, frankly, difficult to say.

However, in 2006, voters in Rhode Island changed the law so that once a felon was released from prison, he or she was able to register to vote. Since probation or parole terms can run a decade or more, an estimated 15,000 people in that State were prevented from voting. After passage of the amendment, about 6,000 of these people registered to vote in the 2008 election.

Felony disenfranchisement also has an impact at the community level. Voting is one way that people take responsibility for their lives and show a sense of ownership, or become a stakeholder in our great Nation. By prohibiting an individual from participating in an electoral process, we are decreasing the stake he or she may have in his or her own community.

Furthermore, election laws—even those governing Federal elections—are determined by individual States, and so, disenfranchisement laws may vary significantly across the country. On one hand, some States allow individuals to vote while they are incarcerated. On the other hand, 11 States currently do not allow people to vote once they are convicted of a felony offense, even after they have fully completed their sentences.

This leads to confusion and disparities. A perfect example of the vast disparities is right here in our own backyard.

In Virginia, a felony conviction automatically results in a permanent disenfranchisement, yet just over the State line in West Virginia, a person is allowed to register and vote once he or she leaves prison. As a result, less than 1 percent of the total population of West Virginia is disenfranchised, and all but 3.4 percent of African American populations of voting age are able to vote.

In Virginia, almost 7 percent of the entire voting age population is disenfranchised due to a past felony conviction, and almost 20 percent of the State's African American population is locked out of the voting booth.

Felony voting restrictions are the last vestige of voting prohibition. When the U.S. was founded, only wealthy men were allowed to vote. Women, racial and ethnic minorities, illiterates and the poor were excluded. Most of these restrictions have all been eliminated over time, often with much debate, rancor and challenges.

People who have served their time and been released from prison are the last Americans to be denied their highly cherished, basic right to vote. Furthermore, the fact that the States which disenfranchise the most African Americans tend to be in the South, makes these laws all the more suspect.

In fact, in some States with more restrictive ex-felony disenfranchisement laws, we have had African Americans report that their personal history—and, therefore, their voting eligibility—is questioned, simply because of the color of their skin.

Because the right to vote is such an important element of the democratic process, it is simply wrong to predicate it upon a system rife with racial disparities.

And with the voting such an integral part of becoming a productive member of American society, the way forward for our Nation should be a new paradigm in which we encourage ex-felons to vote, not prohibit them.

Chairman, I would like to again thank the Committee for the opportunity to speak, and I look forward to your questions.

[The prepared statement of Mr. Shelton follows:]

PREPARED STATEMENT OF HILARY O. SHELTON



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TESTIMONY OF HILARY O. SHELTON

**DIRECTOR, NAACP WASHINGTON BUREAU &
SENIOR VICE PRESIDENT
FOR ADVOCACY AND POLICY**

before the

**HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL
RIGHTS AND CIVIL LIBERTIES**

on

H.R. 3335, THE *DEMOCRACY RESTORATION ACT*

March 16, 2010



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H.R. 3335, THE *DEMOCRACY RESTORATION ACT*

March 16, 2010

Good morning Chairman Nadler, Ranking Member Sensenbrenner and esteemed members of the Subcommittee. Thank you so much for calling this important hearing and for asking me here today to share with you the NAACP's position on this crucial piece of legislation.

The NAACP strongly supports H.R. 3335, the *Democracy Restoration Act*, and we urge its immediate enactment.

At the heart of this debate, Mr. Chairman, is a question of rehabilitation, democracy and fairness. Currently, an estimated 5.3 million Americans across our nation are denied the right to vote because of laws that prohibit or restrict voting by people with felony convictions. Three fourths of these Americans are no longer in jail.

The *Democracy Restoration Act* would permit men and women to register and vote in federal elections once they have done their time, paid their debt to society, and have been released from prison.

The question as to whether or not these people should be allowed to vote is not a partisan question: since 1997, 19 states, under both Democratic and Republican governors, states that are considered both "blue" and "red", have amended felony disenfranchisement policies in an effort to reduce their restrictiveness and confusion while restoring voter eligibility.

I am honored to be asked here today because felony disenfranchisement laws have had a racial and ethnically disparate effect on minority Americans in general and on

African Americans specifically. As a result of the racial disparities that continue to plague our criminal justice system, racial concentrations and differing state laws a vastly disparate number of the people who are disenfranchised are racial or ethnic minorities. Specifically, nation-wide, an estimated 13%, or one out of every 8 African American men cannot vote because of the law in the state where he resides and a prior felony conviction. This is seven times the national average.

And while the majority of those Americans who are disenfranchised because of prior felony convictions are Caucasian, African Americans, who make up about 13% of the US population are disproportionately kept out of the voting booth: about 1/3, or 33% of those disenfranchised are black. Furthermore, if prevailing trends continue, it is only going to get worse. Given current rates of incarceration, three in ten of the next generation of African American men can expect to lose their right to vote at some point in their lifetime. In states that disenfranchise ex-offenders, as many as 40% of black men may effectively and permanently lose their right to vote.

In the last 30 years, due to the dramatic expansion of the criminal justice system and the continuing racial disparities among those incarcerated, former offender disenfranchisement laws have significantly affected the political voice of the African American community. The so-called "war on drugs" has had a disproportionate impact on African Americans; between 1985 and 1995, there was an unacceptably high incarceration increase of 306% for White Americans. Over the same time period, however, there was an unbelievable and completely unacceptable increase by 707% in the number of African Americans in state prison for a drug offense.

African Americans are disproportionately losing their right to vote. More than 60% of the people in prison today are racial and ethnic minorities. For Black males in their twenties, 1 in every 8, or 12.5% is in prison or jail on any given day. African Americans are incarcerated at nearly six (5.6) times the rate of white Americans, and Hispanics are incarcerated at nearly double (1.8) the rate of whites Americans.

One question that is frequently asked is how many of these men and women would vote if they were allowed to? It is, frankly, difficult to say. In 2006, however, voters approved an amendment to the Rhode Island Constitution which changed the law so that once a felon is released from prison, he or she is able to register to vote. Under the old law, felons could not vote until the completion of their entire sentences, including jail time and probation or parole. Since probation or parole terms can run a decade or more in some cases, an estimated 15,000 people in the state were prevented from voting. After passage of the amendment, about 6,000 of these people registered to vote in the 2008 elections.

Felony disenfranchisement also has an impact at a community level. Voting is one way that people take responsibility for their lives and show a sense of ownership or become a stakeholder in their communities. By prohibiting an individual from participating in the electoral process, we are decreasing the stake he or she may have in his or her community. It is akin to telling a person that no matter how long ago he or she erred,

and regardless of how long that person paid their penance, they will never be whole; they will never be a full and complete stake-holder in his or her community, or of our society.

Furthermore, election laws, even those governing federal elections, are determined by individual states, and so disenfranchisement laws vary significantly across the country. On the one hand, some states allow individuals to vote while they are incarcerated. At the other extreme, 11 states currently do not allow people to vote once they are convicted of a felony offense – even after they have fully completed their sentences and all associated probation or parole. In some cases, only a pardon from the governor can reinstate their voting rights. This leads to confusion and disparities.

A perfect example of the vast disparity is right here in our back yard. In Virginia, a felony conviction automatically results in permanent disenfranchisement. Yet just over the state line, in West Virginia, a person is allowed to register to vote once he or she leaves prison. As a result, less than 1% (0.8%) of the total population of West Virginia is disenfranchised; and all but 3.4% of the African American population of voting age can register. In Virginia, almost 7% of the entire voting-age population is disenfranchised due to a past felony conviction; and almost 20% of the state's African American population is locked out of the voting booth.

Felony voting restrictions are the last vestige of voting prohibitions; when the U.S. was founded only wealthy white men were allowed to vote. Women, minorities, illiterates and the poor were excluded. Most of these restrictions have all been eliminated over time, often with much debate, rancor and challenges. People who have served their time and been released from prison are the last Americans to be denied their highly cherished, basic right to vote.

Furthermore, the fact that a majority of the states with the most restrictive laws in terms of when an ex-felon can vote are primarily in the southern United States, arguably some of the most racially and ethnically diverse regions of our nation, makes these laws, their intent and the end effect, all the more suspect.

In fact, in some states with more restrictive ex-felony disenfranchisement laws, we have had African Americans report that their personal history, and therefore their voting eligibility, is questioned simply because of the color of their skin.

Because the right to vote is such an important element of the democratic process, it is simply wrong to predicate it upon a system rife with racial disparities. And with voting such an integral part of becoming a productive member of American society, the way forward for our Nation should be a new paradigm in which we encourage ex-felons to vote, not prohibiting them.

Chairman Nadler, members of the subcommittee, I urge you in the strongest terms possible to support the *Democracy Restoration Act* and expeditiously usher it through the congressional process and to the President's desk for his signature.

Mr. SCOTT. Exactly 5 minutes. Very good.
Thank you, Mr. Shelton.
Mr. Clegg?

TESTIMONY OF ROGER CLEGG, PRESIDENT AND GENERAL COUNSEL, CENTER FOR EQUAL OPPORTUNITY, FALLS CHURCH, VA

Mr. CLEGG. Thank you, Mr. Chairman, for the opportunity to testify today.

My name is Roger Clegg, and I am the president and general counsel of the Center for Equal Opportunity. I work there with Linda Chavez on a variety of issues. We are best described as a conservative think tank.

I appreciate the opportunity to testify today, because I feel very strongly about this bill. I am sorry to say that what I have to say is that this Committee, this Congress, does not have the authority to pass it, and that even if you did have the authority to pass it, it would be a bad idea. And I do not view either one of those as being particularly close calls.

The authority that is asserted for passing this bill appears principally to be Article I, Section 4 of the Constitution. That is not what Article I, Section 4 of the Constitution says.

It is about Congress regulating the "Times, Places and Manner" of elections. That is not determining who votes in an election. That is explicitly the subject of other, different parts of the Constitution.

That is what Alexander Hamilton thought. That is what James Madison thought. That is what the words of the Constitution mean. There is no Supreme Court authority to the contrary.

The case that most squarely presented this issue succeeded in getting the vote of exactly one Supreme Court justice. The other eight justices not only did not join him, but explicitly, to one degree or another, rejected Article I, Section 4 as authority. So, what you have to rely on instead, I guess, is authority under the 14th or 15th Amendment.

Mr. Chairman, in your introduction you said that you can rely on those provisions if there is a racially disproportionate intent or effect—there is racial intent or effect.

I must respectfully disagree. The case law is quite clear that there must be discriminatory intent, there must be disparate treatment. And the history is quite clear that there is no systematic use of or intent behind these felon disenfranchisement laws to disenfranchise people on the basis of race.

The opposing side's own historical research bears that out. The idea that, if you commit a crime, you are not allowed to vote, has roots in ancient Greece and ancient Rome. It came over to the colonies from England. It was passed in all kinds of States that did not have any—did not even allow African Americans to vote, and so, could not have been intended to keep them from voting. They were passed in a huge majority of States, long before the Civil War.

It is true that there were five southern States in the period from 1890 to 1910 that tweaked those laws to further disenfranchise African Americans. But those were five States—those laws are no longer on the books. All the other States that passed these laws did not have that intent.

The historical record is overwhelming that that is the case. And as has already been acknowledged, 48 of the 50 States in the United States, to one degree or another, disenfranchise felons. The historical record simply is not there.

And the record that is being relied on here is nonexistent. The Supreme Court's decision, the Supreme Court's handling of the Northwest Austin case last year, made clear that they were very interested in Congress being able to point to some kind of authority.

And I must say, Mr. Chairman, that as skeptical as the Supreme Court was in the Northwest Austin case, the case for congressional authority there was robust compared to what we have here. There is simply no authority for Congress to pass this bill. And as my

written testimony elaborates, it would be a bad idea for them to do so, even if they did have that authority.

Thank you.

[The prepared statement of Mr. Clegg follows:]

PREPARED STATEMENT OF ROGER CLEGG

TESTIMONY OF

ROGER CLEGG,

PRESIDENT AND GENERAL COUNSEL,

CENTER FOR EQUAL OPPORTUNITY

BEFORE THE

HOUSE JUDICIARY COMMITTEE'S

SUBCOMMITTEE ON THE

CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

REGARDING

H.R. 3335, THE "DEMOCRACY RESTORATION ACT"

March 16, 2010

2141 Rayburn House Office Building

Introduction

Thank you, Mr. Chairman, for the opportunity to testify this afternoon before the Subcommittee.

My name is Roger Clegg, and I am president and general counsel of the Center for Equal Opportunity, a nonprofit research and educational organization that is based in Fall Church, Virginia. Our chairman is Linda Chavez, and our focus is on public policy issues that involve race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. I should also note that I was a deputy in the U.S. Department of Justice's Civil Rights Division for four years, from 1987 to 1991, and that I testified against a very similar bill in 1999.

With all respect, Mr. Chairman, I do not think Congress should pass H.R. 3335, and for two reasons. First, it does not have authority under the Constitution to do so, since it is the states' prerogative to disenfranchise felons if they choose to do so. Second, even if Congress had the authority to pass this bill, it would not be good policy, because it is a matter best left to individual States, and there are sound reasons why the States may decide that at least some felons should not vote – that is, that those who are not willing to follow the law should not have a role in making the law.

I. Lack of Congressional Authority to Enact Felon Re-Enfranchisement Legislation

1. Description of the Bill

The heart of H.R. 3335 is section 3, which provides:

The right of an individual who is a citizen of the United States to vote in any election for Federal office shall not be denied or abridged because that individual has been convicted of a criminal offense unless such individual is serving a felony sentence in a correctional institution or facility at the time of the election.

Thus, with the exception of those currently serving time in prison for a felony conviction, H.R. 3335 would require that all persons convicted of crimes--those serving time for misdemeanors or in "any residential community treatment center" for a felony, those on probation or parole for felonies or misdemeanors, and those who have completed their sentences for felonies or misdemeanors--be allowed to vote in federal elections. Also, since it is logistically difficult for states to have one voting list, set of ballots, and set of voting booths for federal elections and another for state and local elections, it is likely that this bill would change who is allowed to vote in state and local elections. This is a dramatic change because currently the vast majority of States bar at least some felons not currently serving time from voting.

H.R. 3335 makes no claim that criminals are disenfranchised because of their race, nor could it plausibly do so, as I discuss later on. Without an assertion of its authority under the Fourteenth or Fifteenth Amendment, Congress may not dictate to States the

requirements of electors in state elections, and wisely H.R. 3335 does not do so. H.R. 3335 does, however, propose to cover federal elections.

2. Possible Fonts of Authority

The Supreme Court reaffirmed in *United States v. Lopez* what is obvious from the text of the Constitution: "The Constitution creates a Federal Government of enumerated powers." Accordingly, Congress must point to some font of authority in the Constitution for passing H.R. 3355.

There are three theories under which Congress might be asserting authority for passing this bill. First, if Congress has authority to pass this bill under Article I, Section 4 of the Constitution, it can simply assert its conclusion that all criminals (excepting felons currently in prison) are entitled to vote. Under this theory, Congress would not rely on any claim that it is addressing racial discrimination. Under the last two theories, Congress could assert authority to pass this bill under the enforcement clauses of the Fourteenth or Fifteenth Amendment, either because of the disparate impact that disenfranchisement of felons has on some minority groups or because this disenfranchisement is in fact racially motivated. [Footnote: The Task Force on Constitutional and Federal Election Law of the National Commission on Federal Election Reform, in its Task Force Report prepared by Professor Daniel Ortiz, likewise concluded that Congress lacked authority under these possible fonts, and also rejected the Commerce Clause as a possibility. *National Commission on Election Reform, To Assure Pride and Confidence in the Electoral Process: Task Force Reports* 40-41, at http://www.reformelection.org/data/task_t3/t3_reports/legal_issues.pdf (August 2001). The Task Force concluded, however, that Congress might use its Spending Clause authority. *Id.* at 41. However, the report also conceded that this would not work if a State was willing to refuse whatever funds were being tied to such a prohibition, and the Commission itself apparently rejected this suggestion, concluding, "we doubt that Congress has the constitutional power to legislate a federal prescription on this subject." *National Commission on Federal Election Reform, To Assure Pride and Confidence in the Electoral Process* 45, at http://www.reformelections.org/data/reports/99_full_report.pdf (August 2001). I agree with the Commission. If Congress tied participation in a spending program to re-enfranchising felons, the courts would likely and properly conclude that this was unrelated to the purpose of the spending and perhaps coercive as well, making the requirement unconstitutional. See *South Dakota v. Dole*, 483 U.S. 203, 207-08, 211 (1987) (holding that spending program regulations must be reasonably relevant to the federal interest in the program and may not be coercive).]

3. Article I, Section 4

To be valid, the Article I, Section 4 justification must overcome the explicit language of Article I, Section 2 of the Constitution, which provides that electors for the House of Representatives--and, by extension, for all federal elections--"shall have the Qualifications requisite for Electors of the most numerous Branch of the State

Legislature." Thus, the Constitution gives authority for determining elector qualifications to the States.

It might be asserted that Article I, Section 4 gives Congress authority to trump the States, insofar as it allows Congress to "make or alter such [state] Regulations" regarding "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." And, indeed, it appears that this is what H.R. 3335 principally relies on (see Section 2(2)).

As a textual matter, however, this interpretation is unpersuasive, since Article I, Section 4 discusses "holding Elections," not who is allowed to vote, which is the express focus of Section 2.

This is what the words of Article I, Section 4 mean and meant; and it is also what the Framers intended them to mean. In *The Federalist No. 60*, Alexander Hamilton said of Article I, Section 4 that the national government's "authority would be expressly restricted to the regulation of the times, the places, and the manner of elections. The qualifications of the persons who may choose or be chosen . . . are defined and fixed in the Constitution, and are unalterable by the legislature." In *The Federalist No. 52*, James Madison had written of Article I, Section 2: "To have left [the definition of the right of suffrage] open for the occasional regulation of the Congress would have been improper . . ." Hamilton and Madison believed that generally the state constitutions would determine who voted; Congress, in any event, would not.

The Supreme Court's decision in *Oregon v. Mitchell* should be discussed here. In a highly fractured series of opinions, five Justices voted to uphold legislation that required States to allow eighteen-year-olds to vote in federal elections. Justice Black wrote one opinion, Justice Douglas another, and Justice Brennan a third, in which he was joined by Justices White and Marshall. None of those writing or joining one of these opinions joined any of the others, and four other Justices--Harlan, Stewart, Blackmun, and Chief Justice Burger--dissented. The issue was superseded six months later with the ratification of the Twenty-Sixth Amendment, which provided that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

Although a majority of the Justices upheld a statute that dictated who could vote in federal elections, only one, Justice Black, relied on Article I, Section 4. The other four Justices relied on interpretations of Congress's enforcement authority under the Fourteenth and Fifteenth Amendments that are inconsistent with the Court's subsequent ruling in *Richardson v. Ramirez* combined with *City of Boerne v. Flores*. Accordingly, reliance on Article I, Section 4 lacks textual support and has been endorsed by only a 1970 opinion written by Justice Black. *Oregon v. Mitchell*, therefore, provides little support today for H.R. 3335.

Finally, it is not at all clear that the Framers were wrong in letting states determine who should vote. Some states are more conservative than this bill would allow, but two

other states are more liberal, and it is not at all clear why we should insist on a one-size-fits-all approach. The bill complains about a lack of uniformity, but it is hard to take this complaint seriously, when it allows nonuniformity so long as it is in the more liberal direction (compare Sections 2(4) and 2(5) with Section 7(a)).

4. *The Fourteenth and Fifteenth Amendments*

If Article I, Section 4 does not give Congress the power to trump the States' authority to determine voting qualifications in Article I, Section 2, then we are left with the claim that Congress may pass H.R. 3335 under its authority to enforce the Fourteenth and Fifteenth Amendments. The bill's findings suggest that it might be relying in part on these constitutional provisions as well (see, e.g., Sections 2(3), 2(8), and 2(9)).

Laws that have a mere disparate impact but no discriminatory intent do not violate the Fourteenth and Fifteenth Amendments. The Supreme Court has so held repeatedly with respect to the Fourteenth Amendment. A plurality has so held with respect to the Fifteenth Amendment (see *City of Mobile v. Bolden*, 446 U.S. 55, 62-65 (1980)), and it is hard to see how the standard could be different for one Reconstruction amendment than for another. When the Supreme Court in *Hunter v. Underwood* considered a claim that a State law denying the franchise to those convicted of crimes "involving moral turpitude" was unconstitutional race discrimination, it said: "[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Accordingly, Congress cannot credibly assert its enforcement authority if it can point to nothing but disparate impact.

It is true that the Supreme Court has upheld congressional bans on certain voting practices and procedures—like literacy tests—that are not themselves discriminatory on their face but have disproportionately excluded racial minorities from voting. But, as the Court stressed in *Boerne*, these cases involved bans aimed at practices that historically have been rooted in intentional discrimination.

H.R. 3335 does not assert that the reason States disenfranchise criminals is racial, nor could this assertion be plausibly made. To begin with, Section 2 of the Fourteenth Amendment itself contemplates disenfranchisement. It acknowledges that "the right to vote" may be "abridged . . . for participation in rebellion, or other crime." Surely this is recognition in the most relevant part of the Constitution itself that there are typically nonracial reasons for disenfranchising criminals.

That an overwhelming number of States have passed such disenfranchisement laws also indicates that something other than racial discrimination is indeed the motive. Rather, as the Sentencing Project and the Human Rights Watch—vigorous supporters of felon re-enfranchisement—acknowledge, "Disenfranchisement in the U.S. is a heritage from ancient Greek and Roman traditions carried into Europe." In Europe, the civil disabilities attached to conviction for a felony were severe, and "English colonists brought these concepts with them to North America." [Footnote: See also National

Commission on Federal Election Reform, *supra*, at 44-45.] Consider the following (Source: The Sentencing Project):

(1) Only two New England States--Maine and Vermont--allow all felons to vote.

(2) Thirty States prohibit felons who are on probation from voting.

(3) Thirty-five States prohibit felons who are on parole from voting.

(4) The States that prohibit all felons from voting--whether in prison, on probation, on parole, or having fully served their sentences--are: Alabama (for certain offenses), Arizona (for a second felony), Delaware (certain offenses, five years), Florida (certain offenses), Kentucky, Mississippi (certain offenses), Nebraska (2 years), Nevada (except first-time nonviolent), Tennessee (certain offenses), Virginia, and Wyoming (certain offenses, 5 years). This is hardly the old Confederacy; indeed, fewer than half the States fall in that category. Or consider this: Only one state in the old Confederacy, Virginia, disenfranchises all felons (and there the governor has frequently re-enfranchised felons).

(5) Furthermore, a majority of the States in the old Confederacy -- Texas, Arkansas, Louisiana, North Carolina, South Carolina, and Georgia -- do allow felons to vote, so long as they are no longer in prison, on parole, or on probation.

It is true that, between 1890 and 1910, five Southern States (Alabama, Louisiana, Mississippi, South Carolina, and Virginia) tailored their criminal disenfranchisement laws to increase their effect on black citizens. [Footnote: See Andrew L. Shapiro, Note, "Challenging Criminal Disenfranchisement Laws under the Voting Rights Act: A New Strategy," 1032 *Yale L.J.* 537 (1993).] But these States have all changed their laws to one degree or another, and in any event, the judiciary has been willing to strike such laws down when it is shown that they were intended to discriminate on the basis of race. For example, the Supreme Court struck down an Alabama law in *Hunter v. Underwood*. The meat-ax approach of H.R. 3335 is as unnecessary as it is unwise.

We can continue the historical narrative by consulting another key source for the felon-voting proponents: an article by professors Christopher Uggen and Jeff Manza in the *American Sociological Review*. It concedes, "Restrictions [on felon voting] were first adopted by some states in the post-Revolutionary era, and by the eve of the Civil War some two dozen states had statutes barring felons from voting or had felon disenfranchisement provisions in their state constitutions." That means that over 70 percent of the states had these laws by 1861—when most blacks couldn't vote in any case because they were still enslaved.

During the period from 1890 to 1910 when five southern states passed race-targeted felon-disenfranchisement, a graphic in the *American Sociological Review* article indicates that over 80 percent of the states in the U.S. already had felon-disenfranchisement laws. Alexander Keyssar's book *The Right to Vote*—cited in the Uggen and Manza piece—says that, outside the South, the disenfranchisement laws "lacked socially distinct targets and

generally were passed in a matter-of-fact fashion." Even for the post–Civil War South, Keyssar has more recently written, in some states “felon disfranchisement provisions were first enacted [by] ... Republican governments that supported black voting rights.” Thus, to quote Uggen and Manza, “In general, some type of restriction on felons' voting rights gradually came to be adopted by almost every state, and at present 48 of the 50 states bar felons—in most cases including those on probation or parole—from voting.” [For more on the non-racist history of felon disenfranchisement in the United States – from the Founding, up to the Civil War, after the Civil War (with the limited exceptions noted above), including the Reconstruction Congress, on to the present day, see Roger Clegg, George T. Conway III & Kenneth K. Lee, “The Bullet *and* the Ballot? The Case for Felon Disenfranchisement Statutes,” 14 *Journal of Gender, Social Policy & the Law* 1, 5-8 (2006).]

The Supreme Court's decision in *City of Boerne v. Flores*, discussing the scope of Congress's enforcement powers for the Reconstruction amendments, declared, “There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” The Court concluded that Congress could not bar State actions with a discriminatory effect on the free exercise of religion when the underlying constitutional right was to be free from State actions with discriminatory intent. Likewise, there is no “congruence and proportionality” between guaranteeing people the right to vote irrespective of race and a requirement that criminals be allowed to vote, just because there is a specific, transitory racial imbalance at this particular time among felons.

II. Policy Objections to Felon Re-Enfranchisement

Those who are not willing to follow the law cannot claim a right to make the law for everyone else. And when you vote, you are indeed making the law – either directly, in a ballot initiative or referendum, or indirectly, by choosing lawmakers.

Not everyone in the United States may vote—not children, for example, or noncitizens, or the mentally incompetent, or criminals. We have certain minimum, objective standards of responsibility, trustworthiness, and loyalty for those who would participate in the sacred enterprise of self-government. And it is not unreasonable to suppose that, in particular, those who have committed serious crimes against their fellow citizens may be presumed to lack this responsibility, trustworthiness, and loyalty.

It is not too much to demand that those who would make the laws for others—who would participate in self-government—be willing to follow those laws themselves. A ballot initiative in November 2000 removed Massachusetts from the States allowing felons now in prison to vote (as noted above, there are now only two, Vermont and Maine). Francis Marini, GOP leader of the state house, said, of the state's repealed practice, “It makes no sense.” Marini stated, “We incarcerate people and we take away their right to run their own lives and leave them with the ability to influence how we run our lives?” (Massachusetts governor Paul Cellucci decided to back the repeal after prisoners began to organize a political action committee.)

These are, in my view, strong arguments – and certainly strong enough to refute a claim that Congress must intervene here to present some sort of irrational malfeasance in the States by dictating a one-size-fits-all national policy.

The policy arguments in favor of felon voting, on the other hand, are unpersuasive. For the balance of my testimony, I will address them.

“We let everyone else vote.” Again, this is simply not true. We also deny the vote to children, noncitizens, and the mentally incompetent, because they, like felons, fail to meet the objective, minimal standards of responsibility, trustworthiness, and loyalty we require of those who want to participate in the government of not only themselves but their fellow Americans.

“Once released from prison, a felon has paid his debt to society and is entitled to the full rights of citizenship.” This rationale would apply only to felons no longer in prison, of course, and might not apply with respect to felons on parole or probation. Even for these “former” felons, the argument is not persuasive. While serving a sentence discharges a felon’s “debt to society” in the sense that his basic right to live in society is restored, serving a sentence does not require society to forget what he has done or bar society from making judgments based on his past crimes.

For example, federal law prohibits felons from possessing firearms or serving on juries, which does not seem unreasonable. Here is a more dramatic example: Most would agree that a public school ought to be able to refuse to hire a convicted child molester, even after he has been released from prison. In fact, there are a whole range of “civil disabilities” for felons after prison release that apply as a result of federal and state law, listed in a 144-page binder (plus two appendices) published by the U.S. Justice Department’s Office of the Pardon Attorney. Society is simply not required, nor should it be required, to ignore someone’s criminal record once he gets out of prison.

Finally, I should note that it is unlikely that those on the other side of the aisle really take this argument seriously. If they did, then presumably they would agree that, if you have *not* paid your debt to society, then you should *not* be able to vote. But this is frequently not the case. Marc Mauer, executive director of the ACLU’s Sentencing Project, for example, believes that “people in prison should have the right to vote.”

“Disenfranchisement can be a disproportionate penalty.” Common sense would dictate that some felons be allowed to vote and others not. Some crimes are worse than others, some felons have committed more crimes than others, and some crimes are recent while others are long past. At one extreme, it is hard to see why a man who wrote a bad check in 1933 and has a spotless record since then should not be entrusted with the franchise. At the other extreme, however, it is hard to see why a man just released after serving time for espionage and treason, and after earlier convictions for murder, rape, and voter fraud, should be permitted to vote.

Yes, not all crimes are equal, even among felons, and one cannot presume that all felons are equally to be mistrusted with the ballot. But, it does not follow that therefore all felons should be allowed to vote. Rather, it would be more prudent to distinguish among various crimes, such as serious crimes like murder, rape, treason, and espionage on the one hand, versus marijuana possession on the other; and between crimes recently committed and crimes committed in the distant past; and among those who have committed many crimes and those who have committed only one.

But this line-drawing is precisely why the matter should be left to the states, and why it should be applied on a case-by-case basis. It will be difficult for Congress to undertake this power—even if it had the authority to do so, which, as discussed earlier, it does not—since, for one thing, every State has its own array of offenses. Further, these offenses are constantly changing, so Congress would have to be constantly updating any statute it wrote that drew distinctions among various crimes. It would also be difficult to draft a statute that drew intelligent lines with respect to how recent a crime was and the number of crimes committed. Accordingly, it is wiser for Congress to leave the line-drawing to the States, where it has always been.

Finally, I should note that, even at the state level, drafting a statute that would properly calibrate seriousness of offense, number of offenses, and how recently they occurred is probably impossible. The better approach is a general presumption against felons voting but with an efficacious administrative mechanism for restoring the franchise on a case-by-case basis through an application procedure. (If those procedures are not working well, as is sometimes complained, then those complaining should work to improve them, rather than arguing that the solution is to let all felons vote automatically.)

“These laws have a disproportionate racial impact.” Undoubtedly the reason that there is heightened interest in this subject is that a disproportionate percentage of felons are African Americans. According to the NAACP at one point, thirteen percent of African American males (1.4 million) are prohibited from voting, a much higher percentage than other demographic groups. The NAACP has in the past pointed to Alabama and Florida as particularly egregious examples, where “more than 30 percent of all African American men have lost their rights to vote forever.” It blamed, in particular, the war on drugs, arguing that between 1985 and 1995 there was a 707 percent increase in blacks in state prison for drug offenses, compared to a mere 306 percent increase for whites. Other traditional civil-rights groups and leaders, like Jesse Jackson, have also supported felon re-enfranchisement.

As discussed earlier, the racial impact of these laws is irrelevant as a legal matter. It should also be irrelevant as a matter of policy. Legislators should determine what the qualifications or disqualifications for voting are and then let the chips fall where they may. In *The Souls of Black Folk*, W.E.B. Du Bois wrote: “Draw lines of crime, of incompetency, of vice, as tightly and uncompromisingly as you will, for these things must be proscribed; but a color-line not only does not accomplish this purpose, but thwarts it.”

The fact that these statutes disproportionately disenfranchise men and young people is not cited as a reason for changing them—as “sexist” or “ageist”—nor does it matter that some racial or ethnic groups may be more affected than others. That criminals are “overrepresented” in some groups and “underrepresented” in others is no reason to change the laws. This will probably always be the case, with the groups changing with time and with the country’s demography. If large numbers of young people, black people, or males are committing crimes, then our efforts should be focused on solving those problems. It is bizarre instead to increase criminals’ political power.

Much has been made of the high percentage of criminals—and, thus, disenfranchised people—in some communities. But the fact that the effects of disenfranchisement may be concentrated in particular neighborhoods is actually an argument in the law’s favor. If these laws did not exist there would be a real danger of creating an anti-law enforcement voting bloc in local municipal elections, for example, which is hardly in the interests of a neighborhood’s law-abiding citizens. Indeed, the people whose votes will be diluted the most if criminals are allowed to vote will be law-abiding people in high-crime areas – people who are themselves disproportionately poor and minority. Somehow, the liberal civil-rights groups often forget them.

“We should welcome felons back into the community.” The bill suggests that re-enfranchising felons is a good way to reintegrate them into society. I am sympathetic to this, but it should not be done automatically, but carefully and on a case-by-case basis, once it is shown that the felon has in fact turned over a new leaf. When that has been shown, then holding a ceremony – rather like a naturalization ceremony – in which the felon’s voting rights are fully restored would be moving and meaningful. But the restoration should not be automatic, because the change of heart cannot be presumed. Richard Freeman, of Harvard University and the National Bureau of Economic Research, has found, “Two-thirds of released prisoners are re-arrested and one-half are reincarcerated within 3 years of release from prison Rates of recidivism necessarily rise thereafter, so that upwards of 75%-80% of released prisoners are likely to be re-arrested within a decade of release.”

Felon re-enfranchisement sends a bad message: We do not consider criminal behavior such a serious matter that the right to vote should be denied because of it. Alternatively, consider that not allowing criminals to vote is one form of punishment and a method of stigmatization that tells criminals that committing a serious crime puts them outside the circle of responsible citizens. Being readmitted to the circle is not automatic. It is true that a disproportionate number of African Americans are being disenfranchised for committing serious crimes, but their victims are disproportionately black, too. Perhaps the logical focus of an organization like the NAACP should be on discouraging the commission of such crimes, rather than minimizing their consequences.

Conclusion

In sum, Mr. Chairman, in my opinion Congress does not have authority to pass

this bill and, even if it did, it would be unwise to do so. Thank you again for the opportunity to testify today.

Appendix: References

(1) The “Felon Voting” section of the website of the Center for Equal Opportunity [link: <http://www.ceousa.org/content/blogcategory/64/93/>] includes, among other things, a list of what Roger Clegg has written in this area, including:

Roger Clegg, “Commentary - Should felons have the right to vote? - NO: Felon disenfranchisement is actually a good idea” *Examiner.com*, July 24, 2008.
 Roger Clegg, “Voting Rights on a Slippery Slope,” *Pajamas Media*, November 30, 2007.
 Roger Clegg, “Franchise Protection,” *Wall Street Journal*, August 26, 2006, at page A11.
 Roger Clegg, George T. Conway III & Kenneth K. Lee, “The Bullet and the Ballot? The Case for Felon Disenfranchisement Statutes,” 14 *Journal of Gender, Social Policy & the Law* 1 (2006).
 Roger Clegg, George T. Conway III & Kenneth K. Lee, “The Case against Felon Voting,” 2 *U. St. Thomas J.L. & Pub. Pol’y* 1 (2008).
 Roger Clegg, “Perps and Politics,” *National Review Online*, October 18, 2004.
 Roger Clegg, “Who Should Vote?,” 6 *Texas Review of Law & Politics* 159 (Fall 2001).
 Roger Clegg, “Felon Should Not Have an Automatic Right to Vote,” in *Contemporary Issues in Criminal Justice Policy* 69 (Natasha A. Frost et al. eds., 2010).
Testimony of Todd Gaziano and Roger Clegg before the House Judiciary Committee’s Subcommittee on the Constitution (Oct. 21, 1999).

(2) Also recommended is John Dinan’s “The Adoption of Criminal Disenfranchisement Provisions in the United States: Lessons from the State Constitutional Convention Debates,” *Journal of Policy History*, vol. 19, No. 3, 2007, pp. 282-312 (“As for the possibility that these provisions were designed to reduce African American voter turnout, the extant convention debates reveal a single delegate who mentioned such a connection (although contemporaneous evidence reveals that modifications made to several other post-Reconstruction southern state constitutional provisions on this subject were also motivated by racial concerns).”).

(3) Finally, the CEO website also includes the following questions-and-answers that focus on some common arguments in favor of felon enfranchisement.

Why should felons not be allowed to vote?

Because you don’t have a right to make the laws if you aren’t willing to follow them yourself. To participate in self-government, you must be willing to accept the rule of law.

We don’t let everyone vote—not children, not noncitizens, not the mentally incompetent. There are certain minimum and objective standards of trustworthiness, loyalty, and responsibility, and those who have committed serious crimes against their fellow citizens don’t meet those standards.

Shouldn’t some felons be allowed to vote?

Yes, and some shouldn’t. The decision to restore the right to vote should not be made automatically. It should be made carefully, on a case-by-case basis, weighing the

seriousness of the crime, how long ago it was committed, and whether there is a pattern of crime.

Haven't felons paid their debt to society?

They've paid enough of their debt to be allowed out of prison, but that doesn't mean there aren't continuing consequences. We don't let felons possess firearms or serve on juries, for instance. By the way, most of the groups that want felons to be able to vote want them to be able to vote when they are still in prison, so this "paid their debt to society" argument is a red herring.

Aren't these laws racist?

No. They have a disproportionate impact on some racial groups, because at any point in time there are always going to be some groups that commit more crimes than others, but that doesn't make the laws racist--just as the fact that more crimes are committed by men doesn't make criminal laws sexist. The people whose voting rights will be diluted the most if criminals are allowed to vote are the law-abiding people in high-crime areas, who are themselves disproportionately black and Latino.

But, historically, weren't these laws passed to keep African Americans from voting?

A few southern states did so a hundred years ago, but those statutes are no longer on the books, and they would be unconstitutional if they were. Today's laws have their roots in ancient Greece and Rome, came to the American colonies from England, and are found in nearly every state in the country, where they were adopted without any racist intent at all and have never been applied discriminatorily.

Don't these laws keep felons from rejoining society?

Two out of three felons who are released from prison commit another crime, but it is ridiculous to assert that the reason they do so is that they can't vote. If a felon shows that he or she really has turned over a new leaf and is no longer a threat to the community but is giving something back to it, there should be a formal ceremony that restores the right to vote to that individual. But it should not be done automatically.

Do these laws violate the Constitution and the Voting Rights Act?

No. The Supreme Court has ruled that they do not violate the Constitution, and indeed the Constitution itself contains language approving of felon disenfranchisement. Similarly, the history of the Voting Rights Act makes clear that it was not intended to require letting criminals vote.

Mr. SCOTT. Thank you.
Mr. Neuborne?

TESTIMONY OF BURT NEUBORNE, INEZ MILHOLLAND PROFESSOR OF CIVIL LIBERTIES, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NY

Mr. NEUBORNE. Mr. Chairman, Members of the Committee, thank you for the opportunity to testify this afternoon.

It is a great tribute to the both scholarly and intellectual force in this Nation that I can disagree so vehemently with Professor Clegg over the Committee's authority.

I don't think there is any doubt about the Committee's authority. One can argue about the merits of this, and other people will do that much better than I can. But as far as the power of Congress to sever the last link between a history of using devices to prevent the members of racial minorities to vote, I think is, without question, that you have this power.

This is the last link. Literacy tests are gone. The durational residence requirements are gone. The property qualifications are gone. The intimidation has finally been stopped. The violence has been stopped—the last link to the racist past of the felony disenfranchisement laws.

Felony disenfranchisement, or disenfranchisement for conviction, did indeed predate the Civil War. They had it in Greece. But once the Civil War was fought, and once the 14th and 15th Amendments were put on the books, this was an extraordinarily convenient device for racists in both the North and the South to seize upon as a way to make sure that the newly freed slaves and the newly freed Black Americans would be unable to vote.

And it is true that five States in 1890 began to tweak it, but the southern States and many of the northern States in the period from 1868 to 1890 used felony disenfranchisement laws outrageously and discriminatorily in a way to discriminate against Blacks.

Now, I noticed on the train on the way down—and I hope you will forgive this personal aside—that this is the 45th anniversary of my first testimony before Congress. I testified in 1965 on the Voting Rights Act of 1965. And my topic, the task I had that day, was to talk to Congress about its power to abolish literacy tests—nationwide, in every State in the union, whether or not those States were currently engaged in racial discrimination.

And I argued to the Committee then—and I argue now, because it is the same argument—that under Section 2 of the 15th Amendment, Congress possesses power to act when three things come together: one, an impediment to voting that has been historically used to discriminate against members of racial minority; two, a showing that that impediment continues today to have the effect of discriminating against racial minorities; and three, the possibility and potential that the current effect is intended, because, as we all know, proof of intent is very, very difficult.

And the most important power this Committee possesses under Section 2 of the 15th Amendment is the power to act prophylactically to stop techniques that have been historically used in a racially discriminatory way, that are still having racial impact, and

where it is impossible to prove on a case-by-case basis that the intent exists. The purpose of Section 2 of the 15th Amendment is to give you the power to act prophylactically on a wholesale basis, where litigation on a retail basis would be inappropriate and impossible to prove.

Now, when this issue came before the Supreme Court in *Oregon v. Mitchell*—the case that Professor Clegg mentioned—all nine members of the Supreme Court—nine-nothing, not a single dissent—all nine members said that you had the power to eliminate literacy tests in every State in the country, because of three things: because literacy tests had been used in a discriminatory way to prevent Black people from voting; because they were still being used in a way that had a disproportionate impact on Black people; and because it was impossible on a case-by-case basis to differentiate when it was intentional and when it was not.

And Congress, under those circumstances under Section 2 of the 15th Amendment, has the power to exercise the enormously important reform of saying, where there is smoke, you do not have to prove fire every time, if it is too hard to do. And we will step in and eliminate the practice entirely in order to sever the possibility that it is still linked to a racially discriminatory past.

In fact, when Professor Clegg and, I assume, my colleague on my left are going to argue to you that the Committee has no power to do this, what they are really telling you is that the Committee had no power to eliminate literacy tests nationwide in 1970, and that the Supreme Court was wrong when it voted nine-nothing in *Oregon v. Mitchell* to uphold that power. Each of these devices—literacy tests on one hand, felony disenfranchisement on another.

First, the legislation would operate only in Federal elections, leaving States to do what they will.

Second, they both have long and ugly histories of racially discriminatory animus in their genesis and in their use after the Civil War.

Three, they both today operate with disproportionate impact and prevent large numbers of poor people and racial minorities from voting.

And fourth, it is difficult and—as a litigator who spent a lifetime doing this—virtually impossible to prove a racial animus in a sophisticated world where people know that they are not supposed to admit it. And so, it becomes impossible to prove it.

But when you put those four things together, you have a prescription, I believe, for congressional action. And I urge you to follow that prescription.

Thank you.

[The prepared statement of Mr. Neuborne follows:]

PREPARED STATEMENT OF BURT NEUBORNE

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Before the
Judiciary Committee
Constitution, Civil Rights, and Civil Liberties Subcommittee
United States House of Representatives
March 16, 2010

Introduction

Chairman Conyers, Chairman Nadler and Members of the Committee:

Good afternoon, and thank you for the opportunity to testify today in support of H.R. 3335, the Democracy Restoration Act. This legislation would restore the right to vote in federal elections to millions of our fellow citizens who have a criminal conviction in their past, but who have been released from prison and have rejoined their communities. The Brennan Center believes that it is both morally wrong and socially self-defeating to exclude citizens who are living and working in the community from full participation in our democracy. I am confident that the federal government possesses ample constitutional authority to enact this legislation which will restore voting rights in federal elections to nearly 4 million American citizens.

I am the Inez Milholland Professor of Civil Liberties at New York University School of Law where, among other courses, I have taught Constitutional Law and the Law of Democracy since 1972. I have served as the Legal Director of the Brennan Center for Justice at NYU since its founding in 1995. The Brennan Center is a non-partisan public policy and legal institution honoring the memory of Justice William Brennan, Jr. The Brennan Center focuses on fundamental issues of democracy and justice, issues that were at the heart of Justice Brennan's remarkable career. A singular institution—part think tank, part public interest law firm, part advocacy group—the Brennan Center combines scholarship, legislative and legal advocacy, and public education to win meaningful, measurable change in the public sector on behalf of the most vulnerable members of society.

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In addition to my work with the Brennan Center, I served on the New York City Human Rights Commission from 1988-92, and as National Legal Director of the American Civil Liberties Union from 1981-86. I have written numerous books and articles on the law of democracy, and have sought to protect the right to vote and to run for office in a fair election on many occasions in our courts. It was my honor to represent Senators McCain and Feingold in connection with their efforts to curb the pernicious influence of excessive campaign contributions on American democracy. I am grateful to my colleague at the Brennan Center, Erika Wood, for helping me to prepare for this hearing.

Background

While the right to vote is at the core of American democracy, it has taken more than two centuries to realize the dream of near-universal formal suffrage. In the beginning, the vote was restricted to white men of property. Property qualifications, including the poll tax, were gradually relaxed during the 19th century, and were eventually declared unconstitutional in the 20th century in *Harper v. Virginia Board of Elections*,¹ and *City of Phoenix v. Kolodziejewski*.² Federal legislation in 1965 outlawing the poll tax in state elections³ played a major role in ending property qualifications for voting by dramatically illustrating the pernicious effects of property-based impediments to voting.

Racial discrimination in access to the ballot was declared illegal with the ratification of the Fifteenth Amendment in 1870. But it took more than a century to make the promise of the Fifteenth Amendment a reality. For more than 100 years, a combination of lawless violence, intimidation, racist manipulation of state and local election laws, and judicial indifference resulted in the wholesale disenfranchisement of citizens of color. Significantly, federal legislation, particularly legislation ending literacy tests in federal elections throughout the United States,⁴ played a major role in enfranchising millions of poor voters, many of whom were members of racial minorities. While gender discrimination in access to the ballot was formally ended by the ratification of the 19th Amendment in 1920, women continue to be radically under-represented at every level of American democracy.

Onerous state and local rules defining voter qualifications, and regulating voter registration and the mechanics of voting, have also played a major role in denying many Americans the right to vote. Slowly, many of the onerous formal impediments to voting were removed. Durational residence requirements were declared unconstitutional in *Dunn v. Blumstein*.⁵ The remaining formal impediments to voting were subjected to

¹ 383 U.S. 663 (1966).

² 399 U.S. 204 (1970).

³ See Voting Rights Act of 1965, 79 Stat 442, 42 U.S.C. sec. 1973h. The 24th Amendment, ratified in 1964, had eliminated the poll tax in federal elections.

⁴ The constitutionality of literacy tests for voting had been upheld in *Lassiter v. Northampton Bd. of Elections*, 360 U.S. 45 (1959). Congress suspended the use of literacy tests in federal elections for a five year period beginning in 1970, and made the ban permanent in 1975. Congress's authority to ban literacy tests in federal elections was unanimously upheld in *Oregon v. Mitchell*, 400 U.S. 12 (1970).

⁵ 405 U.S. 330 (1972).

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withering strict scrutiny review by the Supreme Court beginning in *Carrington v. Rash*⁶ and *Kramer v. Union Free School District*,⁷ and fell one by one. Significantly, federal legislation played a major role in providing for uniform and convenient voter registration procedures in federal elections.

As a result, our democracy is more diverse, and more representative of the American people, than ever before - although we continue to suffer from an unacceptably low voter turnout in state and federal elections that will not be fully cured until, like most mature democracies, we adopt universal voter registration.

After two centuries of progress, one final formal voting barrier remains. 5.3 million American citizens are not allowed to vote because of a felony conviction in their past. As many as 4 million Americans live, work and raise families in our communities, but because of a conviction in their past they are denied participation in the political community, rendering them second-class citizens.⁸ In 1974, in *Richardson v. Ramirez*,⁹ a majority of the Supreme Court misread the text of section 2 of the Fourteenth Amendment to insulate felony disenfranchisement laws from strict scrutiny under section 1 of the Fourteenth Amendment. The Court erroneously read the phrase “rebellion or other crime” in section 2 to limit the reach of section 1 in any case involving disenfranchisement for “crime.”

In fact, the language of section 2, which was intended to enfranchise newly freed slaves without the necessity of enacting the Fifteenth Amendment, was intended to apply solely to persons barred from voting because of “rebellion or other crimes” in connection with the Civil War.¹⁰ In *Hunter v. Underwood*,¹¹ the Court undid a piece of the mischief it wrought in *Ramirez* by outlawing felony disenfranchisement laws enacted with the intent of disenfranchising minority voters. Although most felony disenfranchisement statutes have their genesis in an effort to disenfranchise racial minorities, and are therefore unconstitutional under *Hunter*, it is notoriously difficult to prove discriminatory intent. As a result, felony disenfranchisement laws of one kind or another remain on the books of 48 of the 50 states as a morally repugnant link with a racist past.

The states vary widely on if, when, and how voting rights are restored to citizens with criminal convictions. Maine and Vermont do not withdraw the franchise because of a criminal conviction; they refuse to turn any American citizen into a political pariah, even during their time in prison. At the other end of the spectrum, Kentucky and Virginia

⁶ 380 U.S. 89 (1965).

⁷ 395 U.S. 621 (1969).

⁸ Erika Wood, Brennan Center for Justice, *Restoring the Right to Vote 2* (2009), available at http://www.brennancenter.org/content/resource/restoring_the_right_to_vote/; see also JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 76 (2006).

⁹ 418 U.S. 24 (1974).

¹⁰ In many ways, the erroneous decision in *Richardson v. Ramirez* is analogous to the Court’s decision in *Lassiter* upholding literacy tests. It took Congressional action to free millions of citizens from *Lassiter*. The Democracy Restoration Act will likewise free millions of citizens from *Ramirez*.

¹¹ 471 U.S. 222 (1985).

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are the most intransigent, permanently disenfranchising citizens with felony convictions, thereby exiling them from their political communities forever unless they receive individual, discretionary, executive clemency. The rest of the states fall between the two poles, but 35 states continue to disenfranchise people with criminal convictions even after they have rejoined their communities, often for decades; sometimes for life.¹²

As the Supreme Court noted in *Hunter v. Underwood*, the history of criminal disenfranchisement laws in the United States is deeply rooted in the troubled history of American race relations. In the late 19th century, criminal disenfranchisement laws spread as part of a larger backlash against the adoption of the Reconstruction Amendments – the Thirteenth, Fourteenth, and Fifteenth Amendments – which ended slavery, granted equal citizenship to freed slaves, and prohibited racial discrimination in voting.¹³

Despite their newfound eligibility to vote, many freed slaves remained effectively disenfranchised. Violence and intimidation were rampant. Over time, state politicians sought to solidify their hold on power by modifying voting laws in ways that would exclude African-Americans from the polls without overtly violating the Fourteenth and Fifteenth Amendments.¹⁴ The legal barriers employed – including literacy tests, residency requirements, grandfather clauses, and poll taxes – while race-neutral on their face, were unquestionably intentional barriers to African-American voting.¹⁵ The reaction against the Amendments achieved its intended result: the removal of large segments of the African-American population from the democratic process for sustained periods, in some cases for life.¹⁶

Criminal disenfranchisement laws were at the center of the post-Reconstruction effort to maintain white control over access to the polls. Between 1865 and 1900, 18 states adopted laws restricting the voting rights of criminal offenders. By 1900, 38 states had some type of criminal voting restriction, most of which disenfranchised convicted individuals until they received a pardon.¹⁷ At the same time, states expanded their criminal codes to punish offenses that freedmen were thought most likely to commit. Thus, a toxic combination of targeted criminalization, racist administration of the criminal justice system, and felony disenfranchisement produced both practical re-

¹² See Brennan Center for Justice, *Criminal Disenfranchisement Laws Across the United States* (2009), http://www.brennancenter.org/dynamic/subpages/download_file_48642.pdf. Thirteen states and the District of Columbia currently allow people on probation and parole to vote: Hawaii, Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island and Utah.

¹³ MANZA & UGGEN, *supra* note 1, at 56-57; Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 AM. J. SOC. 559, 560-61 (2003); Alce C. Ewald, "Civil Death": *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1087-88.

¹⁴ ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 111 (2000); Ewald, *supra* note 3, at 1087.

¹⁵ KEYSSAR, *supra* note 5, at 111-12; Behrens et al., *supra* note 3, at 563; Ewald, *supra* note 3, at 1087.

¹⁶ Behrens et al., *supra* note 3, at 560; Ewald, *supra* note 3, at 1087.

¹⁷ MANZA & UGGEN, *supra* note 1, at 55, 238-39 tbl.A2.1 (A typo in the text indicates 28 states, but the table correctly lists 38).

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enslavement, and the legally mandated loss of voting rights, usually for life, effectively suppressing the political power of African-Americans for decades.¹⁸

Criminal disenfranchisement laws continue to have a lingering, often intended, racial effect today. Nationwide, 13 percent of African-American men have lost the right to vote, a rate that is seven times the national average.¹⁹ In eight states, more than 15 percent of African Americans cannot vote due to a felony conviction, and three of those states disenfranchise more than 20 percent of the African-American voting-age population.²⁰

In fact, in January, 2010, the United States Court of Appeals for the Ninth Circuit ruled in *Farrakhan v. Gregoire*, that Washington State's criminal disenfranchisement law violated Section 2 of the Voting Rights Act.²¹ The Ninth Circuit found that racial discrimination in the state's criminal justice system had interacted with the state's felony disenfranchisement law, resulting in the denial of the right to vote on account of race.²² The Ninth Circuit found that plaintiffs presented "compelling" evidence that "in the total population of potential 'felons,' . . . minorities are more likely than Whites to be searched, arrested, detained, and ultimately prosecuted. . . . If those decision points are infected with racial bias, resulting in some people becoming felons not just because they have committed a crime, but because of their race, then that felon status cannot, under section 2 of the VRA, disqualify felons from voting."²³

Commendably, there has been significant activity in state legislatures restoring the right to vote to citizens who have rejoined their communities after release from prison. In the past decade, 21 states have either restored the right to vote or eased the restoration process.²⁴ Nevertheless, millions of Americans with a criminal conviction in

¹⁸ These tactics were not confined to the South. They were employed in northern states as well, perhaps most notably in New York. Starting in the 18th century, New York's criminal disenfranchisement provisions were part of a concerted effort to exclude African Americans from participating in the political process. See Erika Wood & Liz Budnitz, Brennan Center for Justice, *Jim Crow in New York* (2009) available at <http://www.brennancenter.org/content/resource/jimcrowny>. As African Americans gained freedom with the gradual end of slavery, New York's voting qualifications – including criminal disenfranchisement laws – became increasingly restrictive. A careful reading of New York's constitutional history reveals that at the very time that the Fourteenth and Fifteenth Amendments forced New York to remove its nefarious property requirements for African-American voters, the state changed its law from allowing to *requiring* the disenfranchisement of those convicted of "infamous crimes." *Id.* The effects of this policy continue: currently, 80% of those disenfranchised under New York law are black or Latino. *Id.*

¹⁹ Wood, *supra* note 1, at 8.

²⁰ MANZA & UGGEN, *supra* note 1, at p. 251-53, tbl A3.4. Note that this data was gathered in 2004. The eight states are: Alabama, Arizona, Delaware, Florida, Kentucky, Virginia, Washington, and Wyoming. Arizona, Kentucky, and Wyoming disenfranchise more than 20 percent of the African-American voting-age population.

²¹ 590 F.3d 989, 1016 (9th Cir. 2010).

²² *Id.*

²³ *Id.* at 1009, 1014.

²⁴ See Ryan S. King, The Sentencing Project, *Expanding the Vote, State Felony Disenfranchisement Reform, 1997-2008* (Sept. 2008), available at http://www.sentencingproject.org/doc/publications/fd_state_disenfranchisement.pdf; see also Fair Release and Reentry Act of 2009, 2009 N.J. Laws ch. 329 (to be codified as amending Pub. L. 1969, ch.22 and

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their past continue to be denied the right to vote. Often, disenfranchisement results from inadequate legal provisions. But often it results from confusion and misinformation about the existing state law. The confusion and misinformation resulting from the patchwork of state laws calls out for an easily administrable uniform federal standard.²⁵

I urge Congress to pass the Democracy Restoration Act, which resonates with the sentiments of Americans across the country.²⁶ By providing a uniform national standard to restore voting rights to persons who have been released from prison and have rejoined their communities, the Act will achieve widely supported democratic reform in practice, as well as theory; and will finally sever, once and for all, a disturbing link with our country's troubled racial history.

Congressional Authority

There is a long and honorable history of Congressional legislation protecting and defining the right to vote, especially in federal elections. Piecemeal Congressional legislation²⁷ ripened into the landmark Voting Rights Act of 1965 (re-authorized in 2006), followed by the National Voter Registration Act in 1993, and the Help America Vote Act in 2002. These important pieces of Congressional legislation were each passed with strong bipartisan support. Each has played a vital role in assuring that all Americans have a voice and a vote in our democracy. The Democracy Restoration Act is another critical step in this effort.

I. The Election Clause: Congress's Inherent Authority to Regulate Federal Elections

Congress has constitutional power to enact the Democracy Restoration Act under the Election Clause of Article I, section 4, which provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as the Places of choosing Senators." The phrase "times, places and manner of holding elections for Senators and Representatives" has been read broadly by the Supreme Court to include Congressional authority to: (1) regulate presidential

supplementing Titles 30 and 52); 2009 Wash. Ch. 325 (codified as amended in WASH. REV. CODE § 29A.08.520 (2009), § 9.92.066 (2009), § 9.94A.637 (2009), § 10.64.140 (2009), § 9.94A.885 (2009), and § 9.96.050(2009)).

²⁵ Research indicates that there is widespread confusion among election officials about state's voter eligibility laws and registration procedures for people with criminal convictions. See Erika Wood and Rachel Bloom, *De Facto Disenfranchisement* (2008), available at http://www.brennancenter.org/content/resource/de_facto_disenfranchisement/. For example, in Colorado, half of local election officials erroneously believed that people on probation are ineligible to vote, when in fact they are eligible. *Id.* In Tennessee, 63% of local election officials were unaware of the types of offenses and other criteria for which people could be permanently disfranchised under state law. *Id.*

²⁶ A 2002 telephone survey of 1000 Americans found that substantial majorities (64% and 62%, respectively) supported allowing people on probation and parole to vote. Jeff Manza, Clem Brooks & Christopher Uggen, *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OP. Q. 275, 280-82 (2004).

²⁷ Congress's first exercise of power under the Fifteenth Amendment occurred in 1957, with the establishment of the United States Civil Rights Commission. Since 1957, Congress has sought to protect the franchise in virtually every session.

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elections, as well as elections to Congress; and (2) to broaden eligibility for voting in federal elections.²⁸

More than thirty years ago, the Supreme Court upheld Congress's power to lower the voting age in federal elections from 21 to 18 in the landmark case of *Oregon v. Mitchell*.²⁹ In doing so, at least five members of the Court recognized Congress's "ultimate supervisory power" over federal elections, including broadening the qualifications for voting, especially when the challenged practice had been used to disenfranchise members of racial minorities.³⁰ Although a majority of the Justices in *Mitchell* did not coalesce around a single theory – some based their opinion on the Election Clause, others on Congress's enforcement powers under the Reconstruction Amendments – the full Court has not viewed this disagreement over theory as undercutting *Mitchell*'s holding in practice about the existence of Congressional power to eliminate barriers to voting in federal elections.³¹

In addition to upholding Congress's power to lower the voting age from 21 to 18 in federal elections, the Supreme Court in *Mitchell* unanimously upheld Congress's 1970 legislation suspending literacy tests in federal elections, even in those areas not tainted with a history of racial discrimination in voting.³² Indeed, in 1978, when David Souter, as Attorney General of New Hampshire, argued that New Hampshire was not obliged to comply with the Congressional statute, his argument was rejected by the courts, and summarily dismissed by Solicitor General Robert Bork. The Supreme Court declined to hear the case.³³

Finally, eight members of the Court in *Mitchell* upheld Congress's power to outlaw durational residence requirements and to set standards for absentee balloting in federal elections.³⁴

Despite such powerful legislative and judicial precedent supporting Congressional power, opponents of this legislation may argue that Congress lacks power to directly set qualifications for voters in federal elections under the Qualifications Clauses of Article I and the Seventeenth Amendment, which provide that the qualifications of voters in congressional elections must be the same as the qualifications for voters in elections to

²⁸ See, e.g., *Kusper v. Pontikes*, 414 U.S. 51, 57 n.11 (1973); *Oregon v. Mitchell*, 400 U.S. 112, 121, 124 (1970).

²⁹ 400 U.S. 112 (1970).

³⁰ Justice Black delivered the opinion of the Court in *Oregon v. Mitchell*. His separate opinion recognizes Congressional power under the Election Clause to lower the voting age in federal elections from 21 to 18.

³¹ See *Kusper*, 414 U.S. at 57.

³² 400 U.S. at 118. The literacy test at issue in *Oregon v. Mitchell* was imposed by Arizona. All nine Justices agreed that Congress's enforcement power under the Fifteenth Amendment authorized legislation sweeping away a practice that had been historically associated with preventing black Americans from voting, without the necessity of a finding that it was currently being imposed in a discriminatory manner.

³³ *Id.*
³⁴ TINSLEY E. YARBROUGH, DAVID HACKETT SOUTER: TRADITIONAL REPUBLICAN ON THE REHNQUIST COURT (Oxford University Press 2005) 31-32, nn. 80-82.

³⁴ 400 U.S. at 118, 150, 237, 286.

the most populous branch of the state legislature. Such an argument would ignore clear Supreme Court precedent construing the scope of the Qualifications Clauses.

As the Supreme Court's 1986 decision in *Tashjian v. Republican Party*,³⁵ makes clear, the Qualifications Clause of Article I, which the Seventeenth Amendment adopted verbatim, was not intended to limit congressional power, or to require that qualifications for voting in federal elections be the same as those for voting in state elections. Instead, as the Court explained, "[f]ar from being a device to limit federal suffrage, the Qualifications Clauses was intended by the Framers to prevent the mischief which would arise if state voters found themselves disqualified from participation in federal elections."³⁶ The Court concluded that the fundamental purpose of the Qualifications Clauses is satisfied if all those qualified to vote in state elections are also qualified to vote in federal elections. Because the Democracy Restoration Act expands rather than limits the group of qualified voters in federal elections, it does not run afoul of the Qualifications Clauses.

II. Congress's Enforcement Powers under the Fourteenth and Fifteenth Amendments

Several members of the Court in *Oregon v. Mitchell* upheld Congress's power to lower the voting age from 21 to 18 in federal elections under the enforcement clauses of the Fourteenth and Fifteenth Amendments, thereby providing an additional basis for Congressional authority to pass the Democracy Restoration Act. Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment both grant Congress the power to enforce the Amendments "by appropriate legislation." The Supreme Court has described this enforcement power as "a broad power indeed" – one that gives Congress a "wide berth" to devise appropriate remedial and preventative measures for unconstitutional actions.³⁷ More than a decade ago, in *City of Boerne v. Flores*, the Supreme Court established a test for determining whether legislation falls within Congress's Fourteenth Amendment enforcement powers: the legislation must exhibit "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."³⁸

The first part of this analysis requires identifying the constitutional right that Congress seeks to enforce.³⁹ In order for Congress to properly utilize its enforcement powers, its legislation must be clearly remedial in nature – that is, aimed at remedying past constitutional violations – rather than expanding constitutional rights. The second part of the test determines whether the legislation is "an appropriate response" to a "history and pattern of unequal treatment."⁴⁰

³⁵ 479 U.S. 208 (1986).

³⁶ *Id.* at 229.

³⁷ *Tennessee v. Lane*, 541 U.S. 509, 518, 520 (2004).

³⁸ *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

³⁹ *Lane*, 541 U.S. at 520.

⁴⁰ *Id.*

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Rather than serving as a rigid doctrinal test, the Court's analysis has functioned as a sliding scale. Congress's enforcement authority is at its most expansive, and "congruence and proportionality" is most likely to exist, when Congress legislates to remove the lingering effects of historic government discrimination based on a suspect classification,⁴¹ especially when the discrimination affects the enjoyment of fundamental rights.⁴² Because the Democracy Restoration Act protects the right to vote, arguably the most fundamental constitutional right, and attempts to remedy past and present racial discrimination by government officials, it clearly meets this standard.

Whatever the scope of the Fourteenth Amendment's enforcement clause, when acting pursuant to the Fifteenth Amendment, Congress's enforcement powers are at their apogee because such legislation involves both the fundamental right to vote, and the suspect category of race. Indeed, the Court has "compared Congress's Fifteenth Amendment enforcement power to its broad authority under the Necessary and Proper Clause."⁴³ Legislation enforcing the Fifteenth Amendment is afforded deferential review by the courts because it necessarily protects against racial discrimination and deprivations of the fundamental right to vote.⁴⁴

While the Supreme Court has, on occasion, found that Congress has exceeded its Fourteenth Amendment powers either because the discrimination was purely private, or too attenuated in nature, those concerns are not present in legislation designed to combat the lingering effects of government-imposed racial discrimination in voting. In *Boerne*, the Court found that Congress had exceeded its enforcement powers in passing the Religious Freedom Restoration Act, which prohibited both federal and state governments from "substantially burdening" a person's free exercise of religion in the absence of a compelling state interest, concluding that the law "attempted a substantive change in constitutional protections."⁴⁵ The *Boerne* Court rejected an attempt by Congress to "say what the law is," which is the clear province of the courts.⁴⁶

⁴¹ See e.g., *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

⁴² See *Lane*, 541 U.S. at 523.

⁴³ *Lopez v. Monterey County*, 525 U.S. 266, 294 (U.S. 1999) (citing *City of Rome v. United States*, 446 U.S. 156, 175 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)).

⁴⁴ See *Johnson v. California*, 543 U.S. 499, 505 (2005); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966). Indeed, just last year the Supreme Court, in an 8 to 1 decision, declined to rule that the pre-clearance provision of the Voting Rights Act was an unconstitutional exercise of congressional authority under the Fifteenth Amendment. See *NAMUDNO v. Holder*, 129 S. Ct. 2504, 557 U.S. __ (2009).

⁴⁵ 521 U.S. at 532.

⁴⁶ *Boerne*, 521 U.S. at 537 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). Other cases have similarly been skeptical of Congressional action to combat discrimination unrelated to racial classifications or fundamental rights. See, e.g., *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 373 (2001) (concluding that Congress could not enforce the Americans with Disabilities Act against state governments, and explaining that the "ADA's constitutional shortcomings are apparent when the Act is compared to Congress' efforts in the Voting Rights Act"); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (finding that Congress did not have the power to enforce the Age Discrimination in Employment Act against state governments and pointing to protection of voting rights as a valid use of congressional enforcement powers).

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The Democracy Restoration Act does not seek to overrule a past Supreme Court precedent. Rather, it is intended to remedy a “history and pattern of unequal treatment,”⁴⁷ recognized by the Court in *Hunter v. Underwood*, resulting from centuries of discriminatory criminal disenfranchisement laws. There is ample evidence in the historical record that racial discrimination was a substantial motivating factor in the adoption of many, probably most, and possibly all, criminal disenfranchisement laws, and that laws which appear racially neutral on their face have been implemented and enforced in a discriminatory manner.⁴⁸ Indeed, in *Hunter*, the Supreme Court explicitly recognized that the roots of many criminal disenfranchisement laws lie in an effort to deny the ballot to members of racial minorities. Since proving racially discriminatory motive is painfully difficult, prophylactic Congressional enforcement legislation aimed at combating the current residue of past (and present) racism is clearly authorized. That is precisely what Congress did in 1970 when it banned literacy tests in federal elections.

Opponents of the legislation may argue that Section 2 of the Fourteenth Amendment limits Congress’s enforcement authority. That section provides, “when the right to vote at any election for the choice of electors . . . is denied to any of the male inhabitants of such State . . . or in any way abridged, *except for participation in rebellion, or other crime* . . .” (emphasis added). Relying on this language, the Supreme Court rejected a nonracial equal protection challenge to California’s felony disenfranchisement law in *Richardson v. Ramirez*.⁴⁹ But the findings section of the Democracy Restoration Act makes clear that the legislation is intended to remedy past and current racial discrimination in the voting system. Therefore, reliance on *Richardson* would be misguided. In *Hunter v. Underwood*, the Court clarified that Section 2 of the Fourteenth Amendment does not limit the Equal Protection Clause’s prohibition on criminal disenfranchisement laws that deny voting rights *on account of race*.⁵⁰ The Court stated: “[W]e are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of [felony disenfranchisement laws] which otherwise violate § 1 of the Fourteenth Amendment.”⁵¹

Even if section 2 was found to somehow limit Congress’s power under the Fourteenth Amendment, the Fifteenth Amendment’s broad ban on race discrimination in voting clearly carries no such exception. The language and legislative history of the Fifteenth Amendment reveal that it does not replicate or incorporate Section 2, but replaces it with a ban on any disenfranchisement based on race. A few years after the

⁴⁷ *Lane*, 541 U.S. at 520. After the Civil War and enactment of the Fifteenth Amendment, numerous southern states adopted criminal disenfranchisement provisions, along with literacy tests and poll taxes, to exclude newly enfranchised African American voters. Criminal disenfranchisement provisions today continue to have a substantially greater impact on minorities, especially African American men. This disparate effect is particularly dramatic in states with laws that permanently disenfranchise criminal offenders. In some states, it is estimated that 30 percent of Black men are currently disenfranchised. For more information see Erika Wood, *Restoring the Right to Vote* (2009), available at http://www.brennancenter.org/content/resource/restoring_the_right_to_vote/

⁴⁸ *Cf. Hibbs*, 538 U.S. at 731-32 (finding evidence that state medical leave laws discriminated on the basis of gender both intentionally and in the way in which they were applied).

⁴⁹ 418 U.S. 24 (1974).

⁵⁰ *Hunter v. Underwood*, 471 U.S. 222, 233(1985)

⁵¹ *Id.*

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Fifteenth Amendment was ratified, the Supreme Court explained that the Amendment “invested citizens . . . with a new constitutional right which is within the protecting power of Congress. The right is exemption from discrimination of the elective franchise on account of race, color, or previous condition of servitude.”⁵²

III. The Supremacy Clause Supersedes Conflicting State Laws

A state policy in conflict with the Democracy Restoration Act would unquestionably be preempted by contrary Congressional legislation under the Supremacy Clause. In those few situations where the Democracy Restoration Act would conflict with a state constitution, the constitutional provisions would likewise be preempted by the operation of the Supremacy Clause of Article VI of the Constitution, which provides:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.⁵³

The nationwide suspension of literacy tests serves as an important analogue. In *Oregon v. Mitchell*, the Supreme Court was called to rule on the constitutionality of the 1970 Amendments to the Voting Rights Act imposing a nationwide ban on literacy tests. The Justices concluded unanimously that the literacy test suspension was lawfully enacted pursuant to Congress’s enforcement authority under either or both of the Fourteenth or Fifteenth Amendments, and that state statutes in conflict with the federal statute, such as the Arizona literacy statute at issue in the case, would be superseded under the Supremacy Clause.⁵⁴

Conclusion

The Elections Clause, combined with Congress’s broad powers over federal elections, and Congress’s enforcement powers under the Fourteenth and Fifteenth Amendments, provide ample constitutional authority to pass the Democracy Restoration Act.

Thank you for the opportunity to testify today. I am happy to answer any questions you may have.

⁵² *United States v. Reese*, 92 U.S. 214, 218 (1875).

⁵³ U.S. Const. art. VI, cl. 2.

⁵⁴ *Oregon*, 400 U.S. at 132.

Mr. SCOTT. Thank you.
Mr. von Spakovsky?

**TESTIMONY OF HANS A. von SPAKOVSKY, SENIOR LEGAL
FELLOW, THE HERITAGE FOUNDATION, WASHINGTON, DC**

Mr. VON SPAKOVSKY. Thank you, Mr. Chairman, for the invitation to testify today.

I am Hans von Spakovsky of the Heritage Foundation.

Various consequences attach to a criminal felony conviction. First, there are prison or jail sentences. Second, there may be fines, court costs, restitution and possible probation and parole requirements. Finally, there are various disabilities such as the inability to own a gun, to work as a police officer, to serve in certain elected offices, or to serve on a jury.

Time in prison is not, and has never been, the only way a felon pays his debt for breaking the law and endangering his fellow citizens and the public.

I have to say with all due respect to Professor Neuborne, I pulled out my copy of the Constitution. He must be looking at a different version of it than I have, because this bill is an unconstitutional intrusion into the rights of the States. Congress does not have the power to do this.

Professor Neuborne keeps talking about literacy tests, and that we would say that Congress did not have the power to do anything about that. That, of course, is wrong. The 15th Amendment made discriminating on the basis of race illegal. Literacy tests were used for that purpose. So, obviously, with the Voting Rights Act, which was passed under the power of the 15th Amendment, Congress had the power to do that.

But the 14th Amendment specifically states that States may abridge the right to vote because of rebellion or other crime. And as it was said in the, I think, Ramirez case, which looked at a felon disenfranchisement law in California, Congress cannot be seen to—the Founders and the passers of that amendment could not be seen to be taking away with one section of the 14th Amendment what they are granting the States specifically with the other.

As has been said, criminals lose their right to vote, not because of their race, but because of their conscious actions. There is no power in Article I for Congress to do anything that is contrary to this provision in the 14th Amendment.

Section 2 of Article I and the 17th Amendment provide that voters for Members of Congress shall have the same qualifications as voters for members of State legislatures. This explicitly places in the hands of the States the ability to determine the qualifications of voters.

Congress is given the authority to alter the times, places and manner of elections for Congress. But the qualification of a felon to vote cannot be remotely compared to a regulation governing the time, place or manner of an election.

And I would point out that in the *ACORN v. Edgar* case, which upheld the National Voter Registration Act, the court specifically said that the reason that those provisions regarding voter registration were within the power of Congress was because voter registration is within the manner of holding an election. And in fact, the court said that, if the law had been designed to make it impossible for the State of Illinois to enforce its voter qualifications, that would have been an entirely different case.

There are also sound public policy reasons why this should not be done. The loss of civil rights is part of the sanction that our society has determined should be applied to criminals. States are entitled to ensure that those who injure or murder their fellow citizens, who steal, or who damage our democracy by committing crimes, have paid their debt to society, and even more importantly, have shown that they can be trusted to exercise all the rights of full citizenship.

This bill would force States to immediately restore the right of convicted felons the moment they are out of prison, even if they are on parole in a halfway house, or have not paid restitution or fine.

While most States automatically restore this right when felons have completed their sentences, other States have a more individualized procedure. Virginia, for example, has set up an application process that allows an individual review.

A felon cannot apply until he has been released from supervised probation for 3 or 5 years, depending upon the crime. This is perfectly reasonable, given that a majority of felons were re-arrested and re-incarcerated within a short time after they were released from prison.

The felon also has to show he has paid all of the court costs, fines and restitution. This bill would completely override this process at the expense of victims who are still owed restitution, and grant relief on a wholesale basis without considering whether someone is really entitled to restoration of those rights.

The findings claim that this legislation will "reintegrate offenders into free society, helping to enhance public safety." And it also says that felon voting laws serve no compelling State interest.

If that is correct, then why does this legislation not also restore the other civil rights a convicted criminal may lose, such as the right to public employment?

Federal law also prohibits felons from owning a gun. If public safety will be enhanced by providing felons with the ability to vote, why doesn't this bill amend Federal law to allow them to own a gun?

Are we to believe they can be trusted to vote, but not to own a gun?

Are we to believe that a convicted child molester can be trusted to vote, but not to be a teacher in a public school? Are we to believe a convicted drug dealer can be trusted to vote, but not to be a police officer?

Won't that help integrate such criminals back into society, as claimed by the bill?

The supporters of this bill apparently trust felons enough to require the automatic restoration of their right to vote. But they do not trust them enough to automatically restore the right to own a gun, or to restore all of the other civil rights that are taken away when they are convicted of murder, robbery, rape or bribery.

The American people and their State representatives make these decisions. The Constitution specifically gives them that right. If Congress wants to change it, you have to do it through a constitutional amendment.

Thank you.

[The prepared statement of Mr. von Spakovsky follows:]

PREPARED STATEMENT OF HANS A. VON SPAKOVSKY

TESTIMONY OF

HANS A. von SPAKOVSKY

Senior Legal Fellow
Center for Legal and Judicial Studies
Heritage Foundation*

BEFORE THE

HOUSE JUDICIARY COMMITTEE'S

SUBCOMMITTEE ON THE

CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES

H.R. 3335 – DEMOCRACY RESTORATION ACT

March 16, 2010
2141 Rayburn House Office Building

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Testimony of Hans A. von Spakovsky

Thank you for the invitation to testify before the Subcommittee on the subject of felons and the rights of states to prevent convicted criminals from voting.

I am Hans A. von Spakovsky, a Senior Legal Fellow and Manager of the Civil Justice Reform Initiative in the Center for Legal and Judicial Studies at the Heritage Foundation (www.heritage.org). I was a Commissioner on the Federal Election Commission for two years and, of particular relevance to the subject of this hearing, I am a former career Counsel to the Assistant Attorney General for Civil Rights at the U.S. Department of Justice. I am also a former member of the Board of Advisors of the U.S. Election Assistance Commission as well as the Registration and Election Board of Fulton County, Georgia. I currently serve on the Electoral Board of Fairfax County, Virginia, and on the Virginia Advisory Board to the U.S. Commission on Civil Rights. All of the views and opinions I express in my testimony are my own and should not be construed as representing any official position of the Heritage Foundation or any other organization.

Various consequences attach to a criminal felony conviction. First, there may be (and usually are) prison or jail sentences. Second, there are other direct penalties such as fines, court costs, restitution, and possible probation and parole requirements. Finally, there are various disabilities such as the inability to own a gun, to work as a police officer, to serve in certain elected offices or to serve on a jury. In short, the initial time in prison is not, and has never been, the only way a felon pays his debt to society for breaking the law and endangering his fellow citizens and the public.

H.R. 3335 represents an unconstitutional intrusion into the rights of the states. Congress simply does not have the constitutional authority to force states to restore the voting rights of convicted felons. There are also good public policy reasons why this should not be done. While some states automatically restore the right to vote after a felon has completed all of the terms of his sentence, others require individual applications. States are entitled to make their own decisions on this issue. That includes implementing procedures that ensure that those who break the law to injure or murder their fellow citizens, to steal, or to damage our democracy by committing election crimes or engaging in public corruption like bribery, have paid their debt to society and, even more importantly, have shown that they can be trusted to exercise all of the rights of full citizenship.

H.R. 3335 states that the right of an individual to vote in any federal election cannot "be denied or abridged because that individual has been convicted of a criminal offense unless such individual is serving a felony sentence in a correctional institution or facility at the time of the election." The definition of "correctional institution or facility" contained in the bill does not include "any residential community treatment center (or similar public or private facility)."

Thus, H.R. 3335 would force all states to immediately restore the ability to vote to convicted felons the moment they are out of prison – even if they are simply out on parole, are in a half-way house or have not completed other requirements of their sentence such as paying restitution to the victims of their crimes or fines and civil penalties imposed on them. In other words, states would be forced to allow criminals to vote before they have even completed the primary terms imposed on them as a punishment by their fellow citizens through our justice system. So at least some individuals who have shown no compunction whatsoever about breaking the law will be given the ability to help make the law.

However, Section 2 of the Fourteenth Amendment specifically provides that states may abridge the right to vote of citizens “for participation in rebellion, or other crime.” The Fourteenth Amendment simply recognized a process that goes back to ancient Greece and Rome. The claim that state laws that take away the right of felons to vote are all rooted in racial discrimination is simply historically inaccurate – even prior to the Civil War when many black Americans were slaves and could not vote, a majority of states took away the rights of voters who were convicted of crimes.

It is true that some Southern states tried to use these laws during Reconstruction and afterward to disenfranchise blacks, but those laws have all been changed and amended. The case cannot be made today that such laws are in any way applied in a discriminatory fashion. When they have been, they have been struck down, as the Supreme Court did to Alabama’s law in *Hunter v. Underwood*, 471 U.S. 222 (1985). However, that case involved Alabama’s 1901 Constitution that disenfranchised persons convicted not just of felonies, but of misdemeanors “involving moral turpitude,” a catch all that was used by state officials specifically to target black Alabamians.

Even the “Findings” in this bill do not claim that felon voting laws are administered in a racially discriminatory fashion; only that they have a “disparate impact” because of the higher incarceration rate of certain minorities. In the *Hunter* case, however, the Supreme Court specifically noted that “[p]roof of racially discriminatory intent is required to show a violation of the Equal Protection Clause.” No such showing of intentional discrimination can be made with regard to such state laws today and they cannot be held unconstitutional even if they have a “racially disproportionate impact.” Criminals lose their right to vote because of their own conscious actions in violating the law, not because of their race.

It should be kept in mind that the Fourteenth Amendment, like the Fifteenth Amendment, was one of the key post-Civil War amendments sponsored and passed by Republicans, the party of Abraham Lincoln and abolition, to help secure the rights of black Americans, including their right to vote. Those same members of Congress deliberately and intentionally protected the right of states to withhold the right to vote from those citizens convicted of serious crimes against their fellow citizens.

Under our Constitution, if Congress is not acting pursuant to a specific grant of power in Article I, it is acting unconstitutionally. The federal government does not have

the inherent power to do whatever it wants – we have a government of limited and enumerated powers. See *U.S. v. Lopez*, 514 U.S. 549 (1995). There simply is no authority in Article I for Congress to force states to allow felons to vote, particularly in light of the language of the Fourteenth Amendment.

In fact, Section 2 of Article I says that voters for members of the House of Representatives “shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” The Seventeenth Amendment provides the same state qualification for voters for members of the Senate. In other words, the qualifications or eligibility requirements that states apply to their residents voting for state legislators must be applied to those same residents voting for members of Congress, which *explicitly* places in the hands of the states the ability to determine those qualifications.

This is confirmed by James Madison and Alexander Hamilton in *The Federalist Papers*, Nos. 52 and 60. James Madison states, for example, in *Federalist* No. 52, that to have left such qualifications open to “the regulation of the Congress” would be improper. States also disqualify children, noncitizens, and the mentally incompetent. States cannot limit voting qualifications based on race or sex because of the explicit prohibitions of the Fifteenth and Nineteenth Amendment – but in contrast, the Fourteenth Amendment specifically allows them to limit those qualifications based on criminal convictions.

Congress is given the authority in Section 4 of Article I to alter the “Times, Places and Manner of holding Elections for Senators and Representatives” but that power does not extend to the “qualifications” of voters. The qualification of a felon to vote cannot even remotely be compared to a regulation governing the time, place or manner of an election.

Congress has even less authority when it comes to presidential elections. Article II, Section I, provides that states “shall appoint, in such Manner as the Legislature thereof may direct,” the electors of the Electoral College. Congress can only determine “the Time of chusing the Electors, and the Day on which they shall give their Votes.” Thus, Congress clearly has no authority under these provisions to tell the states that they must allow felons to vote in presidential (or congressional) elections.

The Equal Protection Doctrine of Section 1 of the Fourteenth Amendment also provides Congress with no authority on this issue. The “Findings” in H.R. 3335 state that “equal protection for Americans to vote in Federal elections” require a uniform federal rule for felons. However, the Supreme Court threw out an equal protection challenge to California’s felon disenfranchisement law in 1974, concluding that “those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in §1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by §2 of the Amendment.” *Richardson v. Ramirez*, 418 U.S. 24, 43 (1974).

Finally, *Oregon v. Mitchell*, 400 U.S. 112 (1970), in which the Supreme Court upheld a federal statute changing the voting age from 21 to 18 just prior to the ratification of the Twenty-Sixth Amendment and the elimination of residency requirements for federal elections also provides no basis for believing that Congress has any constitutional authority for H.R. 3335. The opinion in *Mitchell* was a fractured decision, in which eight Justices *rejected* the argument that Congress had the authority under Article I to make such changes – only Justice Black thought Congress had that inherent authority. Four of the justices based their opinion on the age change on the enforcement clause of the Fourteenth Amendment.

The residency requirement was thrown out based on the Privileges or Immunities Clause of the Fourteenth Amendment because it infringed on an individual's national right as a citizen to travel. While such a residency requirement would discriminate against individuals living in the same state by allowing older residents to vote while preventing newer residents from voting, a disparity in felon voting laws does not discriminate among voters in the same state.

Because the Fourteenth Amendment gives states the right to bar felons from voting, there is no equal protection violation because some states have different rules for when felons recover their right to vote (two states even allow felons to vote while they are in prison). As in the *Richardson* case, it cannot be argued that the Privileges or Immunities Clause in Section 1 can take away from the states a right specifically granted them in Section 2.

Finally, as the Eleventh Circuit said in *Johnson v. Florida*, 405 F.3d 1214 (2005), when it concluded that Section 2 of the Voting Rights Act did not apply to Florida's voting rules for felons, any contrary view would raise "serious constitutional problems because such an interpretation allows a congressional statute to override the text of the Constitution [in the Fourteenth Amendment]." *Johnson* at 1229 ("Congress has expressed its intent to *exclude* felon disenfranchisement provisions from Voting Rights Act scrutiny." *Id.* at 1234).

Even if Congress had the constitutional authority to pass this legislation, which it does not, there are sound public policy reasons why it should not. The loss of civil rights is part of the sanction that our society has determined should be applied to criminals. Many black communities unfortunately suffer from high rates of crime, yet this bill would have a pernicious effect on the ability of law-abiding citizens to reduce crime in their own communities. These laws are overwhelmingly supported by the public, a clear sign that they do not want their ability to influence the decisions made by elected officials on controlling crime diluted by convicted felons or individuals on parole.

While some states automatically restore the rights of felons when they have completed their sentences, other states have more individualized procedures. Virginia, for example, has set up an application process for felons to apply for the restoration of their civil rights, including the right to vote. Virginia's process allows for an individualized review in which the state can determine whether a felon has fully paid his

debt to society and changed his ways. He cannot apply for restoration until he has been released from supervised probation for three years for nonviolent crimes or five years for violent, drug, or election-related crimes. That is perfectly reasonable and common-sense – particularly since a large majority of felons are rearrested and re-incarcerated within a short time after they are released from prison.

In Virginia, the felon must also show that he has paid all court costs, fines, and restitution to their victims. This proposed bill would completely ignore and override this process, particularly at the expense of victims who are still owed restitution, and grant relief on a wholesale basis, without considering whether someone is really entitled to restoration of his rights.

Finally, what is particularly odd about this proposed legislation is the fact that it is limited only to restoring the ability of convicted criminals to vote. The findings in Section 2 of H.R. 3335 state that this legislation will reintegrate “offenders into free society, helping to enhance public safety.” The findings also say felon disenfranchisement laws serve “no compelling State interest” for felons “who are living and working in the community.” If that is correct, than why does this legislation not propose to restore all of the other civil rights that a convicted criminal loses in many states?

If convicted criminals can now be trusted to exercise the right to vote, as the legislation concludes, and if restoring that ability will help integrate such criminals back into society, than why are their rights to public employment not restored? Many states prohibit felons from working as police officers or school teachers – if they can be trusted with the right to vote, why do the sponsors of this legislation not trust them to work as teachers in our public schools?

State and federal laws also prohibit felons from owning a gun (*see e.g.*, 18 U.S.C. § 922(g)). If public safety will be enhanced by providing felons with the ability to vote as the legislation claims, why does this bill not also amend federal law to allow them to once again own a gun? Are we to believe that they can be trusted to vote but not to own a handgun? Are we to believe that the sponsors of this legislation think that a convicted child molester can be trusted to vote but cannot be trusted to be a teacher in a public school? Are we to believe a convicted drug dealer can be trusted to vote but cannot be trusted to be a police officer? Or is the true motivation here based more on the fact that their vote is important to winning close elections?

The problem with the supporters’ narrow focus is obvious. The sponsors apparently trust felons enough to require the automatic restoration of their right to vote, but don’t trust them enough to automatically restore their right to own a gun or all of their other civil rights that were taken away when they were convicted of murder or robbery or rape or bribery.

The American people and their freely-elected state representatives must make their own decisions in their own states on when felons should have their civil rights

restored, including the right to vote. The Constitution specifically gives that authority to the states and any legislation passed by Congress taking away that power is unconstitutional and bad public policy.

Mr. SCOTT. Thank you.
Mr. Wicklund?

**TESTIMONY OF CARL WICKLUND, EXECUTIVE DIRECTOR,
AMERICAN PROBATION AND PAROLE ASSOCIATION, LEX-
INGTON, KY**

Mr. WICKLUND. Good afternoon, Chairman, Members of the Committee. I appreciate the opportunity to testify today in support of H.R. 3335.

I am not a constitutional scholar, but I do think that this legislation will restore the right to vote in Federal elections to nearly four million of our fellow citizens who have a criminal conviction in their past, but who are out of prison and living in the community.

Because I believe that voting plays an integral role in a successful reentry of people coming out of prison, I urge you to pass the Democracy Restoration Act.

I happen to live in Kentucky, one of the last two States in the country to permanently disenfranchise everyone with a felony conviction unless they receive individual, discretionary, executive clemency. This archaic law disenfranchises over 180,000 Kentuckians, more than a quarter of whom are African American.

I have been the executive director of the American Probation and Parole Association since 1996, and I have over 37 years of experience in the corrections and human services field, including serving as the director of probation and parole for the county community corrections department and have developed and managed several community-based and private sector programs for offenders and at-risk youth in Minnesota.

Among the many other professional associations I sit on, the FBI Criminal Justice Information Services Advisory Policy Board and the National Governors Association Intergovernmental Justice Working Group. I have been awarded the Florida Association of Community Corrections Lifetime Achievement Award, the Congressional Crime Victims' Rights Caucus Allied Professional Award and the Justice Leadership Award.

APPA, or the American Probation and Parole Association, represents over 35,000 individuals in the field of probation, parole and community corrections. We have members in every State, as well as a number of different countries. APPA members supervise more than five million adults across the United States.

Our vision is to have a fair, just and safe society where community partnerships restore hope by creating a balance of prevention, intervention and advocacy. Restoring the right to vote—the most basic of all rights—to people who are living and working in the community is central to this core mission.

For this reason, APPA has been part of national efforts to restore voting rights to people with criminal convictions. In 2007, we passed a resolution calling for the restoration of voting rights. I currently sit on the Brennan Center for Justice Law Enforcement and Criminal Justice Advisory Council, comprised of police chiefs, corrections officials and prosecutors who have come together to support voting rights restoration.

Our members have encouraged voting rights legislation in a number of States, including Kentucky, Maryland, Minnesota, New

York, Washington and Wisconsin. We believe that civic participation is integral to successful rehabilitation and reintegration.

One of the core missions of parole and probation supervision is to support successful transition from prison to the community. Civic participation is an integral part of this transition, because it helps transform one's identity from deviant to law-abiding citizen.

For this reason, the Democracy Restoration Act is indispensable; it is an indispensable part of the reentry process.

The combination of the sheer number of people being released from prison every day and the revolving door created by staggering recidivism rates have forced those who work in community supervision to look carefully at the process of reentry and find innovative ways to ease this reintegration, with the ultimate goal of preventing future crime and protecting public safety.

Civic participation and successful rehabilitation are intuitively linked. One of the greatest challenges facing those who are coming out of prison or jail is the transition from focus on one's self as an individual that is central to the incarceration experience, to a focus on one's self as a member of community that is the reality of life in our democratic society.

Civic participation has also been linked to reducing recidivism. One study tracking the relationship between voting and recidivism found that former offenders who voted were half as likely to be arrested than those who did not. This study reaffirms that a package of pro-social behaviors that are linked to desistance from crime and participatory life.

There are four generally accepted purposes of criminal penalties: prevention against committing new crimes, deterrence, retribution and rehabilitation. Losing the right to vote does not address any of those.

And we are not alone in our support for restoring the voting rights. Other national criminal justice and law enforcement agencies, including the National Black Police Association and the Association of Paroling Authorities International, have passed resolutions in favor of voting rights restoration.

Even the current director of the Office of National Drug Control Policy wrote, when he was chief of police in Seattle, "voting is an important way to connect people to their communities.—We want those who leave prison to become productive and law-abiding citizens. Voting puts them on that path."

I thank you for the opportunity to present today.

[The prepared statement of Mr. Wicklund follows:]

PREPARED STATEMENT OF CARL WICKLUND



American Probation and Parole Association

A Force for Positive
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EXECUTIVE DIRECTOR
Carl Wicklund

**Testimony of
Carl Wicklund
Executive Director
American Probation and Parole Association
Before the
Judiciary Committee
Constitution, Civil Rights, and Civil Liberties Subcommittee
United States House of Representatives
March 16, 2010**

Introduction

Good afternoon Chairman Conyers, Chairman Nadler and Members of the Committee. Thank you for the opportunity to testify today in support of H.R. 3335, the Democracy Restoration Act. This legislation would restore the right to vote in federal elections to nearly 4 million of our fellow citizens who have a criminal conviction in their past, but who are out of prison and living in the community. Because I believe that voting plays an integral role in the successful reentry of people coming out of prison and trying to reclaim their lives, I urge you to pass the Democracy Restoration Act.

I live in Kentucky, one of the last two states in the country (Virginia is the other) to permanently disenfranchise everyone with a felony conviction unless they receive individual, discretionary, executive clemency.¹ This archaic law disenfranchises over 180,000 Kentuckians, more than a quarter of whom are African-American.² In all, 24% of the African-American population in Kentucky has lost the right to vote for life.³

I have been the Executive Director of the American Probation and Parole Association since 1996. I have over 35 years of experience in the corrections and human services field, including serving as Director of Community Corrections and managing several community-based, private sector programs for offenders and at-risk youth in Minnesota. I am the Vice Chair of the United States Department of Justice Global Justice Information Sharing Initiative Advisory Committee, the Vice Chair of Corrections Operations Subcommittee for the National Law Enforcement and Corrections Technology Advisory Committee,

¹ KY. CONST. § 145.

² JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELONY DISENFRANCHISEMENT AND AMERICAN DEMOCRACY Tbl. A3.3, A3.4 (2006).

³ *Id.*

and serve on the FBI Criminal Justice Information Services Advisory Policy Board and the National Governors Association Intergovernmental Justice Working Group, among others. I have been awarded the Florida Association of Community Corrections Lifetime Achievement Award, the first U.S. Congress Crime Victims' Rights Caucus Allied Professional Award and the Justice Leadership Award from Family Justice.

The APPA represents over 35,000 individuals in the field of probation, parole and community corrections. We have members in every state, as well as affiliate members in Poland, New Zealand, Australia, Canada, and the European Organization for Probation.⁴ APPA members supervise more than 5 million adults across the United States.

At the American Probation and Parole Association, we work to build a fair, just and safe society where community partnerships create a balance of prevention, intervention and advocacy. We seek to create a system of community justice where a full range of sanctions and services protects public safety by insuring humane, effective, and individualized sentences for offenders, and support and protection for crime victims.

Restoring the right to vote to people who are living and working in the community is central to this core mission. For this reason, the American Probation and Parole Association has been part of the national efforts to restore voting rights to people with criminal convictions. In 2007, we passed a resolution calling for the restoration of voting rights to people under supervision as well as those who have served their sentences.⁵ I currently sit on the Brennan Center for Justice Law Enforcement & Criminal Justice Advisory Council, comprised of police chiefs, corrections officers and prosecutors; the main purpose of the Council is to advocate for voting rights restoration at both the federal and state level.⁶ We have joined dozens of other law enforcement and criminal justice professionals and organizations in signing a letter supporting the Democracy Restoration Act. And APPA members have encouraged voting rights legislation in a number of states, including Kentucky, Maryland, Minnesota, New York, Washington and Wisconsin.

We support the Democracy Restoration Act because we believe that civic participation is integral to successful rehabilitation and reintegration.

Successful rehabilitation and reintegration

One of the core missions of parole and probation supervision is to support the successful transition from prison and jail to the community. Civic participation is an integral part of this transition because it helps transform one's identity from deviant to law-abiding citizen. For this reason, the Democracy Restoration Act is an indispensable part of the reentry process. The bill's

⁴ A full list of APPA affiliates is available at http://www.appa-net.org/eweb/docs/APPA/2007/Affiliate_Reps.pdf.

⁵ See American Probation and Parole Association, Resolution, Restoration of Voting Rights (2007), http://www.appa-net.org/eweb/Dynmainpage.aspx?site=APPA_2&webcode=JD_Resolution&wp_key=3e8f5612-9d1e-4f6f-8e8b-1b1f6c60135e.

⁶ To read more about the Brennan Center Law Enforcement & Criminal Justice Advisory Council, visit http://www.brennancenter.org/content/pages/law_enforcement_criminal_justice_advisory_council.

requirement that probation and parole officers provide information about voting rights and assist with voter registration is also necessary. These responsibilities would not create an undue burden on probation and parole offices – indeed, they are central to our mission.

The United States is the world's leader in incarceration, with 2.1 million people currently in our prisons – a 500% increase over the past thirty years.⁷ Each year, over 600,000 people leave prison. Approximately two out of every three people released from prison in the United States are re-arrested within three years of their release.⁸ The combination of the sheer number of people being released from prison every day, and the “revolving door” created by those staggering recidivism rates have forced all of us in the community supervision field to look carefully at the process of reentry – the transition from prison to community – and find innovative ways to ease this reintegration with the ultimate goal of preventing future crime and protecting public safety.

The APPA believes that full civic participation and successful rehabilitation are intuitively linked. One of the greatest challenges facing those who are coming out of prison or jail is the transition from a focus on one's self as an individual that is central to the incarceration experience, to a focus on one's self as a member of a community that is the reality of life in our democratic society. While having strong family support and stable employment are critical to a person's successful transformation from prisoner to citizen, research has determined that one's identity as a responsible citizen – including volunteer work, community involvement *and voting* – plays a vital role.⁹ Further, having the right to vote and learning how to exercise that right sends a message that these individuals are welcomed back as integral and valuable members of their home communities.

Civic participation has also been linked to reducing recidivism. While measuring a direct causal relationship between voting rights and criminal behavior is difficult, one study tracking the relationship between voting and recidivism found “consistent differences between voters and non-voters in rates of subsequent arrests, incarceration, and self-reported criminal behavior.”¹⁰ In fact, the study found that former offenders who voted were half as likely to be re-arrested than those who did not.¹¹ The study reaffirms that voting is part of a package of pro-social behavior that is linked to desistance from crime. Someone who has a stake in the community, who sees himself or herself as a member of that community, is less likely to offend that community.

Disenfranchisement serves no legitimate law enforcement purpose

⁷ THE PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS (Mar. 2009), available at http://www.pewcenteronthestates.org/report_detail.aspx?id=49382; see also MARC MAUER, RACE TO INCARCERATE 1 (2006).

⁸ RE-ENTRY POLICY COUNCIL, CHARTING THE SAFE & SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY 3 (2003), available at <http://www.reentrypolicy.org/publications/1694.file>.

⁹ Christy A. Visser & Jeremy Travis, *Transition from Prison to Community: Understanding Individual Pathways*, 29 ANN. REV. SOC. 89, 97 (2003).

¹⁰ Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence From a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 213 (2004).

¹¹ *Id.* at 205. The survey was based on longitudinal survey data from a general sample people with felony convictions in St. Paul, Minnesota of the effects of voting participation upon self-reported crime and arrest in the years 1997 to 2000.

Moreover, there is no credible evidence showing that continuing to disenfranchise people who have rejoined the community serves any legitimate law enforcement purpose.

Criminal justice experts typically point to four accepted purposes of criminal penalties: prevention against committing new crimes, deterrence, retribution and rehabilitation.¹² I have already explained that denying the right to vote hinders, rather than fosters, successful rehabilitation. And indeed, disenfranchising individuals after release from prison furthers none of these goals.

Prevention

The prevention, or incapacitation, rationale for punishment is that a person who has committed a crime is likely to do so again and that punishment is therefore necessary to prevent him from breaking the law again. Typically this punishment takes the form of physically incarcerating the individual. As applied to disenfranchisement schemes, however, the prevention justification is unpersuasive.¹³ States are hard pressed to identify evidence that people with felony convictions are prone to commit offences affecting the integrity of elections, and there is no evidence that people on probation and parole have a higher propensity for voter fraud in the states where they are entitled to vote.¹⁴

Deterrence

Similarly, there is no basis for concluding that continuing to disenfranchise people who have rejoined the community deters them from committing new crimes. Deterrence flows from the other penal consequences of a felony conviction, namely a term of incarceration and significant fines. It is unlikely that a person who is not dissuaded by the prospect of a prison sentence will be deterred by the threat of losing his right to vote.¹⁵

Retribution

The law enforcement community and society at large now recognize that a punishment can be morally justified as retribution only if it is proportionate in severity and duration to the crime in question. Blanket disenfranchisement for everyone with a felony conviction is unjustifiably broad. At the same time, the severity of disenfranchisement is undeniable.¹⁶ Laws mandating the denial of voting rights to a person convicted of a felony destroy that citizen's most direct form of participation in the central process of self-government and render him invisible to elected officials. The weakness of the retribution justification is especially poignant for those who may have a reduced sentence, are under court or community supervision, or may have already served their criminal sentences and are seeking to reintegrate into society. To deny them

¹² See Howard Itzhowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 730-731 (1973).

¹³ See Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1167 (2004). (Noting that "...incarceration is the paradigmatic incapacitating punishment. It prevents an offender from committing (most) crimes during its duration. But disenfranchisement cannot incapacitate an ex-offender from committing future criminal offenses, except perhaps, from committing an extraordinarily narrow subset of voting-related crimes such as vote selling.")

¹⁴ See Itzhowitz & Oldak, *supra* note 12, at 738-739.

¹⁵ Karlan, *supra* note 13, at 1166.

¹⁶ *Id.* at 1168.

the most basic of rights -- the right to vote -- is to disregard the assessment of the sentencing judge or jury and the corrections officials who, after review of each individual's circumstance, deemed them fit to reenter society.

Broad Support in the Law Enforcement & Criminal Justice Field

The APPA is not alone in its support for restoring the right to vote. Other national criminal justice and law enforcement agencies, including the National Black Police Association and the Association of Paroling Authorities International, have passed resolutions in favor of restoring voting rights to people living in the community.¹⁷

And many in the law enforcement field have spoken out in favor of restoring voting rights. One Kentucky prosecutor supporting change to our state's archaic disenfranchisement laws wrote, "voting shows a commitment to the future of the community."¹⁸ Similarly, Providence Police Chief Dean Esserman, writing in support of Rhode Island's 2006 successful referendum restoring voting rights, explained, "denying the vote to people who completed their prison sentence disrupts the re-entry process and weakens the long-term prospects for sustainable rehabilitation."¹⁹ And Gil Kerlikowske, now the Director of the Office of National Drug Control Policy, wrote when he was Chief of Police in Seattle, "voting is an important way to connect people to their communities, which in turn helps them avoid going back to crime. . . . We want those who leave prison to become productive and law-abiding citizens. Voting puts them on that path."²⁰

Conclusion

I urge you to pass the Democracy Restoration Act because it promotes successful rehabilitation of formerly incarcerated people, preventing further crime and making our neighborhoods safer. Thank you for the opportunity to testify today. I am happy to answer your questions.

¹⁷ See National Black Police Association, Resolution of Restoring Voting Rights (2003), <http://www.brennancenter.org/page/-/Democracy/NBPA%20resolution.pdf>; Association of Paroling Authorities International, Resolution on Restoring Voting Rights (2008), http://www.apainl.org/en/aw_resolutions_voting.html.
¹⁸ R. David Stingle, *Let's Simplify the Process for Disenfranchised Voters*, CENT. KY. NEWS-J., Jan. 28, 2007, available at <http://www.brennancenter.org/page/-/Democracy/Stingle%20Kentucky%20op%20ed%201-28-07.pdf>.
¹⁹ Dean Esserman & H. Phillip West, *Yes on Question 2 -- Freed Felons Should Have a Voice*, PROVIDENCE J., Sept. 25, 2006 at C4.
²⁰ (Gil Kerlikowske & John Lovick, *Restore Voting Rights to Ex-Felons*, SEATTLE POST-INTELLIGENCER, Feb. 12, 2009, available at http://www.seattlepi.com/opinion/399906_votingrights13.html). For more information on law enforcement support for restoring the right to vote, see Erika Wood, *Restoring the Right to Vote* 9-11 (2009) and http://www.brennancenter.org/content/pages/law_enforcement_criminal_justice_advisory_council.

Mr. SCOTT. Thank you.

We have been joined by the Chairman of the full Committee, Mr. Conyers, the gentleman from North Carolina, Mr. Watt, and the gentlelady from California, Ms. Chu.

Mr. Sancho?

TESTIMONY OF ION SANCHO, SUPERVISOR OF ELECTIONS LEON COUNTY, TALLAHASSEE, FL

Mr. SANCHO. Thank you very much, Mr. Chair, honorable Members of the Committee. My name is Ion Sancho, and I have been

an election official in the State of Florida for, now, 21 years. And I can tell you that Florida is probably the poster child for the dramatic case for reform that we need in this Nation.

Of the five million Americans that are estimated to be barred from voting as a result of committing crimes, almost one out of five of these people reside today in the State of Florida. And the genesis of our current statute did begin following the American Civil War with the Constitution of 1868, the first evidence of a bar to felon voting in our history.

No one here can forget the Florida election of 2000, perhaps the most infamous election in our country's history. While most Americans can recall problems with butterfly ballots or pregnant chad, less well-known, but of more significance, is the role played by the flawed felons list distributed to the 67 Florida supervisors of elections in the spring of 2000 by Florida state officials.

Pursuant to a consent decree entered into with the NAACP, and then-Florida Secretary of State Kathryn Harris, in 2002, 20,000 legal Florida voters were required to be added back to our rolls, because these were the numbers that the State admitted had been illegally identified as felons, and thus, not allowed to vote on November 7, 2000, in a contest that was decided by a mere 537 votes.

Again, in 2004, we were given flawed lists, which fortunately, this time, the media sued to gain access. And once the flaws were known, Governor Jeb Bush was forced to withdraw those lists for our use to declare citizens as ineligible.

Even as I am talking to you now, Florida's current efforts to reform the process of civil rights restoration is not working. Republican Governor Charlie Crist and the Florida cabinet, based upon the need for fundamental fairness in our process, initiated reforms in 2007, allowing for the restoration of voting rights for all non-violent offenders.

The Florida legislature, when told that 42 new employees would have to be dealt with to deal with the work load necessary, not only did not provide the 42 workers, they cut the clemency board's existing work staff. And today, the backlog is between 1 to 3 years for individuals that the State has said should be brought back into the process of voting, and they cannot, because of the partisan interference at the Florida legislative level.

It is time we adopted national and rational standards for Federal elections and to stop the partisan game playing which has become the hallmark of American politics today—not just in Florida, but across the Nation.

And I can tell you that in my tenure as an election administrator in Florida, nothing has helped our voting process more than the two major pieces of Federal legislation that this Congress enacted: the National Voter Registration Act of 1993, which finally established voter registration procedures fairly across our State; and the Help America Vote Act, which established properly the statewide databases which we now can properly identify and process voters in a fair and opportune manner.

But even today, even though we have what I consider one of the best databases in the country in terms of voter registration, costing \$23 million, which was completely funded through Federal dollars, and an ongoing cost of \$2.5 million a year to operate, there is one

central flaw in the State design of that database. No supervisor of elections can look up and identify which Florida citizens have been given the right to have their voting rights restored.

And in a study that was released last March by the Florida ACLU, numerous Florida election officials could not properly identify what Florida's current votes were—what the law for individuals seeking to vote were. An individual who was turned away from registering to vote in Hillsborough County had to come to Leon County, where that individual was properly registered and placed back on the rolls where they should have been.

Again, the constitutional arguments here that the manner of an election does not include the right and how one may register or cast a ballot, I think is a specious argument. The same argument was used against the National Voter Registration Act of 1993. In fact, you can determine what is right and what proper manner individuals may vote in Federal elections.

And it is time we ended the partisan process that is all too often appurtenant to this process, and have a rational standard, so that all election officials all across the country, and all citizens who want to participate in this process do not have to come up to me, as citizens do when I am in the outside in my community and seeking to register individuals. And I see the look in people's eyes who want to register to vote, but they cannot. They cannot register to vote, and I can see that. And they are ashamed.

They wear the scarlet letter on their forehead that Congressman Cohen talked about. And there is nothing I can do to assist them, because that is the process in Florida, and I am charged with carrying out those rules.

But I think we do need reform. I think that our association has been on record for, in our own State, for adopting a procedure much as this congressional act. As soon as an individual has served his time, that individual should be allowed to register and vote.

And in conclusion I would like to cite Republican Governor Charlie Crist, who in trying to convince the Florida Cabinet—which he successfully did—that we needed to make reforms, wrote, justice cries out for us to do what is right. Dignity, justice, honor. And at what point do the punished have the right to do a simple chance to come back to society?

Those whose lives we discuss today have served a sentence, as they should have. But what right do we here have to add to that sentence?

Thank you very much.

[The prepared statement of Mr. Sancho follows:]

Testimony of Leon County, Florida,
Supervisor of Elections Ion Sancho

Presented on March 16, 2010 to
The United States House of Representatives,

The Subcommittee on the Constitution, Civil
Rights and Civil Liberties,

Committee On The Judiciary

Honorable members of the Subcommittee on the Constitution, Civil Rights and Civil Liberties, thank you for inviting me to present this testimony today. I have been the Supervisor of Elections for Leon County Florida for over twenty one years, and during that time the issue of felon disenfranchisement has been one of the most consistent and problematic issues plaguing Florida's electoral landscape.

Florida probably provides perhaps the most dramatic case for reform of all the states in our nation. It's has been estimated that as many as 5 million American citizens are barred from voting as a result of committing crimes, and of these persons, almost one in five are Floridians.

The genesis of our current statutes began following the American Civil War, with the Florida Constitution of 1868, when state officials officially began their formal efforts to frustrate Federal intervention into its segregated society, and unfortunately, it continues to mars our recent political history.

Who can forget the Florida election of 2000, perhaps the most infamous election in our country's history. While most Americans can recall problems with "butterfly ballots" or "pregnant chad", less well known, but of more significance, is the role played by flawed "felon lists", distributed to the 67 Florida supervisors' of elections in the spring of 2000 by state election officials. According to the data provided to the Florida supervisors of elections in 2002, pursuant to the consent decree entered into with the NAACP and then Florida Secretary of State Kathryn Harris, approximately 20,000 legal Florida voters were barred from casting ballots in that presidential election., a contest decided by a mere 537 votes.

In 2004, state election officials barred Florida's Supervisor of Elections' from using that iteration of the "felon lists" to remove ineligible voters, when the media disclosed that list contained severe inaccuracies.

Even as I'm talking to you now, Florida's current efforts to reform the process of civil rights restoration for voting is not working. Governor Charlie Crist and the Florida Cabinet, based upon the need for fundamental fairness in Florida's restoration of civil rights process, instituted reforms in 2007 allowing for the restoration of voting rights for all non-violent offenders. Failure by the Florida Legislature to fund the needed positions, 42 in the 2008 budget (instead of providing these workers - their existing staff was actually reduced), means that today there is as long as a three year wait in processing the paperwork of individuals who were pardoned in 2007, and an additional 20,000 were added to the waiting list this year alone.

It's time we adopted a rational and national standard for federal elections, and to end the confusing process has plagued election officials for decades, not just in Florida, but across the country.

In conclusion I must tell you that in my tenure as an election administrator in Florida, nothing has modernized our voting process more than the two major pieces of federal legislation, the National Voter Registration Act of 1993, and the Help American vote Act of 2002 . We need the United States Congress to step up to the plate now, as it has previously done, and allow the reintegration of these citizens to our national electoral system in a fair and straightforward manner. That's why I support this legislation today.

Mr. SCOTT. Thank you.
Mr. Idarraga?

TESTIMONY OF ANDRES IDARRAGA, CENTRAL FALLS, RI

Mr. IDARRAGA. Chairman Conyers, Chairman Scott, Representatives Chu, Watt and Members of this honorable Committee, thank you for this opportunity to testify at this hearing in support of this bill.

My name is Andres Idarraga, and I am here to discuss the merits of this bill from an extremely personal perspective, for myself and for the communities I grew up in and worked.

Almost 6 years ago, I was released from prison after serving 6½ years. Like most other newly released persons, my priorities were securing housing and employment. I also dearly wanted to get an education.

Voting was neither at the top nor near the top of my list at that time. However, it was something I thought about very much.

Half-way through my prison term, I discovered the prison library, and ironically, it was there where I discovered what being a citizen of this great country means.

When I grew up, neither of my parents had formal education. My father did not make it past elementary school in his native country. My mother did not get an education, either.

I had very few reference points of what getting an education meant. And it was in that library where a small group of prisoners would discuss various topics ranging from economics, law, literature, math, philosophy, where I finally found what it meant to be a citizen.

The latter was mainly due to two great, influential books. One was the autobiography of Nelson Mandela, and the other was a biography of Thurgood Marshall. Both men understood the self-correcting mechanisms and the deep humanity of their societies. For them, there were no enemies, only potential allies, for both men understood that we all had to live with the results that society creates together.

Today, we have created a society that excludes some five million people from the ballot. This exclusion is at the end of a complicated chain that often begins with poverty and a lack of education, involves the criminal justice system and penal institutions, and often ends in isolation, bitterness and disfranchisement.

I have personally travelled this complicated chain from beginning to end, like I stated.

After serving 6½ years in prison, during that time I realized what I had thrown away and became determined to turn things around for myself, my family and my community. After I was released, I attended the University of Rhode Island, graduated from Brown University, and am now in my second year at Yale Law School.

My education and my experiences provide me with the foundation to believe, like my role models, that our constitutional laws call for correcting the injustice of felon disfranchisement.

In summer of 2004, shortly after my release, I approached my parole officer about voting. She answered that she was not sure whether I could or not, because I was a convicted felon. Her re-

sponse is emblematic of our national patchwork of laws on this issue, which create confusion, even for those who should know what the answer is.

Therefore, I had to find out for myself.

At that time, I was living with an aunt, had a job, was a month away from beginning my freshman year at the university. I felt extremely fortunate. During my time in prison, I worked relentlessly to prepare myself for my second chance, and my efforts were beginning to pay off. Now that I had taken care of my most pressing concerns, I could begin thinking about larger issues.

One of those larger issues was, what was my role as a citizen who had been recently released from prison, and who aspired to make a difference in the lives of similarly situated men and women? At least, I thought, I should be able to exercise the fundamental role the citizen plays in our society, which is voting.

Ironically, I have also talked to many individuals who have gone for the citizenship test. And one of the questions it states is, it says, what is the most important right you get upon becoming a U.S. citizen? And the answer is, voting.

My question to my parole officer at the time was the first step in the direction to vote. However, I later learned that I was barred from voting due to my felon conviction. I was disappointed and perplexed.

Later, I soon joined the Rhode Island Right to Vote coalition that was working to change laws on this issue. In my home State of Rhode Island, which was referenced, there was—there is parts of the State where close to 25 percent of young men are disfranchised. About 10 to 15 percent are Latinos. And while it does disproportionately affect minorities, in the aggregate, it is still our felon White citizens who are mostly affected by these laws.

Denying the formerly incarcerated the right to vote serves no purpose as far as I can see. On the front end, disfranchisement does not function as an effective deterrent to crime, nor does it further any compelling government interest in public safety upon release. In fact, the opposite is true.

Studies have shown that voting by those who have been arrested is associated with lower rates of recidivism.

In November 2006, my fellow Rhode Islanders were the first in the Nation to go to the polls and approve a ballot referendum to restore voter rights to people as soon as they were released from prison.

After this ballot was approved, I recall going in to vote for the very first time, and driving my 8-year-old nephew to the voting booth with me. We engaged in a back-and-forth conversation of who was I voting for, and why. And he was extremely interested.

And I was able to impart in him for the very first time the model and behaviors that I try to impart on my community, and which I did not grow up in. I hope that he takes the lesson to heart.

This year, I founded a group that organizes law students to teach constitutional law in local high schools. And the beginning of the year, we asked students what their conception of the law is. For most of them, they viewed the law negatively. They see it as a blunt instrument with little give.

I believe, and I have come to view the law very different. I see its redemptive qualities. And I hope to impart that in those communities.

During my travels, I have received many e-mails, many letters from people that have been affected, thanking me, and telling me about the first time they went to vote, because of some of our efforts. This bill will further citizenship and the rule of law in communities that sorely need it.

I only hope that those communities become as actively engaged in our society as my fellow classmates at Yale Law School are.

Thank you for this opportunity.

[The prepared statement of Mr. Idarraga follows:]

PREPARED STATEMENT OF ANDRES IDARRAGA

**Hearing on the
Democracy Restoration Act of 2009
H.R. 3335**

**Testimony of Andres Idarraga
Yale Law School Student &
Impacted Individual**

March 16, 2010

Chairman Nadler, Ranking Member Sensenbrenner, and Members of House Judiciary Committee's Subcommittee on the Constitution, Civil Rights and Civil Liberties:

Thank you for the opportunity to testify at this hearing in support of H.R. 3335, the "Democracy Restoration Act of 2009." My name is Andres Idarraga, and I am pleased to join you today to discuss why gaining the right to vote was important to me. I have organized my testimony into three sections:

1. The first section provides this committee with my personal background. As a person impacted by felon disenfranchisement laws, I would like this committee to understand why and how I have come to view voting as a fundamental democratic act with great resonance and symbolic meaning.
2. The second section describes the impact these laws and the repeal of these laws has had on the communities where I grew up and worked.
3. In the last section, I discuss how the passage of this bill will promote citizenship among impacted citizens, further the goals of rehabilitation, and legitimize our constitutional structure in areas where the law is often viewed negatively.

I. Personal Background

Almost six years ago, I was released from prison after serving six and a half years. Like most other newly released persons, my priorities were securing housing and employment. I also dearly wanted to get an education. Voting was neither at the top, nor near the top, of my list but was something I did think about.

Halfway through my prison term, I discovered the prison library. There, I fell in with a small group of prisoners who would read, discuss, and debate many issues across various disciplines. Economics, Law, Literature, Math, Politics, and Philosophy were all treated with vigor. Those prison seminars planted the seed for the pursuit of my education and, ironically, my current thoughts about citizenship.

The latter was mainly due to two of the most influential books I read—the autobiography of Nelson Mandela and a biography of Thurgood Marshall. Both men understood the self-correcting mechanisms and the deep humanity of their societies. For them there were no enemies, only potential allies, for all had to live with the results that society created together. Today, we have created a society that excludes some five million people from the ballot. This exclusion is at the end of a complicated chain that often begins with poverty and a lack of education, involves the criminal justice system and penal institutions, and often ends in isolation, bitterness and disfranchisement.

I have personally traveled this complicated chain, from beginning to end. While always a good student, as a teenager I allowed negative influences to prevail. For too many reasons to mention, during high school I did not—and at the time could not—envision myself going to college. Instead, I became involved in some of the worst aspects of where I grew up. I became involved in drug dealing, and, at 20, I was sent to prison as a result. I would spend the next six years and four months incarcerated. While incarcerated, I realized what I had thrown away and became determined to turn things around for myself, for my family, and for my community. After I was released, I attended the University of Rhode Island, graduated from Brown University, and am now attending Yale Law School.

My education and my experiences provide me with the foundation to believe, like my role models, that our Constitution and laws call for correcting the injustice of felon disfranchisement.

In late summer 2004, shortly after my release from prison, I asked my parole officer if I could vote. She answered that she was not sure. Her response is emblematic of our national patchwork of laws on the issue, which create confusion even for those who should know the answer. Therefore, I had to find out for myself. At the time, I was living with an aunt, had a job, and was a month away from beginning my freshmen year in college. I felt extremely fortunate. During my time in prison, I worked relentlessly to prepare myself for my second chance, and my efforts were beginning to pay off. Now that I had taken care of my most pressing concerns, housing and employment, I could begin thinking of larger issues and questions. What would I study in college? What were my career plans? How would I make amends to my family and community for the things I had done?

Coincidentally, the Bush and Kerry presidential campaigns were intensifying during this time, which prompted another question. What was my role as a citizen who had been recently released from prison and who aspired to make a difference in the lives of similarly situated men and women? At the least, I thought I should exercise the fundamental role a citizen plays in our society, voting. My question to my parole officer was a first step in that direction. However, I later learned that I was barred from voting due to my felony conviction. I was disappointed and perplexed. I soon joined the Rhode Island Right to Vote campaign and began to work to change the law.

II. Community Impact of Disfranchisement Laws

Denying the formerly incarcerated the right to vote serves no purpose as far as I can see. Disenfranchisement does not function as an effective deterrent to crime, nor does it further any compelling government interest in public safety upon release. In fact, the opposite is true. Studies have shown that voting by those who have been arrested is associated with lower rates of recidivism. I also believe that voting is correlated with higher levels of investment in and ownership over community. I have experienced both factors in my own life and in the communities where I have worked on felon disenfranchisement.

In November 2006, my fellow Rhode Islanders were the first in the nation to go to the polls and approve a ballot referendum to restore voting rights to people as soon as they are released from prison. Now, when a person leaves prison, the Department of Corrections hands him or her a voter registration form. This change in the law allowed me and 15,000 other citizens with felony convictions to vote. We are now finally fully vested members of our communities, and our civic engagement will leave lasting imprints. I think my experience voting for the first time in 2008 exemplifies this.

Before voting that morning, I drove my then eight-year-old nephew to school. My nephew spent time with me as I worked on the Right to Vote campaign and he came with me on the day I registered. On the way to school, I asked him if he knew that today was the day voting took place in Rhode Island. He said he did and asked me who I planned to vote for. I told him I was still thinking through my options, and we talked about the different candidates. This was a conversation I relished. Coming from a family in which voting had rarely, if ever, been discussed, this was a new beginning. Because I voted that day and shared the experience with my

nephew, he is more likely to vote when he is an adult. Voting is a good and responsible behavior, one that should be encouraged among citizens, not discouraged.

III. Furthering Citizenship and the Rule of Law

This year at Yale Law School, I co-founded a group that organizes law students to teach Constitutional Law in New Haven high schools. High school students are taught Constitutional Law through the prism of school-related First, Fourth, Eighth, and Fourteenth Amendment cases that have reached the Supreme Court. They also compete in a local moot court competition, with some advancing to a national moot court competition. Several students have remarked that the experience has been transformative. Notably, students remarked with wonder at the previously unnoticed powerful and positive deployment of the law in their lives. Most of our high school students previously viewed the law as a blunt enforcement mechanism with little give.

Most people in distressed and disfranchised communities view the law similarly and have rarely had the opportunity to see, experience, or study its positive effects. They see it as unfair, unforgiving, and cold. This creates a reactionary antagonism on the part of these individuals that, in turn, has historically prompted even harsher laws by bodies such as this one. This destructive feedback loop has created the deplorable status quo, where we now place conditions on a fundamental right. I have seen a different side of the law, the replenishing and redemptive side. The law I have come to know protects those who have no voice while creating rules that are in the best interest of all. That is the side of the law I hope to impart on disfranchised communities. My work on this issue has allowed me to explain this view of the law in places where it may not be initially popular. In these places, engagement with law and policy is sorely needed, and I endeavor to explain the importance of such engagement. Because all of us here

understand the importance of proactive citizenship, I need not dwell on it in detail. I only wish to emphasize that it would make our democracy stronger if ALL participated. If individuals in poor and distressed communities were as publicly engaged as my classmates at Yale Law School, this would be a great service to democracy. Returning the right to vote to all previously incarcerated citizens is an essential first step towards creating this engagement.

Mr. SCOTT. Thank you.

We will now question the witnesses under the 5-minute rule, and I will begin.

Mr. Clegg and Mr. Neuborne, Article I, Section 2 says that the electorates in each State shall have the qualifications requisite of the electors of the most numerous branch of the State legislature.

That is where the States get to pick who can vote in a Federal election. Is that right?

Mr. NEUBORNE. That is the source of the States' power to set ballot—qualifications for their own elections, and at least presumptively for State—

Mr. SCOTT. Okay. And the 14th Amendment says that you essentially cannot deny someone the right to vote, but then says, except for participation in rebellion or other crimes. That is the authority to disenfranchise people who have committed felonies. Is that right?

Mr. CLEGG. No.

Mr. SCOTT. No? Mr. Clegg?

Mr. CLEGG. I do not think that the States need affirmative Federal authority. I do not think that the States need affirmative—thank you.

I do not think that the States need affirmative Federal authority to decide what the qualifications for voting in their States are.

I think, though, that the provision that you read—

Mr. SCOTT. Well, it says—wait, wait, wait.

Mr. CLEGG [continuing]. It says that the people who wrote the 14th Amendment saw that there would typically be non-racial reasons for disenfranchising criminals.

Mr. SCOTT. Well, it says that—essentially, it says, when the right to vote in any election is denied to any male inhabitant of such State, being 21 years of age—now, we have taken out the male with the subsequent—and it has gone to 18 subsequently.

But it suggested you cannot discriminate. Anybody that is otherwise qualified, male inhabitant over 21, you have got to let them vote, except for participation in a crime. That would give them the right to discriminate against those people. If they have committed a crime, you would be able to discriminate against them for having committed a felony.

Mr. CLEGG. No, I do not think that that is—

Mr. SCOTT. Then where else can you discriminate against them on any basis?

Mr. CLEGG. Well, for instance, there are all kinds of people who are not allowed to vote in the United States. I mean, we sort of think that everybody can vote, but actually, that is not true. Of course, we do not let children vote. We do not let people who are mentally incompetent vote.

Mr. SCOTT. No, wait a minute. We have 21 years of age—

Mr. CLEGG. That does not—

Mr. SCOTT [continuing]. Inhabitant.

Mr. CLEGG [continuing]. Mental competence. We do not let non-citizens vote.

There are certain minimum, objective standards of responsibility and trustworthiness and loyalty that we require of people, if they are going to participate in the sacred enterprise of self-government. And people who have committed serious crimes against their fellow citizens do not meet those minimum standards.

Mr. SCOTT. Okay. Then you get the 15th Amendment that says that the right to vote shall not be denied or infringed by the United States or any State on account of race, color, previous condition of servitude. If you can show for any reason, for any scheme that you

are denying the right to vote on account of race, color, that can be prohibited.

Mr. CLEGG. Absolutely.

Mr. SCOTT. Okay.

Mr. CLEGG. But I do not think that that is what is going on with the vast majority of felon disenfranchisement—

Mr. SCOTT. Okay. Well, if you could show in a particular State that the scheme of disenfranchisement was enacted for the—with the intent to diminish the African American vote, would it be illegal? Could you proscribe it?

Mr. CLEGG. You could proscribe it. And you could have it—even without a Federal law, you could bring a lawsuit—and have it struck down as unconstitutional. And indeed, the Supreme Court has done that in at least one case.

Mr. SCOTT. Which case? Could you describe the case?

Mr. CLEGG. The case was *Hunter v. Underwood*. And it involved an Alabama misdemeanor, an Alabama statute that disenfranchised people who had committed certain misdemeanors, not even felonies. And it was shown that that law was passed in the post-Reconstruction era, explicitly to disenfranchise African Americans.

And Chief Justice Rehnquist in, I believe, a unanimous opinion for the Court, struck it down was unconstitutional.

Mr. SCOTT. And so, without regard to the bill as it is written, in those targeted situations where you can show that it has discriminatory, in that case, intent, then the Federal Government would have the right to proscribe that disenfranchisement.

Mr. CLEGG. That is correct.

Mr. SCOTT. Now, if it is intent. What about discriminatory impact?

Mr. CLEGG. No. The Court has made quite clear that laws that have a simple disproportionate impact on the basis of race or ethnicity are not unconstitutional. It said that on several occasions with respect to the 14th Amendment. A plurality has said that with respect to the 15th Amendment. And of course there is no reason to think that two Reconstruction era statutes would have a different standard in that regard.

Mr. SCOTT. But if you tried to start a disenfranchisement, and you are in a covered State under Section 5, and you could show a discriminatory impact, could you prohibit it under the Voting Rights Act today?

Mr. CLEGG. That is one reason why I think the Voting Rights Act today is unconstitutional in that respect.

Mr. SCOTT. To the extent that the Voting Rights Act is constitutional, you could, in fact, proscribe the use of felony disenfranchisement with a disparate impact, if you tried to pull it off today in a covered State.

Mr. CLEGG. I think what would happen then, Mr. Chairman, is that arguendo you would be able to make out a prima facie case under Section 5, or under Section 2, for that matter, if you could show a disproportionate impact.

However, the State would be able to come back and rebut that prima facie case by showing that it had a strong and legitimate reason for the challenged practice.

And in my view not allowing people who have committed crimes, who are not willing to follow the law, to make the law for the rest of us is a good reason. And a case—a prima facie case could be rebutted by a State simply saying that, look, the overwhelming majority of States in the United States do not, and have not, allowed felons the vote. That is what we do.

Mr. SCOTT. Well, wait a minute.

Mr. CLEGG. And it could rebut the prima facie case that way.

Mr. SCOTT. A racially neutral, good faith purpose does not override the discriminatory impact under Section 5.

Mr. CLEGG. No, I disagree with that. It is just like in the employment context, Mr. Chairman. If an employer has a selection device that has a disparate impact, a prima facie case can be made against him. But the employer can then come back and show a business necessity for the practice and win that way.

The Supreme Court has recognized in the——

Mr. SCOTT. But if they cannot——

Mr. CLEGG [continuing]. In a voting rights case involving——

Mr. SCOTT. If they cannot show a business necessity, although they had racially neutral intent, but it had a disparate impact, and cannot show a business—I mean, there is just the Griggs case.

Mr. CLEGG. That is right. But you are able to come back and rebut it. And the Supreme Court has recognized the same kind of rebuttal opportunity under the Voting Rights Act.

Mr. NEUBORNE. Mr. Chairman, could I comment a bit on the question, as well? Because I think I disagree quite strongly with Professor Clegg on this.

He is, of course, completely correct in describing *Hunter v. Underwood* to you, which is the case where the Supreme Court struck down the Alabama felon disenfranchisement law on the ground of showing that it was part of this post-Reconstruction effort to disenfranchise Blacks throughout the South. And Chief Justice Rehnquist's opinion has a splendid history of the use of the felon disenfranchisement laws during that period as a racist way to prevent people from voting.

Now, how do we take that forward into the modern era under Section 2 of the 15th Amendment?

And Professor Clegg's description of the complexities of litigating a case one by one to try to prove the continuing racial animus is exactly why Congress has power under Section 2 of the 15th Amendment to act when there is a history of racial animus, where there is a continuing racial impact—a disproportionate racial effect, as you point out—and where Congress finds that it is extraordinarily difficult to determine on a case-by-case basis which voter is being turned away because of race, and which voter is being turned away for some other reason.

Congress has the power under those circumstances to act prophylactically to sweep away the remnants of a racist past, precisely because it is impossible to do it on a case-by-case basis to try to prove intent in a world in which politicians now have a sophisticated knowledge that they are not supposed to admit that that is what they are doing.

Mr. CLEGG. I do not agree, by the way, that it is that difficult to show discriminatory intent.

When I was at the Justice Department, we brought disparate treatment cases, and won disparate treatment cases, all the time.

Mr. NEUBORNE. Did you ever lose one?

Mr. CLEGG. And we used——

Mr. NEUBORNE. Did you ever lose one?

Mr. SCOTT. Wait a minute. Wait a minute.

Mr. CLEGG. Probably should have.

Mr. SCOTT. Let me just follow through, Mr. Neuborne.

Mr. Neuborne, under your analysis, and under the constitutional requirement that we have to narrowly tailor any remedy, could you globally proscribe felony disenfranchisement laws everywhere, even where it is clearly in States where there are virtually no African Americans, and you cannot possibly show that it was done with that intent?

Or would you have to do it on a targeted basis showing, as we did with the Voting Rights Act, that it has a discriminatory intent and impact in a particular State, and do it on a case-by-case—not an individual voter-by-voter, but state-by-state basis where it would be illegal?

Mr. NEUBORNE. Well, that is a great question, congressman. And fortunately for me, at least, there is a good answer for it. And that is that the literacy test experience is exactly that experience.

What happened was that literacy tests were obviously used throughout the South in a much more aggressive way to disenfranchise Blacks than throughout the North. But they were used everywhere in a racially discriminatory way in one way or another at one point in the Nation's history.

And then, in 1970, when Congress was considering what to do with literacy tests, they asked exactly your question. They said, should we sweep away literacy tests only in the States that fall under the Voting Rights Act? Or should we sweep literacy tests nationwide, regardless of whether or not there is a history in the past?

And they chose to do it nationwide, because they realized that even in States without a comprehensive history, there were, nevertheless, the opportunity for racially discriminatory behavior. And indeed, there was a case by New Hampshire, ironically, argued by David Souter when he was an attorney general of New Hampshire, in which he attempted to distinguish New Hampshire from the rest of the country on literacy tests, and he lost.

And he should have lost, because Congress wanted to take it out all over the country as part of their prophylactic power to eliminate the vestiges of racial discrimination in voting——

Mr. CLEGG. But, you know, at the other extreme, I think that if you had one instance in one State of discrimination, for the Congress to use that as an excuse to enact a nationwide law would clearly be unconstitutional.

And there was testimony——

Mr. SCOTT. Well, Mr. Clegg, is the——

Mr. CLEGG.—11 years ago——

Mr. SCOTT. Is the prohibition against literacy tests—how is that done?

Mr. CLEGG. No. I think that that is much closer to the opposite extreme, where it was being used systematically in large parts of the country in order to disenfranchise——

Mr. SCOTT. In New Hampshire?

Mr. CLEGG. I am sorry?

Mr. SCOTT. In New Hampshire?

Mr. CLEGG. I do not know.

But the point is, it was being used in lots of places, not just one isolated incident.

Here, on the other hand, we have laws that have been passed all over the country with every State except for two, had a history of clearly being used for non-racial reasons for hundreds and thousands of years.

And for Congress seize upon the disparate impact that it has in some instances as an excuse to invalidate all these laws, I think would clearly be unconstitutional.

Mr. SCOTT. My time has more than expired.

Mr. CLEGG. Mr. Chairman, could I ask one question?

I just want to compliment you on your scrupulousness in wanting to get the right answer on this constitutionally, which I think is very important. And I do not know—I mean, I am a little reluctant to bring this up, particularly because he is not here.

But I thought that I heard Representative Cohen say that he is, you know, very much in favor of this law, and if there is a constitutional problem, that this Committee will just have to find some way around it.

I do not know if that is what—if you heard that or not. But I just want to go on record saying that that is——

Mr. SCOTT. Well, if we pass a law, we will do everything we can to make sure that it is constitutional.

The gentleman from Arizona, Mr. Franks?

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. Chairman, I guess I would direct my first question to Professor Clegg.

I think I saw you shaking your head when the comparison was made between felony disenfranchisement and the literacy laws test. And could you expand on that? Tell me what was on your mind there. I am fascinated.

Mr. CLEGG. Well, I thank you for the question, but I have been trying to do that, actually. I think that two really cannot be equated. The history of literacy tests as a deliberate device that was used to disenfranchise people on the basis of race and ethnicity, that that was being stubbornly adhered to and abused for decades, is one historical incident.

The felony disenfranchisement laws present a completely different historical incident. And I just think that the two cannot be equated.

It is true, as I said in my testimony, that there were five southern States that tweaked their laws in the period from 1890 to 1910 deliberately to keep African Americans from voting. And that was unconstitutional. That was wrong. But those laws are no longer on the books.

And the 48 States that have felony disenfranchisement laws now, it is just ridiculous to assert that those laws, as a general matter, have racial roots. That is simply not true.

Now, I have great affection for Professor Neuborne, but, you know, the parts of his testimony, you know, where he says, you know, to the contrary, that, for instance—the one instance he says that “many, probably most, and possibly all” criminal disenfranchisement laws have been implemented and enforced in a discriminatory manner—and another instance where he says “most felony disenfranchisement statutes have their genesis in an effort to disenfranchise racial minorities”—you believe that?

Mr. NEUBORNE. I will stand by it.

Mr. CLEGG. “Most felony disenfranchisement statutes?”

You are talking about 48 States—most of those have their genesis in an effort to disenfranchise racial minorities?

Mr. NEUBORNE. I will stand by that. It came into being after—now, if I have a moment to explain, felony disenfranchisement in this country has two periods, the period before the Civil War and the period after the Civil War.

The period before the Civil War, there were literacy tests. There were felon disenfranchisement statutes. There were property qualifications. They probably did not have much of a racial impact, because most Blacks could not vote, especially after Dred Scott. There simply was not a serious racial problem with voting.

But once the 14th and 15th Amendments got passed, all of a sudden, these old standards—which of course date back to Greece and Rome—were recycled by racists. They were recycled by racists all over the country as convenient rocks to throw at newly enfranchised Blacks. And they threw them everywhere. They threw them in New York. They threw them in Florida.

To say that you only want to look at the period from 1890, when five States tweaked their laws—obviously to target Blacks—overlooks entirely the period from 1868 to 1890, when State after State adopted these rules, or made them harsher, or made them harder to administer. There is no way to separate the ugly racial past that seeps into our felony disenfranchisement laws from the legitimate, which is exactly why Section—

Mr. FRANKS. Mr. Neuborne, if I could—

Mr. NEUBORNE [continuing]. Of the 15th Amendment is so important.

Mr. FRANKS.—I would like to have Professor Clegg have a chance to respond.

Mr. NEUBORNE. I am sorry. I am sorry. I overstated, I am afraid.

Mr. CLEGG. No, no, no.

Professor Neuborne and I, before the hearings began, were talking about how we both enjoyed Alexander Keyssar’s book, “The Right to Vote.” And Keyssar said that outside the South, the disenfranchisement laws “lacked socially distinct targets and generally were passed in a matter-of-fact fashion.” Even for the post-war, post-Civil War South, Keyssar has more recently written, in some States “felon disenfranchisement provisions were first enacted by Republican government that supported Black voting rights.”

I just do not think that you are going—you know, try as hard as you might, Professor Neuborne—I do not think that you are going to be able to get a majority, let alone “all” of the 48 States in the category of having racist intent—

Mr. FRANKS. I would be interested in knowing what, Mr. Neuborne, what States you would suggest did that.

Mr. NEUBORNE. What State?

Mr. FRANKS. Yes, what States?

Mr. NEUBORNE. Alabama. We know that, because the Supreme Court certified it. In *Hunter v. Underwood*, they struck it down as unconstitutional.

Mr. FRANKS. You are suggesting all States—

Mr. NEUBORNE. We know that there were—Florida, in 1868, when it enacted its constitution, and for the first time put in a criminal disenfranchisement to prevent newly freed Blacks.

The constitutions of many of the States that were being readmitted to the Nation, for the first time begin to put in felon disenfranchisement, because they recognized that it is a very, very easy way to be able to minimize the ability of Blacks to vote.

Mr. CLEGG. No, no—

Mr. FRANKS. Professor Clegg, I am out of time here, but I would like to have you respond.

Mr. CLEGG. Well, I would just say that none of those laws are on the books anymore.

Mr. NEUBORNE. Yes, but their ancestors are on the books.

The question is, what was the genesis—what we are talking about here is, was there a past in which it was clear that felon disenfranchisement was intentionally imposed to prevent Blacks from voting? And the answer is, of course there was such a past.

Now the question is, is there a present in which the current incarnation of those laws is having a disproportional racial impact? And of course, the answer is yes.

And then third is, is there power in Congress, once that happens, to say, given the racist past, given the racist impact, we can take this thing out once and for all, all over the country, just like we took out literacy tests. Because believe me, there were many States that did not have a history of racial discrimination with literacy tests.

Mr. FRANKS. Professor Clegg, I will give you the final word.

Mr. CLEGG. Well, I will just say that Chief Justice Rehnquist in his *Hunter v. Underwood* opinion made it clear that a very different case would be presented if Alabama were to re-pass the law without discriminatory intent. These laws are not on the books anymore. And I do not think that in most States they ever had discriminatory intent.

And to say that, well, once you had a felon disenfranchisement law that might have had discriminatory intent, you are therefore forever barred from ever having—from ever saying that a criminal should not be able to vote—is not good constitutional law.

Mr. NEUBORNE. And that is not what I am saying. I am simply saying that once you—

Mr. CLEGG. And I think, if it is not unconstitutional, then Congress is not going to have—does not have the authority to go in on a wholesale basis and cite that as evidence for why there has to

be a national, one-size-fits-all standard superseding constitutional authority that is expressly given to the States.

Mr. NEUBORNE. Well, I will just ask one last question, and I will ask Professor Clegg, why——

Mr. FRANKS. I thought we were asking the questions up here, Mr. Neuborne.

Mr. NEUBORNE [continuing]. Is the literacy test different? Why is the literacy test case different? That is all.

Mr. FRANKS. Mr. Neuborne, I am going to—to the Chairman, I am going to yield back.

Mr. SCOTT. Thank you.

The gentleman from Michigan, Chairman of the full Committee, Mr. Conyers?

Mr. CONYERS. Is there credit being given in constitutional law for this course, Professor Scott? [Laughter.]

This is a fascinating discussion.

And I would like to continue it, because I think this hearing is very important. We have in the audience attorney Marc Mauer of the Sentencing Project, Charles Sullivan of CURE, not to mention all the distinguished witnesses you have called. And there are probably others in the audience that makes this hearing extremely important.

There may be a requirement for us to have another hearing on this, because this is very fundamental. And I would like the discussion to keep going on, except that I just have to—I have been informed, Mr. Clegg, that you feel that the Voter Rights Act was and is unconstitutional?

Mr. CLEGG. I am sorry. The what act?

Mr. CONYERS. I said, I have been informed that you believe the Voters Rights Act was, and is, unconstitutional?

Mr. CLEGG. Yes, I think I told you that before you passed it. Unfortunately, you did not listen to me.

Mr. CONYERS. Well, I did not ask for any explanation. I just wanted to make sure that you had said that. I was not here.

Mr. CLEGG. Section 5 and Section 203, I believe——

Mr. CONYERS. You do not have to go any further. [Laughter.]

Thank you.

Mr. CLEGG. I do not think that it is all unconstitutional.

Mr. CONYERS. Thank you, sir. I am trying to ask you the questions, and not you give me the lecture when I do not need it.

Okay.

Now, I wanted to spend some attention with Mr. von Spakovsky, because it is your view, I take it, that no one convicted of a felony should ever be allowed to vote again. Is that correct?

Mr. VON SPAKOVSKY. That is incorrect, sir.

Mr. CONYERS. Oh.

Mr. VON SPAKOVSKY. I think it is up to the States to decide that issue.

Mr. CONYERS. I see.

Mr. VON SPAKOVSKY. If Congress wants to change the 14th Amendment, then I think they have to do it through a constitutional amendment.

Mr. CONYERS. All right. Then, is it your view that no felon, once convicted, should ever be allowed to vote?

Mr. VON SPAKOVSKY. No, no. I——

Mr. CONYERS. I said, is that your view?

Mr. VON SPAKOVSKY. No. I think they should get their vote back under certain circumstances.

Mr. CONYERS. Oh, okay. That is what I am trying to find out.

But you are in a State that does have lifetime felony preclusion of anyone from voting. Is that right? Virginia?

Mr. VON SPAKOVSKY. There is an application process——

Mr. CONYERS. Is that right? Yes or no.

Mr. VON SPAKOVSKY. The answer is no. If you apply and meet the standards, you can get your right to vote back.

Mr. CONYERS. Well, I am getting help from my colleague——

Mr. SCOTT. If the gentleman would yield?

Mr. CONYERS. Yes.

Mr. SCOTT. In practice, and that is what happens, but it is totally discretionary with the governor.

These governors have set some standards, and have said that they will follow, if you go with these good guidelines in so many years. But it is totally discretionary with the governor. And some governors have been much more liberal with their process, and others have been fairly stingy.

Mr. CONYERS. So, some governors have at some time granted someone the right to vote, even though they were formerly a felon. Is that right?

Mr. VON SPAKOVSKY. I am sorry. In Virginia?

Mr. CONYERS. Yes, sir.

Mr. VON SPAKOVSKY. Yes.

Mr. CONYERS. Okay, but not very many.

Mr. VON SPAKOVSKY. I do not know what the numbers are.

Mr. CONYERS. You mean, you think there could be a lot of them could have gotten the right to vote back?

Now, you are not really coming here as—are you a member of the Virginia Board of Elections?

Mr. VON SPAKOVSKY. I am not a member of the Virginia Board of Elections.

Mr. CONYERS. Fairfax County.

Mr. VON SPAKOVSKY. I was sworn in as a member, yes.

Mr. CONYERS. Oh, okay. So, maybe you would not know whether there were few or many. Okay.

This is a great panel here. [Laughter.]

I am going to implore that you and the Chairman see if we can continue this discussion, because it is, I think, very important. And I think the Subcommittee is doing a great service by having all of them here, including you. And I yield to you.

Mr. FRANKS. Mr. Chairman, I am glad to see that. If Professor Clegg and Mr. von—I always have a tough time with his name—Spakovsky could get equal time on that, that would just tickle me to death.

Mr. CONYERS. Oh, that is great.

What about Neuborne? [Laughter.]

Mr. FRANKS. No, I would have to take the Fifth on that. [Laughter.]

Mr. CONYERS. Well, then, let me yield to him now, since you may not be able to get the equal time that some of the others would.

Mr. NEUBORNE. As long as I can still vote.

Mr. CONYERS. Yes, we do not have any power to prevent anybody from voting. We wish we could encourage more people to vote, as a matter of fact. But sometimes I think we do not have much power to do that, Mr. Shelton.

Please, where can we—can we reach any form of agreement among the seven of you here this afternoon in terms of the subject matter, which is presumably my legislation on this subject?

Mr. NEUBORNE. If I may, congressman?

I mean, one of the prerequisites of a law professor is to assign research to other people. And it seems to me that, from the disagreement that has emerged on the panel, one, I think, very important thing would be to assemble a definitive history of the use of felon disenfranchisement laws to prevent Black people from voting, because if that history does not exist, I agree with Professor Clegg, then, that it is much harder to find power to deal with it.

It still might exist under the elections clause and under Section 5 of the 14th Amendment. But surely, the easiest place to look is Section 2 of the Fifteenth. And that requires the history of racial animus. And it seems to me that it is not beyond the power of experts to provide the Committee with an excellent history.

And once that history exists, then I think it is logically, absolutely impossible to distinguish felon disenfranchisement from literacy tests. And then there is a unanimous decision of the Supreme Court in *Oregon v. Mitchell*, saying that you have the power to act.

Mr. CONYERS. Now, before I yield—and I see that Judy Chu is waiting patiently, and now we have been joined by Sheila Jackson Lee, so I am going to wrap this up.

But could I ask a leader in the civil rights movement, Hilary Shelton, for any impressions that you could leave with us to help guide us as we move through this legal, historical, constitutional thicket, which most of us up here find totally fascinating—most of you there, as well. I would like to hear your views.

And I will yield back my time, Mr. Chairman.

Mr. SHELTON. Well, thank you, Mr. Chairman. I agree with you that it is a fascinating conversation as we talk about many of the theories in our legal system.

But the biggest concerns, of course, to organizations like the NAACP is the actual effect, what happens in practice. And quite frankly, what we have seen happen in practice is—I am happy to see my colleague from Florida sitting here—is something very, very different.

We have, in effect, African Americans and many other racial and ethnic minorities locked out of the process, because of an assumption that indeed they are a felony offender—an assumption that very well they should be screened out unlike any others.

As you talked about that 2000 election in Florida, what the NAACP experienced, quite frankly, when we went into Florida, was every African American male being asked at some polling sites whether indeed they had felony offenses on their record, but no one else being asked that question.

And very well what that attitude is actually a form of discrimination that actually intimidated many of the African American and

other Black voters, for that matter, that went into the polls to participate.

The effect, again, is the disenfranchisement in large pockets in the most heavily concentrated African American cities in the country, where they are disenfranchised to a point there is no involvement, there is no political capital along those lines. And much, much of the very spirit of our democracy is then prohibited from being able to be implemented.

So, indeed, it is a great conversation. But in many ways, as we look at what it means to everyday people, what it means to the very core of our democracy itself, raises major concerns.

Mr. SCOTT. Thank you.

The gentlelady from California, Ms. Chu?

Ms. CHU. Thank you, Mr. Chair.

I was interested in Mr. Clegg's testimony. And I wanted to give a chance for the others to respond to the rationale that was posed by your testimony, Mr. Clegg. And they had to do with the policy rationale for being against felony voting.

First was the rationale that we should not let felons vote, just as we deny other groups the right to vote. So, we also, as you state, we also deny the vote to citizens and non-citizens and the mentally incompetent, because they, like felons, fail to meet the objective minimal standards of responsibility, trustworthiness and loyalty we require of those who participate in government.

And so, Mr. Neuborne, or Mr. Wicklund, or any others that may want to respond, how are felons different from children citizens, non-citizens and the mentally incompetent?

Mr. NEUBORNE. With respect, congresswoman, on the merits, the rest of the panel is so much better qualified than I am to talk about why it is so important to re-enfranchise convicted felons.

I will say that the notion that somehow you would equate them with children or with mental incompetents, I mean, there, the reason you do not let them vote is because they lack the capacity to make the choices that goes to voting. But nobody suggests that when someone comes out of prison they lack the capacity for choice. So, of course, those are not helpful analogies.

But the actual merits, I would ask my colleagues who know much more about it to respond.

Mr. CLEGG. Of course, I am not suggesting that they are, you know, incompetent or lack the facilities in the same way. Again, though, there are, these—as I said, we have these minimum standards of responsibility, loyalty and trustworthiness. And I think that—you know, I have nothing against children. I have children. But they are not as responsible as adults.

And likewise I think that people who have committed serious crimes against their fellow citizens have shown that they, too, lack a sense of responsibility. And that this minimum level of responsibility is something that we demand of people if they are going to participate in the sacred enterprise of self-government and making laws that they and everyone else are going to have to follow.

Ms. CHU. Well, Mr. Wicklund or Mr. Sancho, do you have any response? Should felons be put in the same category as children, non-citizens and the mentally incompetent?

Mr. IDARRAGA. Representative Chu, to respond briefly, I would say there is absolutely, actually no difference between ex-felons and normal citizens when it comes to voting. The analog between abridgement of voting rights, I do not think, is the gun rights or other type of—for example, myself, I will be up before the Bar committee one day of character and fitness, and they should rightly take into account my past.

The analog is more the abridgement of a fundamental, core right, although voting is not a Bill of Rights right. But it is more—the analog is closer to abridging freedom of speech because you are an ex-felon, or any other of the freedom of religion, or what have you, because you are an ex-felon.

It is fundamentally different than small children or the mentally incompetent, because of the reasons Professor Neuborne stated. But I think, if anything, the rationale should swing the other way. We would want people invested in their communities, reintegrated into communities, and have them become stakeholders in their communities.

This—is at the end of a very troublesome chain. And that begins with problems in the criminal justice system too far for this Committee to handle, to take up in this instance.

And another thing I want to point out is, Professor Clegg spoke that we do not want violent offenders making laws for other people. The fact is, I believe, in Rhode Island it was close to 80 percent of people disenfranchised were non-violent offenders, low-level drug offenses.

We are disenfranchising people because of the over-criminalization on the front end of things, which has a very disparate impact and troublesome impact on the back end of things.

Mr. CLEGG. I do not think I drew a distinction between violent and non-violent offenders.

Ms. CHU. Well, actually, though, I see this in your testimony right here, because I am reading right from it. But because—you say that there should not be a Federal law allowing felons to vote, because, “Some crimes are worse than others, some felons have committed more crimes than others, and some crimes are recent while others are long past.”

That is a quote, actually, from your testimony.

So, then, my question would be to the rest of the panel, should there be a differentiation allowing a felon the right to vote, based on the degree of the crime? And if not, why not?

Mr. SANCHO. In Florida, I would like to point out that we had an explosion in individuals’ loss of the right to vote when the Florida legislature decided to make writing a bad check a felony. And it raises the issue of, is this the serious crime that had been identified, for example, with rebellion that was part of the constitutional framework that has been previously mentioned.

And I seriously think it is not, but these kinds of felony laws have the same pernicious effect. And in fact, in Leon County had the effect of removing individuals that had worked for years as election workers.

And one personal case that I am aware of, a young mother who, in fact, wrote a bad check to a grocery store to feed her son, could no longer work.

And this kind of—in Florida, they have tagged these economic elements, so that once you are a felon, you no longer can do basic kinds of non-professional work, such as you cannot be a barber, you cannot be a roofer, you cannot be a contractor, you cannot be a cosmetologist.

Well, these are whole categories of non-professional workers, which now, the loss of your right to vote and your civil right has now removed you from being able to economically serve the purpose that, in my opinion, we established this great Nation, was to pursue happiness to the highest and best degree that we can. And this right to vote has been kind of a hammer that has now put the Nation in a Catch-22 posture, where, is this the kind of crime we are talking about?

Yet we are now preventing the individual, as in Tennessee, who they are going to be in prison, they are going to fall behind in their ability to make the child payment. They are going to now permanently be in this Catch-22 where they will not be able to get their right to vote restored. And we have done that in Florida. We have done that across the States.

And I think we need to rationalize this process and remove what is clearly now, in my own opinion as a humble Florida election official, a partisan tool to attempt to reduce the other side's troops and votes. And I think that is not where we want to be, and we have got to reverse that posture in this Nation today.

Mr. CLEGG. I agree that there are all kinds of contexts where drawing distinctions between different kinds of crimes can make sense, and including in the re-enfranchisement of felons. But that is exactly what this statute does not do. And I think it would be very difficult for Congress at the Federal level to engage in that kind of fine-tuning.

This is another policy reason—wholly apart from the constitutional reasons—this is another policy reason why I think it is a mistake for Congress to leap in here and try to write a one-size-fits-all statute that is going to apply to all States—states which are constantly changing what is a felony, what is not a felony, constantly changing the—you know, passing new laws and rescinding old laws. It is simply unworkable for the Federal Government to engage in the kind of fine-tuning that is being urged here.

Mr. SANCHO. But I actually believe it is just the opposite, sir, because what we have done by these crazy patchwork of laws is make it impossible for election administrators to properly determine who is properly ineligible or eligible. And, in fact, as the report that I have presented from Florida from last March, many Florida election officials actually illegally barred individuals from registering. And I think this problem is occurring in the election administration area all across the country.

A bright line, a simple test to ensure that citizens may vote in Federal elections is exactly what we have to do, if we want to pursue, I believe, fundamental—

Mr. CLEGG. Well, the bright line that you have is one—it is a bright line all right, and it makes no distinction between espionage, treason, murder, writing bad checks—right, whatever. They are all in the same category. That is a bright line.

Ms. CHU. I see my time has long since expired. So, I yield back.

Mr. SCOTT. Thank you.

The gentleman from Tennessee, Mr. Cohen?

Mr. COHEN. Thank you, Mr. Scott. And I want to thank you for holding this hearing. And indeed, I have already thanked Mr. Conyers for presenting the bill.

I understand that part of my opening statement was either confused or misunderstood. And when I said that the argument that this was possibly not constitutional, that we should find a way to make it constitutional—or what exactly the verbiage I used, I am not sure—was basically saying what Mr. Neuborne said. Mr. Neuborne believes it is totally constitutional and totally proper.

But, you know, after *Plessy v. Ferguson*, there were a lot of people that said that was the law of the land. And it went on for 58 more years until Thurgood Marshall had the good sense and the courage to bring a case to the Supreme Court and say, no, separate was not equal. And *Brown v. Board of Education* changed all that.

And sometimes you can take a position that something is the law, and that there is not standing, or that there is not venue, but the courts can find it.

Now, the words “manner of election” in Florida, who was allowed to vote determined who was President of the United States. And that affected people in all 49 States. And there should be a basis where, in an election for President of the United States, if you vote in Florida, or you cannot vote in Florida but you could vote in Michigan, it is not fair.

People should be able to have the same standards by which they vote to elect the President of the United States—in my opinion.

And in my opinion, we ought to find arguments and make arguments that hopefully a court will accept. I have little faith in this Court that we have right now to accept those arguments—or any arguments.

But we need to make progress in this country. And this is 2010. You know, there were citings—and I understand the citings, you hear them on the floor, and I use them, too—Founding Fathers, what Alexander Hamilton thought. Alexander Hamilton did not think women should vote, and he did not think African Americans should be free. And he did not think, if you did not own property or could not pass some literacy test, that you should be able to vote, either.

And Thomas Jefferson said, constitutions should not be seen as sacrosanct. But like children who outgrow their clothing, they should be able to adjust as they grow and fit new clothes, and fit new ideas.

And the idea that we should be trapped in a mentality that denies people a chance to vote, that because they committed a wrong at one time means they are perpetually wrong and never have an opportunity, is, I think, antithetical to the basis of the founding of this Nation and what this Nation is supposed to stand for.

Now, I know the organization Mr. Clegg represents, Center for Equal Opportunity, it is a confusing name. Because usually when you see Center for Equal Opportunity, you think of something else. You know, I know in George Orwell, he wrote about the Department of Peace that waged war, the Department of Education that burned books.

So, I guess it is all right, because of that great literary classic, to have something called the Center for Equal Opportunity. But I would submit to you, what you are talking about is not equal opportunity. It is saying that one time burned, forever scorched.

And as I mentioned—and I think somebody here referenced Hester Prynne, I think it was Mr. Sancho—you should not have a perpetual scarlet letter. The idea that people can become good citizens—and the fact is, in most elections, not more than 25 percent of those in a good election year take the opportunity to vote and exercise their freedoms and their franchise.

So, if you take these people who were supposed to be the bottom of the barrel, and give them the opportunity, they have got a chance by their proof, to show by going to the polls that they are better than 75 percent of the country that neglects their opportunity to vote.

But give them a chance. And if they want to vote, obviously, they are better citizens than you think.

But I would submit to you that this legislation is appropriate.

I appreciate Mr. Neuborne's well-reasoned argument, that just like the literacy test in 1965, the people came up here and said, oh, that is not the law, and you cannot do it, just like people said, civil rights is not the law and you cannot do it, that America needs to bring its resources together and its best legal talent to formulate arguments to present to a court that hopefully will accept them, and move this country out of where it is in certain of these laws, which are vestiges of Jim Crow.

Now, Mr. Clegg, I would like to ask you a question. Do you think that Jim Crow laws still have an effect on society today, that people have been affected by those laws, and that they are disenfranchised and/or disadvantaged because of the long history of Jim Crow laws in this Nation?

Mr. CLEGG. Yes, I do.

Mr. COHEN. You do? Well, where under equal opportunity do they get some extra opportunity, because of the fact that they are starting with a weight around their ankle?

Mr. CLEGG. Well, I think that there are—the playing field is not level in many different ways. But I think that there are people of all colors at both ends of the playing field. And I think that where you and I may differ is that I do not think that you should use skin color as a proxy for whether somebody is poor or not, or whether somebody is disadvantaged or not.

If you want to have programs—and we may be able to agree on some programs—that help people who come from disadvantaged backgrounds, who are poor, who live in poverty.

Mr. COHEN. Let me ask you this. Mr. Clegg, the question I asked was about Jim Crow. Jim Crow was targeted at African Americans. Tell me where you agree that Jim Crow laws that targeted African Americans still affect African Americans today. And how can we remedy that?

Mr. CLEGG. I think that—well, I would have to give you an example. You could probably without too much difficulty show that an individual living in poverty can trace that poverty to the fact that his father was not able to get a good education because of Jim Crow laws. You can do that.

However, there are—I do not think that you should say, okay, well, therefore, we are going to make a program available to you. This other person over here, he is poor, but the reason he is poor is because he just immigrated from Mexico.

Mr. COHEN. But the government of the United States——

Mr. CLEGG. And the person here is poor——

Mr. COHEN. Mr. Clegg——

Mr. CLEGG [continuing]. Because he just came over——

Mr. COHEN. Mr. Clegg——

Mr. CLEGG [continuing]. On a boat from Southeast Asia.

Mr. COHEN. Mr. Clegg——

Mr. CLEGG. But you do not hear about them.

Mr. COHEN. Look at me, and let me give you something. But question is, with Jim Crow laws, the States of this government, under the permission of the United States government, passed laws to keep those people as second-class citizens. Nobody passed any laws saying that people came over in boats, like my great-grandfather did, had to be second class. There were no laws on the books.

This government passed laws and said, you cannot go to water fountains. You cannot go to theaters. You cannot have jobs. You cannot have contracts. And that happened.

So, how do you rectify the lingering consequences of Jim Crow?

Mr. CLEGG. My point is that the poverty and so forth, the disadvantages that people suffer because of Jim Crow, can be remedied. But there is no reason to——

Mr. COHEN. How do you do it? Tell me how you do it.

Mr. CLEGG [continuing]. And deny people opportunity——

Mr. COHEN. Tell me how you do it. Don't tell me how you—these other people, don't put them on the same boat. How do we help these people that this government, this life, liberty and pursuit of happiness, that enslaved people, and then did it through laws passed by legislatures and Congresses, how do you help those people?

Mr. CLEGG. If you have somebody who is in poverty, you can have programs that provide, you know, better educational opportunities, that provide, you know, a Head Start program, or something like that, scholarships, special mentoring programs. There are all kinds of programs——

Mr. COHEN. And if I go to your Web site, will I see those types of——

Mr. CLEGG. My point is that——

Mr. COHEN. If I go to your Web site, will I find your Web site showing programs like that that you espouse and advocate?

Mr. CLEGG. Yes. And you will find it made very clear that we have no objection at all to programs that improve the opportunities for disadvantaged people, without regard to race or ethnicity.

And that is why—I mean, you know, you were criticizing as misleading the name of my organization. The reason that we are the Center for Equal Opportunity is to draw a distinction between those who believe in equal opportunity, which we do, and those who believe in racially mandated equal results, which is something that we reject.

We do not like quotas. We believe in *e pluribus unum*. We do not think that statutes and laws that give preference on the basis of race and ethnicity are constitutional or good policy.

And let me just say, Congressman Cohen, you know, my notes show that when you were giving your opening statement, you used the phrase "get around it," referring to the Constitution. I do not think——

Mr. COHEN. You cannot get around the Constitution. You have got to make a good argument. And that is what I was submitting. When I say "get around," I mean get around the mentality that you have got, that it is set in stone, and that you do not have jurisdiction.

I am submitting that Mr. Neuborne is right, and that you can make an argument that there is jurisdiction, and there is, in my opinion—and Mr. Neuborne made it. And that is what I mean. I meant get around your mentality that says there is not, and therefore, do not try to make progress.

My time has expired, and I thank Mr. Scott for the hearing.

Mr. NEUBORNE. Can I——

Mr. CLEGG [continuing]. To get around the Constitution. And with all respect, I think that that is a very troubling attitude for somebody who has taken an oath to the Constitution to have.

Mr. NEUBORNE. Can I congratulate you, Representative Cohen, on putting into my mind an argument that I should have thought of, but did not? But it is another very powerful reason why you have authority to pass it.

It is astonishing to me that somebody, that a felon, or somebody who has been convicted of passing a bad check in Florida cannot vote, but somebody who is convicted of passing a bad check in Georgia can vote.

Now, that is the kind of irrational discrimination on the ability to vote that should trigger the 14th Amendment's power under Section 5 of the 14th Amendment.

The passage of uniform criteria that would sand down irrational differences State to State on whether you can vote for President of the United States, seems to me clearly within this Committee's power without the necessity of going to the 15th Amendment. It is a 14th Amendment argument. And I did not think of it until you were making your point.

Mr. COHEN. Mr. Chairman, I want to thank Mr. Neuborne. I also want to let Mr. Clegg know that congress people get the last word.

And after I closed, and you questioned my taking my oath of office, which I take seriously, let me submit to you that Dr. King said so appropriately, that sometimes when the laws are wrong, it is all right to resist them, because they are inherently wrong and morally wrong.

And what I am submitting is, arguments can be made, not to subvert the Constitution, but to change the Constitution, to change the law of this land. Because you change it through arguments. And words have meaning, and you put flesh on them.

Thank you very much.

Mr. SCOTT. The gentlelady from Texas?

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Mr. Neuborne, you have gotten us just at that burst of thought and analysis to where we need to be with this particular legislation and why this legislation should move as expeditiously as it can. As we have listened to all of the testimony, I think we have come to a point to recognize there is discrimination.

For example, in the State of Maine and Vermont, we have Members of Congress who are here. The State of Maine has no disenfranchisement for people with criminal convictions. Except for their philosophy and the representation of their State, I see no difference in the Members of Congress from the States of Maine and Vermont.

They do not act erratically. They do not seem to espouse unconstitutional or unpatriotic statements. They do not seem to be perpetrating criminal acts or supporting freeing all criminals across America.

But yet, felons, apparently, in Maine and Vermont can vote. So you make a very valid point.

And as I look at the whole list, and I see some States with some forms of release or opportunity to vote, and some were not, we have a constitutional question of whether or not it is a discriminatory practice across the Nation, because there is inconsistency.

And I may steal or have a bounced check in Texas—which, by the way, for the first time in this Judiciary Committee, I can actually say a kind word on the criminal justice system about Texas. At least they have a compromise, and that is attributable to State Representative Harold Dutton and others, who have worked so without ceasing on this issue.

But it seems to me, if I have a bounced check in Texas, and I go to another place, am I a felon there and cannot vote? I was able to vote in Texas, but I have to go to another State, because I am being relocated because of my spouse. Can I vote?

That is a patently discriminatory practice, and I think that it cries out for relief.

I hope that the court reporters captured your analysis there, because we need to rush right immediately, even in an amendment form, to make sure we attributed the framework of this bill to, I believe you said the 14th Amendment and Section 5 under that, to be able to deal with it.

But let me ask Mr. Spakovsky. Could he tell me when slavery ended in Virginia?

Mr. VON SPAKOVSKY. Well, it ended at the end of the Civil War. But after Reconstruction, as many people know, many of the southern States, including Virginia, implemented Jim Crow laws to suppress the rights of Black citizens.

Ms. JACKSON LEE. And during that time, slavery, and then, as you indicated, Reconstruction and Jim Crowism, could Black citizens vote?

Mr. VON SPAKOVSKY. Only if you look at the percentages of registration and turnout. It varied over time. It was a very small amount—

Ms. JACKSON LEE. No, let me go back—

Mr. VON SPAKOVSKY [continuing]. Depending on what period you were looking at.

Ms. JACKSON LEE. All right. The slaves that were enslaved, could they vote in Virginia?

Mr. VON SPAKOVSKY. I am sorry. When they were——

Ms. JACKSON LEE. At the time that slavery was——

Mr. VON SPAKOVSKY. No, of course, no.

Ms. JACKSON LEE [continuing]. In place, they could not vote.

Mr. VON SPAKOVSKY. No.

Ms. JACKSON LEE. During Jim Crow, could Africans, negroes or colored people vote in Virginia?

Mr. VON SPAKOVSKY. A small percentage could, depending on where you were and in what years you are looking at. But the percentages were very small, because of the efforts made to suppress their registration and voting.

Ms. JACKSON LEE. Do you think that was a good thing?

Mr. VON SPAKOVSKY. I am sorry. What?

Ms. JACKSON LEE. Do you think that was a good thing?

Mr. VON SPAKOVSKY. Well, of course not.

Ms. JACKSON LEE. In the instance of your State—and I think you are on the elections law, and it seems as if you have a complete bar with individuals of felony convictions, which I imagine are an array of different acts, except for government approval of their individual rights, which I imagine there is some process—you do not see that as a restoration of slavery?

Mr. VON SPAKOVSKY. I do not.

Ms. JACKSON LEE. Because I do.

Mr. VON SPAKOVSKY. No.

Ms. JACKSON LEE. To completely bar a person who has served their time and seeks to restore their contributions to society, that you would bar them, are they not enslaved to the extent that their constitutional rights, or rights to express themselves, is then denied?

Mr. VON SPAKOVSKY. I do not agree. The State of Virginia has an application process, so people can apply after a certain period of time to get that right back—and the other rights that are taken away——

Ms. JACKSON LEE. And how many do you think——

Mr. VON SPAKOVSKY [continuing]. Such as not the right——

Ms. JACKSON LEE. How many do you think apply?

Mr. VON SPAKOVSKY [continuing]. To serve on a jury or to serve in elected office.

Ms. JACKSON LEE. How many do you think apply to this process? Do you have any percentages?

Mr. VON SPAKOVSKY. I do not have the numbers or percentages on——

Ms. JACKSON LEE. Mr. Leon, I think—no, you are from the state of Leon, excuse me. You are from—Mr. Sancho, let me thank you for having a bright light on this concept. And I think you have made a very important point.

You recall the election of 2000, when the database came from the State of Texas, and represented that there were many more felons in your State than there actually were.

What kind of crisis did that pose for you? It seems like you were in—I know this was particularly around Florida A&M, when individuals were trying to vote. There were allegations that Black men

were arrested walking toward the poll. Obviously, a lot of that was investigated.

But what does that do to the election process?

Mr. SANCHO. It destroys the people's faith that, in fact, elections have any validity at all. That is what it does.

And I will tell you that today, that there are portions of the State of Florida around Duval County, where there are large populations of African Americans in South Florida, where, in fact, people do believe that, in fact, there is no right to vote because of that experience. And it is going to take a long, long time to reestablish in their minds that this is, in fact, a Nation of laws and justice.

Ms. JACKSON LEE. You made another point, and I would like to ask Mr. Andres, so I need to get the pronunciation of his last name. I will call on you in just a moment. But you made a very valid point that ties into this whole issue.

Mr. Spakovsky did not want to acknowledge that the oppression of a person who has finished their time, and has to be subjected to an application process, is like slavery. As far as I am concerned, it is like slavery.

And although Virginia may have ended the formal slavery of African Americans, or colored people, negroes, at a period of time past Jim Crowism, there are people who are presently enslaved with the complete denial of any right to be re-enfranchised, except for an application process.

But you expanded your point, and that was the point that people cannot be barbers, or cannot be beauticians. And I think some of that spills over into our other States. This is not a case for that right now.

But what it says is that we have a completely oppressive system that has people in third class citizenship. Is that what I am hearing from you, Mr. Sancho, in the voting sense?

Mr. SANCHO. Well, it does. These individuals have become a permanent underclass in the State of Florida. And it is a drag on every element of our social institutions—education, social welfare programs—and it impacts on the right to vote.

We are a jurisdiction in Leon County that believes in access. Leon County, in fact, is the southern-most extension of the Old South plantation. There is only about a 12 percent population of African Americans in the State of Florida.

But in the panhandle, that average is much higher. We are near 35 percent. My neighboring county, Gadsden, is the only majority minority county in the State of Florida.

And you can see the economic destruction that our own lack of restoring the ability to people to integrate themselves into society has left. It is a terrible legacy.

We tried to overcome that in Leon County. We have a lot of great educational institutions at Florida State and Florida A&M. And in our jurisdiction, our jurisdiction is the highest-voting jurisdiction in the State of Florida. We had an 86 percent turnout in the last general election.

Ms. JACKSON LEE. But this bill would help you, if this was to be passed. This bill would help if this was to be passed, to give more empowerment to individuals.

Mr. SANCHO. I believe it would. I believe that people would no longer have to avert their eyes when I am doing voter registration drives, because I challenge people to register to vote. I encourage them.

And you can see the individuals who have this permanent shame that has scarred their soul. They will not even look me in the eye. They cannot even answer. They just shake their heads and——

Ms. JACKSON LEE. I have seen that, too.

Mr. SANCHO [continuing]. Just cannot register to vote.

Ms. JACKSON LEE. Mr. Chairman, if you would indulge me, just to get this last question to—is it Mr. Aradarra?

Mr. IDARRAGA. Idarraga.

Ms. JACKSON LEE. Idarraga, thank you so very much. You are a living example. Six years incarcerated, if I am correct?

Mr. IDARRAGA. Yes.

Ms. JACKSON LEE. And presently at Yale Law School. What State would you call your residence at this point, sir?

Mr. IDARRAGA. I would say I am a permanent resident of Rhode island, and a temporary resident of Connecticut.

Ms. JACKSON LEE. All right. And I have to find Rhode Island here, but the point is, you are redeeming, in essence, you are restoring your life. You are being rehabilitated.

What is your response to what seems to be the enslavement of individuals who have previously been incarcerated? It seems to be a constant state of slavery, because they are not allowed to exert their constitutional rights or the right to vote. What is your perception of that?

Mr. IDARRAGA. I would say, at the very least, when you are in a distressed community, and you see the law basically working against you at many steps of the way, and that is all you know, that is all you see, it just creates a natural antagonism to the law and to the legitimacy of the law.

I think when we embrace individuals that—we give them the rights that are fundamental at the core of citizenship, it at least tells them that the law will not work unequally. It invests them in the democratic process.

I think it is nonsensical to restrict the right to vote for ex-felons, just like it is nonsensical——

Ms. JACKSON LEE. There is a representation that you are not competent, that you would be incompetent, and that you are not worthy. What do you say to that?

Mr. IDARRAGA. Tremendously. Even as a student at Yale Law School, I may go through an interview process and then have to bring up my past. And in that context, people take a step back, and that scarlet branding is very evident, even for myself.

For a person that does not even have that credential, I could just only imagine the obstacles they have to face. They are living under permanent second, third class citizenship with a tremendous scarlet branding that they have to walk around with——

Ms. JACKSON LEE. But do you think they are incompetent, that they should not be able to vote, because they are incompetent?

Mr. IDARRAGA. Absolutely not. Absolutely not.

In Rhode Island, out of the 15,000 that were re-enfranchised, 6,000 registered to vote. And many, many people that I knew per-

sonally, because the place where I grew up was a small place, called me, told me about some of the things they were thinking through, thanked me, went to the polls with their children.

They are absolutely not incompetent, and they are much smarter than we give them credit for.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

I would just—I am sorry, if I could yield to Mr. Wicklund? Yes, sir.

Mr. WICKLUND. I just wanted to add that there are so many collateral consequences that go with a felony conviction.

There are many collateral consequences that go with felony convictions, and some make sense. For instance, there are some restrictions. You do not want a pedophile driving a school bus. But at the same time, you know, should a burglar never get to be a barber?

And there are also collateral consequences, such as your criminal history never goes away. I mean, just ask any of these mining and harvesting of information companies that are buying criminal justice information and selling it to employers and apartment renters, et cetera. However, even the ones that make sense are there because the felon, the past felon, creates some sort of risk to the community.

There is no risk in having someone vote. How does that hurt anybody? And in fact, they can then vote to eliminate some of these barriers that are in their way of actually becoming participatory citizens.

Ms. JACKSON LEE. Mr. Chairman, I thank you.

I was at a meeting, Mr. Chairman, I will just put on the record, with what I would think informed persons. And we were talking about Federal funding. An informed government official said to me, well, I believe that if it is Federal funding, ex-felons cannot get a job.

This is about voting. I understand that. But I believe it is also about lifting the burden of slavery on ex-felons. That what it is, plain and simple—enslaved.

So, the constitutional rights, the 13th, 14th and 15th Amendment, has just been voided, whether they are White, Hispanic, African American or Asian. How many people can we keep enslaved in the United States of America in the 21st century?

I would argue that this legislation is long overdue, and would hope that we could move it forward as quickly as possible. I yield back to the Chairman.

Mr. SCOTT. Thank you.

And I want to thank all of our witnesses. This has been very informative.

There seems to be a fairly universal consensus that we may be able to do something. There is not a consensus on the bill yet. But certainly, if we can show intent, and target it to those where we can show that intent, there seems no question. There seems to be a question about what we can do if we cannot show the intent, but we can show impact.

But we want to thank all of our witnesses for helping us out today.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward, and ask the witnesses to respond to as promptly as they can, so the answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion into the record.

And with that, without objection, the Subcommittee stands adjourned.

[Whereupon, at 4:15 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Last Congress, President Bush signed the Second Chance Act into law, signaling a greater awareness of the need to implement policies that assist in the reintegration of ex-offenders into their communities. I believe that the Democracy Restoration Act is the next logical step for restoring ex-offenders to their fullest participation in civic life and merits our support.

When this Subcommittee last held a hearing on ex-offender disenfranchisement legislation in October, 1999, the news was somewhat discouraging, as millions of citizens across the nation were permanently barred from the polls. Since that time, I can report that bipartisan reform efforts like this legislation have gained traction at the state level. Democrat and Republican governors alike—including then-governor George Bush of Texas—have seen that this issue is not about who wins elections, but about constitutional principles.

The Sentencing Project reports that, since 1997, 19 states have amended felony disenfranchisement policies in an effort to reduce their restrictiveness and expand voter eligibility. These reforms have resulted in more than 760,000 citizens regaining their voting rights. Yet, despite these reforms, more than 5 million American citizens were ineligible to vote in 2008's historic Presidential election because they have a felony conviction. Almost 4 million of these people—many of whom work every day and pay their taxes—reside in the 35 states that still prohibit ex-offenders who have completed their sentences, or who are on probation or parole, from voting.

As a matter of principle, I believe that such prohibitions on the right to vote undermine both our voting system and the fundamental rights of people with felony convictions. Disenfranchisement laws isolate and alienate ex-offenders, and serve as one more obstacle in their attempt to successfully put the past behind them by fully reintegrating into society. But that is only half the story.

There are three grave discrepancies in State laws regarding felony convictions that lead to unfairness in Federal elections. *First*, there is no uniform standard for voting in Federal elections, which leads to an egregious disparity and unequal participation in Federal elections based solely on where a person lives.

Second, laws governing the restoration of voting rights after a felony conviction are unequal throughout the country and persons in some States can easily regain their voting rights while in other States persons effectively lose their right to vote permanently.

Third, State disenfranchisement laws disproportionately impact ethnic minorities, thus adversely infringing upon citizens of these communities constitutional right to vote.

These concerns about ex-offender disenfranchisement are not rhetorical. Laws that continue to disenfranchise people after release from prison create the opportunity for erroneous purges of eligible citizens from the voting rolls, are difficult to administer, and generate needless confusion among election officials and the public.

For example, although people with misdemeanor convictions never lose the right to vote in Ohio, in 2008 30% of election officials in the state responded incorrectly or expressed uncertainty about whether individuals with misdemeanor convictions could vote. This kind of confusion has resulted in barriers to legal voter registration and flawed voter purges that have deprived legitimate voters of their rights. Only federal law can conclusively resolve the ambiguities in this area plaguing our voting system.

This legislation is a narrowly crafted effort to expand voting rights for people with felony convictions, while protecting state prerogatives to generally establish voting qualifications. The legislation would only apply to persons who are not in prison, and it would only apply to federal elections. As such, our bill is fully consistent with constitutional requirements established by the Supreme Court in a series of decisions upholding federal voting rights laws.

In past Congresses, voting restoration legislation has been supported by a broad coalition of groups interested in voting and civil rights, including the NAACP, ACLU, the National Council of Churches (National and Washington Office), the National Urban League, the Human Rights Watch, The Brennan Center for Justice and the Lawyers Committee for Civil Rights, among many others.

This coalition has expanded to include many law enforcement groups including the American Probation and Parole Association, the Association of Paroling Authorities International and the National Black Police Association, among others, who recognize that allowing people to vote after release from prison helps rebuild ties to the community that motivate law-abiding behavior.

The practice of many states denying voting rights to ex-offenders represents a vestige from a time when suffrage was denied to whole classes of our population based on race, gender, religion, national origin and property. Even today, Courts have made a similar link and found that ex-offender disenfranchisement statutes can be racially discriminatory—violating the Voting Rights Act. Just like poll taxes and literacy tests prevented an entire class of citizens, namely African Americans, from integrating into society after centuries of slavery, ex-felon disenfranchisement laws prevent people from reintegrating into society after they have served their time in prison.

Ultimately, I believe that our nation fails not only people with felony convictions by denying them the right to vote, but the rest of our society as well. America has struggled throughout its history to ensure that its citizenry be part of legitimate and inclusive elections. It is long overdue that these restrictions be relegated to unenlightened history. I look forward to hearing from today's witnesses as we build the record in support of passing this critical civil rights legislation.





**Statement of Marc Mauer
Executive Director
The Sentencing Project**

**Prepared for the House Judiciary Committee
Subcommittee on the Constitution, Civil Rights
and Civil Liberties**

**Hearing on H.R. 3335
"The Democracy Restoration Act of 2009"**

March 16, 2010

I am writing to express the strong support of The Sentencing Project for H.R. 3335, the “Democracy Restoration Act of 2009.” The legislation, introduced by Judiciary Chairman John Conyers, would ensure federal voting eligibility for persons with felony convictions who are not incarcerated. I commend Chairman Nadler and the U.S. House Judiciary Committee, Subcommittee on the Constitution, Civil Rights and Civil Liberties for holding today’s hearing on this important legislation.

I am Marc Mauer, Executive Director of The Sentencing Project, a national non-profit organization engaged in research and advocacy on criminal and juvenile justice policy issues. In regard to the issue of felony disenfranchisement, I am the co-author of a 1998 study that provided the first state-based estimates of the impact of disenfranchisement and I have written articles for a wide variety of publications, including those of the American Bar Association and the U.S. Commission on Civil Rights. I have also testified on this issue before the U.S. House of Representatives and the Maryland legislature.

In this testimony I will present a brief overview of the national scale of this problem and recent legislative developments, followed by a rationale for why I believe this legislation would establish a more fair and effective policy for the nation.

NATIONAL OVERVIEW

There are currently over five million Americans who are not eligible to vote as a result of a felony conviction. While disenfranchisement policies have been in place for many years, the number of persons subject to these provisions has increased dramatically, along with the escalation of the criminal justice system in recent decades. Notably, three-quarters of the disenfranchised population are not incarcerated; they are persons under probation or parole supervision, or persons who have completed a felony sentence but are still disenfranchised due to their state laws.

During the Jim Crow era, disenfranchisement laws in southern states were revised to silence the political voice of newly emancipated slaves. Today, the racial disparities in the criminal justice system translate into higher rates of disenfranchisement in communities of color, resulting in one of every eight adult black males being ineligible to vote. Disproportionate disenfranchisement in communities of color means the concerns of those communities are not fairly represented at the polls.

In recent years there has been a great deal of legislative activity around the nation in regard to disenfranchisement policies. This has come about as the public and policymakers have become aware of the broad impact of these practices, leading to a reconsideration of the wisdom of policies. As a result of these reforms, at least 760,000 persons have regained the right to vote.

The current momentum for disenfranchisement reform began 13 years ago when the Texas legislature and then-Governor George W. Bush repealed a two-year waiting period required for vote restoration after completion of sentence. The change restored rights to an estimated 317,000 people. Since 1997, 21 states have amended felony disenfranchisement policies in an effort to reduce their restrictiveness and expand voter eligibility. These have included nine states that either repealed or amended lifetime disenfranchisement laws, two states that expanded voting rights to persons under community supervisions and five states that eased the restoration

process for persons seeking to have their right to vote restored after completing their sentence.

No Penological Justification for Disenfranchising People on Probation and Parole

Persons living in the community under probation or parole supervision have been determined by judges or corrections officials to not require incarceration for the safety of the community. Further, these persons are presumed to have the same rights and responsibilities as other citizens, except for supervision and reporting requirements imposed by corrections agencies. Persons on probation, for example, can get married or divorced, write a letter to the editor, or participate in their child's PTA organization. It is in the community's interest to encourage these activities, because to the degree that persons under supervision maintain positive connections with the community they will be more likely to engage in pro-social behavior. Rather than sending a message of second-class citizenship through denial of voting rights, it would be far better to provide incentives for first-class citizenship, with all the rights and obligations that it entails.

A study by sociologists Christopher Uggen and Jeff Manza found "consistent differences between voters and non-voters in rates of subsequent arrest, incarceration, and self-reported criminal behavior." For persons with a prior arrest, 27% of non-voters were re-arrested over a three-year period, compared with only 12% of voters. Indeed, in recent years a growing chorus of law enforcement officials and organizations, including police chiefs, corrections officials, and prosecutors, have called for the restoration of voting rights to people released from prison because it aids efforts for successful reintegration.

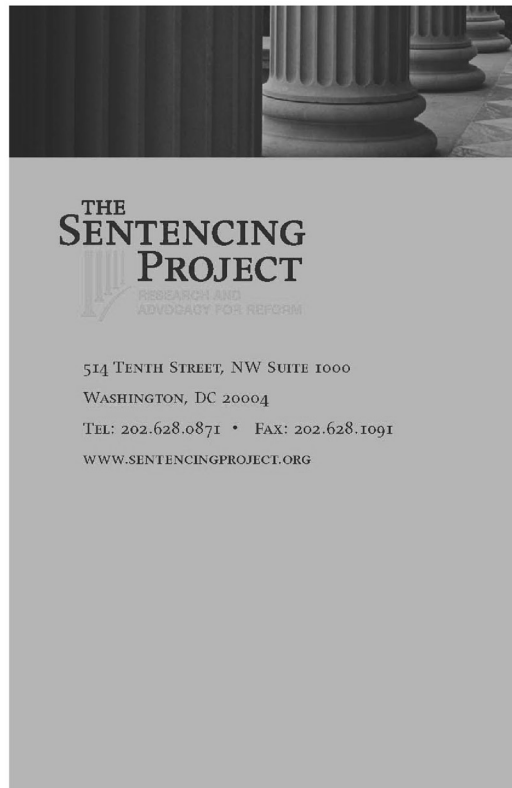
Standardizing Federal Voter Qualifications will Create a Fairer Election Process

Voting policies vary widely across the country. The current patchwork of disenfranchisement laws means that a person's right to vote in federal elections is determined by where he or she resides. For example, in West Virginia a person who has completed his or her sentence for a felony conviction can vote for President, but in Virginia someone convicted of the same offense is barred for life from voting. State laws range between never losing the right to vote because of a felony conviction to permanently ending voting rights upon conviction. The Democracy Restoration Act would standardize the federal electoral system, but not apply to state elections; therefore, it would not infringe on a state's right to regulate state elections.

CONCLUSION

I hope Congress can join the growing movement for reform of disenfranchisement policies. When people leave prison and seek to participate in their community, they deserve a second chance to work, raise families, participate in community life, and vote. The current patchwork of voting laws across the country means that a person's right to vote in federal elections is determined simply by where he or she chooses to call home. Congress must take action to fix this problem. Such a change would aid persons returning to the community from incarceration, as well provide public safety benefits for all citizens.

I appreciate your consideration of these remarks and would be pleased to work with the Committee if I can be of any further assistance.





**American Civil Liberties Union
Statement Before the House Judiciary Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties**

Hearing on the Democracy Restoration Act (H.R. 1355)

Submitted by

Laura W. Murphy
Director, ACLU Washington Legislative Office

and

Deborah J. Vagins
Legislative Counsel ACLU Washington Legislative Office

March 26, 2010

I. Introduction

Chairman Nadler, Ranking Member Sensenbrenner, and Members of the Subcommittee:

On behalf of the American Civil Liberties Union (ACLU), its over half a million members, countless additional supporters and activists, and fifty-three affiliates nationwide, we commend the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties for conducting a hearing concerning the voting rights of millions of American citizens currently barred from exercising that most fundamental of rights.

The ACLU is a nationwide, non-partisan organization working daily in courts, Congress, and communities to defend and preserve the civil rights and liberties that the Constitution and laws of the United States guarantee everyone in this country. We are pleased to submit this written statement for the record on the vitally important Democracy Restoration Act, H.R. 3335, a bill that would restore the voting rights of formerly incarcerated people in federal elections so that they, like all Americans, may be heard. This statement is excerpted, in part, from a forthcoming American Constitution Society issue brief co-authored by Deborah J. Vagins of the ACLU and Erika Wood of the Brennan Center for Justice at NYU School of Law.¹

¹See DEBORAH J. VAGINS & ERIKA WOOD, THE DEMOCRACY RESTORATION ACT: ADDRESSING A CENTURIES-OLD INJUSTICE (forthcoming American Constitution Society Issue Brief, Spring 2010).

Our history is marked by successful struggles to expand the franchise to include those previously barred from the electorate because of race, class, or gender. There remains, however, a significant barrier to continuing this progress: 5.3 million American citizens are denied the right to vote because of a criminal conviction in their past. Nearly 4 million of those who are disfranchised are out of prison, working, paying taxes, and raising families, yet they are without a voice.² In addition, countless individuals with past convictions who are eligible to vote have been misinformed by election and criminal justice officials that they cannot vote, making the number of Americans impacted by criminal disfranchisement far greater.³

A democracy's strength is derived from broad civic engagement and election participation. Yet, the United States is one of the few western democratic nations to exclude such large numbers of people from the democratic process.⁴ Worse still, felony disfranchisement laws are rooted in the Jim Crow era and were intended and continue to bar minorities from voting. By continuing to deny citizens the right to vote based on a past criminal conviction, the government endorses a system that expects these citizens to contribute to the community, but denies them participation in our democracy. The Democracy Restoration Act (H.R. 3335/S. 1516) provides a solution to this problem by putting in place a uniform law restoring voting rights in federal elections to anyone who is out of prison and living in the community.

II. The Problem

State laws vary widely on when voting rights are restored. Two states, Virginia and Kentucky, permanently disfranchise citizens with felony convictions unless the Governor approves individual rights restoration.⁵ Maine and Vermont allow all persons with felony convictions to vote, even while incarcerated. The rest of the states fall somewhere in between: 13 states and the District of Columbia grant voting rights to people who are not in prison – people in these states can vote while on probation and parole;⁶ five states allow individuals sentenced to probation, but not parole to vote;⁷ 20 states restore the right to vote once an individual has completed his entire criminal sentence, including probation and parole;⁸ and eight states permanently disfranchise at least some

² See Deborah J. Vagins, *The Democracy Restoration Act – Restoring a Civil Right Denied*, DAILY KOS, Aug. 4, 2009, <http://www.dailykos.com/storyonly/2009/8/4/761828/-The-Democracy-Restoration-ActRestoring-a-Civil-Right-Denied->; JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 76 (2006); ERIKA WOOD, RESTORING THE RIGHT TO VOTE 2 (2009), available at http://www.brennancenter.org/content/resource/restoring_the_right_to_vote/.

³ See ERIKA WOOD & RACHIEL BLOOM, DE FACTO DISENFRANCHISEMENT 1 (2008), available at <http://www.aclu.org/votingrights/exoffenders/36992pub20081001.html>.

⁴ LALEH ISPAHANI, OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISENFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES 3 (2006), available at <http://www.aclu.org/votingrights/exoffenders/25663pub20060525.html>.

⁵ See WOOD, *supra* note 2, at 3; AMERICAN CIVIL LIBERTIES UNION, VOTING RIGHTS FOR PEOPLE WITH CRIMINAL RECORDS; 2008 STATE LEGISLATIVE AND POLICY CHANGES, <http://www.aclu.org/state-legislative-and-policy-reform-advance-voting-rights-formerly-incarcerated-persons-2008> (last visited Mar. 11, 2010) [hereinafter *Voting Rights Policy Changes*].

⁶ Hawaii, Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, and the District of Columbia grant voting rights to persons on probation or parole. See WOOD, *supra* note 2, at 3; *Voting Rights Policy Changes*, *supra* note 5.

⁷ California, Colorado, Connecticut, New York, and South Dakota grant voting rights to persons on probation, but not on parole. See WOOD, *supra* note 2, at 3; *Voting Rights Policy Changes*, *supra* note 5.

⁸ These states are Alaska, Arkansas, Georgia, Idaho, Iowa, Kansas, Louisiana, Maryland, Minnesota, Missouri, Nebraska (after a two-year waiting period), New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina,

people with criminal convictions, depending on the type or number of convictions, unless the state approves individual rights restoration.⁹

Within these categories, nine states require people to pay off legal financial obligations – such as fees, fines and restitution – before being allowed to vote,¹⁰ and some states even deny the right to vote to people convicted of certain misdemeanors.

III. The Jim Crow Roots of Felony Disfranchisement Laws

Understanding how criminal disfranchisement laws impact communities of color requires an understanding of the origins of these laws in the United States. Many of these criminal disfranchisement laws are rooted in the Jim Crow era, and were created with the purposes of barring African Americans from voting. In the late 1800s, Jim Crow laws spread and states modified their voting laws in ways that would exclude African American voters without overtly violating the Fourteenth and Fifteenth Amendments. Despite their newfound eligibility to vote, many freed slaves remained effectively disfranchised as a result of organized efforts to stop their access to the polls. While race neutral on their face, along with poll taxes, literacy tests, and grandfather clauses, criminal disfranchisement laws became a targeted method of disfranchising African Americans in the Reconstruction Era.¹¹

Between 1865 and 1900, 18 states adopted laws restricting the voting rights of people convicted of crimes. By 1900, 38 states had some type of criminal voting restriction, most of which disfranchised convicted individuals until they received a pardon.¹² At the same time, states expanded the criminal code to punish those offenses with which they believed freedmen were likely to be charged, including vagrancy, petty theft, bigamy, miscegenation, and burglary.¹³ Aggressive arrest and conviction efforts followed. These targeted criminalization efforts and criminal disfranchisement laws combined to produce the legal loss of voting rights for African Americans, usually for life, effectively suppressing African American political power for decades.¹⁴

Nationwide, the disproportionate impact of felony disfranchisement laws on people of color continues to this day.¹⁵ Over 13% of African American men are denied the right to vote,¹⁶ a rate

Texas, Washington, West Virginia, and Wisconsin. See WOOD, *supra* note 2, at 3; *Voting Rights Policy Changes*, *supra* note 5.

⁹ These states are Alabama, Arizona, Delaware, Florida, Mississippi, Nevada, Tennessee, and Wyoming. See WOOD, *supra* note 2, at 3; *Voting Rights Policy Changes*, *supra* note 5.

¹⁰ These states are Arizona (restitution only), Arkansas, Alabama, Connecticut (out-of-state or federal convictions only), Delaware, Florida, Kentucky (restitution only), Tennessee (restitution and child support arrears) and Virginia. See Erika Wood & Neema Trivedi, *The Modern Day Poll Tax: How Economic Sanctions Block Access to the Polls*, 41 CLEARINGHOUSE REV. J. POVERTY L. AND POL'Y 30 (2007), available at <http://www.brennancenter.org/page/-/Modern%20Day%20Poll%20Tax.pdf>. There have been recent reforms. In 2006, Maryland eliminated its LFO requirement and Washington State eliminated its requirement in 2009. See Voter Registration Protection Act, 2007 Md. Laws 159 and 2009 Wash. Ch. 325.

¹¹ See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 111-12 (2009); see also Alec C. Ewald, "Civil Death": *The Ideological Paradox of Criminal Disenfranchisement in the United States*, 2002 WIS. L. REV. 1087, 1061 (2002).

¹² See Manza & Uggen, *supra* note 2, at 251-53 tbl. A3.4.

¹³ See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* 593 (1988); see Ewald, *supra* note 11, at 1090-95.

¹⁴ See Ewald, *supra* note 11, at 1090-91.

¹⁵ See Vagins, *supra* note 2.

that is seven times the national average.¹⁷ Through 2004, in 11 states more than 15% of African Americans could vote due to a felony conviction, and five of those states disfranchised more than 20% of the African American voting-age population.¹⁸ Most recently, in *Farrakhan v. Gregoire*, the U.S. Court of Appeals for the Ninth Circuit held that Washington State's law resulted in the denial of the right to vote on account of race, in violation of Section 2 of the Voting Rights Act.¹⁹

The disproportionate incarceration rate of African Americans, frequently the result of discriminatory criminal policies, makes it far more likely that they will be disfranchised.²⁰ For example, because of targeted sweeps and prosecutions, African Americans are over ten times more likely than white defendants to be incarcerated for drug offenses.²¹ In 2008, the incarceration rate for all crimes was six-and-a-half times higher for black males than for white males.²² If the current rates of incarceration continue, approximately three in ten of the next generation of black men will be disfranchised at some point during their lifetime.²³ Restoring voting rights to people who are living and working in society is one important step in the battle to correct years of organized efforts to disfranchise African American voters.

IV. The Need for a Uniform Standard in Federal Elections

The patchwork of varying state requirements across the country causes widespread and persistent confusion among election officials, criminal justice professionals, and the public.²⁴ This confusion has resulted in eligible voters, sometimes even those with no disqualifying criminal conviction, being purged from the rolls or denied the ability to register to vote or cast their ballots. Research indicates that many election officials misrepresent or do not understand their state's voter eligibility laws and registration procedures for people with criminal convictions.²⁵ In some instances, their confusion is even further compounded by those who have out-of-state convictions.²⁶ These problems have resulted in the *de facto* disfranchisement of many eligible voters across the country.

¹⁶ See AMERICAN CIVIL LIBERTIES UNION, OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES 3 (2006), available at http://www.aclu.org/images/asset_upload_file825_25663.pdf.

¹⁷ See THE SENTENCING PROJECT, FELONY DISFRANCHISEMENT LAWS IN THE UNITED STATES I (2007), http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus.pdf.

¹⁸ As of December 31, 2004, Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Nebraska, Virginia, Washington, and Wyoming disfranchised more than 15% of their African American voting-age population. Arizona, Iowa, Kentucky, Nebraska, and Wyoming disfranchised more than 20% of the African American voting-age population. MANZA & UGGEN, *supra* note 2, at 251-253 tbl. A3.4.

¹⁹ No. 06-35669, 2010 U.S. App. LEXIS 141, at *73 (9th Cir. Jan. 5, 2010) ("Plaintiffs have demonstrated that the discriminatory impact of Washington's felon disfranchisement is attributable to racial discrimination in Washington's criminal justice system; thus, that Washington's felon disfranchisement violates § 2 of the VRA."). It should be noted that the U.S. Courts of Appeals for the First, Second, and Eleventh Circuits have rejected similar claims. See *Simmons v. Galvin*, 575 F.3d 24 (1st Cir. 2009); *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006); *Johnson v. Bush*, 405 F.3d 1214 (11th Cir. 2005).

²⁰ See Ewald, *supra* note 11, at 1046.

²¹ HUMAN RIGHTS WATCH, TARGETING BLACKS – DRUG LAW ENFORCEMENT IN THE UNITED STATES 2 (2008).

²² BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2008 2 (2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>.

²³ See THE SENTENCING PROJECT, FELONY DISFRANCHISEMENT IN THE UNITED STATES I (2008), available at http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus.pdf.

²⁴ Vagins, *supra* note 2.

²⁵ See WOOD & BLOOM, *supra* note 3.

²⁶ See *id.* at 6-7.

Interviews with election officials around the country confirm the difficulty in applying voter eligibility rules. For example:

- In Colorado, half of local election officials surveyed erroneously believed that people on probation were ineligible to vote.²⁷
- In New York, which also allows people on probation to vote, 38% of local election boards incorrectly stated that people on probation were prohibited from voting.²⁸
- In Tennessee, 63% of local election officials interviewed were unaware of the types of offenses and other criteria for which people could be permanently disfranchised.²⁹
- Over half of election officials interviewed in Arizona could not explain the eligibility rules under that state's law, which differentiates between people convicted of one offense from those convicted of repeat offenses.³⁰

The effects of such widespread confusion among local officials reach further than the misinformed individuals turned away from the registrars' office or the polls. When a person seeking to register is erroneously told he is ineligible to vote, he is likely to accept the election official's word as fact and never follow up. This false information may then be passed on to friends and family, and may eventually result in large segments of communities who never even attempt to vote because they have been misinformed about their rights.³¹

The Democracy Restoration Act of 2009 would resolve the problem of *de facto* disfranchisement in federal elections by putting in place a uniform law restoring voting rights in federal elections to anyone who is out of prison, living in the community.³² Simplifying the law with regard to federal elections will ease the process of educating election and criminal justice officials, allow state administrative processes to run more smoothly, and highlight mistakes quickly before rights are wrongly abridged. Taking these steps is necessary to ensure that those who have served their prison sentences are able to successfully rejoin their communities and exercise their rights as citizens.

V. The Democracy Restoration Act of 2009 and Congressional Authority

Congressional action is needed to establish a federal standard that restores voting rights in federal elections to the millions of Americans who are living in the community, but continue to be denied the ability to fully participate in civic life. In July 2009, Senator Russell Feingold and Representative John Conyers introduced the Democracy Restoration Act of 2009 (S. 1516/H.R. 3335).³³ This Act would restore voting rights in federal elections to nearly 4 million Americans who have been released from prison; ensure that probationers never lose their right to vote in

²⁷ COLO. REV. STAT. §§ 1-2-103, 1-2-606 (2007); see also WOOD & BLOOM, *supra* note 3, at 3.

²⁸ See WOOD & BLOOM, *supra* note 3, at 3.

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.*

³² See H.R. 3335, 111th Cong. (2009); S. 1516, 111th Cong. (2009).

³³ See *id.*

federal elections; and notify people about their right to vote in federal elections when they are leaving prison, sentenced to probation, or convicted of a misdemeanor.

If enacted, the Democracy Restoration Act would strengthen our democracy by creating a broader and more just base of voter participation. It would also aid law enforcement by encouraging participation in civic life, assisting reintegration, and rebuilding ties to the community. The uniform federal standard in the bill would eliminate the confusion that leads to *de facto* disfranchisement by providing a bright line for election administration. This would, in turn, streamline voter registration, and significantly reduce the opportunity for erroneous purges of eligible voters.

Congress' constitutional authority to enact the Democracy Restoration Act is twofold: (1) the Election Clause of Article I, Section 4; and (2) Congress' enforcement powers under the Fourteenth and Fifteenth Amendments.

Under the Elections Clause in Article I, Section 4, Congress has broad authority to regulate federal elections.³⁴ This clause has consistently been read by the Supreme Court as providing Congress with the authority to regulate voting requirements, including voter eligibility, for federal elections.³⁵ Congress also has authority under Section 5 of the Fourteenth Amendment and section 2 of the Fifteenth Amendment, both of which provide Congress with broad authority to enforce these respective amendments "by appropriate legislation."³⁶ Because the right to vote free of racial discrimination is a fundamental right protected by the Fourteenth and Fifteenth amendments, Congress is granted a "wide berth"³⁷ of authority to ensure that long-standing patterns of racial discrimination will no longer impinge on Americans' right to vote.

Opponents of the Democracy Restoration Act may argue that Congress is not constitutionally empowered to regulate the qualifications for voters in federal elections because, they assert, that the Qualifications Clauses found in Article I and in the Seventeenth Amendment³⁸ restrict Congress' power to alter electors' qualifications beyond those provided by the states. However, these clauses merely provide that in federal elections "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."³⁹ As the Supreme Court found in *Tashjian v. Republican Party*,⁴⁰ the Qualifications Clauses do not limit Congress' power to regulate qualifications; rather these clauses were intended to ensure that "anyone who is permitted to vote in the most numerous branch of the state legislature has to be permitted to vote" in federal legislative elections.⁴¹ Thus, the Qualifications Clauses cannot be read as a requirement that federal elections qualifications be the same as those of the states.

³⁴ "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations, except as the Place of choosing Senators.*" U.S. CONST. art I, § 4 (emphasis added).

³⁵ See, e.g., *Kusper v. Pontikes*, 414 U.S. 51, 57 n.11 (1973); *Oregon v. Mitchell*, 400 U.S. 112, 121, 124 (1970).

³⁶ U.S. CONST. amends. XIV, § 5, XV § 2.

³⁷ *Tennessee v. Lane*, 541 U.S. 509, 518, 520 (2004).

³⁸ U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. amend. XVII.

³⁹ U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. amend. XVII.

⁴⁰ 479 U.S. 208 (1986).

⁴¹ *Id.* at 226 (quoting *Republican Party of Conn. v. Tashjian*, 770 F.2d 265, 274 (2d Cir. 1985) (Oakes, J., concurring)).

VI. Bipartisan Support for Reforming Disfranchisement Laws

Support for restoring voting rights to people who are released from prison is growing among a diverse group of organizations, leaders, and politicians. Several law enforcement officials,⁴² members of the faith community,⁴³ and civil rights and legal organizations,⁴⁴ have spoken out against criminal disfranchisement. There is also growing recognition among conservatives that criminal disfranchisement laws run contrary to our democratic ideals.

Republicans and Democrats alike have supported important voting rights restoration laws, recognizing that restoring the right to vote is an issue of democracy, not politics. These state and local officials have seen that felony disfranchisement impedes the rehabilitation of persons with criminal convictions, and have worked to reform their laws accordingly. While at the federal level, voting rights reforms are often cast as partisan, evidence at the state level tells a different story. From 1997 to 2009, 16 Republican governors signed legislation or approved easing the restoration process.⁴⁵ Some important examples of these reforms include:

- **Texas:** In 1997, then-Governor George W. Bush, signed legislation that eliminated the two-year waiting period after completion of sentence before individuals could regain their right to vote.⁴⁶
- **New Mexico:** In 2001, then-Governor Gary Johnson, signed legislation repealing the lifetime ban on voting for people with felony convictions, restoring the right to people upon completion of sentence.⁴⁷

⁴² See Law Enforcement Sign-On Letter in Support of the Democracy Restoration Act (S.1516/H.R. 3335),

<http://www.brennancenter.org/page/-/Democracy/DRA%20-%20Law%20Enforcement%20CJ%20Sign%20on%20Letter%20FINAL.pdf> (last visited Mar. 5, 2010).

⁴³ See Religious Leaders Sign-On Letter in Support of the Democracy Restoration Act (S.1516/H.R. 3335), <http://www.brennancenter.org/page/-/Democracy/DRA%20-%20Faith%20Group%20Letter%20FINAL.pdf> (last visited Mar. 5, 2010).

⁴⁴ See Civil Rights and Legal Advocacy Group Sign-On Letter Support of the Democracy Restoration Act (S.1516/H.R. 3335), <https://www.aclu.org/voting-rights/civil-rights-and-legal-advocacy-group-sign-letter-support-democracy-restoration-act-s1> (last visited Mar. 5, 2010).

⁴⁵ See AMERICAN CIVIL LIBERTIES UNION, BREAKING BARRIERS TO THE BALLOT BOX: FELON ENFRANCHISEMENT TOOLKIT 33 (2008), http://www.aclu.org/pdfs/votingrights/righttovote_20080125.pdf (detailing actions in states with Republican governors: Gov. George W. Bush (Texas, 1997), Gov. John Rowland (Connecticut, 2001), Gov. Gary Johnson (New Mexico, 2001), Gov. Kenny Guinn (Nevada, 2001 and 2003), Gov. Charlie Crist (Florida, 2007)); Ryan S. King, *Expanding the Vote, State Felony Disenfranchisement Reform, 1997-2008*, THE SENTENCING PROJECT, at 1 (2008), available at http://www.sentencingproject.org/docs/publications/fel_statedisenfranchisement.pdf (detailing actions in states with Republican governors: Gov. Jim Gilmore (Virginia, 2000), Gov. Jeb Bush (Florida, 2004 and 2006), Gov. M. Jodi Reil (Connecticut, 2005), Gov. Linda Lingle (Hawaii, 2006), Gov. John Huntsman (Utah, 2006), and Gov. Bobby Jindal (Louisiana, 2008). See also 2002 Neb. Laws, T.B. 1054 (signed by Gov. Mike Johanns); La. Acts 2003, Act 856 (signed by Gov. Murphy J. Foster); 2004 Idaho Sess. Laws, Chap. 166 (signed by Gov. Dirk Kempthorne); 2005 S.D. Laws, Chap. 89 (signed by Gov. M. Michael Rounds); 2009 Nev. Stats., Chap. 211 (signed by Gov. Jim Gibbons).

⁴⁶ Governor George W. Bush signed Texas HB 1011, "Relating to eligibility requirements for voting by persons convicted of a felony" on June 18, 1997. See <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=75R&Bill=HB1001>.

⁴⁷ Governor Johnson signed New Mexico SB 204 "A bill to restore voting rights" on March 15, 2001. See http://legis.state.nm.us/lcs/_session.aspx?Chamber=S&LegType=B&LegNo=204&year=01.

- **Connecticut:** In 2001, then-Governor John Rowland signed legislation extending voting rights to people on probation.⁴⁸
- **Florida:** In 2004, then-Governor Jeb Bush amended the Rules of Executive Clemency to expedite the voting restoration process. In 2006, Governor Bush signed a bill requiring that individuals in prison be provided with rights restoration application information at least two weeks before their release dates. In 2007, Governor Charlie Crist simplified the rights restoration process for persons convicted of certain offenses, who are no longer required to submit to hearings before the Clemency Board.⁴⁹ Governor Crist noted:

If we believe people have paid their debt to society, then that debt should be considered paid in full, and their civil rights should in fact be restored. By granting ex-offenders the opportunity to participate in the democratic process, we restore their ability to be gainfully employed, as well as their dignity.⁵⁰

- **Louisiana:** In 2008, Governor Bobby Jindal signed legislation requiring the Department of Public Safety and Corrections to notify people leaving its supervision about how to regain their voting rights and to provide these individuals with voter registration applications.⁵¹

These reforms indicate a general recognition that restoration of voting rights is not a partisan issue, but one that is of special importance to our democracy and to successful reintegration. In order to achieve suffrage for all American citizens, action at the federal level, through passage of the Democracy Restoration Act, is necessary.

VII. Conclusion

As the Supreme Court has said, “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”⁵² It is time to restore the most precious of civil rights that has been denied far too long to far too many of our citizens. To redress this injustice and give political voice to millions of American citizens, we urge Congress to pass the Democracy Restoration Act.

⁴⁸Governor Rowland signed Connecticut HB No. 5042 on May 4, 2001. See http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=5042&which_year=2001&SUBMIT.x=16&SUBMIT.y=11&SUBMIT1=Normal.

⁴⁹Governor Jeb Bush signed HB 55, “Relating to restoration of civil rights” on June 12, 2006. See http://www.flscnate.gov/scsession/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&ElementID=JumpToBox&SubMenu=1&Year=2006&billnum=55; see also Rules of Executive Clemency, revised April 4, 2007, <https://tpc.state.fl.us/Policies/ExecClemency/ROEC04052007.pdf>.

⁵⁰Press Release from Florida Governor Charlie Crist, April 5, 2007, available at <http://www.flgov.com/release/8776>.

⁵¹Governor Jindal signed HB 1011 on June 30, 2008. See <http://www.legis.state.la.us/> (search HB 1011 in 2008 Regular Session).

⁵²Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

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March 23, 2010

Hon. Robert C. Scott
House Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Civil Liberties
United States House of Representatives

**Re: Hearing on H.R. 3335 (the Democracy Restoration Act)
March 16, 2010**

Dear Representative Scott:

Thank you once again for the opportunity to testify before the Subcommittee. As several members noted, the hearing often proceeded more like a seminar than a formal hearing. One of the best things about a good seminar is that the participants occasionally learn something. I learned something from your remarks, and from the remarks of Representatives Cohen, Jackson-Lee and Chu, that I hope you will allow me to place on the record as a brief supplement to my written testimony.

In considering Congress's power to enact legislation establishing uniform, easily administrable rules governing the right of persons with criminal convictions to vote in federal elections, we should not ignore the current chaotic, deeply discriminatory nature of the law governing eligibility of persons with criminal convictions to vote in federal elections. Not only is there a hopelessly complex patchwork of differing state rules governing when and how persons convicted of a felony can be re-enfranchised, leading to widespread administrative confusion and misinformation, but the fundamental question of what constitutes a felony varies dramatically from state-to-state. As the continuing effort to coordinate our immigration laws with the criminal laws of the 50 states demonstrates, substantial discrepancies exist from state to state in drawing the line between felony and misdemeanor behavior. Thus, in Florida, writing a bad check may result in a felony conviction and disenfranchisement, while the identical behavior in another state will be treated as a misdemeanor that may not result in the loss of the right to vote.¹ Similarly, many states continue to treat bigamy as a felony, while many treat it as a misdemeanor,

¹ It should be noted that a few states still deny the right to vote to people convicted of certain misdemeanors (Illinois, Michigan, Kentucky, and South Carolina, among others).

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and a few appear to have decriminalized it entirely. Moreover, dramatic differences exist between and among the states (and within each state) concerning pleas of guilty to misdemeanors by persons charged initially with felonies. Some states encourage such pleas. Some discourage such pleas. Others have no statewide policy, leaving it to each local jurisdiction to forge a policy.

The inevitable result of such widely differing definitions of what constitutes a felony, and when a felony can be pleaded down to a misdemeanor, is that eligibility to vote for President and Congress by identically situated prospective voters is currently decided under radically differing standards in different states, even when the prospective voters have engaged in identical behavior, and even when the states all claim to be applying the same legal test – disenfranchisement for felony conviction.

Such arbitrary discrimination in determining the right to vote in federal elections may well violate the principle of equal ballot access imposed in *Bush v. Gore*, 531 U.S. 98 (2000). At a minimum, I believe that the current widespread use of arbitrary and unequal standards governing the relationship between a state criminal conviction and the right to vote in a federal election triggers Congress's power under Section 5 of the 14th Amendment to impose equal, uniform and easily administrable rules governing the federal electoral re-enfranchisement of persons with criminal convictions.

In response to a question asked by Representative Franks regarding which state felony disenfranchisement laws have roots in a concerted effort to disenfranchise minorities, there is ample research, as I mentioned in my remarks, that many criminal disenfranchisement laws were enacted, amended or discriminatorily administered in the late 19th and 20th centuries as part of a larger backlash against the adoption of the Reconstruction Amendments² and a sustained effort to minimize the ability of black citizens to vote. While the bulk of the discriminatory activity took place in the states of the old Confederacy, substantial evidence exists that discriminatory application of criminal disenfranchisement laws occurred throughout the United States.

Finally, I ask leave to correct a typographical error in my written testimony. New Hampshire's unsuccessful challenge to the application of the nationwide ban on literacy tests imposed by the Voting Rights Act of 1970 took place in 1970, not 1978.

Respectfully submitted,



Inez Milholland Professor of Civil Liberties, NYU School of Law
Legal Director of the Brennan Center for Justice

² For more information, please refer to page 4-6 of my written testimony before the Subcommittee on Mar. 16, 2010 citing research by The Brennan Center, Alec Ewald, Eric Foner, Alexander Keyssar, and Jeff Manza & Christopher Uggen.



Mr. Matthew Morgan
B353 Rayburn House Office Building
Washington, D.C. 20515

March 30, 2010

Dear Mr. Morgan,

Here are my transcript edits for the recent hearings on the Democracy Restoration Act of 2009.

I wanted to point out that, somewhere in the course of the hearings, I became "Professor Clegg," and I never had the opportunity then to make a polite correction: I have been an adjunct professor, but I am not any longer and have never been a full-time professor, so that title is really not accurate.

Many thanks,

Roger Clegg
President and General Counsel

Enclosure

**LETTER IN SUPPORT OF
THE DEMOCRACY RESTORATION ACT (H.R. 3335 / S. 1516)
FROM CIVIL RIGHTS AND OTHER ADVOCACY ORGANIZATIONS**

December 10, 2009

Dear Member of Congress:

We, the undersigned organizations, a coalition of civil rights, social and criminal justice, and other legal and advocacy organizations, are writing to urge your support and co-sponsorship of the Democracy Restoration Act of 2009 (H.R. 3335/S. 1516), a bill that seeks to restore voting rights in federal elections to people who are out of prison and living in the community. The current patchwork of laws that disenfranchise people with criminal records has created an inconsistent and unfair federal electoral process, perpetuating entrenched racial discrimination. As organizations dedicated to promoting democracy and justice as well as equal rights for all Americans, we strongly support passage of this legislation.

Currently, 5.3 million American citizens are denied the right to vote because they have a criminal conviction in their past. Four million of these people are out of prison, living in the community, paying taxes and raising families, yet they remain disenfranchised for years, often decades, and sometimes for life. The United States is one of the few western democratic nations that exclude such large numbers of people from the democratic process. Congressional action is needed to restore voting rights in federal elections to the millions of Americans who have been released from incarceration, but continue to be denied their ability to fully participate in civic life. Fortunately, Senator Russell Feingold and Representative John Conyers will soon introduce the Democracy Restoration Act of 2009 which is intended to address these injustices.

Felony disenfranchisement laws are rooted in the Jim Crow era. They were enacted alongside poll taxes and literacy tests and were intended to keep African Americans from voting. By 1900, 38 states denied voting rights to people with criminal convictions, most of which disenfranchised people until they received a pardon. The intended effects of these laws continue to this day. Nationwide, 13% of African-American men have lost the right to vote. If current incarceration rates continue, three in ten of the next generation of African-American men will lose the right to vote at some point in their lifetimes. This racial disparity also impacts the families of those who are disenfranchised and the communities in which they reside by diminishing their collective political voice.

In this country voting is a national symbol of political equality and full citizenship. When a citizen is denied this right and responsibility, their standing as a full and equal member of our society is called into question. The responsibilities of citizenship – working, paying taxes and contributing to one's community – are duties conferred upon those reentering society. Further punishing individuals who are in the community by denying them a right of citizenship counters the expectation that citizens have rehabilitated themselves after a conviction. The United States

should not be a country where the effects of past mistakes have countless consequences and no opportunity for renewal.

Passage of the Democracy Restoration Act of 2009 will ensure that all Americans living in the community will have the opportunity to participate in our electoral process. A strong, vibrant democracy requires the broadest possible base of voter participation and allowing all persons who have completed their prison time to vote is the best way to ensure the greatest level of participation.

We urge you to support the passage of the Democracy Restoration Act of 2009.

If you have any questions, please contact Deborah J. Vagins of the ACLU Washington Legislative Office at (202)715-0816 or dvagins@aclu.org or Erika Wood of the Brennan Center for Justice at (212) 992-8638.

Sincerely,

Alliance for Justice
American Civil Liberties Union (ACLU)
American Friends Service Committee
American Humanist Association
Americans for Safe Access
Asian American Justice Center
A Better Way Foundation
ACORN
Black Youth Vote!
Brennan Center for Justice
Campaign for America's Future
Campaign for Youth Justice
Center for the Study of the American Electorate
Citizens Against Recidivism, Inc.
Commission on Social Action of Reform Judaism
Demos: A Network for Ideas and Action
Drug Policy Alliance
Faces & Voices of Recovery
Fair Elections Legal Network
FairVote

FedCURE
Felony Entertainment
Friends Committee on National Legislation
Interfaith Drug Policy Initiative
International CURE
Justice Policy Institute
Lawyers Committee for Civil Rights Under Law
Leadership Conference for Civil Rights
Legal Action Center
Maryland CURE
Mennonite Central Committee U.S. Washington Office
NAACP
National Alliance of Faith and Justice
National Association of Blacks in Criminal Justice
National Coalition on Black Civic Participation
National Council of the Churches of Christ in the USA
NOVA Coalition
Penal Reform International
People Advocating Recovery
People for the American Way
Pennsylvania Prison Society
Project Vote
Rehabilitation Through the Arts
Rhode Island Family Life Center
Roosevelt University's Illinois Consortium on Drug Policy
Safe Streets Arts Foundation
Southern Coalition for Social Justice
The Fortune Society
The National Advocacy Center of the Sisters of the Good Shepherd
The Partnership for Safety and Justice
The Real Cost of Prisons Project
The Sentencing Project

The Voter Enfranchisement Project of The Bronx Defenders

United Church of Christ, Justice and Witness Ministries

United Methodist Church, General Board of Church and Society

U.S. Dream Academy, Inc.

V.O.T.E. (Voice of the Ex-offender)



**LETTER IN SUPPORT OF
THE DEMOCRACY RESTORATION ACT (H.R. 3335 / S. 1516)
FROM LAW ENFORCEMENT AND CRIMINAL JUSTICE LEADERS**

December 10, 2009

Dear Member of Congress:

We, the undersigned law enforcement and criminal justice leaders, urge you to support and co-sponsor the Democracy Restoration Act, a bill which seeks to restore federal voting rights to the nearly four million Americans living, working and paying taxes in our communities who have been disenfranchised because of a criminal conviction in their past. We support the restoration of voting rights because continuing to disenfranchise individuals after release from prison is ineffective law enforcement policy and violates core principles of democracy and equality.

There is no credible evidence that denying voting rights to people after release from prison does anything to reduce crime. In our judgment, just the opposite is true. Every year over 600,000 people leave prison. We must find new and effective ways to foster reintegration back into the community and prevent recidivism. We believe that bringing people into the political process makes them stakeholders in the community and helps steer former offenders away from future crimes.

The hallmark of a democratic government is that it reflects the views of the governed, views that are most readily expressed through the ballot box. As law enforcement and criminal justice officials, we are deeply committed to securing our system of American democracy. Carving a segment of the community out of the democratic process is inconsistent with America's best traditions and highest values.

People who commit crimes must and will serve all terms of their sentence. But once the criminal justice system has determined that they are ready to return to the community, they should receive both the rights and responsibilities that come with the status of being a citizen. Restoring the right to vote is simply good law enforcement policy.

To protect basic public safety and strengthen the core of our democracy, we urge you to use your leadership to pass this important legislation.

Sincerely,

Theodis Beck
President, Association of State Correctional
Administrators Secretary,
North Carolina Department of Corrections

Jane Browning
Executive Director, International
Community Corrections Association

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| Col. Douglas DeLeaver
Former National President, National
Organization of Black Law Enforcement
Executives
Former Chief of Police, Maryland Transit
Administration Police Force | Peg Lautenschlager
Former Wisconsin Attorney General
Former U.S. Attorney, Western
District of Wisconsin |
| Col. Dean Esserman
Chief of Police, Providence Police
Department | Tom Miller
Iowa Attorney General |
| James Gondles, Jr.
Executive Director, American Correctional
Association | Jorge Montes
Chairman, Illinois Prisoner Review
Board |
| Ron Hampton
Executive Director, National Black Police
Association | John F. Timoney
President, Police Executive Research
Forum
Chief of Police, Miami Police
Department |
| Lisa Holley
President, Association of Paroling
Authorities International
Chair, Rhode Island Parole Board | Ashbel T. Wall
Director, Rhode Island Department
of Corrections |
| Charles J. Hynes
District Attorney, Kings County, New York | Carl Wicklund
Executive Director, American
Probation and Parole Association |
| Doug Jones
Former U.S. Attorney, Northern District of
Alabama | Hubert Williams
President, Police Foundation
Former Chief of Police, Newark
Police Department |
| Justin Jones
Director, Oklahoma Department of
Corrections | |

**LETTER IN SUPPORT OF
THE DEMOCRACY RESTORATION ACT (H.R. 3335 / S. 1516)
FROM RELIGIOUS LEADERS**

December 10, 2009

Dear Member of Congress:

We, the undersigned religious leaders, reflecting diverse faith traditions, in one voice write to urge you to support and co-sponsor the Democracy Restoration Act, a bill which seeks to restore federal voting rights to millions of Americans living and working in our communities who have been disenfranchised because of a criminal conviction in their past. As people of faith, we believe all people are created in God's image. We are deeply concerned that state disenfranchisement laws continue to deprive our neighbors of their fundamental right to vote and relegate them to second-class citizenship.

From Joseph saving untold numbers from famine, to Peter being the rock upon which Christ's church was built, our scriptures bear powerful witness of the great achievements that can be made by persons who have spent time in prison. It is consistent with the best of our democratic values and our moral heritage to encourage former prisoners to participate constructively with their communities in ways such as voting.

Accordingly, we join the many Americans who believe that continuing to deny the franchise to millions of our fellow citizens who have rejoined our communities is unwise and unjust. Our support for the Democracy Restoration Act rests squarely on our obligation to be merciful and forgiving, our commitment to treat others with the respect and dignity that God's children deserve, and our steadfast belief in the human capacity for redemption.

We applaud your efforts to restore the franchise to persons who have been released from prison, and we urge you to pass the Democracy Restoration Act.

Yours truly,

The Aleph Institute

Crossroad Bible Institute

American Friends Service Committee

Evangelical Lutheran Church in America

The Billy Graham Center, Institute for
Prison Ministries

Friends Committee on National Legislation

Church of Scientology

Holistic Opportunity for Personal
Empowerment (HOPE)

Interfaith Drug Prevention Initiative	Prison Fellowship
Jewish Reconstructionist Federation	Presbyterian Church (U.S.A.) Washington Office
Mennonite Central Committee, Washington Office	Protestants for the Common Good
National Hispanic Christian Leadership Conference	Restorative Justice Ministries Network of North America
National Alliance of Faith and Justice	Sojourners
The National Advocacy Center of the Sisters of the Good Shepherd National Council of Churches in the USA	Unitarian Universalist Association of Congregations
NETWORK, A National Catholic Social Justice Lobby	United Church of Christ, Justice and Witness Ministries
Office of Social Justice, Christian Reformed Church in North America	United Methodist Church, General Board of Church and Society





Rev. Gilberto & Zuma Velez
Senior Pastor

**Testimony of
Rev. Gilberto Velez
Chair
National Hispanic Christian Leadership Conference
Submitted to the
Judiciary Committee
Constitution, Civil Rights, and Civil Liberties Subcommittee
United States House of Representatives
March 16, 2010**

Chairman Conyers, Chairman Nadler and Members of the Committee. Thank you for the opportunity to submit written testimony in support of H.R. 3335, the Democracy Restoration Act, which would restore voting rights in federal elections to millions of our fellow citizens who have a criminal conviction in their past, but who are out of prison and living in the community.

I am pastor of Iglesia Cristiana Misericordia, a mega-church in Laredo, Texas, with more than 2,000 members. In addition to being a pastor, I am a retired physician with a master's degree in public health. I currently serve as Chairman of the Board of the National Hispanic Christian Leadership Conference ("NHCLC").

NHCLC is committed to serving the 16 million Hispanic born-again Christians in the United States and Puerto Rico across generational, country of origin, and denominational lines on issues that pertain to the family, immigration, economic mobility, education, political empowerment, social justice, and societal transformation. The NHCLC serves and facilitates a representative voice for a growing number of Hispanic churches (currently 25,434) and 75 denominations in addition to faith-based organizations, institutes, networks, congregations, and active laity. Hispanic born-again Christians make up 37 percent of the U.S. Hispanic population and 88% of all U.S. Hispanic Protestants, 43% of all U.S. Hispanic Mainline Protestants, and 26% of all U.S. Hispanic Roman Catholics.

Our organization was founded with the purpose of providing a unified voice for the Hispanic born-again Christians of all denominations in the United States. Led by many of the top Hispanic Christian pastors, denominational leaders, businessmen and civil servants, the NHCLC is one of the preeminent voices in the Hispanic Church today. We actively partner with a number of organizations, including National Association of Evangelicals, World Relief, World Vision, Brennan Center for Justice, Promise Keepers, Sojourners, Center for American Progress, Evangelicals for Human Rights, Compassion

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Rev. Gilberto & Zuma Velez
Senior Pastor

Values Forum, Oral Roberts University, Regent University, and Gordon-Conwell Theological Seminary, among many others.

NHCLC urges Congress to pass the Democracy Restoration Act. Hispanics comprise 21.8% of the state and federal prison and jail population.¹ A significant number of Hispanic Americans are denied the right to vote because of state laws that disenfranchise persons with criminal convictions. In California, two thirds of the Hispanic citizen voting-age population cannot vote because of a criminal conviction.² In Texas, over 522,000 individuals are currently disenfranchised because of a felony conviction.³ Around 119,000 of those are voting-age Hispanics living and working in the community.⁴

As a Christian organization, we know that individuals who led sinful lives can rededicate themselves to God, their communities, and righteous living. With faith and grace, sinners can be reformed and transformed. The three principles that form the basis of NHCLC's mission are: revival, renewal, and redemption. And it is those three principles that guide us to support this important legislation. We believe that laws that continue to deny the right to vote to people who are out of prison and living in the community work against the objective of NHCLC to inspire Latinos and others to soar above their circumstances and become oracles of revival, renewal and redemption. The Democracy Restoration Act reflects an understanding of this transformation.

Revival

"Revival" is generally defined as "the restoration to use." The Democracy Restoration Act restores, or revives, the voice people have in our society. For Christians, a revival is typically understood to be experienced by a community. The Book of Nehemiah provides a powerful lesson about communities and revival. As Nehemiah was attempting to lead his community to the successful rebuilding of its wall, his opponents asked: "Will they revive the stones out of the heaps of the rubbish which are burned?"⁵ Nehemiah and his community succeeded in their efforts, demonstrating that a faithful and

¹ Bureau of Justice Statistics, *Prison in 2008* 2 (2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>.

² See statistics on the state of California in a report entitled *Diminished Voting Power in the Latino Community: The Impact of Felony Disenfranchisement Laws in Ten Targeted States* by Marisa J. Demeo and Steven A. Ochoa of MALDEF, available at <http://www.maldef.org/assets/pdf/FEB18-LatinoVotingRightsReport.pdf> (2003).

³ JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELONY DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 250, Tbl. A3.3 (2006).

⁴ Texas Dep't of Criminal Justice, *Statistical Report Fiscal Year 2009* 4-6, http://www.tdcj.state.tx.us/publications/executive/FY09_Stat_Report.pdf. Currently, there are 19,511 Latinos on active parole supervision and 99,564 Latinos on community supervision.

⁵ *Nehemiah* 4:2.

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Rev. Gilberto & Zuma Velez
Senior Pastor

hardworking community can revive and put to good use stones that have been damaged and broken.

Faithful communities can do the same for their damaged and broken members. The work of the community, however, is made harder when the members it seeks to revive are unable to fully contribute to shared goals. State laws which deny people the right to vote upon their return to the community prevent individuals from using their vote – their voice and their source of political power – to serve and revive their communities.

Disenfranchisement also takes a great toll on the entire community because of the effect it has on a community's children. A parent's political participation influences a child's decision whether to vote. Not only do parents act as role models for children regarding the importance of participating in the political process, they are often the only source of practical information, such as how to register and where to cast a ballot. Accordingly, disenfranchising a parent may discourage generations of the entire family from civic participation.⁶

Communities cannot be transformed and revived if significant portions of those communities cannot and do not vote. Restoring voting rights works in concert with the efforts of the faithful to revive communities.

Renewal

Renewal means to make something new again. When a person is released from prison back into the community he must start life over. Reintegration depends on rebuilding relationships with family and friends, finding work, and learning how to live with others. This new life offers opportunities and challenges. Christians have an obligation to welcome and support this reintegration, much like the gardener Jesus describes in the Gospel of Luke in the parable about the fig tree.⁷

In that parable, the owner of a garden had a fig tree that was fruitless for three years. The owner lost his patience and wanted to chop the fig tree down because it was wasting soil. The gardener asked for more time, explaining that he intended to care for it by giving it fertilizer and nourishing its roots. The gardener acknowledged that the fig tree was not living up to its potential or design. And the gardener did not decline to put expectations on the fig tree. But, the gardener rightfully noted that the tree's chance of success would increase with support and encouragement. By restoring the right to vote to people who are out of prison, we formally welcome them back and encourage them to connect with the community in a way that allows them to reach their fullest potential.

⁶ See ERIKA WOOD, BRENNAN CTR. FOR JUSTICE, RESTORING THE RIGHT TO VOTE 12 (2009).

⁷ Luke 13: 6-9.



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Senior Pastor

Redemption

Redemption means the act of reclaiming something previously sold. Christians associate redemption with Christ's sacrifice on the cross in order to release humans from the bondage of sin. Because all humans are created in God's likeness and image, we all have the potential to be so much more than our worst sins. Moses killed a man, Peter forsook Jesus, King David had Bathsheba's husband killed, and Jonah tried to abandon God. But all of these people went on to serve God and their community. Christ's sacrifice on our behalf requires us to rise above our own failings, limitations, and circumstances, and be the best persons and citizens we can be.

The Democracy Restoration Act not only restores a right, it compels an obligation. This legislation obligates people with a criminal conviction in their past to use the vote to resolve political differences, to think critically about which policies and leaders are best for our country, and to uphold the civic responsibility of voting. Just as the father was joyful at the return of his prodigal son, we should reward the desire of persons with criminal convictions to engage in constructive and positive activities.

The practice in 35 states of extending political disenfranchisement beyond the prisons walls transforms former prisoners into second-class citizens in their own communities and conflicts with Christian principles of mercy and forgiveness. If we want former offenders to live productively, we must impart upon them the opportunity and obligation to vote.

Conclusion

The goals and objectives of the Democracy Restoration Act are consonant with core Christian values. I urge you to pass this important legislation.

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