

New Federal Initiatives Project

**H.R. 3335: “The Democracy
Restoration Act”**

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H.R. 3335: “The Democracy Restoration Act”

Last year, H.R. 3335, “The Democracy Restoration Act,” was introduced in the House of Representatives. On March 16, 2010, hearings were held on the bill before the House Judiciary Committee’s Subcommittee on the Constitution, Civil Rights, and Civil Liberties. Seven witnesses testified (five in favor of the bill, and two opposing); their testimony is available on the Committee’s website. [link: http://www.judiciary.house.gov/hearings/hear_100316_1.html]

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

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

Thus, with the exception of those currently serving time in prison for a felony conviction, H.R. 3335 would require that all persons convicted of crimes--those serving time for misdemeanors or in "any residential community treatment center" for a felony, those on probation or parole for felonies or misdemeanors, and those who have completed their sentences for felonies or misdemeanors--be allowed to vote in federal elections. Also, since it is logistically difficult for states to have one voting list, set of ballots, and set of voting booths for federal elections and another for state and local elections, it is likely that this bill would change who is allowed to vote in state and local elections.

Currently most States bar at least some felons not currently serving time from voting. The bill is controversial and raises two sets of issues. First, it is disputed whether Congress has authority to pass this bill. Second, assuming that Congress does have this authority, there are sharp disagreements on whether the bill makes sense as a policy matter.

I. Does Congress Have Authority to Pass H.R. 3335

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

There are three theories under which Congress might be asserting authority for passing this bill. First, if Congress has authority to pass this bill under Article I, Section 4 of the Constitution, it can simply assert its conclusion that all criminals (excepting felons currently in prison) are entitled to vote. Under this theory, Congress would not rely on any claim that it is addressing racial discrimination. Under the remaining two theories, Congress could assert authority to pass this bill under the enforcement clauses of the Fourteenth or Fifteenth Amendment, either because of the disparate impact that disenfranchisement of felons has on some minority groups or because this

disenfranchisement is in fact racially motivated.

a. Article I, Section 4

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

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

But opponents of the bill argue that, as a textual matter, this interpretation is unpersuasive, since Article I, Section 4 discusses "holding Elections," not who is allowed to vote, which is the express focus of Section 2. They note that, in *The Federalist No. 60*, Alexander Hamilton said of Article I, Section 4 that the national government's "authority would be expressly restricted to the regulation of the times, the places, and the manner of elections. The qualifications of the persons who may choose or be chosen . . . are defined and fixed in the Constitution, and are unalterable by the legislature." In *The Federalist No. 52*, James Madison had written of Article I, Section 2: "To have left [the definition of the right of suffrage] open for the occasional regulation of the Congress would have been improper"

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

On the one hand, a majority of the Justices in *Oregon v. Mitchell* upheld a federal statute that dictated who could vote in federal elections. On the other hand, only one, Justice Black, relied on Article I, Section 4. Opponents of H.R. 3335 note that, not only did the other eight Justices not join in Justice Black's argument, they all to one degree or another explicitly rejected it.

b. The Fourteenth and Fifteenth Amendments

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

Opponents of H.R. 3335 note that laws that have a mere disparate impact but no discriminatory intent do not violate the Fourteenth and Fifteenth Amendments. The Supreme Court has so held repeatedly with respect to the Fourteenth Amendment. A plurality has so held with respect to the Fifteenth Amendment (see *City of Mobile v. Bolden*). When the Supreme Court in *Hunter v. Underwood* considered a claim that a State law denying the franchise to those convicted of crimes "involving moral turpitude" was unconstitutional race discrimination, it said: "[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."

Proponents of the bill counter that the Supreme Court has upheld congressional bans on certain voting practices and procedures--like literacy tests--that are not themselves discriminatory on their face but have disproportionately excluded racial minorities from voting. The Court stressed in *City of Boerne v. Flores* that these cases involved bans aimed at practices that historically have been rooted in intentional discrimination.

Accordingly, it is important to determine to what extent the current state laws disenfranchising felons are rooted historically in an effort to deny the right to vote on account of race.

Opponents of H.R. 3335 point out that Section 2 of the Fourteenth Amendment itself contemplates disenfranchisement. That is, it acknowledges that "the right to vote" may be "abridged . . . for participation in rebellion, or other crime." Surely, it is argued, this is recognition in the most relevant part of the Constitution itself that there are typically nonracial reasons for disenfranchising criminals.

Opponents of H.R. 3335 also cite many historical studies—including some by the proponents of the bill—that they say make clear the nonracist origins of state laws disenfranchising felons. For example, the Sentencing Project and the Human Rights Watch—vigorous supporters of felon re-enfranchisement--acknowledge, "Disenfranchisement in the U.S. is a heritage from ancient Greek and Roman traditions carried into Europe." In Europe, the civil disabilities attached to conviction for a felony were severe, and "English colonists brought these concepts with them to North America." Opponents also point to the following (Source: The Sentencing Project):

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

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

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

(4) Of the States that prohibit all felons from voting--whether in prison, on probation, on parole, or having fully served their sentences--fewer than half the States were in the Confederacy, and only one state in the old Confederacy, Virginia, disenfranchises all felons.

(5) Conversely, a majority of the States in the old Confederacy do allow felons to vote, so long as they are no longer in prison, on parole, or on probation.

Proponents of H.R. 3335 counter with historical evidence of their own. They note that, between 1890 and 1910, five Southern States (Alabama, Louisiana, Mississippi, South Carolina, and Virginia) tailored their criminal disenfranchisement laws to increase their effect on black citizens. [See Andrew L. Shapiro, Note, "Challenging Criminal Disenfranchisement Laws under the Voting Rights Act: A New Strategy," 1032 *Yale L.J.* 537 (1993).] Even if these States have all changed their laws to one degree or another, the proponents of H.R. 3335 point to this as evidence of the role of race in passing these laws. They also suggest that in other states the laws might be enforced in a discriminatory way, even if that was not their original intent.

The Supreme Court's decision in *City of Boerne v. Flores*, discussing the scope of Congress's enforcement powers for the Reconstruction amendments, declared, "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." The Court concluded that Congress could not bar State actions with a discriminatory effect on the free exercise of religion when the underlying constitutional right was to be free from State actions with discriminatory intent. The proponents and opponents of H.R. 3335 disagree about whether there is "congruence and proportionality" between guaranteeing people the right to vote irrespective of race and a requirement that felons be allowed to vote.

II. Is H.R. 3335 Good Policy?

Opponents of H.R. 3335 argue that those who are not willing to follow the law cannot claim a right to make the law for everyone else. They point out that not everyone in the United States may vote (not children, for example, or noncitizens, or the mentally incompetent, in addition to criminals) and assert that we have certain minimum, objective standards of responsibility, trustworthiness, and loyalty for those who would participate in self-government—and that those who have committed serious crimes against their fellow citizens may be presumed to lack this responsibility, trustworthiness, and loyalty.

The bill's supporters counter that there is a historical trend toward broad suffrage and that there should be a strong presumption against disenfranchising any group of people, that those no longer in jail have paid their debt to society, that these laws have a disparate

impact on the basis of race, and that they impede the reintegration of felons back into society.

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Related Links:

United States House of Representatives Committee on the Judiciary Hearing on: H.R. 3335, the "Democracy Restoration Act of 2009"

http://www.judiciary.house.gov/hearings/hear_100316_1.html

Center for Equal Opportunity: Felon Voting Webpage

<http://www.ceousa.org/content/blogcategory/64/93/>

Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States

http://www.sentencingproject.org/doc/File/FVR/fd_losingthevote.pdf

Felons and the Right to Vote, *New York Times*, July 11 2004

<http://www.nytimes.com/2004/07/11/opinion/felons-and-the-right-to-vote.html?pagewanted=1>