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Felon Disenfranchisement Laws: Partisan Politics in the Legislatures

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FELON DISENFRANCHISEMENT LAWS:
PARTISAN POLITICS IN THE LEGISLATURES†

Jason Belmont Conn*

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† This Note is an adaptation of my senior honors thesis written in the Department of Government at Cornell University. This thesis received the Sherman-Bennet Prize, which is awarded annually by Cornell University for the best essay discussing the principles of free government. The original thesis included the results of a survey of state legislators; for a copy of the thesis, please e-mail jbconn@umich.edu.

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INTRODUCTION

Civil rights attorneys and activists seeking to change felon disenfranchisement laws continue to file legal challenges in state and federal court. However, these lawsuits rarely succeed, and because many state courts and federal circuits have now rejected the strongest constitutional arguments against felon disenfranchisement,¹ voluminous case law fortifying felon disenfranchisement laws has developed.² Indeed, throughout American history, advocacy groups used the courts as vehicles for change, but frequent rejections of challenges and landmark decisions also stifled the progress of social movements.³ Although legal scholars continue to

1. See *Johnson v. Governor of Florida*, 2005 U.S. App. LEXIS 5945 (11th Cir. Apr. 12, 2005); Angela Behrens, Note, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN. L. REV. 231, 254 (2004).

2. This Note does not seek to rehash the history of challenges to felon disenfranchisement laws in the courts. For a discussion of this history, see ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 308 (2000); Behrens, *supra* note 1.

3. See Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution"*, 76 N.Y.U. L. REV. 1456 (2001); see also LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE 8 (David A. Schultz ed., 1998):

For some, the federal courts have proven to be trusted allies in furthering the cause of social reform, performing its function of protecting discrete and insular minorities and otherwise policing the political process to keep the channels of representation open. For others, the federal courts have proven themselves either to be clumsy agents at producing lasting social change or usurpers of political power rightly lodged in the states or with Congress and the President.

debate the merits of challenges to felon disenfranchisement laws, and the development of new arguments against these state laws remains a popular topic of scholarship,⁴ the opening for legal challenges to felon disenfranchisement laws may be closing.⁵

In contrast, significant potential for change exists in the state legislatures.⁶ Unlike the courts, where the doctrine of *stare decisis* limits the ability of the court to revisit legal arguments established in previous decisions,⁷ legislatures can repeatedly revisit the same issue each term. For this reason, state legislatures provide a limitless arena for challenges to felon disenfranchisement laws.

Much of the current literature discussing felon disenfranchisement laws focuses on the laws in the context of the civil rights, race, and suffrage

4. See, e.g., John R. Cosgrove, *Four New Arguments Against the Constitutionality of Felony Disenfranchisement*, 26 SAN DIEGO JUST. J. 157 (2004).

5. See, e.g., Nathan P. Litwin, Note and Comment, *Defending an Unjust System: How Johnson v. Bush Upheld Felon Disenfranchisement and Perpetuated Voter Inequality in Florida*, 3 CONN. PUB. INT. L.J. 236, 269 (2003) (discussing the how the case law gives the Supreme Court “ammunition to shoot down the plaintiff’s arguments against Florida’s felon disenfranchisement law”); Martine J. Price, Note and Comment, *Addressing Ex-Felon Disenfranchisement: Legislation vs. Litigation*, 11 J.L. & POL’Y 369, 407 (2002) (finding that “[e]fforts to attack disenfranchisement laws should be concentrated on the state and local legislatures”).

6. The focus of this Note is on the states because, remarkably enough, the right to vote even in federal elections varies by state. The constitutionality of any changes to state election laws by Congress is an unsettled question. In his testimony to the House Judiciary Committee on a proposed bill to enfranchise ex-felons, Roger Clegg, Vice President and General Counsel for the Center for Equal Opportunity, argued strongly against Congress’ authority to change federal election qualifications based on Article 1, Section 4. He said:

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 may be chosen . . . are defined and fixed in the constitution; and are unalterable by any legislature.’ (Emphasis in original.) In *The Federalist No. 52*, James Madison had written of Article I, Section 2: ‘To have left it [that is, [t]he definition of the right of suffrage] open for the occasional regulation of 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 Civic Participation and Rehabilitation Act of 1999: Hearing on H.R. 906 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 106th Cong. (1999) (alterations in original) (statement of Roger Clegg, Vice President and General Counsel, Center for Equal Opportunity), at <http://www.ceousa.org/clegg2.html>. Clegg’s interpretation of Article 1, Section 4 has been used by conservative congressmen to discourage the passage of a federal ex-felon enfranchisement law. Under current interpretations, any change Congress makes would at best extend only to federal elections.

7. For a discussion of the doctrine of *stare decisis*, see Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344 (1990).

movements.⁸ Additionally, most of the commentary on felon disenfranchisement correctly traces the origin of these laws to the “well-documented history of majority groups seeking to deny the right to vote to particular minority groups in the United States.”⁹ Race and fundamental rights frame many of the traditional arguments against felon disenfranchisement because the historical and current impact the laws have on the makeup of the electorate is a crucial part of equal protection challenges to felon disenfranchisement laws.¹⁰

Although it is tempting to assume that the same arguments made before the courts carry over as effective arguments in the state legislatures, this assumption is probably not accurate. Arguments based on fundamental rights may have pulled at the heartstrings of the citizen representatives found in the legislatures fifty years ago, but today’s state legislatures are professionalized and the legislators are more partisan, pragmatic, and calculating.¹¹ In the legislatures, partisan politics, not race, frames the debate.

This examination of the institutional changes to state legislatures, synthesized with an analysis of the handling of felon disenfranchisement laws by state legislatures, presents a troubling realization about the law today: in the twenty-first century, partisan politics moderates decisions about even the most basic and fundamental principles of democracy. This Note suggests that because state legislators follow their party leadership and position, a state’s traditional treatment of racial minorities, geographic location, and even ideology are not the strongest indicators of a state’s

8. See, e.g., *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney-Lind eds., 2002); Jamie Fellner & Marc Mauer, The Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (Oct. 1998), available at <http://www.sentencingproject.org/pdfs/9080.pdf>; Paul Hirschfield, *Losing the Prize? Assessing the Impact of Felon Disenfranchisement Laws on Black Male Voting Participation* (Paper presented at the Law and Society Association annual meeting, Jan. 10, 1999) (on file with author) (suggesting that felon disenfranchisement laws are “reminiscent of Jim Crow electoral laws”); Mary Fainsod Katzenstein & Katherine Davison Rubin, *How Different? A Comparison of the Movement Challenging Ex-Felon Disenfranchisement with Suffrage Politics of an Earlier Time* (Paper presented at the American Political Science Association annual meeting, Aug. 29, 2002) (on file with author).

9. See Behrens, *supra* note 1, at 246.

10. This challenge to felon disenfranchisement laws has been attempted where there is evidence that the legislature enacted the felon disenfranchisement law with the purpose of disenfranchising minorities. See *Hunter v. Underwood*, 471 U.S. 222 (1985); *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998); see also *Johnson v. Bush*, 214 F. Supp. 2d 1333 (S.D. Fla. 2002).

11. See generally Gary F. Moncrief et al., *The Old Statehouse, It Ain't What It Used to Be*, 21 *LEGIS. STUD. Q.* 57 (1996) (examining “significant changes in influence structures within the legislature[s]”).

disenfranchisement laws. Rather, partisan politics drives changes to the state laws governing felon voter eligibility.¹²

A. *Felon Disenfranchisement: Impact on the
Racial Makeup of the Electorate*

Felon disenfranchisement laws substantially impact the makeup of the American electorate. Approximately 4.7 million Americans, or more than 2% of adults, are barred from voting because of felon disenfranchisement laws.¹³ Almost three-quarters of the disenfranchised population are no longer in prison but are on probation, parole, or have completed their sentences.¹⁴ Over 1.7 million disenfranchised Americans are ex-felons who have finished serving their entire sentence.¹⁵

The demographic makeup of disenfranchised Americans largely mirrors the makeup of the prison population.¹⁶ It is estimated that 1.4 million Black men, or 13% of all Black men in the United States, are disenfranchised by the laws; this rate is seven times the national average.¹⁷ In the six states that do not allow any ex-offenders to vote, one in four Black men is permanently disenfranchised.¹⁸

There is no sign of change in the near future, as rates of incarceration continue to rise.¹⁹ Estimates show that at the current rate of

12. See *The Civic Participation and Rehabilitation Act of 1999: Hearing on H.R. 906 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999), at <http://www.ceousa.org/clegg2.html>.

13. Editorial, *Felons and the Right to Vote*, N.Y. TIMES, Jul. 11, 2004, at 12.

14. Jeff Manza & Christopher Uggen, *Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 778 (2002).

15. The Sentencing Project, *Felony Disenfranchisement Laws in the United States*, available at <http://www.sentencingproject.org/pdfs/1046.pdf> (last visited Mar. 29, 2005).

16. See Litwin, *supra* note 5, at 240 (finding “[p]roportionally over 16% of voting age African Americans in Florida cannot vote”).

17. The Sentencing Project, *supra* note 15.

18. *Id.*

19. In a NEW YORK TIMES editorial that he wrote just ten days before leaving office, in honor of Martin Luther King Day, President Bill Clinton wrote that he agreed with W.E.B. DuBois when he said “the problem of the 20th century is the problem of the color line.” William Jefferson Clinton, Editorial Desk, *Erasing America’s Color Lines*, N.Y. TIMES, Jan. 14, 2001, at 17. In the editorial, President Clinton outlined what he believed were the greatest civil rights problems that America would face in the 21st century. He discussed drug laws, crime, prison policy, and the death penalty. But the issues that he spent the most space discussing were related to voting rights and election law:

We must do more to ensure that more people vote and that every vote is counted. To that end, I urge the new administration to appoint a nonpartisan presidential commission on electoral reform, headed by distinguished citizens like former presidents Gerald Ford and Jimmy Carter. Such a commission should gather facts and determine the causes—in every state—of voting

incarceration, three in ten of the next generation of Black men will be disenfranchised at some point in their lifetime, and certain states will disenfranchise 40% of their Black male residents in the next decade.²⁰ These statistics demonstrate the way in which felon disenfranchisement laws impact the racial makeup of the electorate by significantly reducing the number of eligible Black voters.

Because felon disenfranchisement impacts the racial makeup of the electorate so significantly and because many of the disenfranchisement laws were originally enacted as a way of suppressing the electoral power of racial minorities, many of the court challenges focus on the laws' racial impact. However, it is important to recognize that in state legislatures, where partisan politics drives policy, the racial makeup of the disenfranchised may not be important in and of itself; rather, it may be important to the extent race connects to political party.

B. Syllabus

Part I of this Note describes the professionalization of state legislatures in the United States. Over the last fifty years, significant structural changes have altered the way in which state legislatures operate and also the role that partisan politics plays in the decision-making process. Part II examines the partisan nature of felon disenfranchisement laws. Such laws are somewhat unique because not only is the battle to change them politically charged, but the result of any legal change impacts politics itself by changing the makeup of the electorate. This Part concludes that any changes to felon disenfranchisement laws will be made based on partisan politics and suggests a framework for determining where such changes may occur. Part III examines three states with professionalized legislatures

disparities, including those involving race, class and ethnicity. It should make recommendations to Congress about how to achieve fair, inclusive and uniform standards for voting and vote counting. It should also work to prevent voter suppression and intimidation and to increase voter participation.

Here are two places to start: We should make Election Day a national holiday. And it is long past time to give back the right to vote to ex-offenders who have paid their debts to society.

Id. Just a few months earlier, voting rights may not have been an issue that President Clinton would have included in his final editorial in the *NEW YORK TIMES* before leaving office, but in the aftermath of the 2000 presidential election and the controversy that surrounded the upcoming inauguration of President George W. Bush on January 20, 2001, voting rights were a major concern for Americans. It was in this spirit that President Clinton made voting rights the focus of two recommendations he gave to the new administration. *Id.*

20. The Sentencing Project, *supra* note 15.

in which the felon disenfranchisement laws have recently changed. This section demonstrates that partisan politics drove those changes. Part IV scrutinizes the complexities of the partisan interests in Massachusetts, a state that was reassessing prisoner voter eligibility, and Delaware, a state with an "unprofessionalized" legislature.

I. THE PROFESSIONALIZATION OF STATE LEGISLATURES

To understand the role that partisan politics plays in state legislatures, it is important to be familiar with how state legislatures operate today, and how changes to legislatures over the last fifty years affect the interests of today's legislators. Three significant periods of institutional change to state legislatures occurred in the post-World War II era: Reorganization, Professionalization, and Institutionalization.²¹ These changes have led to a rise in the role of partisan politics at the state level.

State legislatures in the United States were traditionally citizen legislatures that did not look anything like the politicized legislatures of today. Partisan politics was not a strong force in state government for most of American history; as one scholar observed at the beginning of the 20th century:

In practice . . . most questions of State legislation and administration are not party questions; and political differences between the chief executive and the legislature are less serious than in the national government. Serious conflicts in State affairs between the two branches are indeed as likely to arise when they are of the same party as when they are of opposing parties.²²

Although not a great deal of literature focuses on the history of state legislatures prior to the 1950s,²³ political scientists generally agree that "[a]mong U.S. political institutions, few have undergone the degree of change experienced by state legislatures."²⁴

At the Founding, state legislatures enjoyed a great deal of power, largely in reaction to the distaste colonists had for the colonial governor, a near monarchy which was only accountable to England.²⁵ Thus, the first state constitutions made the governorship an elected position, and in order

21. See Alan Rosenthal, *Is the Party Over? Trends in State Legislative Parties*, SPECTRUM: J. ST. GOV'T 5, 6-8 (2002) [hereinafter Rosenthal, *Is the Party Over?*].

22. John A. Fairlie, *The State Governor: I*, 10 MICH. L. REV. 370, 375 (1912).

23. See John A. Worthley, *Public Administration and Legislatures: Past Neglect, Present Probes*, 35 PUB. ADMIN. REV. 486, 486-90 (1975).

24. Moncrief et al., *supra* note 11.

25. See Fairlie, *supra* note 22, at 370.

to maintain a powerful legislature, the legislatures elected the governor.²⁶ But by about 1850, as state government expanded and the need for a more centralized administration emerged, those states that did not already, switched to hold their gubernatorial elections by direct popular vote and made gubernatorial terms longer.²⁷ The state governor was no longer directly accountable to the state legislature and “the position of the State governor . . . [was] strengthened to a notable extent . . . by the expansion of State administration and a considerable increase in the appointing power of the governor.”²⁸ The result was a significant increase in the power of the governor relative to the legislature.²⁹ Between the 1850s and the middle of the twentieth century, governors dominated state political power and few scholars questioned this unbalanced power structure.³⁰ When scholars began examining the institutional strength of state legislatures in the 1950s and 1960s, they found “moribund institutions” that needed considerable reorganization if they were to regain the position of power they enjoyed at the Founding.³¹

Until the 1950s, the political and administrative processes of state governments received little attention.³² However, after the Hoover Commission examined administrative reorganization at the federal level,³³ government reorganization generated increased academic and public interest, and many states began examining their administrative processes.³⁴

26. *Id.* at 371.

27. *Id.* at 372.

28. *Id.*

29. *See id.* at 375–79 (discussing the powers of the governor over the legislative process).

30. *See* Worthley, *supra* note 23, at 486–90.

31. *See* Moncrief et al., *supra* note 11.

32. For a more detailed discussion of this subject, see Malcolm E. Jewell, *The Neglected World of State Politics*, 44 J. POL. 638, 638–57 (1982); Carl W. Stenberg & David B. Walker, *Federalism and the Academic Community: A Brief Summary*, 2 PS 155, 155–67 (1969).

33. As Herbert Hoover wrote, “one of the important purposes of the [Hoover] Commission was to open the doors of understanding of the functions of our government to our people at large.” NEIL MACNEIL & HAROLD W. METZ, *THE HOOVER REPORT 1953–1955: WHAT IT MEANS TO YOU AS CITIZEN AND TAXPAYER* (1956). The bulk of the meetings for the Hoover Commission occurred between 1953 and 1955, but there have been other commissions with similar purposes that have spun off from that original group of meetings; some have even used the name “Hoover.”

34. *See* John A. Perkins, *Reflections on State Reorganizations*, AMER. POL. SCI. REV. 507 (1951) (“Many of the states that are now considering what should be done to overhaul the structure of their administration have been prompted to do so by the recent popularization of the administrative reorganization idea brought about by the Hoover Commission report and by public interest in it.”).

A. Reorganization in the 1960s and 1970s

In the late 1960s and 1970s, many states completely modified their state legislatures politically and changed their capitols physically. The goal of the modifications was to make legislatures more powerful in relation to the executive branch, or governor.³⁵ A 1971 report by the Citizens Conference on State Legislatures made seventy-three recommendations to all fifty states and a number of recommendations to individual states as to how state legislatures could become more modern, professional, efficient, and member-friendly.³⁶

During this period of reform, legislators began spending more time working during legislative sessions and between sessions.³⁷ Forty-three of the states changed their constitutions so that the legislature could meet annually, instead of biennially, and legislatures in some of the more populous states began meeting year-round.³⁸ The extra time helped the legislatures accomplish four main goals: become more involved in policymaking; help shape the state budget; play a role in running the government itself; and become a constant presence that could serve as a check to executive power.³⁹

TABLE 2.1
ANNUAL AND BIENNIAL LEGISLATIVE SESSIONS
IN THE STATES, 1960 AND 2001⁴⁰

YEAR	STATES WITH ANNUAL SESSIONS	STATES WITH BIENNIAL SESSIONS
1960	19	31
2001	44	6

Capitol buildings were expanded or rebuilt. Not only was increasing the space and expanding the property a practical move to make room for larger staffs, but the symbolic act of making the Capitol into a

35. See SARAH F. LIEBSCHUTZ, *NEW YORK POLITICS AND GOVERNMENT: COMPETITION AND COMPASSION* 85 (1998) (discussing the changes made in New York state).

36. See Alan Rosenthal, *State Legislative Development*, 21 *LEGIS. STUD. Q.* 169, 171 (1996) [hereinafter Rosenthal, *State Legislative Development*].

37. See *id.*

38. California, Pennsylvania, Illinois, Massachusetts, Ohio, Wisconsin, Michigan, and New York began to stay in session throughout most of the year at this time.

39. See Rosenthal, *State Legislative Development*, *supra* note 36, at 171.

40. Keith E. Hamm & Peeverill Squire, *A 'Tools of the Trade' Look at Comparing Congress with State Legislatures* (Paper presented at the American Political Science Association annual meeting, Aug. 29–Sept. 2, 2001) (on file with author).

legislature-centered complex gave legislators a sense of empowerment. Legislators, who traditionally worked from home or met outside of the Capitol complex, now worked from their government offices. The addition of meeting rooms accommodated caucus discussions and committee hearings.⁴¹

The reform movement succeeded in altering the way that state governments operated, but nowhere was the increase in legislative resources more apparent than in the large increase in staffs. As the legislatures modernized, larger staffs met the increasing workload of legislators.⁴² In addition, legislators started receiving expert political and policy advice on decisions they made.

Today, many legislators in larger states have staffs that mirror those of United States Congressmen. For instance, in New York state:

The legislature now has the staff to conduct its own analyses and to form its own proposals. There are now staff members who have been through numerous budget negotiations and who are quickly able to determine the governor's position. They have 'institutional memory' and are not ignorant of past debates and decisions. There are staffs who conduct long-range studies on policy development and oversight. Staff of the Assembly Ways and Means Committee and the Senate Finance Committee either conduct or contract for economic forecasts for the state to help guide them in preparing analyses of anticipated revenues. Legislative staff members still rely on executive branch agencies for information, but the era when the legislature had to rely on executive branch personnel for interpreting that information is over.⁴³

With the ability to personally assist or perform favors for more constituents, larger legislative staffs helped to secure more support for their bosses. Legislators sent out more press releases, answered more letters, wrote more legislation, and took more politically savvy positions. Although staff members are not supposed to partake in political activity while being paid by the state, staffs began to take care of a great deal of the legislative work, thus leaving more time for legislators to fundraise and campaign.⁴⁴ All in all, staffs provided a huge electoral advantage for

41. See Rosenthal, *State Legislative Development*, *supra* note 36, at 170.

42. EDWARD SCHNEIFER & JOHN BRIAN MURTAUGH, *NEW YORK POLITICS: A TALE OF TWO STATES* 98 (2001).

43. LIEBSCHUTZ, *supra* note 35, at 85.

44. See generally Susan Webb Hammond, *Legislative Staffs*, 9 *LEGIS. STUD. Q.* 271, 271-317 (1985).

incumbents.⁴⁵ That advantage helped to jumpstart the second major period of institutional change for state legislatures: professionalization.

B. Professionalization

In 1974, Alan Rosenthal wrote that "there is widespread agreement among political scientists that turnover in state legislatures is excessive and that rapid turnover detracts from the performance of both the lawmaking and watchdog functions and weakens the institution."⁴⁶ At the time, many legislators did not view their positions as full time jobs. But after the workload increased during the period of reorganization and legislative positions gained prestige, legislators began taking their positions more seriously and focused more effort on their legislative duties.

Unlike the deliberately planned process of reorganization, professionalization was a somewhat inadvertent consequence of the reorganization process.⁴⁷ "As state legislatures . . . improved their decision making capability through procedural changes, longer sessions, increased staff, and better resources, they also . . . created the conditions for a different breed of legislator; that is, legislators who find the new professional institution an attractive place in which to build a career."⁴⁸

As indicators of professionalization, political scientists generally use compensation levels, size of staff, time spent in session, and continuity of service by legislators.⁴⁹ During the 1980s and early 1990s all of these indicators rose dramatically, suggesting a significant increase in the professionalization of legislatures.⁵⁰

Salary increases during the 1980s also helped to professionalize the states' legislatures. In some larger and more professionalized states, a legislator could make a living working solely in that capacity. For example, in his 1993 analysis of retention in the New York state legislature from

45. Kenneth Silver, *New York's Nightmare Legislature*, 5 CITY J., Spring 1995 ("Many staffers who perform constituent services during the legislative session go on temporary leave during election season to work on campaigns.").

46. Alan Rosenthal, *Turnover in State Legislatures*, 18 AM. J. POL. SCI. 609 (1974).

47. These changes have not been universally embraced. In an attempt to quell the movement towards professionalization, some states looked for ways to purge career politicians from the legislatures. Concerns over institutionalization and its potential negative effects on representative government led many legislatures to consider term limits in the early 1990s. In fact, over forty states considered such limitations in 1991. Many states opted not to impose term limits. The failure to pass such laws is a testament to the desire of legislators to remain in office and make a career out of legislating. See generally Cynthia Opheim, *The Effect of U.S. State Legislative Term Limits Revisited*, 19 LEGIS. STUD. Q. 49 (1994).

48. See Moncrief et al., *supra* note 11, at 57.

49. See Rosenthal, *State Legislative Development*, *supra* note 36, at 174.

50. See *id.*

1870–1990, Jeffrey Stonecash found that even when adjusting a legislator's salary for inflation against the Consumer Price Index, today's salaries are still substantially greater than those of the past, and the largest salary increases have come since 1980.⁵¹ Similar patterns of salary increases during this time period have been documented in legislatures across the country.⁵²

But maybe the most significant trend of the 1980s and 1990s was the high rate of incumbent success in legislative elections, which climbed to mirror that of the United States Congress.⁵³ Essentially, legislators ran for reelection at a higher rate and succeeded more often.⁵⁴

Finally, the number of legislators listing "Legislator" as their full time occupation rose in the 1980s and 1990s.⁵⁵ These professional legislators had a lot more to lose in an election than their predecessors, as a defeat at the polls meant a loss of their career rather than merely a leisure pursuit.

As a result of professionalization, legislators in the 1990s needed more political savvy, so they utilized polling data and consultants to help ensure reelection. The politics of legislatures in many states began to reflect those of the United States Congress.⁵⁶

C. Institutionalization

Arguably, the period of institutionalization overlapped with the period of professionalization, and many states remain in the process of institutionalization today.⁵⁷ Alan Rosenthal borrowed Nelson Polsby's notion of institutionalization as it applied to the United States Congress and used it to look at the changing role of the legislature in the 1990s.⁵⁸ He noted three important characteristics of an institutionalized legislature. First, the membership is stable and largely unchanging. The leadership is recruited internally and the membership has a significant term of office.

51. Jeffrey M. Stonecash, *The Pursuit & Retention of Legislative Office in New York, 1870–1990: Reconsidering Sources of Change*, 26 *POLITY* 301, 305 (1993).

52. See Rosenthal, *State Legislative Development*, *supra* note 36, at 174.

53. See Moncrief et al., *supra* note 11, at 58.

54. See Rosenthal, *State Legislative Development*, *supra* note 36, at 187.

55. See *id.* at 180. There are two explanations for this change. First, with the increase in time and salary, legislators could afford to legislate as a full time job. Second, because legislating took up a substantial amount of time, the only citizens who could afford to serve as legislators were those who were independently wealthy or dependent on a family member.

56. See Peverill Squire, *Legislative Professionalization and Membership Diversity in State Legislatures*, 17 *LEGIS. STUD. Q.* 69 (1992).

57. See Rosenthal, *State Legislative Development*, *supra* note 36, at 183.

58. See *id.* at 185.

Second, the organization is complex and difficult for outsiders to understand. The functions of the organization are internally separated and there is a clear division of labor among the membership. In addition, members have aids such as salaries, allowances, staffs, and office space. Third, the organization uses "universalistic criteria" to select its leaders instead of unrestricted methods of doing internal business. In other words, experience and seniority are more important than talent and expertise.⁵⁹

During the 1990s, many state legislatures came to exhibit the three criteria listed above. Additionally, some individual party caucuses became institutionalized themselves. A majority party in each state selects the Speaker of the House or President of the Senate, and its majority caucus appoints all major committee heads and doles out the committee assignments. In almost all states, the majority party controls its chamber's organization, overseeing rules and deciding how to maximize its power through closed caucus meetings.⁶⁰ Because of the complexity of the politics and operations of the legislature, senior legislators can expect to hold better positions within the party and legislature as a whole. Consequently, it is difficult for a freshman legislator to gain substantial power.

The institutionalization of legislatures centralized political power in the party leadership and caucus. Thus, loyalty to one's party became necessary to gain political power, and partisanship became fiercer.⁶¹

D. *The Role of Partisanship in Institutionalized Legislatures*

As a result of reorganization, professionalization, and institutionalization, state legislatures today differ greatly from a half century ago. Legislating is now a full time job in many states, and legislators reap the electoral benefits of large resources and professional staffs. Because of the increase in prestige and salary, legislators, now more than ever, make their decisions based on electoral politics and carefully consider the impact of each policy decision on their electoral chances.

The decision-making process in today's legislatures is much more complex than it was in the past.⁶² Legislators pay attention to the desires of their constituents but also to their party leadership, lobbyists, and voter registration.⁶³

59. See *id.* at 184.

60. See generally Ronald D. Hedlund & Keith E. Hamm, *Political Parties as Vehicles for Organizing U.S. State Legislative Committees*, 21 LEGIS. STUD. Q. 383 (1996).

61. See Rosenthal, *Is the Party Over?*, *supra* note 21, at 8.

62. See Paula L.W. Sabloff, *The Decision Process of a Professionalized Legislature: A Cognitive Anthropology Approach*, 17 POL. BEHAV. 403 (1995).

63. See ROGER DAVIDSON & WALTER OLESZEK, *CONGRESS AND ITS MEMBERS* 275 (2000) (discussing the "predisposition and conversation" model).

Institutionalization led to an increase in the importance of political parties for state legislatures. In order to receive appointments to committee chairmanships and funding from political action committees, legislators must maintain loyalty to their parties. Since most legislators hope to make a career out of elected office, they want to continue to move up the ladder of seniority and receive internal promotions.⁶⁴ Thus, a legislator is like any employee in a large company; he focuses his efforts on promotion within the internal structure by being loyal and valuable to his boss. Loyalty to one's political party, one's boss, is paramount for success.

E. Ambition and Leadership Selection

Legislators have an incentive to vote the party position on key issues because of their own personal ambitions within the institution. Because many districts are gerrymandered so that one party has a significant majority and voters usually vote the party line, incumbents have an extraordinarily high rate of success in contested general elections.⁶⁵ Malcolm Jewell and David Breaux found that from 1968 to 1986 the rate of incumbent success rose only slightly, largely because incumbents already won at an extremely high rate in 1968.⁶⁶ Most legislators do not have to worry about reelection, and legislators in these "safe" positions may concern themselves with climbing the institutional ladder.⁶⁷

With increased salary and prestige, leadership positions and committee chairmanships attract the budding legislator. Just as any employee

64. For example, in New York state, the legislature as an institution has become a political force of its own, taking priority over any other interests:

For more than two decades, a Republican majority has controlled the State Senate, and a Democratic majority has controlled the State Assembly. The result has been government by quid pro quo—the two majorities posturing over their differences while tacitly collaborating to accommodate the permanent interests of each, usually by spending more public money. New York State is governed, in effect, by a single Incumbency Party, dedicated above all to preserving its own power and privileges.

Silver, *supra* note 45.

65. Malcolm E. Jewell & David Breaux, *The Effect of Incumbency on State Legislative Elections*, 13 LEGIS. STUD. Q. 495 (1988).

66. *Id.*

67. See Larry M. Bartels, *Partisanship and Voting Behavior, 1952–1996*, 44 AM. J. POL. SCI. 35 (2000) ("Partisan loyalties in the American public have rebounded significantly since the mid-1970s, especially among those who actually turn out to vote."). Bartels concludes that partisan loyalties of voters have led to partisan loyalties of presidents and representatives at all levels of government. See *id.*

hopes for a promotion and increased responsibility, these legislators want leadership positions.

Given the current structure, the majority party's leadership generally has the most say concerning appointments to leadership positions. When a leadership position is reserved for a member of the minority party, in most cases, the minority party's leadership doles it out. In this way, each party controls the promotional opportunities of its members. As described earlier, loyalty to the party is the easiest way to get a leadership promotion, and disobedience can quickly lead to a demotion under most systems.⁶⁸

If the legislators do not follow the party leadership's instructions, in many cases, they may face a difficult primary in the next election: "Even if they represent districts that are considered statistically safe, they can be challenged from within their own party in a primary."⁶⁹ With the state party leadership backing another candidate, legislators may lose an opportunity for re-election.

Finally, state parties commonly use state legislatures as recruiting grounds for federal offices.⁷⁰ A simple examination of current United States Representatives' and Senators' biographies reveals this.⁷¹ A legislator who understands his partisan role is more likely to be identified as a loyal partisan worthy of support for higher office. As many legislators hope to rise to higher political office, ambitious state legislators have a strong reason to support the party line and vote with party leadership.

F. Partisan Staff

Legislators lack knowledge about many of the issues on which they vote.⁷² Most legislators do not have large full time staffs to help them research policy proposals or understand complex legislation. For this reason, many legislators rely on partisan staff and lobbyists to help them determine positions. In a poll of legislators who served in their respective legislatures for more than fifteen years,⁷³ 43% said that the influence of partisan staff increased during their tenure.⁷⁴ Additionally, 50.9% of the

68. See James M. Snyder & Tim Groseclose, *Estimating Party Influence in Congressional Roll-Call Voting*, 44 AM. J. POL. SCI. 194 (2000).

69. Rosenthal, *Is the Party Over?*, *supra* note 21, at 5.

70. See B. Dean Bowles, *Local Government Participation as a Route of Recruitment to the State Legislature in California and Pennsylvania, 1900-1962*, 19 W. POL. Q. 491 (1966).

71. See *id.*

72. See Christopher Z. Mooney, *Information Sources in State Legislative Decision Making*, 16 LEGIS. STUD. Q. 445 (1991).

73. See Moncrief et al., *supra* note 11, at 57, 61.

74. Forty-five percent said that their influence had stayed the same, and only 11.9% said that it had decreased. See *id.*

legislators said that the influence of lobbyists had increased since they entered the legislature.⁷⁵

Even with the professionalization of many state legislatures, legislators still do not spend a large amount of their time on policy analysis.⁷⁶ As a result, legislators sometimes completely lack knowledge about a policy area on which they vote.⁷⁷ Consequently, they will follow the party's position as determined by partisan staff.

G. Partisanship at the State Level

Partisanship is a strong force at the state level for two main reasons. First, because of the professionalization and institutionalization of state legislatures, ambitious career politicians who rely on their elected office for income focus their legislating efforts on moving up the party ranks and receiving "promotions" within the institution. To secure their party's nomination, a legislator must remain a loyal partisan. Second, legislators today lack knowledge of many of the issues on which they vote. They rely on partisan staffs and the leadership to help them determine positions on key legislation.

II. THE PARTISAN NATURE OF EX-FELON DISENFRANCHISEMENT LAWS

The development of ex-felon disenfranchisement laws can be understood only through an examination of state politics in the twenty-first century. As noted earlier, any changes to ex-offender voter eligibility will

75. Thirty-six and six tenths percent said that their influence had stayed the same, and only 12.5% said that it had decreased. *See id.*

76. *See id.* at 64 (finding that only 13.9% of legislators surveyed disagreed with the statement that "[l]egislators are more likely today to give a higher priority to their reelection than to legislative matters").

77. In Spring 2001, a research group I worked with at Cornell University completed a survey of Pennsylvania state senators on the privatization of prisons. *See generally* Jason Conn & Paul Flaharty, *Policy Paper on the Partisan Politics of Privatization of Prisons in Pennsylvania* (2001) (unpublished undergraduate paper, Cornell University) (on file with author). By electronic mail, we contacted the Pennsylvania state senators and asked them to provide their position on the privatization of Pennsylvania's prison system. Many state senators from this professionalized chamber knew very little about prison policy or privatization. *Id.* Although the privatization of prisons would impact thousands of prisoner's lives, alter areas of the state budget significantly, and hand over incarceration duties to a private entity for the first time in the state's history, state senators knew few details. Despite an overall lack of knowledge on the subject, almost all state senators voted on the legislation. The support for privatization was split strictly down partisan lines: Republicans supported privatization; Democrats did not. *Id.*

most likely originate at the state level. Therefore the institutionalization, ideological differences, and partisanship evident in state government today play a significant role in determining whether an ex-offender may vote in a certain state.

The debate at the state level over ex-felon disenfranchisement laws remains partisan for three reasons. First, allowing ex-felons to vote will change the partisan makeup of the electorate in ways that will aid Democrats. Second, criminal justice policy and being viewed as “tough on crime” have become a central part of many legislative campaigns. Third, the organizations that lobby on each side of the debate over felon disenfranchisement laws have clear ties to the political parties.

A. *Changing the Makeup of the Electorate*

When debating felon disenfranchisement laws, the conversations are intensely political because repealing them would change the makeup of the electorate. State politicians consider the number of people that will enter the electoral process in their states should the laws change.⁷⁸ Politically, they assess how they expect those ex-offenders will vote in the next election, or if they will vote at all.

Because voters in state elections tend to vote strictly based on party, the party registration of the potential electorate is a significant factor that party leadership must consider when developing a position. Jeff Manza and Christopher Uggen examined the likely voting decisions that ex-offenders would make given the opportunity to vote.⁷⁹ They used National Election Studies data to pair the demographic characteristics of the felon population with matching demographic groups in the general population.⁸⁰ Manza and Uggen found that ex-felons would overwhelmingly support Democratic candidates and register as Democrats if given the option.⁸¹ This seems obvious when one considers that three social groups that have traditionally supported the Democratic Party are over-represented in the prison population: Blacks, those without a high school

78. It is estimated by Demos, a political action group working to restore felon voter eligibility, that 4,653,587 Americans were disenfranchised by felon disenfranchisement laws in the 2000 election, and about 1,609,710 of the disenfranchised are ex-felons who have completed their sentences and are back in their respective communities. See Demos, *Restoring Voting Rights to Citizens with Felony Convictions* (Winter 2003–04), available at http://www.demos-usa.org/pubs/FD_-_Toolkit.lr.pdf (last visited Mar. 29, 2005). However, because the laws vary between states, certain states have a larger number of the disenfranchised population.

79. Jeff Manza & Christopher Uggen, *Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777 (2002).

80. See *id.*

81. See *id.* at 794.

degree, and low-income earners.⁸² Democrats would gain a significant number of potential voters at the state level if legislation that enfranchises ex-felons passes.

Data suggest that had felons been allowed to vote in the 2000 election, the partisan makeup of the United States Senate would be different and President George W. Bush would have lost to former Vice President Al Gore in Florida by a 60,000 vote margin.⁸³ In addition, control of entire state legislatures in certain states would be different had felons or ex-felons been allowed to vote.⁸⁴ In other words, the political stakes are high in debates over ex-felon disenfranchisement laws.

B. Party Platforms and Issue Framing

Equally pertinent as the development of state legislatures is the development of party positions on issues relating to ex-felon disenfranchisement laws. Politically, ex-felon disenfranchisement laws are often discussed today within the context of two issues: civil rights policy and “tough on crime” policy. Democrats are often associated with policies related to civil rights⁸⁵ and Republicans are often touted as the “tough on crime” party.⁸⁶ These traditional political stances guide the votes of Democrats and Republicans on ex-felon disenfranchisement legislation and helped to create a partisan divide on this issue.

82. Ninety percent of Blacks, 58% of those without a high school degree, and 57% of low income earners supported Gore in 2000. See Christopher Uggen et al., *Public Attitudes Towards Felon Disenfranchisement in the United States* (Paper presented at the National Symposium on Felon Disenfranchisement Laws, Sept. 30, 2002).

83. It is worth noting that even Manza and Uggen suggest that 60,000 may be too high a number. See Manza & Uggen, *supra* note 79, at 792. But they point out that even if their estimates are off by half, Gore still would have won by a comfortable 30,000 vote margin. *Id.* In fact, even if they were off by 59,000 votes, Gore would still have won. See *id.* But see Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 J. LEGAL STUD. 85, 122 (2004) (suggesting that “the conventional wisdom that disenfranchisement depresses state-level voter turnout is incorrect” and criticizing the methodology used in previous studies).

84. See Manza & Uggen, *supra* note 79, at 796.

85. See Robert S. Erikson, *The Relationship Between Party Control and Civil Rights Legislation in the American States*, 24 W. POL. Q. 178 (1971) (finding that “there were more civil rights enactments when the Democrats were in power”); see also Mary Alice Nye, *The U.S. Senate and Civil Rights Roll-Call Votes*, 44 W. POL. Q. 971 (1991).

86. Sara Sun Beale, *Rethinking Federal Criminal Law: What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 40 (1997).

1. Democrats: Civil Rights

Civil rights often frame discussions of ex-felon disenfranchisement.⁸⁷ The right to vote for the representative of one's choice is believed to be a basic civil right. As the modern Democratic Party consistently associates with policies that broaden and expand civil rights, supporting ex-felon voting rights is consistent with the Democratic agenda of the last decade.

Mary Alice Nye examined the two parties' platforms with regard to civil rights issues and found that in the United States Congress, Democrats supported civil rights legislation thirty percent more often than Republicans.⁸⁸ Congressional Democrats consistently supported expanding civil rights, whereas Republicans often did not support such measures or made decisions individually based on their background.⁸⁹ Over the last thirty years, political party has likely influenced roll call votes related to civil rights more than region, personal income, or education.⁹⁰

2. Republicans: "Tough on Crime"

In today's political atmosphere, being viewed as "tough on crime" is electorally beneficial.⁹¹ A politician benefits from a perception that he will make preventing crime and punishing offenders priorities of his term in office.⁹² The large number of elected officials who support the death penalty⁹³ and the strong support for cutting funding to prison educational programs reflects this perception.⁹⁴

87. See Elizabeth Simson, Americans for Democratic Action Educ. Fund, *Justice Denied: How Felony Disenfranchisement Laws Undermine American Democracy*, at 51 (Mar. 2002), available at <http://www.adaction.org/lizfullpaper.pdf> (last visited Mar. 29, 2005) ("In both legal and historical terms, felony disenfranchisement is perhaps most compelling as an issue of civil rights. . . . In literature and press releases, the civil rights and voting rights struggles are commonly invoked by civil rights groups in decrying the effects of felony disenfranchisement laws.").

88. Nye, *supra* note 85, at 984.

89. See *id.*

90. See *id.*

91. See Beale, *supra* note 86, at 40; see also Dan Schnur, *Davis Won by Toeing the GOP Line: Democratic Candidates Are Using the Conservative Agenda to Win Elections, but Where Does That Leave Republicans?*, L.A. TIMES, Nov. 5, 1998, at B9.

92. *Id.*

93. See Hazel Erskine, *The Polls: Politics and Law and Order*, 38 PUB. OPINION Q. 623, 623 (1974-75).

94. See Abby Ellin, *Cons in Class*, N.Y. TIMES, Aug. 3, 2003, at 28.

Many politicians believe that by voting and speaking against voter eligibility for ex-felons they can be viewed as “tough on crime.”⁹⁵ Republicans have succeeded in campaigning as “tough on crime” candidates, and they have won elections by painting their Democratic opposition as sympathetic to criminals.⁹⁶

Republicans who have supported enfranchising legislation carefully frame their position by assuring voters that they are tough on criminals. For example, at his press conference on election law on February 15, 2002, United States Senator Arlen Specter, the senior Republican from Pennsylvania, said:

I believe that once a convicted felon has paid his or her debt to society that that person ought to be reintegrated into society and ought to have the right to vote. Now most of my professional career, a good part of it was as a prosecuting attorney, I was D.A. of Philadelphia, prosecuted some 30,000 cases a year, 500 homicides, had 165 assistants. And I believe in tough sentences for tough criminals. But once a person has paid their debt to society, I believe we ought to bring them back to society as law abiding citizens. I have been an advocate of life sentences for career criminals, throw away the book. But once they get out of jail, I believe in realistic rehabilitation, job training, literacy training, and I believe that recognition of the right to vote and the responsibilities of citizenship are a part of that.⁹⁷

Senator Specter responded to questions about his position on ex-felon voter eligibility after he was one of only three Republicans to support Senate Amendment 2879 to Senate Bill 565, the “Martin Luther King, Jr. Equal Protection of Voting Rights Act of 2002,” which was to “secure the Federal voting rights of certain qualified persons who have served their sentences.”⁹⁸ Although only asked to explain why he supported the measure, in his response, Senator Specter felt it necessary to provide substantial evidence of his support of “tough on crime” policies. Democrats try to turn felon disenfranchisement laws into a civil rights

95. See Daniel S. Goldman, Note, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 627–28 (2004) (linking felon disenfranchisement with other “tough on crime” policies).

96. See Erskine, *supra* note 93.

97. Senator Arlen Specter, *Weekly News Conference*, Senate Republican Conference, Radio Media Center (Feb. 15, 2002), available at http://www.src.senate.gov/public/_files/radio/newsconferencespecter2-15.mp3 (quote transcribed by author from audio press conference file).

98. Amendment to Senate Bill 565, S.Amdt. 2879, 107th Cong., 2d Sess. (2002).

issue, and Republicans frame it as a “tough on crime” issue; this difference intensifies the partisan debate.

C. Lobbyists and Activists

The third reason ex-felon disenfranchisement laws have become such a partisan issue is the influence of interest groups on both sides of the debate. Traditionally liberal and Democratic organizations tend to support enfranchising ex-felons.⁹⁹ More conservative groups have supported disenfranchisement.¹⁰⁰ Legislators try to please the interest groups that support their party by following their party's position.

Many civil rights and voting rights organizations lobby legislators on laws concerning ex-felon disenfranchisement.¹⁰¹ These organizations have strong ties to the Democratic Party. The NAACP, ACLU, AFL-CIO, People for the American Way, Puerto Rican Legal Defense and Education Fund, Lawyers' Committee for Civil Rights Under Law, and National Organization for Rehabilitative Offenders, among others, initiate lobbying efforts around the country on behalf of ex-felons.¹⁰² Whereas most ex-felons cannot afford to contribute to campaigns and do not have experience lobbying legislative bodies, these political interest groups can contribute substantial funds to candidates and parties, exerting significant influence over the legislative process.

For example, in Delaware, the AFL-CIO was a powerful organizing force.¹⁰³ Because labor unions are influential in the state, support for ex-felon voting rights by the labor unions was an important component of the movement for enfranchisement in that state.¹⁰⁴ The unions helped by educating their members, and this action helped build support for legislative change.¹⁰⁵ This support translated into political pressure on legislators, who ultimately changed the law.

Democratic legislators feel lobbying pressure from many powerful organizations.¹⁰⁶ Although no significant national organizations lobby in

99. See Goldman, *supra* note 95, at 652.

100. *Id.*

101. Telephone Interview with Marvin L. “Doc” Cheatham, Sr., President, Baltimore City Board of Elections (Nov. 15, 2002) [hereinafter Telephone Interview with Marvin Cheatham].

102. *Congressional Black Caucus Hearings: Election Reform*, Official Web Site of Congresswoman Eddie Bernice Johnson (Apr. 4, 2001), at <http://www.house.gov/ebjohnson/1streform1.htm> (last visited Jan. 20, 2002).

103. Telephone Interview with Janet Leban, Executive Director, Delaware Center for Justice (Mar. 26, 2003) [hereinafter Telephone Interview with Janet Leban].

104. *Id.*

105. *Id.*

106. See Simson, *supra* note 87, at 34–45.

support of ex-felon disenfranchisement laws, corrections officers, police officers, and prosecuting attorneys tend to oppose giving the right to vote to ex-felons.¹⁰⁷ All three of these groups traditionally hold significant political weight with the Republican Party; these groups are politically connected and have the ability to make influential public statements.

Furthermore, since many organizations traditionally associated with the Democratic Party vocally support ex-felon voter eligibility, Republicans have less of an incentive to support legislative changes. Some Republicans may even oppose the changes because their opposition's supporters lobby for them.

III. PARTISAN CHANGES: CONNECTICUT, MARYLAND, AND NEW MEXICO

Much of the evidence provided thus far has focused on general party analysis and political trends. A more concentrated examination of the politics of ex-felon disenfranchisement laws at the state level shows that partisanship has a strong practical impact on our laws.

The remainder of this Note will examine the political developments that led to changes to the laws governing ex-felon voter eligibility in five states that changed their laws between 2000 and 2002. These five cases clearly show that partisan politics play a major role in legislative changes to these laws.

A. Connecticut

On May 4, 2001, Republican Governor John Rowland of Connecticut signed his state's House Bill 5042 into law, making it Public Act 01-11: "To restore voting rights to individuals who have been convicted of a felony and are on probation."¹⁰⁸ House Bill 5042 passed the House of

107. Telephone Interview with Marvin Cheatham, *supra* note 101.

108. According to the bill's Summary:

With one exception, this act enables felons on probation to vote and run for public office. It does so by limiting a person's disenfranchisement to the period during which he is committed to (1) the Department of Correction (DOC) confinement in a correctional institution, facility, or community residence or placed on parole; (2) a federal prison; or (3) the custody of the chief correctional official of another state or county of another state. A person who is released from prison after serving time for an elections-related felony conviction cannot get his rights back until he is discharged from parole or probation. The act requires the DOC commissioner, instead of the Judicial Department, to send the secretary of the state lists of felons whose voting rights should be forfeited and those eligible to have their rights restored. It establishes a new

Representatives on April 11, 2001, by a margin of 80 to 63.¹⁰⁹ It passed the Senate 22 to 14 on April 25, 2001.¹¹⁰

1. Background

In modern times, Connecticut has been a restrictive state in terms of ex-felon voting rights.¹¹¹ Prior to legislative changes in 2001, Connecticut had allowed ex-felons to vote for twenty-five years but had disenfranchised felons on probation, parole, and in prison.¹¹² In 1999, Democratic State Representative Kenneth P. Green, a former chair of Connecticut's Legislative Black and Puerto Rican Caucus, attempted to introduce a bill that would grant voting rights to those felons on probation.¹¹³ House leadership blocked his attempts, so Representative Green attached a voting rights bill to a public financing bill.¹¹⁴ Although the measure failed, Representative Green succeeded in bringing the issue to the floor of the House for the first time. He said, "When you have people in the community, working, paying taxes, they should have the right to vote. You're talking about taxation without representation. This is just as important in opening up the political process as other bills to empower our citizens."¹¹⁵ With the attention he received from his attempts in 1999, Representative Green formed a coalition to prepare for legislative action in 2000.

In April 2000, Representative Green introduced H.B. 5701, trying again to reinstate voting rights to those felons on probation.¹¹⁶ Working as the voice for the newly established Connecticut Voting Rights Restoration

procedure for restoring the voting rights of felons who were confined to the commissioner's custody. It requires the Office of Adult Probation to use available appropriations to inform people on probation on January 1, 2002 of their right to become voters and of the new restoration procedures.

An Act Restoring Voting Rights of Convicted Felons Who Are on Probation, H.B. 5042, Gen. Assem., 2001 Sess. (Conn. 2001), at 2001HB-05042-R00-CBS.

109. See *infra* p. 520 tbl.3.3.

110. *Id.*

111. See Darryl McMiller, DemocracyWorks, *The Right to Vote: The Campaign to Restore the Voting Rights of Persons Convicted of a Felony and Sentenced to Probation in Connecticut* (2004), available at <http://www.sentencingproject.org/pdfs/dw-rtv-ct.pdf> (last visited Mar. 29, 2005).

112. See *id.*

113. See Michael Coyle, *State-based Advocacy on Felony Disenfranchisement*, The Sentencing Project, at 4 (Feb. 2003), available at <http://www.sentencingproject.org/pdfs/5083.pdf> (last visited Mar. 29, 2005).

114. *Id.*

115. *Id.*

116. An Act Concerning the Forfeiture of Electoral Rights and Privileges, H.B. 5701, Gen. Assem., 2000 Sess. (Conn. 2000), at 2000HB-05701-R00-CBS.

Coalition ("CVRRC"),¹¹⁷ Representative Green garnered significant support for the bill. DemocracyWorks heads the CVRRC, which consists of over 40 organizations, including the ACLU, NAACP, Connecticut Citizen Action Group, Common Cause, church groups, and social service agencies.¹¹⁸ Capitalizing on the political clout of coalition members, H.B. 5701 eventually passed in the House but failed in the Senate.¹¹⁹

A year later, after concentrating on lobbying legislators, a statewide media campaign, public education, and outreach, Representative Green and the CVRRC garnered enough support for the passage of the legislation through the House and Senate. In April 2001, H.B. 5042 passed, and as of January 1, 2002, over 37,000 convicted felons on probation regained their right to vote in Connecticut elections.¹²⁰

2. Partisan Politics

Although the DemocracyWorks web site stated that H.B. 5042 passed with bipartisan support, this statement is probably just an attempt by the organization to appear non-partisan as it continues to pursue legislative changes in Connecticut.¹²¹ A closer examination of the politics that led to the restoration of voting rights to probationers reveals a partisan battle with a roll call vote that was anything but bipartisan.

In 2001, Connecticut had a Republican governor, John Rowland, but the Democratic Party dominated the House and held a small majority in the Senate. In all of the roll call votes between 1999 and 2001, the Republicans overwhelmingly opposed granting probationers the right to vote. Many Republicans believed that granting voting rights to probationers diminished their punishment; for example, Republican Senator John McKinney opposed the bill in 2001, stating "we're not just giving back voting rights, but also lessening the punishment."¹²² Republican leadership also made the caucus position clear, as Senate Minority Leader

117. Kenneth Green, *Description of the Voting Rights Restoration Coalition*, DemocracyWorks, at <http://www.democracyworksct.org/votingrightsrestoration.htm> (last visited Mar. 29, 2005) ("The Connecticut Voting Rights Restoration Coalition, organized by DemocracyWorks, led the campaign to encourage voting by more than 36,000 Connecticut residents on probation that previously lost their right to vote due to a felony conviction.').

118. See *id.*; Coyle, *supra* note 113, at 4.

119. Conn. H.B. 5701.

120. Gregory B. Hladky, *Senate OKs Bill on Felons' Voting Rights*, NEW HAVEN REG., Apr. 26, 2001.

121. For more information on CVRRC, see DemocracyWorks, *Voting Rights Restoration*, at <http://www.democracyworksct.org/votingrightsrestoration.htm> (last visited Mar. 29, 2005).

122. Hladky, *supra* note 120.

Louis C. Deluca opposed the bill in the press and then attempted to push through an amendment that would have added additional exemptions for certain crimes, thus altering the purpose of H.B. 5042.¹²³

TABLE 3.2
CONNECTICUT STATE GENERAL ASSEMBLY 2001-02¹²⁴

	TOTAL MEMBERS	DEMOCRAT	REPUBLICAN
HOUSE	151	100	51
SENATE	36	21	15

Senate Democrats feared looking “soft on crime” and many supported the amendment:

[T]he GOP proposal appeared to have been approved when Sen. Eileen M. Daily, D-Westbrook, voted in support of the Republican amendment. That resulted in an 18–18 tie. Under the Senate rules, Republican Lt. Gov. M. Jodi Rell used her power as presiding officer to break the tie, voting in support of the GOP plan.¹²⁵

In a fascinating political development, Democratic leaders convinced Senator Daily to change her vote on the amendment before time expired, thus defeating the amendment.¹²⁶ Senator Daily chose to go along with party interests, even if it was not her first instinct to do so.

123. *Id.* (“Republican lawmakers almost succeeded in adding a[n] . . . exemption for felons convicted of such serious crimes as sexual assault or criminal use of a firearm, but the idea was rejected after two votes.”).

124. National Conference of State Legislatures, *State Vote 2000: Connecticut Election Profile*, at <http://www.ncsl.org/ncsl/db/elect98/profile.cfm?year=2000&state=CT> (last visited Mar. 29, 2005).

125. Hladky, *supra* note 120.

126. *Id.*

TABLE 3.3
S.H.B. 5042 BY PARTY¹²⁷

	YES	NO	NO VOTE/ EXCUSED	DEMOCRAT YES	DEMOCRAT NO	REPUBLICAN YES	REPUBLICAN NO
HOUSE	80	63	8	72	22	8	41
SENATE	22	14	0	19	2	3	12

House Bill 5042, without the Republican amendment, passed the House and Senate. All of the sponsors of the bill were Democrats.¹²⁸ Over 86% of the legislators chose to vote their prescribed party position on this bill, evidencing a strong connection between party and position on the legislation.

B. Maryland

On May 6, 2002, Democratic Governor Parris Glendening of Maryland signed House Bill 535 into law, lifting Maryland's lifetime ban on felon voter eligibility.¹²⁹ House Bill 535 passed the House of Delegates on April 5, 2002, by a margin of 84 to 49.¹³⁰ The Senate's sibling bill, Senate Bill 184, passed by a margin of 26 to 20 on April 2, 2002.¹³¹

127. An Act Restoring Voting Rights of Convicted Felons Who Are on Probation, H.B. 5042, Gen. Assem., 2001 Sess. (Conn. 2001), at 2001HB-05042-R00-CBS. Because the number was the same in both chambers, but the bill was introduced in the House, the designation "s.H.B." precedes the bill number.

128. See *id.*

129. See NAACP National Voter Fund, *Empowerment 2002 Summary: Ex-Felon Voter Re-enfranchisement* (May 1, 2003), at http://www.naacpnvf.org/c_emp2002sum.php (last visited Mar. 29, 2005).

130. According to the bill's fiscal note:

This bill restores the voting rights of an individual who has been convicted more than once of theft, or other infamous crimes, provided that three years have elapsed since the completion of a court-ordered sentence imposed for conviction including probation, parole, community service, restitution, and fines. An individual convicted of a second or subsequent violent crime is permanently disqualified from registering to vote. The bill is effective January 1, 2003.

An Act Concerning Election Law, Voting Rights, Felons, Fiscal Note, S.B. 184, Gen. Assem., Reg. Sess. (Md. 2002) [hereinafter Fiscal Note, S.B. 184 (Md.)], available at http://mlis.state.md.us/PDF-Documents/2002rs/fnotes/bil_0004/sb0184.pdf.

131. S.B. 184, Gen. Assem., Reg. Sess. (Md. 2002), available at <http://mlis.state.md.us/2002rs/billfile/SB0184.htm>.

1. Background

Maryland has a history of conservatism, especially when it comes to voting rights. Activists point to the fact that the Fifteenth Amendment, which guarantees that the right to vote would not be denied or abridged on account of race, color, or previous condition of servitude,¹³² was ratified by the United States Congress in 1870 but was not ratified by Maryland until 1973.¹³³ Similarly, Maryland did not ratify the Nineteenth Amendment—"the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude"¹³⁴—until 1941, twenty years after it was ratified by the United States Congress.

Despite this conservative history, activists at the end of the twentieth century hoped the strength of the Democratic Party in Maryland provided an opportunity to make legislative change. In the late 1990s, numerous attempts to change the laws governing ex-felon disenfranchisement all failed.¹³⁵ No single organization pushing for ex-felon voting rights had enough political power within the state to win in the legislature.

The process that led to legislative changes in Maryland mirrors the process in Connecticut. This should not come as a surprise, as the coalition in Maryland modeled its campaign after the ongoing campaign in Connecticut, right down to its name.¹³⁶ In October 2001, under the leadership of Marvin L. "Doc" Cheatham, Sr., the president of the Baltimore City Board of Elections, a coalition of organizations supporting the restoration of voting rights to ex-felons was convened.¹³⁷ Mr. Cheatham believed that there needed to be a large coalition that had the political

132. U.S. CONST. amend. XV, § 1.

133. Telephone Interview with Marvin Cheatham, *supra* note 101.

134. U.S. CONST. amend. XIX.

135. Senate Bill 184's fiscal note summarizes previous attempts to enact legislation:

Prior Introductions: SB 83, introduced in the 2001 session was nearly identical, and was unfavorably reported from the Senate Economic and Environmental Affairs Committee. HB 438 of the 2000 session would have allowed felons to register to vote upon completion of a five-year period after serving a sentence for an infamous crime beyond the first offense. Also, HB 25 in the 1999 session would have allowed felons to vote after completing probation, with no five-year waiting period. Both HB 438 and HB 25 received an unfavorable report from the Commerce and Government Matters Committee.

Fiscal Note, S.B. 184 (Md.), *supra* note 130.

136. Telephone Interview with Marvin Cheatham, *supra* note 101.

137. See Coyle, *supra* note 113, at 8.

clout to press legislators.¹³⁸ The Maryland Voting Rights Restoration Coalition (“MVRRC”) was formed with support from over fifty organizations from across Maryland and the nation. Most notably, it included the NAACP, ACLU, and League of Women Voters. The coalition eventually succeeded in its effort to change the felon disenfranchisement laws, but not without a significant political battle.

The coalition’s first success came at the end of 2001. In response to inquiries by state legislators working with the MVRRC, Chapter 481 (H.B. 495) was enacted “to establish a Task Force to study repealing the disenfranchisement of convicted felons in Maryland.”¹³⁹ Although the task force’s report did not contain any specific recommendations, the release of the report was the first time that many voters in Maryland, and even Maryland’s legislators, became aware that Maryland had some of the most stringent voter eligibility laws in the nation.¹⁴⁰

The release of the task force’s report brought about the introduction of two matching bills to eliminate Maryland’s ex-felon disenfranchisement laws: Democratic Delegate Kerry Hill introduced H.B. 535, and Democratic Senator Delores Kelly introduced S.B. 184.¹⁴¹ A significant amount of lobbying by MVRRC followed that included using ex-felons as lobbyists.¹⁴² In addition, in an attempt to ensure the passage of the legislation, a compromise was made with Republicans through the inclusion of a three-year waiting period. The bills eventually both passed. The legislation went into effect on January 1, 2003,¹⁴³ and enfranchised about 60,000 ex-offenders.

According to a recent report released by The Sentencing Project, Mr. Cheatham views “the success of the coalition as due to its organization and the efforts that went into realizing all aspects of the campaign: rallies, posters, mailings, flyers, and other media.”¹⁴⁴ Although there is no doubt that MVRRC’s grassroots efforts served as the catalyst for the passage of H.B. 535 and S.B. 184, a political analysis reveals that partisan forces, in combination with Democratic control of the legislature, determined the fate of the bills in the legislature.

138. *Id.* at 8–9.

139. Fiscal Note, S.B. 184 (Md.), *supra* note 130.

140. Telephone Interview with Marvin Cheatham, *supra* note 101.

141. Coyle, *supra* note 113, at 8.

142. Telephone Interview with Marvin Cheatham, *supra* note 101.

143. Margie Hyslop, *Special Report: Right to Vote?*, WASH. TIMES, July 14, 2002, at A1.

144. Coyle, *supra* note 113, at 9.

2. Partisan Politics

Democrats controlled both the Senate and House in Maryland during the 2001–02 session, and its governor, Parris Glendening, was also a Democrat.¹⁴⁵ The Maryland case demonstrates the partisan nature of the laws.

TABLE 3.4
MARYLAND STATE LEGISLATURE 2001–02¹⁴⁶

	TOTAL MEMBERS	DEMOCRAT	REPUBLICAN
HOUSE	141	106	35
SENATE	47	34	13

Democrats in Maryland strongly supported the legislative changes, while Republicans were in public opposition.¹⁴⁷ Senator Timothy R. Ferguson, a Maryland Republican, argued that “certain people should never stop paying for their sins, even if between them and their Maker the slate is clean.”¹⁴⁸ Most Maryland Democrats did not share this viewpoint: “Senator Ulysses Currie, Prince George’s County Democrat said . . . ‘There are 50,000 kids whose fathers and mothers are in [Maryland] institutions. . . . [I]f any of those guys come out, you’d want them to assume responsibilities for their lives and their kids. Voting is part of that responsibility.’”¹⁴⁹ Only one Republican senator publicly supported S.B. 184, and she was a moderate who came from a district with a particularly high Democratic registration.¹⁵⁰

Although the MVRRC targeted Republican support for the legislation, Republicans remained aware of the potential harm that ex-felons could have on their electoral chances.¹⁵¹ Many Republicans attributed the electoral success of former Mayor Marion Barry of nearby Washington D.C. to his courting of the ex-felon vote after his misdemeanor cocaine-possession conviction.¹⁵² In addition, granting voting rights to ex-felons

145. National Conference of State Legislatures, *State Vote 2000: Maryland Election Profile*, at <http://www.ncsl.org/ncsl/db/elect98/profile.cfm?years=2000&state=MD> (last visited Mar. 29, 2005).

146. *Id.*

147. See Coyle, *supra* note 113, at 8–9.

148. Hyslop, *supra* note 143, at A1.

149. *Id.*

150. Telephone Interview with Marvin Cheatham, *supra* note 101.

151. *Id.*

152. *Id.*

would increase the political power of Baltimore, a Democratic stronghold. Maryland Secretary of State John Willis declared at a rally for ex-felon voting rights: "We're talking about another 50,000 to 60,000 people in the city [of Baltimore] that could help hold on to the city's political power."¹⁵³ In Maryland, it was generally recognized that the political impact of ex-offender's votes could further entrench Democrats in power.

The MVRRC additionally found some opposition among Democrats. Despite the evident electoral gains that the legislation would bring Democrats, some feared that they would be painted as "soft on crime" in the upcoming election.¹⁵⁴ The coalition's greatest successes probably came from convincing Senate Democrats to vote for S.B. 184. Powerful interest groups launched a groundswell of lobbying for the legislation, and eventually Democrats that were on the fence decided to support the legislation.¹⁵⁵

When the bills were voted on in April 2002, the legislation passed overwhelmingly in the House and squeaked through in the Senate. As Table 3.5 shows, the votes were almost strictly partisan. Over 87% of the legislators voted their prescribed party position. It is also worth noting that the sponsors and co-sponsors of the legislation were Democrats.

TABLE 3.5
H.B. 535 AND S.B. 184 BY PARTY¹⁵⁶

	YES	NO	NO VOTE/ EXCUSED	DEMOCRAT YES	DEMOCRAT NO	REPUBLICAN YES	REPUBLICAN NO
HOUSE BILL 535	84	49	8	84	14	0	35
SENATE BILL 184	26	20	1	25	8	1	12

Based on these votes, Maryland shows a clear example of the partisan nature of ex-felon disenfranchisement legislation.

153. *Id.*

154. *See Coyle, supra* note 113, at 9.

155. *Id.*

156. S.B. 184, Gen. Assem., Reg. Sess. (Md. 2002), at <http://mlis.state.md.us/2002rs/billfile/sb0184.htm>.

C. *New Mexico*

On March 15, 2001, Republican Governor Gary Johnson of New Mexico signed Senate Bill 204 into law, "restoring the right to vote to a person convicted of a felony who has satisfied all conditions of a sentence."¹⁵⁷ Senate Bill 204 passed the Senate on March 2, 2001, 25 to 17.¹⁵⁸ It passed the House of Representatives on March 10, 2001, by a margin of 39 to 20.¹⁵⁹

1. Background

New Mexico was among the states with the most restrictive laws throughout the twentieth century. Senate Bill 204 was the first change to New Mexico's felon disenfranchisement laws since 1911.¹⁶⁰ Senate President Richard Romero, a Democrat from Albuquerque, introduced Senate Bill 204.¹⁶¹

The legislative process in New Mexico involved less complexity than in Connecticut or Maryland. Although some national organizations lobbied for changes to the New Mexico disenfranchisement laws, the action in New Mexico was largely a response to the 2000 election and changes to felon disenfranchisement laws taking place elsewhere in the country.

In the aftermath of the 2000 election, it is easy to forget that the closeness of the vote between Gore and Bush in New Mexico rivaled that of Florida.¹⁶² With the final count completed and all of the challenges exhausted, Gore won New Mexico by less than 400 votes.¹⁶³ Although Florida became the focus of the election controversies because of its role in deciding the Electoral College, and thus the presidency, New Mexico found itself equally plagued with issues of election administration. Senator Romero capitalized on the attention being given to election reform, and as a result, New Mexico's legislature began examining its election laws, including ex-felon disenfranchisement laws.

157. Restore Voting Rights, S.B. 204, 47th Leg., Reg. Sess. (N.M. 2001).

158. See *infra* p. 526 tbl.3.7.

159. *Id.*

160. See 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, 565 (2003) (showing that New Mexico enacted its first felon disenfranchisement law even before gaining statehood).

161. Donovan Kabalka, *Felons Might Be Able to Vote Again*, ALBUQUERQUE TRIB., June 29, 2001, at A2.

162. See DOUGLAS KELLNER, *GRAND THEFT 2000: MEDIA SPECTACLE AND STOLEN ELECTION* 47 (2001).

163. FEDERAL ELECTION COMMISSION, *FEDERAL ELECTIONS 2000: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES* (2001).

TABLE 3.6
NEW MEXICO STATE LEGISLATURE 2001-02¹⁶⁴

	TOTAL MEMBERS	DEMOCRAT	REPUBLICAN
HOUSE	70	42	28
SENATE	42	24	18

Like Connecticut and Maryland, Democrats dominated the New Mexico legislature. In addition, New Mexico's Republican Governor Gary Johnson, known as a progressive Republican, often supported social policies traditionally associated with liberals.¹⁶⁵ In 1999, he even called for an end to the "War on Drugs," traditionally a major part of the Republican platform.¹⁶⁶ All in all, the political pieces were in place for S.B. 204.

2. Partisan Politics

The votes on Senate Bill 204 in New Mexico show the strength of the support for reform within the Democratic Party. As seen in Table 3.7, not a single Democrat voted against S.B. 204 in the Senate.

TABLE 3.7
S.B. 204 BY PARTY¹⁶⁷

	YES	NO	NO VOTE/ EXCUSED	DEMOCRAT YES	DEMOCRAT NO	REPUBLICAN YES	REPUBLICAN NO
HOUSE	39	20	9	32	2	7	18
SENATE	25	17	0	24	0	1	17

164. National Conference of State Legislatures, *StateVote 2000: New Mexico Election Profile*, at <http://www.ncsl.org/ncsl/db/elect98/profile.cfm?year=2000&state=N.M> (last visited Mar. 29, 2005).

165. See Jeff Zeleny, *Governor Jogs Solo on Drug Issue; New Mexico's Johnson Sees U.S. Failure, Hypocrisy*, CHI. TRIB., Aug. 8, 2001, at 8.

166. See *id.*

167. Restore Voting Rights, S.B. 204, 47th Leg., Reg. Sess. (N.M. 2001), at http://legis.state.nm.us/lcs/_session.asp?chamber=S&type=++&number=204&year=01.

Many New Mexico Republicans recognized that the enfranchisement of New Mexico's ex-felon population would potentially increase the number of Democrats in the state. In an interview with the *Albuquerque Tribune*, State Republican Party Chairman John Dendahl noted that "he worried those eligible under the bill would register with the Democratic Party."¹⁶⁸ However, Dendahl later decided that he would follow Governor Johnson's lead and support the legislation: "When people have served their time, all of it, it's very hard for me intellectually to say that person should not be restored to full citizenship. So, I supported it."¹⁶⁹ Although some Republican leaders like Dendahl and Governor Johnson supported the legislation, most Republicans opposed the measure in the roll call vote, as shown in Table 3.7.

Hispanics, a group that strongly identifies with Democratic candidates, constitute over 60% of the New Mexico prison population.¹⁷⁰ New Mexico Republicans were concerned about the political impact of enfranchising such a large Hispanic population. At the same time, the makeup of this group gave Democrats an electoral incentive to support the legislation.

Most legislators voted along party lines. An astounding 90% of legislators who voted on the bill voted with their party's prescribed position,¹⁷¹ providing more evidence of partisan influence on felon disenfranchisement legislation.

IV. EXPANDING THE ARGUMENT: MASSACHUSETTS AND DELAWARE

A. Massachusetts: The Democratic Threshold

On June 28, 2000, legislators from the House and Senate in Massachusetts held a joint session to convene a constitutional convention.¹⁷² At the convention, the General Court voted 155 to 45 to put a Legislative Constitutional Amendment on the 2000 election ballot in Massachusetts¹⁷³ to take away the right to vote from all imprisoned felons.¹⁷⁴ On November

168. Kabalka, *supra* note 161.

169. *Id.*

170. Fair Vote, *Voting Rights Update: March 23, 2001*, at <http://www.fairvote.org/vra/march23.htm> (last visited Mar. 29, 2005).

171. See *supra* p. 526 tbl.3.7.

172. Michael Crowley, *Lawmakers Favor Ban of Felons' Voting Rights*, BOSTON GLOBE, June 29, 2000, at B3.

173. A "Legislative Constitutional Amendment" requires that a "[m]ajority of ballots cast on the question must be affirmative." See Elections Division, Secretary of the Commonwealth, *Massachusetts Statewide Ballot Measures: An Overview*, at <http://www.sec.state.ma.us/ele/elebalm/balmover.htm> (last visited Mar. 29, 2005).

174. As of publication, Maine and Vermont are the only two states that allow prisoners to vote. See Demos, *About Felon Re-enfranchisement*, at <http://www.demos-usa.org/>

7, 2000, the Amendment, or Question 2 on the 2000 ballot, passed.¹⁷⁵ Massachusetts voters overwhelmingly passed the Amendment, 1,648,447 (60.3%) to 926,737 (33.9%).¹⁷⁶

1. Background

In 1997, Republican Governor Paul Cellucci advocated repealing voting rights from felons imprisoned in Massachusetts.¹⁷⁷ In reaction to Governor Cellucci's statements, prisoners in Massachusetts began organizing a political action committee. Governor Cellucci shot back by issuing an executive order that stopped the prisoners from organizing, muting a potentially strong political voice.¹⁷⁸ The legislature began discussing felon disenfranchisement in an attempt to resolve the issue in a more democratic and permanent fashion.

A very public debate on amending the state constitution to ban prisoner voting began. The proposed constitutional change received a great deal of support from the public and political organizations. Although it is estimated that less than 5% of the Massachusetts prison population voted on a regular basis, legislators hoping to look "tough on crime" rallied behind the legislation.¹⁷⁹ Throughout the entire process, Governor Cellucci remained the most supportive advocate of the amendment.

Even supporters of felon voting rights found little to rally behind. Democratic Representative Patricia D. Jehlen, who opposed the amendment, noted that only four inmates from the Somerville prison had voted in the presidential primaries.¹⁸⁰ The Criminal Justice Policy Coalition in Boston mounted the strongest opposition to the amendment,¹⁸¹ but many of the arguments commonly used in the battle for ex-felon voting rights, such as "ex-felons are rehabilitated" and "it helps with reintegration," were

page26.cfm (last visited Mar. 11, 2005). It is worth noting that neither state has a significant minority population in the general public or in the prison population. Further study of this connection is warranted.

175. According to the Elections Division of Massachusetts, Legislative Constitutional Amendments have historically passed at a high rate, with a total of 51 of 59 passing in Massachusetts history, a success rate of 86.44%. See Elections Division, *supra* note 173.

176. See Elections Division, Secretary of the Commonwealth, *Ballot Measure Information for 2000*, at <http://www.sec.state.ma.us/ele/elebalm/balmpdf/balm2000.pdf> (last visited Mar. 29, 2005). Over 94% of those that voted in the 2000 election chose to vote on Question 2. *Id.* Only 158,647 left this question blank, suggesting a low number of undecided voters. *Id.*

177. Hyslop, *supra* note 143, at A1.

178. *Id.*

179. Crowley, *supra* note 172, at B3.

180. See *id.*

181. Jack Sullivan, *Choices 2000; Answers to Questions*, BOSTON HERALD, Nov. 5, 2000, at E07.

not applicable in the battle for voting rights for imprisoned felons. One of the Criminal Justice Policy Coalition’s strongest arguments in opposition to the amendment was essentially “if it ain’t broke, don’t fix it.” Bolstering that sentiment, Stephen T. Saloom, director of the Criminal Justice Policy Coalition said, “[u]nless there’s a threat to our democracy or the social fabric we shouldn’t amend it. This sets a dangerous precedent for fiddling with the constitution.”¹⁸² Ultimately, this argument did not persuade Massachusetts’ voters. In November 2000, the electorate made the first restrictive change to Massachusetts’ voting rights laws in the history of the state.

2. Politics

The Democratic Party dominates the Massachusetts General Court, which seems surprising at first glance, given the overwhelming support for the felon disenfranchisement amendment in the legislature. A majority of Massachusetts Democrats supported taking away prisoners’ right to vote, which seems inconsistent with the arguments presented earlier in this Note linking Democrats to the efforts to enfranchise felons.

TABLE 3.8
MASSACHUSETTS STATE LEGISLATURE 2000¹⁸³

	TOTAL MEMBERS	DEMOCRAT	REPUBLICAN	INDEPENDENT
HOUSE	160	132	27	1
SENATE	40	33	7	0

It is true that Massachusetts Republicans also fiercely supported the amendment. Republican Representative and House Minority Leader Francis Marini was one of the leading proponents of the amendment: “The right to vote is the foundation of our democracy and that foundation needs to be protected and honored.”¹⁸⁴ Ironically, he felt that protecting that foundation required taking away that right from felons. Marini’s spokesman responded at a press conference, “This was not designed to limit the impact that prisoners have on law-abiding society—but why should they have an impact?”¹⁸⁵ Republicans were well aware that had a significant number of

182. *Id.*

183. National Conference of State Legislatures, *StateVote 2000: Massachusetts Pre-Election Profile*, at <http://www.ncsl.org/ncsl/db/elect98/profile.cfm?year=2000&state=MA> (last visited Mar. 29, 2005).

184. Sullivan, *supra* note 181, at E07.

185. Hyslop, *supra* note 143, at A1.

felons voted during the previous gubernatorial election, Governor Cellucci might have lost the election.¹⁸⁶

Democrats did not use their majority to stop the amendment, and in a state dominated by Democrats, the voting public approved of the bill. It appears that Democrats, although more liberal than Republicans, are still to the political right of a position supporting prisoner voting. The Maryland effort, according to Mr. Cheatham, had focused on ex-felons because many Democrats were not ready to discuss voting rights for prisoners.¹⁸⁷ Maryland activists feared that including prisoners' voting rights in their fight for ex-felon voting rights would have jeopardized the entire movement.¹⁸⁸ Similarly, former Attorney General Janet Reno stated that she was not sure of her position on prisoner voting rights.¹⁸⁹ She believed that most Democrats were not ready to embrace prisoner voting rights.¹⁹⁰ It appears that for Massachusetts Democrats, the political risk of voting for imprisoned convicts' voting rights was significant. That being said, Democrats in Massachusetts were not vocally supportive of the amendment. The politics of Massachusetts with regard to prisoners' voting rights mirrored the politics of a similar Utah bill two years earlier.¹⁹¹ When the Utah legislature voted to ban prisoner voter eligibility in 1998, most Democrats were silent on the bill. However, as Table 3.10 exhibits, the roll call vote in the Senate was unanimous, and in the House only five legislators did not support the ban.¹⁹²

186. See Joe Sciacca, *Time to Take Voting Rights from the Cons*, BOSTON HERALD, Oct. 16, 2000, at 4.

187. Telephone Interview with Marvin Cheatham, *supra* note 101.

188. *Id.*

189. Interview with Janet Reno, former Attorney General of the United States, Ithaca, N.Y. (Feb. 10, 2003).

190. *Id.*

191. Robert R. Preuhs, *State Felon Disenfranchisement Policy*, 82 Soc. Sci. Q. 733, 736-37 (2001).

192. Felon Voting Restrictions, H.B. 190, Leg., Gen. Sess. (Utah 1998), at <http://www.le.state.ut.us/~1998/htmldoc/hbillhtm/HB0190S3.htm>.

TABLE 3.9
UTAH STATE LEGISLATURE 1998¹⁹³

	TOTAL MEMBERS	DEMOCRAT	REPUBLICAN
HOUSE	75	20	55
SENATE	29	9	20

TABLE 3.10
UTAH H.B. 190 (1998)¹⁹⁴

	YES	NO	NO VOTE/ EXCUSED
HOUSE	56	5	14
SENATE	27	0	2

Felons do not vote at a high rate while in prison.¹⁹⁵ Accordingly, Democrats do not stand to gain many votes by supporting prisoner voting rights. From a purely political standpoint, Democrats stand to lose their more conservative supporters by voting in favor of inmate voting rights, but they may disappoint their most liberal voting bloc if they vocally support banning prisoner voting.¹⁹⁶

The Massachusetts case suggests a Democratic threshold when it comes to felon disenfranchisement laws. Democrats will support allowing ex-felons to vote but are not willing to support allowing prisoners' suffrage. The lack of vocal backing of the amendment on the part of the Democrats who supported it suggests that they either did not feel strongly about their position or were concerned about the electoral impact. Either way, it appears that in Massachusetts, Democrats and Republicans both played electoral politics when it came to felon disenfranchisement laws.

193. NATIONAL CONFERENCE OF STATE LEGISLATURES, 1997: ELECTION RESULTS DIRECTORY 245 (1997).

194. Utah H.B. 190.

195. Sciacca, *supra* note 186, at 4.

196. This is similar to the "fine line" which Democrats walk on the issue of gay marriage. Democrats do not want to alienate their liberal voting bloc by opposing gay marriage, but many more conservative Democrats would be turned off by outright support of allowing gay marriage. See Patrick Healy, *Kerry Aims to Keep Peace with Gays*, BOSTON GLOBE, May 15, 2004, at A1 (discussing Democratic presidential candidate and Massachusetts Senator John Kerry's efforts to maintain his base while addressing the gay marriage issue in the 2004 presidential election).

The Massachusetts case provides strong evidence of the influence of electoral and partisan politics on the process of changing felon disenfranchisement laws. It also suggests that the rule that Democrats as a caucus will always support enfranchisement does not extend to prisoners' voting rights.

B. Delaware: An "Unprofessionalized" Legislature

An amendment to the Delaware State Constitution must receive a two-thirds majority in the House and Senate in two consecutive General Assemblies to pass. On June 28, 2000, the Delaware State Senate passed House Bill 126, 16 to 5, thus amending the Delaware State Constitution¹⁹⁷ and eliminating the lifetime voting ban for felons. The House of Representatives passed House Bill 126 by a margin of 35 to 1 earlier in the session on May 11, 1999.¹⁹⁸ As the amendment had been approved in the previous Assembly, the vote in 2000 was the last "legislative leg" needed to enact the amendment.

1. Background

Until 2000, Delaware disenfranchised all convicted felons for life.¹⁹⁹ Delaware had one of the highest general disenfranchisement rates in the country, 5.62%, and the laws disqualified 15.71% of the Black vote,²⁰⁰ or one in five Black men.²⁰¹

In 1990, the Delaware Center for Justice formed an alliance to educate the public about disenfranchisement laws and to lobby the General Assembly to change the state constitution.²⁰² The alliance for the restoration of ex-offenders' voting rights included labor unions, evangelical Christian churches, Muslim groups, civil rights organizations, and peace groups.²⁰³ By not solely making arguments based on race and not singling out Democratic organizations, the Delaware Center for Justice created a coalition that included a diverse group of organizations.²⁰⁴ By appealing to conservatives and liberals, the alliance reached out to diverse sections of the population and catered to the interests of legislators from across the

197. See DEL. CONST. art. V, § 2.

198. See *infra* p. 534 tbl.3.11.

199. *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1948 (2002).

200. *Id.*

201. *Carper Signs Bill Supporting Voting Rights for Most Ex-Felons*, A.P. STATE & LOCAL WIRE, June 14, 2000, BC Cycle.

202. See Coyle, *supra* note 113, at 10.

203. See *id.* at 7; see also Telephonic Interview with Janet Leban, *supra* note 103.

204. See Coyle, *supra* note 113, at 6–7.

political spectrum.²⁰⁵ According to Janet Leban, executive director of the Delaware Center for Justice, "we did not leave a stone unturned. Anything we felt would be reinforcing, we tried it."²⁰⁶

Despite significant public support²⁰⁷ and a broad coalition, the alliance met strong opposition from a senator who held a key leadership position. Democratic Senator James Vaughn, chair of the Corrections Committee, and a former corrections commissioner, strongly opposed lifting the ban on ex-felon suffrage.²⁰⁸ A Senate regulation stipulated that a bill may not be voted on until the chair of the committee authorizes its release.²⁰⁹ Despite significant political pressure, Senator Vaughn refused to release the bill.²¹⁰

Finally, a task force met with Senator Vaughn in early 2000. By then, Senator Vaughn had essentially held up the legislation for close to ten years.²¹¹ During the task force, Senator Vaughn stated publicly that his main objection to the legislation was that there was no way to monitor whether or not a felon had paid all of his fines and completed his sentence, and that he would not release the bill from committee until this point of contention was resolved.²¹² Although it is likely that Senator Vaughn had other objections to the legislation, his public declaration provided an opening to activists. The Delaware Center for Justice, the elections commissioner, and other key legislators worked to develop a system to ensure that felons would complete their sentences before being cleared to vote.²¹³ When presented with the plan, Senator Vaughn kept his word and released the bill.²¹⁴

Just prior to the passage of the amendment, Senator Margaret Rose Henry, a Democrat, proposed Senate Bill 350 to create a system to monitor ex-felon registration.²¹⁵ The goal of this bill was to make sure that the

205. See generally *Carper Signs Bill Supporting Voting Rights for Most Ex-Felons*, *supra* note 201.

206. Coyle, *supra* note 113, at 7.

207. *Id.* at 6.

208. *Id.*

209. *Id.*

210. Telephone Interview with Janet Leban, *supra* note 103.

211. Coyle, *supra* note 113, at 6.

212. Telephone Interview with Janet Leban, *supra* note 103.

213. It is worth noting that the law excludes "persons convicted of murder, manslaughter, sex offenses or violations of the public trust." Coyle, *supra* note 113, at 6.

214. Telephone Interview with Janet Leban, *supra* note 103.

215. According to the bill:

If and when a Constitutional Amendment is passed, restoring voting rights to felons, this Act would provide a procedure to be utilized: 1) to determine whether or not a person applying for voter registration has been convicted of a felony; and 2) if so, whether or not it is a disqualifying felony which would prohibit approval of such person's application; and 3) if the felony is not a

system that Senator Vaughn wanted was in place before the Senate voted on the amendment. Senate Bill 350 passed the House and Senate unanimously and paved the way for the amendment.²¹⁶

The bill passed the Senate, and the constitution was amended to state “any person who is disqualified as a voter because of a [felony] conviction . . . shall have such disqualification removed upon being pardoned, or five years after the expiration of the sentence, whichever may first occur.”²¹⁷ The roll call votes were not split down partisan lines.

TABLE 3.II
H.B. 126 VOTE²¹⁸

	YES	NO	NO VOTE/ EXCUSED
HOUSE	35	1	5
SENATE	16	5	0

2. Politics

The Delaware case stands in stark contrast to the political process that took place one year later in neighboring Maryland. As described in Part III.B., Maryland’s political process was extremely partisan and complex. The reason Delaware’s politics differed from Maryland is likely because of the differences in professionalization of the legislatures.

The Delaware General Assembly was divided in 2000; Republicans controlled the House and Democrats controlled the Senate. That being said, party affiliation was not an important factor in the legislative politics in Delaware. According to the General Assembly’s web site, the legislature

disqualifying felony, whether or not the applicant has been discharged of all obligations imposed when the applicant was sentenced.

An Act to Amend Title 15 of the Delaware Code Relating to Felon Voting Rights, S.B. 350, 140th Gen. Assem., 2000 Sess. (Del. 2000).

216. See generally *Carper Signs Bill Supporting Voting Rights for Most Ex-Felons*, *supra* note 201.

217. *Developments in the Law—The Law of Prisons*, *supra* note 199, at 1948.

218. An Act Concurring in a Proposed Amendment to Article V, Section 2, of the Constitution of the State of Delaware, Relating to Qualifications for Voting and Forfeiture of Right, H.B. 126, 140th Gen. Assem., 2000 Sess. (Del. 2000).

and the legislator positions are part-time.²¹⁹ The legislature is considered a “citizen’s legislature,” and almost all of the legislators are either retired or hold other jobs.²²⁰

TABLE 3.12
DELAWARE GENERAL ASSEMBLY 2000²²¹

	TOTAL MEMBERS	DEMOCRAT	REPUBLICAN
HOUSE	41	15	26
SENATE	21	13	8

The Delaware case is an example of the way in which a legislature with no strong party structure and low political stakes will deal with ex-felon disenfranchisement legislation. The lobbying effort in Delaware was largely grassroots. In Delaware, if a state legislator receives more than ten phone calls from constituents, those calls can hold serious weight.²²² The alliance employed no professional polling company, and activists worked hard to individually educate voters.²²³

The party structure is weak in Delaware, and the national political stakes were low. With its one congressional seat and three Electoral College votes, Delaware’s amendment did not draw the same national attention that Maryland’s movement did. Most of the major lobbying groups involved in the Delaware legislation were local to Delaware, and there was no strong organized effort from those opposed to the changes.²²⁴

The General Assembly’s vote on House Bill 126 was not an aberration in Delaware.²²⁵ In fact, the legislature commonly passes bills with

219. State of Delaware, *Department of State: Government Information Center; Chapter 3: The Legislature*, at <http://www.state.de.us/sos/gic/lwv/body/dgbody-05.shtml> (last visited Mar. 29, 2005).

220. See *id.*

221. National Conference of State Legislatures, *StateVote 2000: Delaware Election Profile*, at <http://www.ncsl.org/ncsl/db/elect98/profile.cfm?yearsel=2000&stase=DE> (last visited Mar. 29, 2005).

222. Telephone Interview with Janet Leban, *supra* note 103.

223. *Id.*

224. Coyle, *supra* note 113, at 7.

225. Delaware’s legislature has often been unaffected by national trends and has wanted to keep its part-time citizen’s legislature. Delaware has also been unaffected by the partisanship seen at the federal level. Although Delaware was the first state to ratify the constitution, President Bill Clinton was the first President in United States history to address the Delaware legislature, on May 8, 1998. See Richard Benedetto, *Education Is a Top Priority, Right? Just Ask the Voters*, USA TODAY, May 11, 1998, at 6A. Clinton’s speech on the roles of the federal and state government when it comes to education could have been

bipartisan support.²²⁶ For example, the Delaware State Senate recently voted unanimously to revamp Delaware's probation system.²²⁷ The bill, Senate Bill 50, had two sponsors, a Democrat and a Republican.²²⁸ In Delaware's unprofessionalized legislature, bipartisan and unanimous votes are possible, even on bills related to issues as polarizing as criminal justice policies.

The Delaware case shows that when partisan stakes are particularly low, the legislative votes will not be constrained by partisan politics. Consistent with the arguments presented in this Note, Delaware demonstrates that a less professionalized legislature may result in a less politicized and partisan legislative process with regard to ex-felon disenfranchisement laws.

CONCLUSION: DEMOCRACY IN THE TWENTY-FIRST CENTURY

The United States Constitution establishes no guaranteed right to vote. However, those convicted of felonies are the last remaining group of American citizens who have been barred from voting. In the majority of states, ex-felons cannot vote for at least a short period after leaving prison. In other states, this group of disproportionately Black and Hispanic citizens is disenfranchised indefinitely. Americans celebrate the expansions of suffrage, such as the Nineteenth Amendment and the Voting Rights Act, because we have come to think of the vote as embodying a foundation of democratic politics. But this analysis of ex-felon disenfranchisement laws has shown that in the twenty-first century, this fundamental principle can be qualified by political interests. In state legislatures, where decisions on whether or not to enfranchise ex-felons are made, partisan interests will determine whether this last disenfranchised segment of the population will be given the right to vote.

made in any state legislature in the country, but Clinton selected Delaware because he wanted to go to a state where he knew he would receive a positive reception from both Democrats and Republicans. Delaware provided this non-partisan atmosphere. In describing the Delaware legislature during Clinton's speech, the national press referred to the legislature as "quaint," "cozy," and "warm." *Id.*

226. See, e.g., Joe Rogalsky, *Delaware Senate Approves Probation Overhaul*, newszap.com, Apr. 9, 2003, at <http://www.newszap.com/dover>.

227. *Id.*

228. See *id.*

A. Summary

Part I discussed the processes of reorganization, professionalization, and institutionalization that the state legislatures have gone through in the past forty years. These processes have created legislatures that attract more politically savvy legislators. Since most voters vote for the candidate of their party in state elections, legislators in gerrymandered districts concern themselves with climbing the institutional ladder. Party dedication and loyalty are paramount and majority parties have control over the policy decisions of the states. In today's professionalized legislatures, it can be expected that issues with partisan significance will be decided based on electoral and political positioning.

Part II focused on the partisan divide between Democrats and Republicans when it comes to voting on legislation related to ex-felon voter eligibility. Ex-felon disenfranchisement laws have a clear impact on the outcome of elections in the United States, and this influences legislators' positions. Changes to ex-felon voter eligibility laws are being made based on the influence of partisan and electoral politics. Democrats will likely support a more enfranchising policy, whereas Republicans will almost always support more restrictive laws.

In Part III, three states—Connecticut, Maryland, and New Mexico—demonstrate the partisan nature of roll call votes on felon disenfranchisement legislation and exemplify the political battles that occur when these laws are discussed in the legislatures. Part IV discussed two states that appear to be aberrations, Massachusetts and Delaware. The example of Massachusetts revealed that although Democrats will always support the more enfranchising policy, they will not go so far as to support prisoners' voting rights. In Delaware, a state with an unprofessionalized legislature, felon disenfranchisement laws changed in a generally non-partisan way.

B. *The Race Card?*

Given that a disproportionate number of those disenfranchised by ex-felon voter eligibility laws are minorities, and given the important role that arguments based on race play in the courts, why is a discussion of race largely absent from the public political discussions of these laws in the state legislatures?

In *The Race Card*,²²⁹ Tali Mendelberg suggests that race is rarely discussed explicitly by public officials²³⁰ because politicians hide their inner

229. TALI MENDELBERG, *THE RACE CARD* (2001).

230. This observation seems obvious. After all, publicly stating that one's decision was based on race is political suicide in today's politically correct atmosphere. One only has to

justifications and find other arguments to justify their race-based opinions.²³¹ Applying Mendelberg's theories to ex-felon disenfranchisement laws, one might conclude that legislators are merely obscuring the fact that they are developing their positions on disenfranchisement laws based on race. But analysis of the recent history of ex-felon disenfranchisement laws suggests another possibility: that legislators develop their positions based on a rational assessment of electoral politics.

In the twenty-first century, partisan commitments that have evolved over more than a century of racially-divided perspectives infuse race's connection to party politics. For that reason, it may be impossible to fully disentangle race from political party. But Republicans and Democrats who oppose ex-felon voting rights are not necessarily taking racist positions; they are determining their roll call votes based on partisan political interests. Because of the clear connection between race and party politics, it is difficult to determine legislators' true motives, but it is important to recognize that it may not be racial animus but rather race's connection to party identification that is causing many legislators to vote against eliminating felon disenfranchisement laws.

look to the recent events surrounding the resignation of Senator Trent Lott from his position as Senate Republican leader to see the way in which the public reacts to any comments explicitly tied to race:

Mr. Lott touched off the furor on Dec. 5 at a 100th-birthday tribute to Sen. Strom Thurmond, South Carolina Republican, when Mr. Lott said he was proud Mississippi voted for Mr. Thurmond for president in 1948, when the South Carolinian ran on the segregationist 'Dixiecrat' platform. . . .

Almost immediately, House and Senate Democrats began to call for Mr. Lott to step down as leader, and for Mr. Bush to publicly rebuke Mr. Lott. Mr. Bush obliged last week, calling Mr. Lott's remarks 'offensive,' though White House aides also said the president did not think Mr. Lott should resign.

Stephen Dinan, *Lott Resigns Senate Leadership Post; Will Retain His Seat; Frist Set to Succeed Him*, WASH. TIMES, Dec. 21, 2002, at A01.

231. As Mendelberg notes:

[R]acial stereotypes, fears, and resentments shape our decisions most when they are least discussed. Racial communication is common, but it is often presented as if it were not about race at all. It is this strong but implicit reference to race that is most effective in priming racial predispositions and racializing the political choices of white citizens. . . . Thus, the most effective way to counter a racial message is to render it explicit, to show that it is in fact racial.

MENDELBERG, *supra* note 229, at 268.

C. From the Courts to the Legislatures

This Note suggests that it will soon be time for those who seek changes to felon disenfranchisement laws to get rid of civil rights attorneys and hire political strategists. Whereas the debate over felon disenfranchisement in the courts has centered on racial impact, fundamental rights, and constitutional arguments, the battle in the legislatures will be based on partisan politics. Because legislatures have become more professionalized, partisan politics plays a larger role in the workings and decision-making of the nation's state legislatures, and today's suffragists seeking to change felon disenfranchisement policy will face different types of partisan political obstacles than suffragists of past movements to expand the electorate.

D. Conclusion

This analysis of ex-felon disenfranchisement laws has shown that what many Americans consider to be a fundamental entitlement, the right to vote, is a privilege that can be revoked through a partisan political process. The paradox is that this partisan political process is both the greatest obstacle to the restoration of ex-felon voting rights in state legislatures controlled by Republicans and the most effective means to attain this restoration in states controlled by Democrats.

Perhaps the most significant lesson we can take away from this discussion of ex-felon disenfranchisement is that in the twenty-first century, decisions about even the most basic and fundamental principles of democracy are moderated by partisan politics. As long as voters elect partisans to the legislatures, and as long as partisan and electoral interests remain the most influential forces in state legislatures, the politicization of any legal issue should not surprise Americans. It should be expected.