STATES AS LABORATORIES FOR FEDERAL REFORM: CASE STUDIES IN FELON DISENFRANCHISEMENT LAW

*Lynn Eisenberg**

* J.D. Candidate, 2012, New York University School of Law; B.A., Washington University in St. Louis, 2007. Many thanks to Professor Roderick Hills for encouraging me to explore this topic and advising me on this Note; Professor Richard Pildes and Dale Ho for additional advice; and Meg Brown, Alex Kohen, Nina Thanawala, Matt Robinson, Paul Brachman, and the staff of the *New York University Journal of Legislation and Public Policy* for their hard work and editing skills. Additionally, thank you to my parents, family, and friends for giving me tremendous support and encouragement in this and all of my endeavors.

INTRODUCTION

Felon disenfranchisement litigation has been an uphill battle since the Supreme Court's 1974 decision in *Richardson v. Ramirez*,[1] which held that ex-felon disenfranchisement does not violate the Equal Protection Clause of the Fourteenth Amendment.[2] The Court relied on an exception in the Clause that allows states to abridge the right to vote due to "participation in rebellion, or other crime."[3] Despite dozens of cases challenging felon disenfranchisement laws in the circuit courts,[4] the Supreme Court has granted certiorari in related cases only three times[5] and struck down programs only when the laws were created with the specific intent to discriminate on the basis of race.[6] Due to the challenges of bringing cases under the Fourteenth Amendment, advocates have turned to provisions of the Voting Rights Act (VRA)[7] as possible tools for reducing felon disenfranchisement.[8] But advocates have had only nominally greater luck under the VRA; until recently, federal circuit courts were split on whether felon disen-

1. 418 U.S. 24 (1974).

2. U.S. CONST. amend. XIV, § 1.

3. 418 U.S. at 43. The Court has only held that a prisoner disenfranchisement law violates the Equal Protection Clause where prisoners were denied the right to vote not because of status as a prisoner, but solely based on whether the prison was located within that prisoner's county of residence. O'Brien v. Skinner, 414 U.S. 524, 528 (1974) (noting that the constitutionality of felon disenfranchisement was not at issue).

4. *See Right to Vote: Key Decisions in Felony Disenfranchisement Litigation*, BRENNAN CTR. FOR JUSTICE, http://brennan.3cdn.net/d0efedbde2e9ae8988_2jm6bxqrl.pdf (last visited Feb. 2, 2012).

5. *Id.*

6. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 233 (1985) (striking down a felon disenfranchisement law in Alabama where there was significant evidence that the law was passed with discriminatory intent).

7. 42 U.S.C. § 1973 (2006).

8. Advocates have argued that felon disenfranchisement laws that disproportionately impact minority voter populations violate section 2 of the VRA, which prohibits the denial or abridgment of the right to vote on the basis of race or color. *See* 42 U.S.C. § 1973(a).

franchisement laws with a discriminatory effect violate the VRA and today it is nearly impossible to succeed on such a claim.[9]

Perhaps for this reason, advocates of felon disenfranchisement reform increasingly have focused on strategies involving state-level litigation and local legislative changes. When viewed in terms of numerical changes, those efforts have met with a large degree of success. A report by the Sentencing Project documented changes to voting laws in twenty-three states between 1997 and 2010,[10] looking at both expansion of the right to vote for ex-felons and the facilitation and streamlining of voting procedures for those already franchised. These changes eliminated voting barriers for an estimated 800,000 ex-felons[11] and eliminated lifetime disenfranchisement in thirteen states;[12] today, only Kentucky and Virginia disenfranchise all classes of felons for the remainder of their lives.[13]

Regardless of the strength of these improvements, advocates of an expanded franchise continue to have a lot of work ahead of them. In the 2010 federal elections, state laws restricted almost four million ex-felons and nearly one million prisoners, parolees, and probationers from voting based on their conviction statuses.[14] Nationally, 13% of

9. In the fall of 2010, the Supreme Court seemed poised to tackle the legality of state-level felon disenfranchisement laws under section 2 of the VRA. The First Circuit recently held, in *Simmons v. Galvin*, that disenfranchisement due to criminal conviction is not a cognizable claim under the VRA. 575 F.3d 24 (2009). But that holding directly contradicted the Ninth Circuit's 2003 decision in *Farrakhan v. Washington*, that felon disenfranchisement laws could be challenged under the VRA. 338 F.3d 1009, 1016 (9th Cir. 2003) (*Farrakhan I*) (holding that "courts must consider how the challenged practice 'interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives' " (*citing* Thornburg v. Gingles, 478 U.S. 30, 47 (1986))). As the circuit split made its way to the Supreme Court, an en banc panel of the Ninth Circuit reversed course, limiting its 2003 decision in *Farrakhan I*. *See* Farrakhan v. Gregoire, 623 F.3d 990, 992 (9th Cir. 2010) (en banc). In doing so, the Ninth Circuit explicitly eliminated the circuit split and, without a circuit split, it is unlikely that the Court will reevaluate the validity of felon disenfranchisement claims under the VRA.

10. NICOLE D. PORTER, THE SENTENCING PROJECT, EXPANDING THE VOTE: STATE FELONY DISENFRANCHISEMENT REFORM, 1997-2010 (2010) [hereinafter SENTENCING PROJECT 2010 REPORT].

11. *See id.* at 2.

12. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 62 (2000) (discussing the elimination of lifetime disenfranchisement laws in fifteen states between the 1960s and 2008).

13. *See Felon Voting Rights*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/default.aspx?tabid=16719 (last visited Jan. 11, 2012).

14. Together, nearly five million Americans were disenfranchised. *See Democracy Restoration Act of 2009: Hearing on H.R. 3335 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 41 (2010) [hereinafter Neuborne Testimony] (statement of Burt Neuborne, Legal Di-

African-Americans and, in some states, more than 20% of African-Americans are disenfranchised.[15] According to the Brennan Center for Justice at New York University School of Law (Brennan Center), "While 15 states and the District of Columbia already restore[d] voting rights upon release from prison, 35 states continue to restrict the voting rights of people who are no longer incarcerated."[16] Comparatively expansive voting laws in Utah and Massachusetts have actually moved towards more restricted access during the same period. Voters in Utah and Massachusetts, in 1998 and 2000 respectively, passed constitutional amendments limiting the franchise to ex-felons; previously, both states allowed felons to vote from prison.[17] Moreover, even in the twenty-three states credited by the Sentencing Project as having enacted liberalizing policy reforms, only twelve states enacted what could be considered substantive reforms, such as expanding the class of eligible voters, or eliminating or reducing a waiting period for voting rights restoration.[18] Eleven states,[19] on the other hand, made only procedural reforms relating to notification of rights and data sharing between agencies.[20] Though meaningful, these reforms do not always translate to expanded franchise. For example, the Sentencing Project recognizes Kentucky as one of its twenty-three states with marked improvements, citing state reforms that "simplified [the] restoration process" in 2001 and 2008.[21] In practice, however, Kentucky remains one of the few states that imposes lifetime disenfranchisement on all ex-felons.[22]

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rector, Brennan Center for Justice); *see also* SENTENCING PROJECT 2010 REPORT, *supra* note 10.

15. *See* Neuborne Testimony, *supra* note 14, at 41; *see also Democracy Restoration Act of 2009: Hearing on H.R. 3335 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 22 (2010) [hereinafter Shelton Testimony] (statement of Hilary O. Shelton, Director, Washington Bureau & Senior Vice President for Advocacy, NAACP) ("African Americans, who make up about 13% of the US population are disproportionately kept out of the voting booth: about 1/3, or 33% of those disenfranchised are black.").

16. *Democracy Restoration Act Fact Sheet*, BRENNAN CTR. FOR JUSTICE, http://brennan.3cdn.net/b52b1ae0ac5f631a88_bgm6bnf6t.pdf (last visited Jan. 11, 2012).

17. SENTENCING PROJECT 2010 REPORT, *supra* note 10, at 3, 27.

18. Connecticut, Delaware, Iowa, Maryland, Nebraska, Nevada, New Mexico, Rhode Island, Texas, Virginia, Washington, and Wyoming. *Id*. For the purposes of this Note, any reform that is not strictly procedural in nature is considered substantive.

19. Alabama, Florida, Hawaii, Kentucky, Louisiana, New Jersey, New York, North Carolina, South Dakota, Tennessee, and Utah. *Id*.

20. *Id.*

21. *Id.*

22. *See id.* In 2004, many of these advances were eliminated when Kentucky Governor Ernie Fletcher implemented an additional requirement that all ex-felons submitting pardon applications include three references and an essay explaining why the

This Note analyzes the felon disenfranchisement debate in the context of the two federalist theories of the majoritarian problem and "states as laboratories." Part I offers a brief introduction to the theoretical and historical arguments surrounding felon disenfranchisement,[23] particularly the relevant background of the current state of felon disenfranchisement and its effect on the larger community. Part II details recent liberalizations of felon disenfranchisement laws in three states: (1) Rhode Island, where legislators, and subsequently, voters, passed a constitutional amendment limiting disenfranchisement to presently incarcerated felons; (2) Iowa, where then-Governor Tom Vilsack issued an executive order to streamline re-enfranchisement rights for ex-felons;[24] and (3) Nebraska, where legislators overrode a gubernatorial veto to pass legislation that limited disenfranchisement to inmates and former inmates within two years of release. Part III examines the theoretical role of "states as laboratories" of democracy in a federalist regime, and considers how and when a group can overcome majoritarian concerns and effect change. I will examine why there has been movement at the state level when classic federalist theories suggest that the possibility of large-scale voting reforms is unlikely and analyze whether these reforms can continue to grow in the states. Ultimately, I argue that while state-level reforms provide a workable temporary solution, the tendency for states to experiment within a limited regional context necessitates national legislation for large-scale reform. Despite the fact that elections are managed at the state and local level, significant national rights remain at stake.

I.
WHY FELON DISENFRANCHISEMENT MATTERS

A. Historical Background of Modern American Disenfranchisement

While this Note focuses on recent changes in state-level felon disenfranchisement and analyzes the need for federal reform, this analysis would be incomplete without a brief overview of felon disen-

applicant deserves the right to vote. *See* LEAGUE OF WOMEN VOTERS, FELONY DISENFRANCHISEMENT IN THE COMMONWEALTH OF KENTUCKY: A REPORT OF THE LEAGUE OF WOMEN VOTERS OF KENTUCKY 4 (2006).

23. For a more thorough discussion, see, for example, JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT & AMERICAN DEMOCRACY (2006); s*ee also* George Brooks, Note, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 851 (2004).

24. The Iowa Executive Order has since been overturned. *See infra* Part III.B.

franchisement laws in the United States.[25] Most modern disenfranchisement laws, especially in the South, were enacted or significantly altered in the years immediately after the passage of the Fourteenth Amendment in 1868 and, in particular, following passage of the Fifteenth Amendment in 1870, which prohibits the denial and abridgment of voting rights "on account of race, color, or previous condition of servitude."[26] The Fourteenth Amendment's explicit exception "for participation in rebellion, or other crime,"[27] "enabled the former slave states to subvert the amendment's very purpose."[28] States incorporated criminal disenfranchisement laws directly into their constitutions and buttressed these prohibitions by attaching disenfranchisement as a consequence for only those laws that legislators believed African-Americans were more likely to commit.[29]

The presumption that the rise of convictions relating to minor crimes in the South was not only related to, but was actually motivated by a desire to disenfranchise black voters has strong support in the documentation of disenfranchisement laws throughout the South. Alabama's law, which included disenfranchisement for the crime of wife-beating was enacted as a method of "disqualify[ing] sixty percent of the Negros."[30] The Supreme Court ultimately invalidated this law in *Hunter v. Underwood*,[31] in which the Court noted that the "zeal for white supremacy [had run] rampant" during the Alabama constitutional convention in 1901.[32] Mississippi was no less explicit in detailing the rationale behind its new disenfranchisement laws. Delegates to the Mississippi constitutional convention replaced an older, general disenfranchisement law with one that disenfranchised offenders for only those crimes that the delegates presumed black citizens were more likely to commit, such as "bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, em-

25. An in-depth analysis of the formation of felon disenfranchisement laws is beyond the scope of this paper. For more information, see John Dinan, *The Adoption of Criminal Disenfranchisement Provisions in the United States: Lessons from State Constitutional Convention Debates*, 19 J. POL'Y HIST. 282 (2007).

26. U.S. CONST. amend. XV, § 1.

27. U.S. CONST. amend. XIV, § 1.

28. ELIZABETH A. HULL, THE DISENFRANCHISEMENT OF EX-FELONS 19 (2006).

29. *See* Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 739 (1998).

30. *See* HULL, *supra* note 28, at 20; *see also* Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 541 (1994).

31. 471 U.S. 222 (1985).

32. *See Hunter*, 471 U.S. at 229; HULL, *supra* note 28, at 20.

bezzlement or bigamy."[33] The Mississippi Supreme Court validated the use of disenfranchisement as a means to subvert the Fourteenth Amendment's prohibition on "discriminating against the Negro race" by attaching the punishment only to "those offenses to which its weaker members were prone."[34] More serious crimes, including rape and murder, were considered equally likely to be committed by black and white Mississippians; accordingly, those crimes were immune from disenfranchisement until the mid-1960s.[35]

The experiences of Alabama and Mississippi were far from isolated. In fact, legislative efforts in states throughout the South resembled Mississippi's convention, culminating in new disenfranchisement laws targeting blacks in Alabama, Louisiana, South Carolina, and Virginia, as well as the modification of disenfranchisement laws in Arkansas, Florida, North Carolina, Oklahoma, Tennessee, and Texas.[36] Northern states instituted disenfranchisement laws in the aftermath of the Fourteenth and Fifteenth Amendments as well, although these laws tended to be wide-ranging and aimed at affecting whites and blacks alike.[37]

In spite of this history, modern proponents of felon disenfranchisement rely on race-neutral theoretical and practical arguments to support their cause.[38] One of the earliest modern arguments in support of disenfranchisement relies on social contract theory. Under John Locke's theory, "[T]hose who broke social contract should not

33. Ratliff v. Beale, 20 So. 865, 867–68 (Miss. 1896) (affirming an injunction against the forced sale of furniture to satisfy a poll tax). The Mississippi Supreme Court also noted the motivations of the authors of the state constitution. *Id* at 868 ("Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit, of temperament and of character, which clearly distinguished it, as a race, from that of the whites—a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone.").

34. *See* HULL, *supra* note 28, at 19.

35. *See id.*

36. *See* Shapiro, *supra* note 30, at 537–42; *see also* Aman McLeod, Ismail K. White & Amelia Gavin, *The Locked Ballot Box: The Impact of State Criminal Disenfranchisement Laws on African American Voting Behavior and Implications for Reform*, 11 VA. J. SOC. POL'Y & L. 66, 68 (2003) [hereinafter *Michigan Study*].

37. *See, e.g.*, HULL, *supra* note 28, at 22.

38. While this paper focuses on the extension of the franchise to ex-convicts, this discussion cannot exist absent a short, introductory discussion of the theoretical arguments surrounding franchise.

be allowed to participate in the process of making society's rules."[39] While social contract theory was no longer the primary justification for disenfranchisement laws after the early years of the Republic,[40] it remains a powerful tool of proponents. As late as 1967, Judge Friendly noted that,

> it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.[41]

Challengers to felon disenfranchisement laws have made similarly theoretical arguments, focusing on conceptions of liberty and citizenship. According to liberal theory, "[T]he central purpose of the state is to preserve as much latitude as possible for individuals to choose their own ends."[42] This conception of citizenship is very much part of the same social contract theory used by proponents of disenfranchisement. In practice, however, it argues against lifetime disenfranchisement, where the length of the loss of the right to vote is not tied to the length of punishment. Moreover, "[u]nder a regime of [permanent] disenfranchisement, an individual who breaches the social contract continues to be bound by the terms of the contract even after being stripped of the ability to take part in political decisions."[43] This does not comport with the liberal view of social contracts—"the injured party cannot simply pick and choose which terms will remain."[44]

In addition to traditional social contract theory, early proponents of disenfranchisement argued that the ballot box is "the only sure

39. *See* Brooks, *supra* note 23, at 854. Disenfranchisement of criminal offenders originated in Greece and Rome, was exported through the Roman Empire to Western Europe, where it was maintained through incorporation into the notion of "civil death" and attainder in Europe. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 13; *see also* Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1049, 1052, 1059 (2002). "Civil death," the process by which an offender "loses his property and can no longer perform any legal functions," was originally brought to America by the colonists but was quickly eliminated as an acceptable punishment under the Constitution. *Id.* at 1061 ("Some states did adopt 'civil death' statutes for criminal offenders, but the Constitution prohibited bills of attainder, forfeiture for treason, and 'Corruption of Blood.'") (internal citations omitted). Disenfranchisement serves as the sole exception. *See id.*; *see also* HULL, *supra* note 28, at 17.

40. *See* Brooks, *supra* note 23, at 853.

41. Green v. Bd. of Elections, 380 F.2d 445, 451 (2d Cir. 1967).

42. *See* Jason Schall, *The Consistency of Felon Disenfranchisement with Citizenship Theory*, 22 HARV. BLACKLETTER L.J. 53, 68 (2006) (quoting Ewald, *supra* note 39, at 1050).

43. *Id.* at 77.

44. *Id.*

foundation of republican liberty, and . . . needs protection against the invasion of corruption, just as much as against ignorance, incapacity, or tyranny."[45] As with social contract theory, this "purity of the ballot box" argument is largely pretextual, especially in the context of laws enacted or modified during the southern conventions in the aftermath of the Civil War, in which the laws were not related to the "moral turpitude" of the crime.[46]

B. Practical Consequences of Disenfranchisement

The practical consequences of felon disenfranchisement are significant and far-reaching. The clearest and most obvious effect—one that became very clear during the 2000 presidential election and sparked renewed scholarship on the issue—is the increasing potential for disenfranchisement laws to change the outcome of an election.[47] There has been a significant increase in the number of Americans with felony convictions in recent years.[48] Many of these Americans will lose their right to vote forever—long after they've been released from prison. As of January 2010, there were over 1.6 million Americans in state and federal prisons,[49] many of whom will never again have the opportunity to vote in a state or federal election.

Without more information, however, these statistics and others like them are not helpful in determining whether the 2000 election or other elections were actually affected by this mass disenfranchisement of ex-felons. As sociologists Jeff Manza and Christopher Uggen observe, whether felon disenfranchisement has affected federal elections depends upon a variety of factors, including whether the ex-felons would have voted in the absence of these barriers to voting.[50] Nevertheless, the professors found that, after accounting for both the disproportionate number of disenfranchised African-Americans and "below-average turnout," as many as seven senatorial elections since 1978 would have had a different outcome without felon disenfranchisement laws; additionally, "felon disenfranchisement has provided a small but

45. Brooks, *supra* note 23, at 854 (quoting Washington v. State, 75 Ala. 582, 585 (1884)).

46. *See supra* notes 32–36 and accompanying text.

47. In the aftermath of the 537-vote margin, questions arose regarding the more than 600,000 ex-felons who were not permitted to vote in the state of Florida. *See, e.g.*, Brooks, *supra* note 23, at 851.

48. In 1980, about 170,000 Americans were released from prisons; in 2008, that number grew to 735,454. Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. OF CRIM. L. & CRIMINOLOGY 1213, 1213 (2010).

49. PEW CTR. ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS 7 (2010).

50. *See* MANZA & UGGEN, *supra* note 23, at 188.

clear advantage to Republican candidates in every presidential and senatorial election from 1972–2000."[51]

While the Manza and Uggen study found that Republican candidates have benefitted from felon disenfranchisement laws, it is not clear that they are the only beneficiaries. Although differences in political preferences are not statistically significant, incarcerated individuals actually tend to be slightly more conservative than other members of the population.[52] Given this conflicting data, it is not surprising that efforts to end or alter disenfranchisement meet with opposition from institutional actors on both sides of the aisle whose reelection depends on demographic stasis within the electorate.[53]

In addition to affecting the overall composition of the electorate, felon disenfranchisement laws have the potential to leave lasting effects on the franchise of both the families and communities of the disenfranchised. Former President Jimmy Carter recognized this concern in 2001, noting that "[w]e have been far too casual in disenfranchising people due to past felony convictions—not only creating inequalities, but influencing future lack of participation by children of those disenfranchised."[54] A 2003 study looking at the effects of criminal disenfranchisement at the state level, confirmed this fear.[55] The study found that in the 1996 and 2000 federal elections, "mean voter turnout rates in states with the most restrictive criminal disen-

51. *Id.* at 188–95. For the purposes of their statistical analyses, Manza and Uggen assumed that "nothing else about the candidates or elections would have changed if people with felony convictions were allowed to vote" while recognizing that a change in one election would impact all future elections. *Id*. at 189.

52. *Id.* at 120. Although the results of this study were not statistically significant, it demonstrates—at the very least—that incarcerated individuals are not necessarily more progressive than the general population.

53. In 2002, Senator Harry Reid (a Democrat) and Senator Arlen Specter (a Republican) introduced an amendment to a bill that was designed to address felon disenfranchisement. When the amendment was ultimately voted down 63-31, Senator Chris Dodd (a Democrat) noted that he voted against the amendment out of fear that it would undermine the host bill. *See* HULL, *supra* note 28, at 88. Additionally, Congressman John Conyers (a Democrat) has proposed the Civic Participation and Rehabilitation Act at the beginning of every legislative session since 1994 but the act has never reached the floor of the House. *See id.* at 86. Former President Jimmy Carter recognized this potential hesitance to reform disenfranchisement laws on the part of legislators at a meeting of the Commission on Federal Election Reform, stating that "[a] safe and secure Congressional seat or House seat in the Legislature is a very valuable thing, and to open up the Pandora's box for new registrants is not always an easy thing to sell." *Id.* at 133 (citing CTR. FOR DEMOCRACY & ELECTION MGMT., BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM (2005)).

54. *Id.* at 56.

55. *See Michigan Study*, *supra* note 36, at 81.

franchisement laws [were] lower than in states with less restrictive criminal disenfranchisement laws."[56]

The extensive effect of disenfranchisement is not lost on ex-felons. Ex-felon-turned-activist and law student Andres Idarraga recognizes the important effect that a person's civic engagement has on the future engagement of those around him. Discussing an exchange about voting and candidates with his eight-year-old nephew on the morning Idarraga was allowed to vote for the first time—after working to eliminate felon disenfranchisement in Rhode Island[57]—Idarraga said:

> This was a conversation I relished. Coming from a family in which voting had rarely, if ever, been discussed, this was a new beginning. Because I voted that day and shared the experience with my nephew, he is more likely to vote when he is an adult.[58]

Empirical evidence supports Idarraga's insight. A 2007 study found that citizens whose parents vote and actively discuss politics are more likely to vote themselves.[59]

The collateral effects of felony disenfranchisement fall most heavily on African-American communities, whose members face disproportionate levels of disenfranchisement. Although the majority of disenfranchised voters in the United States are Caucasian, thirty-three percent are African-American, despite the fact that African-Americans constitute just thirteen percent of the national population.[60] Although these national statistics are striking, disenfranchisement happens at the state and local, rather than national, level. Looking at the states themselves, the disproportionate effect of disenfranchisement laws on minority communities becomes even more pronounced. In Arizona, Kentucky, and Wyoming, more than twenty percent of African-Americans are disenfranchised due to prior criminal convictions.[61] In five

56. *Id.* at 77.

57. *See infra* Part III.A.

58. *Democracy Restoration Act of 2009: Hearing on H.R. 3335 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 5–6 (2010) (statement of Andres Idarraga).

59. *See generally* JOHN GROSS, THE INFLUENCE OF PARENTS IN THE VOTING BEHAVIOR OF YOUNG PEOPLE: A LOOK AT THE NATIONAL CIVIC AND POLITICAL ENGAGEMENT OF YOUNG PEOPLE SURVEY AND THE 2008 PRESIDENTIAL ELECTION 7–8 (2007) (The survey found that in 2008, about 84% of young adults with a parent interested in politics reported intent to vote, while less than 1% planned not to vote; just under 64% of young adults with a "politically disinterested" parent intended to vote, while 8% planned not to vote.); *see also* Hugh McIntosh, Daniel Hart & James Youniss, *The Influence of Family Political Discussion on Youth Civic Development: Which Parent Qualities Matter?*, POL. SCI. & POL., July 2007, at 495.

60. Shelton Testimony, *supra* note 15, at 3.

61. Neuborne Testimony, *supra* note 14, at 5.

other states, more than fifteen percent of African-Americans are barred from voting.[62] As the Ninth Circuit found in applying *Farrakhan I*,[63] plaintiffs presented "compelling" evidence that "in the total population of potential felons, . . . minorities are more likely than [w]hites to be searched, arrested, detained, and ultimately prosecuted," resulting in a disproportionate number of minorities losing the right to vote.[64] As discussed below,[65] the discriminatory effect of disenfranchisement laws has played a key role in both motivating and ultimately building successful state-level campaigns for reform.

Unfortunately, the effect of felon disenfranchisement on the voting power of the greater African-American community is not theoretical; it has had a real and meaningful impact on voting levels of otherwise eligible African-Americans. A study comparing voting rates in states with the least restrictive felon disenfranchisement laws and states with the most restrictive laws found that while white voting dropped approximately three percent, black voting dropped by approximately eight percent among eligible voters in both the 1996 and 2000 elections, after controlling for other variables known to affect voting trends.[66]

Perhaps the most important collateral effect of disenfranchisement is its link to increased recidivism among ex-offenders. Supporters of disenfranchisement often argue that newly released ex-offenders must be given time to demonstrate their trustworthiness, arguing for a case-by-case determination of the franchise rather than large-scale reforms.[67] Manza and Uggen's study demonstrates that this argument is actually backwards; they note that "there appears to be a dialectical relationship between citizenship and the prospect of leaving crime."[68] According to their study, there was a statistically significant difference in criminal activity among those who voted in 1996 and those who did not after controlling for other potential effects on voting behavior: approximately five percent of voters were arrested between 1997 and

62. *Id.*

63. Farrakhan v. Gregoire, 590 F.3d 989 (9th Cir. 2010), *rev'd en banc*, 623 F.3d 990 (9th Cir. 2010).

64. *See id.* at 1009, 1014 (internal quotation marks omitted); *see also* Neuborne Testimony, *supra* note 14, at 5.

65. *See infra* Part III.

66. *Michigan Study*, *supra* note 36, at 79. The authors of the study controlled for other factors with the potential to create this disparity including state voting laws, socioeconomic factors, aggressiveness of state law enforcement practices and levels of "oppression" in a state. *Id.* at 75–76.

67. Roger Clegg, George T. Conway & Kenneth K. Lee, *The Case Against Felon Voting*, 2 ST. THOMAS J. L. & PUB. POL'Y 1, 25 (2008).

68. MANZA & UGGEN, *supra* note 23, at 127.

2000, while approximately twelve percent of nonvoters were arrested during the same time period.[69] The difference is even starker in the context of recidivism rates: "[A]mong former arrestees, about 27 percent of the nonvoters were rearrested, relative to 12 percent of the voters."[70] Recognizing this correlation, co-sponsors of the Democracy Restoration Act[71] found that "[d]isenfranchising citizens who have been convicted of a felony offense and who are living and working in the community serves no compelling State interest and hinders their rehabilitation and reintegration into society."[72]

Interestingly, many ex-felons themselves recognize the effect that citizenship—and disenfranchisement in particular—has on their likelihood of recidivism.[73] When approaching voters in Rhode Island during a ballot initiative to change the state's constitution to eliminate the disenfranchisement of ex-felons, released prisoners explained the importance of regaining a sense of citizenship.[74] Bruce Reilly, who began working on the issue of felon disenfranchisement while in prison and became very active after his release, focused on the importance of citizenship and community, explaining, "It was not about voting rights to the people affected, it was about respect. Who cares about corporate candidate A and corporate candidate B—but you can instill respect and dignity by telling people they are citizens."[75] Simply put, disenfranchisement contradicts one of the central goals of criminal punishment[76]—"if [the goal of] correction is to reintegrate an offender into free society, the offender must retain all attributes of citizenship."[77] Disenfranchisement laws create a system in which former offenders

69. *Id.* at 131.

70. *Id.* at 131–33.

71. H.R. 3335, 111th Cong. (2010).

72. *Id.* at § 2(9).

73. A recent study by the Florida Parole Commission substantiates the belief that reinstating rights diminishes recidivism. While 33.1% of all released prisoners returned to prison within the three years after release, only 11% of former prisoners granted full civil rights restoration in 2009 and 2010 returned to prison by June of 2011. *See* TENA M. PATE ET AL., FLA. PAROLE COMM'N, STATUS UPDATE: RESTORATION OF CIVIL RIGHTS' (RCR) CASES GRANTED 2009 AND 2010, 7–14 (2011). While there may be other factors contributing to this differential—parolees are included in the first sample—this represents a significant decrease in recidivism.

74. Telephone Interview with Ariel Werner, Student Coordinator, Brown Univ. (Feb. 8, 2011) [hereinafter Werner Interview].

75. Telephone Interview with Bruce Reilly, Volunteer Coordinator, R.I. Right to Vote Campaign (Feb. 3, 2011) [hereinafter Reilly Interview].

76. The goals of criminal punishment are generally seen as deterrence, retribution, and rehabilitation. *See, e.g.*, Joshua Dressler, *The Wisdom and Morality of Present-Day Criminal Sentencing*, 38 AKRON L. R. 853, 855 (2005).

77. Congressman John Conyers, *Foreword* to HULL, *supra* note 28, at x.

are expected to contribute to society and act as model citizens even though they lack the essential rights associated with citizenship.

II.
Overcoming the Majoritarian Problem

Despite institutional tendencies to maintain the political status quo, there have been significant changes to felon disenfranchisement laws among the states. As noted above,[78] a 2010 report documenting voting changes found that twenty-three states eased restrictions on ex-felons' access to the ballots between 1998 and 2010. After factoring in the two states—Vermont and Maine—which already allow both incarcerated and released felons to vote, the study demonstrates that over half of all states either do not restrict the voting rights of ex-felons at all, or have made progress towards that end. With some exceptions, these state reforms have moved towards restoring the franchise to ex-felons upon their release. While Massachusetts and Utah decreased the voting rights of incarcerated felons during this time period, they nonetheless remain two of the more progressive states when it comes to felon disenfranchisement, granting everyone physically released from prison the right to vote. Only eleven other states and the District of Columbia do the same.[79] And yet, while there appears to be general movement towards ending the disenfranchisement of ex-felons, all but fourteen states continue to place at least some restrictions on formerly incarcerated citizens' right to vote.[80]

Classic principles of democracy suggest that strong minority viewpoints or factions can be controlled and prevented from overcoming the will and rights of other citizens. As James Madison described in Federalist No. 10, the control of factions in the United States is accomplished not by "destroying the liberty which is essential to [the faction's] existence" but by "giving to every citizen the same opinions, the same passions and the same interests."[81] Under this conception, the majority and minority factions are both protected because

78. *See e.g.*, Sentencing Project 2010 Report, *supra* note 10.

79. Other states that permit citizens convicted of a federal or state felony to vote immediately after release from prison include: Hawaii, Illinois, Indiana, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, and Rhode Island. *Criminal Disenfranchisement Laws Across the United States*, Brennan Ctr. for Justice, http://www.brennancenter.org/page/-/Democracy/USA%20MAP%203.23.2011.pdf (last visited Feb. 20, 2012).

80. *See id.* This divergence in new laws begs the question of whether there is more than one overarching common legislative objective igniting the varying state-level reforms throughout the country.

81. The Federalist No. 10 (James Madison).

both are ensured equal access to political mechanisms and regimes. Absent special circumstances, the American political processes of voting, separation of powers, and federalism will both protect minorities and prevent the public will from being overshadowed and controlled by a minority viewpoint or special interest. This process is predicated on the vital assumption that every actor—including those of the minority faction—has a voice in the electoral process.

Modern constitutional analysis recognizes that certain groups may need additional protections if they are excluded from full involvement in the political process.[82] Justice Harlan Fiske Stone's suggestion that "discrete and insular minorities" are in need of special protections precisely because they are not fully granted the same access to the political process as other groups has become a cornerstone of constitutional jurisprudence and is often cited as the modern justification for judicial review.[83] As James Madison explained, however, the constitutional process that protects majority interests works best in the national rather than local realm because "[t]he influence of factions may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other states."[84] A particularly pertinent example is that the traditional system of federalism is unable to provide assurances that all groups have equal access to the polls, as evidenced by the need for and passage of the Civil Rights Act of 1964.[85] Despite the guarantees of the Fourteenth and Fifteenth Amendments, Congress passed the Civil Rights Act in order to "enforce the constitutional right to vote."[86] In doing so, Congress increased its control over the franchise and removed from the states

82. These groups receive "strict scrutiny" in analyzing claims that their rights arising under substantive due process rights or the Equal Protection Clause of the Fourteenth Amendment are being violated. The Court, however, has been reluctant to extend the doctrine of strict scrutiny beyond race, alienage, and national origin. That strict scrutiny does not apply to felon disenfranchisement laws is evidenced by the Court's numerous decisions holding that it is not a violation of the Equal Protection Clause. *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24, 44 (1974) (holding that felons can be barred from voting without violating the Fourteenth Amendment); Hunter v. Underwood, 471 U.S. 222, 232 (1985) (affirming that disenfranchisement does not inherently violate the Equal Protection Clause).

83. United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938); *see also* McDonald v. City of Chicago, 130 S. Ct. 3020, 3101 (2010) (Stevens, J., dissenting) ("We have long appreciated that more 'searching' judicial review may be justified when the rights of 'discrete and insular minorities'—groups that may face systematic barriers in the political system—are at stake."); JOHN HART ELY, DEMOCRACY AND DISTRUST 151–53 (1980).

84. THE FEDERALIST NO. 10 (James Madison).

85. 42 U.S.C. §§ 1973–1973aa-6 (1964).

86. Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

the ability to disenfranchise otherwise eligible voters,[87] with one exception: the states maintain full jurisdiction over felon disenfranchisement laws.[88]

Under majoritarian theory, ex-felons should not make substantial (or any) progress towards ending disenfranchisement in the states. Presumably, ex-felons have an "utter lack of political leverage,"[89] resulting from the fact that they are restricted from even the most basic form of political expression: the vote. Moreover, neither elected Democrats nor Republicans have an incentive to change the status quo and increase the franchise because there is no real way to know which candidates or parties the new voters, if they vote, will support.[90] However, as demonstrated through the case studies and statistics below, ex-felons have managed to gain greater access to the political process in the final years of the twentieth and into the twenty-first century. In fact, over 760,000 Americans have been re-enfranchised on the basis of these reforms.[91]

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87. *Id.* ("No person acting under color of law shall . . . apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals . . . or . . . employ any literacy test"). Other limitations, such as the poll tax, were forbidden prior to the Civil Rights Act of 1964. *See* U.S. CONST. amend. XXIV § 1; *see also* KEYSSAR, *supra* note 12, at 308 ("By the late twentieth century, voting had become a right belonging to all American citizens, but it has remained a right that can be lost or taken away as a means—largely symbolic—of promoting social discipline.").

88. The Court has imposed one limited check on the ability of states to implement felon disenfranchisement laws. In *Hunter v. Underwood*, the Court affirmed an Eleventh Circuit decision striking down Alabama's disenfranchisement law in the face of clear evidence of discriminatory intent. 471 U.S. 222, 229 (1985). In addition to disenfranchisement laws, states can control, to a certain degree, residency, citizenship, and age requirements for voters. However, because of federal restrictions on voting age and Supreme Court decisions concerning the scope of states' abilities to define citizenship and residency, state laws in those areas are essentially uniform. For a discussion of the Court's treatment of age and residency restrictions on the right to vote, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD PILDES, THE LAW OF DEMOCRACY 56–65 (3d ed. 2007).

89. KEYSSAR, *supra* note 12, at 308. Of course, ex-felons have the technical ability to influence elections outside of the electoral context, through donations or public speech. However, their ability to do so will be significantly limited by resources and public opinion.

90. *See supra* notes 51–52 and accompanying text. Although it may seem counterintuitive that an increase in ex-felon voting would not benefit one party more than another, it is important to recognize the value of incumbency; incumbent officials were elected by the existing electorate and have little incentive to make substantial changes to the demographics of that electorate.

91. *Democracy Restoration Act of 2009: Hearing on H.R. 3335 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 109 (2009) (statement of Mark Mauer, Executive Director, The Sentencing Project).

III.
CONVERGENCE IN THE STATES: CASE STUDIES IN RHODE ISLAND, IOWA, AND NEBRASKA

Rhode Island, Iowa, and Nebraska each enacted liberalizing changes to felon disenfranchisement laws between 2005 and 2006, and each did so through a different legal mechanism (constitutional amendment, executive order, and traditional legislative action, respectively). In each state the result differs drastically.[92] In deciding which states to profile, I considered various aspects of state history and demographics predicted to be good indicators of the restrictiveness of a state's felon disenfranchisement law, including political culture, percent minority population, and prevalence of urban areas.[93] I looked for states that had similar percentages of African-American populations but did not otherwise fit neatly into traditional frameworks for looking at political culture.[94] The three initiatives examined in this Part are very different, yet all represent successful attempts to alter state-level felon disenfranchisement laws. In examining the states, I analyzed the extent to which each was motivated by or concerned with: (1) the desire to remove the vestiges of discrimination against African-Americans; (2) the role of citizenship; (3) a concern with the standing of the state when compared to other states' laws; and (4) an influx of public interest organizations advocating around this issue.[95]

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92. As demonstrated in the case studies to follow, Rhode Island citizens convicted of a felony have their voting rights restored upon release from prison, regardless of the length of their parole or probation. In Nebraska, ex-felons must wait two years from the completion of their parole before rights are automatically restored. Until January of this year, ex-felons in Iowa had their rights automatically restored upon completion of all elements of their sentence, including restitution, probation and parole; today, however, Iowans must again seek a pardon to have their voting rights restored.

93. For these factors, I relied on a study conducted by Appalachian State University Professors Daniel Murphy, Adam Newmark, and Phillip Ardoin. Among other predictors, the professors expected to find that the prevalence of urban areas and minority populations increased the likelihood of strict disenfranchisement laws. The only statistically significant indicator of restrictive felon disenfranchisement, however, was political culture, as defined by Daniel Elazar (moralistic, individualistic, and traditional). Daniel S. Murphy, Adam J. Newmark & Phillip J. Ardoin, *Political and Demographic Explanations of Felon Disenfranchisement Policies in the States*, 3 JUST. POL'Y J. 11 (2006), available at http://www.cjcj.org/files/political_and.pdf [hereinafter *Appalachian State Study*].

94. Perhaps for this reason, none of the states that I study below were studied in the *Appalachian State Study*, *supra* note 93.

95. Marc Mauer, Executive Director of the Sentencing Project notes the way in which advocacy organizations "just mushroomed" and took up the cause of felon disenfranchisement in the past two decades, with attendance at a national symposium on

A. Case Study: Rhode Island

Prior to 2006, Rhode Island boasted one of the most restrictive felon disenfranchisement laws in the country, barring access to the ballot even to ex-felons who completed both parole and probation.[96] In 2006, however, Rhode Island became the first state to institute liberalizing disenfranchisement reform through a popular vote[97]—a feat that many believed impossible and that reformers in other states avoided.[98] Bringing together students, advocacy organizations, and ex-felons, organizers put together a full-scale political and grassroots campaign to change the state constitution. This was especially difficult in a year in which the coalition could count on very little institutional support from more traditional players in electoral politics. Closely contested gubernatorial and federal elections in the state were receiving national attention and, with that, the support and focus of most institutional actors.[99] In the face of these barriers, advocates in Rhode Island nevertheless put together a successful campaign to change the state constitution through the requisite two-step process of legislative

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the issue increasing from sixty attendees in 1999 to 230 "community activists, scholars, and concerned citizens" in 2002. *See* HULL, *supra,* note 28, at 58.

96. R.I. FAMILY LIFE CTR., RHODE ISLAND'S SHRINKING BLACK ELECTORATE (2005), *available at* http://www.opendoorsri.org/sites/default/files/RI_ShrinkingBlack Electorate2_10_05.pdf. Nineteen states maintain restrictions at this level today, while ten states have harsher laws, removing the right to vote forever in the case of Kentucky and Virginia, or instituting permanent disenfranchisements unless the government grants restoration. These statistics are slightly skewed, however, in that they include a state within the category reflected by its harshest laws. Some states limit permanent disenfranchisement without executive restoration to only some crimes. *See Criminal Disenfranchisement Laws Across the United States*, BRENNAN CTR. FOR JUSTICE, http://www.brennancenter.org/page/-/d/download_file_48642.pdf (last visited Feb. 2, 2012).

97. Daniel Schleifer, *Unlocking the Vote: Activists and Disenfranchised Former Felons Restore Voting Rights in Rhode Island*, THE NATION, Dec. 18, 2006, *available at* http://www.thenation.com/article/unlocking-vote-activists-and-disenfranchised-former-felons-restore-voting-rights-rhode-islan.

98. *See infra* Part III.C (noting that Nebraskan senators looking to reform their laws specifically avoided the constitutional amendment and sought the legal support of New York University's Brennan Center for Justice to argue the constitutionality of legislative reforms under the state constitution).

99. In addition to the constitutional amendment aimed at expanding the franchise to all ex-offenders (designated as "State Question Two"), voters in Rhode Island were presented with two other constitutional amendments, six state questions, a gubernatorial race, a Senate race, and two contested congressional races. Republican Donald Carcieri won the governor's race with only 51.01% of the vote, while Democrat Sheldon Whitehouse won the Senate seat with 53.52%. *See 2006 General Election: Statewide and Federal Races*, R.I. BD. OF ELECTIONS, *available at* http://www.elections.state.ri.us/elections/results/2006/generalelection/topticket.php (last visited Feb. 2, 2012).

enactment followed by popular vote.[100] The particular movement to expand the franchise to all ex-felons was actually a relatively short battle in Rhode Island, and was accomplished during just one legislative session. The bill was introduced on March 28, 2006 and became effective without the governor's signature on July 7, 2006.[101] The case study below looks at the process, arguably replicable in other states, that elected officials, student volunteers, former inmates, and advocacy organizations implemented to drastically change Rhode Island's prospective electorate.[102]

1. Getting Started

Although some advocates focused on the issue of felon disenfranchisement in the aftermath of the 2000 elections, Rhode Island's felon disenfranchisement reform movement did not truly emerge until a Brown University student, Nina Keough, in conjunction with the Rhode Island Family Life Center (now Open Doors)[103] where she was interning, released a report focusing on the effect of felon disenfranchisement. The report was especially compelling because it was broken down by neighborhood.[104] The report's "key findings" included: (1) a comparison of Rhode Island's disenfranchisement laws with other New England states, noting that Rhode Island's were the most restrictive; (2) analysis of the disproportionate effect of the laws

100. R.I. Const. art. XIV, § 1 ("The general assembly may propose amendments to the constitution of the state by a roll call vote of a majority of the members elected to each house. Any amendment thus proposed shall be published in such manner as the general assembly shall direct, and submitted to the electors at the next general election as provided in the resolution of approval; and, if then approved by a majority of the electors voting thereon, it shall become a part of the constitution.").

101. *2006 Bill Status*, H.B. 7938, 2005 Sess. (R.I. 2005), STATE OF R.I. GEN. ASSEMBLY, *available at* http://www.rilin.state.ri.us/Billstatus06/H7900.PDF; *see also Progressive Bills and Executive Orders Dealing with the Voting Rights of People with Felony Convictions*, BRENNAN CTR. FOR JUSTICE, http://www.brennancenter.org/page/-/d/download_file_50355.pdf (last visited Feb. 2, 2012) [hereinafter *Brennan Center Legislative Achievements*].

102. Of course, whether the electorate was truly affected will depend upon the percentage of ex-convicts who actually registered and voted in the following elections. Unfortunately, this information either has not been gathered or is not accessible.

103. For the remainder of the Note, the Rhode Island Family Life Center will be referred to as "Open Doors." The center "primarily provides services and support to individuals leaving prison and their families, but also engages in some research and advocacy around the impact of mass incarceration in urban communities." Schleifer, *supra* note 97.

104. NINA KEOUGH & MARSHAL CLEMENT, POLITICAL PUNISHMENT: THE CONSEQUENCES OF FELON DISENFRANCHISEMENT FOR RHODE ISLAND COMMUNITIES 1 (2004) [hereinafter KEOUGH REPORT]. For example, the report found that 12.07% of black Rhode Island citizens were disenfranchised because of a felony conviction, while only 1.27% of white Rhode Island citizens were similarly disenfranchised. *Id.* at 2.

on African-American and Hispanic Rhode Islanders; (3) evidence of the disproportionate effect of the laws on urban residents; and (4) the fact that more than eighty-five percent of Rhode Island's disenfranchised had already completed their prison sentences and were living and working among other free citizens.[105]

When the Keough Report was initially released, it was re-published online through the Department of Justice's National Criminal Justice Reference Service (NCJRS), a "federally funded resource offering justice and drug-related information to support research, policy, and program development worldwide."[106] It also received national attention from prison reform advocacy organizations, including the national Right to Vote Campaign.[107] With increased awareness and focus on Rhode Island's criminal disenfranchisement laws in particular, Open Doors received a grant from the national Right to Vote Campaign[108] and began working with Representative Joseph Almeida,[109] the State Representative with jurisdiction over the most urban areas of Providence.

2. *The Legislative Battle*

With the assistance of the Brennan Center[110] as well as a coalition of advocacy groups called Rhode Island Right to Vote,[111] State Representative Almeida, a former police officer,[112] and State Senator Harold Mets, a former school principal, sponsored identical bills in the State House of Representatives and Senate.[113] Focusing on the concerns raised by the Keough Report, the legislative findings included Rhode Island's standing compared to other states in New England with respect to disenfranchisement, the percentage of disenfranchised voters no longer in prison, and the disproportionate minority im-

105. *Id*. at 1.

106. *About NCJRS*, NAT'L CRIMINAL JUSTICE REFERENCE SERV., http://www.ncjrs.gov/whatsncjrs.html (last visited Feb. 2, 2012).

107. Schleifer, *supra* note 97; Telephone Interview with Monifa Bandele, Nat'l Coal. on Black Civic Participation (Feb. 14, 2011).

108. *See* Schleifer, *supra* note 97.

109. Representative Joseph Almeida first won election to the 12th Representative District in Rhode Island in 1998 and was recently replaced by Representative Leo Medina after an unsuccessful primary bid. He plans to oppose Representative Medina in a future election. Telephone Interview with Rep. Joseph Almeida, former Member, R.I. House of Representatives (Feb. 28, 2011) [hereinafter Almeida Interview].

110. *Brennan Center Legislative Achievements*, *supra* note 101, at 2.

111. E-mail Interview with Daniel Schleifer, Field Coordinator, Rhode Island Right to Vote (Feb. 20, 2011) [hereinafter Schleifer Interview].

112. Almeida Interview, *supra* note 109.

113. H.B. 7938, 2005 Sess. (R.I. 2005); S.B. 2486, 2005 Sess. (R.I. 2005).

pact.[114] To support these legislative efforts, the Brennan Center drafted enforcement mechanisms requiring government voter registration agencies to "notify [released] person[s] in writing that voting rights will be restored, provide that person with a voter registration form and a declination form, and offer that person assistance in filling out the appropriate form," and further requiring agencies to file the form unless the released citizen refuses assistance.[115]

In developing support for legislation, Representative Almeida and the bill's co-sponsors[116] focused on convincing members of the House to pass the bill. Representative Almeida estimates that at the outset, about twenty-five members of the seventy-five member House were "really for it," while a majority of legislators preferred full restoration of voting rights only after completion of probation.[117] Despite the role of the minority caucus in pressuring Democratic representatives on criminal justice issues each year,[118] the Rhode Island Right to Vote Campaign coalition members made the strategic decision not to focus on race. Instead, the sponsors emphasized the legislative proposal's limited nature, the personal stories of ex-felons and police officers, and Rhode Island's standing in the country. As Representative Almeida explained, "What we did was to make sure it went across all colors—Black, White, Latinos, Asians—and all economic levels."[119]

While some states avoided the constitutional amendment route,[120] in Rhode Island that strategy provided a distinct benefit for the legislative battle itself. Although the Rhode Island General Assembly consisted primarily of Democrats, it was considered extremely conservative[121] and many Republicans and Democrats were concerned that they were going to allow "these pedophiles and mobsters" to vote.[122] At the same time, although many Democrats were willing to vote against franchise reform legislation, far fewer were willing to vote against placing the issue on the ballot to allow voters to make an

114. H.B. 7938, 2005 Sess. (R.I. 2005).

115. *Id.*; *Brennan Center Legislative Achievements*, *supra* note 101, at 2.

116. The House bill was introduced by Representative Almeida and was co-sponsored by Representatives Williams, Ajello, Diaz, and Slater. *See 2006 Bill Status*, H.B. 7938, 2005 Sess. (R.I. 2005), R.I. GEN. ASSEMBLY, http://www.rilin.state.ri.us/Billstatus06/H7900.PDF (last visited Feb. 20, 2012).

117. Almeida Interview, *supra* note 109. Rhode Island already provided full franchise after the completion of probation and parole. *Id*.

118. Schleifer Interview, *supra* note 111.

119. Almeida Interview, *supra* note 109.

120. *See* Nebraska Case Study, *infra* Part III.C.

121. *See, e.g*., David Scharfenberg, *State House Status*, THE PROVIDENCE PHOENIX (Aug. 12, 2009), http://providence.thephoenix.com/news/88120-state-house-status/.

122. Almeida Interview, *supra* note 109.

informed decision. Ultimately, the 64-6 vote broke down along party lines with Democrats, who rarely vote as a bloc in Rhode Island,[123] all supporting the bill based on the implicit understanding that there was a very low probability that the ultimate amendment would come to fruition.[124] In the same vein, proponents focused on similar movements occurring throughout the country; this served both to show concerned legislators that they would not "have to worry about being first movers on" the issue, and to show that Rhode Island not only provided fewer voting rights than other New England states, but was actually "more draconian than other states that [the legislators] would consider less liberal."[125]

During the legislative hearings, which lasted slightly more than an hour,[126] advocates focused on the personal stories of voters and criminal justice workers. Advocates also leaned on legislators' conceptions of Rhode Island's standing in the country and in New England, as well as the effect of the changes happening in other states.[127] Former prisoners told their personal stories to legislators and explained the importance of voting to their reintegration into society.[128] Although these stories helped to provide support for the bill, there was also a notable absence of organized opposition—the chief of police supported the bill and the governor, who was not a proponent, chose not to actively oppose the Amendment.[129]

3. The Ballot Referendum

After the bill passed the General Assembly, advocates had just four months to run a statewide campaign to persuade a majority of

123. *Id.*

124. Email from Joseph Almeida, former Member, R.I. House of Representatives, to author (Feb. 11, 2012, 17:19 EST) (on file with *New York University Journal of Legislation and Public Policy*).

125. Telephone Interview with Andres Idarraga (Jan. 30, 2011) [hereinafter Idarraga Interview].

126. *See* Schleifer, *supra* note 97.

127. Almeida Interview, *supra* note 109 ("We used the fact that other states were doing it and no one was getting hurt.").

128. Former incarcerated felon Andres Idarraga, a Brown University student and active member of the campaign, provided testimony in Rhode Island and later did so before a U.S. Senate subcommittee. *See supra* note 58 and accompanying text. Daniel Schleifer, the eventual field director of the ballot initiative and a researcher during the legislative phase of the campaign, cites this focus on individual stories of community citizenship as one of the more compelling aspects of the campaign. *See* Schleifer, *supra* note 97 ("Legislators—even ones representing communities with low incarceration rates—could relate to their stories of redemption and their honest desire to participate in American democracy.").

129. Idarraga Interview, *supra* note 125.

voters to support what became known as Question Two.[130] Although the campaign produced some advertisements, the focus of the campaign was door-to-door advocacy carried out with the assistance of volunteers, almost all of whom were either students interested in criminal justice issues or former convicted felons who wanted to vote.[131] Student volunteer coordinator, Ariel Werner, explained that at Brown University there was already an active community of students involved in criminal justice reform initiatives and interested in criminal justice generally. That interest, combined with the opportunity to take an active role in a small campaign, motivated a significant number of students to get involved.[132] Campaign staff credits students with providing otherwise unavailable manpower that was essential to the tight vote, as the campaign only had ten paid canvassers at ten hours per week.[133]

The canvassers targeted traditionally Democratic areas and focused their discussions with voters on conceptions of citizenship. Ex-felons routinely spoke to voters about their work to become part of the community since their release from prison.[134] Both students and ex-felons found that introducing statistics about the effect of citizenship rights on recidivism, while focusing on the impacts of legislation on the voter's own community, was the most successful tactic when speaking to a voter.[135] Reilly and the ten to twenty other disenfranchised canvassers volunteering on any given day[136] were able to give skeptical voters a first hand, poignant explanation of how voting

130. Although the legislative component became effective in July of 2006, five months before the November election, a variety of state-level campaign finance laws prevented the Right to Vote campaign from spending money directly on a ballot initiative. Although the Rhode Island ACLU was able to successfully challenge the barrier for a conglomeration of non-profits, the campaign lost considerable time. *Rhode Island Affiliate, Am. Civil Liberties Union v. Begin*, 431 F. Supp. 2d 227, 244 (D.R.I. 2006) (holding that R.I. Gen. Laws §§ 17-25-10(a) and (b), when read together, forbid any persons "acting in concert with any other person or group" to fund a ballot initiative and therefore violated the First Amendment); *see also* Schleiffer Interview, *supra* note 111.

131. *See* Schleifer, *supra* note 97.

132. Werner Interview, *supra* note 74.

133. Reilly Interview, *supra* note 75; *see also* Schleiffer, *supra* note 97. There were between 100 and 150 students working during Get-Out-the-Vote (GOTV) weekend (the extended weekend leading up to and including election day). In addition, about twenty students became student-leaders and built coalitions with other student groups to increase student volunteer turnout. Representative Almeida gives credit to the students, noting that "it was really a lot of college students who came out for us and really helped us get through." Almeida Interview, *supra* note 109.

134. Idarraga Interview, *supra* note 125; Reilly Interview, *supra* note 75.

135. *See, e.g.*, Werner Interview, *supra* note 74; Almeida Interview, *supra* note 109.

136. Reilly Interview, *supra* note 75.

rights lowered recidivism rates, explaining that "[i]f I feel like I am a part of your community, I am not going to want to violate your community's laws."[137] Additionally, canvassers compared Rhode Island's felon disenfranchisement laws to those of other states, mirroring the legislative phase of the campaign.[138] Ultimately, the canvasser's role was to convince voters that, "[w]hen someone is home, is working, is paying taxes, there is no reason that person should not be able to vote . . . it is an ugly mark, we don't trust you with democracy or the right to vote."[139] As with any political campaign, it is difficult to determine what role any individual effort ultimately had on the outcome of the election. Nevertheless, fifty-two percent of voters in areas where canvassing took place supported the bill, compared with forty-nine percent of voters in other areas, indicating that the field effort played an important role in the success of the ballot initiative.[140]

Although it is admittedly unlikely that voters made a determination at the ballot box based solely on the text of the ballot question, it is worth at least referencing that text and raising the role that it might have played in the Rhode Island Right to Vote Campaign's close victory.[141] The ballot question was framed in the negative—indicating that it would limit the right to vote to those who were not currently serving a criminal conviction for a felony.[142] Due to this wording, it is possible that misinformed voters, believing that they were voting to strip felons of the right to vote, helped instead to secure the restoration of that right.

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137. Werner Interview, *supra* note 74.

138. Reilly Interview, *supra* note 75 ("One thing that we were fond of saying is that we have worse freedom for folks than southern states: higher rate of disenfranchisement than blacks in Mississippi; lowest standard in New England. People are always trying to keep up with the Jones's. That made it a lot easier.").

139. Idarraga Interview, *supra* note 113.

140. Reilly Interview, *supra* note 75.

141. Bruce Reilly penned the ballot question, relying on input from other members of the campaign. Reilly does not believe that the wording of the ballot question "tricked" anyone who wanted to limit access to the polls for felons. He notes that the introduction to the question unmistakably designated the amendment as one that "would grant voting rights to felons on probation and parole." Email from Bruce Reilly, Volunteer Coordinator, R.I. Right to Vote Campaign, to author (Mar. 3, 2011, 19:56 EST) (on file with *New York University Journal of Legislation and Public Policy*).

142. *See Question 2: Amendment to the Constitution of the State*, FELONVOTING, http://felonvoting.procon.org/sourcefiles/rhodeislandquestion2.pdf (last visited Feb. 2, 2012) ("Approval of the amendment to the Rhode Island Constitution will provide that no person who is incarcerated in a correctional facility upon a felony conviction shall be permitted to vote until such person is discharged from the facility, at which point that person's right to vote shall be restored[.]").

Ultimately, the Rhode Island Right to Vote Campaign successfully amended the Rhode Island Constitution to ensure voting rights for all non-incarcerated Rhode Island citizens. To do so, advocates focused on local concern both for controlling recidivism and for ensuring that Rhode Island did not steer too far away from other New England states in the context of voting rights. Although they faced an uphill battle against some of the most restrictive felon disenfranchisement laws in the country, ex-felons in Rhode Island were able to form coalitions strong enough to change the status quo.

B. Case Study: Iowa

On July 4, 2005, approximately 80,000 ex-felons in the State of Iowa received automatic restoration of their voting rights under Governor Tom Vilsack's Executive Order 42.[143] At the time, more than eighty percent of Iowa's disenfranchised population had completed their sentences and were living in the community, working, and paying taxes. The following case study looks at the process through which then-Governor Vilsack used an executive order to reinstate the right to vote to an estimated 80,000 disenfranchised citizens[144] in the face of both constitutional and statutory obstructions.

1. The Need for Reform

The Iowa Constitution provides that "[n]o idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector."[145] Functionally, this serves as a rule of lifetime disenfranchisement for all ex-felons in the absence of a gubernatorial pardon.[146] Prior to the 2005 Executive Order detailed below, ex-felons were able to petition the governor for restoration of the right to vote, independent of a full pardon.[147] However, there is no indication that citizenship restoration was granted at a higher rate than full par-

143. Iowa Exec. Order No. 42, 28 Iowa Admin. Bull. 218 (Aug. 3, 2005).

144. SENTENCING PROJECT 2010 REPORT, *supra* note 10, at 12. Although an estimated 100,000 Iowans were disenfranchised at the time, only about 80,000 had completed their sentences and were eligible for reinstatement. *Id.*

145. IOWA CONST. § 5. "Infamous crime" has been interpreted to include "a crime that may be punishable by imprisonment in a penitentiary for a period of one year or more" and is not limited to felonies but "may include aggravated misdemeanors." *Frequently Asked Questions*, IOWA.GOV, https://governor.iowa.gov/wp-content/uploads/2011/02/Restoration-of-Citizenship-Rights-FAQ.pdf (last visited Feb. 2, 2012) [hereinafter *Iowa Fact Sheet*].

146. SENTENCING PROJECT 2010 REPORT, *supra* note 10, at 12.

147. IOWA CODE § 914.2 (2006) ("[A] person convicted of a criminal offense has the right to make application to the board of parole for recommendation or to the governor for a reprieve, pardon, commutation of sentence, remission of fines or forfeitures,

dons. As with any discretionary act, citizenship restoration was dependent upon the governor in power at the time of application.[148] Moreover, there was no mechanism to apply directly to the governor for assistance because Iowa law provided only the ability to apply to the parole board, which, in turn, would make a recommendation to the governor.[149] Under this system, Iowa boasted one of the five most restrictive felon disenfranchisement regimes in the country.[150] As a result of the confluence of their application system and criminal laws, Iowa's citizens were disenfranchised at twice the average rate of other states.[151] Although Iowa has a very low minority population compared to the rest of the country,[152] its disenfranchisement laws had a severely disparate impact on minority populations. While Iowa disenfranchised 4.65 percent of its citizens prior to the Executive Order, it disenfranchised 24.87 percent of its African-American citizens.[153] This level of disenfranchisement reflected a rate more than three times the national average for African-Americans.[154]

2. *The Legislative Battle*

The process to challenge Iowa's lifetime felon disenfranchisement law began in the state legislature. On January 14, 2005, House File 75, "An Act providing for the restoration of the right to vote and hold elective office for certain persons who have made full restitution and who have been discharged from probation, parole, or work release, or who have been released from confinement,"[155] was submitted

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or *restoration of rights of citizenship* at any time following the conviction.") (emphasis added)*; see also Iowa Fact Sheet*, *supra* note 145.

148. Between 1998 and 2003, Governor Vilsack granted 2,158 of 3,067 applications for rights restoration. MARGARET COLGATE LOVE, THE SENTENCING PROJECT, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE IA 4 (2008).

149. IOWA CODE § 914.2 (2006).

150. The only others states that permanently disenfranchise ex-felons are: Alabama, Florida, Kentucky, and Virginia. THE SENTENCING PROJECT, IOWA AND FELONY DISENFRANCHISEMENT 1 (2005), *available at* http://www.sentencingproject.org/doc/publications/fd_iowa.pdf.

151. Lee Rowland, *A Dark Day for Democracy in Iowa*, HUFFINGTON POST (Jan. 25, 2011, 5:32 PM), http://www.huffingtonpost.com/lee-rowland/a-dark-day-for-democracy-_b_813957.html.

152. According to the United States Census Bureau, 91.3% of Iowa's population is white, while whites make up only 72.4% of the United States as a whole. *State & Country "Quick Facts"– Iowa*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/19000.html (last visited Feb. 2, 2012).

153. *See* IOWA AND FELONY DISENFRANCHISEMENT, *supra* note 150, at 2.

154. *See supra* text accompanying note 15.

155. H.F. 75, 82nd Gen. Assemb., 1st Sess. (Ia. 2005). An identical bill was introduced in the State Senate. S.F. 63, 82nd Gen. Assemb., 1st Sess. (Ia. 2005).

to the Iowa legislature. The bill would have amended the Iowa Code to provide automatic restoration of voting rights to all citizens upon completion of their sentences (including any restitution owed to the state), removing that determination from the purview of the governor and parole board.[156]

Although proposed legislation almost always captures the governor's attention to varying degrees, the flailing felon disenfranchisement bill in the General Assembly received careful attention from Governor Vilsack for several reasons. One reason was simply a matter of fortuitous circumstances: a high school civics class studying the General Assembly and legislative process chose to track the progress of the bill during the 2004–2005 legislative session and lobbied over thirty legislators on the issue. When it appeared that the bill would not progress, the students in the class began lobbying Governor Vilsack's office to lend support to the bill itself or to the ultimate goal of the bill—franchise restoration—through executive action.[157] At the same time, the legislative sponsors of the bill recognized that it might not survive and approached the governor's office to see if there were steps that the administration could take to enact the spirit of the bill.[158]

3. The Executive Order

These events, coupled with Governor Vilsack's recognition of both the disparate impact of the current restoration regime on minorities and of Iowa's standing on the issue when compared to other states,[159] persuaded the governor to develop an executive solution that would accomplish the legislative goals of H.F. 75.[160] The governor believed that his administration "ought to be doing as much as [they could] in this area" and that the state's felon disenfranchisement laws should better reflect what he saw as Iowa's history of leadership in civil rights.[161] Provisions in the Iowa Constitution, however, made the

156. H.F. 75, 82nd Gen. Assemb., 1st Sess. (Ia. 2005).

157. Telephone Interview with Gary Dickey, General Counsel to Governor Tom Vilsack (Feb. 23, 2011) [hereinafter Dickey Interview]; see *also* Antonio Chalmers, *High School Students or Professional Lobbyists?*, THE REPORT: METRO HIGH SCHOOL, Apr. 2005, *available at* http://metro.cr.k12.ia.us/The%20Report/2000s/2005%20spring%20Metro%20Report.pdf.

158. Dickey Interview, *supra* note 157.

159. Iowa Exec. Order No. 42, *supra* note 143 (recognizing that "Iowa was only one of 5 states that did not provide an automatic process for vote restoration," that disenfranchisement of offenders has a disproportionate racial impact," and that "research indicates that ex-offenders that vote are less likely to re-offend").

160. Dickey Interview, *supra* note 157.

161. *Id.* Gary Dickey, Governor Vilsack's general counsel and architect of Executive Order 42, noted the leadership role that the state of Iowa has traditionally played in

formation of an executive order granting voting rights difficult. Under the Iowa Constitution, the right to vote is limited to ex-felons whose rights have been restored. In addition, Section 914 of the Iowa Code governs the role of the governor in granting pardons and specifically allows for individual applications.[162] Because of a recent Iowa Supreme Court decision invalidating an executive order,[163] the governor's staff was especially concerned with ensuring that any actions taken by the governor did not conflict with Iowa law. Gary Dickey, Governor Vilsack's general counsel at the time, carefully constructed a limited executive order so that it did not contradict Section 914.[164]

As a result of the concerns surrounding both Iowa Code 914 and the Iowa Constitution,[165] the executive order had to be limited in scope. Moreover, in drafting the executive order, Dickey looked to changes that were made and upheld in other states, specifically legislative changes made in Texas in 1997, which were signed into law by then-Governor George W. Bush.[166] The final rule, Executive Order 42, automatically restored voting rights to anyone who had completed all aspects of his or her sentence as of July 4, 2005 and, going forward, provided for automatic restorations on a monthly basis.[167] Essentially, ex-felons were given the choice to apply individually for restoration of rights through the pardon office or go through the automated process.[168] This process technically avoids creating an auto-

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the realm of civil rights and liberties, from refusing to consider a runaway southern slave to be property to the recognition of a constitutional right to marry someone of the same sex. According to Dickey, all of this factored into the decision to issue an Executive Order because "we wanted to be known as a state with a better history of protection of civil rights . . . it is clear we were an outlier on this issue." *Id.*

162. IOWA CODE § 914 (2006).

163. An Iowa court previously invalidated Governor Vilsack's Executive Order 7, banning discrimination in executive branch hiring on the basis of sexual orientation or gender identification. The court found that, because Section 216 of the Iowa Code expressly dealt with workforce discrimination, the executive order unlawfully conflicted with existing statutes. Rod Boshart, *Executive Decisions: A Look at Iowa Governors' Use of Power*, GLOBE GAZETTE, (Apr. 25, 2011, 12:01 AM), http://globegazette.com/news/iowa/executive-decisions-a-look-at-iowa-governors-use-of-power/article_4c66d57a-6eca-11e0-8ca0-001cc4c002e0.html.

164. *See* IOWA CODE § 914.2 (2006); *see also* Boshart, *supra* note 163.

165. As noted above, the only mechanism for an Iowan to regain his or her right to vote was through the restoration process, which was spelled out in IOWA CODE § 914.2 (2006).

166. Dickey Interview, *supra* note 157. The Texas legislation "eliminated the 2-year waiting period and adopted a policy of automatically restoring voting rights at the completion of sentence." SENTENCING PROJECT 2010 REPORT, *supra* note 10, at 26.

167. Iowa Exec. Order No. 42, *supra* note 143.

168. Dickey Interview, *supra* note 157; *see also* ALEC EWALD, A 'CRAZY-QUILT' OF TINY PIECES: STATE AND LOCAL ADMINISTRATION OF AMERICAN CRIMINAL DISENFRANCHISEMENT LAW 65 (2005) ("The *New York Times* headlined its story on this

matic restoration process that would have conflicted with the constitutionally mandated pardon process. Even with this limited scope, the Sentencing Project estimates that about 100,000 voters were re-enfranchised between 2005 and 2010, representing over eighty percent of previously disenfranchised Iowans.[169]

4. Going Forward

Unlike a constitutional amendment or legislative enactment, executive orders are more easily overturned by future administrations. In November 2005, felon disenfranchisement scholar Alec Ewald warned that while "Iowa demonstrates the significance of gubernatorial discretion in disenfranchisement law, particularly in those states which bar some people from voting even after their sentences are over," a "future governor could easily reverse course, returning to a case-by-case restoration process."[170] Indeed, less than six years after Governor Vilsack issued Executive Order 42, Governor Terry Branstad rescinded the rule and issued Executive Order 70, under which ex-felons in Iowa seeking franchise restoration must once again apply individually for executive clemency.[171] Because the new order does not affect ex-felons whose rights have already been restored, this change will likely create confusion when the board of elections makes future voter registration eligibility assessments.[172]

The Iowa case study demonstrates the strong impact that other state voting laws have on decisions to increase the franchise. Executive Order 42 even went so far as to reference Iowa's comparatively conservative franchise laws. Knowing the strength of state comparisons, in the aftermath of Governor Vilsack's executive order, Dickey reached out to other states looking to make similar changes to offer

development 'Iowa Governor Will Give Felons the Right to Vote.' But this headline is a bit misleading: Governor Vilsack's executive order amounts to a mass restoration for those who have finished felony sentences, but it does *not* change the state's eligibility rules.").

169. SENTENCING PROJECT 2010 REPORT, *supra* note 10, at 12.

170. *See* EWALD, CRAZY-QUILT, *supra* note 168, at 5.

171. *See* Iowa Exec. Order No. 70, 33 Iowa Admin. Bull. 1165 (Feb. 9, 2011) (reversing Executive Order No. 42); *see also* Rod Boshart, *Branstad Rescinds Labor, Voting Orders*, SIOUX CITY JOURNAL ONLINE (JAN. 15, 2011), http://www.siouxcityjournal.com/news/state-and-regional/iowa/article_af6e450c-b77f-5026-935b-b055d42cc167.html.

172. Ewald warned about the mass confusion that continuous changes can create, pointing to Tennessee, in which "[d]isenfranchisement . . . is dependent on which of five different time periods a felony conviction occurred between 1973 and the present." EWALD, CRAZY-QUILT, *supra* note 168, at i. For a more detailed analysis of the confusion that this creates, see *infra* Part III.C.

guidance.[173] The Iowa experience also illustrates the risks of using executive orders to restore the franchise to felons; although an executive order is easier to implement, its very ease makes it more prone to overturning by future administrations.

C. Case Study: Nebraska

As in Rhode Island and Iowa, Nebraska recently eliminated the state's lifetime disenfranchisement provisions. To do so, state legislators overcame a gubernatorial veto. Prior to 2005, when the new voting law changes took effect, Nebraska was one of seven states that disenfranchised its citizens for life.[174] Since then, an estimated 50,000 Nebraskans have regained their right to vote, representing over eighty percent of the state's disenfranchised population in 2004.[175] As with most other states, Nebraska's disenfranchisement laws had a disparate impact on minority citizens,[176] who regained their voting rights in large numbers as a result of the legislation. The following case study examines why Nebraska's legislators chose legislation rather than a constitutional amendment as a tool for restoring franchise, and how they ultimately garnered enough support to overcome a gubernatorial veto.

1. The Need for Reform

Although Nebraska had a lifetime disenfranchisement regime prior to 2005, ex-felons did have one mechanism for rights restoration—executive pardon.[177] But the process was time-consuming and difficult; applicants had to wait at least ten years after completing a

173. Specifically, Dickey reached out to Governor Warner's office in Virginia and to members of the governor's legal team in Florida. Dickey Interview, *supra* note 157.

174. *Proposal Would Let Nebraska Felons Vote: Current Law Allows Only Pardoned Felons To Vote In Nebraska*, KETV OMAHA (Jan. 10, 2005, 9:20 PM), http://www.ketv.com/news/4069074/detail.html#ixzz1OdPEOrmf [hereinafter *Proposal Would Let Nebraska Felons Vote*].

175. The percentage was determined by dividing the estimated number of citizens whose rights have been restored by the number of disenfranchised voters before the legislation was enacted. For the relevant statistics, see SENTENCING PROJECT 2010 REPORT, *supra* note 10, at 12.

176. While 10% of Nebraskans convicted of a felony at the time were black men, black persons (male and female) represent only about 4.5% of the Nebraskan population. 2010 U.S. CENSUS BUREAU, http://2010.census.gov/2010census/data/ (last visited Feb. 18, 2012). The effect of the differential in incarceration rates was reflected in disenfranchisement rates. Although just over 4.7% of Nebraska's population was disenfranchised in 2004, over 22%—nearly one quarter—of the African-American population was disenfranchised. SENTENCING PROJECT 2010 REPORT, *supra* note 10, at 17.

177. NEB. CONST. art. VI, § 2.

sentence (including parole),[178] then submit at least three character references, pay all restitution, and endure a public hearing.[179] Although the board of pardons heard over thirty applications at each meeting, meetings were held only every six to eight weeks. The process to have an application heard is time-intensive; the average application takes between nine and twelve months to complete.[180] Moreover, reliance on the pardon application system assumes that ex-felons are able to navigate the lengthy and confusing application process.[181]As a result, in 2004, 4.5 percent of the state's total population was disenfranchised.[182]

By 2005, a cohesive effort to reform Nebraska's felon disenfranchisement rules began to pick up steam. In the two previous legislative sessions, State Senator DiAnna Schimek introduced a bill to end disenfranchisement upon completion of a convicted felon's incarceration and parole.[183] Voter disenfranchisement reform was a long-standing issue for Senator Schimek, who described her interest as developing in a "prosaic" way—while knocking on doors during her reelection campaign, she met a citizen who could not vote because of a previous felony conviction and who wished to have his rights restored.[184] This quickly became the senator's top legislative priority.[185]

2. Avoiding a Constitutional Amendment

Senator Schimek hoped to avoid a constitutional amendment. The formal process to amend the Nebraskan Constitution is onerous, requiring not only a majority of participating voters to support the

178. Scott Bauer, *Legislature Overrides Veto of Felon Voting Bill*, JOURNAL STAR (Mar. 9, 2005, 6:00 PM), http://journalstar.com/news/legislature-overrides-veto-of-felon-voting-bill/article_fa389772-74b4-5cd7-809b-496118ae707c.html.

179. *Pardon Application Instructions*, NEB. BD. OF PARDONS, http://www.pardons.state.ne.us/instructions.html (last visited Jan. 11, 2012). The public hearing includes notice and an opportunity for the victims of the original crime to appear.

180. *See* NEB. BD. OF PARDONS, http://www.pardons.state.ne.us/ (last visited Jan. 11, 2012).

181. Although Nebraska grants pardons more frequently than most other states, there has been a trend in both the federal government and in the states to limit pardon grants in recent years. For a general discussion of the changing dynamic of pardons, including exceptions to the trend, see Rachel Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT'G REP. 153 (2009).

182. SENTENCING PROJECT 2010 REPORT, *supra* note 10, at 17.

183. *Proposal Would Let Nebraska Felons Vote*, *supra* note 174.

184. Telephone Interview with DiAnna Schimek, former Senator, Neb. Legislature (Feb. 17, 2011) [hereinafter Schimek Interview].

185. *Proposal Would Let Nebraska Felons Vote*, *supra* note 174 ("Schimek has introduced similar bills twice before. She said she may prioritize it among her legislative proposals this year to make sure it gets a full debate.").

amendment, but also that at least thirty-five percent of all voters in that year's election vote on the constitutional question.[186] Senator Schimek believed that it would be easier to use statistics on disparate impact, recidivism, and personal stories to convince the Nebraskan legislature to pass a franchise reform bill than it would be to convince the public to support an amendment on the issue.[187]

At the time, however, Schimek faced opposition from Attorney General Jon Bruning who "opposed prior restoration bills on the ground that the legislature had no constitutional authority to pass [franchise restoration] legislation."[188] The Nebraska Constitution provides that "[n]o person shall be qualified to vote who . . . has been convicted of treason or felony under the laws of the state or of the United States, unless restored to civil rights."[189] The Nebraska Constitution further allocates control of restorations to the pardon process.[190] A 2002 Nebraska Supreme Court decision, however, opened the door for the argument that the state legislature has the constitutional power to restore voting rights to citizens after completion of their sentences. The court held that the plaintiff's "notice of discharge," which serves as proof that the ex-felon has been "restored all of his/her civil rights, as provided by law," did not include a restoration of the right to vote.[191] However, the court recognized that "[r]estoration of the right

186. NEB. CONST. art. III, § 4 ("A measure initiated shall become a law or part of the Constitution, as the case may be, when a majority of the votes cast thereon, and not less than thirty-five per cent of the total vote cast at the election at which the same was submitted, are cast in favor thereof, and shall take effect upon proclamation by the Governor which shall be made within ten days after the official canvass of such votes."); *see also* JOHN GALE, NEB. SEC'Y OF STATE, HOW TO USE THE INITIATIVE AND REFERENDUM PROCESS IN NEBRASKA 10 (2009), *available at* http://www.sos.ne.gov/elec/pdf/init_ref.pdf.

187. Schimek Interview, *supra* note 184.

188. *Voting Rights Restoration Efforts in Nebraska*, BRENNAN CTR. FOR JUSTICE, http://www.brennancenter.org/content/pages/voting_rights_restoration_efforts_in_nebraska (last visited Jan. 11, 2012) [hereinafter *Brennan Center Nebraska Fact Sheet*].

189. NEB. CONST. art. VI, § 2.

190. "The Legislature shall provide by law for the establishment of a Board of Parole . . . [s]aid board, or a majority thereof, shall have power to grant paroles after conviction and judgment, under such conditions as may be prescribed by law, for any offenses committed against the criminal laws of this state except treason and cases of impeachment." NEB. CONST. art. IV, § 13. The Board of Pardons takes the position that it has the sole constitutional authority to restore rights ("[o]nce a conviction has occurred, the only redress that is available to restore civil rights (other than the Court of Appeals) is that of the Pardons Board") and that its "constitutional powers cannot be limited or modified by any act of the legislature or the Nebraska Courts." *See* NEB. BD. OF PARDONS, *supra* note 180.

191. *See* Ways v. Shively, 646 N.W.2d 621, 626 (Neb. 2002).

to vote is implemented through statute."[192] Senator Schimek made a final attempt at reform and introduced a bill after the Vote Nebraska Initiative, a legislative task force created to analyze the state's decline in voter turnout[193] and run by Secretary of State John Gale, recommended franchise restoration as a method of increasing voter turnout in the state.[194] Outside groups such as the Brennan Center and the Sentencing Project provided legal support and counseling to Senator Schimek.[195] The Brennan Center provided a constitutional analysis which found that the Nebraska legislature had "vested [restoration] authority in the Board of Pardons," and therefore could also "remove it and decide instead to restore the franchise automatically."[196] With the support of the Brennan Center and Sentencing project, Senator Schimek successfully overcame the attorney general's concerns and won the support of the legislature.[197]

3. Legislative Bill 53 and Gubernatorial Veto

The proposed bill, in its original form, would have restored voting rights to all Nebraskans after completion of any mandated prison sentence, including parole.[198] Senator Schimek chose to place restoration at the end of parole, explaining that while she knew that some states allow prisoners to vote, she believed that was "too extreme . . . [because] when you are serving time you are not allowed certain rights and privileges." After release, on the other hand, Schimek noted that

192. *Id. See also* EWALD, CRAZY-QUILT, *supra* note 168, at Appendix 25 (Nebraska's ex-felons had received a discharge document restoring their "civil rights," but a 2002 decision held that this did not restore their right to vote).

193. *See* VOTE NEB. INITIATIVE, VOTE NEBRASKA INITIATIVE REPORT 3 (2004), http://nlc1.nlc.state.ne.us/epubs/L3790/B056-2004.pdf. The Task Force was created "to examine why voter turnout continues to decline, what voter education resources exist, what resources should be established to engage the voter and encourage voter turnout among minority and young voters, what roles the media and schools play in voter education and what the media and schools can do to increase voter education." *Id.*

194. *John A. Gale's Tenure as Secretary of State*, NEB. SEC'Y OF STATE, http://www.sos.ne.gov/admin/about/tenure.html (last visited Feb. 2, 2012); *see also Brennan Center Nebraska Fact Sheet*, *supra* note 188.

195. Telephone Interview with Christy Abraham, Legal Counselor for Neb. State Senator Ray Aguilar (Feb. 18, 2011) [hereinafter Abraham Interview]; *see also* Schimek Interview, *supra* note 184.

196. Letter from Catherine Weiss, Assoc. Counsel, Brennan Ctr. for Justice, to Senator DiAnna Schimek (Jan. 20, 2005), *available at* http://www.brennancenter.org/page/-/d/FVR-LetterinSupportofNBBill.pdf. Weiss and the Brennan Center also found that "[t]he bill straightforwardly applies the state constitutional rule, disfranchising people convicted of felonies for the duration of their criminal sentences and restoring their rights thereafter." *Id.*

197. *Brennan Center Nebraska Fact Sheet*, *supra* note 188.

198. Schimek Interview, *supra* note 184.

"you are part of the community again" and should be granted the rights of citizenship.[199] Despite crafting a bill designed to reflect a moderate position on disenfranchisement reform, Schimek faced opposition from legislators who were wary of adopting a blanket rule and who believed that the pardon system provided more individualized determinations of true community involvement.[200]

At this time, a coalition of local community groups was preparing to fight this concern in the legislative hearings. Christy Abraham, general counsel for the senate's Committee on Government, Military, and Veterans Affairs, whose work helped push the legislation through the senate, believes that the testimony provided by the coalition of public interest groups was invaluable to changing the minds of the senators on the committee.[201] She described the hearings as "one of the rare moments where the legislators had their minds changed."[202] After Senator Roger Wehrbein successfully introduced an amendment to the bill to include a mandatory two-year waiting period after sentence completion before ex-felons become eligible for rights restoration, the bill passed the committee then easily passed the full senate.[203] The amendment provided much needed assurance to legislators who wanted to grant restoration only to those ex-felons who successfully reintegrated into society.[204]

The bill, however, was vetoed by the newly elected governor, Dave Heineman, who adhered to his belief that "[t]he current process of submitting a pardon request allows the Board of Pardons to weigh the merits of each request on a case-by-case basis, which I believe is the appropriate procedure and one that is consistent with the views of citizens as expressed in our Constitution."[205] Led by Schimek, the legislature overrode the veto within twenty-five hours of its receipt by a vote of 36-11.[206] While the testimony of the outside groups was inval-

199. Schimek Interview, *supra* note 187.

200. *Id.*

201. Led primarily by the League of Women Voters, the groups presented "the most compelling testimony that the Government Committee had ever heard," focusing on registration drives and personal testimony of ex-felons, expressing regret for mistakes that they had made as much younger adults and their current engagement with the community. Abraham Interview, *supra* note 195.

202. *Id.*

203. Schimek Interview, *supra* note 184.

204. *Id*.

205. Dave Heineman, *A Week of Firsts*, (Mar. 14, 2005), http://www.governor.nebraska.gov/archive/columns/2005/0314.html.

206. L. 99, 1st Sess., at 800–01 (Neb. 2005)*; see also* Scott Bauer, *Legislature Overrides Veto of Felon Voting Bill*, JOURNAL STAR (Mar. 9, 2005, 6:00 PM), http://journalstar.com/news/legislature-overrides-veto-of-felon-voting-bill/article_fa389772-74b4-5cd7-809b-496118ae707c.html.

uable, Abraham believes that additional factors played into the legislators' decision to override the veto and vote for, what she considered to be, "the right thing to do."[207] Because of a 2000 constitutional amendment, legislative term limits were scheduled to go into effect in Nebraska at the end of the 2005 legislative term, pushing just over one-third of Nebraska's state legislators out of office in 2006.[208] Abraham credits the high turnover rate and the fact that outgoing legislators were no longer concerned with seeking re-election with helping to secure victories for several progressive bills, including Bill 53, during the 2005 legislative session.[209]

The Nebraska experience demonstrates the vital role that state comparisons can play in developing the contours of new felon disenfranchisement laws. Although other factors certainly played a role, Senator Schimek looked closely at laws in other states, specifically rejecting the laws in states that she considered substantially more or less progressive than Nebraska.

IV.
THE STATES CAN'T DO IT ALONE: WHY "STATES AS LABORATORIES" IS NOT ENOUGH

The case studies above demonstrate that states are overcoming what should be a classic Federalist Ten majoritarian problem[210] and are making significant advancements in the realm of felon disenfranchisement, despite laws that exclude them from participating directly in the electoral process. Nevertheless, consideration of the basic right of mobility in a federalist society demonstrates that the states are simply not equipped to deal with the issue of felon disenfranchisement alone. For progress towards the elimination of felon disenfranchisement to continue spreading to other states, legislation must occur at the national level. The remainder of this Note looks at why ex-felons

207. Abraham Interview, *supra* note 195.

208. *See* LEGISLATIVE RESEARCH DIV., NEB. LEGISLATURE, A REVIEW: NINETY-NINTH LEGISLATURE, FIRST SESSION, 2005, 39 (2005), *available at* http://nebraskalegislature.gov/pdf/reports/research/2005sessionreview_0507.pdf; *see also* Scott Bauer, *Impact of Term Limits on State's Unicameral Government Feared*, JOURNAL STAR (Mar. 25, 2006, 6:00 PM), http://journalstar.com/news/state-and-regional/article_46347502-3ade-56a6-8f65-f3b5e2c57795.html.

209. Abraham Interview, *supra* note 195. Some of the more progressive bills passed in 2005 included LB 554 (increasing the minimum wage) and LB 331 (providing a registry for cancer patients who could not afford medicine to receive leftover medicine from others). Abraham believes that it is possible that legislators were more willing to support these progressive changes once they no longer had to seek re-election on their voting records. *Id.*

210. *See* THE FEDERALIST NO. 10 (James Madison).

have been able to overcome the majoritarian problem in some states, and the impediments likely to prevent these disenfranchisement reforms from being exported to remaining states.

A. *Overcoming the Majoritarian Problem*

The perception that Florida's disenfranchisement laws may have played a role in determining the outcome of the 2000 presidential election likely plays a large role in bringing the issue of disenfranchisement into political discussions, if not in convincing legislatures to ease restrictions.[211] It is possible, therefore, that advocates of reform are making progress not because they are overcoming the majoritarian problem, but because the majority itself has a significant stake in an outcome of fair elections. The case studies, however, demonstrate that the arguments that ultimately proved successful in enacting reforms did not revolve around the 2000 election or the need for fair national elections generally. Rather, winning arguments reflected a focus on the rights of ex-felons themselves and the local benefits of reintegrating ex-felons into society as full citizens.

Another possible explanation is that ex-felons simply do not face the majoritarian problem at all; each year they move further away from Justice Stone's notion of a "discrete and insular minority"[212] and may no longer lack access to the political process. In the last several decades, the prison population in the United States has increased dramatically. By 2008, one out of every one hundred Americans was behind bars.[213] Considering that all but fifteen states and the District of Columbia disenfranchise at least some ex-felons for a period of time after release from prison,[214] the numbers of disenfranchised ex-felons is increasing dramatically. As a result, in "the twenty-first century, convicted felons constitute the largest single group of American citizens who are barred by law from participating in elections."[215] Although disenfranchisement laws have an extremely disproportionate impact on minority populations, today they affect members of every

211. *See, e.g.*, Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1149 n.8 (2004) (noting the scholarship on felon disenfranchisement laws emerging from the 2000 Presidential Election).

212. United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

213. Adam Liptak, *More Than 1 in 100 Adults Are Now in Prison in U.S.*, N.Y. TIMES, Feb. 29, 2008, at A14.

214. *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CTR. FOR JUSTICE, http://www.brennancenter.org/page/-/d/download_file_48642.pdf (last visited Feb. 2, 2012).

215. KEYSSAR, *supra* note 12, at 308.

group in American society. It is therefore more difficult to assume that ex-felons necessarily, and by definition, have an "utter lack of political leverage" as assumed above.[216] Rather, the studies of Rhode Island, Nebraska, and Iowa all demonstrate that advocacy organizations, when able to work with ex-felons themselves, play a substantial role at both the national and local levels in securing progressive changes to state-level disenfranchisement laws. This simply could not be true if ex-felons remained a discrete, insular group. As Bruce Reilly, an ex-felon and a leader in Rhode Island's Right to Vote Campaign explained, interested volunteers on the campaign included both ex-felons whose rights had been taken away and the family and friends of ex-felons[217] who understood the toll that disenfranchisement has on reintegration into society.

B. The Problem of Regionalism in the "States as Laboratories" Theory

Although Madison warned that the Union, rather than each individual state, has the ability to protect against tyranny, another theory of federalism points to the ability of state governments to serve as "laboratories of democracy."[218] This theory argues that because most power is reserved to state and local governments under the Constitution,[219] a diverse system of laws can develop and take root. The state-level innovations that are successful and beneficial will be copied across the country because states must prevent their citizens from voting with their feet and moving away to other states because of perceived advantages in their legal systems.[220] Viewed through this lens, the expansion of ex-felon voting rights on a state-by-state basis can be explained as the inevitable outcome of other states liberalizing their own voting laws. Historically, the federalist system has been a crucial

216. *See supra* note 89 and accompanying text.

217. Reilly Interview, *supra* note 75.

218. Justice Louis Brandeis developed the concept in the context of scientific innovation and race to the bottom theory. He noted, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

219. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

220. Of course, this theory assumes that individuals have freedom of mobility between states and can choose to live in a state with the laws and protections that each individual citizen finds most important. This presumption, however, does not exist in the felon disenfranchisement context, as restrictions on mobility are common for anyone serving probation or on parole. *See infra* note 251 and accompanying text.

element in expansion of the franchise, from the slow elimination of property requirements[221] to the national attainment of women's suffrage.[222] In both instances, national voting norms changed and national laws were enacted to reflect experiments in local voting norms. This history and the case studies above demonstrate that the "laboratories of democracy" approach can and has applied to the expansion of voting rights.

In each of the case studies presented above, legislators and reformers pointed to and relied upon innovations in other states as essential support for local reform. In Iowa, the Governor's General Counsel looked specifically to the wording of reforms in Texas as a model for writing the Governor's Executive Order.[223] Innovations in other states were also essential in Rhode Island, where legislators were encouraged to change their law after having delayed earlier efforts because of concerns about "being the first movers on this" issue.[224] In Nebraska, Senator Schimek looked to other states in developing the contours of her own legislative proposal. Ultimately, she rejected Maine and Vermont's more inclusive approach in favor of the approaches of other states with more recent reforms.[225]

Comparisons with other states, however, have not been limited solely to instances of replication. In each of the states outlined above, reformers made the restrictiveness of the state's disenfranchisement laws relative to those of other states a central focus. Advocates of change focused on comparisons to other states in public hearings, field efforts, and newspaper opinion articles.[226] Iowa's Governor Tom Vilsack included the state's ranking as one of only five states relying on pardons for rights restoration in the actual text of his executive order.[227] Canvassers supporting Rhode Island's constitutional amendment found that voters responded favorably to evidence that the state's

221. *See* ALEC C. EWALD, THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE 129–31 (2010) ("[A]n equally important reason for the property [test's] demise was the fact that local officials were not enforcing the tests.").

222. *Id.* at 131 ("[W]omen voted in some elections long before 1920, and in fact women's participation in local elections probably helped them win suffrage nationally.").

223. *See supra* Part III.B(1).

224. Idarraga Interview, *supra* note 125.

225. Schimek Interview, *supra* note 184.

226. In pushing for change in Maryland, former United States Secretary for Housing and Urban Development, Jack Kemp, argued that "it is now time to move Maryland into the mainstream by restoring voting rights to people after they have fully completed their criminal sentences." Jack Kemp, Op-Ed., *An Opportunity to Expand Civil Rights*, WASH. TIMES, Apr. 12, 2007, *available at* http://www.restoreourvote.org/media/KempWashTimesOpEdApr122007.pdf.

227. Iowa Exec. Order No. 42, *supra* note 143.

laws were more restrictive than the laws of southern states with a history of discrimination in voting.[228] The use of comparisons to other states is the strongest common thread running through the case studies.

While the case studies seem to demonstrate that the issue of felon disenfranchisement is, in itself, a perfect case study of the "states as laboratories" approach to federalism, the question remains whether the model is sufficient to enact wide-scale, national disenfranchisement reform.[229] Because the theory is premised on the inherent ability of states to be innovative and then to choose whether to replicate one another, it is very likely that certain states simply will choose not to follow the lead of other states. Kentucky and Virginia, for example, maintain a position of permanent disenfranchisement for all felons without any sign of movement towards reform.[230] Under the "states as laboratories" theory, ex-felons in these states simply have no recourse absent moving to another state, which, as described in Part IV.C, below, is often difficult or impossible.

Moreover, the state-level reforms demonstrated above are not based on conceptions of national movements or consensus. Instead, they generally depend on notions of regional cohesion. While reformers within the states looked to other states with traditionally less progressive voting rights records, they also looked to separate themselves from "liberal" states—with the exception of Rhode Island, which is located in close proximity to Maine and Vermont, the only two states that allow prisoners to vote. Legislative leaders in Nebraska, for example, specifically rejected the more liberal options represented by the northeastern states of Vermont and Maine.[231] In Rhode Island, advocates of reform focused on comparisons with restrictions in other New England states.[232] In Iowa, reformers looked at states outside of the region only to highlight the similarity of Iowa's laws to those of states considered much less progressive; a comparison that demonstrated to

228. Reilly Interview, *supra* note 75.

229. This is especially true for anyone who believes that felon disenfranchisement is a national, rather than a state problem. Whether or not it is inherently a national problem is outside of the scope of this paper, which looks only to analyze a state's ability to legislate the issue.

230. CRIMINAL DISENFRANCHISEMENT LAWS ACROSS THE UNITED STATES, *supra* note 79, at 1. The following states also maintain permanent disenfranchisement for at least some felonies: Alabama, Arizona, Delaware, Florida, Mississippi, Nevada, Tennessee, and Wyoming. *Id.*

231. See Schimek Interview, supra note 184.

232. Werner, however, notes that while the state-by-state comparisons were important in Rhode Island, she and other canvassers found that focusing on recidivism rates was actually more convincing. Werner Interview, *supra* note 74.

Governor Vilsack that Iowa was an outlier on the disenfranchisement issue.[233] As Catherine Weiss of the Brennan Center stated, "Once Nebraska went, the pressure on Iowa increased dramatically," noting that the two states were the last non-southern states to remove permanent bans on ex-felon voting.[234]

If states seek to replicate only states within their region,[235] by definition they have no incentive to duplicate reforms taking place in other regions. For this reason, we can expect to see states like Kentucky and Virginia maintain their restrictive laws, just as states like Nebraska, Iowa, and Rhode Island try to distance themselves from comparisons to more restrictive regions. Additionally, the very factors that allow states to experiment with change more freely than the federal government—the existence of unicameral legislatures, direct accountability through simpler amendment processes, and greater access to representatives—permit reversing these reforms just as quickly. The day he took office, Governor Terry Brandstad reversed Governor Vilsack's Executive Order 42, and reinstated permanent disenfranchisement for Iowa's convicted felons.[236] In Massachusetts, reformers relied on a constitutional amendment—similar to the one used to liberalize laws in Rhode Island—to restrict rather than expand the voting rights of incarcerated convicted felons,[237] thereby bringing their previously more liberal law into conformance with those of other states in the region.

This desire of state leaders to ensure that their states do not become outliers within their own regions is a considerable but not fatal flaw in the "states as laboratories" theory. The social policy experiments being conducted at the state and regional level can serve as an example of both positive and negative experimentation not only for other states and regions, but also for the federal government. This is especially true where there are significant similarities between the policies in states within each region and, to a lesser extent, between dif-

233. Dickey Interview, *supra* note 157.

234. Kate Zernike, *Iowa Governor Will Give Felons the Right to Vote*, N.Y. TIMES, June 18, 2005, at A8.

235. For the purposes of this Note, "region" is not limited to geographical placement. Though I focus primarily on geographical regionalism, the theory applies also to cultural regionalism. For a discussion of the theory of cultural regionalism, see generally, DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES (1972).

236. Iowa Exec. Order No. 70, 33 Iowa Admin. Bull. 1165 (Feb. 9, 2011). The Executive Order does not apply retroactively and all ex-felons who regained their right to vote prior to January 14, 2011, maintain their right to vote. *Id.* ("Nothing in this Order shall affect the restoration of the rights of citizenship granted prior to the date of this Order.").

237. *See Question 2: Amendment to the Constitution of the State*, *supra* note 142.

ferent regions. This convergence can create the impetus for change at the federal level.[238] In the felon disenfranchisement context, it is likely that the New England states of Maine and Vermont will continue to allow all convicted felons to vote from prison, just as it is likely that the Southern states of Kentucky and Virginia will continue to disenfranchise all ex-felons for life, absent federal legislation. All other states, however, have been moving towards a middle-ground policy that allows felons to vote after completion of either their prison term or full sentence. Doing so has required most states to adopt reforms, but others, such as Massachusetts, have actually restricted the voting rights of their citizens in order to conform to the centrist model.[239]

Taking note,[240] members of the United States House of Representatives introduced the Democracy Restoration Act (DRA) in 2009.[241] The DRA seeks to ensure that in any federal election, the right of any citizen to vote "shall not be denied or abridged because that individual has been convicted of a criminal offense unless such individual is serving a felony sentence in a correctional institution or facility at the time of the election."[242] The recent focus on the DRA[243] demonstrates that, while it is institutionally difficult for Congress to legislate,[244] state experimentation can lead to federal action at the median.

C. The Problems of Mobility Rights and Mass Confusion: Additional Grounds for Federal Action

A key assumption of the "states as laboratories" approach to federalism is that citizens have the constitutional ability to move to a

238. *But see* Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 593–94, 608 (1980) (arguing against the conception of states as laboratories of democracy because politicians will refrain from innovating and will hope to free-ride off of the innovations of others).

239. SENTENCING PROJECT 2010 REPORT, *supra* note 10, at 1–3.

240. *Democracy Restoration Act of 2009: Hearing on H.R. 3335 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 107–35 (2009).

241. Democracy Restoration Act of 2009, H.R. 3335, 111th Cong. (2009).

242. *Id.* at § 3.

243. The Act, in some form or another, has been introduced in each Congress since 1999. *See Related Legislation*, GOVTRACK, http://www.govtrack.us/congress/bill.xpd?bill=h111-3335&tab=related (last visited Jan. 22, 2012).

244. For an analysis on the causes of and fluctuations in congressional gridlock, see Sarah A. Binder, *Going Nowhere: A Gridlocked Congress*, THE BROOKINGS REV., vol. 18, no.1, 2000, at 16.

different state.[245] This "right to travel" is "so important that it is 'assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all.'"[246] While the Court has held that this right is so strong that states cannot discriminate based on length of residency in determining residents' benefits,[247] it has not provided guidance regarding how to determine who is a "bona fide" resident or clarified whether a state may discriminate against residents who come to that state specifically for a given benefit.[248] These holdings focused on issues prevalent in and arising out of the welfare state and monetary benefits, and therefore may not be applicable directly to the right to vote. However, given that the right to vote is a fundamental right, protected by the Constitution[249] and the Voting Rights Act of 1965,[250] it seems that the right to travel—and with that, the right to be free of discrimination that would deter travel—should apply to voting rights.

Many affected ex-felons, however, are actually legally prohibited from travelling between states. Under the rules of the Interstate Commission for Adult Offender Supervision (Interstate Compact) regarding transfers of persons on parole or probation, discretionary transfers require the transferring state to provide sufficient documentation to justify a request to transfer and the receiving state has the right to accept or reject such a transfer request.[251] Moreover, it is unlikely that ex-felons will attempt to move en masse to those states with the least

245. For a discussion on the ability of voters to make strong statements by "voting with their feet," see generally Ilya Somin, *Foot Voting, Political Ignorance, and Constitutional Design*, 28 SOC. PHIL. & POL'Y 202 (2011).

246. Saenz v. Roe, 526 U.S. 489, 498 (1999) (quoting Shapiro v. Thompson, 394 U.S. 618, 643 (1969) (Stewart, J., concurring)) (ellipsis in original).

247. *Id.*

248. *See* Roderick M. Hills, Jr., *Poverty, Residency, and Federalism: States' Duty of Impartiality Toward Newcomers*, 1999 SUP. CT. REV. 277, 288–98 (1999).

249. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 667 (1966) (holding that voting is a fundamental political right).

250. 42 U.S.C. § 1973 (1965).

251. Interstate Commission for Adult Offender Supervision, ICAOS Rules, Rule 3.101-2. The Interstate Commission for Adult Offender Supervision (ICAOS) oversees the operations of the Interstate Compact for Adult Offender Supervision, a quasi-governmental body created among the states, the District of Columbia, Puerto Rico, and the Virgin Islands, and authorized by Congress to control the interstate movement of some convicted persons. *See* 4 U.S.C. § 112(a); Interstate Commission for Adult Offender Supervision, ICAOS Rules, Rule 3.101-1. In addition states have their own restrictions on the movement of offenders on parole. Kentucky, for example, the state with the most restrictive disenfranchisement policies, provides that offenders must stay in a "designated area of supervision" and may not "leave this area without [his] officer's permission." *Information for Offenders*, KY. DEP'T. OF CORRECTIONS, http://corrections.ky.gov/depts/Probation%20and%20Parole/Pages/InformationforOffenders.aspx (last visited Jan. 15, 2012).

restrictive disenfranchisement laws specifically to exercise the right to vote. For these reasons, this Part focuses instead on the rights of ex-felons who have moved for any number of other reasons.

Unlike typical areas of state control, individual state differences in felon disenfranchisement laws can cause significant confusion when ex-felons do move to a state with either more or less restrictive voting laws, calling the usefulness of a "laboratories of democracy" approach into question. As Alec Ewald noted after conducting interviews with election officials across the country:

> No state has a systematic mechanism in place to address the immigration of persons with a felony conviction, and there is no consensus among indefinite-disenfranchisement states on whether the disqualification is properly confined to the state of conviction, or should be considered in the new state of residence.[252]

In fact, thirty-seven percent of state and local election officials in ten states "either described their state's fundamental eligibility law incorrectly, or stated that they did not know a central aspect of that law."[253] That this confusion would be a problem has not escaped legislators looking to loosen restrictions in their own states. In Nebraska, General Counsel Christy Abraham, who helped draft the final re-enfranchisement legislation, voiced concern about how to protect Nebraskan residents who move to a more restrictive state, knowing that laws differed dramatically outside of Nebraska.[254] The final legislation, however, simply did not address the issue.[255]

This confusion tied to differing state felon disenfranchisement laws under the rubric of "laboratories of democracy" is not limited to instances in which an ex-felon moves from one state to another. In a letter to fellow members of Congress seeking co-sponsors for the Democracy Restoration Act,[256] Congressmen John Conyers and Jerold Nadler argued that the "current patchwork of state laws create widespread confusion among election officials throughout the country. . . . [This has] resulted in flawed voter purges that have deprived legitimate voters of their rights."[257] In addition to the inherent confusion

252. EWALD, CRAZY-QUILT, *supra* note 168, at ii.
253. *Id*. at i.
254. Abraham Interview, *supra* note 195.
255. *Id.*
256. Democracy Restoration Act of 2009, H.R. 3335, 111th Cong. (2009).
257. Letter from Representatives John Conyers and Jerrold Nadler, Members, U.S. House of Representatives Comm. on the Judiciary, to Congressional colleagues (June 3, 2009) (on file with author). Specifically, the Congressmen pointed to the fact that 30% of election officials in Ohio misinterpreted state law and "deprived thousands of people with felony convictions of even the opportunity to register." *Id.*; *see also* Neuborne Testimony, *supra* note 14, at n.25 ("[I]n Colorado, half of local election

created both between and within states by this legal patchwork, the fact that states can and frequently do change their laws adds to the confusion. In Tennessee, because of changing laws, disenfranchisement "is dependent on which of five different time periods a felony conviction occurred between 1973 and the present."[258]

Because of the federalist system, the problems created by this confusion—mostly in the form of voting roll purges and mistaken rejections of voter registration forms—are not limited to the states in which the problems occur. Federal elections and, consequently, federal laws are affected when ex-felons are able to vote in federal elections in some states and not in others.[259] Moreover, state laws making fraudulent registration a felony compound this confusion. As Professor Burt Neuborne, Executive Director of the Brennan Center, explained, "[The] confusion and misinformation resulting from the patchwork of state laws calls out for an easily administrable uniform federal standard."[260] The Supreme Court may agree that a uniform standard is overdue; although the Court has not held that felon disenfranchisement is unconstitutional, it has acknowledged that a "more modern view" of the issue could be addressed "in a 'legislative forum.' "[261]

CONCLUSION

Despite limited access to the political process, support for increased franchise for ex-felons has increased dramatically in the last several decades. Dozens of states have loosened restrictions on the right to vote for citizens leaving prison or completing provisions of parole and probation. As expected under the theory that states act as "laboratories of democracy," states look to one another to determine the scope of their own changes. In doing so, however, states focus on other states within their own regions rather than on national conceptions of ideal policies. While this focus has led to increased liberalization of disenfranchisement laws over the last decade, it is also likely to ensure that certain areas of the country do not benefit from these reforms. Therefore, although several states have made significant changes, state-level control of felon disenfranchisement laws should

officials erroneously believed that people on probation are ineligible to vote, when in fact they *are* eligible. In Tennessee, 63% of local election officials were unaware of the types of offenses and other criteria for which people could be permanently disfranchised under state law.") (internal citations omitted).

258. EWALD, CRAZY-QUILT, *supra* note 168, at i.

259. *See supra* note 52 and accompanying text.

260. Neuborne Testimony, *supra* note 14, at 6.

261. Richardson v. Ramirez, 418 U.S. 24, 55 (1974).

cede in favor of national legislation. The federal government has the ability to capitalize on the experimentation happening within the states and develop national laws that reflect the trajectory of a majority of the states. This dual process of state experimentation followed by national legislation would enable the states to develop optimal standards over time while allowing the federal government to ensure that, where a consensus has formed, citizens throughout the United States can benefit from reform.