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REP. JERROLD NADLER HOLDS A HEARING ON FORMER CONVICT VOTING RIGHTS RESTORATION

March 16, 2010 Tuesday

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

SPEAKER: REP. JERROLD NADLER, CHAIRMAN

WITNESSES:
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REP. F. JAMES SENSENBRENNER JR., R-WIS. RANKING MEMBER REP. TOM ROONEY, R-FLA. REP. STEVE KING, R-IOWA REP. TRENT FRANKS, R-ARIZ. REP. LOUIE GOHMERT, R-TEXAS REP. JIM JORDAN, R-OHIO REP. LAMAR SMITH, R-TEXAS EX OFFICIO
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WITNESSES: HILARY O. SHELTON, DIRECTOR, NAACP WASHINGTON BUREAU
ROGER CLEGG, PRESIDENT AND GENERAL COUNSEL, CENTER FOR EQUAL OPPORTUNITY
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TEXT:

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.

As Chairman Conyers of the full committee -- Chairman Conyers has introduced legislation to deal with that problem. H.R. 3335, the Democracy Restoration Act, of which I'm 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 laws stand -- 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 a driving force between -- excuse me -- 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's 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're going to see what the options are. Even with -- even though this may be legal, we may be able to restore some rights.

So, today, we're 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.

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're incarcerated, or on parole, or on probation.

As former Judge Henry Friendly said, someone who, quote, 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.

Unquote.

When the 11th Circuit, speaking en banc, upheld Florida's felon voting roll (ph), 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 Fourteenth 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 Fourteenth Amendment itself explicitly permits states to adopt such laws. The framers of the Civil War amendment expressly included in Section 1 of the Fourteenth 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 canceling 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's doubtful that Congress even has the constitutional authority to enact it, because doing so would exceed Congress' enforcement powers under the Fourteenth and Fifteenth 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.

SCOTT: Thank you. And we're joined by the gentleman from Tennessee, Mr. Cohen.

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 change 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 didn't want to see those people come back to vote, because they wouldn't vote for that D.A.

And that's not right either. It's politically covering your rear. And that's 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 '86 to '96.

However, an individual from East Tennessee -- a Republican in the house -- put an amendment on, to say that you couldn't get your voting rights restored if you were behind in your child support. Well, spend some time in prison. I think you're going to be behind in your child support, because you're 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 wouldn't 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 weren't 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 don't care if it's in Wisconsin, if it's in Utah, if it's in Alaska, it's a vestige of Jim Crow. And it needs to go. And if the Constitution -- if there's 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's a condemnation of the Supreme Court of the United States, not a condemnation of the 9th Circuit, that's more likely on point, correct and moving this country forward. So, because it's overturned, that's a badge of honor.

And the fact is, Mr. Chairman, this is an important hearing. We need to make sure that all these type laws, that in their heart and their soul are evil and trying to put a scarlet letter -- Hester Prynne doesn't have the A on her chest anymore. We've 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 can't vote, they don't have a stake. And so, they're going to stay out of society and they're going to be recidivists. It's just wrong, and I appreciate Mr. Conyers' bill, and we need to do all we can to pass it.

Thank you so much.

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 '93, he held a number of positions with the Department of Justice, including assistant solicitor general, and has served as the Civil Rights Division -- and served in the Civil Rights Division and Environmental Division. He's a graduate of Rice University and Yale Law School.

Burt Neuborn 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 '92, and as the legal -- as the national legal director of the ACLU from 1981 to '86.

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's 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's 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 -- thank you -- 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've learned that he is going to be joining the office of the full Judiciary Committee as an intern later this year.

I'm 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 five minutes or less. To help you stay within that time, there's a timing device at the table that's right behind the water pitcher. So -- there you go -- that'd help you stay within the time. The light will start green, switch to yellow when there's one minute remaining, and will turn red when five minutes are up.

It is customary in this subcommittee to swear in the witnesses, but we're going to skip that this time and just go with -- starting with Mr. Shelton.

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, 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 complete 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.

SCOTT: Exactly five minutes. Very good.

Thank you, Mr. Shelton.

Mr. Clegg?

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

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

I appreciate the opportunity to testify today, because I feel very strongly about this bill. I'm 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 don't 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 time, place 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's what Alexander Hamilton thought. That's what James Madison thought. That's 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 Fourteenth or Fifteenth 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.

SCOTT: Thank you.

Mr. Neuborn?

NEUBORN: Mr. Chairman, members of the committee, thank you for the opportunity to testify this afternoon. It's 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's 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 Fourteenth and Fifteenth 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's 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'll 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's the same argument -- that under Section 2 of the Fifteenth 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 Fifteenth 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 Fifteenth 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 Fifteenth Amendment, has the power to exercise the enormously important reform of saying, where there is smoke, you don't have to prove fire every time, if it's 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're 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're 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.

SCOTT: Thank you.

Mr. von Spakovsky?

VON SPAKOVSKY: Thank you, Mr. Chairman, for the invitation to testify today. I'm 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 Neuborn, 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 Neuborn keeps talking about literacy tests, and that we would say that Congress didn't have the power to do anything about that. That, of course, is wrong. The Fifteenth 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 Fifteenth Amendment, Congress had the power to do that.

But the Fourteenth 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 can't be seen to -- the Founders and the passers of that amendment could not be seen to be taking away with one section of the Fourteenth Amendment what they're 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's no power in Article I for Congress to do anything that is contrary to this provision in the Fourteenth Amendment.

Section 2 of Article I and the Seventeenth 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's been released from supervised probation for three or five 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's 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, quote, 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 don't 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.

SCOTT: Thank you.

Mr. Wicklund?

WICKLUND: Good afternoon, chairman, members of the committee. I appreciate the opportunity to testify today in support of H.R. 3335.

I'm 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 in 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've 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 (ph) 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've 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 indispensible -- it's an indispensible 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're 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.

SCOTT: Thank you.

We've 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?

SANCHO: Thank you very much, Mr. Chair, honorable members of the committee. My name is Ion Sancho, and I've 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'm 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 one to three 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's 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's 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 don't have to come up to me -- as citizens do when I'm in the outside into my community and seeking to register individuals. And I see the look in people's eyes who want to register to vote, but they can't. They can't register to vote, and I can see that. And they're ashamed.

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

But I think we do need reform. I think (ph) 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'd 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's 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.

SCOTT: Thank you.

Mr. Idarraga?

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'm 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 six years ago, I was released from prison after serving 6.5 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 6.5 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 response 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 (ph) to (ph) 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 (ph) 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 eight-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.

SCOTT: Thank you.

We'll now question the witnesses under the five-minute rule, and I'll begin.

Mr. Clegg and Mr. Neuborn, 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. Is that -- that's where the states get to pick who can vote in a federal election. Is that right?

NEUBORN: That's the source of the states' power to set ballot -- qualifications for their own elections, and at least

presumptively for state...

SCOTT: OK. And the Fourteenth Amendment says that you essentially can't deny someone the right to vote, but then says, except for participation in rebellion or other crimes. That's the authority to disenfranchise people who have committed felonies. Is that right?

CLEGG: No.

SCOTT: No? Mr. Clegg?

CLEGG: I don't think that the states need affirmative federal authority. I don't think that the states need affirmative -- thank you.

I don't think that the states need affirmative federal authority to decide what the qualifications for voting in their state is.

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

SCOTT: Well, it says -- wait, wait, wait.

CLEGG: ... it says that the people who wrote the Fourteenth Amendment saw that there would typically be non-racial reasons for disenfranchising criminals.

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've taken out the male with the subsequent -- and it's gone to 18 in a subsequent.

But it suggested you can't discriminate. Anybody that's otherwise qualified, male inhabitant over 21, you've got to let them vote, except -- and then they have the -- except for participation in a crime. That would give them the right to discriminate against those people. If they've committed a crime, you'd be able to discriminate against them for having committed a felony.

CLEGG: No, I don't think that that's...

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

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's not true. Of course, we don't let children vote. We don't...

SCOTT: But that's...

CLEGG: ... let people who are mentally incompetent vote.

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

CLEGG: That doesn't say (ph) anything (ph) about (ph)...

SCOTT: ... inhabitant.

CLEGG: ... mental competence. We don't 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 don't meet those minimum standards.

SCOTT: OK. You've got -- then you get the Fifteenth 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.

CLEGG: Absolutely.

SCOTT: OK.

CLEGG: But I don't think that that's what's going on with the vast majority of felon disenfranchised (inaudible).

SCOTT: OK. 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?

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. Another...

SCOTT: Which case? Could you describe the case?

CLEGG: The case was Hunter v. Underwood. And it involved an Alabama misdemeanor, a statute -- 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.

SCOTT: And so, without regard to the bill as it's 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.

CLEGG: That's correct.

SCOTT: Now, if it's intent. What about discriminatory impact?

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 Fourteenth Amendment, a plurality (ph). It said that with respect to the Fifteenth Amendment. And, of course, there's no reason to think that two Reconstruction era statutes would have a different standard in that regard.

SCOTT: But it you tried to start a disenfranchisement, and you're in a covered state under Section 5, and you could show a discriminatory impact, could you prohibit it under the Voting Rights Act today?

CLEGG: That's one reason why I think the Voting Rights Act today is unconstitutional in that respect (ph).

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.

CLEGG: I think what would happen then, Mr. Chairman, is that 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's why we do. And...

SCOTT: Well, wait a minute.

CLEGG: ... it could rebut the prima facie case that way.

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

CLEGG: No, I disagree with that. It's 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...

SCOTT: But if they can't...

CLEGG: ... in a voting rights case involving...

SCOTT: If they can't show a business necessity, although they had racially neutral intent, but it had a disparate impact, and can't show a business -- I mean, there's just the Griggs case.

CLEGG: That's 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.

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

If -- he's, 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 Fifteenth 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 Fifteenth 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're not supposed to admit that that's what they're doing.

CLEGG: I don't agree, by the way, that...

NEUBORN: Under that...

CLEGG: ... that it's 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.

NEUBORN: Did you ever lose one?

CLEGG: And we used...

NEUBORN: Did you ever lose one?

SCOTT: Wait a minute. Wait a minute.

Let me just...

CLEGG: Probably should have.

SCOTT: ... just follow through, Mr. Neuborn.

Mr. Neuborn, 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?

NEUBORN: Well, that's a great question, congressman. And fortunately for me, at least, there's a good answer for it. And that's 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's 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 (ph)...

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...

SCOTT: Well, Mr. Clegg, is the...

CLEGG: ... 11 years ago...

SCOTT: .. is the prohibition against literacy tests -- how is that done?

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

SCOTT: In New Hampshire?

CLEGG: I'm sorry?

SCOTT: In New Hampshire?

CLEGG: I don't know.

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

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 (inaudible) 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.

SCOTT: My time has more than expired.

The gentleman...

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 don't know -- I mean, I'm a little reluctant to bring this up, particularly because he's 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 don't know if that's what -- if you heard that or not. But I was -- I just want to go on record saying that that is...

SCOTT: Well, if we pass a law, we'll do everything we can to make sure that it's constitutional.

The gentleman from Arizona, Mr. Franks?

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'm fascinated.

CLEGG: Well, I thank you for the question, but I've 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 incidence.

The felony disenfranchisement laws present a completely different historical incidence. 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's just ridiculous to assert that those laws, as a general matter, have racial roots. That is simply not true.

And, now, I have great affection for Professor Neuborn, 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.

NEUBORN: I'll stand by it.

(CROSSTALK)

CLEGG: Most felony disenfranchisement statutes.

NEUBORN: I will...

CLEGG: You're talking about 48 states -- most of those have their genesis in an effort to disenfranchise racial minorities.

NEUBORN: 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 didn't have much of a racial impact, because most blacks couldn't vote, especially after Dred Scott. There simply was not a serious racial problem with voting.

But once the Fourteenth and Fifteenth 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's no way to separate the ugly racial past that seeps into our felony disenfranchisement laws from the legitimate, which is exactly why Section...

FRANKS: Mr. Neuborn, if I could...

NEUBORN: ... (inaudible) of the Fifteenth Amendment is so important.

FRANKS: ... I'd like to have Professor Clegg have a chance to respond.

NEUBORN: I'm sorry. I'm sorry. I overstated, I'm (ph) afraid (ph).

CLEGG: No, no, no. Professor Neuborn and I, before the hearings began, were talking about how we both enjoyed Alexander Keyssar's book, "The Right to Vote." And he said that outside the South, the disenfranchisement laws, quote, 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. End

quote.

I just don't think that you're going -- you know, try as hard as you might, Professor Neuborn -- I don't think that you're going to be able to get a majority, let alone all of the 48 states in the category of having racist intent...

FRANKS: I'll be interested in knowing what, Mr. Neuborn, what states you would suggest did that?

NEUBORN: What state?

FRANKS: Yes, what states...

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

FRANKS: You're suggesting...

NEUBORN: We know that...

FRANKS: ... that (ph) all states...

NEUBORN: ... there were five (ph) -- Florida, in 1868, when it enacted its constitution, and for the first time put in felon -- 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.

CLEGG: No, no...

FRANKS: Professor Clegg, I'm out of time here, but I'd like to have you respond.

CLEGG: Well, I'll just say that none of those books are -- none of those laws are on the books anymore.

NEUBORN: Yes, but their ancestors are on the books.

The question is, what was the genesis -- what we're 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.

CLEGG: Well...

NEUBORN: 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 didn't have a history of racial discrimination with literacy tests.

FRANKS: Professor Clegg, I'll give you the final word.

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 don't 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.

NEUBORN: And that's not what I'm saying. I'm simply saying that once you...

CLEGG: And I think, if it's 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.

NEUBORN: Well, I'll just ask one last question, and I'll ask Professor Clegg, why...

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

NEUBORN: ... is the literacy test different? Why is the literacy test case different? That's all.

FRANKS: Mr. Neuborn, I'm going to -- the chairman -- I'm going to yield back.

SCOTT: Thank you.

The gentleman from Michigan, chairman of the full committee, Mr. Conyers?

CONYERS: Is there credit being given in constitutional law for this course, Professor...

(LAUGHTER)

... Professor Scott? 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've 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'd like the discussion to keep going on, except that I just have to -- I've been informed, Mr. Clegg, that you feel that the Voter Rights Act was and is unconstitutional?

CLEGG: I'm sorry. The what act?

CONYERS: I said, I've been informed that you believe the Voters Rights Act was, and is, unconstitutional?

CLEGG: Yes, I think I told you that before you passed it. Unfortunately, you didn't listen to me. But...

CONYERS: Well, I didn't ask for any explanation. I just wanted to make sure that you had said that. I wasn't here.

CLEGG: Section 5 (ph) and Section 203 (ph), I believe...

CONYERS: You don't have to go any further.

(LAUGHTER)

Thank you.

CLEGG: I don't think that it's all unconstitutional. It's...

CONYERS: Thank you, sir. I'm trying to ask you the questions, and not you give me the lecture when I don't

need it.

OK.

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

VON SPAKOVSKY: That is incorrect, sir.

CONYERS: Oh.

VON SPAKOVSKY: I think it's up to the states to decide that issue.

CONYERS: I see.

VON SPAKOVSKY: If Congress wants to change the Fourteenth Amendment, then I think they have to do it...

CONYERS: OK.

VON SPAKOVSKY: ... through a constitutional amendment.

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

VON SPAKOVSKY: No, no. I...

CONYERS: I said, is that your view?

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

CONYERS: Oh, OK. That's what I'm trying to find out.

But you're in a state that does have lifetime felony preclusion of anyone from voting. Is that right? Virginia?

VON SPAKOVSKY: There is an application process...

CONYERS: Is that right? Yes or no.

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

CONYERS: Well, I'm getting help from my colleague...

SCOTT: If the gentleman would yield?

CONYERS: Yes.

SCOTT: In practice, and that's what happens, but it's 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.

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

VON SPAKOVSKY: I'm sorry. In Virginia?

CONYERS: Yes, sir.

VON SPAKOVSKY: Yes.

CONYERS: OK, but not very many.

VON SPAKOVSKY: I don't know what the numbers are.

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

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

VON SPAKOVSKY: I'm not a member of the Virginia Board of Elections.

CONYERS: Fairfax County.

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

CONYERS: Oh, OK. So, maybe you wouldn't know whether there were few or many. OK.

This is a great panel here. I...

(LAUGHTER)

I'm going to implore that you and the chairman see if we can continue this discussion on, because it's, I think, very important. And I think the committee is -- the subcommittee is doing a great service by having all of them here, including you. And I yield to you.

FRANKS: Mr. Chairman, I'm 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'd just tickle me to death.

CONYERS: Oh, that's great.

What about Neuborn?

(LAUGHTER)

FRANKS: No, I'd have to take the Fifth on that.

(LAUGHTER)

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.

NEUBORN: As long as I can still vote.

CONYERS: Yes, we don't 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 don't 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?

NEUBORN: 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's 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 doesn't exist, I agree with Professor Clegg, then, that it's much harder to find power to deal with it.

It still might exist under the elections clause and under Section 5 of the Fourteenth 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's logically, absolutely impossible to distinguish felon disenfranchisement from literacy tests. And then there's a unanimous decision of the Supreme Court in Oregon v. Mitchell, saying that you have the power to act.

CONYERS: Now, before I yield -- and I see that Judy Chu is waiting patiently, and now we've been joined by Sheila Jackson Lee, so I'm 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'd like to hear your views.

And I'll yield back my time, Mr. Chairman.

SHELTON: Well, thank you, Mr. Chairman. I agree with you that it's 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've seen happen in practice is -- I'm 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're 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's 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.

SCOTT: Thank you.

The gentlelady from California, Ms. Chu?

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

NEUBORN: 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 don't 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.

CLEGG: Of course, I'm 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.

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?

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 don't think, is the gun rights or other type of -- (inaudible), 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's more -- the analog is closer to abridging freedom of speech because you're an ex- felon, or any other of the freedom of religion, or what have you, because you're an ex-felon.

It's fundamentally different than small children or the mentally incompetent, because of the reasons Professor Neuborn stated. But I think there is another -- if anything, the (inaudible) 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 (inaudible) 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 don't 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.

CHU: Well, I've done (ph)...

CLEGG: I don't think I drew a distinction between violent and non-violent offenders.

CHU: Well, actually, though, I see this in your testimony right here, because I'm 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's 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?

SANCHO: In Florida, I'd 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'm 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 -- these -- in Florida, they have tagged these economic elements, so that once you're 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 can't be a contractor, you can't 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're talking about?

Yet we're now preventing the individual, as in Tennessee, who they're going to be in prison, they're going to fall behind in their ability to make the child payment. They're going to now permanently be in this Catch-22 where they won't be able to get their right to vote restored. And we've done that in Florida. We've 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've got to reverse that posture in this nation today.

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's going to apply to all states -- states which are constantly changing what is a felony, what isn't 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's being urged here.

SANCHO: But I actually believe it's 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've 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...

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

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

SCOTT: Thank you.

The gentleman from Tennessee, Mr. Cohen?

COHEN: Thank you, Mr. Scott. And I want to thank you for holding this hearing. And indeed, I've 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'm not sure -- was basically saying what Mr. Neuborn said. Mr. Neuborn believes it's 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's the law, and that there's not standing, or that there's 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 can't vote in Florida but you could vote in Michigan, it's 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 didn't think women should vote, and he didn't think African Americans should be free. And he didn't think, if you didn't own property or couldn't 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's 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's 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's 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 shouldn't 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've got a chance by their proof, to show by going to the polls that they're 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're better citizens than you think.

But I would submit to you that this legislation is appropriate. I appreciate Mr. Neuborn's well-reasoned argument, that just like the literacy test in '65, the people came up here and said, oh, that's not the law, and you can't do it, just like people said, civil rights isn't the law and you can't 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'd 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?

CLEGG: Yes, I do.

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

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 don't 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. But...

COHEN: Let me ask you this. There are people...

(CROSSTALK)

CLEGG: ... of all colors...

COHEN: 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?

CLEGG: I think that -- well, to (ph) continue (ph), I'd 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 don't think that you should say, OK, well, therefore, we are going to make a program available to you. This other person over here, he's poor. But the reason he's poor is because he just immigrated from Mexico.

COHEN: But the government...

(CROSSTALK)

CLEGG: (inaudible) is for (ph)...

COHEN: Mr. Clegg...

CLEGG: ... because he just came over...

COHEN: Mr. Clegg...

CLEGG: ... on a boat from Southeast Asia.

COHEN: Mr. Clegg...

CLEGG: But you don't hear about them.

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 can't go to water fountains. You can't go to theaters. You can't have jobs. You can't have contracts. And that happened.

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

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

COHEN: How do you do it?

CLEGG: ... draw (inaudible)...

COHEN: Tell me how you do it.

CLEGG: ... and deny people opportunity...

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?

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's all kinds of programs...

COHEN: And if I go to your Web site...

(CROSSTALK)

CLEGG: ... to improve...

COHEN: ... will I see those types of...

CLEGG: My point is that...

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

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 don't 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 don't think...

COHEN: You can't get around the Constitution. You've got to make a good argument. And that's what I was submitting. When I say "get around," I mean get around the mentality that you've got, that it's set in stone, and that you don't have jurisdiction.

I'm submitting that Mr. Neuborn is right, and that you can make an argument that there is jurisdiction, and there is, in my opinion -- and Mr. Neuborn made it. And that's what I mean. I meant get around your mentality that says there isn't, and therefore, don't try to make progress.

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

NEUBORN: Can I...

(CROSSTALK)

CLEGG: (inaudible) 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.

NEUBORN: Can I congratulate you, Representative Cohen, on putting into my mind an argument that I should have thought of, but didn't? But it is another very powerful reason why you have authority to pass it. It's astonishing to me that somebody -- that a felon, or somebody who has been convicted of passing a bad check in Florida can't vote, but

somebody who is convicted of passing a bad check in Georgia can vote.

Now, that's the kind of irrational discrimination on the ability to vote that should trigger the Fourteenth Amendment's power under Section 5 of the Fourteenth 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 Fifteenth Amendment. It's a Fourteenth Amendment argument. And I didn't think of it until you were making your point.

COHEN: Mr. Chairman, I want to thank Mr. Neuborn. 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's all right to resist them, because they're inherently wrong and morally wrong.

And what I'm 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.

SCOTT: The gentlelady from Texas?

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

Mr. Neuborn, 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've 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 don't act erratically. They don't seem to espouse unconstitutional or unpatriotic statements. They don't 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'm 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 Fourteenth 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?

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.

JACKSON LEE: And during that time, slavery, and then, as you indicated, Reconstruction and Jim Crowism, could black citizens vote?

VON SPAKOVSKY: Only if you look at the percentages of registration and turnout. It varied over time. It was a very small amount...

JACKSON LEE: No, let me go back...

VON SPAKOVSKY: ... depending on what period you were looking at.

JACKSON LEE: All right. The slaves that were enslaved, could they vote in Virginia?

VON SPAKOVSKY: I'm sorry. When they were...

JACKSON LEE: At the time that slavery was...

VON SPAKOVSKY: No, of course, no.

JACKSON LEE: ... in place, they could not vote.

VON SPAKOVSKY: No.

JACKSON LEE: During Jim Crow, could Africans, negroes or colored people vote in Virginia?

VON SPAKOVSKY: A small percentage could, depending on where you were and in what years you're looking at. But the percentages were very small, because of the efforts made to suppress their registration and voting.

JACKSON LEE: Do you think that was a good thing?

VON SPAKOVSKY: I'm sorry. What?

JACKSON LEE: Do you think that was a good thing?

VON SPAKOVSKY: Well, of course not.

JACKSON LEE: In the instance of your state -- and I think you're 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's some process -- you don't see that as a restoration of slavery?

VON SPAKOVSKY: I do not.

JACKSON LEE: Because I do.

VON SPAKOVSKY: No.

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?

VON SPAKOVSKY: I don't 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...

(CROSSTALK)

JACKSON LEE: And how many do you think...

VON SPAKOVSKY: ... such as not the right...

JACKSON LEE: How many do you think apply?

VON SPAKOVSKY: ... the serve on a jury or to serve in elected office.

JACKSON LEE: How many do you think apply to this process? Do you have any percentages?

VON SPAKOVSKY: I don't have the numbers or percentages on...

JACKSON LEE: Mr. Leon, I think -- no, you're from the state of Leon, excuse me. You're from -- Mr. Sancho, let me thank you for having a bright light on this concept. And I think you've 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?

SANCHO: It destroys the people's faith that, in fact, elections have any validity at all. That's 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's going to take a long, long time to reestablish in their minds that this is, in fact, a nation of laws and justice.

JACKSON LEE: You made another point, and I'd like to ask Mr. Andres, so I need to get the pronunciation of his last name. I'll 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 can't be barbers, or can't 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'm hearing from you, Mr. Sancho, in the voting sense?

SANCHO: Well, it does. These individuals have become a permanent underclass in the State of Florida. And it's a drag on every element of our social institutions -- education, social welfare programs -- and it impacts on the right to

vote.

We're a jurisdiction in Leon County that believes in access. Leon County, in fact, is the southern-most extension of the Old South plantation. There's only about a 12 percent population of African Americans in the State of Florida. But in the Panhandle, that average is much higher. We're 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's 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.

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.

SANCHO: I believe it would. I believe that people would no longer have to avert their eyes when I'm 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 won't even look me in the eye. They can't even answer. They just shake their heads and...

JACKSON LEE: I've seen that, too.

SANCHO: ... (inaudible) just can't register to vote.

JACKSON LEE: Mr. Chairman, if you'd indulge me, just to get this last question to -- is it Mr. Aradarra (ph)?

IDARRAGA: Idarraga.

JACKSON LEE: Idarraga, thank you so very much. You are a living example. Six years incarcerated, if I'm correct?

IDARRAGA: Yes.

JACKSON LEE: And presently at Yale Law School. What state would you call your residence at this point, sir?

IDARRAGA: I would say I'm a permanent resident of Rhode island, and a temporary resident of Connecticut.

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're not allowed to exert their constitutional rights or the right to vote. What is your perception of that?

IDARRAGA: I'd say, at the very least, when you're in a distressed community, and you see the law basically working against you at many steps of the way, and that's all you know, that's 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's nonsensical...

JACKSON LEE: There's a representation that you're not competent, that you would be incompetent, and that you are not worthy. What do you say to that?

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're living under permanent second, third class citizenship with a tremendous scarlet branding that they have to walk around with...

JACKSON LEE: But do you think they're incompetent, that they should not be able to vote, because they're incompetent?

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 personally, 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're much smarter than we give them credit for.

JACKSON LEE: Thank you, Mr. Chairman. I would just -- I'm sorry, if I could yield to Mr. Wicklund? Yes, sir.

WICKLUND: I just wanted to add that there are so many collateral consequences that go with a felony conviction. Some...

SCOTT: Switch on your microphone. Microphone?

WICKLUND: Oh, OK.

There are many collateral consequences that go with felony convictions, and some make sense. For instance, there are some restrictions. You don't 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's 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.

JACKSON LEE: Mr. Chairman, I thank you.

I was at a meeting, Mr. Chairman, I'll 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's federal funding, ex-felons can't 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 Thirteenth, Fourteenth and Fifteenth Amendment, has just been voided, whether they're 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.

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 can't 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 five 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 five legislative days to submit any additional materials for inclusion into the record.

And with that, without objection, the subcommittee stands adjourned.

END

LOAD-DATE: March 18, 2010