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The “Other” Side of *Richardson v. Ramirez*: A Textual Challenge to Felon Disenfranchisement

ABSTRACT. Section 2 of the Fourteenth Amendment allows states to disenfranchise citizens on account of “rebellion, or other crime” without reducing the size of the state’s delegation in the House of Representatives. In its 1974 decision in *Richardson v. Ramirez*, the Supreme Court held that this language in the Fourteenth Amendment (the so-called Penalty Clause) provides an “affirmative sanction” for at least some forms of felon disenfranchisement. Although lower courts have construed the *Ramirez* Court’s constitutional approval for felon disenfranchisement broadly, this Note argues that *Ramirez* authorizes felon disenfranchisement only in a narrow set of circumstances. Whereas other commentators have called for the overruling of *Ramirez* and for nontextualist interpretations of the Penalty Clause, this Note works within the confines of the *Ramirez* decision and follows the Court’s command that “language [in the Penalty Clause] was intended . . . to mean what it says.” The Clause’s “other crime” construction follows a syntactical pattern found in three other constitutional clauses, and a close examination of the repeated use of this construction reveals that the scope and meaning of “crime” is framed by the leading examples or categories that precede it. The constitutionality of disenfranchisement is limited by this relationship and should be reexamined.

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INTRODUCTION

There are few modern practices that so strike at the heart of American democracy as felon disenfranchisement.¹ The main federal constitutional decision on the subject is *Richardson v. Ramirez*, in which a divided Court held that felon disenfranchisement was constitutional based on the second clause of the Fourteenth Amendment.² The section in question was the Penalty Clause, which allows states to disenfranchise persons convicted of “participation in rebellion, or other crime” without losing representation in Congress.³ The Court construed this text as an “affirmative sanction” for the disenfranchisement of felons.⁴ This section blocks approximately 5.3 million adult American citizens – 2.4% of the eligible population – from voting.⁵

The practice of felon disenfranchisement has received significant academic attention and has been the subject of many legal challenges. These criticisms have been based on such varied authorities as the Equal Protection Clause,⁶ the Eighth Amendment,⁷ the Fifteenth Amendment,⁸ and the Voting Rights Act.⁹ The majority of these challenges are aimed at overturning *Ramirez*.¹⁰ However, given that *Ramirez* has withstood challenges for more than three-and-a-half

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1. As Chief Justice Warren wrote in *Reynolds v. Sims*, “The 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.” 377 U.S. 533, 555 (1964).
 2. 418 U.S. 24 (1974).
 3. U.S. CONST. amend. XIV, § 2.
 4. *Ramirez*, 418 U.S. at 54.
 5. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2011) [hereinafter FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES], available at http://www.sentencingproject.org/detail/publication.cfm?publication_id=15 (noting that 1 in 41 adults – or 2.4% of the voting age population – have “currently or permanently lost their voting rights as a result of a felony conviction”).
 6. See *Ramirez*, 418 U.S. 24.
 7. See Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right To Vote*, 71 U. CIN. L. REV. 1345, 1368 (2003).
 8. Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right To Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259 (2004).
 9. *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc).
 10. In addition to the sources cited *supra* notes 7–9, see, for example, *Woodruff v. Wyoming*, 49 F. App’x 199 (10th Cir. 2002); *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998); *Owens v. Barnes*, 711 F.2d 25 (3d Cir. 1983); and ALEXANDER KEYSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 307–08 (2000). See also *Hunter v. Underwood*, 471 U.S. 222 (1985) (ruling that Alabama’s disenfranchisement law was unconstitutional and racially discriminatory); *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010) (rejecting a theory that would limit *Ramirez*’s sanction to common law felonies).

decades, and given that the Court has shown no interest in reconsidering the *Ramirez* ruling, strategies that seek to overturn the decision are likely to fail.¹¹ Post-*Ramirez* legal challenges to disenfranchisement have generally been unsuccessful, as courts have found the topic to be a “settled issue.”¹²

This Note argues that advocates should work within *Ramirez*’s central holding and focus on lower courts’ interpretations of this decision to limit the constitutional approval for felon disenfranchisement statutes. Lower courts have given an unwarranted sanction to an expansive version of the practice of felon disenfranchisement. A reexamination of the Penalty Clause will demonstrate that the scope of states’ rights to disenfranchise is much more limited.

This Note describes an untouched litigation strategy for those seeking to limit the practice of felon disenfranchisement.¹³ The Penalty Clause is ripe for reexploration; the modern form and justifications of the practice of felon disenfranchisement do not fit the language of the Clause. When examined as a part of a cohesive document, rather than a clause in isolation, it is clear that the “other crime” construction follows a syntactical pattern found in three other constitutional clauses: the Extradition, Grand Jury, and Impeachment Clauses all use a similar “other crime” construction. As in these other clauses, the meaning of the word “crime” is defined (and circumscribed) by the paradigm term¹⁴—in this case, “rebellion”—and may justifiably extend only to crimes

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11. See, e.g., *Johnson v. Bush*, 546 U.S. 1015 (2005) (denying a petition for certiorari by plaintiffs challenging a Florida felon disenfranchisement law on, inter alia, Fourteenth Amendment grounds).
 12. Christopher Uggen, Angela Behrens & Jeff Manza, *Criminal Disenfranchisement*, 1 ANN. REV. L. SOC. SCI. 307, 315 (2005).
 13. Of course, many opponents of felon disenfranchisement advocate a legislative solution in addition to (or, sometimes, instead of) legal action. See Avi Brisman, *Toward a More Elaborate Typology of Environmental Values: Liberalizing Criminal Disenfranchisement Laws and Policies*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 283, 436 (2007) (noting that “legislative campaigns have been more successful than litigation in bringing about reform”); George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 851, 894 (2005) (citing *Ramirez* for the proposition that the question of disenfranchisement is better suited for state legislatures than courts).
 14. This Note’s use of the term “paradigm term” or “paradigm case” is indebted to Professor Jed Rubenfeld’s paradigm-case analysis. As he aptly summarizes in a 2008 article, “To pursue paradigm-case interpretation . . . is to follow a particular set of interpretive commitments; privileging the constitutional text and that text’s foundational applications, treating the latter as paradigmatic for all subsequent interpretation. And to follow one set of interpretive commitments is, of course, implicitly to reject others” such as “original understanding” or Blackstonian definitions. Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 122-23 n.94 (2008); see also JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* chs. 1-3 (2005); Jed Rubenfeld, *The*

that relate in a meaningful way to the crime of rebellion.¹⁵ The textual reasoning underlying these claims follows well-recognized canons of constitutional interpretation.¹⁶ Indeed, the Court's holding in *Ramirez*, which noted that the text of the Penalty Clause must be paramount in its interpretation,¹⁷ invites a narrow reading of the Clause based on the context of the word "crime."

The idea of using the canons of construction to interpret the "other crime" language has been mentioned by some scholars but has never been explored in depth. John Cosgrove contends that

[t]he references in the Fourteenth Amendment, § 3 to persons who "engaged in rebellion" against the United States and who gave "aid or comfort to the enemies thereof," and in § 4 to "insurrection and rebellion" invite application of the *noscitur a sociis* canon of construction under which a general word like "crime" is interpreted in accordance with the words surrounding it.¹⁸

Paradigm-Case Method, 115 YALE L.J. 1977 (2006). This Note's use of the term "paradigm case" is similar but not identical to Professor Rubinfeld's. While this Note privileges the constitutional text and finds support from the text's foundational applications, its "paradigm applications" are taken strictly from the examples given in a particular constitutional clause, rather than from both text and the foundational applications, or those understandings that were "widely shared at the time of enactment, by supporters and opponents alike, and that played a special, animating role in getting the provision enacted." *Id.* at 1982-83. Thus, while this Note borrows from Professor Rubinfeld's paradigm-case analysis and pedigree, its use of the term "paradigm case" should be taken to mean only a term listed as an exemplar in a particular constitutional clause. For example, in the phrase "bananas, pears, and other fruit," the words "bananas" and "pears" are the paradigm cases of fruit.

15. For example, a strong claim might argue that the category of "crime" in the Penalty Clause is limited to treasonous acts such as espionage and terrorism. A weaker claim would argue for limiting the category to felonies that represent a particularly grave threat to the security of the state, including violent crimes or "serious" drug offenses. Note, however, that the strong claim was rejected by a pre-*Ramirez* Second Circuit opinion. *Green v. Bd. of Elections*, 380 F.2d 445, 452 (2d Cir. 1967), *cert. denied*, 398 U.S. 1048 (1968) ("We see nothing in the language or in history to support plaintiff's suggestion that 'other crimes' meant only a crime connected with the rebellion." (citation omitted)). The strong claim also stands in significant tension with *Ramirez*. See *infra* Section I.B and Part IV.
16. See *infra* Section III.D.
17. *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974) (stating that the Penalty Clause "is as much a part of the Amendment as any of the other sections, and how it became a part of the Amendment is less important than what it says and what it means").
18. John R. Cosgrove, *Four New Arguments Against the Constitutionality of Felony Disenfranchisement*, 26 T. JEFFERSON L. REV. 157, 178 n.97 (2004).

Otis King and Jonathan Weiss make a similar point when they argue that “the majority [in *Ramirez*] blatantly abandoned any pretense of normal constitutional construction [T]he term ‘crimes[]’ . . . must be considered under the well-established doctrine of *ejusdem generis* (the general must follow the specific).”¹⁹ Thus, they suggest, disenfranchisable crimes “must be at the level of ‘rebellion’ as well If Congress had wanted to define ‘crimes’ by any other method than putting it in conjunction with ‘rebellion’ it would have so stated.”²⁰ In addition to those arguments that explicitly employ the textual canons, other scholarship has noted the “unreasonable” reach of the “other crime” exception.²¹

Despite the repeated recognition of the poor textual fit of an expansive interpretation of the Penalty Clause, interpretations of the Penalty Clause utilizing the textual canons remain undertheorized. No other author has noted the important limits that the syntactical pattern of the “other crime” exception places on the constitutionality of felon disenfranchisement statutes.²²

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19. Otis H. King & Jonathan A. Weiss, *The Courts’ Failure To Re-Enfranchise “Felons” Requires Congressional Remediation*, 27 PACE L. REV. 407, 421-23 (2007).
 20. *Id.* at 423-24. Note, however, that this argument does not purport to “construct a . . . detailed argument for [*Ramirez*’s] overruling.” *Id.* at 426. *But see* Chin, *supra* note 8, at 292 (“[W]e should not expect too much from the drafters of these amendments because Congress was under great pressure, and it is thus ahistorical to apply the canons of construction to the Fourteenth Amendment as if it were meticulously crafted and carefully discussed over time like the Uniform Commercial Code. Of course, this assumption is also consistent with the idea that Section 2 is really about race, and race alone, in spite of its plain language.”). As I will argue in Part III, Chin’s objection carries less weight given the explicitly textual interpretation that the Court has given the Penalty Clause.
 21. *Developments in the Law—One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1960-61 (2002) [hereinafter *One Person, No Vote*] (“Bolder plaintiffs could attempt to reopen *Richardson* with a previously untested argument: Section 2 permits disenfranchisement *only* for activity that falls within a reasonable understanding of ‘rebellion, or other crime.’ . . . Two historical facts support this understanding. First, before Reconstruction, most states imprisoned—and hence disenfranchised—individuals for only a narrow range of crimes. Second, contemporaneous legislation indicates that the Congress that authored the Fourteenth Amendment did not intend to grant states carte blanche authority to disenfranchise.” (footnotes omitted)); *see also* Christopher M. Re & Richard M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. (forthcoming 2012) (making an originalist argument that the history of the Fourteenth Amendment casts doubt on the constitutionality of expansive disenfranchisement laws); sources cited *infra* notes 82-93 and accompanying text.
 22. In his student comment about tax felon disenfranchisement, Sloan G. Speck notes that the interpretation of the word “other” varies throughout the Constitution. However, Speck is primarily concerned with interpreting the Twenty-Fourth Amendment, which prohibits federal and state governments from denying the franchise to voters in presidential and congressional elections “by reason of failure to pay any poll tax or other tax.” U.S. CONST.

This Note seeks to fill the gap by explaining how clues from other sections of the Constitution ought to inform our understanding of felon disenfranchisement and the Fourteenth Amendment. Part I of this Note discusses the history and practice of felon disenfranchisement in the United States and includes a detailed discussion of *Ramirez*'s holding and the major challenges it has survived. Parts II and III describe this Note's textual challenge to lower courts' applications of *Ramirez*. Part II situates this challenge within the existing literature and outlines some reasons why this challenge avoids the pitfalls faced by other strategies. Part III carefully examines the use of the "other crime" construction, examining its interpretation in the Extradition, Grand Jury, and Impeachment Clauses. It then describes the interpretive pattern followed by these other clauses. Part IV applies this pattern to the Penalty Clause. In doing so, it concludes that current interpretations of the Penalty Clause's affirmative sanction for felon disenfranchisement are overbroad. Finally, this Note suggests several possible interpretations of the Penalty Clause that fit better with the rest of the Constitution's text and the current statutory scheme.

I. FELON DISENFRANCHISEMENT IN THE UNITED STATES

This Part describes the history of felon disenfranchisement in the United States. Section A briefly describes the colonial, eighteenth-, and nineteenth-century practice of felon disenfranchisement, leading up to the Supreme Court's first explicit review of the practice in *Richardson v. Ramirez*.²³ Section B gives an overview of the *Ramirez* decision, as well as its implications and key subsequent history. Section B also describes the major challenges to *Ramirez* and gives some analysis as to why these strategies have been unsuccessful. This discussion both frames and supports the textual arguments presented in Part II.

amend. XXIV, § 1. While he states in a footnote that "[t]he principal example [of this variance is] that 'other' crimes generally must match their specified predecessors in severity," Speck does not address the implications that this variance in the term "other crimes" has for the Penalty Clause's affirmative sanction for felon disenfranchisement statutes. Sloan G. Speck, Comment, "Failure To Pay Any Poll Tax or Other Tax": The Constitutionality of Tax Felon Disenfranchisement, 74 U. CHI. L. REV. 1549, 1572 n.122 (2007) (citing the Impeachment, Extradition, and Penalty Clauses).

23. 418 U.S. 24 (1974).

A. *The Historical Practice of Felon Disenfranchisement*

The history of felon disenfranchisement in the United States has been extensively reviewed in the academic literature on voting rights; the following summary is particularly indebted to Alexander Keyssar’s *The Right To Vote*.²⁴ This Section does not intend to provide a comprehensive treatment of the history of disenfranchisement laws, but rather to provide context and a brief prelude to the *Ramirez* decision.

Disenfranchisement in the United States dates back to the colonial period, although both the length of disenfranchisement and the range of offenses punishable by disenfranchisement were limited compared to disenfranchisement under modern statutes.²⁵ The historical rationale for disenfranchisement was twofold. First, disenfranchising criminals—whether permanently or for some preset length—was punitive.²⁶ Felons had committed a grave wrong, the argument went, and the curtailment of voting rights served to punish that wrong. This rationale continued to motivate U.S. disenfranchisement provisions into the nineteenth century.²⁷ Second, disenfranchisement was seen as a deterrent to future criminal behavior.²⁸ Although this rationale had no empirical support, many reasoned that disenfranchisement laws would deter criminal activity in those who feared losing their voice in government.²⁹

The Penalty Clause of the Fourteenth Amendment was the first constitutional provision to address felon disenfranchisement. The Clause authorizes states to disenfranchise persons convicted of “rebellion, or other crime” without the size of the state’s delegation in the House of Representatives being reduced proportionally.³⁰ It is clear that the Clause was meant by the Reconstruction Congress to permit at least the disenfranchisement of some ex-Confederate soldiers. Nevertheless, the historical

24. KEYSSAR, *supra* note 10.

25. Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1061-66. During this period, men who committed serious crimes, “particularly felonies or so-called infamous crimes,” began to be disenfranchised by state constitutions. KEYSSAR, *supra* note 10, at 62-63. Felon disenfranchisement provisions were not uniform across the states during that period. *Id.* at 63.

26. KEYSSAR, *supra* note 10, at 63.

27. *Id.* at 162-63.

28. *Id.* at 63.

29. *See id.* at 63, 163.

30. U.S. CONST. amend. XIV, § 2.

purpose of the Penalty Clause is the subject of much debate.³¹ Possible purposes of the Clause range from punishing the South to validating states' then-current disenfranchisement practices.³² The initial impact of the ratification of the Fourteenth Amendment on felon disenfranchisement is unclear.

In any case, Reconstruction was a period of substantial change.³³ Between the end of the Civil War and the turn of the century, many states either adopted sweeping new laws to disenfranchise felons or broadened the scope of their current disenfranchisement provisions.³⁴ The rationale for state disenfranchisement laws also increasingly focused on protecting the integrity of the electoral system. In the words of one state court, felon disenfranchisement was needed to "preserve the purity of the ballot box."³⁵ State legislatures feared that felons and ex-felons would "corrupt the electoral process" or form a voting bloc to "repeal . . . criminal laws."³⁶

By 1920, all but a few states had some provision—whether constitutional or statutory—that disenfranchised felons.³⁷ The first major push against the tide of increasing restriction on the voting rights of felons came in the Civil Rights Era. This push came at the same time that the Court—in non-felon-

31. For one perspective on this debate, see Re & Re, *supra* note 21, in which the authors argue that felon disenfranchisement and the expansion of the franchise to African Americans were inextricably intertwined elements of a common political philosophy underlying the Fourteenth and Fifteenth Amendments.

32. See *infra* Subsections I.B.2-3.

33. KEYSSAR, *supra* note 10, at 104; see also ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 272-78, 323-24 (2002) (noting similar developments).

34. JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 55, 238-39 tbl.A2.1 (2006); Angela Behrens, Christopher Uggen & Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 AM. J. SOC. 559, 560-66 (2003). These laws often were passed as a matter of course, "lack[ing] socially distinct targets." KEYSSAR, *supra* note 10, at 162. In the postwar South, however, disenfranchisement laws were "often . . . more detailed and included lesser offenses, targeting minor violations of the law that could be invoked to disenfranchise African Americans." *Id.* at 162; see also *Davis v. Beason*, 133 U.S. 333 (1890) (permitting the disenfranchisement of felons in federal territories).

35. KEYSSAR, *supra* note 10, at 163 (internal quotation marks omitted).

36. *Id.*

37. *Id.* at 162, 390 tbl.A.15. See generally *id.* ch. 3. The exact crimes for which one could be disenfranchised varied; most states included major crimes, but "lesser offenses . . . could do the trick in particular states." *Id.* at 302.

disenfranchisement cases such as *Kramer v. Union Free School District No. 15*,³⁸ *Reynolds v. Sims*,³⁹ and *South Carolina v. Katzenbach*⁴⁰ – recognized voting as a fundamental right and held that burdens and restrictions placed on the voting ability of different groups were unconstitutional.

One consequence of the Civil Rights Movement's increased national focus on the right to vote was heightened concern for the validity and use of felon disenfranchisement.⁴¹ For those alert to the impact of the practice of felon disenfranchisement, the "lack of a compelling rationale . . . was difficult to miss."⁴² As the law increasingly embraced the possibility of rehabilitation for convicted criminals, many states rewrote disenfranchisement laws to eliminate lifetime disenfranchisement or narrow the range of qualifying crimes. The Civil Rights Movement and its transformation of voting rights law also paved the way for legal challenges to felon disenfranchisement statutes. Prior to the 1960s, there were few legal challenges to the practice of disenfranchisement.⁴³ This rapidly changed.

In *Otsuka v. Hite*,⁴⁴ the first significant modern case on felon disenfranchisement, the California Supreme Court determined that ex-felons could be disenfranchised only for felonies involving "moral corruption and dishonesty" that made the perpetrator a threat to a free and fair electoral system.⁴⁵ A year after *Otsuka*, the Second Circuit Court of Appeals, deciding a similar challenge, reached the opposite conclusion. While observing that the plaintiff's crime (conspiring to overthrow the government) was potentially linked to electoral

38. 395 U.S. 621 (1969).

39. 377 U.S. 533 (1964).

40. 383 U.S. 301 (1966).

41. KEYSSAR, *supra* note 10, at 302-03; Behrens et al., *supra* note 34. Nevertheless, the disenfranchisement of felons was often taken for granted. See KEYSSAR, *supra* note 10, at 163. Factors such as the expansion of the number of felonious offenses and the increasing prosecution of drug crimes contributed to an increase in the size of the disenfranchised population. Chin, *supra* note 8, at 307-08.

42. KEYSSAR, *supra* note 10, at 303.

43. *Id.*

44. 414 P.2d 412 (Cal. 1966).

45. *Id.* at 424; see KEYSSAR, *supra* note 10, at 304 (quoting *Otsuka*, 414 P.2d at 422, 425). Since 1849, the California Constitution had denied the right to vote to individuals convicted of "infamous crime[s]." *Otsuka*, 414 P.2d at 420. Before 1966, lower courts and election officials interpreted the term "infamous crime" to include all felonies. KEYSSAR, *supra* note 10, at 303. But *Otsuka* narrowed the category, holding that the "blanket disenfranchisement of all convicted felons was not permissible under the Fourteenth Amendment." *Id.* at 304.

integrity, Judge Friendly held that “there was nothing unreasonable or unconstitutional about criminal disenfranchisement statutes.”⁴⁶

In 1972, the Supreme Court held in *Dunn v. Blumstein* that laws limiting the franchise were to be closely scrutinized.⁴⁷ Later that year, the Ninth Circuit invoked *Blumstein* in vindicating the claim of a paroled felon who had been permanently disenfranchised by the state of Washington.⁴⁸ A year later, the California Supreme Court ruled in what was to become the landmark *Ramirez* case.

B. Richardson v. Ramirez

Ramirez effectively halted the trend away from felon disenfranchisement. While the 1960s saw a general lifting of restrictions on the right to vote,⁴⁹ the *Ramirez* decision placed the practice on solid constitutional ground. In *Ramirez*, the Court held that the Penalty Clause of the Fourteenth Amendment amounted to an “affirmative sanction” of the disenfranchisement of felons.⁵⁰

1. Procedural Posture

On May 31, 1972, Abran Ramirez, Larry Gill, and Albert Lee filed a class action seeking to register those ex-felons who were not convicted of election-related felonies and whose terms of incarceration and parole had expired. Petitioners argued that such provisions violated the Equal Protection Clause of the U.S. Constitution.⁵¹ In all three cases, petitioners had been convicted many years before for offenses that were not related to voting.⁵² Ramirez was

46. KEYSSAR, *supra* note 10, at 304 (citing *Green v. Bd. of Elections*, 380 F.2d 445, 451 (2d Cir. 1967)).

47. 405 U.S. 330, 343 (1972).

48. KEYSSAR, *supra* note 10, at 304-305 (citing *Dillenburg v. Kramer*, 469 F.2d 1222 (9th Cir. 1972)).

49. See, e.g., *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964).

50. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974).

51. *Id.* at 32-33. The respondents also alleged several state claims regarding the inconsistent application of criminal disenfranchisement statutes. Brief for Respondents at 2, *Ramirez*, 418 U.S. 24 (1974) (No. 72-1589), 1973 WL 172330.

52. *Ramirez*, 418 U.S. at 56-57 (Marshall, J., dissenting).

convicted (in Texas) of "robbery by assault."⁵³ Gill was convicted of second degree burglary and forgery. Lee was convicted of drug possession.⁵⁴

The California Supreme Court unanimously decided that it was not constitutionally permissible to disenfranchise ex-felons who were not incarcerated or on parole.⁵⁵ The court found that since California was depriving its citizens of a fundamental right, strict scrutiny was appropriate. Applying strict scrutiny, the court determined that the penalty of disenfranchisement was too blunt an instrument to preserve the purity of the ballot box and that the state had less restrictive and more efficacious instruments to do so.⁵⁶ This holding was appealed to the United States Supreme Court, which granted certiorari on October 9, 1973.⁵⁷

2. Supreme Court Holding

Justice Rehnquist, writing for the Court, determined that the criminal disenfranchisement of felons who completed both sentence and parole did not violate the Equal Protection Clause.⁵⁸ The Court held first that the express language of the Penalty Clause in Section 2 of the Fourteenth Amendment exempted from the sanction of reduced congressional representation states that denied the right to vote for "participation in rebellion, or other crime."⁵⁹ Second, the Court held that Section 1 of the Fourteenth Amendment "could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation" imposed by Section 2.⁶⁰ Third, even if the Penalty Clause were incorporated into the Fourteenth Amendment "largely through the accident of political exigency,"⁶¹ it could still be interpreted to allow felon disenfranchisement

53. Brief for Respondents, *supra* note 51, at 4-5.

54. *Id.* at 5-6.

55. *Ramirez v. Brown*, 507 P.2d 1345 (Cal. 1973), *rev'd sub nom.* *Richardson v. Ramirez*, 418 U.S. 24 (1974).

56. *Id.* at 1357.

57. Brief for Respondents, *supra* note 51, at 7.

58. *Ramirez*, 418 U.S. at 54-55. Note, however, that "[t]he California court did not reach respondents' alternative contention that there was such a total lack of uniformity in county election officials' enforcement of the challenged state laws as to work a separate denial of equal protection." *Id.* at 56.

59. *Id.* at 42-43.

60. *Id.* at 55.

61. *Id.* (quoting Brief for Respondents, *supra* note 51, at 41).

because “how it became part of the Amendment is less important than what it says and what it means.”⁶²

3. *The Court’s Analysis*

The Court’s analysis in *Ramirez* differed from typical equal protection decisions. Unlike most claims arising under the Equal Protection Clause, the Court held that respondents’ equal protection challenge to felon disenfranchisement statutes implicated not merely the Equal Protection Clause (in Section 1 of the Fourteenth Amendment), but also Section 2 of the Amendment, which reads:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.⁶³

The Court thus found itself in the position of interpreting the little-discussed Penalty Clause, of which “[t]he legislative history . . . is scant indeed.”⁶⁴ The *Ramirez* Court noted that “the framers of the Amendment were primarily concerned with the effect of reduced representation upon the States,” but declared that the legislative history of criminal disenfranchisement “indicates that this language was intended by Congress to mean what it says.”⁶⁵

62. *Id.*

63. U.S. CONST. amend. XIV, § 2 (emphasis added).

64. *Ramirez*, 418 U.S. at 43.

65. *Id.* Despite a number of changes to Section 2 proposed during the floor debates on the Fourteenth Amendment, “the evolution of the draft language in the Committee . . . throws only indirect light on the intention or purpose of those who drafted § 2.” *Id.* at 44 (citing BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 104-120 (1914)). “[M]ost of the discussion” of the Clause, the Court noted, “was devoted to its foreseeable consequences in both the Northern and Southern States, and to arguments as to its necessity or wisdom.” *Id.* at 45.

The Court's historical analysis relied on several discrete points. Neither the House nor the Senate considered proposals to change the language "except for participation in rebellion, or other crime" after it was introduced in the course of reforming what had been Section 3 of an earlier draft.⁶⁶ The Court also used contemporary statutes, including the Reconstruction Act and the various acts admitting Confederate states,⁶⁷ as evidence for acceptance of felon disenfranchisement at the time of the Fourteenth Amendment. Moreover, while the Court had "never given plenary consideration to the precise question of whether a State may constitutionally exclude some or all convicted felons from the franchise," it had "indicated approval of such exclusions on a number of occasions."⁶⁸ In sum, according to the Court, "What little comment there was on the phrase in question here supports a plain reading of it."⁶⁹

The opinion found further support for this proposition in the plain meaning of the Penalty Clause. After all, the Court reasoned, how could felon disenfranchisement violate the Equal Protection Clause in Section 1, if it was "expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement?"⁷⁰ Indeed, the

66. *Id.* at 43-45.

67. *Id.* at 49-52 (citations omitted). As part of the readmission process, Congress passed the Reconstruction Act, ch. 153, 14 Stat. 428 (1867); Section 5 of the Act established the conditions on which states in the former Confederacy would be readmitted. Section 5 required the states, among other things, to adopt universal male suffrage and to elect delegates to form their constitutions. These delegates were to be elected by "the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition," who had met the residency requirement of one year, "except such as may be disenfranchised for participation in the rebellion or for felony at common law." *Ramirez*, 418 U.S. at 49. The enabling acts admitting the former Confederate states attached conditions, with only slight variations in language, requiring that the state constitutions never deprive the right to vote from citizens "except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted, under laws equally applicable to all the inhabitants of said State." *Id.* at 51 (citation omitted).

68. *Id.* at 53. The *Ramirez* Court cited *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959), which upheld a literacy requirement in North Carolina, as well as both *Davis v. Beason*, 133 U.S. 333 (1890), and *Murphy v. Ramsey*, 114 U.S. 15 (1885), which affirmed similar constitutional challenges to laws in the territories that disenfranchised felons.

69. *Id.* at 45. Moreover, at the time the Amendment was adopted, twenty-nine states had constitutional provisions which "prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes." *Id.* at 48.

70. *Id.* at 55.

Court's opinion stated that the text was of paramount importance to the Clause's interpretation.⁷¹

Justice Marshall, joined by Justices Brennan and Douglas, dissented. Justice Marshall argued that the Court's holding was "based on [an] unsound historical analysis."⁷² In the view of the dissent, the historical purpose of the Penalty Clause was to maintain Republican dominance in Congress,⁷³ a limited political motivation that "should not be construed to be a limitation on the other sections of the Fourteenth Amendment."⁷⁴ Thus, the Penalty Clause "does not necessarily imply congressional approval of this disenfranchisement. . . . [A]nd such discriminations thus are not forever immunized from evolving standards of equal protection scrutiny."⁷⁵ Justice Marshall went on to argue that the proposed justifications for disenfranchisement were unpersuasive,⁷⁶ and concluded that the practice of felon disenfranchisement violated the Equal Protection Clause.⁷⁷

4. Implications and Key Subsequent History

At the time *Ramirez* was decided, the majority of states had laws that disenfranchised most felons for life.⁷⁸ Modern disenfranchisement statutes vary significantly, but many fewer states – only four as of March 2011 – deny voting rights to ex-felons who have completed their sentences (and even fewer permanently disenfranchise first-time felons).⁷⁹ However, the numerical impact of criminal disenfranchisement is "greater than at any point in our history."⁸⁰ The impact is even more significant when examining the effect on

71. *Id.* On this analysis, the Court rejected arguments that the practice of felon disenfranchisement was "outmoded" and that voting rights are essential to the rehabilitation of ex-felons. The Court maintained that it was "not for us to choose one set of values over the other." *Id.*

72. *Id.* at 56 (Marshall, J., dissenting).

73. *Id.* at 73 (noting that the congressional presence of the South after the abolition of slavery would weaken Republican political dominance). The Republicans wanted to "insure that southern Negroes, sympathetic to the Republican cause, would be enfranchised; but an explicit grant of suffrage to Negroes was thought politically unpalatable at the time." *Id.*

74. *Id.* at 74.

75. *Id.* at 75-76 (footnote omitted).

76. *Id.* at 78-80.

77. *Id.* at 86.

78. Karlan, *supra* note 7, at 1363.

79. FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, *supra* note 5, at 3.

80. Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1156 (2004).

minority populations, particularly African Americans.⁸¹ The current justifications for felon disenfranchisement are barely revised versions of antiquated explanations for the practice. Politicians (and some scholars) still justify disenfranchisement under social contractarian,⁸² electoral integrity,⁸³ subversive voting,⁸⁴ and states’ rights⁸⁵ analyses.

The *Ramirez* decision has been much criticized by legal scholars. The vast majority of scholarly critiques argue that *Ramirez* was wrongly decided or wrongly reasoned. Most post-*Ramirez* challenges to felon disenfranchisement statutes have urged the Court to overturn *Ramirez*—and have failed.⁸⁶ These challenges are many and varied;⁸⁷ they range from historical critiques⁸⁸ to

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81. *Id.* at 1157 (noting, for example, that “[i]n Alabama and Florida, nearly a third of all black men are permanently disenfranchised . . .”); Mark Mauer, *Mass Imprisonment and Disappearing Voters*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 50, 52-53 (Mark Mauer & Meda Chesney-Lind eds., 2002).
82. See KATHERINE IRENE PETTUS, *FELONY DISENFRANCHISEMENT IN AMERICA: HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES* 130-40 (2005) (critiquing the “neo-contractarian” justification).
83. See, e.g., *Washington v. State*, 75 Ala. 582, 585 (1884); Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 172 (2001). The idea that the participation of ex-felons compromises the integrity of the electoral process sometimes links up with the social contract justification for excluding convicts. See, e.g., 148 CONG. REC. 1489, 1494-95 (2002) (statement of Sen. Mitch McConnell); Angela Behrens, Note, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws*, 89 MINN. L. REV. 231, 261 (2004).
84. See 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, 114-16 (2004).
85. Uggen et al., *supra* note 12, at 313 (citing 148 CONG. REC. 1489, 1495 (2002) (statement of Sen. Jeff Sessions)).
86. Behrens, *supra* note 83, at 257 (“Courts have adhered rather rigidly to the *Ramirez* decision, and its precedent has thus far remained untouched.”).
87. I will not address all imagined or actual litigation strategies. For example, I leave aside the challenges brought under the First Amendment claiming that felon disenfranchisement infringes upon the right of political speech. See, e.g., *Johnson v. Bush*, 214 F. Supp. 2d 1333 (S.D. Fla. 2002), *aff’d in part, rev’d in part sub nom. Johnson v. Governor of Fla.*, 353 F.3d 1287 (11th Cir. 2003), *vacated en banc*, 377 F.3d 1363 (11th Cir. 2004); Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330 (1993). I also do not address litigation challenges claiming that disenfranchisement is a poll tax in violation of the Twenty-Fourth Amendment (in states charging a fee to apply for restoration of voting rights). See, e.g., *Johnson*, 214 F. Supp. 2d at 1342-43; J. Whyatt Mondesire, *Felon Disenfranchisement: The Modern Day Poll Tax*, 10 TEMP. POL. & CIV. RTS. L. REV. 435 (2001).
88. Richard W. Bourne, *Richardson v. Ramirez: A Motion To Reconsider*, 42 VAL. U. L. REV. 1 (2007). A related critique of the *Ramirez* Court’s reliance on Section 2 asserts that the Penalty Clause, including its exceptions, was effectively repealed by the Fifteenth

separate challenges under the Eighth,⁸⁹ Fourteenth,⁹⁰ and Fifteenth⁹¹ Amendments, and the Voting Rights Act.⁹² Other scholars rely on legislative history to argue that even if the Penalty Clause exempts felon disenfranchisement as a general matter, it does not shield states from challenges to laws that disenfranchise individuals for crimes (such as drug offenses) that were not classified as common law felonies when the Fourteenth Amendment was adopted.⁹³

This “common law felony” theory was recently litigated before the Ninth Circuit Court of Appeals in *Harvey v. Brewer*.⁹⁴ In an opinion written by retired Justice O’Connor (sitting by designation), the Ninth Circuit rejected the plaintiffs’ challenge,⁹⁵ observing that the plaintiffs’ strategy “seems . . . to be in direct conflict with [*Ramirez*], which . . . evince[ed] no concern with whether any particular felony was one recognized at common law. Indeed, at least one

Amendment. See Uggen et al., *supra* note 12, at 317 (arguing that the “limited historical purpose” of the Penalty Clause—to enfranchise African Americans in the Reconstruction South—was accomplished in express terms two years after the Fourteenth Amendment, by the Fifteenth Amendment); Chin, *supra* note 8.

89. Karlan, *supra* note 80, at 1149-50; Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man’s Land*, 56 SYRACUSE L. REV. 85, 117-42 (2005).
90. *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010).
91. Chin, *supra* note 8, at 272-87.
92. See, e.g., Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 (1993). However, despite some sporadic victories in the circuits, challenges under the Voting Rights Act (VRA) do not presently seem like the most promising avenue for turning the tide against felon disenfranchisement. Most courts have either held the VRA to be inapplicable to felon disenfranchisement, or in the context of felon disenfranchisement, courts have insisted upon a very high threshold of proof of racial discrimination. The VRA cases reveal that courts are interpreting and applying the Act in the shadow of *Ramirez*. As the Second Circuit noted, “The starting point for our analysis is the explicit approval given felon disenfranchisement provisions in the Constitution. . . . The Supreme Court has ruled that . . . felon disenfranchisement provisions are presumptively constitutional.” *Hayden v. Pataki*, 449 F.3d 305, 316 (2d Cir. 2006) (en banc).
93. Cosgrove, *supra* note 18, at 175-81. Common law felonies include offenses formerly punishable by death, forfeiture of lands or goods, or both. Limiting the meaning of “other crime” in the Penalty Clause exception to crimes that were common law felonies would significantly restrict the application of current disenfranchisement statutes. *Id.* at 181.
94. *Harvey*, 605 F.3d at 1070-71. Like this Note’s strategy, the strategy of the *Harvey* plaintiffs works within the framework of *Ramirez* to the extent that it acknowledges Chief Justice Rehnquist’s characterization of the Penalty Clause as an “affirmative sanction” of felon disenfranchisement.
95. Noting *Ramirez*’s reliance on the plain meaning of the Penalty Clause, the Ninth Circuit “consider[ed] plaintiffs’ reasons for looking beyond Section 2’s plain language.” *Id.* at 1074.

of the three ex-felons in [*Ramirez*] was convicted of a crime that was clearly not a felony at common law."⁹⁶

As the Ninth Circuit did in *Harvey*, the majority of lower courts interpret *Ramirez* "as having closed the door on the equal protection argument in a challenge to state statutory voting disqualifications for conviction of crime."⁹⁷ One exception stands out. In *Hunter v. Underwood*, decided nearly a decade after *Ramirez*, the Court held that criminal disenfranchisement laws enacted with discriminatory intent violated the Equal Protection Clause.⁹⁸ But courts have severely limited *Hunter's* test of intentional discrimination: even when a state was originally motivated by discriminatory intent, a subsequent change (such as an amendment or reenactment) to the discriminatory law would remove its discriminatory taint.⁹⁹

Most lower courts read *Hunter* as the only exception to *Ramirez's* holding that felon disenfranchisement is presumptively constitutional,¹⁰⁰ and affirm that the Penalty Clause "immunizes any classification of disqualifying crimes, whether the classification is stated in terms of 'felonies' generally, or of some felonies, or of certain specified crimes."¹⁰¹ In challenges to felon disenfranchisement using the Equal Protection Clause (and the status of voting as a

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96. *Id.*; *Richardson v. Ramirez*, 418 U.S. 24, 32 n.9 (1974) ("felony of heroin possession"). The Ninth Circuit further found plaintiffs' arguments unsupported by contemporary usage, including previous Court cases. *See, e.g., Harvey*, 605 F.3d at 1074 (citing *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860)).
97. *One Person, No Vote*, *supra* note 21, at 1950 (quoting *Allen v. Ellisor*, 664 F.2d 391, 395 (4th Cir. 1981)).
98. *See Hunter v. Underwood*, 471 U.S. 222 (1985).
99. *See, e.g., Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998). Moreover, in other cases, courts reasoned that criminal disenfranchisement met a rational state interest, and therefore states would have such laws even in the absence of intentional discrimination. *One Person, No Vote*, *supra* note 21, at 1951 (citing *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986)); *see also Jones v. Edgar*, 3 F. Supp. 2d 979, 981 (N.D. Ill. 1998).
100. *One Person, No Vote*, *supra* note 21, at 1951-52. There have been some successful challenges. *See, e.g., Hunter*, 471 U.S. at 233; *Farrakhan v. Washington*, 338 F.3d 1009, 1020 (9th Cir. 2003) (holding that felon disenfranchisement violates the Voting Rights Act); *McLaughlin v. City of Canton*, 947 F. Supp. 954, 973 (S.D. Miss. 1995) (holding that disenfranchisement for a misdemeanor violates equal protection); *Stephens v. Yeomans*, 327 F. Supp. 1182, 1188 (D.N.J. 1970) (holding that New Jersey's law violates equal protection); *Mixon v. Commonwealth*, 759 A.2d 442, 451-52 (Pa. Commw. Ct. 2000), *aff'd mem.*, 783 A.2d 763 (Pa. 2001).
101. *Allen v. Ellisor*, 664 F.2d 391, 397-98 (4th Cir. 1981) (en banc), *vacated on other grounds by* 454 U.S. 807 (1981).

fundamental right), “courts generally cite *Ramirez* and *Hunter* with little additional analysis.”¹⁰²

Indeed, these lower court decisions result from a reasonable reading of *Ramirez*, and this Note does not suggest that courts are acting in bad faith when they dismiss these suits as barred by the *Ramirez* decision. As Part II will make clear, however, there is another, better, and more constitutionally consistent way to interpret the decision’s holding. Modern constitutional law – including *Ramirez* – leaves intact the principle that state voting restrictions are constitutionally suspect.

II. RIPE FOR REEXAMINATION: A NEW TEXTUAL STRATEGY

The remaining Parts of this Note describe an untouched argument against expansive judicial approval for felon disenfranchisement statutes. For those advocates seeking judicial remedies rather than legislative action, this argument may prove more attractive than the predominant litigation strategies. This Part frames the following discussion by first outlining the reasons why the Penalty Clause is ripe for textual reexamination and by then demonstrating why the textual argument supplied by this Note may have a better chance of success than other legal arguments.

A. A Textual Opportunity

The critiques outlined in Part I have garnered much support in academic circles and among interested organizations. However, these arguments promise little chance of success. Although scholars continue to advance these arguments persuasively, most approaches amount to relitigating *Ramirez* based on reasoning that the majority already considered and rejected.¹⁰³ Beyond its traditional reluctance to overturn past decisions, the Supreme Court has looked especially unfavorably on a reconsideration of the issue of felon disenfranchisement.¹⁰⁴ In *Lewis v. United States*,¹⁰⁵ for example, in upholding a felon-in-possession statute, the Court noted that it had “recognized repeatedly that a

102. Uggem et al., *supra* note 12, at 315 (citing *Woodruff v. Wyoming*, 49 F. App’x 199 (10th Cir. 2002)); see also *Cotton*, 157 F.3d 388; *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983).

103. See *supra* notes 86-102 and accompanying text.

104. Christine Hunter Kellett, *Draft Registration and the Conscientious Objector: A Proposal To Accommodate Constitutional Values*, 15 COLUM. HUM. RTS. L. REV. 167, 176 (1984) (noting that the Court reaffirmed its position in dicta as recently as 1980).

105. 445 U.S. 55 (1980).

legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm.”¹⁰⁶ As one scholar opines, “Since the Roberts Court seems most unlikely to reverse *Richardson v. Ramirez*, . . . the prospects of either Congress or the federal judiciary easing this growing restriction on the suffrage seem poor.”¹⁰⁷

Thus, “[e]ven with the passage of time, and change in composition of the Supreme Court, it seems unlikely that [the Court] would overrule its former precedent without some changed circumstances or new argument.”¹⁰⁸ This proposition is “all the more true since the *Ramirez* argument is a textual one, based on the intent of the framers, not something subject to an evolving interpretation.”¹⁰⁹ While the Court’s narrow textual approach to interpreting the Penalty Clause may rest on “unsound historical analysis,”¹¹⁰ challenges that rely on the historical purpose of the Clause in the context of the Reconstruction Amendments ignore the Court’s insistence that the scant legislative history supports a textual reading of the Penalty Clause.¹¹¹ Furthermore, the Court’s discussion of the history of the Fourteenth Amendment contains “the caveat that such legislative history should not be afforded unlimited weight in constitutional interpretation.”¹¹²

Lower courts have “generally accepted” that the *Underwood* intentional discrimination exception is the only “possible modification of *Ramirez*’s bright line”¹¹³ rule that felon disenfranchisement is presumptively constitutional. However, to read *Ramirez* as sanctioning all felon disenfranchisement provisions would be a mistake. The decision does not say that laws

106. *Id.* at 66 (citing *Richardson v. Ramirez*, 418 U.S. 24 (1974)).

107. J. Morgan Kousser, *Disfranchisement Modernized*, 6 ELECTION L.J. 104, 111 (2007) (book review).

108. Jason Morgan-Foster, *Transnational Judicial Discourse and Felon Disenfranchisement: Re-Examining Richardson v. Ramirez*, 13 TULSA J. COMP. & INT’L L. 279, 287 (2006).

109. *Id.* at 287-88 (footnote omitted).

110. *Ramirez*, 418 U.S. at 56 (Marshall, J., dissenting).

111. *Id.* at 55. *But cf.* Re & Re, *supra* note 21 (manuscript at 51) (“*Ramirez* can be viewed as having preserved a role for constitutional text and original meaning in what would otherwise be an entirely ahistorical voting rights jurisprudence.”).

112. J. Kenneth Blackwell & Kenneth A. Klukowski, *The Other Voting Right: Protecting Every Citizen’s Vote by Safeguarding the Integrity of the Ballot Box*, 28 YALE L. & POL’Y REV. 107, 113 n.21 (2009).

113. Morgan-Foster, *supra* note 108, at 280-81 (citing *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1217-18 (11th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1015 (2005)). *Johnson* stated that “[a] state’s decision to permanently disenfranchise convicted felons does not, in itself, constitute an Equal Protection violation” and limited its analysis to whether the statute in question violated *Underwood*. *Johnson*, 405 F.3d at 1217.

disenfranchising felons can never violate the Constitution.¹¹⁴ This Part describes a new strategy for working within the textual framework described in *Ramirez*.

The Court has construed the Penalty Clause as an affirmative sanction for felon disenfranchisement. However, lower courts have interpreted this affirmative sanction to apply to a variety of disenfranchisement practices that need not and should not be upheld under the textualist logic of the *Ramirez* decision. Litigants should focus on limiting the range of felon disenfranchisement practices to those that could plausibly be covered by the text of the Penalty Clause. As Part IV will argue, if the text of the Clause affirmatively sanctions felon disenfranchisement, the text also limits the sanction to disenfranchisement for relatively serious offenses.

Indeed, a few practitioners and scholars have noted that the *Ramirez* decision did not “consider the seriousness of the crime leading to disenfranchisement in any level of detail.”¹¹⁵ This observation suggests the possibility of limiting the scope of *Ramirez* through a careful reinterpretation of the words “rebellion, or other crime” in Section 2 of the Fourteenth Amendment.¹¹⁶ Retired Justice O’Connor noted in her *Harvey* opinion that the *Ramirez* Court did not directly address this question.¹¹⁷ *Ramirez* was specifically concerned with the constitutionality of California’s felon disenfranchisement law. The question that the Court addressed was whether California violated the Equal Protection Clause by disenfranchising felons who completed their sentences and paroles.¹¹⁸

The Court’s holding in *Ramirez* was no more (nor less) than that the Equal Protection Clause permits states to “exclude from the franchise convicted felons who have completed their sentences and paroles.”¹¹⁹ Whether that rule applies equally to all convicted felons, regardless of the gravity of the crime, the Court did not say. Thus, if and when the Supreme Court faces the question of which crimes fall under Section 2’s affirmative sanction, it will be a matter of first impression for the Court.¹²⁰ In the meantime, the question is an open one

114. Wilkins, *supra* note 89, at 108 (“First, *Ramirez* does not say that such provisions can never violate the Constitution. It merely refers to another case that, as the Court acknowledged, made such a suggestion in dicta.” (footnotes omitted)).

115. Morgan-Foster, *supra* note 108, at 287.

116. *Id.* at 287-88.

117. *Harvey v. Brewer*, 605 F.3d 1067, 1074 (9th Cir. 2010).

118. *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974).

119. *Id.*

120. *See Harvey*, 605 F.3d at 1067.

for the lower courts. In raising it, litigants have an opportunity to successfully challenge felon disenfranchisement statutes without overturning *Ramirez*.

But how best to seize this opportunity? Current proposals (such as the challenge described in *Harvey v. Brewer*¹²¹) for reading the text of the Penalty Clause to limit its affirmative sanction of disenfranchisement to convictions for rebellion and like crimes face a number of hurdles. First, their focus on the purposes of the Framers of the Fourteenth Amendment, as opposed to the words they used, stands in some tension with the text of the *Ramirez* decision.¹²² Second, given the Court’s apparent acceptance of fairly expansive felon disenfranchisement statutes, the Justices seem unlikely to approve such a narrow reading of “other crime.” Yet how can we account for the apparent open-endedness of the phrase “other crime”? This Note proposes a new, textualist approach to construing the Penalty Clause that, in answering these questions, represents a viable strategy for limiting the reach of *Ramirez*.

B. A Textual Invitation

In its interpretation of the “other crime” exception, the Court deduced from the scant legislative history of the Penalty Clause that the exception “was intended by Congress to mean what it says.”¹²³ This aspect of the holding invites litigants working within the *Ramirez* framework to use the varied tools of textual interpretation to elucidate the extent of the “other crime” exception.¹²⁴ Yet beyond its nod in the direction of plain meaning, the *Ramirez* Court did not engage in any sustained or detailed exercise in textual interpretation.¹²⁵

After *Ramirez*, lower courts have tended to hold “other crime” to mean any offense that state legislatures designate as triggering disenfranchisement so long as there is no clearly demonstrated intent to discriminate based on race.¹²⁶ But this construction of “other crime” is not compelled by the textualist reasoning of *Ramirez*, and least of all by the plain meaning of the constitutional text. Indeed, the “other crime” exception to the Penalty Clause does not “plainly” mean anything.

121. See *supra* notes 94-96 and accompanying text.

122. *Ramirez*, 418 U.S. at 43.

123. *Id.*

124. See *supra* Introduction.

125. *Ramirez*, 418 U.S. at 45 (“What little comment there was on the phrase in question here supports a plain reading of it.”).

126. Morgan-Foster, *supra* note 108, at 280-81.

Consider all the questions that are left unanswered. Does “other crime” include only felonies, or may states disenfranchise for misdemeanors as well? (Some states currently disenfranchise for offenses that are not and were not, under any regime, “felonies or infamous crimes.”¹²⁷) If “other crime” means “felony,” can states disenfranchise for felonies that were not felonies at the time of the Fourteenth Amendment? How (if at all) is the phrase “other crime” modified by the antecedent enumeration of “rebellion” as a paradigmatic example of an offense punishable by disenfranchisement? And finally, how (if at all) is the meaning of “other crime” informed by the use of identical or similar phrasing elsewhere in the Constitution?

These questions all point to the necessity of deploying modes of textual interpretation. Consider the several instances of the word “crime” in the Constitution. The word itself has been construed differently in different contexts.¹²⁸ Article III’s mention of “all Crimes” includes crimes punishable by six months or more in prison,¹²⁹ while Article IV’s mention of “other Crime” includes both felonies and misdemeanors.¹³⁰ As this Note will discuss below, those acts covered by Article II’s “other high Crimes and misdemeanors”¹³¹ differ from Article IV’s “other Crime[s]”¹³² and Amendment V’s “infamous crime[s].”¹³³ Yet, despite the many meanings of “crime” throughout the Constitution, a pattern emerges. The next Part examines the use of the phrase “other crime” in the Extradition, Grand Jury, and Impeachment Clauses to establish the pattern running through them.

127. Alec Ewald, *A ‘Crazy-Quilt’ of Tiny Pieces: State and Local Administration of American Criminal Disenfranchisement Law*, THE SENTENCING PROJECT, at i (Nov. 2005), http://www.sentencingproject.org/doc/publications/fd_crazyquilt.pdf (noting that, as of 2005, “at least five states—Colorado, Illinois, Michigan, South Carolina, and Maryland—also formally barred some or all people convicted of *misdemeanors* from voting”) (emphasis added). There is significant state disagreement over this point; some jurisdictions hold that disenfranchising for misdemeanors violates the Equal Protection Clause, while in “Mississippi and Kentucky, constitutions and statutes suggest that misdemeanants might be disqualified, but state officials in both states say they should retain the right to vote.” *Id.* at 6.

128. Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279 (1998).

129. U.S. CONST. art. III, § 2, cl. 3; *Baldwin v. New York*, 399 U.S. 66 (1970).

130. U.S. CONST. art. IV, § 2, cl. 2; *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 66 (1860), *overruled by Puerto Rico v. Branstad*, 483 U.S. 219, 231 (1987).

131. U.S. CONST. art. II, § 4.

132. U.S. CONST. art. IV, § 2, cl. 2; *Dennison*, 65 U.S. at 76, *overruled by Branstad*, 483 U.S. at 230-31.

133. U.S. CONST. amend. V; *Mackin v. United States*, 117 U.S. 348 (1886).

III. THE SYNTACTICAL PATTERN

The Constitution contains three separate clauses—the Extradition Clause, the Grand Jury Clause, and the Impeachment Clause, which address utterly distinct subjects—in which the words “or other crime” or similar language appear in constructions that are syntactically similar to the “rebellion, or other crime” exception to the Penalty Clause. The construction always includes an enumerated offense or offenses, followed by the words “other”/“otherwise” and “crime”/“crimes.”¹³⁴ A close examination of the repeated use of this construction reveals a clear and consistent method for interpreting the meaning of “other crime” in the constitutional text. The “other crime” exception is consistently interpreted with reference to the enumerated offense, or paradigm case. The following Sections will address each clause in turn. While the first two clauses are subject to authoritative judicial interpretation, the Impeachment Clause, addressed third, is not. As will become clear, even in cases where the ultimate limits of the exception remain unclear, courts, commentators, and (in the case of the Impeachment Clause) politicians all use the enumerated offense to give content and context to the words “other crime.”

A. Article IV, Section 2: The Extradition Clause

The Interstate Extradition Clause is the only other clause in the Constitution that includes the exact “or other crime” phrase found in the Penalty Clause. The Extradition Clause reads:

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.¹³⁵

The Extradition Clause “articulates . . . the concepts of full faith and credit needed to foster national unity and facilitate[] the smooth functioning of the criminal justice system.”¹³⁶ The purpose of the Clause was to preclude any state

¹³⁴. The words “other”/“otherwise” and “crime”/“crimes” are sometimes separated by an adjective qualifying the relevant crimes. See U.S. CONST. art. II, § 4 (“or other high Crimes”); U.S. CONST. amend. V (“otherwise infamous crime”).

¹³⁵. U.S. CONST. art. IV, § 2.

¹³⁶. Donald W. North, *The Obstruction of the Extradition Derailment*, 28 S.U. L. REV. 151, 155 (2001).

from becoming a sanctuary for fugitives from justice of another state and thus to avoid “balkanizing” the administration of criminal justice among the several states.¹³⁷

In the context of the Extradition Clause, the phrase “or other Crime” has been construed to include even the most minor misdemeanors.¹³⁸ As noted in *State ex rel. Knowles v. Taylor*, “The words ‘treason, felony, or other crime’ [in the clause] . . . include every offense . . . from the highest to the lowest, including misdemeanors, statutory crimes, and acts made crimes by Statute at any time after the adoption of the federal Constitution.”¹³⁹ Chief Justice Taney, writing in *Kentucky v. Dennison*, stated that the term “[c]rime is synonymous with misdemeanor . . . and includes every offence below felony punished by indictment as an offence against the public”¹⁴⁰ The Chief Justice went on to note that “in the first draft of this clause of the Constitution, the words ‘high misdemeanor’ were used. They were stricken out, and ‘other crime’ inserted, because ‘high misdemeanor’ might be technical and too limited. The framers wanted ‘to comprehend all proper cases.’”¹⁴¹ This view has “never been challenged during the intervening years.”¹⁴²

One should not conclude from this examination of the Extradition Clause that “other Crime” necessarily means all felonies and misdemeanors. Rather, the lesson of the Extradition Clause is that the meaning of “other Crime” necessarily follows from the categories – “Treason, Felony” – that precede the

137. *Michigan v. Doran*, 439 U.S. 282, 286-88 (1978).

138. *Ex parte Reggel*, 114 U.S. 642 (1885) (holding that the word “crime” as used in the Extradition Clause comprehends in itself every offense, including misdemeanors); *Glover v. State*, 515 S.W.2d 641, 644 (Ark. 1974); *State v. Taylor*, 160 Tenn. 44 (1929); *Ex parte Williams*, 622 S.W.2d 482, 483 (Tex. App. 1981); 31A AM. JUR. 2D *Extradition* § 37 (West 2011) (stating that “[t]he word ‘crime’ as used in the Extradition Clause comprehends in itself every offense, including misdemeanors” (footnote omitted)).

139. *Taylor*, 160 Tenn. at 44.

140. *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 76 (1860), *overruled by Puerto Rico v. Branstad*, 483 U.S. 219, 230-31 (1987) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *5).

141. *Id.* (citing *In re Clark*, 9 Wend. 212 (N.Y. Sup. Ct. 1832)); 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 487 (William S. Hein & Co. 1996) (1845).

142. *Pointer v. Slavin*, 199 A.2d 341, 343 (Conn. Super. Ct. 1964) (“The view expressed by the United States Supreme Court over a hundred years ago in the case cited, that the words ‘or other Crime,’ employed in article IV, § 2, of the United States constitution, necessarily include those offenses called ‘misdemeanors’ has never been challenged during the intervening years.”).

phrase. The words “Treason, Felony” provide an interpretive frame for construing “or other Crime” in the Extradition Clause.

In the Extradition Clause, the categories that precede “other Crime” named two of the three recognized classes of offenses at common law.¹⁴³ So it is logically consistent to interpret “other Crime” in the Extradition Clause as “synonymous with misdemeanor”¹⁴⁴—the third category of common law offenses. In other words, construing “other Crime” in the Extradition Clause as all crimes less serious than felony is the only way to make sense of the connection between “other Crime” and the paradigm cases that precede it.¹⁴⁵ As we will see, the importance of the paradigm case is a recurrent feature of the “other crime” construction.

B. Amendment V: The Grand Jury Clause

The Grand Jury Clause of the Fifth Amendment also contains a variation on the “other crime” construction. The Clause guarantees criminal defendants immunity from prosecution for certain crimes unless charged with those crimes by a Grand Jury.¹⁴⁶ The Clause reads:

No person shall be held to answer for a capital, or *otherwise infamous crime*, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger¹⁴⁷

The language “otherwise infamous crime” raises the same sort of interpretive question we have considered in the context of the Penalty and Extradition Clauses. What crimes are included in the “otherwise infamous” category?

143. 1 WHARTON’S CRIMINAL LAW § 17 (Charles E. Torcia ed., West rev. 2011) (“At common law, there were three kinds of offenses: treasons, felony, and misdemeanor.”); *accord* *Harvey v. Brewer*, 605 F.3d 1067, 1073 (9th Cir. 2010).

144. *Dennison*, 65 U.S. at 76 (citations omitted).

145. Indeed, it would be implausibly redundant to believe that in the context of the Extradition Clause the word “crime” should be taken to include felonies. If this were so, the Clause would read “Treason, Felony, or other Felonies and Misdemeanors.” This point will be further elaborated in Part IV, *infra*.

146. *Branzburg v. Hayes*, 408 U.S. 665, 687-88 (1972). *Branzburg* notes furthermore that although indictment by grand jury “is not part of the due process of law guaranteed to state criminal defendants by the Fourteenth Amendment,” the majority of states require indictment for serious criminal prosecutions. *Id.* at 688 n.25 (citing *Hurtado v. California*, 110 U.S. 516 (1884)).

147. U.S. CONST. amend. V (emphasis added).

The test for whether a crime can be considered “infamous” turns on the severity of the maximum punishment authorized for the crime.¹⁴⁸ Specifically, the Court now interprets “otherwise infamous crime” to include any crime punishable by imprisonment for a term of one year or longer.¹⁴⁹ This general rule is subject to some exceptions. For example, imprisonment at hard labor for any definite term is considered to be an “infamous” punishment.¹⁵⁰ Crimes resulting in exclusion from the right to vote or to hold public office have also been classified as “infamous.”¹⁵¹

Crimes that are declared by statute to be felonies are per se infamous, since the term felony generally has been used since the nineteenth century to designate crimes carrying a possible prison sentence.¹⁵² Courts have excluded most misdemeanors from the category of infamous offenses;¹⁵³ however, a misdemeanor will be considered infamous if the statute criminalizing the conduct declares that it is infamous¹⁵⁴ or if it subjects offenders to the possibility of an “infamous” punishment (typically, a year or more of imprisonment).¹⁵⁵

The Court’s attention to severity of punishment in construing “otherwise infamous crime” in the Grand Jury Clause fits the pattern of interpretation we saw in the Extradition Clause. Note that the Grand Jury Clause names “capital” offenses as the paradigmatic case of an “infamous” crime. Since “capital” is a

148. *Mackin v. United States*, 117 U.S. 348 (1886).

149. *Parkinson v. United States*, 121 U.S. 281 (1887); *Mackin*, 117 U.S. at 398 (“[T]he most conclusive evidence of the opinion of Congress upon this subject is . . . the act conferring on the Police Court of the District of Columbia ‘original and exclusive jurisdiction of all offences . . . committed in the District, not deemed capital or otherwise infamous crimes . . . and all other misdemeanors not punishable by imprisonment’” (citing Act of June 17, 1870, ch. 133, § 1, 16 Stat. 153) (emphasis added)); *United States v. Evans*, 28 App. D.C. 264 (D.C. Cir. 1906).

150. *Falconi v. United States*, 280 F. 766 (6th Cir. 1922); see also *Ex parte McClusky*, 40 F. 71 (C.C.D. Ark. 1889) (holding that for a punishment to be infamous, the law does not require the accused to be sentenced to hard labor).

151. *People v. Russell*, 91 N.E. 1075 (Ill. 1910); *State ex rel. Stinger v. Krueger*, 217 S.W. 310 (Mo. 1919).

152. *Ex parte Westenberg*, 139 P. 674, 679 (Cal. 1914).

153. *Hunter v. United States*, 272 F. 235, 238 (4th Cir. 1921) (“It is clear to our minds that the effect of the decisions of the courts generally is that a crime is not infamous unless it subjects one to the liability of punishment of death, or confinement in the state penitentiary, or to disqualification for holding office, or some other specific forfeiture, or disqualification not incident to ordinary misdemeanors.”).

154. *Russell*, 91 N.E. at 1077-78.

155. *United States v. Moreland*, 258 U.S. 433, 439-40 (1922).

punishment-based classification, the Court reasoned that the infamy of an offense (for Grand Jury Clause purposes) must be measured by the punishment it carries. Indeed, in interpreting the meaning of "infamous crime," the Court specifically noted that "[t]he leading word, 'capital,' describ[es] the crime by its punishment only." Thus, "the associated words, 'or otherwise infamous crime,' must, by an elementary rule of construction, be held to include any crime subject to an infamous punishment."¹⁵⁶

C. Article II, Section 4: The Impeachment Clause

There is no authoritative judicial interpretation of the Impeachment Clause. After all, "impeachment is a criminal process of accusation and trial carried out in Congress."¹⁵⁷ However, notwithstanding the absence of a precedential and judicially reviewed interpretation of the Clause, when members of Congress and legal scholars interpret the Clause, they turn to the paradigm cases to determine the limits of impeachable offenses. The Clause reads:

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.¹⁵⁸

Gerald Ford famously quipped that "an impeachable offense . . . is whatever a majority of the House of Representatives considers [it] to be;"¹⁵⁹ after all, as Sunstein notes, "no court is likely to review a decision to impeach."¹⁶⁰ Rarely noted is the more important aspect of then-Congressman Ford's statement—that because citizens can remove the President during an election, "[t]o remove them in midterm . . . would indeed require crimes of the magnitude of treason and bribery."¹⁶¹

The majority of judges and scholars who have examined the likely meaning of "other high Crimes and Misdemeanors," (including, among others, Chief Justice Hughes, Justice Wilson, Alexander Hamilton, Charles Black, and Raoul Berger) have reached the same conclusion: the category of impeachable

156. *Mackin v. United States*, 117 U.S. 348, 350-51 (1886).

157. Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 *YALE L. & POL'Y REV.* 53, 63 (1999).

158. U.S. CONST. art. II, § 4.

159. 116 CONG. REC. 11,913 (1970) (statement of Rep. Gerald Ford).

160. Sunstein, *supra* note 128, at 282.

161. 116 CONG. REC. 11,913 (1970) (statement of Rep. Gerald Ford).

offenses refers to some form of political (and not necessarily indictable) crimes.¹⁶² After all, “[t]he opening reference to treason and bribery, together with the word ‘other,’ seems to indicate that high crimes and misdemeanors should be understood to be of the same general kind and magnitude as treason and bribery (as in the Latin canon of construction, *ejusdem generis*).”¹⁶³ At least one scholar has examined other, similar constitutional provisions (although not the Penalty Clause) to support a view that the paradigm cases of treason and bribery were carefully chosen.¹⁶⁴

The impeachment proceedings against President Clinton provide an illustration of the way in which Congress grapples with the meaning of the Clause. During the proceedings, extensive hearings were held on the background and history of impeachment. At the outset of these hearings, Congressman Canady noted that “it should be understood by everyone that the purpose of today’s hearing is not to establish a fixed definition of impeachable offenses under the Constitution.”¹⁶⁵ Yet “[w]ith the launching of an impeachment inquiry” the House was “faced with determining whether or not

162. RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 61 (1973); CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 35, 39-40 (1974); *THE FEDERALIST* NO. 65, at 334 (Alexander Hamilton) (Max Beloff ed., 2d ed. 1987); 2 *THE FOUNDERS’ CONSTITUTION* 166 (Philip B. Kurland & Ralph Lerner eds., 1987) (Justice Wilson); CHARLES E. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 19 (1928).

163. Sunstein, *supra* note 128, at 283.

164. *Id.* The diverse references to crimes in the Constitution (in, for example, the Interstate Extradition Clause, the Speech and Debate Clause, and the Fifth Amendment’s Grand Jury Clause) all point to the conclusion that “[b]ecause the phrase ‘other high Crimes and Misdemeanors’ is a dramatic contrast to other provisions in the text, it is reasonable to think that those terms are a reference to abuses that are, in both nature and magnitude, similar to treason and bribery.” *Id.* at 284. Another scholar adds, “That the Constitution lists these two grave offenses as its only examples of ‘high’ misconduct suggests that ‘high’ really does mean serious indeed.” Vikram David Amar, *The Truth, the Whole Truth, and Nothing but the Truth About “High Crimes and Misdemeanors” and the Constitution’s Impeachment Process*, 16 *CONST. COMMENT.* 403, 407 (1999) (reviewing ANN COULTER, *HIGH CRIMES AND MISDEMEANORS: THE CASE AGAINST BILL CLINTON* (1998)). The enumeration of illustrative offenses helps answer the question of how “high” a particular offense must be before it is one for which the President can be impeached. Since “[t]he text specifies ‘treason’ and ‘bribery’ as impeachable . . . one question we should ask is whether a given form of misconduct is as bad, or as ‘high’ a misdeed, as these two textual exemplars.” Akhil Reed Amar, *An(Other) Afterword on The Bill of Rights*, 87 *GEO. L.J.* 2347, 2358 (1999).

165. *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 2 (1998) [hereinafter *Background and History of Impeachment*] (statement of Rep. Charles J. Canady, Chairman, H. Subcomm. on the Constitution).

Mr. Clinton’s conduct [was] impeachable,”¹⁶⁶ that is, whether it fell into the category of “high Crimes and Misdemeanors.”¹⁶⁷

In making this determination, the House Committee heard from numerous legal and historical experts on the meaning of the term “high Crimes and Misdemeanors.” A substantial number of these experts—both for¹⁶⁸ and against¹⁶⁹ impeachment—made special note of the interrelation between the exemplary cases of treason and bribery and the phrase “high Crimes and Misdemeanors.” As one expert noted, no matter how the politicians eventually determined what actions fell under the umbrella of “high Crimes and Misdemeanors,” “[i]t is a cardinal error to abbreviate this passage and speak of ‘high crimes and misdemeanors’ in isolation, and so to ignore the fact that the Constitution gives two concrete examples of the type of offense the Framers intended to be proper grounds for impeachment.”¹⁷⁰

Legislators on both sides of the political aisle referred to these scholarly readings when reasoning about the reaches of the Clause in the Clinton

166. *Id.* at 25 (statement of Rep. Christopher B. Cannon).

167. *Id.* at 31 (statement of Professor Gary L. McDowell).

168. *See, e.g., id.* at 104 (statement of Professor John O. McGinnis) (interpreting “high Crimes and Misdemeanors” in light of the before-listed offense of bribery).

169. Professor Cass Sunstein explained that “[i]f you remember anything from this testimony, remember the word ‘other.’ . . . The word ‘other’ suggests we need acts of the same magnitude and the same nature as treason and bribery.” *Id.* at 81 (statement of Professor Cass Sunstein); *id.* at 92 (statement of Professor Richard D. Parker) (noting that “the word ‘other’ is crucial”); *id.* at 98 (statement of Professor Arthur M. Schlesinger, Jr.). Professor Robert F. Drinan noted that “[t]he word ‘other,’ as has been pointed out here several times, is most significant. It clearly implies that the high crimes and misdemeanors must be comparable to or close to or analogous to treason and bribery.” *Id.* at 112 (statement of Professor Robert F. Drinan); *id.* at 231 (statement of Professor Susan Low Bloch). Professor Laurence H. Tribe argued that “[t]he word ‘other’ is a dead giveaway: high crimes and misdemeanors are offenses that bear some strong resemblance to the flagship offenses listed by the framers—treason and bribery.” *Id.* at 224 (statement of Professor Laurence H. Tribe); *see also id.* at 58 (statement of Professor Matthew Holden, Jr.) (“We should not miss the powerful word ‘other’ in Article II, section 4. ‘Other,’ as Justice Curtis who represented Johnson said, ‘other’ of a status equal to treason or bribery, not ‘other’ simply because we can find it.”).

170. *Id.* at 346 (statement of Professor Frank O. Bowman, III and Professor Stephen L. Sepinuck). After all, a letter signed by several hundred law professors noted: “Neither history nor legal definitions provide a precise list of high crimes and misdemeanors. Reasonable people have differed in interpreting these words. . . . [T]he proper interpretation of the [sic] Impeachment Clause must begin by recognizing treason and bribery as core or paradigmatic instances, from which the meaning of ‘other high Crimes and Misdemeanors’ is to be extrapolated.” Letter from Law Professors to Newt Gingrich, Speaker, House of Representatives, et al. (Nov. 6, 1998), *reprinted in Background and History of Impeachment, supra* note 165, at 375.

impeachment proceedings. As Representative Scott argued, “Our experts at our hearing also told us to pay close attention to another word in the phrase, and that is ‘other.’ It’s treason, bribery, . . . and stuff like that and its effect against our government.”¹⁷¹ Put simply, representatives argued with treason and bribery in the background.¹⁷² The Senate hearings contain similar arguments—again, both for and against impeachment. Senators Abraham,¹⁷³ Ashcroft,¹⁷⁴ Kennedy,¹⁷⁵ and Johnson,¹⁷⁶ as well as Senator Biden¹⁷⁷ all made forceful

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171. *Impeachment Inquiry: William Jefferson Clinton, President of the United States, Consideration of Articles of Impeachment*, 105th Cong. 336 (1998) [hereinafter *Impeachment Inquiry*] (statement of Rep. Robert C. Scott, Member, H. Comm. on the Judiciary).
172. *Id.* at 27 (statement of Rep. Bill McCollum, Member, H. Comm. on the Judiciary) (“Under the Constitution, impeachable offenses are treason, bribery and other high crimes and misdemeanors. If our courts for good reason punish perjury and obstruction of justice more severely than bribery, how could anyone conclude they are not impeachable offenses? Bribery and perjury both go to the same grave offense: the undermining of justice.”); *id.* at 129 (statement of Rep. Steven R. Rothman, Member, H. Comm. on the Judiciary); *id.* at 316 (statement of Rep. Melvin L. Watt, Member, H. Comm. on the Judiciary); *id.* at 332 (statement of Rep. Martin T. Meehan, Member, H. Comm. on the Judiciary) (“[L]ying about fully consensual sexual conduct even under oath simply . . . [is] not an offense of the magnitude of treason and bribery.”).
173. 145 CONG. REC. 2415 (Feb. 12, 1999) (statement of Sen. Spencer Abraham) (“[I]t has been suggested by some that a ‘high Crime’ must be a truly heinous crime. But that interpretation is obviously wrong. Treason is certainly among the most heinous crimes. But bribery is not.”). Note that these are statements from the Senate’s closed deliberations on the articles of impeachment against President Clinton, excerpts of which senators were allowed to publish in the Congressional Record for Friday, February 12, 1999.
174. *Id.* at 2549 (statement of Sen. John Ashcroft) (“[T]he scope of ‘high crimes and misdemeanors’ is informed by the two crimes specifically enumerated in the Constitution as a basis for impeachment, treason and bribery. Both these crimes, in common with perjury and obstruction of justice, threaten the proper functioning of government Perjury is bribery’s twin.”).
175. *Id.* at 2498 (statement of Sen. Edward M. Kennedy) (“[T]he two specific impeachable offenses—treason and bribery—can help identify both the ‘ordinary crimes which ought also to be looked upon as impeachable offenses, and those serious misdeeds, not ordinary crimes, which ought to be looked on as impeachable offenses’” (quoting BLACK, *supra* note 162, at 37) (alteration in original)).
176. *Id.* at 2393 (statement of Sen. Tim Johnson) (“The learned opinions of our nation’s leading scholars overwhelmingly support the understanding that presidents should not be removed from office by Congress short of some . . . misconduct which arises from executive authority and threatens the nation—such as treason or bribery.”).
177. *Id.* at 2405-06 (statement of Sen. Joseph R. Biden, Jr.) (“[T]he text sets forth a list that begins with terms that have definite meaning . . . and proceeds to relatively indefinite terms, high crimes and misdemeanors. In this setting, two rules of construction, *eiusdem generis* and *noscitur a sociis*, instruct that the meaning of the indefinite terms are to be understood as similar in kind to the definite terms. Application of these canons of construction is bolstered

statements about the necessity of considering the "other crimes" term in relation to the paradigmatic impeachable offenses of treason and bribery.

Thus, the Clinton impeachment hearings demonstrate that the scope of impeachable offenses is understood with respect to the paradigm terms ("Treason, Bribery"). One might wish to refrain from drawing too strong a conclusion, noting that the connection between "high Crimes and Misdemeanors" and "Treason [and] Bribery" is just one factor that members of Congress considered.¹⁷⁸ One might even say it is secondary to historical analysis of "high Crimes and Misdemeanors" as a term of art in the Founding era.¹⁷⁹ More cynically, one might argue that lawmakers may take any number of factors into account, including pure political preference. After all, unlike judicial officials, members of Congress do not need to explain and justify their votes except, perhaps, *ex post* to voters.

It is true that members of Congress may consider factors other than linguistic consistency when voting on a bill of impeachment. It is equally true that the meaning of the terms in the Impeachment Clause — none more so than

here by the text itself. The indefinite element, 'high Crimes and Misdemeanors,' is introduced by the term 'other.'").

178. STAFF OF THE IMPEACHMENT INQUIRY, H. COMM. ON THE JUDICIARY, 105TH CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT: MODERN PRECEDENTS 17 (Comm. Print 1999) ("Impeachment is a unique and distinct procedure established by the Constitution. Each member must decide for himself or herself . . . whether the proven acts constitute a High Crime or Misdemeanor.").
179. See MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 3-21 (2d ed. 2000). However, a textual reading that analyzes the "other crime" language in reference to the paradigm cases of treason or bribery accords well with what we know about the history of the Impeachment Clause. A number of scholars note that, in 1788, the "terms 'treason' and 'bribery' would be unmistakable references to misuse of office, probably through betraying the country in one way or another. . . . The opening references to treason and bribery seem to limit the kinds of offenses for which a president may be removed from office." Sunstein, *supra* note 128, at 283; see also *Background and History of Impeachment*, *supra* note 165, at 58, 69 (statement of Professor Matthew Holden, Jr.). Professor Holden cited back to the Constitutional Convention, when George Mason had proposed adding maladministration to treason and bribery as impeachable offenses. Holden noted that Mason's

suggestion of "maladministration" had been opposed by Madison and supported by no one. In such a decision-making situation, the thing to do is . . . to fall back on some other language that most people think they know how to decipher. For these men, "high Crimes and Misdemeanors" had some meaning *at the time*, but there is an additional word that seems crucial. That word is "other." . . . [I]t seems that this late-added provision refers to such "other high Crimes and Misdemeanors," as would be comparable in their significance to "treason" and "bribery."

Id.

“other high Crimes”—is still debated.¹⁸⁰ The point is that on any reading, the paradigm cases of “Treason” and “Bribery” are useful—even critical—to the interpretation of the phrase “other high Crimes and Misdemeanors.” Evidence from congressional hearings and debates on presidential impeachment demonstrates the considerations that animated legislators’ decisionmaking. These records clearly indicate that Congress struggled to determine which presidential actions should count as impeachable and that the paradigm cases were important in determining the meaning of “high Crimes and Misdemeanors.”

D. A Canonical Pattern

The syntactical pattern remains consistent across the varied uses of the “other crime” phrase in the constitutional text. The Constitution defines a category of “other” crimes either in relation to complementary categories (as in the Extradition Clause) or in relation to a paradigmatic example of the same category (as in the Grand Jury and Impeachment Clauses). The “elementary rule of construction” that the Court used to interpret the Grand Jury Clause is none other than the interpretive move encountered in the Impeachment and Extradition Clauses. In consistently construing the “other crime” category in relation to the preceding terms, the Court is simply (if implicitly) employing two overlapping canons of statutory construction: *ejusdem generis* and *noscitur a sociis*.

Ejusdem generis requires that when a general term follows a list of specific terms, the general term is confined to items of the same kind.¹⁸¹ The canon of *noscitur a sociis* means literally that “a word is known by its company.” This doctrine “stands for the principle that a word or phrase is given meaning by its context or setting.”¹⁸² These canons “together instruct that words in a series should be interpreted in relation to one another.”¹⁸³ Accordingly, “under the

180. Sunstein, *supra* note 128; *see also* Isenbergh, *supra* note 157, at 62 (noting the “great uncertainty” in interpreting this phrase); Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631, 631 (1999) (explaining that the text “rather plainly ha[s] little to say”).

181. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001).

182. *Tyler v. La. Pub. Sch.*, 590 N.W.2d 560, 563 (Mich. 1999).

183. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 229 (2008) (Kennedy, J., dissenting); *see id.* at 231 (quoting *Wash. State Dep’t. of Soc. & Health Servs. v. Estate of Keffeler*, 537 U.S. 371, 384 (2003)) (“[E]jusdem generis is often invoked in conjunction with the interpretative canon *noscitur a sociis*, which provides that words are to be ‘known by their companions.’”); *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000).

established interpretative canons of *noscitur a sociis* and *ejusdem generis*, where general words follow specific words . . . the general words are construed to embrace only objects similar to those enumerated by the specific words.”¹⁸⁴ Thus, there is nothing unusual about the interpretive pattern we have discovered across the constitutional clauses that contain variations on the “other crime” construction.

This pattern yields three general principles that will be useful in construing the meaning or scope of “other crime” in the Penalty Clause. First, the meaning of “crime” is malleable in that it varies from clause to clause. Second, the scope of the “other crime” category in any given clause is framed by the leading examples or categories that precede it. Third, the “other crime” category is the one that makes the most sense of the relationship between the category and its preceding terms. These principles essentially restate familiar canons of construction. They will be crucial to courts’ eventual determination of the limits of the Constitution’s affirmative sanction of felon disenfranchisement for “rebellion, or other crime.”

This reading is further supported by another interpretive strategy: intratextualism. Intratextualism is an “important form of constitutional argument”¹⁸⁵ whereby constitutional phrases are read in light of other instances of an identical or similar phrase within the constitutional text. When words (or phrases) repeat in the constitutional text, their repetition provides interpreters with clues to the text’s meaning.¹⁸⁶ In effect, practitioners of intratextual interpretation find linguistic patterns within the Constitution to illuminate the meaning of particular clauses.

This Note’s argument partakes of one particular type of intratextual argument. The pattern described does not resemble “Intratextualism as Philology,”¹⁸⁷ which uses the Constitution as a sort of dictionary for certain words. Instead of looking at the use of one phrase (say, “crime”) and arguing that it should mean the *same* thing throughout the document, this Note’s analysis demonstrates that the phrase “other crime” has *different* meanings depending on its context, and that this attention to difference should inform courts’ readings of the Penalty Clause.

This Note finds support in the idea of “Intratextualism as Pattern Recognition.”¹⁸⁸ As Professor Akhil Amar notes in his article on

¹⁸⁴. *Keffeler*, 537 U.S. at 372.

¹⁸⁵. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 749 (1999).

¹⁸⁶. *Id.* at 748.

¹⁸⁷. *Id.* at 791 (emphasis omitted).

¹⁸⁸. *Id.* at 792 (emphasis omitted).

intratextualism, the Constitution sometimes functions “as a special kind of concordance, enabling and encouraging us to place nonadjoining clauses alongside each other for analysis because they use the same (or very similar) words and phrases. Once we accept the invitation to read noncontiguous provisions together, we may see important patterns at work.”¹⁸⁹ Just such a pattern is present in the “other crime” exception. The intratextual key is that the *way* to interpret the “other crime” phrase (as bound by the paradigm case) ought to be consistent across the Constitution.¹⁹⁰

One might initially characterize this Note’s approach as a dangerous rejection of the first type of intratextualism. After all, why *don’t* the words “other crime” mean the same thing throughout the Constitution? This potential characterization is mistaken: the theory of intratextualism does not require the approval of one type at the expense of another. The Constitution does not “function . . . *merely* as a special kind of dictionary,”¹⁹¹ but as both a dictionary and a harmonious document. Intratextualism is a “cluster of [several] different kinds of constitutional claims,”¹⁹² and different forms of intratextual argument may be appropriate for different circumstances. As Professor Amar notes, “[C]ertain chameleon words should sensibly mean different things in different clauses.”¹⁹³ Such a text-specific, clause-bound reading is the most sensible reading of the “other crime” exception.

189. *Id.* at 792-93.

190. Moreover, the limited nature of this Note’s intratextual claim (as support for its textual argument) shields it from the harshest critiques of intratextualism, that is, that any claim that the Framers were self-conscious about the way constitutional clauses fit together is “descriptively implausible.” Adrian Vermeule & Ernest A. Young, Commentary, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 731 (2000). Whereas other versions of intratextualism may imply implausibly that the drafters of any constitutional amendment are looking to word definitions and syntactical patterns in other articles and amendments, this Note’s argument assumes only that the drafters of the Penalty Clause were focused on the paradigm case of the Penalty Clause (“rebellion”), just as the drafters of the Impeachment Clause were focused only on the paradigm cases of the Impeachment Clause (“Treason” and “Bribery”), and so on. In other words, the syntactical pattern that this Note sees running throughout these clauses is the same pattern that would emerge even if the drafter of each clause were only concerned with his clause. In that scenario, he would define the word “other” with respect to the words that surround it.

191. Amar, *supra* note 185, at 792 (emphasis added).

192. *Id.* at 791.

193. *Id.* at 793.

IV. APPLYING THE PATTERN

In all clauses except one, the Court (or Congress) has used the same syntactical pattern to ascertain the breadth of the words “other crime.” The Penalty Clause is unique in the unbounded meaning that lower courts have given these words. This expansive interpretation is unjustified, and broad readings of *Ramirez* are constitutionally suspect. The following Part will first prove that the scope of the Penalty Clause’s “other crime” term is limited by its paradigm term “rebellion.” This Part will then consider a variety of limiting principles, testing possible restrictions for fit with the text of the Penalty Clause, the *Ramirez* opinion, and the modern practice of felon disenfranchisement. This Part will also address possible critiques, responding to or incorporating objections into this Note’s argument.

A. The Limits of “Other Crime”

In applying the canons, we see immediately that “other crime” cannot mean the same thing in the Penalty Clause that it means in the Extradition Clause. In the Extradition Clause, “other Crime” is preceded by the enumeration of two broad categories of common law offenses, namely treason and felonies. Thus, “other Crime” in the Extradition Clause *must* refer to at least some misdemeanors; if it referred to felonies, the clause would read “treason, felonies, and other felonies.” Moreover, construing “other crime” as synonymous with misdemeanors makes sense in the context of the Extradition Clause, since misdemeanors are all that is missing from the Clause’s list of categories of common law offenses.

By contrast, “other crime” in the Penalty Clause is preceded by the word “rebellion”—that is, by the enumeration of a single, specific, and serious offense. This framing closely parallels the Impeachment Clause, which also lists specific examples of impeachable offenses before adding to that list “other high Crimes and Misdemeanors.” As we have seen, the enumerated offenses in the Impeachment Clause have been construed as paradigmatic of the sort of offense that could justify impeachment. Similarly, it seems sensible to read “rebellion” as paradigmatic of the sort of offense that justifies disenfranchisement.

But what sort of offense does “rebellion” exemplify? What—beyond treason—counts as a “crime of disloyalty,” and how can such crimes be meaningfully distinguished from the breach of social contract inherent in most, if not all, crimes? The most certain thing we can say is that rebellion does not exemplify an ordinary felony. Indeed, within the tripartite classification of common law crimes, rebellion would have counted as treason rather than as a

felony.¹⁹⁴ It would therefore be odd to specify rebellion (and only rebellion) as the paradigmatic case of a disenfranchisable offense if any run-of-the-mill felony would suffice to justify the loss of the right to vote. At the very least, then, the framing of “other crime” in the Penalty Clause suggests that the category embraces only some subset of (particularly serious) crimes.

Thus, the Penalty Clause is not an affirmative sanction for *all* felon disenfranchisement, and should not be read to immunize all disenfranchisement statutes from the strict scrutiny of the Equal Protection Clause. Disenfranchisement statutes that mandate the denial of voting rights to individuals convicted of such felonies that bear no relation to the seriousness of rebellion must be held up to constitutional scrutiny. The Penalty Clause does not immunize states employing expansive disenfranchisement statutes from the penalty of reduced representation. Consequently, states cannot constitutionally count individuals who are disenfranchised for less serious crimes in their populations for the purposes of congressional representation.

It is not a convincing objection to this conclusion to argue that the Penalty Clause, in contrast with the Impeachment and Grand Jury Clauses, does not modify “other crime” with an adjective, requiring that qualifying crimes must be particularly serious. It is true that the Framers of the Penalty Clause shied away from terms of art like “high Crimes and Misdemeanors” and “infamous crime,” perhaps because those terms seemed to them too broad, too narrow, or too technical for the disenfranchisement context.¹⁹⁵ By the same token, however, the Framers also shied away from a formulation as broad as the Extradition Clause’s “Treason, Felony, or other Crime,” which would have encompassed every offense, including misdemeanors. After all, when the Constitution refers to “felonies,” it does so explicitly.¹⁹⁶ The Framers of the Fourteenth Amendment had a precise term with which to refer to all felonies (to wit, “Felony”), and the fact that they did not deploy that term in the Penalty Clause context suggests that they meant for “other crime” to refer to some other category (or sub-category) of offenses.¹⁹⁷ In any case, the absence

194. *Harvey v. Brewer*, 605 F.3d 1067, 1073-74 (9th Cir. 2010).

195. *But see* Re & Re, *supra* note 21 (manuscript at 38-39) (noting that drafters of the Fifteenth Amendment considered constitutionalizing an affirmative sanction for “treason, felony, or other infamous crime”).

196. *Cf.* U.S. CONST. art. I, § 6, cl. 1 (“The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same . . .”).

197. Of course, this “something else” could conceivably include misdemeanors; this objection is addressed *supra* text accompanying notes 194-196.

of an adjective denoting seriousness in the Penalty Clause’s “other crime” formulation does not eliminate the need to relate that general category to the specific, paradigmatic example of rebellion. To give the word rebellion any force at all, we must read it as circumscribing the scope of “other crime.”

B. Limiting Principles

If courts were willing to circumscribe the scope of disenfranchisable crimes to a relatively narrow range of particularly dangerous felonies, various limiting principles could be fashioned from existing statutory schemes. This Note does not take a position on which limiting principle courts are most likely to favor, but rather points out that once this reading is accepted, there are a variety of possible outcomes.

The most linguistically coherent interpretation of the Clause is that “rebellion” connotes a distinctly political crime, or an act that aims at injuring the state as a whole. Thus, one possible construction of “other crime” would limit the category to crimes of disloyalty, such as espionage, terrorism, or other attempts to undermine the foundations of government. However, such a narrow construction seems unlikely to be accepted by either the Supreme Court or lower courts looking to stay within *Ramirez*’s animating principles. After all, the *Ramirez* Court suggested that the Framers of the Fourteenth Amendment intended to preserve the established practice of felon disenfranchisement, which extended beyond strictly political crimes. Moreover, the *Ramirez* Court upheld disenfranchisement for at least one felony (heroin possession) that would not ordinarily be classified as a crime of disloyalty to the state.

A broader reading might characterize “rebellion” as an example of any particularly dangerous crime. Of course, this category may be expansive enough to include crimes that are, while very dangerous, considerably less serious than the paradigm case of “rebellion.” After all, the category of “otherwise infamous crime” in the Grand Jury Clause includes crimes punishable by as little as one year’s imprisonment, even though the paradigm case for that category is capital offenses.

One possible limiting principle for what counts as a disenfranchisable crime could embrace all those offenses punishable by at least one year in prison. Such a limiting principle would track both the current construction of “infamous crime” (of which rebellion is surely an exemplar) and the current federal definition of felonies. However, this construction falls into the same trap—although less egregiously so—as the interpretation that reads the “other crime” construction identically in the Extradition and Penalty Clauses. The clauses have different paradigm cases, and while reading “crime” to mean the

same thing in the Grand Jury and Penalty Clauses does not commit a *logical* fallacy, it ignores the constitutional pattern that relates the “other crime” exception to the paradigm case.

One strategy would be to limit the class of disenfranchisable offenses to a specific list of particularly dangerous felonies. For example, courts could define disenfranchisement-eligible offenses as “crimes of violence or serious drug offenses” – both terms of art used in well-known federal criminal statutes.¹⁹⁸ Indeed, limiting the sanction of the Penalty Clause to the crimes like those listed in, say, the federal “three strikes law,” which defines “serious violent felony” and “serious drug offense,”¹⁹⁹ has a further philosophic appeal of being crimes for which the Court has implicitly determined that collateral consequences are appropriate.²⁰⁰

This disenfranchisement regime would set a clear “floor” for the disenfranchisable crimes – and, unlike the current challenges to the *Ramirez* doctrine, this strategy would stay well within the *Ramirez* framework. The offenses committed by the *Ramirez* petitioners would all fall within the range of “crimes of violence or serious drug offenses.”²⁰¹ Yet such a limiting principle would have a significant impact on the current disenfranchisement regime and would mean the reenfranchisement of a considerable portion of the population.

This strategy does have serious flaws. Courts may be justifiably uncomfortable pegging their constitutional sanction of a state-specific practice to terms of art in federal statutes. It is philosophically troubling for courts – especially lower courts – to tie interpretations of constitutional text to malleable statutory text passed long after the provision in question was ratified. Equally troubling are the federalism issues this strategy poses for state disenfranchisement statutes and the fact that federal criminal laws are not known for their clarity of draftsmanship.²⁰²

Indeed, the most successful strategies will likely be tailored to state-specific criminal laws. For example, in states that classify crimes as A, B, or sometimes C felonies according to seriousness, the felonies (and attached penalties) in each category differ between the states. If one reads the Penalty Clause as sanctioning disenfranchisement for the most serious crimes (say, A felonies),

198. 18 U.S.C. § 16 (2006) (defining crime of violence); *id.* § 924(e)(2) (defining serious drug offense).

199. *Id.* § 3559(c)(2)(F), (H).

200. *Id.* Under the statute, three convictions for qualifying crimes – either serious violent felonies or serious drug offenses – mandate a sentence of life imprisonment. *Id.*

201. See *supra* Subsection I.B.1.

202. See *Sykes v. United States*, 131 S. Ct. 2267, 2284–88 (2011) (Scalia, J., dissenting).

states’ disenfranchisement schemes will differ—as they do in the status quo.²⁰³ Litigants will likely see the most significant results where, as in *Underwood*, they target expansive statutes or particularly egregious cases of mass disenfranchisement. State-specific strategies will allow plaintiffs to better tailor this Note’s textual argument to a particular historical record, criminal code, and disenfranchisement regime.

Of course, as noted above, there are many less circumscribed readings of the Penalty Clause, even if courts accept the limitations of the paradigm case. While there are reasons to give a different meaning to the word “crime” where a different paradigm case is listed, the Court has given expansive readings to the “other crime” language in both the Grand Jury and Extradition Clauses. Despite the seriousness of the exemplar of “rebellion,” courts may feel relatively free to curtail the constitutionality of disenfranchisement only slightly.

C. *Objections and Counterarguments*

One might plausibly argue that *Ramirez* implicitly rejected any narrowing of the “other crime” exception. As Justice O’Connor noted in the *Harvey* opinion, severe limitations on the “other crime” language are in “extreme tension” with *Ramirez*.²⁰⁴ The Penalty Clause “permit[s] disenfranchisement ‘for participation in rebellion, or other crime’ without regard to whether the crime was a felony at all,” and “[a]s noted in [*Ramirez*], ‘this language was intended by Congress to mean what it says.’”²⁰⁵ After all, the offenses that the *Ramirez* plaintiffs were convicted of—while serious—seem quite unrelated to the crime of rebellion.²⁰⁶

It is true that *Ramirez* does not lend itself to readings that severely limit the “other crime” language; lower courts’ interpretations of its rule are not unreasonable. However, it is premature to say that the Court has rejected

²⁰³ As noted by Justice O’Connor in the *Harvey* decision,

Even if we were to assume arguendo that Section 2 is limited to serious crimes or felonies (as plaintiffs’ definitions suggest), a far better reference point for determining whether a crime is serious is to look at how the crime is designated by the modern-day legislature that proscribed it, rather than indulging the anachronisms of the common law. Indeed, that is precisely the course the Supreme Court has charted in defining the contours of the right to a jury trial.

Harvey v. Brewer, 605 F.3d 1067, 1074-75 (9th Cir. 2010).

²⁰⁴ *Id.* at 1078.

²⁰⁵ *Id.* at 1074 (quoting *Richardson v. Ramirez*, 418 U.S. 24, 43 (1974)).

²⁰⁶ See *supra* notes 52-54 and accompanying text.

wholesale a narrowing of the “other crime” exception. The respondents in *Ramirez* did not argue that the Court should adopt a pattern-recognition reading of the exception. While narrowing the scope of the exception would be in tension with *Ramirez*, the strategy is not rejected by the Court’s decision. Indeed, Justice O’Connor admitted as much in the *Harvey* opinion when she stated that litigants could use the contemporaneous definitions provided in *Webster’s Dictionary* and *Blackstone’s Commentaries* of the word “crime” as a “deep[] and atrocious” violation of the law “to support the proposition that the word ‘crime’ in Section 2 refers only to serious crimes or felonies.”²⁰⁷

Furthermore, the fact that the *Ramirez* respondents’ felonies were unrelated to the crime of rebellion should not be seen to foreclose this Note’s argument in favor of narrowing of the “other crime” exception. The exception is not necessarily limited to the same type of offense as the paradigm case. As discussed in this Note’s earlier analysis of the Impeachment Clause,²⁰⁸ Congress has debated whether “other high Crimes and Misdemeanors” requires the same kind of political nexus as “Treason [or] Bribery.” Similarly, in the Grand Jury Clause, the paradigm case is read to indicate the scope of the term “infamous crime,” which supports the reading that the Clause applies to a certain set of crimes that have serious punishments. This Note has already demonstrated the way in which the “Treason, Felony, or other Crime” construction of the Extradition Clause necessitates the reading of “other crime” to mean misdemeanors.²⁰⁹

Moreover, there are strong philosophical as well as textual reasons not to treat all felonies as equally disenfranchisable. As Professor Pamela Karlan has observed,

The fact that many felony convictions do not result in a defendant’s imprisonment suggests that the . . . judge [and] jury do not view the defendant’s conduct as deeply blameworthy. The very fact that potential sentences for a felony conviction range from one year’s imprisonment to death shows that all felonies are not equally serious.²¹⁰

Given the breadth of offenses encompassed by the felony classification, a narrower limiting principle might better accord with the text’s specification of a crime as extraordinary as rebellion as the paradigmatic disenfranchisable offense.

207. *Harvey*, 605 F.3d at 1074.

208. See *supra* Section III.C.

209. See *supra* Section III.A.

210. Karlan, *supra* note 7, at 1369.

The text of the Penalty Clause is ambiguous. The words “other crime” do not clearly circumscribe any set of crimes, particularly when read in conjunction with the paradigm case of rebellion. When faced with this ambiguity, courts might attempt to fashion new standards loosely based on the text—although these limited principles are likely to be unsatisfying for any judge or justice concerned with judicial discretion or arbitrary outcomes. The better, more probable approach would incorporate nontextualist interpretive tools, such as an increased attention to the drafting and ratification of the Amendment (despite *Ramirez’s* ahistoric bent), its purpose, and its relationship to the structure of the Fourteenth Amendment and other constitutional clauses. Fundamentally, the message of this Note is as follows: states who wish to broadly disenfranchise cannot simply rely on *Ramirez* or on the “plain language” of the Penalty Clause as their constitutional bulwark. Courts that ignore the Clause’s paradigm case of rebellion engage in an unprecedented interpretive move, and an unconstitutional one.

CONCLUSION

Even given the support that the canons of construction give to a highly circumscribed reading of “other crime” in the Penalty Clause, convincing courts to drastically curtail the post-*Ramirez* practice of felon disenfranchisement will be an uphill struggle. However, a challenge specifically aimed at overturning the disenfranchisement of individuals convicted of less serious felonies may be successful. As the Court recently noted in its decision in *District of Columbia v. Heller*, “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.”²¹¹ At a time when a much smaller portion of the population had a criminal record, it is quite unlikely that the Framers of the Fourteenth Amendment intended the phrase “other crime” to be interpreted in such a way that it disproportionately disenfranchised the descendants of the very slaves that the Reconstruction Amendments were intended to emancipate. This gap is aptly captured by the use of the word “rebellion” as exemplary of the sort of crime that would justify disenfranchisement.

So far, lower courts since *Ramirez* have ignored this textual framing of the “other crime” exception to the Penalty Clause. But a bench focused on text is bound to hold that even if the Constitution affirmatively sanctions (some) felon disenfranchisement, it reserves that sanction only for more serious offenders. In further developing their interpretations of the Penalty Clause,

211. 554 U.S. 570, 634-35 (2008).

courts will find that the text and structure of the Constitution align well with the document's democratic aspirations.