TESTIMONY OF

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214 MASSACHUSETTS AVENUE, NE
WASHINGTON, DC 20002

BEFORE THE UNITED STATES SENATE

COMMITTEE ON RULES AND ADMINISTRATION

REGARDING

ELECTION REFORM

14 MARCH 2001

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Good morning Mr. Chairman and Members of the Committee. Thank you for the opportunity to testify today on election reform and issues related to the 2000 election. For the record, I am a Senior Fellow in Legal Studies and Director of the Center for Legal and Judicial Studies at The Heritage Foundation, a nonpartisan research and educational organization. I am a graduate of the University of Chicago Law School and a former law clerk to the U.S. Fifth Circuit Court of Appeals. I also served in the U.S. Department of Justice, Office of Legal Counsel, during different periods in the Reagan, Bush, and Clinton Administrations, where I provided constitutional advice to the White House and four Attorneys General.

A number of concerns have been raised about the 2000 election. In my view, some are serious and some are not. I will divide my testimony today between two somewhat distinct areas. The first is whether the Supreme Court of the United States improperly interfered with the recent presidential election. The second is whether the states have taken adequate steps to ensure that only eligible voters are voting in federal elections.

If you find that the Supreme Court's exercise of jurisdiction or their decision in *Bush* v. *Gore* was in serious error, the Congress has some authority under Article III, section 2 to regulate the Court's appellate jurisdiction in future elections. If you find that the states have failed to take adequate steps to prevent vote dilution of eligible voters, you may exercise your powers under Article I, section 4 to alter the times, places and *manner* of congressional elections.

The Supreme Court's Election 2000 Rulings

I will turn first to an analysis of the Supreme Court's election rulings. At The Heritage Foundation, I edit a Supreme Court bulletin for our subscribers in which I report on the decisions and other major actions of the Supreme Court. I am also a member of the Bar of the Supreme Court and I frequently attend oral arguments at the High Court. So it was with some interest that I followed the election contests in the state and federal courts as they worked their way twice to the Supreme Court of the United States.

The most important constitutional holding of the U.S. Supreme Court in *Bush* v. *Gore* was that all of the recounts and re-recounts in Florida prior to December 12 were unconstitutional. That ruling was by a vote of 7-2, not 5-4 as it has been erroneously reported in many places. This 7-2 ruling is undoubtedly correct, and the only aspect of the vote that surprised me was that it was not unanimous. This is because there were several independent grounds for holding that the recounts were unconstitutional based on the Court's equal protection and due process precedents and the text of Article II. In fact, the two dissenting justices had to abandon positions they had previously taken in analogous cases to vote as they did.

I am disappointed that some lawyers who should know better are continuing their effort to mislead the public about the need for – and correctness of – the Supreme Court's December 12 ruling. These activist lawyers are joined by others who have a partisan motive to undermine the legitimacy of the current Administration. For example, I am well aware that debates still rage in the law schools over the Court's decision. But that says more about the politicized nature of American law schools

than about whether the decision was controversial in any objective sense.

In recent weeks, former Solicitor General Charles Fried, who teaches at Harvard Law School, and federal appeals court judge Richard Posner, who teaches at the University of Chicago Law School, have ridiculed the academic ferment over the Supreme Court's decision. Professor Fried has said that a newspaper ad by a number of law professors was a "preposterous" statement by a group of people "in the grip of partisan excitement." He is quoted in *The New York Times* as saying that "[t]he only thing that is beyond the pale is this kind of ridiculous rhetoric about the court disgracing itself."

Judge Posner has expressed similar sentiments and has said that at least one prominent member of the University of Chicago Law School faculty now regrets signing the letter and is trying to distance himself from it. But no one should be surprised that a number of legal academics will continue to churn out utter nonsense – for liberal agitprop is now a high art form in many American law schools.

The Supreme Court's December 4 and December 12 decisions speak for themselves and they are understandable to any intelligent person who takes the time to read them carefully. I will summarize some of the principal features for the Committee, but I urge you not to take my or anyone else's testimony or submissions at face value, particularly those that amount to thinly veiled attacks on the justices' motives. There was a time when the leading Supreme Court advocates were U.S. Senators, and while your modern duties may prevent you from actually arguing the leading cases of the day, I submit that you are fully capable of evaluating the correctness of a given case by yourselves.

That said, let me summarize what I consider to be some of the most important aspects of the Supreme Court's two decisions:

In both decisions, *Bush* v. *Palm Beach Co. Canvassing Bd. et al.* (Dec. 4, 2000) and *Bush* v. *Gore* (Dec. 12, 2000), all nine justices of the Supreme Court agreed that the cases were within the Court's jurisdiction because they presented important issues of federal constitutional and statutory law. Some have accused conservatives of hypocrisy for defending the federal suit, but there is nothing inconsistent with defending federal intervention in the 2000 presidential election dispute. Progressive nationalists may try to advance the position that states have no reserved power except that which the national government permits. But strong defenders of federalism have never taken the opposite position that the national government has no constitutional power of its own.

The federal judiciary is unquestionably vital in the vindication of federal rights. The U.S. Supreme Court would not have agreed to hear the Florida cases, no matter how important the election contests seemed to others, if it did not conclude that the case presented weighty issues of *FEDERAL* law. The real irony is that some liberal academics now invoke the crudest formulation of the states' rights argument in the ongoing debate. No principled federalist would sign on to such a formulation.

Outside of the racial context, I continue to question some aspects of the Court's decades-old jurisprudence that requires every vote in every political subdivision to be weighed exactly equally. Nevertheless, there is no doubt that this line of cases predated the 2000 election and was implicated by the inconsistent standards of vote tabulation applied in different parts of Florida. In the days leading up to the oral argument in the first Supreme Court case, I noted in an op-ed that the

Supreme Court should have considered the equal protection issue in its initial grant of certiorari. I predicted then that a ruling on the equal protection issue "would have the greatest impact in voiding the results from all selective hand recounts and end other ÿ attempts to cherry-pick votes. Because a statewide hand recount with uniform standards is increasingly unlikely, an equal protection ruling probably would be dispositive."

After numerous subsequent court proceedings, the Supreme Court finally took up that issue and seven justices ruled that all the previous recounts were unconstitutional because they violated equal protection and due process guarantees. It was obviously hard for any justice to disagree, although the two most ideological liberals, Stevens and Ginsburg, found a way to abandon their prior positions in pursuit of a contrary result. Stevens and Ginsburg argued that the inconsistent vote tabulation standards were "flawed" and "raise[d] serious concerns" but that the state courts could be counted on to take care of the problem. Would these two justices have ruled that literacy tests were only "flawed" and that state courts in the Jim Crow South were in the best position to resolve those issues? In any event, it was the four liberal justices who were evenly divided (2-2) on the most significant constitutional holding of the case.

Based solely on precedent, the equal protection rationale joined by seven justices was the strongest ground for the ruling. Nevertheless, I believe the separate opinion by Chief Justice Rehnquist for three members of the Court provided a more satisfactory basis for the ruling. The Chief Justice pointed out that all the hand recounts were illegal under Florida statutes and that Article II of the Constitution required the federal courts to enforce that state Legislature's mandate. This opinion is worth reading again if for no other reason than it is a fitting defense of the logical and sensible decisions that Secretary of State Katherine Harris made in applying the Florida election laws.

As for the hysterical rant that the majority was wrong to end the re-re-recounts on December 12, not doing so would have required the U.S. Supreme Court to overrule a federal statute that provides finality if that date is met, a Florida statute that was enacted to get that protection, AND a Florida Supreme Court decision that December 12 was the state deadline for recounts. It is hard to argue with that, even though Justices Souter and Breyer made a spirited attempt to do so. However, we now know, according to several independent news organizations, that Gore would have lost anyway even if the recounts had continued under the most favorable standard imaginable to him.

Others argue that it was "unfair" to Gore not to allow the recounts to continue after December 12 under uniform standards even if the law did not allow it. Yet, Bush raised the equal protection problem almost from day one. In response, Gore's lawyers repeatedly argued in federal district court, federal appellate court, and in briefs before the U.S. Supreme Court, that the issue was not "ripe" for the courts to consider. In other words, Gore urged the courts not to rule on the equal protection issue until the state process was completed. Thus, in the end, it was Gore who ran out the clock on the issue that seven justices of the U.S. Supreme Court ultimately relied on to invalidate his shady legal recount scheme. He who seeks unconstitutional, standardless recounts and tries to delay federal challenges to them, is in no position to complain that time has run out when the federal courts finally rule. In the law, as in the rest of life, choices have consequences.

The partisan wailing over the outcome is only surpassed by liberal anguish over judicial activism.

That the Florida Supreme Court's first and second tour de force of judicial activism would make any other judicial overlord blush deserved no comment from those who are now shocked that judges might let bias affect their rulings. Nevertheless, there is simply no evidence that the majority in the U.S. Supreme Court was controlled by partisan bias, and as an officer of the Court, I take serious issue with those who suggest it was. In any event, the liberal wailing may still help educate the public that judicial tyranny really does exist, even if it is misdirected in this case.

State Efforts to Ensure That Only Eligible Voters Vote in Federal Elections

In federal elections, Congress has an important responsibility to prevent fraud, improve vote counting accuracy, and ensure that American citizens' votes are not illegally diluted by people who are not eligible to vote. In the 2000 election, both of the major parties accused the other of irregularities or outright fraud. In an election as close as the past presidential election, the truth of these accusations matters, but so does the public perception. If the states are not doing an adequate job eliminating the possibility of fraud and improper voting in federal elections, it falls on Congress to take steps to fix the problems and reverse this corrosive perception.

Regardless of the intent of the Motor Voter law, it has helped create the most inaccurate voting rolls in our history. Citizens are registered in multiple jurisdictions at the same time, and very few states have effective procedures to ensure that those registered even are citizens. If you compound our sloppy voting rolls with the fact that over 15 percent of Wisconsin college students in one survey admitted voting more than once (several voted at least five times) and that absentee voter fraud has plagued many recent contests, you can almost guarantee that illegal voting may provide the margin of victory in a close contest. The most technically advanced nation and leader of the free world should do a better job of policing its democratic processes.

Still, Congress should not get involved unless two conditions are met: (1) the Constitution grants it the power to do so and (2) there are good reasons for Congress to act. Both conditions are met with regard to ensuring voting integrity. Article I, section 4 of the Constitution grants Congress the power to establish the times, places, and *manner* of congressional elections. Moreover, Congress helped create the current mess with the Motor Voter law, and it is unlikely to fix itself without congressional action (which should include a reexamination of the Motor Voter law itself). In any legislative action, Congress should leave as many alternatives open to the states as possible out of respect for legitimate state interests, but it ought to establish some minimum safeguards and standards to govern voter registration, voting procedures, and vote counting.

These minimal safeguards should address potential vote fraud, including multiple voting and absentee voting abuse, but these matters deserve careful debate. It is important that these measures do not go so far that they discourage voting. Still, the overwhelming majority of Americans would gladly comply with reasonable safeguards (such as showing some identification at the polls) in order to ensure that our elected officials really have won the elections that put them in office.

Non-Citizens and Disenfranchisement Based on Criminal Behavior

I want to contrast Congress's power to regulate the times, places, and manner of elections with

the power to establish voter qualifications. There can be no discrimination in voting based on race or gender, and the states may not impose long residency requirements, a poll tax, or deny the right of people 18 or older to vote because of their age. Beyond that, the states have the exclusive power to establish voter qualifications (even in federal elections) so long as the states apply the same qualifications for congressional elections that they do for the most numerous branch of the state legislature. The two principal voting restrictions in state law today involve non-citizens and those who have been convicted of certain crimes, usually serious felonies.

All states accept the basic principle that legal voters should be U.S. citizens. I am a second generation American. I hope that all legal residents pursue the necessary steps to become U.S. citizens just as my patriotic, immigrant grandparents did. But until they do become citizens, our state laws do not grant non-citizens the most important privilege of citizenship: the vote.

The estimates vary on the number of non-citizens who are registered to vote, but this number would include both legal resident aliens and illegal aliens. At no time have any of the four states where I have serially registered to vote asked me for any proof of citizenship, even though I must establish with proper forms of identification that I am eligible to work every time I change jobs. Indeed, some state procedures imposed in the wake of the Motor Voter law automatically register home owners and drivers and include many non-citizens. Instead of complicating the states' job in keeping non-citizens off their voting rolls, Congress should help the states to ensure that our vote is not illegally diluted by non-citizens.

The most hotly-debated restrictions on voting today are the laws that exist in different form in almost every state that disenfranchise persons convicted of various enumerated crimes that are either quite serious or indicate a particular degree of untrustworthiness, such as fraud or bribery. In recent years, there have been several bills introduced in Congress to overrule and ban such state laws. Congress not only has no enumerated power to interfere with state felon disenfranchisement laws, but state felon disenfranchisement laws are specifically sanctioned in section 2 of the Fourteenth Amendment and result in no reduction in a state's congressional representation.

Historically, criminal disenfranchisement laws have served two purposes. The first is that they are part of the sanction for specified crimes. This legitimate state purpose of setting the proper sanction to fit the crime would be partially frustrated with non-enforcement or attempts to overturn felon disenfranchisement laws. Criminal punishment takes many forms, including fines, incarceration, periods of probation or parole, restitution, and the relinquishment of the individual right guaranteed by the Second Amendment to own and use a gun. It is simply false to say that a felon has served his entire debt to society upon the completion of his prison sentence. It is a bad policy, and probably unconstitutional in itself, for Congress to try to lessen the sanction for state crimes. But this is what many people are urging Congress to do.

The other traditional reason for criminal disenfranchisement laws is based on the notion that those convicted of certain crimes are less trustworthy citizens and that they have forfeited their right to vote for at least a period of time, which varies from state to state. In every state disenfranchisement law of which I am aware, there is at least some process for those disenfranchised to restore their voting privileges. That is generally not the case with a felon's Second Amendment right to own or use a gun.

Both federal and state law presume that those convicted of certain felonies are never to be trusted again with a gun, even though that presumption is unfair to many felons.

Related to this second purpose is the concern that a large and important function of government is devoted to law enforcement. Criminal disenfranchisement allows law-abiding citizens to decide law enforcement issues and the proper allocation of scarce community resources without the dilution of voters who are deemed either to be less trustworthy or to have forfeited their right to participate in those decisions.

Nevertheless, some have argued that state disenfranchisement laws affect certain communities more than others. At first blush, it seems like a laudable goal to try to eliminate such a disparity, but it is unclear to me what is best for communities most affected by these laws. In general, those communities that have a higher rate of crime have a higher rate of disenfranchised criminals living among them. Given that many poor and minority communities are ravaged by crime, proposals to eliminate felon disenfranchisement laws could have a perverse effect on the ability of law-abiding citizens to reduce the deadly and debilitating crime in their communities. With regard to the traditional purposes of these laws, it could be argued that those communities that currently have the highest level of state disenfranchisement are the most protected by those laws and would be the most adversely affected by the vote of "unreformed" convicts in their communities. The fact that so many states have these felon disfranchisement laws is strong evidence that many citizens do not want their ability to influence crime control decisions to be diluted by convicted felons on parole or otherwise.

Criminal disenfranchisement laws go back at least as far as the Roman Empire and existed in the American colonies. That said, criminal disenfranchisement laws that were designed or intended to have a racially discriminatory effect are clearly unconstitutional under the Fourteenth and Fifteenth Amendments. At the turn of the Twentieth Century and shortly thereafter, a handful of southern states amended their felon disenfranchisement laws in an attempt to further bar African-Americans from voting. Yet, no such intentionally discriminatory law probably survives today and the federal courts are open to strike down any such law that does exist. Indeed, the Supreme Court struck down Alabama's felon disenfranchisement law when it concluded that past racial animus permiated the statute. See *Hunter* v. *Underwood*, 471 U.S. 222 (1985). Thus, if persuasive evidence exists that any current statute would not have passed absent racial animus, then the statute should and will be struck down.

However, the Fourteenth and Fifteenth Amendments do not outlaw a statute that has a disparate impact on a racial group but that lacks an invidious motive or intent. As the Supreme Court noted in the case striking down Alabama's criminal disenfranchisement statute: "[O]fficial action will not be held unconstitutional solely because it results in racially disproportionate impact. * * * Proof of racially discriminatory intent is required to show a violation of the Equal Protection Clause." *Hunter* v. *Underwood*, 471 U.S. at 227-28 (quoting prior cases). In short, findings regarding the disproportionate racial impact of many state felon disenfranchisement laws would do nothing to confer constitutional authority on Congress to address that disparity. Proof of such discriminatory intent, on the other hand, renders congressional action wholly unnecessary, as the case of *Hunter* v. *Underwood* shows.

Attached as an appendix to my testimony is a more detailed constitutional analysis of why Congress lacks the constitutional authority to overrule or ban current state felon disenfranchisement laws. But I do think Congress can play a constructive role in clarifying that federal law cannot be used to interfere with such laws.

Despite the Supreme Court's ruling that disparate effects of such laws are not sufficient to overturn them under the Fourteenth and Fifteenth Amendments, there is ongoing litigation seeking to have such statutes overturned under the federal Voting Rights Act. I believe such litigation should fail, in part because such an interpretation of the Voting Rights Act would, at a minimum, raise serious constitutional problems. But portions of the Voting Rights Act do invite some disparate impact claims, and the federal litigation might take years to resolve in any case. Congress should clarify in legislation that state criminal disenfranchisement laws are not a violation of federal law if the suit is based on a showing of disparate impact alone.

In addition, a strong argument can be made that the "weigh every vote equally" line of cases that was the basis for the majority opinion in *Bush* v. *Gore* requires states to enforce their felon disenfranchisement laws in a uniform way. There is substantial evidence that disenfranchised felons voted in large numbers in some counties in Florida, Wisconsin, and other states in the last presidential election. As we all know, the presidential vote was very close in both Florida and Wisconsin.

The Associated Press estimated that as many as 5,000 disenfranchised felons may have voted in Florida alone. Of the 445 Florida felons who were known to have voted illegally, 45 were murders, 16 were rapists, seven were kidnappers, 62 were robbers, and 56 were drug dealers. Because the Associated Press reported that nearly 75 percent of the Florida felons were registered Democrats, there is reason to believe that they did not provide the margin of victory in the presidential election. Given the larger margin of victory for Gore in Wisconsin, it is also unlikely that felons provided the margin of victory for him in that state either, but they may have provided the margin of victory in some of the close local elections.

Disenfranchised felon voting was not as big a problem in many counties of Florida and Wisconsin where local election officials took their state-law responsibilities to prevent illegal voting more seriously. People who are deeply concerned about vote dilution claims in the racial context, as is appropriate, should also be concerned about diluting the vote of law-abiding citizens, particularly when the harm is concentrated in certain parts of a state and not in others. I believe such equal protection claims may be adjudicated in any court, and that judges may provide appropriate relief in such cases.

However, Congress can only act pursuant to authority under section 5 of the Fourteenth Amendment if it found that uneven enforcement of felon disenfranchisement laws dilutes the votes of lawful voters in a number of states and its remedy is proportional to the equal protection violation. So while Congress has no constitutional authority to overrule or bar state felon disenfranchisement laws, it might have the authority to enact legislation to require even-handed application of such laws. That said, it is my view that Congress should take a neutral stance regarding state felon disenfranchisement laws unless the evidence is overwhelming such laws are being enforced in an uneven manner.

APPENDIX RE: CONGRESS'S LACK OF AUTHORITY TO OVERRULE OR BAN STATE FELON DISENFRANCHISEMENT LAWS

In recent years several bills have been introduced in Congress that are designed to overrule and ban state felon disenfranchisement laws. But for the following reasons, Congress lacks the constitutional authority to interfere with current state felon disenfranchisement laws in this way.

The Constitutional Framework of Analysis

The constitutional analysis of any congressional bill is bounded by certain bedrock principles, the most important of which is as follows: If the Congress is not acting pursuant to a specific grant of power set forth in the Constitution, the legislation is unconstitutional. This is because the national government is one of limited and enumerated powers—as opposed to one of inherent powers. No citation to Supreme Court authority is necessary for this proposition, although many are available. But the federal courts' interest in this principle since the Supreme Court struck down the federal gun-free school zone statute in *United States* v. *Lopez*, 514 U.S. 549 (1995) is especially noteworthy.

As Congress knows, this aspect of federalism is not just wise policy to be followed whenever Congress deems it appropriate; it is specifically designed to limit Congress's appetite to encroach on state power and individual liberty. This fundamental principle of federalism is recognized not only in the Tenth Amendment, but also in the text and structure of Articles I through III, and it is strongly reinforced in the debates on the Constitution. Although the Federalists and Anti-Federalists disagreed on the precise scope of federal power and the need for a Bill of Rights, everyone agreed that the national government could only exercise those powers enumerated in the written Constitution.

Of course, Members of Congress take their oath to uphold the Constitution seriously, but some public misconceptions remain about every Member's responsibility to ensure that Congress does not attempt to pass unconstitutional legislation. For example, it is not permissible for Congress to vote for unconstitutional legislation with the expectation that the courts will make the constitutional determinations. Although the courts have their own obligation to make such determinations in a case or controversy properly before them, it is no less the duty of Congress to adhere to and be bound by the Constitution. Although many cite *Marbury* v. *Madison* for a contrary view, the opinion of Chief Justice John Marshall recognizes that each branch of government has the same duty in its own realm to act constitutionally and pass on constitutional questions. It was simply Marshall's view that the courts, *no less than Congress*, shared in this responsibility.

So that no person thinks my general approach to constitutional analysis is invoked selectively, let me state clearly that I think the current majority and minority in Congress are almost equally guilty of forgetting these principles of constitutional law when a popular bill is before them. I have opposed many well-meaning bills in recent years solely because they were beyond the constitutional authority of Congress to enact. Bills to ban state felon disenfranchisement laws are no different.

Constitutional Analysis under Article I

Congress has no power to ban or preempt state felon disenfrachisement laws under Article I of the Constitution, and the question is not a close one. There is no textual grant of authority to Congress in Article I to override nondiscriminatory state voting qualifications; there is no Supreme Court precedent recognizing such a power; and there are three constitutional provisions that recognize that this is an inherent state power.

Article I, section 2 provides that voters for Members of the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The Seventeenth Amendment contains the exact same phrase with respect to voters for U.S. Senators. This provision essentially requires states to have the same qualifications for voters in state and national elections (at least with regard to legislative elections), but it also is an explicit recognition that states have the authority to set those voting qualifications—even for Members of Congress.

Other provisions of the Constitution prohibit voting qualifications based on race, sex, and young adult status, but Section 2 of the Fourteenth Amendment implicitly recognizes that states may deny the franchise to those who have engaged in "rebellion, or other crime." Thus, the Constitution recognizes the general power of states to set voting qualifications in Article I and the Seventeenth Amendment and the specific power of states to disenfranchise those convicted of a crime in the Fourteenth Amendment.

It could be argued that these three provisions of the Constitution recognize the states' inherent authority to establish voting qualifications and disenfranchise felons rather than provide a grant of such power to the states, but that is of no less constitutional significance. Like the operation of the Eleventh Amendment, Article I, the Seventeenth Amendment, and the Fourteenth Amendment provide powerful evidence that this state power was understood to be an aspect of state sovereignty that predated the Constitution and always remained with the states. See *The Federalist*, Nos. 52 and 60 (where James Madison and Alexander Hamilton concur with this understanding of Article I); *Alden* v. *Maine*, 527 U.S. 706, 741-43 (1999) (recognizing that aspects of state sovereignty are of no less constitutional significance if they are proven by the existence of the Eleventh Amendment rather than protected by its text).

Article I, section 4 cannot reasonably be read as a grant of power to Congress to define the qualifications of voters in national elections. Article I, section 4 allows the states to establish the "Times, Places and Manner of holding Elections for Senators and Representatives," except that "Congress may at any time by Law make or alter such Regulations.ÿ" "[S]uch Regulations" refers only to the "Times, Places, and Manner" of holding congressional elections—not to voting qualifications. Article I, section 4 simply cannot be read to overrule the plain meaning of Article I, section 2 and the same phrase in the Seventeenth Amendment. Although it is still a fashionable theory on some university campuses and among some special interest groups to argue that words are infinitely malleable, that approach would render a written constitution of no particular value. Members of Congress and judges faithful to their oath cannot engage in such nonsense. The text of Article I and the Seventeenth Amendment is clear.

Nor is there any Supreme Court authority for the proposition that Article I grants Congress power to establish voting qualifications. *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), which upheld an

18-year-old voting statute just prior to the ratification of the Twenty-Sixth Amendment, certainly is not to the contrary. In that highly fractured decision, there were three separate opinions for the five members who voted to uphold the statute. The most significant feature of *Oregon* v. *Mitchell* is that eight justices rejected the Article I argument when it was squarely presented in the case. Only Justice Hugo Black relied on Article I, section 4, and no other justice of the five-member majority would join his opinion. I also believe the Court's ruling in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) makes it unlikely that today's Court would rule the same way as the majority in *Oregon* v. *Mitchell* (absent the Twenty-Sixth Amendment). But I want to add that even if I am wrong about the continued validity of *Oregon* v. *Mitchell*, the Court certainly would not rely on any Article I power in its decision.

There are some fascinating and complex constitutional questions about which reasonable scholars can disagree in good faith, and there are some easy questions about which no reasonable high school student ought to disagree. Whether Congress has plenary power to establish the qualifications of voters under Article I is in the latter category, and the answer is "no."

The Fourteenth and Fifteenth Amendments

Section 1 of the Fourteenth and Fifteenth Amendments render unconstitutional any state law that has as its purpose the intentional disenfranchisement of a racial group. Although state statutes that disenfranchise felons predate the Revolutionary War and may serve legitimate, nondiscriminatory ends, any statute intended to have a racially discriminatory effect is nevertheless unconstitutional. Thus, congressional legislation is wholly unnecessary to address statutes with such a purpose, because they can and should be struck down by any court at any point in time.

Some historical evidence suggests that racial animus may have played a part in the passage or revision of a handful of states' criminal disenfranchisement laws 50-100 years ago. At least two of those states have largely repealed the offending statute. In Alabama, the courts agreed that the evidence was sufficient to conclude that one part of its statute was based on unconstitutional racial animus. See *Hunter* v. *Underwood*, 471 U.S. 222 (1985). It is unclear whether any state's current felon disenfranchisement law was passed because of racial animus. But if evidence exists that any current statute would not have passed absent racial animus, then the statute should be struck down.

However, the Fourteenth and Fifteenth Amendments do not outlaw a statute that has a disparate impact on a racial group but that lacks an invidious motive or intent. As the Supreme Court noted in the case striking down Alabama's criminal disenfranchisement statute: "[O]fficial action will not be held unconstitutional solely because it results in racially disproportionate impact. * * * Proof of racially discriminatory intent is required to show a violation of the Equal Protection Clause." *Hunter* v. *Underwood*, 471 U.S. at 227-28 (quoting prior cases). In short, findings regarding the disproportionate racial impact of state felon disenfranchisement laws do nothing to confer constitutional authority on Congress to address that disparity. Proof of such discriminatory intent, on the other hand, renders congressional action wholly unnecessary, as the case of *Hunter* v. *Underwood* shows.

Prior to the *Boerne* decision, the Supreme Court upheld some congressional statutes enacted pursuant to section 5 of the Fourteenth Amendment involving voting rights. These congressional

statutes were designed to prevent states from excluding racial minorities from voting through pretextual devices, such as literacy tests, which were facially neutral but had the clear history, pattern, practice, and intent of excluding racial minorities. Everyone knew that the real purpose of literacy tests was invidious discrimination and that the stated purpose was a pretext. Facially neutral statutes that have the intent of excluding one race from the equal protection of the law are unconstitutional and should be struck down by the courts. After *Boerne*, Congress has less power to enact prophylactic statutes that outlaw the use of such facially neutral practices in the future. But the special history, pervasive pattern and practice, and the clear invidious intent of literacy tests present a strong case for a congressional prophylactic ban on the use of that particular device, especially since it was only used in modern times as a tool of intentional discrimination.

In contrast to the literacy test example, Congress's power to ban state felon disenfranchisement laws lacks all of the criteria necessary for Congress to act under section 5 of the Fourteenth Amendment. Congress could not find that a substantial number of current felon disenfranchisement laws (if any) were passed as a pretext to discriminate against racial minorities. Almost every state has such a law, and the type and variety of such laws show no correlation to states with histories of racial discrimination. For example, some southern states have little or no felony disenfranchisement, and in the 2000 election, the people of Massachusetts enacted a new felon disenfranchisement law in response to a prisoner PAC that was formed in their state. In sum, there is no serious evidence that existing felon disenfranchisement statutes were passed for an improper racial motive.

Moreover, section 2 of the Fourteenth Amendment implicitly recognizes that states may have perfectly good reasons to disenfranchise those engaged in rebellion or other crimes. The framers of the Fourteenth Amendment would not have recognized these laws and made them an exception to the normal rules regarding the apportionment of Representatives in Congress if they did not believe such laws could operate in conformity with the rest of the Fourteenth Amendment. It would certainly be odd to argue that Congress could find that no state felon disenfranchisement statute passes muster under the Fourteenth Amendment when the Fourteenth Amendment itself acknowledges otherwise. The Supreme Court seemed to adopt this reasoning when it relied on section 2 of the Fourteenth Amendment to uphold a felon disenfranchisement statute against a nonracial equal protection clause challenge in *Richardson* v. *Ramirez*, 418 U.S. 24 (1974).

Even if the evidence allowed Congress to conclude that a few states passed their existing criminal disenfranchisement statutes to deny their citizens constitutional rights protected by the Fourteenth and Fifteenth Amendments and Congress stated that its ban was designed to address that narrow problem, the proposed solution would still be unconstitutional. In *Boerne*, the Supreme Court stated that before Congress could legitimately invoke section 5 of the Fourteenth Amendment "[t]here must be a congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end." Overruling the laws of the other 50 states regarding criminal disenfranchisement and preventing all 50 states from reenacting any that are not in conformity with Congress's dictates is not proportional to any constitutional violation by one or two states.