The Second Coming of the Second Section: The Fourteenth Amendment and Presidential Elections

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After the 2020 presidential election, supporters of the losing candidate pressured state legislatures in key battleground states to overturn the results of their states' popular presidential elections. In the run-up to the 2024 presidential election, concerns about the potential for state legislatures to subvert popular elections have resurfaced. State legislatures may assert that a state's elected lawmakers have the constitutional authority to choose the state's Electors for the Electoral College without—or in contravention of the result of—a popular election. We demonstrate that the Fourteenth Amendment provides powerful protection against this threat to the integrity of presidential elections. While the Penalty Clause of the Fourteenth Amendment has long lain dormant, it provides vital and distinct protections, and it is the appropriate vehicle for addressing the threat of state legislative usurpation of presidential elections. Whether or not Article II grants state legislatures power over popular elections, Section 2 of the Fourteenth Amendment, for all practical purposes, ensures that states will provide a popular election for selecting Electors in presidential elections. The weight of recent events makes obvious the importance of clear rules safeguarding the integrity of democracy in America. Curiously, however, scholars have paid little attention to Section 2 of the Fourteenth Amendment and its contemporary relevance. When scholars have considered it, they have typically construed it as a grant of authority enabling Congress to pass legislation. We argue that Section 2 is self-executing and no congressional action is needed for Section 2 to prevent state legislatures from circumventing popular elections.

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A careful reading of the second section of the fourteenth amendment of the Constitution, shows that the people must vote for Presidential electors, or lose their representation in Congress.[1]

The past is never dead. It's not even past.[2]

INTRODUCTION

The Fourteenth Amendment is a gift that keeps on giving. In the aftermath of the January 6, 2021 attack on the U.S. Capitol, scholars were quick to observe that Section 3 of the Fourteenth Amendment[3] offered potential remedies for a nation seeking to bar access to federal power to those who had sought to overthrow the federal government.[4] Litigants have achieved some success in invoking Section 3 to challenge the eligibility of aspirants to office.[5] Section 2 of the Fourteenth Amendment also has new and powerful relevance in an era of presidential election subversion. Indeed, Section 2, we will argue, imposes stiff penalties on states that deny their citizens the right to participate in elections for President.

One variant of the independent state legislature theory, much touted in recent months by politicians seeking to overturn popular elections for President, interprets Article II, Section 1, Clause 2 of the Constitution[6] to

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1. *Affairs in Washington*, DAILY PHOENIX (Columbia, S.C.), Aug. 9, 1868, at 3.

2. WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1951).

3. U.S. CONST. amend. XIV, § 3 ("No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.").

4. *See, e.g.*, Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87, 87 n.2 (2021). For more recent scholarly debate about Section 3, see *infra* note 92.

5. *See* Cawthorn v. Amalfi, 35 F.4th 245 (4th Cir. 2022) (reversing the district court's decision to deny voters' complaint seeking to disqualify Madison Cawthorn from candidacy for House Representative on grounds that he had engaged in insurrection, triggering Section 3 of the Fourteenth Amendment); Anderson v. Griswold, 2023 CO 63, ¶ 257 ("[W]e conclude that because President Trump is disqualified from holding the office of President under Section Three, it would be a wrongful act under the Election Code for the Secretary to list President Trump as a candidate on the presidential primary ballot.").

6. U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.").

imply that state legislatures have the exclusive and indefeasible authority to select presidential Electors by means other than a popular election, perhaps even retroactively after a popular election has taken place the results of which the legislature would like to overturn.[7] The worry that a state legislature might overturn a popular election became particularly acute in the aftermath of the 2020 presidential election when President Trump reached out to Republicans in Michigan, Georgia, and Pennsylvania in an effort to induce the legislatures of those states to overturn President Biden's electoral victories in those states.[8] The Court last term rejected a different independent state legislature challenge in *Moore v. Harper*, in which plaintiffs alleged that the Constitution invests indefeasible authority in state legislatures (in a way that overrides even state constitutional provisions) to set election laws.[9] This Article is not concerned with challenging the legal basis of the independent state legislature theory. It has been amply refuted elsewhere.[10] Instead, this Article explains why the Constitution, for all practical purposes, prevents state legislatures from subverting popular elections for presidential Electors.

Although scholars have largely ignored Section 2 of the Fourteenth Amendment, the oft-overlooked provision has not been entirely neglected. Legal historians have traced the context of the drafting and passage of Section 2 in the Reconstruction Congress.[11] Legal historians have also noted the

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7. Ethan Herenstein & Thomas Wolf, *The 'Independent State Legislature Theory,' Explained*, BRENNAN CTR. FOR JUST. (June 27, 2023), https://www.brennancenter.org/our-work/research-reports/independent-state-legislature-theory-explained [https://perma.cc/6MJE-FT4A].

8. Trip Gabriel, *Trump Asked Pennsylvania House Speaker About Overturning His Loss*, N.Y. TIMES (Dec. 8, 2020), https://www.nytimes.com/2020/12/08/us/politics/trump-pennsylvania-house-speaker.html [https://perma.cc/N4WF-BSRL].

9. *See* Amy Howe, *Court Seems Unwilling To Embrace Broad Version of "Independent State Legislature" Theory*, SCOTUSBLOG (Dec. 7, 2022, 5:22 PM), https://www.scotusblog.com/2022/12/court-seems-unwilling-to-embrace-broad-version-of-independent-state-legislature-theory/ [https://perma.cc/C5GU-435Z].

10. *See, e.g.*, Vikram David Amar & Akhil Reed Amar, *Eradicating Bush League Constitutional Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1 (2021); Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and Constitutional Law*, 90 U. CHI. L. REV. 137 (2022); Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235 (2022); Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 44 HARV. J.L. & PUB. POL'Y 135 (2023).

11. *See* Earl M. Maltz, *The Forgotten Provision of the Fourteenth Amendment: Section 2 and the Evolution of American Democracy*, 76 LA. L. REV. 149, 150 (2015); George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93, 93–107 (1961).

nonenforcement of Section 2 in the Reconstruction era.[12] Some scholars contend—wrongly, we argue[13]—that the Fifteenth Amendment repealed Section 2.[14] Other scholars have recognized the relevance of Section 2 of the Fourteenth Amendment to preserving the integrity of presidential elections, but they have understated its value by framing it as a source of congressional authority rather than a self-executing clause.[15] Under this view, the Supreme Court would be powerless—absent congressional action—to give teeth to Section 2's proposed enforcement mechanism.[16] Although we reject this view, arguing that courts can enforce Section 2 with or without new legislation from Congress, we do not make the further claim that Congress is powerless to legislate under Section 2.[17]

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12. *See* Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 71 (2000) ("The Justices never enforced Section 2 of the Amendment, which requires that any state disfranchising blacks (whether openly or pretextually) lose some of its seats in the House, and all but abandoned the Fifteenth Amendment."); Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in* Bush v. Gore, 29 FLA. ST. U. L. REV. 587, 591 n.26 (2001) ("Despite its sweeping language, Section 2 turned out to be toothless because neither Congress nor the courts ever showed themselves willing to pull the trigger . . . .").

13. *See infra* text accompanying notes 57–61.

14. 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, 260 (2004).

15. *See* Zuckerman, *supra* note 11, at 107 ("The apportionment provisions of section 2 of the amendment were obviously not self-executing."); Mark Bohnhorst et al., *Presidential Election Reform: A Current National Imperative*, 26 LEWIS & CLARK L. REV. 437, 455 (2022) (acknowledging that Peter M. Shane had "argued convincingly that this right to vote, anchored in Section 2, is sufficient to empower a court to enjoin legislative usurpation of the right to vote for President, even without additional Congressional action," but focusing on the possibility of federal legislation and making no further argument for whether or not Section 2 is self-executing); Delaram Takyar, *"The Cornerstone of the Stability of Our Government": The Forgotten Penalty Clause and Electoral Reform in the Aftermath of the 2020 Election*, YALE L. & POL'Y REV. INTER ALIA, June 14, 2021, at 1, 8–10, https://yalelawandpolicy.org/sites/default/files/IA/39_ia_takyar-the_forgotten_penalty_clause.pdf [https://perma.cc/CML8-BN8Y]. *But see* Arthur Earl Bonfield, *The Right To Vote and Judicial Enforcement of Section 2 of the Fourteenth Amendment*, 46 CORNELL L. REV. 108, 115 (1960) ("Congress has no discretion in the matter and no enforcing legislation seems necessary."); Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right To Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 549–50 (2001) (arguing that "the most compelling reading" of Section 2 "would have rendered Florida's attempted legislative appointment of electors unconstitutional"); Ben Margolis, *Judicial Enforcement of Section 2 of the Fourteenth Amendment*, 23 LAW TRANSITION 128, 134 (1963) ("[T]here is nothing in the language of section 2 which can be construed as committing exclusively to Congress the enforcement of that constitutional provision.").

16. Zuckerman, *supra* note 11, at 107 ("If [the enforcement provisions of Section 2] were to be enforced, it would require additional congressional action.").

17. Indeed, Congress presumably has just as much "power to enforce, by appropriate legislation, the provisions" of Section 2 as it does the other provisions of the Fourteenth

We offer a straightforward textual argument. Section 2 provides:

> [W]hen the right to vote at any election for the choice of electors for President and Vice President of the United States . . . 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.[18]

It seems clear, as a natural consequence, that if the Pennsylvania legislature in 2020 had annulled the popular vote conducted in that state and selected a slate of Electors who would vote for Trump, Pennsylvania would have "denied" the right to vote to every Pennsylvanian not in the legislature. The Section 2 apportionment penalty would render it with no representation in the House, but Pennsylvania would keep its two Senators, resulting in Pennsylvania having only two Electors.[19] Thus, Section 2 makes a state's attempt to annul a popular presidential election largely self-defeating. We believe a state would be unlikely to preemptively call off a popular election because the public backlash could hurt the electoral chances of the candidate the state legislature wanted to help. The textual case is less clear, but we argue that Section 2 apportionment penalties would still apply. There is strong intra- and extratextual evidence that the word "election" in the Constitution applies both to votes among the people at large and votes conducted by the people's representatives in the state legislature.[20] Thus, for a state legislature to choose presidential Electors without a popular presidential election always constitutes an "election" subject to Section 2. Therefore, Section 2 creates a de facto constitutional guarantee of a popular election for presidential Electors.

This Article proceeds as follows. Part I presents our textual argument about the meaning of Section 2 and its judicial enforceability. Part II addresses the implications of our reading of Section 2 for state elections. We argue that a broad reading of the implications of Section 2 for federal elections can be reconciled with a more limited reading of its implications for state elections. Part III demonstrates that the original understanding of the Fourteenth Amendment neither seriously challenges our interpretation nor

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Amendment. U.S. CONST. amend. XIV, § 5. For an argument in favor of federal legislation to enforce Section 2 of the Fourteenth Amendment, see Bohnhorst et al., *supra* note 15, at 455.

18. U.S. CONST. amend. XIV, § 2.

19. *See infra* notes 30–31 and accompanying text.

20. *See infra* Section II.A.

resolves the interpretive ambiguity identified in Part II. Having dispensed with the originalist challenge, we must rely on text and policy considerations in operationalizing Section 2. Finally, Part IV provides a programmatic summary of the practical implications of the argument.

I. HOW SECTION 2 PROTECTS POPULAR ELECTIONS

Section 2 of the Fourteenth Amendment, properly understood and enforced, effectively guarantees popular elections for presidential Electors. Section I.A shows that Section 2 imposes powerful penalties on states that annul popular elections for presidential Electors. Moreover, the structure of these penalties makes a state's efforts to annul a popular election for presidential Electors largely self-defeating. Section I.B demonstrates that Section 2 is self-executing, and the courts have a constitutional duty to enforce Section 2 even in the absence of any congressional legislation. Section I.C addresses challenges concerning reviewability and timing.

A. Section 2 Punishes States for Annulling Popular Elections for Presidential Electors

The purpose of this Article is not to challenge the independent state legislature theory or a variant of it.[21] Even if state legislatures have the authority to take the selection of Electors out of the hands of the people, the Fourteenth Amendment imposes severe costs on states that choose this course. If a state legislature appoints a slate of Electors in contravention of a popular election or eliminates the procedure for popular election of Electors entirely, then Section 2 of the Fourteenth Amendment applies. Section 2 provides that "when the right to vote at any election for the choice of electors for President and Vice President of the United States . . . 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."[22] This provision means that if a state chooses its Electors by some means other than a popular election, then the state sacrifices its representation in the House

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21. Although, in fact, we disagree with the independent state legislature theory for reasons previously explained. *See supra* note 10 and accompanying text.

22. U.S. CONST. amend. XIV, § 2.

immediately and until citizens have been able to exercise the right to vote for Electors.[23] The text of Section 2 requires that the state's House contingent be reduced in proportion to the fraction of eligible voters in the state excluded from the choice of Electors. By taking the selection of Electors out of the hands of the people of the state entirely, the state will have excluded the people entirely from the choice of Electors. Hence the state's House contingent must be reduced in its entirety.[24]

The Section 2 penalty supersedes the ordinary House apportionment formula. Bohnhorst, Hundt, Morrow, and Soifer claim that the state's House representation would be reduced to one because "Article I provides . . . that each state shall have at least one Representative."[25] But this provision is superseded by Section 2 of the Fourteenth Amendment. When two constitutional provisions conflict, the later provision typically supersedes the earlier.[26] There is no ambiguity about the relationship between Article I, Section 2 and Section 2 of the Fourteenth Amendment: Article I, Section 2 provides the ordinary apportionment formula for the House of Representatives, while Section 2 of the Fourteenth Amendment imposes an exception to that formula for cases in which a state has deprived inhabitants of the right to vote. Moreover, Section 2 of the Fourteenth Amendment contains no ambiguity about the extent to which the state's House representation shall be reduced in consequence of its deprivation of the right to vote: it is to be reduced in exact proportion to the abridgment of suffrage.[27]

There is no ambiguity about the "basis of representation" to which Section 2 refers. Section 2 concerns House representation.[28] The section contains two sentences. The first sentence begins with the phrase "Representatives shall be

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23. For elaboration, *see infra* notes 33–35.

24. If only the legislators of a state voted for that state's presidential Electors, the percentage of the state's eligible voting population allowed the opportunity to vote would round to zero.

25. Bohnhorst et al., *supra* note 15, at 450 (referring to U.S. CONST. art. I, § 2, cl. 3).

26. *See, e.g.*, Andrew M. Hetherington, *Constitutional Purpose and Inter-Clause Conflict: The Constraints Imposed on Congress by the Copyright Clause*, 9 MICH. TELECOMM. TECH. L. REV. 457, 486 (2003) ("[T]he First Amendment was ratified after the original Constitution, and so may be considered to modify those earlier provisions with which it comes into conflict.").

27. Functional analysis bolsters this conclusion. If the Section 2 penalty could not reduce a state's House representation below a single Representative, then states with only one Representative would be functionally immune from any Section 2 penalty.

28. Bohnhorst et al. suggest that a state could have its Electoral College representation, but not its House representation, reduced in penalty for annulling a popular election for Electors. Bohnhorst et al., *supra* note 15, at 450 ("Because the only office for which the right to vote would be abridged through currently proposed legislation would be for electors for President and Vice President, the penalty would likely be limited to reducing the state's representation in the Electoral College, but not in the House."). They provide no argument for this assertion, and it contradicts the plain text of Section 2.

apportioned among the several States according to their respective numbers."[29] The second sentence modifies the provision of the first sentence with the exception concerning states that abridge electoral participation or annul popular elections. Moreover, an alternative reading of the referent of the "basis of representation" would be incoherent, because one of the categories of representation that Section 2 concerns is representation in a state legislature. Surely the Constitution does not prescribe as the remedy for a state's abridgment of the right to vote for state legislators the reduction in size of the state legislature. This would be no penalty at all. Rather, Section 2 penalizes states that restrict the franchise for state legislative elections by reducing the state's influence in national politics.

This reduction in a state's House representation would have the fortuitous knock-on effect of reducing the state's Electoral College representation, because of the interaction between Section 2 of the Fourteenth Amendment and the Electoral College apportionment formula provided in Article II, Section 1. The Electoral College apportionment formula apportions to each state a number of Electors equal to the sum of the state's Senators and Representatives in Congress.[30] If the state's House representation is reduced to zero, therefore, the Electoral College apportionment formula provides that the state may select only two Electors, corresponding to the state's two Senators. And if the Constitution were amended to alter or eliminate states' representation in the Senate,[31] then Section 2 of the Fourteenth Amendment would provide for altering a state's Electoral College representation accordingly—including the possibility of reducing it to zero if a state were not apportioned any Senate representation.

For a state to act on the independent state legislature theory—whatever its legal merits—would therefore be self-defeating. States would be undermining their standing in precisely the presidential election contest they are seeking to influence. There might be an exception in the case of the smallest states. Some states have only a single House representative, so their penalty in the Electoral College would not be as substantial. Key swing states in recent presidential elections, where the prospect of presidential election

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29. U.S. CONST. amend. XIV, § 2.

30. *Id.* art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .").

31. This possibility is considered by David B. Froomkin & A. Michael Froomkin, *Saving Democracy from the Senate*, 2024 UTAH L. REV. (forthcoming Feb. 2024) (manuscript at 22–43), https://papers.ssrn.com/abstract=3797782 [https://perma.cc/K5EM-48TD].

subversion has arisen—such as, Arizona, Georgia, and Pennsylvania[32]—are more populous than average and so would pay a hefty price. The smallest states, despite their disproportionate representation in the Electoral College, have far less influence on the outcome of presidential elections, simply because they have less congressional representation.

A remaining question concerns the duration of the state's reduction in House representation. In the case of the abridgment of the franchise for a House election, the answer is simple: for the cycle in which the franchise was reduced. The answer is more complicated in the case of presidential elections because a President serves for multiple House cycles. Section 2 does not say explicitly how long the state's representation in the House must be reduced in penalty for an abridgment of the franchise for a presidential election, but an answer is implicit. Section 2 applies "when the right to vote . . . is denied."[33] Section 2 thus provides a clear consequence relation: if the right to vote is denied, then the basis of representation is reduced.[34] It is reasonable

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32. *See, e.g.*, Amy Gardner et al., *Trump Asks Pennsylvania House Speaker for Help Overturning Election Results, Personally Intervening in a Third State*, WASH. POST (Dec. 8, 2020), https://www.washingtonpost.com/politics/trump-pennsylvania-speaker-call/2020/12/07/d65fe8c4-38bf-11eb-98c4-25dc9f4987e8_story.html [https://perma.cc/23RN-2JJD]; Trip Gabriel & Stephanie Saul, *Could State Legislatures Pick Electors To Vote for Trump? Not Likely*, N.Y. TIMES (Jan. 5, 2021), https://www.nytimes.com/article/electors-vote.html.

33. U.S. CONST. amend. XIV, § 2.

34. An alternative interpretation might suggest, because of the connection between the Section 2 penalty and the decennial House reapportionment process, that the penalty should apply only at the next decennial reapportionment. *See* Gerard N. Magliocca, *Our Unconstitutional Reapportionment Process*, 86 GEO. WASH. L. REV. 774, 785 (2018) ("The final text of Section Two made clear that the penalty clause was tightly linked to reapportionment and the census." (citation omitted)); Michael Hurta, Note, *Counting the Right To Vote in the Next Census: Reviving Section Two of the Fourteenth Amendment*, 94 TEX. L. REV. 147, 152 (2015) ("Changing the regular apportionment is the only means to honor Section Two's true purpose."). This interpretation is implausible. It would mean that if a state legislature prevented Black men from voting for governor one year after a decennial reapportionment, the state would face no penalty for nine years. Alternatively, if the penalty is only triggered by ongoing violations, a state could evade any penalty at all by timing the enactment and repeal of statutes unconstitutionally restricting voting around the regular apportionment. It beggars belief that the Reconstruction Congress could have intended this non-penalty. Moreover, the penalty imposed under this theory could be disproportionately large. If a state corrected its unconstitutional deprivation of the vote, it might still face a representational penalty for a decade, even under circumstances in which this penalty disenfranchised the members of the electoral group whom Section 2 seeks to protect. Indeed, the decennial timing interpretation of Section 2 would weaken the incentive for a state to correct its constitutional infraction promptly. Further, the language of Section 2 undermines the decennial timing interpretation. Section 2 lays out an exception to the decennial apportionment formula that applies "*when* the right to vote . . . is denied . . . or in any way abridged." U.S. CONST. amend. XIV, § 2 (emphasis added). Section 2 requires the imposition of a penalty immediately upon detection of a relevant deprivation of the franchise.

to conclude that the reduction in the basis of representation must be for the length for which the right to vote was denied.[35] So, in the case of the abridgement of the right to vote in a presidential election, the basis of representation must be reduced for four years, which is the length of a President's term of office.[36] This length of time is the duration for which the right to vote has been denied to the inhabitants of the state. They will not have had the right to vote for the President during the whole of these four years.

The lightest conceivable penalty would be two years for all Section 2 violations.[37] Section 2 protects not only federal elections but state elections as well.[38] A state could provide that its state supreme court justices serve thirty-year terms. On the one hand, it would appear strange if the penalty for a Section 2 violation in a state judicial election was fifteen times a severe as the penalty for a violation in an election for the House of Representatives. An even more difficult interpretive puzzle would be created if a state provided for the popular election of its state supreme court justices but provided that they serve lifetime terms.[39] On the other hand, the longer the term, the greater the harm produced by the Section 2 violation. A sufficiently devious Southern state legislature, before the ratification of the Fifteenth Amendment, might have found a two-year penalty worthwhile if it could stack its state government with governors, legislators, and judges, elected in whites-only elections, serving inordinately long terms. The Reconstruction Congress certainly would have wanted to preclude this possibility.[40] Despite the interpretive difficulties, the most compelling reading of Section 2 provides for the apportionment penalty to match the duration of the longest term of office at issue in the offending election.

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35. However, a stronger penalty could apply considering that the apportionment which Section 2 is discussing occurs decennially following the census. *See supra* note 34 and accompanying text. The penalty proposed in the main body of this Article would be lighter than this plausible alternative in most circumstances (depending on the timing of the Section 2 infringement relative to the Census).

36. U.S. CONST. art. II, § 1, cl. 1.

37. *Election Cycle and Aggregation*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/filing-reports/election-cycle-aggregation/ [https://perma.cc/HJ4X-7MBS] (stating election cycle lengths for House of Representatives, President, and Senate, with two years being the shortest).

38. U.S. CONST. amend. XIV, § 2.

39. In this case, presumably, the penalty would end when the last justice elected under the election that violated Section 2 died or retired. Whether taking senior status could count as the end of a term for Section 2 purposes creates a further interpretive puzzle, but the resolution of such a case might depend on fact-specific features of the state law.

40. *See infra* Section III.B (analyzing the legislative history of Section 2).

Another question concerns the timing of the reduction of Electoral College representation. The question is whether the prescribed reduction in House representation reduces a state's Electoral College representation for the current cycle or only for a subsequent cycle. It ought to affect the current cycle, because it is reducing House representation for the cycle being selected, and Electoral College representation should be the sum of Senate and House representation for the cycle being selected.[41] There is a textual ambiguity here as well: Article II, Section 1 directs "[e]ach State [to] appoint . . . a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[42] The easy answer is that once the deprivation of the right to vote has occurred, the state is no longer entitled to the Representatives; hence, the number of Electors is reduced from this point. Indeed, the fact that the selection and assembly of the Electoral College occurs after the popular election for President and members of Congress[43] makes this result clearer.

A critic of this Article's argument that Section 2 necessitates reducing a state's Electoral College representation might assert that the clause of the Constitution providing the Electoral College apportionment formula uses the language "the whole Number of Senators and Representatives to which the State may be entitled."[44] The critic would assert that this language, because of its subjunctive phrasing, means the maximum possible number of congressional representatives that the state could have ("may be entitled") and not the actual number that it does have ("is entitled"). Similar language appears nowhere else in the Constitution, so intratextualism provides little assistance. But this construction is highly implausible as a matter of textual plain meaning. Had the drafters wanted to ensure that states received the maximum possible number of representatives in the Electoral College, they had more direct means for so requiring. Moreover, it strains credulity to say that a state "may be entitled" to House representation to which it is not in fact entitled. Once Section 2 of the Fourteenth Amendment applies and necessitates a reduction in a state's House representation, the state is no

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41. The Electoral College formula always reflects the House delegations for the cycle being selected, not the House delegations from a prior cycle. For instance, in the 2012 election, following the results of the 2010 census and reapportionment, the allocation of Electoral College votes corresponded to the House delegations in the 113th Congress (elected in 2012) rather than in the 112th Congress (elected in 2010). *See* THOMAS H. NEALE, CONG. RSCH. SERV., RL32611, THE ELECTORAL COLLEGE: HOW IT WORKS IN CONTEMPORARY PRESIDENTIAL ELECTIONS 7 (2017).

42. U.S. CONST. art. II, § 1, cl. 2.

43. *See* NEALE, *supra* note 41, at 12–13.

44. U.S. CONST. art. II, § 1, cl. 2.

longer entitled to more House representation than the amount to which it is now entitled. There is no sense in which it "may be entitled," at the time of the present election, to a greater amount of House representation. It is more plausible that Article II, Section 1 uses the subjunctive tense because of uncertainty in the abstract about the number of representatives to which the state may be entitled. This uncertainty is only magnified by the existence of Section 2 of the Fourteenth Amendment.

The language of Section 2 only mentions men, but this does not affect its legal validity.[45] At the time of the Fourteenth Amendment's passage, the franchise was still restricted to male citizens,[46] and Section 2 accordingly refers only to "male inhabitants." While there may be some expressive

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45. Section 2 also presumably provided no protection for "Indians not taxed" who were not citizens of the United States. U.S. CONST. amend. XIV, § 2. The Fourteenth Amendment did not extend American citizenship to all Native Americans. *See* Elk v. Wilkins, 112 U.S. 94, 102 (1884) ("Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien though dependent power,) although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the [F]ourteenth [A]mendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations. This view is confirmed by the second section of the [F]ourteenth [A]mendment, which provides that 'representatives shall be apportioned among the several [S]tates according to their respective numbers, counting the whole number of persons in each [S]tate, excluding Indians not taxed.'" (quoting U.S. CONST. amend. XIV, §§ 1–2)). Today, all Native Americans born in the United States are American citizens, and Section 2 provides the same protections to Native Americans as it does to other citizens. *Cf.* New York v. Trump, 485 F. Supp. 3d 422, 436 n.3 (S.D.N.Y. 2020) ("For practical purposes, the 'Indians not taxed' proviso was rendered moot by the Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)), which declared that all Native Americans born in the United States are citizens."), *vacated on other grounds*, 141 S. Ct. 530 (2020); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) ("In 1924, Congress declared that all Indians born in the United States are United States citizens . . . and, therefore, under the Fourteenth Amendment, Indians are citizens of the States in which they reside." (citing Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)))). *But see* George Beck, *The Fourteenth Amendment as Related to Tribal Indians: Section I, "Subject to the Jurisdiction Thereof" and Section II, "Excluding Indians Not Taxed*,*"* 28 AM. INDIAN CULTURE & RSCH. J. 37, 53, 57 (2004) ("*Indians not taxed* does indeed mean that *tribal* Indians are not taxable or considered citizens as long as they retain tribal relations. The Constitution has not been amended to provide otherwise . . . . Problem solving begins with the courts recognizing that *Elk* is precedent and that since *Elk* the courts have applied the Fourteenth Amendment incorrectly in decisions involving Indians. Once the courts recognize this precedent, Congress will take steps to amend the Constitution."). A state law that disenfranchised Native American citizens of the state would trigger a Section 2 penalty.

46. The Nineteenth Amendment giving women the right to vote was ratified in 1920, fifty-two years after the ratification of the Fourteenth Amendment in 1868. U.S. CONST. amends. XIV, XIX.

discomfort in invoking the gendered language of the Fourteenth Amendment, there is no textual contradiction with the language of the Nineteenth Amendment. The Nineteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."[47] This text prohibits states from depriving women qua women of the right to vote. Hence there is no situation in which a state's depriving women qua women of the right to vote could give rise to a Fourteenth Amendment issue. The question is resolved by the Nineteenth Amendment. Nor can it be said that there is an Equal Protection problem with Section 2 of the Fourteenth Amendment because the Equal Protection Clause appears in the very same amendment.[48] The authors of the Fourteenth Amendment evidently understood there to be no conflict therein. Nevertheless, a court might regard Section 2 as being implicitly amended by the Nineteenth Amendment, such that Section 2 now covers all inhabitants of a state without respect to the sex of the inhabitant.[49] It would not make sense, however, to regard Section 2 as erased by the Nineteenth Amendment, because Section 2 covers situations that the Nineteenth Amendment does not.[50]

Another respect in which Section 2 arguably has been amended by subsequent constitutional text is in its provision regarding the age of covered inhabitants. While Section 2 on its face concerns the deprivation of the right to vote to those inhabitants of a state "being twenty-one years of age [or

47. U.S. CONST. amend. XIX.

48. *Id.* amend XIV, § 1.

49. *See* Evenwel v. Abbott, 578 U.S. 54, 102 n.7 (Alito, J., concurring) ("Needless to say, the reference in this provision to 'male inhabitants . . . being twenty-one years of age' has been superseded by the Nineteenth and Twenty-sixth Amendments." (quoting U.S. CONST. amend. XIV § 2)); *see also* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 948–53 (2002) (proposing, "as an additional foundation for sex discrimination doctrine, a synthetic reading of the Fourteenth and Nineteenth Amendments that is grounded in the history of the woman suffrage campaign"); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 952 (2002) (arguing that the Nineteenth Amendment "should guide interpretation of the Equal Protection Clause"). The case for a synthetic reading of the Nineteenth Amendment and Section 2 of the Fourteenth is even stronger than the case for a synthetic reading of the Nineteenth Amendment and Section 1, because the text of Section 2 and the text of the Nineteenth Amendment are both about voting rights.

50. The Nineteenth Amendment only prohibits abridgments of the right to vote "on account of sex." U.S. CONST. amend. XIX. Section 2 of the Fourteenth Amendment, by contrast, applies to any abridgment of the right to vote "except for participation in rebellion, or other crime." U.S. CONST. amend. XIV, § 2. The Nineteenth Amendment, for example, would do nothing to prevent a state legislature from annulling the result of a popular election for presidential Electors. Section 2 also prevents age-based disenfranchisement for citizens twenty-one years of age and older. A state law that set a minimum voting age of thirty or a maximum voting age of eighty-five would run afoul of Section 2 but not the Nineteenth Amendment.

older],"[51] this language perhaps should be construed as altered in view of the Twenty-Sixth Amendment. The Twenty-Sixth Amendment provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any state on account of age."[52] As with the question posed by the Nineteenth Amendment, however, there are two ways in which a court could respond to this. The court could either regard Section 2 as amended to apply to all inhabitants eighteen years of age or older, which would be the more reasonable approach, or continue to apply the text of Section 2 as written, which would be the more formalistic approach.[53] There would be little difference in import because, under the Twenty-Sixth Amendment, states are not permitted to deprive the vote to inhabitants between the ages of eighteen and twenty-one on that basis,[54] and the Supreme Court has ruled that discriminating on the basis of proxies for age also violates the Twenty-Sixth Amendment.[55]

Further, the Fifteenth Amendment did not repeal Section 2 of the Fourteenth Amendment.[56] Gabriel J. Chin's argument that the Fifteenth Amendment repealed Section 2 rests on the mistaken premise that there are no scenarios in which Section 2 could provide voting protection that the Fifteenth Amendment could not.[57] "Lesser in every way," Chin argues, "Section 2 could never provide the rule of decision once the Fifteenth Amendment became law."[58] Chin is wrong to assume that Section 2 is "[l]esser in every way."[59] The Fifteenth Amendment, which prohibits denying the right to vote "on account of race, color, or previous condition of servitude,"[60] can do nothing to prevent a state legislature from choosing

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51. U.S. CONST. amend. XIV, § 2.

52. *Id.* amend. XXVI.

53. It is not unreasonable to think that the adoption of a constitutional amendment can have retroactive effects for understanding previously adopted provisions of the Constitution. *See generally* Siegel, *supra* note 49.

54. *Id.*

55. *See* Symm v. United States, 439 U.S. 1105 (1979) (holding that discrimination against college students constituted age discrimination under the Twenty-sixth Amendment). *See generally* Patrick J. Troy, *No Place To Call Home: A Current Perspective on the Troubling Disenfranchisement of College Voters*, 22 WASH. U. J.L. & POL'Y 591 (2006) (discussing applicability of the Twenty-Sixth Amendment to the disenfranchisement of college students).

56. *See* U.S. CONST. amend. XV.

57. *See* Chin, *supra* note 14, at 263.

58. *Id. But see* Margolis, *supra* note 15, at 147 (arguing that the Fifteenth Amendment did not repeal Section 2 because "[a]lthough the two constitutional provisions were primarily directed at the same evil, their scope and method differed").

59. Chin, *supra* note 14, at 263.

60. U.S. CONST. amend. XV, § 1.

presidential Electors without a popular election. Chin also points to the lack of government response to racial voter disenfranchisement under Jim Crow, with the courts and Congress acting "as if Section 2 had disappeared,"[61] but the same government inaction would provide similarly erroneous evidence of the disappearance of the Fifteenth Amendment. Moreover, Section 2 imposes a penalty where the Fifteenth Amendment on its own would not.

One final potential concern involves the possible tactical elimination of a state's House delegation by a state legislature controlled by a different party from the majority of the state's House delegation. A majority of state legislators, unhappy that members of a different party prevailed in the House elections in that state, could tactically annul the presidential election to void the results of the House election. This Article's concern is with the integrity of presidential elections, but the integrity of House elections is a distinct concern of Section 2.[62] This potential scheme would only occur if (1) Section 2 were reliably enforced, (2) the dominant party in the state legislature fared sufficiently poorly in the state's House elections, (3) a majority of state legislators thought that any potential punishment from voters would be an acceptable price to pay, and (4) a majority of state legislators were willing to overcome any moral scruples about intentionally gaming the Constitution and depriving voters of their own state of full representation in Congress. Even in an era of hardball politics, such a maneuver would be shocking. If this issue did arise, ultimately it would be necessary to rely on the voters to punish legislators for such faithless behavior.

The Supreme Court has contributed little to the interpretation of Section 2, and its fragmentary interventions provide little guidance in understanding Section 2's consequences for presidential elections. The Court's most apposite remarks about Section 2 appear in an 1892 case, *McPherson v. Blacker*,[63] although only in dicta. In *McPherson*, the Supreme Court decided that it was constitutional for Michigan to implement its popular election of presidential Electors at the district level.[64] Our analysis does not contradict *McPherson*'s holding. Michigan did not abrogate a popular election. *McPherson*, however, sought to minimize the Fourteenth Amendment. In dicta, the *McPherson* Court opined, "If presidential electors are appointed by

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61. Chin, *supra* note 14, at 260.

62. U.S. CONST. amend. XIV, § 2.

63. 146 U.S. 1 (1892).

64. *Id.* at 24 (describing Michigan's scheme for "the election of an elector and an alternate elector in each of the twelve Congressional districts into which the State of Michigan is divided, and of an elector and an alternate elector at large in each of two districts defined by the act").

the legislatures, no discrimination is made,"[65] and there is no Fourteenth Amendment violation, because "[t]he object of the Fourteenth Amendment in respect of citizenship was to preserve equality of rights and to prevent discrimination as between citizens, but not to radically change the whole theory of the relations of the state and Federal governments to each other, and of both governments to the people."[66] This dicta rests on the mistaken view that the Fourteenth Amendment did not transform federalism.[67] The Supreme Court, however, has fundamentally transformed its Fourteenth Amendment jurisprudence between 1892 and today. The Court has ruled that the Fourteenth Amendment requires state legislative elections to abide by the one person, one vote principle.[68] The Court further ruled that this principle applies to school elections,[69] an application of the Fourteenth Amendment that would probably have surprised the drafters of the amendment.[70] Fourteenth Amendment jurisprudence was so thoroughly transformed in the twentieth century that this dicta from *McPherson* can do little to elucidate current debates about federalism and election law.

The Court perpetuated *McPherson*'s mistaken view of Section 2 through its opinion in *Lassister v. Northampton County Board of Elections*.[71] The *Lassiter* Court held that a literacy test did not violate the Fifteenth Amendment. The Court avoided analysis of potential Fourteenth Amendment Section 2 penalties, relying on dicta from *McPherson* saying that "the right protected [by Section 2] 'refers to the right to vote as established by the laws and constitution of the State.'"[72] Congress overturned the decision in *Lassiter* under its Fifteenth Amendment enforcement power,[73] but it should not have

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65. *Id.* at 40.

66. *Id.* at 39 (citing *In re* Kemmler, 136 U.S. 436 (1890)).

67. *McPherson*, 146 U.S. at 39.

68. *See* Reynolds v. Sims, 377 U.S. 533, 583 (1964) ("[T]he Equal Protection Clause requires that both houses of a state legislature be apportioned on a population basis . . . .").

69. *See* Kramer v. Union Free Sch. Dist., 395 U.S. 621, 629–30 (1969) (interpreting the Equal Protection Clause of the Fourteenth Amendment to prevent states from limiting the electorate in school board elections to property holders, parents of children enrolled in the school district, or other non-geographic groups).

70. *See infra* note 248 and accompanying text.

71. Lassiter v. Northampton Cnty. Bd. Of Elections, 360 U.S. 45 (1959) (upholding the constitutionality of literacy tests), *superseded by statute*, Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10304 (2018)).

72. *Id.* at 51 (quoting McPherson v. Blacker, 146 U.S. 1, 39 (1892)).

73. *See* South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966) (upholding the Voting Rights Act's ban on literacy tests under Congress's Fifteenth Amendment enforcement power); Morse v. Republican Party, 517 U.S. 186, 217 n.30 (1996) ("We upheld [the Voting Rights Act of 1965] under § 2 of the [Fifteenth] Amendment without overruling *Lassiter*." (citing *Katzenbach*, 383 U.S. at 334)).

needed to do so. *Lassiter* preceded the Court's recognition in the 1960s of how fundamentally the Fourteenth Amendment transformed federalism and election law. Literacy tests abridge the franchise in a manner that is not allowed by Section 2, so Section 2 penalties apply.

The Supreme Court has never squarely addressed the role of Section 2 of the Fourteenth Amendment in safeguarding popular elections of presidential Electors.[74] Vague speculations from *McPherson* and *Lassiter* do not substitute for thorough analysis. The text and history of Section 2 demand a more faithful reading. We provide one.

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74 . The Supreme Court, citing Section 2, has held that the Fourteenth Amendment does not bar states from disenfranchising citizens with felony convictions. Richardson v. Ramirez, 418 U.S. 24, 54 (1974) ("[T]he exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment, a sanction which was not present in the case of the other restrictions on the franchise which [have been] invalidated . . . ."). The Court, however, found that Section 2 could not save a state's racially motivated disenfranchisement of citizens for misdemeanors from invalidation under the Equal Protection Clause. Hunter v. Underwood, 471 U.S. 222, 233 (1985) ("Without again considering the implicit authorization of § 2 to deny the vote to citizens 'for participation in rebellion, or other crime,' we are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 [of the Alabama Constitution] which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in Richardson . . . suggests the contrary" (quoting *Richardson*, 418 U.S. at 24)). The Court has cited Section 2 in support of its decision that the Citizenship Clause did not grant birthright citizenship to Native Americans. Elk v. Wilkins, 112 U.S. 94, 102 (1884) (contending that the Citizenship Clause non-application to "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes . . . is confirmed by the second section of the Fourteenth Amendment"). Section 2's language—"Indians not taxed"—has remained important to federal Indian law. *See, e.g.*, Haaland v. Brackeen, 599 U.S. 255, 310 (2023) (Gorsuch, J., concurring) ("The Fourteenth Amendment would later reprise this language ['Indians not taxed'] . . . confirming both the enduring sovereignty of Tribes and the bedrock principle that Indian status is a 'political rather than racial' classification . . . ." (first citing U.S. CONST. amend. XIV, § 2; then quoting Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974))). Section 2 has also been invoked in a handful of dissents. *See, e.g.*, United States v. Reese, 92 U.S. 214, 247 (1875) (Hunt, J., dissenting) ("By the second section of the Fourteenth Amendment, each State had the power to refuse the right of voting at its elections to any class of persons; the only consequence being a reduction of its representation in Congress, in the proportion which such excluded class should bear to the whole number of its male citizens of the age of twenty-one years. This was understood to mean, and did mean, that if one of the late slaveholding States should desire to exclude all its colored population from the right of voting, at the expense of reducing its representation in Congress, it could do so."); Reynolds v. Sims, 377 U.S. 533, 594 (1964) (Harlan, J., dissenting) ("I am unable to understand the Court's utter disregard of the second section which expressly recognizes the States' power to deny 'or in any way' abridge the right of their inhabitants to vote for 'the members of the [State] Legislature,' and its express provision of a remedy for such denial or abridgment. The comprehensive scope of the second section and its particular reference to the state legislatures preclude the suggestion that the first section was intended to have the result reached by the Court today." (quoting U.S. CONST. amend. XIV, § 2)).

B. Section 2 Is Self-Executing

A clause is "self-executing," in the terminology of constitutional law, when it has legal import even in the absence of enabling legislation.[75] In other words, if a clause of the Constitution is self-executing, no act by Congress is necessary before courts can enforce this clause. Many clauses of the Constitution confer rights directly, with no legislative action required for their guarantee.[76] And many provisions of the Fourteenth Amendment work this way.[77] Section 2 is no exception.

The language of Section 2 of the Fourteenth Amendment mirrors that of Article I, Section 2, Clause 3.[78] Both use the key phrase "shall be apportioned."[79] This language permits no discretion on the part of Congress as to the apportionment formula. Congress just chooses the total size of the House;[80] the apportionment formula is specified by the Constitution. Indeed, the function of Section 2 of the Fourteenth Amendment is to modify the Article I, Section 2 apportionment formula in cases where a state deprives some or all of its residents of "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."[81] As with Article I, Section 2, not only is the language of Section 2 of the Fourteenth Amendment self-executing, Congress could not supersede it if it wanted to.[82]

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75. *See* Davis v. Burke, 179 U.S. 399, 403 (1900) ("'A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law' . . . . Where a constitutional provision is complete in itself it needs no further legislation to put it in force." (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 99 (1868))).

76. *See, e.g.*, U.S. CONST. amend. I.

77. *See, e.g.*, *id.* amend. XIV, § 1.

78. *Compare id.* art. I, § 2, cl. 3, *with id.* amend. XIV, § 2.

79. U.S. CONST. art. II, § 2, cl. 3; *id.* amend. XIV, § 2.

80. U.S. CONST. art. II, § 2, cl. 3. The Constitution merely provides for both the maximum and minimum sizes of the House. The number of representatives has been set by Public Law 62-5 at 435 members. Apportionment Act of 1911, Pub. L. No. 62-5, 37 Stat. 13; *The House Explained*, U.S. HOUSE OF REPRESENTATIVES, https://www.house.gov/the-house-explained#:~:text=The%20number%20of%20representatives%20with,state%20is%20proportionate%20to%20population [https://perma.cc/9GHP-SCHE].

81. U.S. CONST. amend. XIV, § 2.

82. *See* Bonfield, *supra* note 15, at 115 ("This provision of our Constitution, therefore, directs in mandatory language (unlike the permissive language of the last sections of the thirteenth, fourteenth and fifteenth amendments giving to Congress power to enforce them) that

The only conceivable argument that Section 2 is not self-executing would appeal to Section 5, which grants Congress the "power to enforce, by appropriate legislation, the provisions of this article."[83] But substantial judicial precedent interpreting the Fourteenth Amendment contradicts the idea that Congress is primarily responsible for executing the provisions of the Fourteenth Amendment.[84] For good or ill, the courts bear the primary responsibility for vindicating its requirements.[85] The Supreme Court has made clear that, while Section 5 gives Congress enforcement power, this power is not a substitute for judicial enforcement.[86] The Court's main holding in *City of Boerne v. Flores* was that the federal courts, not Congress, decide the scope of Fourteenth Amendment due process protections in the first instance.[87] In the course of reaching this conclusion, *Boerne* held straightforwardly that, at least with respect to the Section 1 rights, "[a]s enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing."[88]

Section 2 of the Fourteenth Amendment is even more straightforwardly self-executing than Section 1. The issue in *Boerne* arose because there is ambiguity about the content of the "due process of law" and the "equal protection of the laws" guaranteed by Section 1 of the Fourteenth Amendment.[89] There is no such interpretive ambiguity about Section 2. Its meaning is straightforward. Courts routinely provide remedies in the more complex case of Section 1 violations.[90] And Section 2, just like Section 1,

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whenever the right to vote of any adult citizen-inhabitant is denied or abridged, for any reason whatsoever, excepting only participation in rebellion or other crime, that that state's representation shall be proportionately reduced. Congress has no discretion in the matter and no enforcing legislation seems necessary.").

83. U.S. CONST. amend. XIV, § 5.

84. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997); Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

85. *See Boerne*, 521 U.S. at 523–24 ("The design of the Fourteenth Amendment has proved significant also in maintaining the traditional separation of powers between Congress and the Judiciary . . . . The power to interpret the Constitution in a case or controversy remains in the Judiciary.").

86. *Id.* at 524–27.

87. *Id.* at 536. "Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law." *Id*. at 527.

88. *Id.* at 524.

89. *See id.* at 517 ("The parties disagree over whether RFRA is a proper exercise of Congress's § 5 power 'to enforce' by 'appropriate legislation' the constitutional guarantee that no State shall deprive any person of 'life, liberty, or property, without due process of law' nor deny any person 'equal protection of the laws.'").

90. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6 (1971) ("This Court . . . appropriately dealt with the large constitutional principles; other federal courts had to

uses the word "shall," indicating that its prescription is not permissive but mandatory and hence self-executing.[91]

There are some parallels between the question of whether Section 2 is self-executing and the recent debate over whether Section 3 is self-executing. Gerard Magliocca provides an elegant analysis of the self-executing character of Section 3, and Magliocca's analysis is just as convincing with respect to Section 2.[92] Similarly, William Baude and Michael Stokes Paulsen argue, "While Section Three's requirements *could* be made the subject of enforcement legislation by Congress," Section 3 "requires no legislation or adjudication to be legally effective," and "[i]ts disqualification, where triggered, just *is*."[93] Section 2 is even more straightforwardly self-executing, because it is an amendment of the House apportionment formula provided in Article I.[94] But Section 3 similarly uses language that mirrors the restrictions on eligibility for office found in Article I.[95]

Although the Supreme Court recently held in *Trump v. Anderson*[96] that Section 3 is not self-executing, the Court's decision provides further evidence that Section 2 should be enforced by the federal courts. In *Trump v. Anderson*, the majority decided that only Congress could enforce Section 3, even though

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grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands.").

91. U.S. CONST. amend. XIV, § 2.

92. Magliocca, *supra* note 4, at 106 ("On balance, Chase's claim that Section Three was not self-enforcing is unpersuasive. First, Section Three contains the same mandatory language ('No person shall . . . ') as Section One ('No state shall . . . '), and there is no doubt that Section One is self-executing. Second, nothing indicates that Congress saw Section Three as anything other than self-executing when the Fourteenth Amendment was drafted. Third, the practical problems that the Chief Justice sought to avoid were based on speculation, as there was no proof about how many ineligible officials were in Virginia during the relevant period. Fourth, the inconsistency between the 1787 Constitution's criminal law provisions (for example, the Ex Post Facto Clause) and Section Three occur only if Section Three is characterized as a punishment, which is not the only plausible reading. Finally, the fact that Congress legislated about Section Three did not (as the Chief Justice said at one point) strongly imply that Section Three required legislation." (footnotes omitted)).

93. William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. (forthcoming 2024) (manuscript at 6), https://ssrn.com/abstract=4532751 [https://perma.cc/DR6K-QEFY]. *But see* Josh Blackman & Seth Barrett Tillman, *Sweeping and Forcing the President into Section 3*, 28 TEX. REV. L. & POL. 350 (forthcoming 2024) (manuscript at 404), https://ssrn.com/abstract=4568771 [https://perma.cc/933Y-UMPU] (arguing that Section 3 is not self-executing).

94. *See supra* text accompanying notes 79–82.

95. *See* Baude & Paulsen, *supra* note 93 (manuscript at 383).

96. Trump v. Anderson, No. 23-719, slip op. (U.S. Mar. 4, 2024).

courts routinely enforce other provisions of the Fourteenth Amendment.[97] The Court justified this departure by noting that "Section 3, unlike other provisions of the Fourteenth Amendment, proscribes conduct of individuals."[98] Section 3 "bars persons from holding office after taking a qualifying oath and then engaging in insurrection or rebellion—nothing more."[99] The underlying logic is that if a provision of the Fourteenth Amendment "proscribes conduct of individuals,"[100] then only Congress can enforce it. The Court thereby created a narrow exception—covering only Section 3—to the general rule that provisions of the Fourteenth Amendment are self-executing.[101] Section 2 does not regulate the conduct of individuals. Rather, Section 2 concerns the manner in which states choose to hold elections, providing a constitutional rule of disqualification as a consequence. As the concurrence in the judgment notes in *Trump v. Anderson*, "constitutional rules of disqualification, like the two-term limit on the Presidency, do not require implementing legislation."[102] Section 2, "like the two-term limit on the Presidency," is a "constitutional rule[] of disqualification."[103] Section 2 should be treated like the non-Section 3 provisions of the Fourteenth Amendment, and it should be treated like other constitutional rules of disqualification. By the reasoning of both the majority opinion and the concurrence in the judgment, Section 2 is self-executing.

The lack of a history of judicial enforcement of Section 2 provides no basis for skepticism about its validity. If litigants have rarely sought to make use of this provision, that does not change its meaning or import. Constitutional provisions do not fall into desuetude. According to Arthur Bonfield, writing in 1960, "[t]he second section of the fourteenth amendment is one of the few provisions of the Constitution which no one has seriously attempted to enforce through judicial action."[104] More troubling would be the conclusion that courts have balked at fulfilling the duty conferred upon them by Section

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97. *Id.* at 5; *see also* City of Boerne v. Flores, 521 U.S. 507, 524 (1997) ("The power to interpret the Constitution in a case or controversy remains in the Judiciary.").

98. *Anderson*, slip op. at 10.

99. *Id.* at 10–11.

100. *Id.* at 10.

101. *Id.* at 10–11; *see also Boerne*, 521 U.S. at 525 ("As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing.").

102. *Anderson*, slip op. at 4 (Sotomayor, Kagan, and Jackson, JJ., concurring in the judgment).

103. *Id.*

104. Bonfield, *supra* note 15, at 108. *But see id.* at 108 n.1 (acknowledging that "[t]his statement is not completely accurate since one attempt to enforce § 2 was made in *Saunders v. Wilkins*, 152 F.2d 235 (1945)").

2, a conclusion that might find support in at least one case from the Civil Rights Era.[105] But the D.C. Circuit in *Lampkin v. Connor* did not question the judicial enforceability of Section 2. Rather, the court's decision rested on contemporaneous statutory and administrative developments that, in effect, rendered the issue moot. Section 2 remains a valuable resource for courts to deploy in different circumstances.

The long dormancy of Section 2 does not prove or disprove whether certain long-standing practices are constitutional. While Section 2 has generated relatively scant interest since its ratification, Congress and activists have remembered it from time to time.[106] Magliocca has made the bold claim that the decennial House reapportionment process is in violation of Section 2.[107] "It is axiomatic that a federal statute cannot override a constitutional command," Magliocca argues, citing *Marbury v. Madison*,[108] "but that is precisely what the reapportionment statutes do by omitting any reference to Section Two of the Fourteenth Amendment."[109] Congress designed the 1870 census so as to comply with Section 2, asking respondents whether their right to vote had been abridged in contravention of Section 2.[110] Without such information, implementing Section 2's penalties for racial disenfranchisement would prove difficult. The resulting information from the 1870 census failed to detect the systematic disenfranchisement of Black men

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105. Lampkin v. Connor, 360 F.2d 505, 511 (D.C. Cir. 1966) (upholding the dismissal of a complaint alleging a violation of Section 2 of the Fourteenth Amendment by states that suppressed the votes of Black citizens, on the grounds that the obstacles were in the process of being eliminated by the Voting Right Act and the Twenty-fourth Amendment, making the complaint premature). *But see id.* at 512 ("In telling appellants that events have made their complaint unsuitable for judicial disposition at this time, we think it also premature to conclude that Section 2 of the Fourteenth Amendment does not mean what it appears to say.").

106. Magliocca, *supra* note 34, at 776–77.

107. *Id.* at 775.

108. *Id.* at 776 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803)).

109. *Id.* For a similar argument, see Hurta, *supra* note 34, at 166–69. "When read in light of current federal law, Section Two may make the ministerial Census Bureau one of the most powerful guardians of voting rights within the federal government." *Id.* at 147. Courts have rejected this argument. *See* Lampkin v. Connor, 239 F. Supp. 757, 764–65 (D.D.C. 1965); United States v. Sharrow, 309 F.2d 77, 79–80 (2d Cir. 1962) ("Irrespective of the Fourteenth Amendment's mandate the Congress, in the present state of the law, is not required to prescribe that census-takers ascertain information relative to disenfranchisement."); Sharrow v. Brown, 447 F.2d 94, 98 (2d Cir. 1971) ("Although the Census Bureau may be the most efficient instrument for gathering these statistics . . . nothing in the Constitution mandates that the Census Bureau be the agency to gather these statistics.").

110. Magliocca, *supra* note 34, at 786–87 ("One new question in the 1870 Census asked if someone was a male American citizen age twenty-one or older. If so, the next question asked whether his right to vote was denied on grounds other than rebellion or crime.").

in the South[111] and suggested that Rhode Island and Arkansas might both be at risk of losing one representative.[112] Congress ultimately chose not to punish either state and deleted the Section 2 questions from the 1880 census.[113] Congress considered new legislation in the 1890s to give teeth to Section 2, and activists touted the provision in the following decades, but Section 2 was never actually enforced.[114] As Magliocca's analysis underscores, Congress's failure to enforce Section 2 does not preclude judicial intervention. Indeed, in 1881, Representative Crowley noted that Section 2 must be enforced "either by the courts or Congress."[115] He argued that the enforcement should be accomplished "first by the courts," because "[i]t is more analogous to other provisions of the Constitution."[116] If the courts had the primary enforcement responsibility, he continued, "then the Congress did well to ignore the question in the matter of the census."[117]

During the Civil Rights Movement, scholars and activists again raised the question of enforcing Section 2, given the widespread denial of the right to vote on the basis of race. Legal scholars raised the issue of Section 2 in law reviews.[118] One of the demands of the 1963 March on Washington for Jobs and Freedom was for the enforcement of Section 2, calling for "[e]nforcement of the *Fourteenth Amendment*—reducing Congressional representation of

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111. Ethan Herenstein & Yurij Rudensky, *The Penalty Clause and the Fourteenth Amendment's Consistency on Universal Representation*, 96 N.Y.U. L. REV. 1021, 1043 (2021) ("[T]he returns showed little disenfranchisement across the country and, preposterously, almost none in the South . . . .").

112. *Id.* at 788–89 ("If the census data was taken at face value, then Rhode Island and Arkansas were each at risk of losing one representative. Rhode Island restricted suffrage only to adult male citizens who had lived there for at least a year and owned at least $134 of real property. Arkansas denied voting rights to adult male citizens who (1) had lived in the state for less than six months; (2) had been involved in a duel; (3) were insane; or (4) were barred from voting in the state where they resided before they moved." (footnotes omitted)).

113. *Id.* at 789.

114. Franita Tolson, *What Is Abridgment? A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 434 (2016) ("Section 2 has had its moments—congressional legislation to enforce its penalty in the 1890s; the provision's endorsement in the Republican platform of 1904; the campaign by the National Association for the Advancement of Colored People (NAACP) to implement the provision in the 1920s.").

115. 11 CONG. REC. 1775 (1881).

116. *Id.*

117. *Id.*

118. *See generally* Eugene Sidney Bayer, *The Apportionment Section of the Fourteenth Amendment: A Neglected Weapon for Defense of the Voting Rights of Southern Negroes*, 16 CASE W. RSRV. L. REV. 965 (1965); Zuckerman, *supra* note 11; Bonfield, *supra* note 15; Margolis, *supra* note 15; William W. Van Alstyne, *The Fourteenth Amendment, the "Right" To Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 84–85 (1965).

states where citizens are disfranchised."[119] The NAACP Legal Defense Fund filed a lawsuit seeking a declaratory judgment.[120] After the passage of the Voting Rights Act of 1965, however, the interest of scholars and activists waned.[121]

Importantly, accurate measurement would have been an impediment to using Section 2 for its original, core purpose of preventing southern states from disenfranchising Black men. The 1870 census was notoriously unreliable.[122] This problem was cited in Congress as a reason for not punishing Rhode Island and Arkansas based on 1870 Census data.[123] One Representative dismissed the census data reporting the number of disenfranchised men, objecting, "[T]his whole table is utterly inaccurate; it is not reliable . . . it is without weight, and consideration is not given to it at the [Interior] Department."[124] Indeed, the Secretary of the Interior cautioned that "the Department is disposed to give but little credit to the returns made by assistant marshals in regard to the denial or abridgement of suffrage."[125] Similar problems of determining the exact number of disenfranchised Black men would have presented themselves had Congress enforced Section 2 in the 1960s. A similar rationale led a D.C. District Court to dismiss a recent suit seeking to enforce Section 2 in a challenge to the 2020 reapportionment process.[126] Section 2 provides a very serious penalty. The very weightiness of

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119. MARCH ON WASHINGTON FOR JOBS AND FREEDOM: LINCOLN MEMORIAL PROGRAM 3 (1963), http://www.crmvet.org/docs/mowprog.pdf [https://perma.cc/AWN8-V2Q7].

120. Magliocca, *supra* note 34, at 777.

121. *Id.* at 777–78 ("After the Voting Rights Act became law in 1965 . . . academic interest in Section Two waned. Likewise, the NAACP's reapportionment lawsuit was dismissed on prudential grounds by the D.C. Circuit pending an 'appraisal of the effectiveness of the new Voting Rights Act' and was never refiled." (footnotes omitted)).

122. *See* Magliocca, *supra* note 34, at 788; *see also* Richard H. Steckel, *The Quality of Census Data for Historical Inquiry: A Research Agenda*, 15 SOC. SCI. HIST. 579, 585 ("James A. Garfield (1870), discussing several defects of the census, placed the use of U.S. marshals first on his list. In his view, they were poorly trained for the job and were suspected or distrusted by some households because they also conducted arrests and seizures. Garfield also wanted a shorter period for enumeration (preferably a single day); adequate compensation for enumerators, so that they could take enough time to obtain accurate information; and legislation that assured the confidentiality of replies."); *id.* at 586 ("The extraordinarily low increase during the 1860s and the very large increase during the 1870s strongly suggest that the black population was significantly underenumerated in the 1870 census.").

123. Magliocca, *supra* note 34, at 789.

124. CONG. GLOBE, 42d Cong., 2d Sess. 79 (1871) (statement of Rep. Mercur).

125. *Id.*

126. *See* Citizens for Const. Integrity v. Census Bureau, No. 1:21-cv-03045, 2023 WL 2992466, at *3 (D.D.C. Apr. 18, 2023) (holding that plaintiffs lacked standing to challenge the accuracy of the Census Bureau's count because "Representatives are distributed according to a complicated mathematical formula, prescribed by statute, and states might lose representatives

the enforcement mechanism makes it difficult to use when the exact extent of the violation, and therefore the precise magnitude of the corresponding penalty, is uncertain.[127] In the case of the wholesale denial of the franchise, however, the math is much easier; no census question is required. Even if courts would be understandably reluctant to wade into the political and mathematical thicket of applying Section 2 to reapportionment, no such obstacle prevents their enforcement of Section 2 for the purpose of protecting popular presidential elections.

C. Judicial Review Is Available

While offending states will no doubt seek to prevent judicial review of the question, the two most plausible theories they might assert do not stand up to scrutiny. One objection would allege that the qualifications of House candidates constitute a political question inapposite for judicial resolution, challenging the authority of the reviewing court to provide the remedy we have argued would be appropriate. Another objection would contest the ripeness of a suit to challenge a state legislature's retroactive annulling of a popular presidential election until it would be too late for effective judicial intervention. Neither objection succeeds, however. Judicial review of the qualifications of Electors and appropriate remedial intervention is therefore readily available.

1. The Political Question Challenge

The first objection to judicial intervention contests the remedial approach that we argue is the necessary implication of Section 2 of the Fourteenth Amendment (the elimination of the House delegation of a state whose legislature annuals a popular presidential election—and, concomitantly, the reduction in the state's Electoral College contingent).[128] This objection would

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for reasons unrelated to the Bureau's failure . . . [s]o even if a plaintiff can show that the Census Bureau counted incorrectly, that does not mean that a corrected recount would lead to an apportionment more favorable to the plaintiff"). *But see* Tolson, *supra* note 114, at 433 (arguing that courts should "resurrect" Section 2 as a valuable resource for redressing the current wave of voter suppression).

127. *See* Michael T. Morley, *Remedial Equilibration and the Right To Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279, 280 (2015) (arguing that the severity of the Section 2 penalty should prevent its application to any abridgement of voting rights that is not facially discriminatory). *But see* Tolson, *supra* note 114, at 458 (providing a convincing refutation of Morley's theory based on evidence from text and original understanding).

128. *See supra* Section I.A.

assert that a court lacks the power to disqualify House Representatives, because the qualifications of House members constitute a political question textually conferred upon the House by Article I, Section 5.[129] Article I, Section 5 provides that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members."[130] If the issue fell within the coverage of Article I, Section 5, then it would constitute a political question inapposite for judicial resolution.[131] Nevertheless, the Court has the authority to determine whether the action of a chamber of Congress falls within the coverage of Article I, Section 5.[132] And it has held that many procedural interventions in the conduct of elections do not infringe on the authority of the House to be the ultimate judge of the qualifications of its members.[133]

More fundamentally, however, the Constitution's apportionment formula for House seats supersedes the right of each House to judge the qualifications of individual members. The apportionment formula provided by Article I, Section 2 and supplemented by Section 2 of the Fourteenth Amendment is separate from and precedes the power of the House to determine the qualifications of its members conferred by Article I, Section 5.[134] The role of the reviewing court is not to scrutinize the qualifications of individual candidates for House seats but rather to rule on the existence of the seats in the first place under the Constitution. Surely, the House could not simply add seats by recognizing more members than were elected. But that is effectively what it would be doing if it chose to seat members to fill seats that had been eliminated by the Section 2 penalty.

If the state attempts to conduct an election when it is not permitted to, the appropriate remedy is for a court to enjoin the election. In a related context,

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129. U.S. CONST. art. I, § 5, cl. 1.

130. *Id.*

131. *See* Morgan v. United States, 801 F.2d 445, 447 (D.C. Cir. 1986) ("It is difficult to imagine a clearer case of 'textually demonstrable constitutional commitment' of an issue to another branch of government to the exclusion of the courts than the language of Article I, section 5, clause 1 that '[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members.' The provision states not merely that each House 'may judge' these matters, but that each House 'shall be *the* Judge' . . . . The exclusion of others—and in particular of others who are judges—could not be more evident. Hence, without need to rely upon the amorphous and partly prudential doctrine of 'political questions,' we simply lack jurisdiction to proceed." (citations omitted)).

132. *See* Newberry v. United States, 256 U.S. 232, 285 (1921) (Pitney, J., concurring).

133. *See, e.g.*, Roudebush v. Hartke, 405 U.S. 15, 18–19 (1972).

134. *See* Sharrow v. Brown, 447 F.2d 94, 98 n.9 (2d Cir. 1971) ("Two earlier appellate court decisions have implied that any enforcement of Section 2 is solely within the discretion of Congress and thus presents a nonjusticiable political question. However, apportionment practice would seem to indicate that at least the first sentence of Section 2 has been considered mandatory." (citations omitted)).

courts have prevented elections in conditions compromised by malapportionment[135] and racial gerrymandering.[136] Article I, Section 5 posed no obstacle, because these problems emerged upstream of the situation in which the authority of the House to determine the qualifications of its members could become relevant.[137]

2. The Timing Challenge

Another objection would challenge the power of a reviewing court to hear a case scrutinizing a state's retroactive annulling of a popular presidential election on timing grounds. The argument here would be that, because the state legislature's selection of a competing slate of presidential Electors has no legal import until Congress decides which slate of Electors to recognize, judicial review of the legislature's intervention would be premature before Congress's certification of Electoral votes. Note that this objection only applies in the case of a retroactive annulling. If a state legislature sought preemptively to annul a popular presidential election, then the deprivation of the vote to the state's residents would constitute final action ripe for judicial review at the moment of the legislation.

If a state legislature chooses to submit to Congress a slate of Electors selected in contravention of a popular election, there is a straightforward statutory ground for regarding the legislative act as ripe for judicial review as soon as adopted. Under the Electoral Count Act, "the executive of each state" is authorized to "issue a certificate of ascertainment of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day."[138] The Electoral Count Act instructs that the certificate of ascertainment of appointment of electors provided by the state "shall be treated as conclusive in Congress with respect to the determination of electors appointed by the State."[139] In other words, the Electoral Count Act confers on states the

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135. Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (holding that a violation of one person, one vote in a state's House districts violates the Equal Protection Clause and ordering new map to be drawn).

136. Shaw v. Reno, 509 U.S. 630, 657–58 (1993) (holding that racially gerrymandered House district maps violate the Equal Protection Clause and ordering new map to be drawn).

137. As Justice Harlan's dissenting opinion in *Wesberry* makes clear, the Court found unconvincing the suggestion that Article I, Section 5 imposed any restriction on courts' authority to scrutinize the constitutional adequacy of election procedures. 376 U.S. at 23 (Harlan, J., dissenting).

138. 3 U.S.C. § 5(a)(1).

139. § 5(c)(1)(A).

authority to allocate their Electoral votes, in a manner that neither Congress nor the state is permitted to supersede retroactively. If states possess the authority to issue a "conclusive" allocation of their Electoral votes, then a state's allocation decision pursuant to this authority should be understood to constitute a final act ripe for judicial review under Section 2. While Congress could subsequently legislate to amend the Electoral Count Act, this possibility does not preclude judicial intervention in the interim. Indeed, the Electoral Count Act allows for judicial review of the validity a state's determination, providing that "[a]ny certificate of ascertainment of appointment of electors required to be issued or revised by any State or Federal judicial relief granted prior to the date of the meeting of electors shall replace and supersede any other certificates submitted pursuant to this section."[140]

Even if this statutory ground were unavailable, Section 2 would yield a basis for judicial review of a congressional certification, but this review would probably have to wait until after Congress's count of the votes. Prior to Congress's meeting to certify the results of the election, there would still be the possibility that Congress could correct the constitutional error in the absence of judicial intervention, suggesting that the question might be unripe for judicial review in advance of the congressional count. Even so, there remains an important role for the court if Congress fails to correct the constitutional violation. If Congress were to certify votes that are beyond its power to certify under Section 2, then judicial review would be warranted to correct this constitutional failing. Whatever Congress's role in certifying the Electoral vote count, it does not have the authority to determine how many Electoral votes are apportioned to the states. The court retains the role of enforcing the apportionment formula under Section 2. It would simply have to send the question back to Congress for reconsideration in view of the correct apportionment formula. In order for the court to perform its constitutionally required role, there would need to be a process of expedited review after the statutory date for the congressional count[141] but in time for Congress to act by January 20, which is the date set by Constitution for the beginning of the President's term of office.[142]

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140. § 5(c)(1)(B).

141. Under current law, this date is January 6. *See* 3 U.S.C. § 15 ("Congress shall be in session on the sixth day of January succeeding every meeting of the electors.").

142. *See* U.S. CONST. amend. XX, § 1.

II. THE KARLAN CONUNDRUM

Pamela Karlan raises an important objection to the argument that Section 2 in effect guarantees popular elections for President. Karlan argues that Section 2 requires as a threshold condition that there be an election.[143] Karlan suggests that Section 2 cannot guarantee a right to popular elections because one of the kinds of elections covered by Section 2 is elections for state judicial offices, yet states surely can choose whether to select judges by means other than a popular election without violating the Constitution.[144] It seems entirely plausible that Section 2 does not require states to choose elections for state offices in the first instance, but it is a different story when the federal government—or indeed the Constitution—has already determined that an election will take place. Under these circumstances, a state that deprives its citizens of a popular election clearly triggers Section 2. We do not disagree with Karlan's observation about the structure of Section 2. Indeed, Section 2 only applies to elections. One could go further than Karlan and argue that the text of Section 2 itself presupposes that there is an "election" taking place in which people are being deprived the opportunity to vote.[145] Section 2 would not apply absent this threshold condition.[146] One could also go further than Karlan in noting that Section 2 applies to "executive" as well as "judicial"

143. *See* Karlan, *supra* note 12, at 589–90.

144. *Id.* at 590. *But see* Alstyne, *supra* note 118, at 84–85 (arguing that "the right to vote protected by § 2 included the right to vote for all six specified groups of offices and that complete disqualification from voting for any one of the six would constitute an 'abridgement' of the right to vote for them all, for representational reduction purposes").

145. Section 2 applies only "when the right to vote at any election" for specified officials "is denied" to citizens of a state. U.S. CONST. amend. XIV, § 2. That an election is taking place is a threshold condition.

146. Section 2 plainly does not apply, for instance, when a state chooses not to create an office that it might have created, even though this decision might prevent a popular election that could have taken place.

officers,[147] so the problem could extend to governors[148] and state attorneys general in addition to state judges.[149]

Rather than disagreeing with Karlan about the structure of Section 2, we provide a corrective about the meaning of the term "election" for constitutional purposes. Against the assumption, perhaps intuitive today, that an "election" means a popular election, we recover voluminous evidence demonstrating that the term "election" in the Constitution, including in Section 2, had a more capacious meaning.[150] The term "election" inescapably included the selection of an officeholder by a state legislature.[151] It may well also have included any selection of an officeholder. The following Section presents our evidence about the meaning of "election," and the subsequent Section explores various possible implications of this more accurate understanding.

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147. U.S. CONST. amend. XIV, § 2.

148. Section 2 could conceivably implicate the selection of governor in Vermont in rare cases. In Vermont, the candidate "who has the major part of the votes" is elected governor, but if "there shall be no election[] of Governor, . . . the Senate and House of Representatives shall by a joint ballot, elect to fill the office, not filled as aforesaid, one of the three candidates for such office (if there be so many) for whom the greatest number of votes shall have been returned." VT. CONST. ch. 2, § 47. The legislative election in Vermont in the event no candidate received a majority would be directly analogous for Section 2 purposes to the legislative election of judges in Virginia and South Carolina. *Cf.* VA. CONST. art. VI, § 7 (providing for the legislative election of state judges); S.C. CONST. art. V, § 3 (providing for the legislative election of state Supreme Court members).

149. U.S. CONST. amend. XIV, § 2. The legislative history suggests that Congress intended governors and judges to be included but not local school officials. *See infra* notes 248–251 and accompanying text. Presumably then, state attorneys general and other top executive officials would be included, along with all state judges. It is unclear, however, where exactly to draw the line between governor and school board in "Executive . . . officer" and whether "Judicial officer" means only judges, or could also include other judicial employees, like clerks or registers of wills, who are elected in some states. *See, e.g.*, MD. CONST. art. IV, § 11 (providing rules for "all elections for Clerks, Registers of Wills, and other [judicial] officers"). We do not here enter into the debate about what the word "officer" means in the federal Constitution—and whether "officer" might have a different meaning in Section 2 because the text specifies "officers of a state." U.S. CONST. amend. XIV, § 2; *see* Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution Part I: An Introduction*, 61 S. TEX. L. REV. 309 (2021); Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution Part II: The Four Approaches*, 61 S. TEX. L. REV. 321 (2021).

150. *See infra* Section II.A.

151. *See infra* Section II.A.

A. The Constitutional Meaning of "Election"

Karlan's objection requires as a premise either that (a) only popular elections count as elections for Section 2 purposes or (b) states have the latitude to choose whether to consider the selection of presidential Electors an "election" triggering the protections of Section 2. The Constitution, however, regards the selection of an officeholder by a state legislature as an "election." This conclusion follows from intratextualist analysis.[152] Article I, Section 4 refers to the selection of Senators by a state legislature as an "[e]lection,"[153] and this language was adopted in a context in which Senators were always chosen by state legislatures.[154] The term "election" applied even in the absence of a popular election. At minimum, when the Constitution uses the term "election," it refers to both the selection of an officeholder by a popular election and the selection of an officeholder by a state legislature. Contemporaneous usage at the time of the adoption of the Fourteenth Amendment similarly used the term "election" in an encompassing way that included selection by a state legislature.[155]

Inter- and extratextual constitutional analysis further bolsters this conclusion. The Virginia constitution, under which the legislature chooses judges, calls this selection an "election by the General Assembly."[156] South Carolina, likewise, provides, "The members of the Supreme Court shall be elected by a joint public vote of the General Assembly . . . ."[157] Charles Pinckney, according to Alexander Hamilton's notes of the Constitutional Convention, remarked, "Elections by the state legislatures [to choose Senators] will be better than those by the people."[158] Here, it can be seen clearly that the category of "election" has two subcategories: election by the legislature and election by the people.[159] The evidence that the word "election" applies to both popular and legislative election is overwhelming.

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152. For a discussion of the methodology of intratextualism, see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788–95 (1999).

153. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . .").

154. U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . .").

155. *See infra* Section III.C.

156. VA. CONST. art. VI, § 7.

157. S.C. CONST. art. V, § 3.

158. Alexander Hamilton, Notes for June 6, 7, and 8, 1787, *in* Worthington Chauncey Ford, *Alexander Hamilton's Notes in the Federal Convention of 1787*, 10 AM. HIST. REV. 97, 100 (1904). We would like to thank Jean Binkovitz for bringing this reference to our attention.

159. *See id.*

Indeed, Section 2 would not have been an effective means of protecting the voting rights of Black men in Southern states if Southern states could circumvent the application of Section 2 to presidential elections by electing presidential Electors in the state legislature.[160] During Reconstruction, the Supreme Court had not yet interpreted the Fourteenth Amendment to provide for one person, one vote in state legislative elections.[161] If Section 2 only applied to popular elections, Southern state legislatures could allow both Black and white men to vote in state legislative elections but create racially gerrymandered districts of unequal size. The state legislature could then choose the presidential Electors. It is hard to see how the Reconstruction Congress could have intended Section 2 to be powerless to prevent such a foreseeable circumvention of its central purpose.[162]

This conclusion, which is already sufficiently clear from a formal examination of the Constitution and original meaning, also finds support in political theory. The legislature is a stand-in for the people, the people's representative.[163] Just as the people are acting in a legislative capacity when they authorize or amend a constitution or when they vote on a referendum, so arguably a legislature is acting in an electoral capacity when it legislates.[164]

Further circumstantial evidence is supplied by the exclusion of Senators from the list of officials supplied in Section 2, although this evidence could

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160. *See* Shane, *supra* note 15, at 543 ("Indeed, a devastating problem for the more limited interpretation regarding presidential elections is that, if the use of the popular vote in presidential elections remains discretionary under Section 2, then it would be easy for state legislatures to undermine the Republicans' aim of making black suffrage the price of reempowering the Southern states.").

161. It was not until 1964 that the Supreme Court adopted this interpretation of the Fourteenth Amendment. *See* Reynolds v. Sims, 377 U.S. 533, 558, 568 (1964) (holding in a landmark decision that state legislative elections must be apportioned based on population).

162. Section 2 also intended to protect Black men voting for state legislators, but it is easy to imagine that federalism concerns prevented the Reconstruction Congress from taking the intrusive step of regulating state legislative districts that the Supreme Court took in *Reynolds*. *See infra* notes 202–212 and accompanying text.

163. *See generally* HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION (1967) (discussing theories of political representation).

164. The legislature's ability to act in an electoral capacity does not mean, however, that a legislative election can substitute for a popular election for Section 2 purposes. A critic might think that a state legislative election for presidential Electors should be understood as an indirect popular election, and so the right to vote would not be denied to inhabitants of the state when the state conducts a legislative election, provided that the state did not deny inhabitants the right to vote for state legislators. But Section 2 makes clear that it applies to "*any* election for the choice of electors for President and Vice President of the United States." U.S. CONST. amend. XIV, § 2 (emphasis added). Section 2 thus applies when the right to vote is "denied . . . or in any way abridged" in the challenged election, and the availability of the right to vote in a different election does not suffice to obviate a Section 2 challenge. *Id*.

cut either way.[165] On the one hand, Congress might have excluded Senators because their inclusion would have resulted in a practical constitutional requirement that states directly elect Senators, a result that would have been in clear contradiction to the rest of the Constitution before the Seventeenth Amendment.[166] On this view, the inclusion of Senators would effectively have indirectly enacted the substance of the Seventeenth Amendment. On the other hand, if Congress had viewed "election" as meaning "popular election," Congress plausibly might have excluded Senators because they viewed Section 2 as having no bearing on their selection. If "election" had meant only popular election, then it would have been unnecessary to include Senators, who at the time were not selected by popular election. If this reasoning caused Congress to omit any reference to Senators, however, this would mean that Congress understood the language of Section 2 to operate in a way that would permit states easily to circumvent its requirements by providing for indirect elections of presidential Electors. Because Section 2 was written before *Reynolds v. Sims*, the state legislature could be gerrymandered to overrepresent the state's white population, enabling the disenfranchisement of Black voters that Section 2 was precisely intended to prevent. It is implausible that Congress would have conceived Section 2 in a way that would permit this offensive result, and this plausible eventuality reinforces the intratextual and contextual evidence that Congress did not understand Section 2 in this limited way.

Before further unpacking the implications of our corrective about the constitutional meaning of the term "election," it is worth noting that the only case to which any of this applies is the case of a preemptive annulling of a popular election for presidential Electors. None of this analysis is necessary to explain why Section 2 prevents a state legislature from retroactively annulling a popular election. A retroactive annulling would straightforwardly constitute the denial of citizens' right to vote with which Section 2 is concerned. An attempt at the retroactive invalidation of a popular election for President, as some state legislators suggested in 2020,[167] is more likely than a preemptive elimination of popular elections. Nevertheless, Section 2 also provides resources for preventing states from preemptive annulment of popular elections for presidential Electors.

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165. *See* U.S. CONST. amend. XIV, § 2.
166. *Id.* art. I, § 3.
167. *See supra* notes 6–8 and accompanying text.

B. Confronting the Karlan Conundrum

Given that the term "election" means something broader than just a popular election, there are three possible ways of meeting Karlan's objection.[168] These have different implications for the question, raised by Karlan, of whether Section 2 mandates popular elections for state judges, and also for some details about the application of Section 2 to the case of presidential elections. The first option is simply to bite the bullet and accept the radical implications of the most capacious interpretation of Section 2. This *rigid textualist approach* would accept that any selection of the designated officeholders is an "election" and hence require a popular election lest the Section 2 penalty apply. As we explain below, this would have quite radical results indeed. The second option, which we term *the separation-of-powers approach*, would be to recognize a distinction between an "election" (either popular or legislative) and an "appointment" by an executive official (whether or not confirmed by the legislature). This option finds some support in intratextual analysis[169] and a plausible view of the separation of powers, but it is questionable as a matter of original understanding of Section 2, as much extratextual evidence shows.[170] The separation-of-powers approach would also have the surprising implication of necessitating the immediate imposition of Section 2 penalties on Virginia and South Carolina, both of which provide for the legislative election of judges.[171] The third option, which

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168. We do not address readings that would prevent Karlan's objection from applying at all. One could read "election" as meaning only popular elections, for example. This reading, however, is strongly contradicted by both intra- and extratextual evidence. *See supra* notes 153–157 and accompanying text. Conceivably, there could be other means of meeting the objection, but we find these three to be the most compelling.

169. *See infra* notes 181–183 and accompanying text. However, there is a question about the compatibility of this theory with Article II, Section 1. According to Article II, Section 1, "Each State shall *appoint*, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. CONST. art. II, § 1, cl. 2 (emphasis added). This language indicates that the manner in which a state is to "appoint" its Electors shall be prescribed by the state legislature. Were the legislature to authorize itself to make the selection, this clearly would constitute an "election" under the terminology of the U.S. Constitution. *See supra* notes 153–155 and accompanying text.

170. During the congressional debate over the Fourteenth Amendment, Robert Cumming Schenck remarked that the "words 'vote,' 'choose,' and 'appoint' are used indiscriminately in many parts of the Constitution." CONG. GLOBE, 39th Cong., 1st Sess. 2471 (1866); *see also infra* notes 254–261 and accompanying text.

171. *See* VA. CONST. art. VI, § 7 ("The justices of the Supreme Court shall be chosen by the vote of a majority of the members elected to each house of the General Assembly for terms of twelve years. The judges of all other courts of record shall be chosen by the vote of a majority of the members elected to each house of the General Assembly for terms of eight years . . . . Upon

we term *the federalism approach*, would be to conclude that Section 2 applies differently to elections for federal offices and elections for state offices. This distinction could be grounded either upon general federalist principles of comity[172] or on the more textually determinate footing of the Privileges or Immunities Clause of the Fourteenth Amendment.[173] Either grounding would support a policy of respecting state law definitions of "election" for purposes of elections for state offices while insisting on the federal constitutional definition of "election" for elections for federal offices. The remainder of this Part explores each of these approaches in turn.[174]

1. The Rigid Textualist Approach

The rigid textualist approach to Section 2 would insist on the plain meaning of Section 2, radical consequences be damned.[175] Section 2 plainly

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election by the General Assembly, a new justice or judge shall begin service of a full term."); S.C. CONST. art. V, § 3 ("The members of the Supreme Court shall be elected by a joint public vote of the General Assembly for a term of ten years . . . .").

172. *Cf.* Michigan v. Long, 463 U.S. 1032, 1071 n.4 (1983) (Stevens, J., dissenting) ("The fact that provisions of the state and federal constitutions may be similar or even identical does not justify us in disturbing a judgment of a state court which adequately rests upon its application of the provisions of its own constitution. That the state court may be influenced by the reasoning of our opinions makes no difference. The state court may be persuaded by majority opinions in this Court or it may prefer the reasoning of dissenting judges, but the judgment of the state court upon the application of its own constitution remains a judgment which we are without jurisdiction to review." (quoting Minnesota v. Nat'l Tea Co., 309 U.S. 551, 558–59 (1940))); Brennan Mancil, *Reviving Elusive Rights: State Constitutional Unenumerated Rights Clauses as Bounded Guarantors of Fundamental Liberties*, 19 GEO. J.L. & PUB. POL'Y 281, 304 (2021) (citing *Long*, 463 U.S. at 1041) ("The U.S. Supreme Court's implicit resignation from distinguishing the jurisdictional basis of legal pronouncements has a solution, however. When state courts refer to federal precedent in their decisions solely for its persuasive authority, *Long* requests the state court make a plain statement indicating this use of federal law to avoid judicial review by the U.S. Supreme Court.").

173. The way out of the Karlan conundrum provided by the Privileges or Immunities Clause was first proposed by Peter Shane. *See* Shane, *supra* note 15, at 546.

174. Regardless of which of these approaches one takes, however, it is abundantly clear that the 2020 hypothetical, in which states conducted popular elections and then disregarded the results, would produce Section 2 penalties. Under any definition of "election," an election would have occurred in this case. The Karlan conundrum only applies when one asserts that Section 2 forbids state legislatures from choosing presidential Electors *without* conducting a popular election.

175. That the Fourteenth Amendment may have important consequences unforeseen by its drafters is in no way a fatal objection. As Justice Gorsuch observed, "Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them." Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020). Gorsuch was referring to the Civil Rights Act of 1964, a monumental piece of legislation, but even the significance of that law pales in comparison

provides a list of categories of officials for whom denying citizens of the state the right to vote results in the state's loss of House representation, and this list plainly includes state judges.[176] The implication of the rigid textualist theory is that states could face the Section 2 penalty for failing to select state judges by popular election. One substantial problem for the rigid textualist approach is that it would appear to require not only popular elections for state "[j]udicial officers" but also for state "[e]xecutive . . . officers."[177] This text could be understood to mean that states could be penalized for selecting executive officers by gubernatorial appointment. Similarly, the category of "[j]udicial officer" might be broader than just judges, opening up a Section 2 challenge to various courthouse personnel decisions.[178] The rigid textualist interpretation could generate radical results indeed.

2. The Separation-of-Powers Approach

The separation-of-powers approach would make a distinction between, on the one hand, the selection of an officeholder by the people of a state in a popular election or by the state legislature (as a stand-in for the people) and, on the other hand, the selection of an officeholder by some executive agent. The theory would hold that there is a difference between "election" and appointment. Election means selection by either the legislature or the people.[179] Appointment by a governor or by a special commission is a different matter. The theory would allow that selection by appointment is still selection by appointment even if it requires confirmation by one or two houses of the state legislature.[180] This interpretation is consistent with a plausible intratextualist theory.[181] As we have observed, Article I refers to a legislative selection as an "election," but nowhere does the Constitution refer to an executive selection by that term. The Appointments Clause, of course, refers to the selection of executive and judicial officers by the President as

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to that of the Fourteenth Amendment, drafted after the Republic had stared down dissolution and fundamentally reshaping the national compact among the states and the federal government. Far from being surprised, one ought to expect that the Fourteenth Amendment created important and unexpected consequences.

176. U.S. CONST. amend. XIV, § 2.

177. *Id.*

178. *See supra* note 149.

179. *See supra* Section II.A.

180. *See infra* notes 161–168 and accompanying text.

181. Although, this interpretation has less support in original meaning. *See infra* notes 254–261 and accompanying text.

"[a]ppointment."[182] On these grounds, one could argue that the Constitution recognizes a distinction between the "election" of an official by a state legislature and the "appointment" of an official by an executive officer.[183]

However, Article II refers to a state's selection of its presidential Electors, "in such Manner as the Legislature thereof may direct," as an "appoint[ment]."[184] If a legislative selection can be an appointment as well as an election, then the distinction between elections and appointments fails. A state legislature's selection of an officeholder is always an "election" for constitutional purposes. Article II, Section 1 describes a state legislature's selection of presidential Electors as an "appoint[ment]."[185] This wording strongly suggests that the Constitution can understand a selection as being both an election and an appointment, undermining a strong distinction between these terms for constitutional purposes.[186] Further, there is evidence that the original understanding of Section 2 did not make such a distinction.[187]

This separation-of-powers response to Karlan's worry would rescue our interpretation of Section 2 from the troubling implication that it might require states to choose judges (or subordinate executive officers) by popular election. According to the separation-of-powers theory, there is no such requirement. States retain the right to choose between executive appointment and popular election of executive and judicial officers. They simply cannot assign the selection of judges to the legislature. The separation-of-powers theory would, however, have implications for states that assign the selection of judges to the state legislature. Currently two states choose their judges by legislative election: Virginia and South Carolina.[188] On the separation-of-powers theory of Section 2, these states could face a deprivation of their House representation.

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182. U.S. CONST. art. II, § 2, cl. 2.

183. There is, however, something of an intratextual difficulty for this theory in that Article II, Section 1 uses the term "appoint" to refer to the selection of presidential Electors, which at the time of that Article's adoption could have been by a state legislature. *Id.* This suggests some collapsing of the terms "election" and "appointment." On the other hand, the term "appoint" in Article II, Section 1 has a broader sense than the term "election" in Article I, Section 4. *See supra* notes 143–146 and accompanying text; *supra* text accompanying notes 152–155.

184. U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . .").

185. *Id*.

186. We take no position here about whether the Constitution uses the terms as fully synonymous or merely overlapping.

187. *See infra* notes 257–259 and accompanying text.

188. Both Virginia and South Carolina call their methods of selecting judges "election[s]," providing further evidence that legislative selection of judges falls within the established meaning of "election." VA. CONST. art. VI, § 7; S.C. CONST. art. V, § 3.

There remains a loophole under this separation-of-powers theory, in that state legislatures could, consistent with Article II, Section 1, provide for the selection of Electors by gubernatorial appointment.[189] For practical purposes, this possibility is not an especially grave concern. First, citizens of the state would no doubt object to being deprived of their longstanding right to vote in a presidential election.[190] Second, many states are heavily gerrymandered (or have populations distributed in an uneven way) such that the state legislature is considerably further to the right than the governor, because the governor must win the median voter in a statewide election. Vesting the appointment power in the governor therefore might be more likely to produce a more moderate result and less likely to contribute to efforts to weaponize the independent state legislature theory to install a President who could not win a popular election.[191]

Nevertheless, there is some reason to think that Section 2 would apply, even in the case of gubernatorial appointment of presidential Electors, if a state chose to provide by statute for that manner of selection. It is worth noting that no state legislature has ever delegated to the state's governor the legislature's power to appoint presidential Electors.[192] The Constitution vests the authority to choose presidential Electors in state legislatures.[193] The Supreme Court has characterized this provision as giving the state legislature "plenary authority to direct the manner of appointment."[194] Indeed, the *McPherson* court characterized a state's appointment of electors as attributable to the state's legislature even when the legislature provided for an alternative mode of appointment.[195] A state legislature's decision to delegate its authority to choose presidential Electors to the governor ought not allow it to evade Section 2. Because the Constitution vests the choice of presidential Electors in the state legislature, it is reasonable to attribute the choice of Electors to the state legislature even when the legislature delegates this power.

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189. This method of selection would be consistent with the directive of Article II, Section 1 that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." U.S. CONST. art. II, § 1, cl. 2.

190. *See* Karlan, *supra* note 12, at 591 ("The legislators who voted for such a change would likely face the angry consequences at *their* next election.").

191. Nor, under the separation-of-powers theory, could a state organize its government so that the governor is selected by the state legislature, in an attempt to circumvent the purpose of Section 2. The legislative selection of the governor would constitute an "election," triggering the prescribed penalty of a reduction in the state's House representation.

192. *See infra* Section III.A.

193. U.S. CONST. art. II, § 1, cl. 2.

194. McPherson v. Blacker, 146 U.S. 1, 25 (1892).

195. *Id*. at 25–26.

3. The Federalism Approach

One might still think, however, that the most convincing interpretation of Section 2 would not distinguish between legislative and executive selection of officials, bringing both under the coverage of Section 2. Under this interpretation, Section 2 by its plain text requires states to hold popular elections for each of the listed offices, including both presidential Electors and state judges, lest they face a reduction in their House representation. Federal courts might, however, decide that federalist principles of comity recommend permitting states to define "elections" for state offices. For federal elections, by contrast, the term "election" is a term of art defined by the Constitution. This squishy textualist approach would confer interpretive latitude on states when it comes to the selection of state officials, relieving states of an obligation under Section 2 to select state judges by popular election, and it would also (unlike the separation-of-powers theory) avoid consequences under Section 2 for states that vest the selection of state judges in the state legislature. It would, however, penalize states for failing to hold (not to mention respect the results of) popular elections for presidential Electors.

Comity counsels against using a capacious definition of "election" in Section 2 to impose profound changes in how states select their judges. The principle of comity, as the *Younger v. Harris* Court expounded, entails "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."[196] Comity is at the very basis of "Our Federalism," which requires a "sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."[197] Indeed, the Court has recognized that concerns about national uniformity may result in the Fourteenth Amendment applying differently to elections for federal and state officials.[198]

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196. Younger v. Harris, 401 U.S. 37, 44 (1971).

197. *Id.*

198. Trump v. Anderson, No. 23-719, slip op. at 6 (U.S. Mar. 4, 2024) ("We conclude that States may disqualify persons holding or attempting to hold *state* office. But States have no power under the Constitution to enforce Section 3 with respect to federal offices, especially the Presidency.").

There can surely be few interests of state governments to which more sensitivity is owed than the state's interest in structuring its own government. As Justice Stevens has observed, "[a] State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty."[199] This deference of course is bounded. The Supreme Court has cited the Equal Protection Clause of the Fourteenth Amendment to create the doctrine of one person, one vote, imposing substantive limits on how states may structure elections.[200] The Fifteenth, Nineteenth, and Twenty-Sixth Amendments, which prevent states from discriminating on the bases of race, sex, or age (for citizens who are eighteen years of age or older), also provide substantive limits on a state's power to determine how its officials are chosen. Still, one may conclude as a matter of comity that constitutional amendments which constrain state sovereignty should provide clear statements. The ambiguous usage of the word "election" in Section 2 counsels against effectively forcing states to provide for the popular election of judges.

Another way out of the Karlan conundrum, with similar implications, is provided by the Privileges or Immunities Clause. This path was first proposed by Peter M. Shane, who recognized the apparent consequence that Section 2 requires the popular election of state judges as "[t]he strongest argument" against reading Section 2 to require the direct election of presidential Electors.[201] Shane argues that "[i]t might make perfect sense on federalism grounds to read Section 2 as embodying a background guarantee that the federal offices to which it refers are mandatorily subject to popular votes, while selection systems for the state offices to which it refers remain discretionary with the states."[202] We agree.

Given the ambiguity of Section 2, we may consult "[d]eeply embedded traditional ways of conducting government"[203] to interpret the text. Only twice, once in 1868 and once in 1876, has a state legislature chosen presidential Electors after the ratification of the Fourteenth Amendment.[204] Popular election of presidential Electors is clearly a "[d]eeply embedded traditional"[205] method of conducting presidential elections in modern America. But we need not look outside of the Constitution. We can look to

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199. Cal. Democratic Party v. Jones, 530 U.S. 567, 590 (2000) (Stevens, J., dissenting).

200. *See* Reynolds v. Sims, 377 U.S. 533, 583 (1964) ("[T]he Equal Protection Clause requires that both houses of a state legislature be apportioned on a population basis . . . .").

201. Shane, *supra* note 15, at 543.

202. *Id.*

203. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring); *see also* Shane, *supra* note 15, at 546.

204. *See infra* notes 279–298 and accompanying text.

205. *Youngstown Sheet & Tube Co.*, 343 U.S. at 610 (Frankfurter, J., concurring).

the Privileges or Immunities Clause. This method of escaping the Karlan conundrum has the added benefit of meaning Section 2 requires the popular election of presidential Electors even if "election" in Section 2 is read to refer only to popular elections.[206]

The reasoning of the Privileges or Immunities approach is simple.[207] First, the Privileges or Immunities Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[208] Second, the Supreme Court in the *Slaughter-House Cases* interpreted the Privileges or Immunities Clause to protect only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws."[209] Third, even under a cramped interpretation of the Privileges or Immunities Clause, the right to vote in federal elections is a right "which ow[es] [its] existence to the Federal government, its National character, its Constitution, or its laws."[210] Therefore, Section 2, properly understood in conjunction with the Privileges or Immunities Clause, provides different protections for federal elections than for state elections.

Section 2 explicitly intended to regulate state elections, so it cannot be that Section 2 can protect federal elections but not state elections. According to Shane, the Privileges or Immunities analysis leads to the conclusion that for federal elections, Section 2 protects both the right to *have* a popular election and for the popular election to be non-discriminatory, while for state elections, Section 2 does not mandate popular elections, but if states do hold popular elections, they must be non-discriminatory.[211] The one person, one vote doctrine, rooted in the Equal Protection Clause, now provides for stricter rules of nondiscrimination than the drafters of the Fourteenth Amendment envisioned Section 2 as providing,[212] so the upshot of Shane's analysis is that

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206. Shane takes this approach. *See* Shane, *supra* note 15, at 543.

207. Our analysis in this paragraph follows Shane's reasoning closely. *See id.* at 543–53.

208. U.S. CONST. amend. XIV, § 1.

209. The Slaughter-House Cases, 83 U.S. 36, 79 (1872). *But see* William Baude et al., *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. (forthcoming 2024) (manuscript at 36–48), https://ssrn.com/abstract=4604902 [https://perma.cc/UGZ8-ALQV].

210. *The Slaughter-House Cases*, 83 U.S. at 79.

211. *See* Shane, *supra* note 15, at 543.

212. *Compare* Kramer v. Union Free Sch. Dist., 395 U.S. 621, 629–30 (1969) (interpreting the Equal Protection Clause of the Fourteenth Amendment to prevent states from limiting the electorate in school board elections to property holders, parents of children enrolled in the school district, or other non-geographic groups), *with* CONG. GLOBE, 39th Cong., 1st Sess. 3010 (1866) (remarks of Sen. Henderson) (expressing concern that Section 2 would not prevent elections for school trustees in which the "trustees are elected by the persons who have children to send to school").

the only non-redundant right provided by Section 2 is the right of individuals to vote for presidential Electors.[213]

The evidence that "election" in Section 2 encompasses both popular and legislative elections is overwhelming. This brings us back to the Virginia and South Carolina problem. Are these states currently in violation of Section 2? Our answer is no. Section 2 is triggered by any "election," but the federal Constitution defines the term for federal office while states can define the term for state offices. While states generally are free to determine the manner in which they conduct elections for presidential Electors,[214] Section 2 imposes a substantive limitation on the manner in which states choose their Electors.[215] Because the right to vote for presidential Electors "ow[es] [its] existence to the Federal government,"[216] it is covered by the Privileges or Immunities Clause. The manner in which the Constitution protects this right is Section 2, which provides for rules that are triggered by an "election" of presidential Electors.[217] "Election" as defined by the Constitution encompasses either (1) popular and legislative elections or (2) popular elections, legislative elections, and appointments. Which of these two options is more compelling may depend on whether one prefers relying on political theory (the first) or using "[d]eeply embedded traditional ways of conducting government,"[218] which have firmly established in American political culture the popular election of presidential Electors, to illuminate ambiguous textual language (the second).

Because their state constitutions use the word "election" in their descriptions of the selection processes for judges, Virginia and South Carolina may not seem to be out of the woods yet.[219] But as the Supreme Court has made clear, the same word can have a different meaning in federal and state constitutions.[220] Therefore, the high courts of Virginia and South Carolina must decide whether the legislative elections for judges in those states trigger Section 2. Plainly, the federal deference to state definitions would not be limitless. The states here are interpreting the federal Constitution, *not* a state constitution. Moreover, if a state could consider a

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213. *See* Shane, *supra* note 15, at 545.

214. U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . .").

215. *Id.* amend. XIV, § 2.

216. The Slaughter-House Cases, 83 U.S. 36, 79 (1872).

217. *See* U.S. CONST. amend. XIV, § 2.

218. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

219. VA. CONST. art. VI, § 7; S.C. CONST. art. V, § 3.

220. *See* sources cited *supra* note 172.

popular election not to be an "election," that would allow the state courts effectively to repeal Section 2's inclusion of state judges in the first place. Because the Fourteenth Amendment was intended to increase the power of the federal government to regulate the states and because Section 2 explicitly includes state judges,[221] such an unreasonable definition could not be accepted. States would still retain considerable latitude to define "election" for the purposes of state elections. If a state legislature elected presidential Electors, however, the U.S. Supreme Court would judge whether an "election" had occurred sufficient to trigger Section 2.

A state might plausibly evade Section 2 by providing for gubernatorial appointment of presidential Electors. Because (currently in all fifty states) the governor must herself win a popular vote of the whole state, we believe this possibility is less insidious than legislative election.[222] A state could also, of course, allow for the legislature to elect the governor and for the governor to appoint Electors. Section 2 cannot be expected to account for every remotely possible hypothetical. If this possibility is sufficiently concerning, this hypothetical may encourage acceptance of the reading of "election" that includes gubernatorial appointment. No parade of horribles follows, because the text of Section 2 prevents Section 2 from applying to any federal elections other than those for presidential Electors and House Representatives,[223] and the Privilege or Immunities Clause analysis[224] precludes the application of this definition to state elections.

Minor v. Happersett appears to stand in the way of this reading. In that case, the Supreme Court ruled that the Privileges or Immunities Clause did not guarantee women the right to vote.[225] Shane suggests disregarding *Minor*.[226] A close reading of the text of *Minor*, however, shows that nothing in the opinion precludes our reading of the Privileges or Immunities Clause. The *Minor* court rejected the idea that the Privileges or Immunities Clause vested every adult American with the right to vote.[227] We agree. In our

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221. U.S. CONST. amend. XIV, § 2.

222. *See supra* note 191 and accompanying text.

223. U.S. CONST. amend. XIV, § 2.

224. *See supra* notes 202–210 and accompanying text.

225. *See* Minor v. Happersett, 88 U.S. 162 (1874).

226. *See* Shane, *supra* note 15, at 547 n.49 ("In urging this interpretation, I am plainly giving little or no weight to *Minor* . . . [which] is of little consequence . . . to modern voting rights questions.").

227. *Minor*, 88 U.S. at 175 ("The fourteenth amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, &c.? Nothing is more evident than

reading, the Privileges or Immunities Clause grants the federal government the power to regulate the right to vote for federal elections. It does not in itself grant any class of individuals the right to vote in federal elections. At the time of *Minor*, there was no federal right for women to vote. The Privileges or Immunities Clause could not overcome this deficit. Now that the Nineteenth Amendment has been ratified, the Privileges or Immunities Clause gives the federal government the power to protect women's right to vote in federal elections. Likewise, the Privileges or Immunities Clause did not extend the right to vote to adults under twenty-one or children who were citizens to vote in federal elections, but now that the Twenty-Sixth Amendment has been ratified, the Privileges or Immunities Clause empowers the federal government to protect the right of citizens eighteen and older to vote in federal elections.

Although our analysis can accommodate a cramped reading of the Privileges or Immunities Clause, the Supreme Court's current interpretation is too narrow even for our purposes. If the Privileges or Immunities Clause really protects nothing more than the specific rights enumerated in the *Slaughter-House Cases*,[228] it can be of little help for our argument—or for much of anything. For reasons ably expressed by others elsewhere,[229] we find the reading of the clause given in the *Slaughter-House Cases* excessively and baselessly shallow.

Importantly, evidence suggests that the drafters of the Fourteenth Amendment understood the elective franchise to be a privilege of citizenship. "To be sure," Senator Bingham remarked in the debates over the Fourteenth Amendment, "we all agree, and the great body of the people of this country

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that the greater must include the less, and if all were already protected why go through with the form of amending the Constitution to protect a part?").

228. The Slaughter-House Cases, 83 U.S. 36, 80 (1872) (allowing that the Privileges or Immunities Clause protects "the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth" but generally limiting the reach of the clause).

229. *See The Slaughter-House Cases*, 83 U.S. at 116 (1872) (Bradley, J., dissenting) ("I think sufficient has been said to show that citizenship is not an empty name, but that, in this country at least, it has connected with it certain incidental rights, privileges, and immunities of the greatest importance. And to say that these rights and immunities attach only to State citizenship, and not to citizenship of the United States, appears to me to evince a very narrow and insufficient estimate of constitutional history and the rights of men, not to say the rights of the American people."); McDonald v. City of Chicago, 561 U.S. 742, 813 (2010) (Thomas, J., concurring in part) ("At the time of Reconstruction, the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.' The two words, standing alone or paired together, were used interchangeably with the words 'rights,' 'liberties,' and 'freedoms,' and had been since the time of Blackstone." (citation omitted)); *see also* Baude et al., *supra* note 209 (manuscript at 46–48).

agree, and the committee thus far in reporting measures of reconstruction agree, that the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States."[230] While Bingham's simultaneous claims that voting was both a federal right and that the states had exclusive power to regulate it "make little sense to modern ears,"[231] they are explained by the constitutional understandings of his time. As Justice Brennan noted, "In the minds of members of the 39th Congress, the leading case to construe that clause was *Corfield v. Coryell*, . . . which had listed among a citizen's privileges and immunities 'the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.'"[232] Ultimately, the legislative history of the Fourteenth Amendment is indeterminate, but "clarity and precision are not to be expected in an age when men are confronting new problems for which old concepts do not provide ready solutions."[233]

Of course, whatever latitude states are permitted under Section 2 is subject to the requirement of the Guarantee Clause that states preserve a republican form of government.[234] If a state organized its government such that none of its government officials were selected by popular election, this clearly would violate the Guarantee Clause. But perhaps here again, Section 2 is valuable because of the penalty that it provides.

III. ORIGINALIST INVESTIGATIONS

We are far from the first to observe the apparent implications of the text of Section 2 for the ability of state legislatures to choose presidential Electors in the absence of—or in contradiction to the results of—a popular election. Many newspapers in 1868 argued that the effective enactment of a right to vote for presidential Electors was the "plain conclusion"[235] or followed from

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230. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (Sen. Bingham). *But see id.* at 3039 (Sen. Hendricks) ("I have not heard any Senator accurately define, what are the rights and immunities of citizenship; and I do not know that any statesman has very accurately defined them . . . .").

231. Oregon v. Mitchell, 400 U.S. 112, 264 (1970) (Brennan, J., dissenting in part and concurring in part).

232. *Id.* at 265 (citing Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230)).

233. *Id.* at 269.

234. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

235. *Congress Caught in Its Own Trap*, CHARLESTON DAILY NEWS, Aug. 10, 1868, at 2.

a "careful reading"[236] of Section 2. The Fourteenth Amendment's intrusion on the prerogative of states to choose how to select their presidential Electors marked a clear break with the past.

A. The Electoral College Before the Fourteenth Amendment

Before the Fourteenth Amendment, state legislatures did not always hold popular elections to choose presidential Electors. There was widespread consensus that states could choose presidential Electors in any manner that they wished.[237] Article II, Section 1, Clause 2 of the Constitution gives laconic instructions as to how presidential Electors shall be chosen: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ."[238] The Supreme Court has interpreted this provision to mean that "from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of Electors."[239]

Indeed, several states initially did not have popular elections to select their slate of Electors. In the country's first election, five state legislatures directly appointed their Electors; four states held direct elections, two states apportioning Electors on a district basis and two states using a winner-take-all system; and one state held a direct election but reserved two Electors for the legislature.[240] The New York legislature failed to reach a decision and so no electoral vote took place in New York.[241] Between 1812 and 1820, nine state legislatures chose Electors without a popular election.[242] By 1832,

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236 *Affairs in Washington*, *supra* note 1, at 3.

237. *See, e.g.*, *In re* Opinions of Justices, 45 N.H. 595, 599–600 (1864) ("It is to be observed that the appointment of electors is the act of the State in her sovereign capacity. The State appoints the electors, and the Constitution imposes on her no restraint as to the manner in which she shall perform this act of sovereignty, except as to the time when the act shall be done. Each State makes the appointment in such manner as the legislature thereof may direct. No appeal to the people by popular election in any form is required by the Constitution; excepting only the time, the whole question as to the manner in which the State shall appoint the electors is left wholly to the discretion of the State legislature.").

238. U.S. CONST. art. II, § 1, cl. 2.

239. McPherson v. Blacker, 146 U.S. 1, 35 (1892).

240. Stanley Chang, *Updating the Electoral College: The National Popular Vote Legislation*, 44 HARV. J. ON LEGIS. 205, 208 n.28 (2007).

241. DONALD R. DESKINS, JR. ET AL., PRESIDENTIAL ELECTIONS, 1789-2008: COUNTY, STATE, AND NATIONAL MAPPING OF ELECTION DATA 3 (2010).

242. John D. Feerick, *The Electoral College—Why It Ought To Be Abolished*, 37 FORDHAM L. REV. 1, 10 n.48 (1968).

however, South Carolina was the only state where the legislature chose the Electors.[243]

B. Legislative History

Despite the limited importance of Section 2 after its ratification, Congress placed great importance on Section 2 during the drafting of the Fourteenth Amendment. Thaddeus Stevens, who began discussion of the proposed Fourteenth Amendment in the House on May 8, 1868, regarded Section 2 as "the most important in the article."[244] George Miller concurred. On May 9, he told the Congress that he considered Section 2 "the most important amendment, and . . . in fact the corner-stone of the stability of our Government."[245] Debate on the apportionment provision extended over seven months.[246]

Unfortunately, however, the legislative history of Section 2 does little to elucidate the question of whether the amendment effectively required the direct election of presidential Electors. The original draft of Section 2 reported in the House would have applied the apportionment penalty "whenever in any State the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged, except for participation in rebellion or other crime."[247] John B. Henderson worried that this broad trigger would prevent an election for school trustees in which the "trustees are elected by the persons who have children to send to school."[248] At the same time, Henderson highlighted the urgency of fashioning Section 2 to protect presidential elections. He warned that "unless you alter the Constitution on the subject" of presidential elections, "the State Legislatures will yet have the power to regulate that matter entirely as they please, and this amendment will not change it at all."[249]

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243. *Id.* at 10.

244. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

245. *Id.* at 2510.

246. Zuckerman, *supra* note 11, at 93–94.

247. CONG. GLOBE, 39th Cong., 1st Sess. 2286 (1866) (remarks of Rep. Stevens).

248. *Id.* at 3010. This concern is now moot. The Supreme Court has interpreted the Equal Protection Clause of the Fourteenth Amendment to prevent states from limiting the electorate in school board elections to property holders, children of parents, or other non-geographic groups. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 629 (1969) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." (quoting Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966))).

249. CONG. GLOBE, 39th Cong., 1st Sess. 3011 (1866).

Section 2 needed to prevent a Southern state from disenfranchising Black voters in the election for the State Senate and then providing "that the State Senate may elect the [presidential] Electors."[250] At the same time, while Henderson wanted to make sure there were protections in place regarding elections for "Governor, judges, and members of both branches of the Legislature," he did not want to involve the federal government in regulating the qualifications to vote "at some school election."[251] The version of Section 2 ultimately accepted, on the suggestion of George Williams, replaced the confusingly phrased provision—"election held under the Constitution and laws of the United States or of any State"—with the more specific but still ambiguous "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 members of the Legislature thereof."[252] Curiously, there was little debate over this new language or its many potential implications.[253]

Imprecise language in the text of Section 2 is compounded by imprecision in the legislative history. Speaking in 1871, after the ratification of the Fourteenth Amendment, a Congressman lamented that the "true and proper construction" of Section 2 "is much complicated and by no means clear."[254] Indeed, the Reconstruction Congress was inconsistent in the terminology it used in discussing voting, elections, and appointments.[255] On the one hand, in 1866, Schenck addressed the concern that Southern states might evade Section 3 of the Fourteenth Amendment, which excluded rebels from "the right to vote for . . . electors for President," by having the legislature choose the presidential Electors without a popular election.[256] Schenck suggested that an election in a legislature to choose Electors—or even an appointment of Electors by the governor—involves a "vote."[257] That is, when the governor appoints electors, he is "voting" for them, and so only a governor who is not a rebel could appoint electors consistent with the Fourteenth Amendment.[258]

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250. *Id.*

251. *Id.*

252. *See id.* at 3029, 3040, 3149.

253. Shane, *supra* note 15, at 542 ("The substitution offered by Senator Williams and ultimately ratified as part of the Fourteenth Amendment embodied a critically important move, and it is intriguing that the point elicited no further discussion on the floor of either the Senate or the House.").

254. CONG. GLOBE, 42d Cong., 2d Sess. 106 (1871).

255. *Compare* CONG. GLOBE, 39th Cong., 1st Sess. 2471 (1866), *with* CONG. GLOBE, 38th Cong., 2d Sess. 561 (1864–65).

256. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2471 (1866).

257. *See id.*

258. *See id.*

This line of reasoning apparently presumes that Section 2 would not prevent the legislature or even the governor from choosing electors. Schenck reasons that the "words 'vote,' 'choose,' and 'appoint' are used indiscriminately in many parts of the Constitution," and therefore are functionally synonymous.[259] Under this reasoning, however, the choice of Electors by the legislature—or even by the governor—would appear to be an "election" under the terms of Section 2, sufficient to trigger apportionment penalties. On the other hand, in 1865, Henry Smith Lane claimed, "The right of the people of a State to vote for President is a constitutional right . . . ."[260] Lane's comment appears to suggest belief in a constitutional right to vote for presidential Electors *before* the ratification of the Fourteenth Amendment. Lane was not directly addressing the possibility of a state legislature choosing Electors without holding a popular election, and it is possible that he would not have considered a state legislature choosing Electors to be denying "the people" the right to vote, because the legislature represents the people of the state. But at the very least, his comment suggests an imprecision of terms in the Congressional debate, similar to Schenck's suggestion that "vote," "choose," and "appoint" are all synonyms in the Constitution.[261] These uncertainties caution against an overreliance on legislative history in interpreting Section 2.[262]

Proximate post-enactment legislative history shows some attention to the question of whether state legislatures should be allowed to choose presidential Electors. On January 28, 1869, Charles Rollin Buckalew proposed an amendment to the Constitution that would ensure "that electors of President and Vice President shall be chosen by the people of the several States instead of being chosen as the Legislatures of the States may direct," and the debate surrounding this proposed amendment suggests that several Senators believed state legislatures still had this power.[263] The amendment would have gone further than merely preventing state legislatures from choosing presidential Electors; it also would have conferred on Congress the

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259. *Id.*

260. CONG. GLOBE, 38th Cong., 2d Sess. 561 (1865).

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

262. *Cf.* Oregon v. Mitchell, 400 U.S. 112, 278 (1970) (Brennan, J., concurring in part and dissenting in part) ("The historical record left by the framers of the Fourteenth Amendment, because it is a product of differing and conflicting political pressures and conceptions of federalism, is thus too vague and imprecise to provide us with sure guidance in deciding the pending cases. We must therefore conclude that its framers understood their Amendment to be a broadly worded injunction capable of being interpreted by future generations in accordance with the vision and needs of those generations.").

263. CONG. GLOBE, 40th Cong., 3d Sess. 668–71 (1869).

power to "prescribe the single district system, or any other improved mode" of election.[264] This evidence, however, does little to illuminate the text of Section 2.[265]

Another effort to reform presidential elections occurred in 1874. As part of this effort, a Senate Report, written by Senator Morton, characterized the state of presidential election law. The report, later quoted by the Supreme Court in *McPherson*,[266] painted a dire picture, warning, "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States . . . and it is no doubt competent for the legislature to authorize the governor, or the supreme court of the State, or any other agent of its will, to appoint these electors."[267] Further, the report argued, "[t]his power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions."[268] The Senate report may not have accurately reflected the considered views of the Congress. It may not even have fully reflected the considered views of Morton himself. Supporters of any reform always have a strong incentive to denigrate the status quo: were the world just as it should be, there would be no need for reform. In Morton's telling, this constitutional problem could only be solved by a constitutional amendment. And an amendment to the Constitution was exactly what Morton proposed. Indeed, Bohnhorst, Fitzgerald, and Soifer remark, "The passage epitomizes the rhetorical style for which Senator Morton was famous."[269] He presented an exaggerated portrait of state legislative authority "to dramatize the need for constitutional reform."[270]

The 1874 Senate report's exposition of constitutional law did not command universal assent from nineteenth-century members of Congress. "It [was] clear [to the] mind" of Mississippi Representative John Roy Lynch in 1877 "that, when a State shall have violated the fundamental principles and

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264. *Id.* at 669.

265. *See* Shane, *supra* note 15, at 547 n.51 (arguing that the proposal to enshrine a right to vote for presidential Electors in the Fifteenth Amendment does not prove that Section 2 had not already effectively established such a right because the "1869 proposal would have gone beyond the Fourteenth Amendment in constraining the role of state legislatures in the appointment of presidential electors," by leaving to "Congress the decision whether to provide winner-take-all systems in every state or to permit electors to be chosen by congressional district").

266. McPherson v. Blacker, 146 U.S. 1, 35 (1892).

267. S. REP. No. 43-395, at 9 (1874).

268. *Id.*

269. Bohnhorst et al., *Gaping Gaps in the History of the Independent State Legislature Doctrine:* McPherson v. Blacker*, Usurpation, and the Right of the People To Choose Their President*, 49 MITCHELL HAMLINE L. REV. 257, 296 (2023).

270. *Id.* at 296 n.249.

conditions of republican government in choosing its electors, . . . the United States Government though its legislative department has ample power to inquire into the validity of such an election, and if necessary set it aside."[271] In 1880, Frank Hurd, a Representative from Ohio,[272] argued that Section 2 required states to hold popular elections for presidential Electors:

> I have seen the proposition in several papers that the Republican Legislatures in the States where there are Republican Governors might be convened to choose Electors. This could have been done before the adoption of the Fourteenth Amendment, but those who maintain this proposition now have strangely overlooked the provisions of that article. The second section evidently requires that the Presidential Electors shall be chosen at an election at which all male citizens, being 21 years of age and citizens of the United States, and not disqualified for participation in rebellion or other cause, should have the opportunity of voting. If the right to vote at such election should be denied to any of the said citizens described in that section, the penalty is the reduction of the basis of representation in the proportion which the number of such male citizens shall bear to the whole number of male citizens 21 years of age in such state. . . . If the Legislature chooses the Electors itself, the right to vote for Presidential Electors is thereby denied to every male citizen 21 years of age. Consequently, the State will deprive itself of all representation in the Electoral College.[273]

Hurd clarified that he "did not say the Legislatures of the States have not power by law to provide for election of Electors by Congressional districts."[274] Hurd, therefore, anticipated the judgment in *McPherson*,[275] but for very different reasons. Hurd had partisan motivations in making his argument, but partisan motivations are not uncommon for members of Congress. His analysis was controversial,[276] but it was not unthinkable.

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271. 5 CONG. REC. 1026 (1877).

272. *See* F. William O'Brien, *The Blaine Amendment 1875-1876*, 41 U. DET. L.J. 137, 152 (1963) ("Frank Hurd, a lawyer and graduate of Kenyon College, had a long association with the law before he was elected in 1874 as a Democratic Congressman from Ohio. He had been a prosecuting attorney in Knox County, a member of the state senate, and city solicitor of Toledo. In 1868 he was appointed to codify the criminal laws of Ohio. His bid for reelection to the House in 1877 was rejected.").

273. *Choosing Electors by Legislatures*, CHI. DAILY TRIB., July 12, 1880, at 3.

274. *Id.*

275. McPherson v. Blacker, 146 U.S. 1 (1892).

276. *See, e.g.*, *Choosing Electors*, ST. LOUIS GLOBE-DEMOCRAT, July 12, 1880, at 4 ("Mr. Hurd, after long kicking against the amendments, has suddenly become so thorough a convert to them that he interprets the second section of the fourteenth amendment as depriving the States,

C. Contemporaneous Understandings of Section 2

Newspaper coverage from 1868 advances the claim that Section 2 protects against state legislatures choosing presidential electors.[277] Florida was restored to the Union on June 25, 1868, and the Reconstruction legislature's decision to choose presidential Electors without a popular vote provoked controversy.[278] Newspapers in the North[279] and South[280] denounced the move as undemocratic. Several newspapers, including in South Carolina (where, only eight years earlier, the state had the distinction of being the last state legislature to choose presidential Electors without conducting a popular vote),[281] went further and argued that depriving Floridians of the ability to vote in presidential elections triggered the apportionment penalties of Section 2.[282]

If Section 2 reduced apportionment according to the extent of disenfranchisement, the newspapers reasoned, total disenfranchisement should result in a total loss of representation.[283] "When the right of voting for Presidential electors is denied to all voters of a State," an Anderson, South Carolina newspaper reasoned, "then the basis of representation in such State must be reduced by the number of all the voters, which is to say that it is to have no basis of representation at all."[284] The *Charleston Daily News* agreed.[285] "The plain conclusion" of Section 2 of the Fourteenth Amendment, the paper argued, "is that if in any State the election of Presidential electors is taken out of the hands of the people and placed in the hands of the Legislature, the whole number of citizens in the State, not members of the Legislature, will be excluded from the basis of representation, which would give the state no more than one-hundredth part of one representative or vote

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by implication, of a power which is clearly conferred on them by the first section of the second article of the Constitution.").

277. *See, e.g.*, *Choice of Presidential Electors*, N.Y. TIMES, Aug. 8, 1868, at 4, https://timesmachine.nytimes.com/timesmachine/1868/08/08/78952288.html?pageNumber=4 [https://perma.cc/LS26-Y5TW].

278. *See, e.g.*, *id.*

279. *See, e.g.*, *id.*; *The Radical Plan To Prevent an Election in the Southern States*, BROOKLYN DAILY EAGLE, Aug. 8, 1868, at 2; *Choice of Presidential Electors*, CLEVELAND DAILY PLAIN DEALER, Aug. 10, 1868, at 2.

280. *See, e.g.*, *Congress Caught in Its Own Trap*, *supra* note 235, at 2; *Affairs in Washington, supra* note 1, at 3; N.Y. Herald, Letter to the Editor, *Caught in Their Own* Trap, ANDERSON INTELLIGENCER (S.C.), Aug. 19, 1868, at 4.

281. *See supra* note 243 and accompanying text.

282. *Congress Caught in Its Own Trap*, *supra* note 235, at 2.

283. *See id.*; N.Y. Herald, *supra* note 280, at 4.

284. N.Y. Herald, *supra* note 280, at 4.

285. *Congress Caught in Its Own Trap*, *supra* note 235, at 2.

in the electoral college instead of the number to which she is now entitled."[286] The *Mobile Daily Register* argued:

> By the second section of the fourteenth amendment it is provided that "when the right to vote at any election for the choice of electors for President and Vice-President of the United States" is denied to the people of any state, said state is to lose its representation in Congress, and by Article II, sec. 1, par. 2 of the Constitution of the United States, each State is to have "a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress." Reconstructed Florida having denied its people the right to vote for Presidential electors at the next coming election, loses, *ipso facto*, its right of representation in Congress, and with that its right of representation in the Electoral College.[287]

The *New York World*, following a similar analysis, concluded, "By the second section of the fourteenth amendment it is provided that 'when the right to vote at any election for [Presidential electors]' is denied to the people of any State, said State is to lose its representation in Congress, and . . . is to have a 'number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress.'"[288]

Other newspapers were unconvinced. "Constitutionally," the *New York Times* judged, "the Florida legislature may have acted within its powers. . . . What South Carolina was at liberty to do before the war, Florida is free to do now; and other of the Southern States may follow in the same path, if they please."[289] Still, the *Times* opined that "the wisdom of the step . . . is extremely doubtful."[290] The *Daily Missouri Republican* charged that the Florida legislature, by denying the people the right to vote in presidential elections, had committed "a very great outrage . . . upon the people."[291] Still, the newspaper considered dubious the constitutional argument that this denial of the right to vote would trigger Section 2, pronouncing, "There can be no question, we presume, that every State has the authority to elect through its Legislature if it pleases."[292] The *Baltimore Sun* conceded that "[c]ertainly the *letter* of [Section 2] might seem to warrant

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286. *Id.*

287. *Caught in Their Own Traps*, MOBILE DAILY REG., Aug. 19, 1868, at 2.

288. *No Go*, WORLD, Aug. 14, 1868, at 4 (first quoting U.S. CONST. amend XIV, § 2; then quoting *id.* art. II, § 1).

289. *Choice of Presidential Electors*, *supra* note 277, at 4.

290. *Id.*

291. *Presidential Electors*, DAILY MO. REPUBLICAN, Aug. 6, 1868, at 2.

292. *Id.*

the question whether . . . any . . . State, whose Legislature deprives all the male citizens of the right to vote for presidential electors, by giving that power to the Legislature does not lose her representation," but, the paper countered, "it is probable that such construction is not in accordance with the purpose of the law, and . . . a radical Congress" was unlikely to punish a state for choosing Republican presidential Electors.[293] In any event, the Florida Electors cast their votes for President Grant, and Florida incurred no apportionment penalty.[294]

These newspaper accounts were not, of course, dispassionate scholarly inquiries into the meaning of Section 2. Democratic newspaper writers disliked the Fourteenth Amendment and the Republican Party. When it seemed that the Fourteenth Amendment might prohibit the Republican Party from engaging in electoral chicanery, these writers jumped at the opportunity to gloat that the Republicans would be hoisted by their own petard. The purpose of repeating the arguments of these writers is not to endorse or condone the loathsome racial views held by the opponents of Reconstruction. This evidence shows that our interpretation of Section 2 was thinkable to a contemporary audience. Democratic newspapers would have had nothing to gain politically by making an argument that their readers would find laughable. This interpretation was sufficiently plausible in 1868 that it was thought useful as a cudgel.

The only other instance after the ratification of the Fourteenth Amendment of a state legislature choosing Electors was Colorado in 1876.[295] Colorado joined the Union on August 1, 1876.[296] Congress admitted Colorado as a state with the aim of influencing the presidential election of 1876—an election that had several irregularities.[297] Citing the short period of time between its admission to the Union and the presidential election, and the expense of the July referendum on statehood, the Colorado legislature declined to hold a popular election.[298] Bohnhorst, Fitzgerald, and Soifer argue that "there was no reason to suggest that [the Colorado legislature's selection of presidential Electors] constituted a usurpation of the rights of the people or that it was otherwise unconstitutional," because "the people of Colorado ordained and established a Constitution in which they delegated to the legislature the power

293. *The Electoral Vote and the Fourteenth Amendment*, SUN (Md.), Aug. 15, 1868, at 2.

294. *See* Shane, *supra* note 15, at 545.

295. *Id.*

296. *Id.* at 546 n.43.

297. *See* MICHAEL FITZGIBBON HOLT, BY ONE VOTE: THE DISPUTED PRESIDENTIAL ELECTION OF 1876, at 28–32 (2008).

298. *Id.* at 32; Shane, *supra* note 15, at 545–46.

to elect their electors in 1876, the year that Colorado became a state," and the people of Colorado were thereby "[a]cting in what James Madison referred to as their highest sovereign capacity."[299] In any case, unlike in 1868, there was no burst of contemporaneous press coverage invoking Section 2 in response to this abrogation of Coloradans' right to vote for President.

* * *

The originalist evidence surrounding Section 2 of the Fourteenth Amendment is decidedly mixed. On the one hand, we could not find any evidence from before the ratification of Section 2 suggesting that it might be used to prevent state legislatures from choosing presidential Electors without holding a popular election. On the other hand, such a construction has been suggested as far back as August 1868—only one month after ratification.[300] This indeterminacy should foreclose an objection rooted in history to the textual argument we advance in this Article.[301] While some jurists have

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299. Bohnhorst et al., *supra* note 269, at 299 (citing James Madison, *The Report of 1800, [7 January] 1800*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-17-02-0202).

300. *See supra* Section III.C.

301. It should also be noted that one can make an originalist argument for the right to vote without reference to Section 2. Randy E. Barnett and Evan D. Bernick advance such an argument:

> [R]ights that are subsequently added to the Constitution are, without any enforcement clause, available to the courts to enforce via the Privileges or Immunities Clause combined with the Due Process of Law Clause of the Fourteenth Amendment.
>
> A right that falls into this category is the right to vote. While more than a few dissenters existed, we have seen that the overwhelming consensus, both before and immediately after the adoption of the Fourteenth Amendment, was that the right to vote was not a privilege of citizenship. But this does not mean that it could never become one. That process was begun with the enactment of Section 2 of the Fourteenth Amendment, which penalized states for failing to protect the equal rights of males to vote. It was then further entrenched by the Fifteenth Amendment, which extended the protection of this right to male citizens.
>
> Because both Section 2 of the Fourteenth Amendment and the Fifteenth Amendment expressly limited the protection of the right to vote to male citizens, we do not believe these two amendments established it as a fundamental right of all citizens. These were, however, important steps along the way. We think it was the Nineteenth Amendment that finally accomplished this. Since 1920, the right to vote has been a fundamental privilege or immunity "enjoyed" by all major citizens of the United States who have not been dispossessed of their right by a judicial adjudication of either wrongdoing or mental incapacity. We know this because we can read the text of the Constitution.

expressed deep skepticism about the persuasiveness of legislative history,[302] when the historical evidence is deeply ambiguous—as it is with Section 2—there should be no impediment to following textual evidence wherever it leads, even if the destination may feel surprising.

IV. IMPLICATIONS

The textual evidence overwhelmingly supports the conclusion that Section 2 provides a powerful remedy when states abrogate popular elections for presidential Electors. The first Section of this Part reiterates that conclusion, and the second Section of this Part explains why states retain broad authority to prescribe the manner of popular election for presidential Electors without triggering Section 2 penalties. In particular, Section 2 poses no obstacle to joining the National Popular Vote Interstate Compact.

A. Section 2 Creates a Practical Right To Vote in Presidential Elections

Although Section 2 does not directly create an individual right to vote for presidential Electors, the penalties it imposes are so stiff that it is hard to imagine any state would willingly incur them. A state legislature that violated Section 2 by annulling a popular presidential election would have no representation in the House and only two presidential Electors for four years.[303] This penalty would apply both if the state legislature preemptively announced that the state would not hold a popular election for presidential Electors and if the state held a popular election but, displeased with the outcome, ignored the results and selected presidential Electors by legislative election instead.[304]

The application of Section 2 in the case of a preemptive cancelation requires somewhat more analysis. If a state retroactively annulled a popular election for presidential Electors that had been conducted under state law, then it would straightforwardly abridge its citizens' right to vote in the presidential election, necessitating the imposition of Section 2 penalties. If

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RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 244 (2021).

302. *See* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 609 (2010) (Scalia, J., concurring) (questioning whether "legislative history could ever be persuasive").

303. *See supra* Section I.A.

304. *Id.*

the state instead proactively changed the law to do away with a popular election for presidential Electors, then the court would have to rule on whether the replacement mechanism for selecting presidential Electors constituted an "election." If the replacement mechanism were the selection of Electors by the state legislature, that would always constitute an "election" triggering Section 2 penalties.[305] Other cases would necessitate further analysis. Historically, the only two mechanisms for states' selection of presidential Electors have been popular election and legislative election.[306] We have argued that the potential prospect of gubernatorial selection is less likely to subvert majoritarian decision-making,[307] and in any case there could be grounds for regarding a gubernatorial appointment of Electors as an "election" that would trigger Section 2 penalties.[308]

Therefore, Section 2 creates a practical right to vote in presidential elections for adult[309] citizens who have not participated in crimes[310] and who reside in one of the fifty states or D.C. States still possess considerable power over the manner of presidential elections. Section 2 is a floor and not a ceiling on participation, so states can allow people who have been convicted of crimes to vote in presidential elections.[311] Although Maine and Nebraska are the only states that do not currently hold winner-take-all elections,[312] states are free to allow congressional districts to choose presidential Electors based on the popular vote in those districts rather than allocating all presidential Electors on a winner-take-all state-wide vote. We also believe, as we argue in the next Section, that states could allocate their presidential Electors according to the national popular vote.

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305. *See supra* Section II.A.

306. *See supra* Section III.A.

307. *See supra* text accompanying note 191.

308. *See supra* notes 192–195 and accompanying text.

309. *See* U.S. CONST. amend. XIX (preventing denial of the vote on account of sex for citizens); *id.* amend. XXVI, § 1 (preventing denial of the vote on account of age for citizens who are eighteen or older).

310. U.S. CONST. amend. XIV, § 2 (allowing for denial of the vote of citizens "for participation in rebellion, or other crime").

311. As of 2019, "48 U.S. states and the District of Columbia prohibit voting while incarcerated for a felony offense; 35 states prohibit persons on parole or probation from voting; and twelve states impose voting restrictions on at least some categories of ex-offenders who have completed their sentence." Tilman Klumpp et al., *The Voting Rights of Ex-Felons and Election Outcomes in the United States*, 59 INT'L REV. L. & ECON. 40, 40 (2019).

312. Samuel S.-H. Wang & Jacob S. Canter, *The Best Laid Plans: Unintended Consequences of the American Presidential Selection System*, 15 HARV. L. & POL'Y REV. 209, 214 n.21 (2020); ME. REV. STAT. ANN. tit. 21-A, § 805.2 (2019); NEB. REV. STAT. § 32-714 (2023).

B. States Retain Broad Authority To Prescribe the Manner of Popular Election for Presidential Electors

A particularly interesting question raised by this Article's analysis concerns the constitutional implications of the National Popular Vote Interstate Compact. We have argued that state legislation that interferes with popular elections for President exposes states to a representational penalty under Section 2 of the Fourteenth Amendment. Some might worry that signing onto the National Popular Vote Interstate Compact—which commits signatory states' presidential Electors to the winner of the national popular vote in a presidential election provided that sufficient states have signed on to ensure that signatories collectively constitute a majority of Electoral votes[313]—would thus violate Section 2 and expose signatories to the penalty. Although this suggestion is intriguing, we reject this inference.

Signing onto the National Popular Vote Interstate Compact would not trigger a penalty under Section 2 because it would not deprive voters in the state of the right to participate in the presidential election. It would merely alter the manner in which their votes become effective.[314] While Section 2 penalizes states that deprive their citizens of the right to vote, it does not eliminate states' power to regulate the manner of elections in various respects. States retain substantial power to design their presidential electoral systems. States, for example, could choose a proportional system, a winner-take-all system, or some other alternative.[315] In a related vein, Akhil Amar has argued that it would be constitutional for a state to implement an electoral system that only yields some probabilistic chance of selecting the candidate favored by the majority of voters.[316] This would not offend Section 2, because it would simply alter the manner of the election: rather than depriving people of the right to vote, making their votes not count, it would alter the manner

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313. *Agreement Among the States To Elect the President by National Popular Vote*, NAT'L POPULAR VOTE (May 25, 2023), https://www.nationalpopularvote.com/sites/default/files/202305/1-pager-npv-v227-2023-5-25.pdf [https://perma.cc/RS8B-5X74].

314. Similarly, states are permitted to apportion their presidential Electors on the basis of district-level election returns. *See* McPherson v. Blacker, 146 U.S. 1, 25 (1892) ("If the legislature possesses plenary authority to direct the manner of appointment, and might itself exercise the appointing power by joint ballot or concurrence of the two houses, or according to such mode as designated, it is difficult to perceive why, if the legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket, and not by districts.").

315. *See supra* note 312 and accompanying text.

316. Akhil Reed Amar, Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283, 1283 (1984) (arguing that the system of "lottery voting," which involves choosing Senators and Representatives through a system in which the winner is drawn randomly from a pool representing the proportions of votes for each of the candidates, would be constitutional).

in which their votes count. Similarly, states adhering to the National Popular Vote Interstate Compact would simply be choosing to have their citizens' votes for presidential Electors count as constituents of the national popular vote rather than count as a discrete state delegation. This manner of election would not deprive the citizens of the state of the right to participate or even of the right to participate in a meaningful fashion in a vote for presidential Electors. Indeed, in many states, this innovation might increase the meaningfulness of citizens' votes by giving them a greater likelihood of being determinative for the outcome of the presidential election. Thus, both formalist and functionalist reasoning supports the conclusion that the National Popular Vote Interstate Compact does not give rise to any Section 2 problem.

V. CONCLUSION

The absence of determinate evidence about the original meaning of Section 2 frees us to make a choice among the three possible understandings we have explored in Part II. To review, Section 2 might be understood to apply to state elections just as much as federal elections; it might penalize state legislative election of the named officials but not gubernatorial appointment; or it might be interpreted, on federalism grounds, to apply in a very attenuated way to state elections. In any case, Section 2 penalizes states that deprive their citizens of the right to participate in popular elections for presidential Electors, whether preemptively or retroactively, by eliminating the state's House delegation. This steep penalty, as we have seen, was intentionally chosen for its powerful deterrent effect.

Section 2 of the Fourteenth Amendment, like Section 3, provides a valuable tool for safeguarding American democracy in an age of election subversion. And it is even clearer that Section 2 is self-executing and is properly enforced by courts whether or not Congress seeks to enforce it. This Article is intended as a warning to states considering the radical course of annulling a popular election for President. States that pursue this avenue could face harsh consequences, at least if courts are not cowed from doing their duty under the Constitution.