Testimony of
Professor Burt Neuborne
Inez Milholland Professor of Civil Liberties at
New York University School of Law and
Legal Director of the Brennan Center for Justice

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

On
H.R. 3335, the "Democracy Restoration Act of 2009"

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Introduction

Chairman Conyers, Chairman Nadler and Members of the Committee:

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

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

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

Background

While the right to vote is at the core of American democracy, it has taken more than two centuries to realize the dream of near-universal formal suffrage. In the beginning, the vote was restricted to white men of property. Property qualifications, including the poll tax, were gradually relaxed during the 19th century, and were eventually declared unconstitutional in the 20th century in *Harper v. Virginia Board of Elections,*[1] and *City of Pheonix v. Kolodjiewski*.[2] Federal legislation in 1965 outlawing the poll tax in state elections[3] played a major role in ending property qualifications for voting by dramatically illustrating the pernicious effects of property-based impediments to voting.

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

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

[1] 383 U.S. 663 (1966).
[2] 399 U.S. 204 (1970).
[3] See Voting Rights Act of 1965, 79 Stat 442, 42 U.S.C. sec. 1973h. The 24th Amendment, ratified in 1964, had eliminated the poll tax in federal elections.
[4] The constitutionality of literacy tests for voting had been upheld in *Lassiter v. Northampton Bd. of Elections*, 360 U.S. 45 (1959). Congress suspended the use of literacy tests in federal elections for a five year period beginning in 1970, and made the ban permanent in 1975. Congress's authority to ban literacy tests in federal elections was unanimously upheld in *Oregon v. Mitchell*, 400 U.S. 12 (1970).
[5] 405 U.S. 330 (1972).

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

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

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

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

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

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[6] 380 U.S. 89 (1965).
[7] 395 U.S. 621 (1969).
[8] Erika Wood, Brennan Center for Justice, R*estoring the Right to Vote* 2 (2009), *available at* http://www.brennancenter.org/content/resource/restoring_the_right_to_vote/; *see also* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 76 (2006).
[9] 418 U.S. 24 (1974).
[10] In many ways, the erroneous decision in *Richardson v. Ramirez* is analogous t the Court's decision in *Lassiter* upholding literacy tests. It took Congressional action to free millions of citizens from *Lassiter*. The Democracy Restoration Act will likewise free millions of citizens from *Ramirez.*
[11] 471 U.S. 222 (1985).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[19] Wood, *supra* note 1, at 8.

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

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

[22] *Id.*

[23] *Id.* at 1009, 1014.

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

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

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

Congressional Authority

There is a long and honorable history of Congressional legislation protecting and defining the right to vote, especially in federal elections. Piecemeal Congressional legislation[27] ripened into the landmark Voting Rights Act of 1965 (re-authorized in 2006), followed by the National Voter Registration Act in 1993, and the Help America Vote Act in 2002. These important pieces of Congressional legislation were each passed with strong bipartisan support. Each has played a vital role in assuring that all Americans have a voice and a vote in our democracy. The Democracy Restoration Act is another critical step in this effort.

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

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

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

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

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

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

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

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

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

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

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

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[28] *See, e.g., Kusper v. Pontikes*, 414 U.S. 51, 57 n.11 (1973); *Oregon v. Mitchell*, 400 U.S. 112, 121, 124 (1970).
[29] 400 U.S. 112 (1970).
[30] Justice Black delivered the opinion of the Court in *Oregon v. Mitchell*. His separate opinion recognizes Congressional power under the Election Clause to lower the voting age in federal elections from 21 to 18.
[31] *See Kusper*, 414 U.S. at 57.
[32] 400 U.S. at 118. The literacy test at issue in *Oregon v. Mitchell* was imposed by Arizona. All nine Justices agreed that Congress's enforcement power under the Fifteenth Amendment authorized legislation sweeping away a practice that had been historically associated with preventing black Americans from voting., without the necessity of a finding that it was currently being imposed in a discriminatory manner. *Id.*
[33] TINSELY E. YARBROUGH, DAVID HACKETT SOUTER: TRADITIONAL REPUBLICAN ON THE REHNQUIST COURT (Oxford University Press 2005) 31-32, nn. 80-82.
[34] 400 U.S. at 118, 150, 237, 286.

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

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

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

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

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

[35] 479 U.S. 208 (1986)
[36] *Id.* at 229.
[37] *Tennessee v. Lane*, 541 U.S. 509, 518, 520 (2004).
[38] *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).
[39] *Lane*, 541 U.S. at 520.
[40] *Id.*

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

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

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

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

[42] *See Lane*, 541 U.S. at 523.

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

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

[45] 521 U.S. at 532.

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

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

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

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

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

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

[49] 418 U.S. 24 (1974).

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

[51] *Id.*

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

III. The Supremacy Clause Supersedes Conflicting State Laws

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

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

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

Conclusion

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

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

[52] *United States v. Reese*, 92 U.S. 214, 218 (1875).
[53] U.S. Const. art. VI, cl. 2.
[54] *Oregon*, 400 U.S. at 132.