REVISITING *RICHARDSON V. RAMIREZ*: THE CONSTITUTIONAL BOUNDS OF EX-FELON DISENFRANCHISEMENT

Note

I. INTRODUCTION

Desmond Meade cannot vote in Florida because he is an ex-felon.[1] If one looks only to his checkered past, he appears potentially worthy of disenfranchisement. He was dishonorably discharged from the military and convicted of both aggravated battery and felony possession of a firearm.[2] Meade, however, has "turned his life around."[3] He graduated summa cum laude from Miami-Dade Community College and graduated from Florida International University School of Law.[4] Although Meade seems to now be a model citizen, his ex-felon status precludes him from fully participating in the democratic process because Florida permanently disenfranchises ex-felons.[5] When Meade's wife ran for the Florida House and he was unable to vote for her, he said, "I was told I wasn't a citizen anymore."[6]

Meade and other ex-felon Floridians are not alone in their disenfranchisement. Only Maine and Vermont do not restrict the voting rights of citizens with felony convictions, including those incarcerated.[7] Among the forty-eight other states, 6.1 million citizens lack the right to vote because of a felony conviction.[8] Seventy-seven percent of that population are individuals who have either completed their sentences or have been released on probation or parole.[9] Of the states that place restrictions on felons' right to vote, fourteen states prohibit felons from voting while they are in prison;[10] four states prohibit felons from voting

1. Joe Davidson, *6 Million Citizens, Including 1 in 13 African Americans, Are Blocked from Voting Because of Felonies*, WASH. POST (Oct. 7, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/10/07/ 6-million-citizens-including-1-in-13-african-americans-are-blocked-from-voting-because-of-felonies/?utm_term=.0bd9c9bf0c9b.

2. Robert Steinback, *Advocates Taking Action to Restore Voting Rights to Rehabilitated Ex-Felons*, SUN SENTINEL (Nov. 13, 2014, 3:05 PM), http://www.sun-sentinel.com/opinion/commentary/fl-rlscol-steinback-felon-voting-rights-20141113-column.html.

3. Brittany Alzfan, *From Felon to Lawyer: The Inspiring Story of Desmond Meade*, LAW STREET (June 9, 2014), https://lawstreetmedia.com/news/felon-lawyer-inspiring-story-desmond-meade/.

4. *Id.*

5. Sam Levine, *Former Felon Sheds Tears of Joy as Effort to Restore Voting Rights Advances in Florida*, HUFF. POST (Jan. 23, 2018, 3:21 PM), https://www.huffingtonpost.com/entry/florida-former-felon-voting-rights_us_5a678493e4b0022830075f7f.

6. Steven Lemongello, *Push to Restore Voting Rights to Ex-Felons Reaches Supreme Court*, ORLANDO SENTINEL (Mar. 6, 2017, 3:50 PM), http://www.orlandosentinel.com/news/politics/political-pulse/os-former-felon-voting-rights-20170223-story.html.

7. Jean Chung, *Felony Disenfranchisement: A Primer*, SENTENCING PROJECT (July 17, 2018), https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/.

8. Christopher Uggen et al., *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, SENTENCING PROJECT (Oct. 6, 2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/.

9. *Id.*

10. *Id.* (Hawaii, Illinois, Indiana, Massachusetts, Maryland, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Utah).

while in prison or on parole;[11] eighteen states prohibit felons from voting while in prison, on parole, or on probation;[12] and twelve states impose restrictions on the right to vote even after ex-felons have served their sentences.[13] This Note focuses primarily on the laws of states in the latter category that disenfranchise ex-felons who have completed their sentences.

The disenfranchisement of individuals like Meade who have seemingly served their debt to society invites the question: to what extent can states constitutionally restrict ex-felons' right to vote? The Fourteenth Amendment expressly allows states to abridge citizens' right to vote "for participation in rebellion, or other crime" without the consequence of losing representation in the federal government, which states suffer by imposing other forms of disenfranchisement.[14] However, the right to vote is also a "fundamental political right" because it is "preservative of all rights."[15] By being denied the franchise, ex-felons suffer harm in a multitude of ways.

First, disenfranchised ex-felons suffer "representational harm" because their inability to vote restricts their power to translate their policy preferences into government action. Christopher Uggen and Jeff Manza estimate that enfranchisement of felons and ex-felons would likely have changed the result of seven Senate elections from 1978 to 2002, which could have changed the majority party in the Senate over that time.[16] They also find that if ex-felons had been allowed to vote in the 2000 presidential election, President Bush's victory "would have been reversed."[17] Accordingly, the exclusion of ex-felons from the ballot box may facilitate the election of candidates who are adverse to their interests.[18] Although it is not self-evident that ex-felons would vote as a coalition, disenfranchised ex-felons are disproportionately black;[19] a substantial majority of black Ameri-

11. *Id.* (California, Colorado, Connecticut, and New York).

12. *Id.* (Alaska, Arkansas, Georgia, Idaho, Kansas, Louisiana, Minnesota, Missouri, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, Washington, West Virginia, and Wisconsin).

13. *Id.* (Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Nevada, Tennessee, Virginia, and Wyoming).

14. U.S. CONST. amend. XIV, § 2.

15. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

16. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 789 (2002). However, it is important to note that their estimate takes into account enfranchisement of both felons and ex-felons—it is unlikely that looking only at ex-felons who had completed their sentences would have revealed the same impact.

17. *Id.* at 794.

18. Although one could argue that candidates that ex-felons would vote against are not "adverse" to their own interests, this argument assumes that a candidate running against an individual's preferred candidate represents positions adverse to the interests of the voter by implication.

19. Daniel S. Goldman, Note, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 633–34 (2004).

cans tend to vote for Democrats;[20] and all ex-felons, irrespective of race, have a substantial stake in electing Democrats because they tend to be more amenable to pursuing criminal justice reform that would ease the collateral consequences of sentencing than their "tough-on-crime" Republican counterparts.[21]

Second, ex-felons suffer an "integrational harm" because the inability to vote makes it more difficult to reintegrate into society. Although there are many forms of civic engagement that ex-felons may participate in—campaigns, petitions, and protests, to name a few—voting is uniquely important because it separates one's ability to merely be heard in a democracy from the ability to sanction elected officials who are unresponsive to their pleas. Put differently, because any free person present in the United States could protest, organize, and speak out on issues important to them, the ability to vote is what separates persons from citizens.

Some evidence suggests that the ability to vote is critical to ex-felons' ability to reintegrate into society as full citizens. For example, Uggen and Manza claim, "The right to vote is one of the defining elements of citizenship in a democratic polity and participation in democratic rituals such as elections affirms membership in the larger community for individuals and groups . . . [and is a] kind[] of civic engagement associated with the avoidance of illegal activity."[22] Using limited empirical evidence, they demonstrate that there is a strong correlation between voting and abstaining from crime, which at least suggests that "the act of voting manifests the desire to participate as a law-abiding stakeholder in a larger society."[23] Although it is probable that the evidence merely suggests that those who vote are less likely to commit crimes, their study suggests that democratic participation is not only correlated with one's propensity to follow the law, but encourages law-abiding behavior—they argue that "it seems likely that many [voting ex-felons] will bring their behavior into line with the expectations of the citizen role, avoiding further contact with the criminal justice system."[24] Their expectation is tied to a theory of informal

20. *See, e.g.*, Perry Bacon, Jr. & Dhrumil Mehta, *The Diversity of Black Political Views*, FIVETHIRTYEIGHT (Apr. 6, 2018, 5:56 AM), https://fivethirtyeight.com/features/the-diversity-of-black-political-views/ (highlighting that only 1% of black Americans identify as Republicans, 59% identify as Democrats, but substantially more than 59% vote for Democrats).

21. *See* Goldman, *supra* note 19, at 634 (highlighting that in Uggen and Manza's study on the electoral consequences of felon disenfranchisement, they find that giving felons and ex-felons the right to vote would be favorable to Democrats). *See generally* Lynn Adelman, *Criminal Justice Reform: The Present Moment*, 2015 WIS. L. REV. 181 (2015).

22. Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 195 (2004) (footnote omitted).

23. *Id.* at 213.

24. *Id.* at 215.

social control that is well developed in the criminology literature where voting citizens' "attachment to social institutions . . . increase[s] the reciprocal obligations between people and provide[s] individuals with a stake in conforming behavior."[25] Although the causal link from voting to a lower propensity to commit crimes is probably negligible—Uggen and Manza's data only seems sufficient to suggest that a relationship between voting and subsequent crime exists—its potential is worth noting. They provide an important caveat that, in order to support the crime-deterring potential of voting, ex-felons need greater civic education as a component of their rehabilitation.[26]

Third, ex-felons suffer "symbolic harm" from being unable to vote. When discussing the stigma connected to their convictions, many felons suggest that "losing the right to vote, in particular, [is] a powerful symbol of their status as 'outsiders.'"[27] The symbolic importance of the right to vote has achieved greater salience since the passage of the Voting Rights Act. The legislation exemplifies an aspiration of universal suffrage in American life and the end of general popular acceptance of voter disenfranchisement as an acceptable tool of American politics.[28] Now that expansion of the franchise is the political norm rather than the exception, exclusion generates greater ignominy than the status has carried previously in the nation's history.

Much ink has been spilled discussing the validity of felon disenfranchisement on equal protection grounds,[29] often focusing on its racial dimensions. Many authors have also analyzed the legality of the practice under the Voting Rights Act.[30] This Note makes three primary contributions to the existing literature.

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25. *Id.* at 196.

26. *Id.* at 214.

27. *Id.* at 212.

28. *See* Eric J. Miller, *Foundering Democracy: Felony Disenfranchisement in the American Tradition of Voter Exclusion*, 19 NAT'L BLACK L.J. 32, 42 (2005).

29. *See, e.g.*, Elizabeth Du Fresne & William Du Fresne, *The Case for Allowing "Convicted Mafiosi to Vote for Judges": Beyond* Green v. Board of Elections of New York City, 19 DEPAUL L. REV. 112, 114 (1969); George Brooks, Comment, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 851, 861 (2005); Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 740 (1972); Note, *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1950–51 (2002) [hereinafter *One Person, No Vote*]; Gary L. Reback, Note, *Disenfranchisement of Ex-Felons: A Reassessment*, 25 STAN. L. REV. 845, 846–47 (1973); Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"*, 102 HARV. L. REV. 1300, 1300 n.2 (1989); Note, *The Equal Protection Clause as a Limitation on the States' Power to Disenfranchise Those Convicted of a Crime*, 21 RUTGERS L. REV. 297, 298 (1967); Douglas R. Tims, Comment, *The Disenfranchisement of Ex-Felons: A Cruelly Excessive Punishment*, 7 SW. U. L. REV. 124, 125–27 (1975).

30. *See, e.g.*, Brooks, *supra* note 29, at 868–72; Miller, *supra* note 28, at 46–48; Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 540 (1993).

First, it provides an originalist critique of Justice Rehnquist's majority opinion in *Richardson v. Ramirez* that casts doubt on the Supreme Court's conclusion that felon disenfranchisement laws should be subject to rational basis review. An examination of the historical record reveals that, at the time of the Fourteenth Amendment's enactment, states tended to only disenfranchise offenders who committed felonies including a dishonest element (forgery, embezzlement, etc.), the most serious felonies (murder, rape, arson, etc.), or both rather than felons generally. The finding suggests that the Fourteenth Amendment's drafters and adopters would have understood Section Two to accept disenfranchisement of only these particular offenders rather than all felons, which indicates that laws later expanding the scope of disenfranchisement beyond what existed at the time of the adoption of the Fourteenth Amendment should be subject to greater scrutiny than the Court employed in *Ramirez*.

Second, this Note adds a discussion of voting's importance to constitutional conceptions of citizenship, which should be considered when analyzing the fundamental right to vote under the Fourteenth Amendment. While most discussions of felon disenfranchisement focus on discrimination against suspect classes, this Note argues that, if one looks to the "evolving standards of equal protection scrutiny,"[31] the interests supporting states' expansion of felon disenfranchisement are insufficient to impose greater burdens on the voting rights of ex-felons.

Third, this Note argues that even if *some* felon disenfranchisement would be constitutional were *Ramirez* revisited, prohibiting ex-felons who have completed their sentences from voting is not constitutional because it disturbs the systemic value of democracy in a manner inconsistent with Section One of the Fourteenth Amendment.

Part II of this Note describes the history of criminal disenfranchisement. This Part acknowledges that, although the practice of criminal disenfranchisement is deeply rooted both in ancient and American tradition, the expanding concept of "felony" in American law leads to individuals being excluded from the political system for crimes that would not have supported disenfranchisement when the Fourteenth Amendment was enacted.[32] This conclusion implies that the nexus between modern practice and tradition is insufficient to ground an originalist argument that the history and tradition of felon disenfranchisement supports current law.

Part III catalogs the development of decisions bearing on the

31. Richardson v. Ramirez, 418 U.S. 24, 76 (1974) (Marshall, J., dissenting).

32. Although the ever-expanding concept of felony can accurately be described as the root cause of the problem this Note addresses, that is not the focus of this Note. The evolving meaning of felony is a legislative problem. This Note addresses the role of the judiciary in relation to the problem—at what point does the changing scope of crimes labeled as felonies raise violations of constitutional rights that the courts must rectify?

constitutionality of ex-felon disenfranchisement. This Part also critiques the Supreme Court's reasoning in the landmark case of *Richardson v. Ramirez*, which held that disenfranchising felons is constitutional.

Part IV argues that whether one takes an originalist or constitutionalist position, the expansion of disenfranchisement to deny all ex-felons the right to vote is unconstitutional because it goes beyond what Section Two of the Fourteenth Amendment was thought to sanction at the time and would fail to survive heightened scrutiny. I select originalism and constitutionalism both for their respective value individually, as well as for the insights that the juxtaposition of these often-competing frames of reference can shed on the constitutionality of ex-felon disenfranchisement in particular.

Employing an originalist interpretation of the Fourteenth Amendment anchors the meaning of the Constitution to its text by limiting the ability of interpreters to read their own preferences into its potentially ambiguous provisions.[33] The late Justice Scalia argued that the Constitution has a fixed meaning that can be ascertained by those trained in the law, and that it is not "a novel invitation to apply current societal values," which, by contrast, is the province of the legislature.[34] Although one may disagree with the veracity of Scalia's argument with respect to ambiguous constitutional provisions where the original public meaning is unclear, it seems reasonable to conclude that where provisions of the Constitution lend themselves to a readily determinable original understanding, interpreters should be faithful to that reading to promote the rule of law. Otherwise, the meaning of the Constitution would be unpredictable and subject to change by the interpreter, which would cripple the value of having a constitutional text.

The susceptibility of Section Two of the Fourteenth Amendment, and by implication, the Constitution's position on felon disenfranchisement, is particularly fit for a static interpretation that can be discovered through employing originalist tools of construction—it was enacted against a backdrop of state laws sanctioning the practice, and it seems that Section Two was meant to allow these practices to continue without states losing representation in Congress. Thus, the meaning of "other crime" likely includes only those crimes that supported disenfranchisement under state law at the time of the Fourteenth Amendment's ratification. Additionally, unlike constitutional provisions that incorporate normative language amenable to changing meaning over time, like the Cruel and Unusual Punishment Clause, Section Two employs language that can be more readily anchored to a fixed meaning. The provision's limited potential to be

33. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989).

34. *Id.*

susceptible to many interpretations, given the context of its original public meaning, imposes an important limitation on Section One in the context of felon disenfranchisement because of the potential for (and routinely employed) unconstrained readings of the Equal Protection and Due Process Clauses.

Despite originalism's efficacy in interpreting Section Two as permitting some forms of felon disenfranchisement, it loses some of its draw as an authoritative interpretative method in determining the standard of review courts should employ in the context of restrictions on voting rights. First, an original understanding of the Constitution is unable to capture the current breadth of voting rights jurisprudence. For example, there is no text or history to support the proposition that the Constitution prohibits discrimination on the basis of national origin in voting rights.[35] Second, and more importantly, originalists have created an arguably un-originalist blind spot in voting rights jurisprudence by reading the Privileges and Immunities Clause out of the Fourteenth Amendment, which would have provided the strongest support for an originalist position that the Constitution prohibits restricting voting privileges for any citizen of the United States.[36]

Given originalism's shortcomings in determining the proper standard of review under Section One of the Fourteenth Amendment, its "majestic generalities and ennobling pronouncements"[37] are more readily understood through constitutionalist interpretation. Given that the provision did not have a clear original public meaning at the time of its enactment,[38] the provision invites a reading that considers the political values underpinning the provision[39] in part because the Equal Protection Clause's purpose is to abate the evils of social caste,[40] which an originalist approach threatens to undermine.[41]

By analyzing the constitutionality of ex-felon disenfranchisement under both originalist and constitutionalist theories of interpretation, I am able to avail myself of the benefits of each perspective (although their

35. Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 1024 (1998).

36. *See generally id.*; Kenyon D. Bunch, *The Original Understanding of the Privileges and Immunities Clause: Michael Perry's Justification for Judicial Activism or Robert Bork's Constitutional Inkblot?*, 10 SETON HALL CONST. L.J. 321 (2000).

37. *See* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 433 (1986).

38. *See* Boyce, *supra* note 35, at 1020–26.

39. *See* Brennan, *supra* note 37, at 437–38.

40. *See* Plyler v. Doe, 457 U.S. 202, 213 (1982); Brennan, *supra* note 37, at 438 (arguing that those who ratified the Fourteenth Amendment had the "goal . . . to eliminate all vestige of the slave caste").

41. Brennan, *supra* note 37, at 436–47.

theoretical underpinnings may be in conflict), while each lens safeguards against the weaknesses of the other. Availing myself of an originalist framework, I am able to anchor my position to the discernable, original public meaning of the Fourteenth Amendment's text at the time of its enactment where I otherwise may be predisposed to read my values into the Constitution in an unconstrained manner. Employing a constitutionalist lens, I am able to ensure that my originalist reading of the text is not unduly narrow and that the interpretation does not fall prey to originalism's risk of restricting the meaning of a provision in a manner inconsistent with the purpose of those who proposed and passed it (and, by implication, its true original meaning).

Part V briefly concludes.

II. BACKGROUND

This Part discusses the history of felon disenfranchisement. It begins by describing the practice's ancient roots and its continuation in Europe and the American colonies. It then turns to the development of felon disenfranchisement in the early United States after ratification of the Constitution. Finally, this Part turns to the current state of felon disenfranchisement in American law.

A. Early History

The practice of governments disenfranchising criminals is deeply rooted in democratic history—its roots trace back to antiquity.[42] In ancient Greece, ancient Rome, and Medieval Europe, people who committed crimes were restricted from owning property, were often banished from their communities, could not vote, and could not make public speeches.[43] These civilizations would only curtail a citizen's rights when a judge concluded that the crime committed justified the punishment[44] because it was "pronounced infamous" or as "outlawry."[45]

European lawmakers eventually moved beyond outlawry to punish the worst offenders with "civil death."[46] While outlaws "could be killed with

42. *See* Brooks, *supra* note 29, at 852.

43. Erika Stern, *"The Only Thing We Have to Fear is Fear Itself": The Constitutional Infirmities with Felon Disenfranchisement and Citing Fear as the Rationale for Depriving Felons of Their Right to Vote*, 48 LOY. L.A. L. REV. 703, 710 (2015).

44. *Id.*

45. Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059–60 (2002) (noting that infamy justified stripping criminals of rights in ancient Greece and Rome, where "outlawry" was the correlative label during the Renaissance in Europe).

46. *Id.* at 1060.

impunity, since they were literally considered to be outside the law," those punished by civil death were kept alive but killed in the eyes of the law.[47] After being convicted of treason or a felony, the sentence "destroy[ed] the basis of legal capacity, as did natural death by destroying physical existence."[48] Offenders became "dead in law" and could not perform any legal functions, including transferring ownership of property, appearing as a witness in court, and, of course, voting.[49] Stripping criminals of the right to vote was promulgated in Europe as retribution for past crimes and deterrence of future offenses.[50]

American disenfranchisement laws today are rooted in a similar tradition to that of civil death.[51] But disenfranchisement in the United States differs from its medieval roots in its scope—European disenfranchisement was restricted to the most serious crimes and was applied on a case-by-case basis by judges.[52] Disenfranchisement in the United States is based on statutory law. Prior to ratification of the Constitution, New England communities imposed moral requirements on the right to vote, which often included abstaining from "grossly scandalouse" behavior or "shamefull and vitious crime."[53] After ratification, many American states adopted statutes or constitutional provisions that disenfranchised individuals based on their convictions under their Article I, Section Two, power to set "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[54] Many state constitutions also explicitly reserve the power to disenfranchise criminals from their legislatures.[55] However, early American law reflected

> a prevailing attitude that the right to vote should be limited to the few who proved themselves qualified . . . [but] [g]radually the nation shifted to the modern concept that voting is a right which belongs to every citizen except the few who are specifically disqualified by the qualification requirements of their States.[56]

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47. *Id.*

48. *Id.*

49. *Id*; *see also* Itzkowitz & Oldak, *supra* note 29, at 724.

50. Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOC. 559, 562 (2003).

51. Chung, *supra* note 7.

52. Ewald, *supra* note 45, at 1061.

53. *Id.* (quoting Cortlandt F. Bishop, *History of Elections in the American Colonies*, in 3 STUDIES IN HISTORY ECONOMICS AND PUBLIC LAW 1, 53 (Univ. Faculty of Pol. Sci. of Columbia Coll. ed. 1893)).

54. Brooks, *supra* note 29, at 853 (quoting U.S. CONST. art. I, § 2).

55. Behrens et al., *supra* note 50, at 563.

56. Ewald, *supra* note 45, at 1063 (citing U.S. COMM'N ON CIVIL RIGHTS, WITH LIBERTY AND JUSTICE FOR ALL 23 (1959)) (emphasis omitted).

Disenfranchisement laws gradually seeped into state law as state constitutions took shape. Virginia was the first state to disenfranchise felons in 1776, ten more states adopted similar laws between 1776 and 1821, and eighteen more states followed suit before the ratification of the Fourteenth Amendment.[57] Although the state laws varied substantively, conviction of particular crimes came with the collateral consequence of permanent loss of the right to vote.[58] It is worth noting that, at this time in the nation's history, criminal disenfranchisement only affected already qualified voters—most states already disenfranchised "women, men without extended residency, blacks, soldiers, students, the institutionalized mentally ill, and criminals."[59] Today, given the nation's history and tradition of expanding the franchise,[60] only the latter two groups may now be lawfully disenfranchised.[61] The trend toward enfranchisement began after Reconstruction with the Fourteenth Amendment's imposition of penalties on states that disenfranchised men.

B. Post-Reconstruction

Although the Fourteenth Amendment sought to strengthen minority rights by prohibiting states from denying people the "equal protection of the laws," it strengthened the ability of states to disenfranchise criminals.[62] Section Two of the Fourteenth Amendment acknowledges states' ability to regulate voter qualifications, but it threatens to proportionally reduce the representation each state receives based on the citizens to whom it denies the right to vote.[63]

However, the text imposes one exception through which states will not lose representation—the restriction of the right to vote because of "participation in rebellion, or other crime."[64] The specific reference to "rebellion" enabled states to disenfranchise former Confederates, and an earlier draft of the amendment would have barred former Confederates from voting in federal elections until 1870.[65] During the ratification debates, the "except for participation in rebellion, or other crime" provision

57. Brooks, *supra* note 29, at 853 (citing Green v. Bd. of Elections of N.Y., 380 F.2d 445, 450 n.4 (2d Cir. 1967)).

58. Ewald, *supra* note 45, at 1064 (quoting KIRK HAROLD PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 148 (Greenwood Press 1971) (photo. reprint 1969) (1918)).

59. *Id.*

60. Paul David Meyer, Comment, *Citizens, Residents, and the Body Politic*, 102 CALIF. L. REV. 465, 484–89 (2014).

61. *Id.*

62. *See* U.S. CONST. amend. XIV, § 1; *see also* Ewald, *supra* note 45, at 1066.

63. Ewald, *supra* note 45, at 1071.

64. *Id.* at 1065 n.78 (emphasis omitted).

65. *Id.* at 1104.

drew little scrutiny—the Joint Committee approved the language by a wide margin, and the language was never modified.[66] The ratification debates suggest that representatives understood that the law would enable states to continue to disenfranchise criminals, which accommodated existing state disenfranchisement laws that were in place in twenty-nine of the thirty-seven states at the time.[67] However, "other crime" was likely understood to reach particular felonies.[68] For example, as a condition to readmission into the Union, Arkansas passed a law declaring that it would never amend its constitution "to deprive any citizen or class of citizens . . . of the right to vote . . . except as a punishment for such crimes as are now felonies at common law."[69] Similar language was enacted by other states in the former Confederacy before being readmitted into the Union.[70]

C. Contemporary Disenfranchisement

Unlike at common law, "when all felons were in principle subject to capital punishment," the expansion of crimes coming under the umbrella of felonies has drastically changed the profile of disenfranchised voters.[71] Today, minor drug offenders, first time offenders, and individuals guilty of misdemeanors can be disenfranchised in some states.[72] Laws that disenfranchise "lesser" offenders provide little guidance on the purpose behind the disenfranchisement.[73] However, many scholars believe that the growth of denying felons the right to vote has been tied to race,[74] noting that the incarceration boom[75] and loosening of felon disenfranchisement laws[76] coincided with the fall of Jim Crow. This Note focuses on the general constitutionality of ex-felon disenfranchisement, and a discussion

66. S. Brannon Latimer, Comment, *Can Felon Disenfranchisement Survive Under Modern Conceptions of Voting Rights?: Political Philosophy, State Interests, and Scholarly Scorn*, 59 S.M.U. L. REV. 1841, 1852 (2006).

67. *Id.*

68. *Id.* at 1852–53 (citing Richardson v. Ramirez, 418 U.S. 24, 49 (1974) (discussing the Reconstruction Act's legislative history)).

69. Brooks, *supra* note 29, at 857 (emphasis omitted) (quoting Act of June 22, 1868, ch. 69, 15 Stat. 72).

70. *Ramirez*, 418 U.S. at 52 (highlighting that laws with only minor variations in language were passed by North Carolina, South Carolina, Louisiana, Georgia, Florida, Virginia, Mississippi, and Texas).

71. *See One Person, No Vote*, *supra* note 29, at 1939 (quoting George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 U.C.L.A. L. REV. 1895, 1899 (1999)).

72. Stern, *supra* note 43, at 710.

73. *Id.* at 711.

74. *See, e.g.*, Behrens et al., *supra* note 50, at 560–99.

75. *See* Goldman, *supra* note 19, at 627.

76. *Id.* at 633.

of potentially racially motivated disenfranchisement is beyond the scope of this Note.

Even assuming that states' felon disenfranchisement laws are motivated by bona fide state interests, the United States' treatment of ex-felons is regressive compared to the international democratic community.[77] The European Court of Human Rights invalidated blanket bans on voting from prisons as a violation of the European Convention on Human Rights.[78] Similarly, Canada, Israel, and South Africa's courts have found all disenfranchisement based on criminal convictions unconstitutional.[79] The evidence that other Western democracies refrain from disenfranchising ex-felons suggests that the right of ex-felons who have completed their sentences may be an "integral part of human freedom" protected by the Due Process Clause,[80] or alternatively, that international practice is "instructive for [the Court's] interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"[81]

Approximately 3.9 million voting-age citizens in the U.S. are unable to vote because of prior felony convictions, and about 1.4 million of those citizens have completed their sentences.[82] Of the twelve states[83] that disenfranchise ex-felons after the completion of their sentences, three states—Florida, Iowa, and Kentucky—permanently disenfranchise all people with felony convictions unless the government individually pardons or grants clemency to individual offenders.[84] The other nine states have automatic restoration for some categories of offenders but require governmentally approved restoration of others.[85] For example, Tennessee automatically restores the right to vote to ex-felons "upon completion of one's sentence, fulfillment of all legal financial obligations (namely child support and restitution), and completion of a certificate of restoration."[86] However, the state still permanently disenfranchises ex-felons convicted of

77. *See* Behrens et al., *supra* note 50, at 560.

78. Chung, *supra* note 7.

79. *Id.*

80. *Cf.* Lawrence v. Texas, 539 U.S. 558, 577 (2003) (relying on evidence of the practices of other Western civilizations in finding that anti-sodomy laws violate rights protected by the Due Process Clause).

81. *Cf.* Roper v. Simmons, 543 U.S. 551, 575 (2005) (dedicating an entire section of the majority opinion to the international community's aversion to executing minors to support the holding that the practice is unconstitutional).

82. *See One Person, No Vote*, *supra* note 29, at 1940.

83. Uggen & Manza, *supra* note 16, at 781–82, 782 n.5.

84. *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CENTER FOR JUSTICE (June 5, 2017) [hereinafter *Criminal Disenfranchisement Laws*], https://www.brennancenter.org/ sites/default/files/analysis/Criminal_Disenfranchisement_Map.pdf.

85. Uggen & Manza, *supra* note 16, at 781–82, 782 n.5; *Criminal Disenfranchisement Laws*, *supra* note 84.

86. *Voting Rights Restoration Efforts in Tennessee*, BRENNAN CENTER FOR JUSTICE (Feb. 9, 2018), https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-tennessee.

the most serious crimes, which include murder, rape, treason, and voter fraud.[87]

The laws in Florida, Iowa, and Kentucky, which permanently remove felons' ability to vote absent clemency or pardon, present starker constitutional problems. Although these states have mechanisms in place to facilitate restoration of ex-felons' voting rights, "[t]his promise is true in theory yet false in practice."[88] Few ex-felons ever regain their right to vote either because "they do not have adequate information about the process, because they do not have the financial resources for a successful application, or because they do not have the political resources to gain a pardon."[89] In some states, as few as 1% of disenfranchised ex-felons regain the right to vote in a given year.[90]

Just as the composition of disenfranchised criminals has changed, the state interests supporting the denial of the right to vote have also morphed over time. The original state interest advanced to support disenfranchisement, that groups not granted the right to vote could not be trusted, no longer passes constitutional muster.[91] Today, the primary interests supporting felon disenfranchisement are the "purity of the ballot box" and preventing perversion of the political process.[92] The weakness of these arguments is discussed at Subpart IV.B, *infra*.

III. DEVELOPMENT OF THE LAW

Before the Supreme Court weighed in on the constitutionality of ex-felon disenfranchisement, early lower court decisions addressing the issue demonstrated that the constitutionality of the practice was less clear than Justice Rehnquist's opinion in *Ramirez* indicated.

87. *Id.*

88. Goldman, *supra* note 19, at 637–38.

89. Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1606 (2004).

90. *See id.* at 1606–07.

91. Stern, *supra* note 43, at 712.

92. *Democracy Imprisoned: The Prevalence and Impact of Felony Disenfranchisement Laws in the United States*, THE SENTENCING PROJECT (Sept. 30, 2013), https://www.sentencingproject.org/publications/democracy-imprisoned-a-review-of-the-prevalence-and-impact-of-felony-disenfranchisement-laws-in-the-united-states/ (quoting Washington v. State, 75 Ala. 582, 585 (1884), which argued that felony disenfranchisement was enacted to "preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption, just as much as against that of ignorance, incapacity, or tyranny").

A. Early Challenges to Ex-Felon Disenfranchisement

1. Otsuka v. Hite

Despite the longstanding history of felon disenfranchisement in the United States, state laws revoking felons' voting rights did not face judicial review until the 1960s.[93] The first challenge came from Katsuki Otsuka, a Quaker living in California, who challenged California categorizing his guilty plea to violating the Selective Service Act on religious grounds as an "infamous crime" under the state constitution, which would justify revocation of his right to vote.[94] Twenty years after his conviction, the Los Angeles County Registrar of Voters refused to allow him to register to vote because of his criminal conviction.[95] The trial court upheld his conviction because it concluded that, as a matter of law, the state constitution required such offenders to be ineligible to vote.[96] The California Supreme Court noted that the source of the right to vote in state elections is unclear,[97] but emphasized the fundamental nature of the right to vote as "the essence of a democratic society,"[98] which is "fundamental 'because [it is] preservative of all rights'"[99] and "vital to the maintenance of democratic institutions."[100] Leaning on Supreme Court voting rights precedent, the California Supreme Court found that the right to vote "flows from the wellsprings of our national political heritage."[101]

Drawing on the Supreme Court's prior treatment of the right to vote as a fundamental right, the court applied heightened scrutiny to the application of the California constitution.[102] In conducting its heightened scrutiny analysis, the court found that the "purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption,"[103] was sufficient to justify restrictions on the

93. Pamela S. Karlan, Lecture, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. Cin. L. Rev. 1345, 1362 (2003). However, the Supreme Court did imply that the practice of felon disenfranchisement was assumed constitutional in dicta on multiple occasions. *See, e.g.*, Gray v. Sanders, 372 U.S. 368, 380–81 (1963); Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 51 (1959); Trop v. Dulles, 356 U.S. 86, 96 (1958).

94. Otsuka v. Hite, 414 P.2d 412, 414 (Cal. 1966) (en banc), *abrogated by* Ramirez v. Brown, 507 P.2d 1345 (Cal. 1973) (en banc), *rev'd* Richardson v. Ramirez, 418 U.S. 816 (1973).

95. *Id.* at 415.

96. *Id.*

97. *Id.*

98. *Id.* at 416 (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

99. *Id.* (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

100. *Id.* (quoting Carrington v. Rash, 380 U.S. 89, 94 (1965)).

101. *Id.*

102. *Id.*

103. *Id.* at 417 (quoting Washington v. State, 75 Ala. 582, 585 (1884)).

right to vote when present.[104] The court found that although states may have an interest in denying the vote to those "openly violating its laws," in the case of a defendant who was convicted over twenty years ago, the plaintiff "paid [his] debt to society and . . . ha[d] since been leading [an] exemplary li[fe]."[105] The court recognized that, based on the crimes considered felonies at the time, the challenged law would "sweep into its ambit malum prohibitum conduct which is but little detrimental to society at large and is totally unrelated to the goal of preservation of the integrity of the elective process."[106]

In reaching its conclusion, the court emphasized the importance of how the concept of "infamous crimes" had expanded under California law. It noted:

> [T]he only tenable purpose . . . of the voting disqualification . . . [was] to protect "the purity of the ballot box" against abuses by morally corrupt and dishonest voters . . . . But such abuses [were] not consistently predictable by simply considering "the nature of the punishment," in this day of indeterminate sentences and proliferation of technical, malum prohibitum offenses.[107]

Focusing on the nature of the crime, the court held that violating the Selective Service Act as a conscientious objector over twenty years ago was not an infamous crime within the meaning of the California constitution.[108]

2. Stephens v. Yeomans

Four years later, the United States District Court for the District of New Jersey heard a similar challenge in *Stephens v. Yeomans*.[109] The plaintiff, Robert Stephens, was convicted of stealing a car when he was nineteen years old.[110] Nine years later, and six years after completing his sentence with no additional criminal record, he registered to vote but had his name stricken from the voter rolls.[111] State law at the time provided that any individual convicted of "larceny of the value of $200.00 or more, unless pardoned or restored by law to the right of suffrage," had no suffrage rights.[112] Stephens brought suit against Yeomans, the state Super-

104. *Id.*
105. *Id.* at 419.
106. *Id.*
107. *Id.* at 422 (quoting *Washington*, 75 Ala. at 585).
108. *Id.* at 425.
109. 327 F. Supp. 1182 (D.N.J. 1970).
110. *Id.* at 1183.
111. *Id.*
112. *Id.* (quoting N.J. STAT. ANN. § 19:4-1(4) (1964), *deleted by amendment* 1971 N.J. Laws, ch. 280 § 1 (current amended version at N.J. STAT. ANN. § 19:4-1 (West 2014))).

intendent of Elections, seeking to enjoin enforcement of the law on equal protection grounds.[113]

Drawing on the same Supreme Court precedent as the California Supreme Court in *Otsuka*, the court concluded that laws restricting the franchise, even when generally applicable, were subject to "stricter than usual scrutiny."[114] The court reached this conclusion despite the express language of Section Two of the Fourteenth Amendment.[115]

The court began its heightened scrutiny analysis by examining the history of criminal disenfranchisement in New Jersey.[116] The foundation for disenfranchisement began with the state's enactment of the Act Concerning Witnesses in 1799, which restricted the ability of "person[s] . . . convicted of blasphemy, treason, murder, piracy, arson, rape, sodomy, or the infamous crime against nature, committed with mankind or with beasts, polygamy, robbery, conspiracy, forgery, or larceny above the value of six dollars" from being admitted as a witness.[117] Later, in 1844, the state enacted a new constitution that denied the right to vote to "persons . . . 'convicted of a crime which now excludes him from being a witness unless pardoned or restored by law.'"[118] Although the state later repealed the restrictions on appearing as a witness, it retained the same voter disqualifications.[119] Although the court acknowledged that the scheme promoted the "purity of the electoral process," it questioned "[h]ow the purity of the electoral process [was] enhanced by the totally irrational and inconsistent classification set forth in [the law]," and found "no rational basis for the [state's] classification."[120] It thus held the disenfranchisement of criminals set forth in the state constitution facially unconstitutional.[121]

B. Supreme Court Review: Richardson v. Ramirez

In *Ramirez*, the Supreme Court granted certiorari to a California Supreme Court case that held that statutes disenfranchising felons who completed their sentences were unconstitutional on equal protection grounds.[122] Plaintiffs, three convicted ex-felons who had completed their

113. *Id.* at 1184.
114. *Id.* at 1186.
115. *Id.*
116. *Id.* at 1187.
117. *Id.*
118. *Id.* (quoting N.J. CONST. of 1844 art. II, § 1).
119. *Id.* at 1188.
120. *Id.*
121. *Id.*
122. Richardson v. Ramirez, 418 U.S. 24, 27 (1974).

sentences, filed a class action for a writ of mandate from the California Supreme Court declaring refusal of their voter registration unconstitutional.[123]

The challenged California law, Article XX, § 11, of the California constitution, denies the right to vote to persons "convicted of bribery, perjury, forgery, malfeasance in office, 'or other high crimes.'"[124] Similarly, former Article II, § 1, of the state constitution provided that "no person convicted of any infamous crime . . . shall ever exercise the privileges of an elector in this State."[125] California law directs the county clerk to cancel the registration of voters "convicted of 'any infamous crime'"[126] and "permit[s] a voter's qualifications to be challenged on the ground that he has been convicted of 'a felony.'"[127] California law allows citizens denied registration judicial review of their disqualification.[128] One plaintiff had been convicted of "robbery by assault," another of heroin possession, and another of second degree burglary and forgery.[129]

In considering the equal protection challenge, Justice Rehnquist, writing for the majority, concluded that Section Two of the Fourteenth Amendment "expressly exempts . . . disenfranchisement grounded on prior conviction of a felony" from the penalty states face for denying citizens the right to vote.[130] The majority reasoned that, unless the respondents could demonstrate that the intent of Section Two were different from the most natural reading of the clause, any felon disenfranchisement should pass constitutional scrutiny because "those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in § 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by § 2 of the Amendment."[131] Although the majority acknowledged the problems inherent in analyzing the intent of a constitutional provision,[132] it conducted a detailed analysis of the legislative history of Section Two.[133]

The majority noted that Senator Williams of Oregon introduced the current language of Section Two of the Fourteenth Amendment in the Joint

123. *Id.* at 26.

124. *Id.* at 27 (quoting CAL. CONST. art. XX, § 11 (repealed 1976)).

125. *Id.* at 27–28 (quoting what was formerly CAL. CONST. art. II, § 1 (repealed and renumbered 1972)).

126. *Id.* at 28 (quoting CAL. ELEC. CODE § 383 (repealed 1976)).

127. *Id.* at 29 (quoting CAL. ELEC. CODE § 389 (repealed 1976)).

128. *Id.* at 30–31.

129. *Id.* at 32 n.9.

130. *Id.* at 43.

131. *Id.*

132. *Id.* at 43–44.

133. *Id.* at 43–52.

Committee, and it passed by a "lopsided margin."[134] Although alternative language to some parts of Section Two was discussed in floor debates in both chambers of Congress, "the language 'except for participation in rebellion, or other crime' was never altered."[135] The majority stated that several congressmen noted that the provision equalized representation throughout the nation and tacitly approved of disenfranchisement of criminals.[136]

After highlighting that the floor debates indicated that members of Congress understood the effect of Section Two, the majority noted that the original public meaning of the provision is consistent with the advanced understanding because, at the time of ratification, "29 States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes."[137] Additionally, the Reconstruction Act, as a condition to readmission into the Union, required:

> That when the people of any one of said rebel States shall have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a con-vention of delegates elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in

134. *Id.* at 44.

135. *Id.* at 45.

136. *Id.* at 45–48. The opinion noted that Representative Bingham, "one of the principal architects of the Fourteenth Amendment," stated, "[I]f [New York] discriminates against her colored population as to the elective franchise, (except in cases of crime,) she loses to that extent her representative power in Congress." *Id.* at 45 (quoting CONG. GLOBE, 39th Cong., 1st Sess., 2543 (1866)). The opinion went on to note similar comments of other representatives, highlighting that Representative Eliot of Massachusetts said, "If political power shall be lost because of such denial, not imposed because of participation in rebellion or other crime, it is to be hoped that political interests may work in the line of justice, and that the end will be the impartial enfranchisement of all citizens not disqualified by crime." *Id.* at 45–46 (quoting CONG. GLOBE, 39th Cong., 1st Sess., 2511 (1866)). Similarly, Representative Eckley of Ohio noted, "Under a congressional act persons convicted of a crime against the laws of the United States, the penalty for which is imprisonment in the penitentiary, are now and always have been disfranchised, and a pardon did not restore them unless the warrant of pardon so provided." *Id.* at 46 (quoting CONG. GLOBE, 39th Cong., 1st Sess., 2535 (1866)). Senator Johnson of Maryland, an opponent of the Fourteenth Amendment, argued, "Now it is proposed to deny the right to be represented of a part, simply because they are not permitted to exercise the right of voting. You do not put them upon the footing of aliens, upon the footing of rebels, upon the footing of minors, upon the footing of the females, upon the footing of those who may have committed crimes of the most heinous character. Murderers, robbers, houseburners, counterfeiters of the public securities of the United States, all who may have committed any crime, at any time, against the laws of the United States or the laws of a particular State, are to be included within the basis; but the poor black man, unless he is permitted to vote, is not to be represented, and is to have no interest in the Government." *Id.* at 47 (quoting CONG. GLOBE, 39th Cong., 1st Sess., 3029 (1866)). Finally, the opinion noted that Senator Henderson of Missouri observed, "For all practical purposes, under the former proposition loss of representation followed the disfranchisement of the negro only; under this it follows the disfranchisement of white and black, unless excluded on account of 'rebellion or other crime.'" *Id.* at 48 (quoting CONG. GLOBE, 39th Cong., 1st Sess., 3033 (1866)).

137. *Id.* at 48.

> said State for one year previous to the day of such election, *except such as may be disenfranchised for participation in the rebellion or for felony at common law* . . . .[138]

The former Confederate states then enacted laws, which often reserved the right to restrict the right to vote for ex-felons, to meet the requirement.[139]

After undergoing its intentionalist and originalist analysis, the Court turned to its own precedent. The Court noted that, although it had not previously considered the scope of states' power to disenfranchise criminals, it "approved exclusions of bigamists and polygamists from the franchise" in two cases in the late nineteenth century.[140] It then noted that it had suggested in dicta that it approved of the exclusion of felons from the franchise.[141] Concluding its review of the Court's prior position, it noted that it had recently summarily affirmed two cases rejecting constitutional challenges to the disenfranchisement of convicted felons.[142] Given the plain meaning of the provision, the Court suggested that it did not need to interrogate its earlier equal protection precedents, presumably endorsing rational basis review of such laws.[143] The majority concluded its opinion by giving lip service to the idea that "these notions are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term."[144] The Court made a democratic counterargument to the position, suggesting that "[i]f respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view."[145]

The majority's opinion, although it appears to have undertaken a detailed analysis of the meaning of Section Two of the Fourteenth Amendment, is unpersuasive. First, the committee and floor debates excerpted by the majority are illustrative and worth interrogation, but the majority drew suspect conclusions from the statements. It seems clear that Congress understood that states would be able to disenfranchise those guilty of "rebellion[] or other crime[s]"[146] without losing representation in the federal government, but that is insufficient to support the conclusion that criminals could be disenfranchised for *any* crime and duration. Given

138. *Id.* at 49 (emphasis added).

139. *See id.* at 51–52.

140. *Id.* at 53.

141. *Id.* (citing Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 79 (1959) (upholding the constitutionality of literacy tests)).

142. *Id.*

143. *Id.* at 55.

144. *Id.*

145. *Id.*

146. U.S. CONST. amend. XIV, § 2.

that the majority of states at the time had felon disenfranchisement laws, it is likely that the broad language of "other crime" was meant to ensure that Section Two would not penalize states for criminal disenfranchisement laws that were already on the books. However, the implication that the Amendment was not intended to repeal any existing state law is quite a different conclusion than finding that the Amendment gives states license to disenfranchise persons based upon action they can constitutionally criminalize and to disenfranchise the offenders of such crimes for as long as they wish. The majority ignored this implication of its reasoning, and, if taking an originalist position, it should have limited its conclusion about the permissibility of felon disenfranchisement to the extent that existed at the time of the enactment of the Fourteenth Amendment.[147]

Given my analysis above, the rational basis review adopted by the majority did not pass muster. Although existing state laws that prohibited ex-felons from regaining the right to vote were likely assumed to be constitutional by the ratifiers of the Fourteenth Amendment, it is unclear that felon disenfranchisement laws, as they have evolved, should receive the same treatment. Given that state law has expanded the concept of *felony* beyond what was recognized at the time of ratification of the Fourteenth Amendment, new encroachments on the right to vote beyond what existed at the time of ratification should be subject to heightened scrutiny because of the fundamentality of the right to vote.[148]

Justice Marshall's dissent in *Ramirez* made a similar argument.[149] He argued, "The Court today holds that a State may strip ex-felons who have fully paid their debt to society of their fundamental right to vote without running afoul of the Fourteenth Amendment."[150] Noting the Court's prior precedent, he asserted that the proper analysis of legislation that infringes upon a fundamental right is not whether the legislation was foreseen by the adopters of the Fourteenth Amendment in Section Two, but rather if the legislation meets the test that has been applied to all other curtailment of citizens' right to vote under Section One.[151] Marshall proceeded to argue that Section Two is not an exception to Section One, and that "[i]f a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are necessary to promote a compelling state interest.'"[152] In concluding that he would have struck down the California statute, Justice Marshall observed that the State did not assert a sufficiently compelling state interest to justify

147. *See infra* Subpart IV.A.

148. *See infra* Subpart IV.A.

149. *See* Richardson v. Ramirez, 418 U.S. 24, 77–86 (1974) (Marshall, J., dissenting).

150. *Id.* at 56.

151. *Id.* at 77.

152. *Id.* at 78 (emphasis omitted) (quoting Dunn v. Blumstein, 405 U.S. 330, 337 (1972)).

disabling former felons from accessing the ballot box.[153] He argued, quoting the Secretary of State of California's memorandum in support of the respondents:

> It is doubtful . . . whether the state can demonstrate either a compelling or rational policy interest in denying former felons the right to vote. The individuals involved in the present case are persons who have fully paid their debt to society. They are as much affected by the actions of government as any other citizens, and have as much of a right to participate in governmental decision-making. Furthermore, the denial of the right to vote to such persons is a hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens.[154]

Although I am sympathetic to the framing of Justice Marshall's dissent and in accord with the appropriate standard of review, I would be unable to join the full opinion. Justice Marshall offered an unpersuasive account of the original intent of Section Two.[155] He argued that Section Two was the product of a necessary compromise at the time of ratification because Republicans who controlled the Thirty-Ninth Congress were "concerned that the additional congressional representation of the Southern States which would result from the abolition of slavery might weaken their own political dominance," which required members to choose "either to limit southern representation, which was unacceptable on a long-term basis, or to insure that southern Negroes, sympathetic to the Republican cause, would be enfranchised; but an explicit grant of sufferage [sic] to Negroes was thought politically unpalatable at the time."[156] He argued that Section Two was an accident of political exigency because the only way to expand the franchise through constitutional amendment was through the penalty scheme in Section Two, rather than an express grant of the right to vote to former slaves (as was later enacted in the Fifteenth Amendment).[157]

Although the way in which Section Two of the Fourteenth Amendment modifies the appropriate reading of Section One is an important interpretative question, Justice Marshall's approach is untenable. Marshall's approach exceeded the proper scope of the judicial power because his approach functionally would be a legislative act. The Fourteenth Amendment, although imperfect in its ability to extend fundamental rights to all citizens (in part because of its own language but also the limitation of its provisions by courts shortly after its enactment), must be interpreted in a way that shows fidelity to its language. Although the compromise

153. *Id.*
154. *Id.* at 79 (internal quotation marks omitted).
155. *See id.* at 72–77.
156. *Id.* at 73.
157. *Id.*

embodied in the text of Section Two may be objectionable, its inconsistency with the purpose of the Fourteenth Amendment does not justify reading the language out of the text. The text is clear and easily applied by the courts—it does not present any justiciability problems. Questions about its implication—whether it makes disenfranchisement of individuals based on any crime constitutionally sanctioned—does not justify its elimination from the Constitution, when the language was passed through the rigorous requirements for passing constitutional amendments. The language of Section Two makes clear that the drafters and adopters of the Fourteenth Amendment acknowledged that the Constitution would sanction felon disenfranchisement as it existed at the time this Amendment was adopted. What is less apparent than Justice Rehnquist's opinion suggested is that *any* criminal disenfranchisement would pass constitutional muster. The remainder of this Note discusses a more appropriate middle ground for interpreting the constitutionality of ex-felon disenfranchisement.

IV. REVISITING *RAMIREZ*

The Court should take an opportunity to revisit *Ramirez*. The Court too glibly analyzed the susceptibility of the language of Section Two of the Fourteenth Amendment to different interpretations. Whether one takes an originalist or constitutionalist approach to the right of ex-felons to vote, the current state of the law is in need of revision. The right of ex-felons to vote has two dimensions needing reexamination. The first element is the right itself—under what circumstances is it constitutional for states to deny ex-felons the ability to participate in democracy as voters? The second element is the extent to which states can deny ex-felons the right to vote—when states permissibly disenfranchise ex-felons, how long may those felons be denied the right to vote? This Note addresses only the first consideration.

Taking either an originalist or constitutionalist approach to constitutional interpretation, states may not prohibit all ex-felons from voting.

A. The Originalist Position

Although Section Two of the Fourteenth Amendment says that states can disenfranchise people guilty of "rebellion, or other crime"[158] without losing representation in the federal government, the meaning of "other crime" is unclear. "Other crime" is susceptible to at least three meanings: all crime, crimes of similar gravity to rebellion, or crimes for which states at the time would disenfranchise voters. The last of the three is most appropriate.

158. U.S. CONST. amend. XIV, § 2.

The first, which is the approach Justice Rehnquist seems to have taken in *Ramirez*, seems to conveniently ignore latent ambiguity in the constitutional text. Although "other crime" *could* mean any crime, the interpretation could generate absurd implications, which Rehnquist did not consider in his opinion. This interpretation seems to open up the ability of states to take away the right to vote for minor crimes such as traffic violations. It is unlikely that any serious person would think that a crime that is not even punishable with jail time would support the ability of states to take away fundamental participatory rights from its citizens. Justice Rehnquist's understanding of Section Two of the Fourteenth Amendment is susceptible to two interpretations: either he would have had no issue with "other crime" being extended to any crime, or he understood "other crime" as referring to felonies. Given the potentially perverse implications of the former and that *Ramirez* concerned a state law that only disenfranchised ex-felons—meaning that the Court did not have to address whether state law disenfranchising offenders of other less serious offenses would be constitutional—Justice Rehnquist likely intended the latter. However, restricting the interpretation to all felonies and only felonies is unsupported by the constitutional text or the practice of states at the time of the enactment of the Fourteenth Amendment.[159] This conclusion supports taking the original public meaning approach later described in this Section—if the Court would construe "other crime" to apply to felonies because states disenfranchised only those guilty of felonies, then the suspension of a fundamental right should reach only those crimes thought compelling enough to merit disenfranchisement at the time. As this Section later shows, the current composition of felony disenfranchisement statutes extends far beyond what was permitted by states at the time of the enactment of the Fourteenth Amendment.

The second potential meaning of "other crime[s]" could be crimes that are similar in character to rebellion, which would be the resulting interpretation if the Court employed the *ejusdem generis* canon to resolve the phrase's meaning.[160] Resorting only to this canon raises two significant issues for courts in resolving to what extent Section Two sanctions disenfranchisement of criminals. First, it is unclear what crimes would rise to the level of "rebellion." For example, a court could determine that "other crime[s]" are those of a similar nature to rebellion—those which require action taken against the government—which could be limited to treason. Alternatively, a court could conclude that "other crime[s]" are those in the

159. *See* McLaughlin v. City of Canton, 947 F. Supp. 954, 970 (S.D. Miss. 1995) (acknowledging that most but not all listed crimes justifying disenfranchisement in the Mississippi constitution were felonies).

160. However, "rebellion," without other accompanying crimes, may be insufficient to create a class that triggers an appropriate application of the canon.

same legal category as the crime of rebellion, which could include all felonies. Or, a court could look to the punishment that existed at the time for rebellion, and only permit disenfranchisement based on crimes receiving equivalent or similar degrees of sanction from states. Given the susceptibility to multiple applications of the canon and that little extrinsic evidence exists to support the soundness or consistency of its application, it seems like an ill-suited way to conclude that the Constitution tolerates the disenfranchisement of ex-felons.

The third option, interpreting Section Two according to how it was understood at the time of ratification, seems like the soundest way to interpret the level of ex-felon disenfranchisement tolerated by the Constitution. Given the widespread practice of felon disenfranchisement when the Fourteenth Amendment was enacted, the ratifiers and the public likely understood "other crime[s]" to mean those that supported disenfranchisement under existing state law. Given that a law's force depends on the public's ability to understand its meaning, the original public meaning of the phrase at the time of its enactment should be controlling.

Mississippi provides an illustrative example of the character of state laws Section Two was likely drafted to permit. Mississippi's original 1817 constitution included a felon disenfranchisement provision, which provided that "[l]aws shall be made to exclude from . . . suffrage those who shall thereafter be convicted of bribery, perjury, forgery, or other high crimes or misdemeanors."[161] Although the text ostensibly could apply to a wide range of crimes given the inclusion of the catch-all phrase "other high crimes or misdemeanors," context reveals its narrow scope in practice. In the same section of the state constitution, the text insinuates that the disenfranchisement provision applies to crimes where dishonesty is an element because the constitution directs that "privileges of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper conduct."[162] The unifying elements of "bribery, perjury, and forgery" suggest that the provision was intended only to restrict "undue influence" through crimes constituting betrayals of the public trust. The 1868 Mississippi constitution retained the same list of crimes justifying revocation of the right to vote as the 1832 constitution, which was the last update to the document prior to Reconstruction.[163]

Thus, given the state of the law at the time of the enactment of the Fourteenth Amendment, it seems that the preexisting disenfranchisement

161. MISS. CONST. of 1817, art. VI, § 5, http://mshistorynow.mdah.state.ms.us/articles/98/index.php?s=extra&id=267.

162. *Id.*

163. *See* MISS. CONST. of 1868 art. XII, § 2, http://mshistorynow.mdah.state.ms.us/articles/98/index.php?s=extra&id=269.

the ratifiers intended to permit was based upon convictions of crimes constituting betrayals of the public trust as well as the most serious felonies.[164] However, the language in Section Two permitting disenfranchisement for "crime[s]," although likely understood to encompass only the law as it existed at the time, failed to codify that meaning through specific language. Because the original public meaning was not encapsulated by the text, states used the ambiguity of Section Two as a tool to disenfranchise a new class of criminal citizens. For example, Mississippi adopted a new disenfranchisement law shortly after ratification of the Fourteenth Amendment that served as a model for other states,[165] which enumerated an entirely new class of crimes that included "murder, rape . . . theft, arson . . . [and] bigamy. . . ."[166] Although some authors suggest,[167] and there is evidence to support,[168] that the intent of the new state laws was to disenfranchise former slaves, it should be enough for originalists that the original understanding of Section Two at the time of ratification was that "other crime[s]" did not include minor theft and drug offenses, which often support disenfranchisement today. Although it is not clear why the crimes added in 1890 were not previously thought sufficiently grave to include in earlier disenfranchisement laws, that fact should not be particularly relevant for originalists. It is what the adopters of Section Two and the public understood the text to mean based on the preexisting historical context, not the soundness of the policy, that guides a proper reading of the scope of Section Two. It appears that crimes that have

164. *See supra* text accompanying notes 68–71 (highlighting that crimes justifying disenfranchisement at the time of the enactment of the Fourteenth Amendment were felonies at common law, which were punishable by death); *see also supra* Section III.A.1 (highlighting that New Jersey law at the time of the enactment of the Fourteenth Amendment allowed disenfranchisement for dishonest crimes as well as murder, piracy, arson, rape, robbery, and substantial larceny).

165. Shapiro, *supra* note 30, at 540–41.

166. MISS. CONST. of 1890 art. 12, § 241, http://mshistorynow.mdah.state.ms.us/articles/103/index.php?s=extra&id=270.

167. *See* Brooks, *supra* note 29, at 856; *see also* Goldman, *supra* note 19, at 626.

168. Ratliff v. Beale, 20 So. 865, 868 (Miss. 1896) ("[T]he 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 [sic] 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. A voter who should move out of his election precinct, though only to an adjoining farm, was declared ineligible until his new residence should have continued for a year. Payment of taxes for two years at or before a date fixed many months anterior to an election is another requirement, and one well calculated to disqualify the careless. Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications, while robbery and murder and other crimes in which violence was the principal ingredient were not.").

only recently become felonies were not within the scope of the original understanding of Section Two.

Given that an originalist reading of Section Two of the Fourteenth Amendment limits the permissible scope of ex-felon disenfranchisement, a constitutionalist interpretation of Section One provides the appropriate standard of review when assessing ex-felon disenfranchisement that is not baked into the Constitution.

B. The Constitutionalist Position

Assuming that Section Two of the Fourteenth Amendment does not clearly provide that the Constitution permits states to disenfranchise any criminal without consequence, a constitutionalist approach would turn to the constitutional values at stake in ex-felon disenfranchisement. As Justice Marshall noted in his dissent in *Ramirez*, the right to vote is elemental to our constitutional democracy.[169] Although the document does not expressly recognize the right to vote as a fundamental right, and the limitation of who counts in our democracy is one of the original sins of the Constitution itself, one could point to several sources to identify an implied right to vote.

The first constitutional source one could recognize as containing the value of participation, and by implication, the right to vote, is the Preamble. The Preamble provides that "We the People"—both those at the time of ratification and/or the present citizenry of the United States—"do ordain and establish this Constitution."[170] The use of the present tense in conjunction with the enduring goals of "form[ing] a more perfect Union, establish-[ing] Justice, insur[ing] domestic Tranquility, . . . promot[ing] the general Welfare, and secur[ing] the Blessings of Liberty,"[171] where most of the Constitution uses the future tense, suggests a presently ongoing relationship between "the People" and the document. The Constitution is meant to be read; accordingly, the use of the present tense rather than the past or future tense incorporates not just the ratifiers or future generations into "We the People," but those groups as well as, potentially, the reader. Two additional linguistic elements suggest the presence of an ongoing relationship—the nature of the goals the Preamble affirms and the people for whom the Preamble affirms those goals. The capitalization of "Union," "Justice," "Tranquility," "Welfare," and "Liberty" raises their importance from abstract concepts to proper nouns, which elevates them from mere ideas to the values that frame the American experiment itself. They are the prism through which the Constitution is read. The identification of the bene-

169. Richardson v. Ramirez, 418 U.S. 24, 77 (1974) (Marshall, J., dissenting).

170. U.S. CONST. pmbl.

171. *Id.*

ficiaries of those guiding principles also suggests the presence of an ongoing relationship; they are not only for "ourselves," but also "our Posterity." Because "We the People" are those who affirm, and, by representation, ratify the Constitution, the act of "the People . . . ordain[ing] and establish[ing]" the Constitution implies that "the People" are those who count in a democracy—those to whom representatives are answerable—the voting citizenry.

The issue of who counts as "the People" within the Constitution highlights the importance of the power to vote, which demonstrates the fundamentality of citizenship in the democratic theory intrinsic to the Constitution. Article I, Section Two, refers to "the People of the several States" as those who choose the members of the House of Representatives. At the time of ratification, "the People" were white, property-owning men. With the adoption of the Fifteenth, Sixteenth, and Nineteenth Amendments, "the People" have come to include male and female citizens alike who are at least eighteen years of age. Thus, "history has seen a continuing expansion of the scope of the right of suffrage in this country," which suggests that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[172]

The expansion of the franchise not only suggests a national ethos of growing toward inclusion in the franchise, but because our government is a *representative* democracy, those unable to vote for the candidate of their choice are denied the ability to participate fully in civic life. Put differently, being included within "We the People" means that one is *fully* represented by one's elected officials; being excluded presents the possibility of residing in the country, but precludes one's ability to be a full citizen. Accordingly, "We the People" "facilitates social assimilation, protects individual dignity, and provides for the representation of minority communities and interests."[173] Those excluded are denied the ability to have direct power to affect the laws to which they are subject, which is particularly damaging for minority groups, like ex-felons, because they receive the benefit of judicial protections of their rights, but are unable to have real power to fight against legislative or executive action that would negatively affect them but fails to rise to a violation of their rights that triggers judicial scrutiny.

As the concept of "the People" has expanded, so too has its democratic importance. Under the original Constitution, if one takes seriously the notion that direct election is fundamental to effective representation, only the members of the House of Representatives were directly accountable to

172. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

173. Meyer, *supra* note 60, at 471.

the citizenry, while Senators answered to the state legislatures and thus only indirectly to "the People."[174] After the ratification of the Seventeenth Amendment, "the people" of each state were empowered to directly elect their Senators.[175] The nation's progress toward empowering citizens to hold all of their political representatives accountable underscores the importance of citizens' ability to vote within a democracy—without the ability to do so they cannot sanction their elected representatives through the franchise and are subject to the will of citizens who do hold that power. Assuming that one of the primary motivations of elected representatives is to stay in office, representatives have no incentive to respond to the interests of ex-felons unless their preferences are shared by citizens who can vote. Thus, the democratic importance of the franchise suggests that the right of citizens to vote is directly tied to the nature of the republic established by the Constitution.

Apart from the importance of the right to vote, rights guaranteed by the Constitution that facilitate civic engagement support the conclusion that the democratic theory embodied in the Constitution does not merely make clear that voting is important but that it actually creates an implied right of citizens to vote. For example, the robustness of the First Amendment's protections of speech, association, and assembly is directly tied to the health of the nation's democracy, but it loses some of its power when disconnected from the ability to vote.

The protection of speech facilitates the creation of a more informed citizenry by enabling all individuals to contribute to the marketplace of ideas without fear of retaliation. Although one need not vote to contribute to this marketplace, the vote determines how representatives *value* available ideas—when a plurality of citizens endorse an idea through the vote (whether by voting for a candidate who adopts the idea, voting for a candidate whose political orientation is proximate to the idea, citizens' direct adoption of the idea by ballot initiative, etc.), ideas contributed through speech have the potential to become policy.

Once an idea has been introduced into the marketplace, the freedom of association enables the proliferation of ideas. By forming communities around particular interests, individuals are able to spread contributions on the marketplace of ideas more quickly because they are unrestrained from introducing them to like-minded people. The freedom of assembly enables the public to pressure their representatives to enact the ideas they advance—once representatives are elected based, in part, upon the platforms they adopt to appeal to particular constituencies, assembly and protest allow individuals to signal which ideas they find most important.

174. *See* U.S. CONST. art. I.

175. *See* U.S. CONST. amend. XVII.

Ex-felons can participate in each step of this process—they can contribute ideas, organize constituencies who support them, and protest when the ideas are not enacted by elected representatives—but their freedoms have no teeth without the support of the ballot. They can scream their policy preferences into the abyss all they wish, but without the ballot, elected representatives face no consequences directly from ex-felons for ignoring their preferences. Thus, the right to vote can be inferred from the First Amendment because the power of the rights it guarantees are only given teeth when the people who can exercise them also have the power to vote. Put differently, the value of pluralism embodied by the First Amendment *requires* not only that the perspectives the government tolerates from its citizens can be expressed, but that all citizens have equal power to put the ideas into action. That power requires citizens to have the right to vote. As the Court noted in *Reynolds v. Sims*,

> [n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.[176]

The democratic theory of the Constitution provides sufficient evidence that citizens have the right to vote. Looking to the structure of the Constitution, one cannot look at people only as those subject to the will of their representatives—the people's popular support is what makes the government legitimate on its own terms. Thus, the voting public is a quasi-fourth branch of government. The citizens' ability not only to exercise their rights, but to shape the government, is *how* "We the People" seek to make the principled goals of the Preamble a reality. The only way to "establish Justice" and "secure the Blessings of Liberty" to "ourselves and our Posterity" is to ensure that we all have an equal voice in our government. Providing an equal voice is only possible through providing all citizens the right to vote because of the vote's fundamentality to "preserv[e] . . . all rights."

Given that the right to vote is fundamental, restrictions on ex-felons' right to vote that are outside the original understanding of Section Two of the Fourteenth Amendment should be subject to strict scrutiny. Although, like Justice Marshall in *Ramirez*, one could apply strict scrutiny to any restriction on the franchise, I read Section Two as incorporating approval of certain restrictions permitted at the time of the adoption of the Fourteenth Amendment. Accordingly, Section Two should not be read as inviting rational basis review as Justice Rehnquist suggested, but as evidence that the Constitution endorses a legitimate state interest in

176. 377 U.S. at 560 (quoting Wesberry v. Sanders, 376 U.S. 1, 17–18 (1964)).

curtailing the voting rights of those who have committed particular crimes.

Restrictions on the right to vote outside of those sanctioned by Section Two should be subject to strict scrutiny because this right is fundamental. The Court has argued, "To the extent that a citizen's right to vote is debased, he is that much less a citizen."[177] Even if at one point the Constitution would have recognized a compelling state interest in disenfranchising ex-felons, "the Equal Protection Clause is not shackled to the political theory of a particular era,"[178] which suggests that the American tradition of expanding the franchise to citizens on an equal basis,[179] supported by growing contemporary support for ex-felon enfranchisement both in the United States[180] and the democratic community at large,[181] should guide the interpretation of disenfranchisement whose constitutionality is unclear based on the original public meaning of the Fourteenth Amendment.

Further support for strict scrutiny as the appropriate standard of review can be derived from *Carolene Products*.[182] John Hart Ely argued that one part of the animating theory of the Warren Court in *Carolene Products* footnote four, particularly in paragraph two, was opening the channels of political change.[183] In highlighting the Court's use of strict scrutiny to reverse restrictions on political participation, he argues that

> the [Court's] interventionism was fueled not by a desire on the part of the Court to vindicate particular substantive values it had determined were important or fundamental, but rather by a desire to ensure that the political process—which is where such values *are* properly identified, weighed, and accommodated—was open to those of all viewpoints on something approaching an equal basis.[184]

As applied to ex-felons, Ely's argument suggests that enfranchising citizens formerly excluded as a form of punishment has value in bolstering democracy in and of itself by "keep[ing] the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open."[185] Like the Warren Court in *Reynolds*, he acknowledged that the expansion of the franchise is a

177. *Id.* at 567.

178. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 669 (1966).

179. Meyer, *supra* note 60, at 471.

180. *See 65% Think Felons Should be Able to Vote After Completing Jail Time*, RASMUSSEN (Feb. 14, 2014), http://www.rasmussenreports.com/public_content/politics/general_politics/february_2014/65_think_felons_should_be_able_to_vote_after_completing_jail_time.

181. *See supra* notes 77–79 and accompanying text.

182. *See generally* United States v. Carolene Prod. Co., 304 U.S. 144 (1938).

183. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 74–76 (1980).

184. *Id.*

185. *Id.* at 76.

fundamental theme of the evolution of our Constitution. He highlights:

> There were no amendments between 1870 and 1913, but there have been eleven since. Five of them have extended the franchise: the Seventeenth extends to all of us the right to vote for our Senators directly, the Twenty-Fourth abolishes the poll tax as a condition of voting in federal elections, the Nineteenth extends the vote to women, the Twenty-Third to residents of the District of Columbia, and the Twenty-Sixth to eighteen-year-olds. Extension of the franchise to groups previously excluded has therefore been the dominant theme of our constitutional development since the Fourteenth Amendment, and it pursues both of the broad constitutional themes we have observed from the beginning: the achievement of a political process open to all on an equal basis and a consequent enforcement of the representative's duty of equal concern and respect to minorities and majorities alike.[186]

As *Ramirez* indicates, even if the right to vote is fundamental, the disenfranchisement of certain ex-felons may be constitutional. However, in undergoing a strict scrutiny analysis, the governmental interests that parties before the courts have advanced to support the practice—the purity of the ballot box and preventing subversive voting (against the public interest)—are not sufficiently compelling in the context of offenders of minor felonies and ex-felons who have completed their sentences and have otherwise had time to reintegrate into society.

Promoting the purity of the ballot box does not support curtailing the right to vote for ex-felons. It is not a compelling state interest. The interest is rooted in the idea that "the presence of criminals within the polity erodes confidence in elections through a process of contamination in which dirty votes taint clean ones."[187] This interest is not sufficiently compelling for several reasons. First, a criminal sentence does not make an individual irredeemable—once ex-felons have completed their sentences they have served their debt to society and should be able to reintegrate without permanently being second-class citizens. Second, the erosion of public confidence is unlikely to occur because there is little evidence that ex-felons are likely to fraudulently engage in the electoral process. John Ghaelian argues:

> [P]roponents of this attitude have been able to produce "little to no evidence that former felons are more likely to commit electoral fraud than any other element of the American citizenry." Also weakening the argument that former felon voting will lead to voter fraud are the numerous measures states have taken to ensure that voter fraud does not

186. *Id.* at 99.

187. John Ghaelian, *Restoring the Vote: Former Felons, International Law, and the Eighth Amendment*, 40 HASTINGS CONST. L.Q. 757, 777 (2013) (quoting JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 22–24 (Oxford Univ. Press 2006)).

> occur. Both "election reform and technological advances in the elective process" have dramatically decreased the ability of bad actors to commit voter fraud.[188]

Given that (a) the interest is not compelling, (b) the risk of fraud on which the interest depends is antiquated given the state of current voting regulations, and (c) the blanket exclusion of ex-felons is not accomplished through the requisite least restrictive means, the interest does not support disenfranchisement under a strict scrutiny analysis.

Similarly, the interest in preventing "subversive voting" does not support a policy of disenfranchising all ex-felons. The interest is not compelling. Like the interest of the "purity of the ballot box," the democratic process sufficiently checks the interest because, if a plurality of citizens come to support a particular policy, then its victory is not the product of subversion. Additionally, it is unlikely that ex-felons would come together to weaken criminal law, which is the concern opponents of ex-felons' enfranchisement often flag. Alec Ewald argues:

> Very few voters cast ballots based on any single issue, and there is no reason to think offenders are so "overwhelmed by criminality" that they would do so either. Disenfranchisement's defenders have never mustered any proof at all that those convicted of crime would use their electoral power to rewrite the criminal law, and we have good evidence to the contrary. . . . Interviewing criminal defendants, political scientist Jonathan D. Casper found that, with few exceptions, all "believed that they had done something 'wrong,' that the law they violated represented a norm that was worthy of respect and that ought to be followed." Those charged with property crimes "felt that laws against taking property from others were 'good' laws and that such behavior should not be tolerated but merited punishment."[189]

For similar reasons, even if the goal were compelling, disenfranchising ex-felons is not the least restrictive means to accomplish the goal of maintaining strong criminal laws. Rather, just like in preserving any other legal system, the proper means of its maintenance is through the democratic process. In no other context is it thought legitimate to preserve a particular system of laws by excluding its potential opponents from democracy. Given the flimsy interests advanced in support of denying an entire class of individuals their citizenship rights, the blanket disenfran-

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188. *Id.* at 778 (footnotes omitted) (first quoting MANZA & UGGEN, *supra* note 187, at 200; and then quoting Mark E. Thompson, Comment, *Don't Do the Crime if You Ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment*, 33 SETON HALL L. REV. 167, 190–91 (2002)).

189. Alec C. Ewald, *An "Agenda for Demolition": The Fallacy and the Danger of the "Subversive Voting" Argument for Felony Disenfranchisement*, 36 COLUM. HUM. RTS. L. REV. 109, 125 (2004) (footnotes omitted) (first quoting Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 387 n.242 (1993); and then quoting JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 146 (1972)).

chisement of ex-felons does not survive strict scrutiny. Section Two of the Fourteenth Amendment suggests that felons of certain crimes can be disenfranchised; the provision provides evidence that there is a legitimate state interest to do so in some instances. However, that interest fails to justify the practice once, in all other respects, an ex-felon is a full member of society or the ex-felon's crime would not have supported disenfranchisement at the time of the enactment of the Fourteenth Amendment. Thus, Section Two should be read as justifying only disenfranchisement based upon the commission of particular felonies, and for those disenfranchised felons, only for a reasonable period of time after the completion of their sentences.

V. CONCLUSION

Whether one takes an originalist or constitutionalist approach to interpreting the Fourteenth Amendment, the current state of felon disenfranchisement law is in need of revision. Section Two of the Fourteenth Amendment should inform interpreters of the bounds of permissible disenfranchisement, while all other disenfranchisement should be subject to strict scrutiny given the fundamentality of the right to vote because of its importance to American constitutional democracy.

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