

TESTIMONY OF
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BEFORE THE
HOUSE JUDICIARY COMMITTEE'S
SUBCOMMITTEE ON THE
CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES
REGARDING
H.R. 3335, THE "DEMOCRACY RESTORATION ACT"

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2141 Rayburn House Office Building

Introduction

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

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

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

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

1. Description of the Bill

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

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

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

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

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

2. *Possible Fonts of Authority*

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

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

3. *Article I, Section 4*

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

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

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

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

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

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

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

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

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

4. *The Fourteenth and Fifteenth Amendments*

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

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

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

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

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

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

- (1) Only two New England States--Maine and Vermont--allow all felons to vote.
- (2) Thirty States prohibit felons who are on probation from voting.
- (3) Thirty-five States prohibit felons who are on parole from voting.

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

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

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

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

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

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

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

II. Policy Objections to Felon Re-Enfranchisement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

Appendix: References

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

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

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

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

Why should felons not be allowed to vote?

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

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

Shouldn’t some felons be allowed to vote?

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

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

Haven't felons paid their debt to society?

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

Aren't these laws racist?

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

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

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

Don't these laws keep felons from rejoining society?

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

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

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