



SUPREME COURT MAY INVALIDATE H.R.1

March 2019

I. SUMMARY

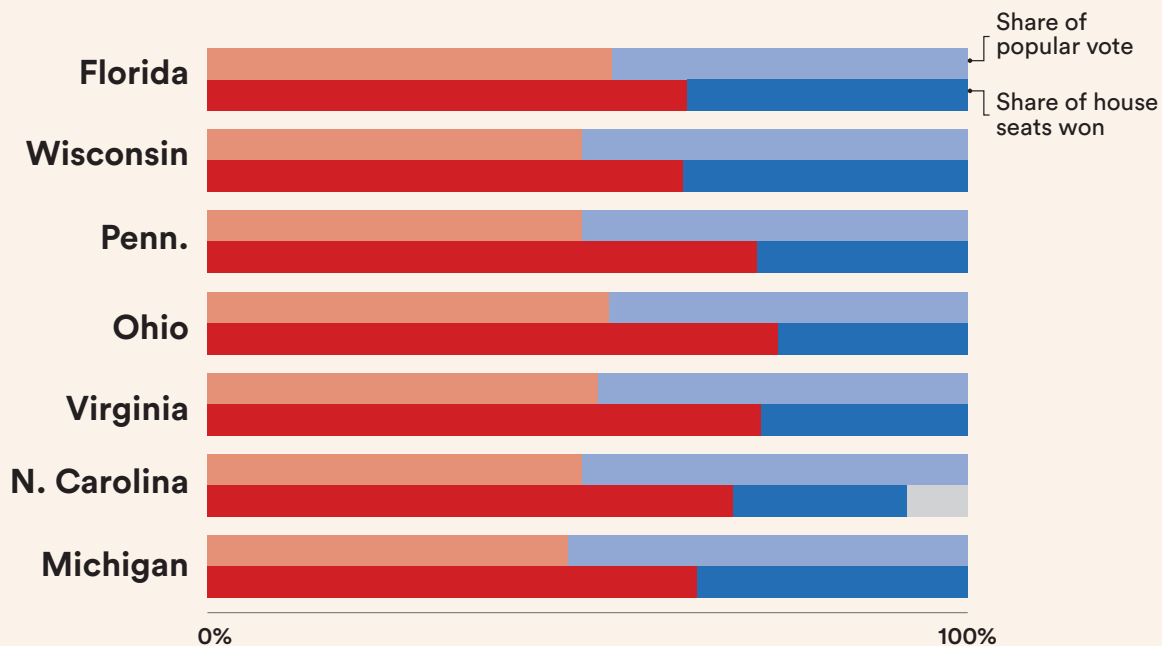
Since 2005, the Supreme Court has upheld restrictive Voter ID laws in Indiana¹ and North Dakota,² allowed dark money to flood the electoral process,³ dismantled the Voting Rights Act,⁴ and authorized voter purges in Ohio.⁵ House Resolution 1, the For the People Act (“H.R. 1”), is intended to undo this damage, and includes provisions to end gerrymandering, register every eligible American voter automatically, reduce the influence of big money in federal elections, and prohibit voter purges.⁶ While H.R. 1 would enhance the robustness of American democracy, there is little doubt that if Congress enacted the law, the Supreme Court would look skeptically at its restorative provisions, and would strike down its key elements on the basis of unpersuasive constitutional analysis.

II. INDEPENDENT REDISTRICTING

Background

In 31 states, the power to redraw electoral districts lies with the state legislature.⁷ In practice, the majority party—whether Democratic or Republican—often uses this power to give disproportionate representation to some groups while limiting the electoral power of others. This practice, commonly known as gerrymandering, establishes congressional districts that create undemocratic results. In the 2012 congressional elections, Republicans received 1.4 million fewer votes than Democrats, but held onto a 33-seat congressional majority thanks to gerrymandering by GOP-controlled state governments.⁸ In Maryland in 2016, however, Republican candidates for U.S. House seats won 37

FIGURE 1 | GOP Gerrymandering at its Best



Source: Mother Jones.

1 Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008).

2 Brakebill v. Jaeger, 139 S.Ct. 10 (2018) (mem.).

3 Citizens United v. FEC, 558 U.S. 310 (2010).

4 Shelby Cty., Ala. v. Holder, 570 U.S. 529 (2013).

5 Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018).

6 Nicholas Fandos, Aiming at Trump, Democrats Lay Out Agenda for a Post-Shutdown Congress, N.Y. Times (Jan. 4, 2019), <https://www.nytimes.com/2019/01/04/us/politics/house-democrats-ethics-voting-rights.html>.

7 Who Draws the Maps? Legislative and Congressional Redistricting, Brennan Center For Justice (Jan. 30, 2019), <https://www.brennancenter.org/analysis/who-draws-maps-states-redrawing-congressional-and-state-district-lines>.

8 Ari Berman, Five Myths About Gerrymandering, Wash. Post (Mar. 8, 2018), https://www.washingtonpost.com/outlook/five-myths/five-myths-about-gerrymandering/2018/03/08/f9d1a230-2241-11e8-badd-7c9f29a55815_story.html.

percent of the vote, but only won one race “because of the way Democrats drew district boundaries after the 2010 Census.”⁹ Gerrymandering is also common in maps of state-level districts. Republicans received just 48.6 percent of the popular vote for the Wisconsin Assembly in 2012, but won 60 of the 99 seats.¹⁰

The Supreme Court has ruled that race-based gerrymandering violates the Voting Rights Act,¹¹ but has resisted challenges to partisan gerrymandering under several theories.¹² Moreover, the Court has found that partisan intent can be a defense to allegations of racial gerrymandering, even if a racial group favors one party such that a partisan gerrymander is a *de facto* racial gerrymander.¹³ In the most recent partisan gerrymandering cases, the Court has sidestepped the issue, instead finding against the parties bringing suit on more technical grounds of standing¹⁴ and timeliness.¹⁵

Because the Court has been hesitant to strike down district maps that purposely create a disproportionate advantage for a political party, some states have turned to their own constitutions to implement redistricting reform.¹⁶ Voters in other states have passed redistricting reform by ballot measure, which include independent redistricting commissions and limits on the criteria state legislatures can use

to draw district maps.¹⁷ But while ballot initiatives have been successful, that avenue is only available to voters in 26 states, and redistricting reform is unlikely to be passed by statute in states where entrenched legislatures have no political incentive to implement change. As long as the Supreme Court remains uninterested in interventions against partisan gerrymandering, the only path to comprehensive reform runs through Congress.

Arguments

In an effort to end partisan gerrymandering, H.R. 1 would take redistricting out of the hands of politically motivated state legislatures, instead requiring states to use partisan balanced independent commissions to draw electoral districts based on non-political criteria.¹⁸ If Congress passed H.R. 1 and the President signed it into law, these reforms would be unlikely to withstand judicial review. Justice Kennedy was considered a swing vote on the issue of partisan gerrymandering.¹⁹ In his absence, it is unlikely that the current Supreme Court will be more amenable to arguments for judicial intervention in partisan gerrymandering.²⁰ Instead, the current Court can be expected to strike down independent redistricting reforms, locking in the power of state legislatures to create disproportionate representation at the state and federal level through partisan gerrymandering.

9 Christopher Ingraham, How Maryland Democrats Pulled Off Their Aggressive Gerrymander, Wash.Post (Mar. 28, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/03/28/how-maryland-democrats-pulled-off-their-aggressive-gerrymander/>.

10 Michael LI and Thomas Wolf, Five Things to Know About the Wisconsin Partisan Gerrymandering Case, Brennan Center for Justice (June 19, 2017), <https://www.brennancenter.org/blog/5-things-know-about-wisconsin-partisan-gerrymandering-case>.

11 Shaw v. Reno, 509 U.S. 630, 657–58 (1993).

12 Benisek v. Lamone, 138 S. Ct. 1942 (2018); Gill v. Whitford, 138 S. Ct. 1916 (2018).

13 Easley v. Cromartie, 532 U.S. 234, 244–58 (2001). However, other recent cases show that the Court does still apply strict scrutiny when race is a factor in redistricting. See, e.g., Cooper v. Harris, 137 S. Ct. 1455, 1468 (2017); Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 794 (2017).

14 Gill, 138 S. Ct. at 1929–34.

15 Benisek, 138 S. Ct. at 1945.

16 League of Women Voters v. Detzner, 172 So. 3d 363 (Fla. 2015); League of Women Voters v. Commonwealth, 178 A.3d 737 (Pa. 2018).

17 Annie Lo, Citizen and Legislative Efforts to Reform Redistricting in 2018, Brennan Center For Justice (Nov. 7, 2018), <https://www.brennancenter.org/analysis/current-citizen-efforts-reform-redistricting>.

18 Nicholas Stephanopoulos, H.R. 1 and Redistricting Commissions, Election L. Blog, <https://electionlawblog.org/?p=103123>.

19 Justice Kennedy joined the liberal justices to uphold the 2018 redistricting reform in Pennsylvania. See also Michael Wines, Kennedy’s Retirement Could Threaten Efforts to End Partisan Gerrymandering, N.Y. Times (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/kennedy-scotus-gerrymandering.html>.

20 See Austen Erblat, How Brett Kavanaugh Could Freeze Gerrymandering Reform Nationwide, Salon (Jan. 8, 2019), <https://www.salon.com/2019/01/08/how-brett-kavanaugh-could-freeze-gerrymandering-reform-nationwide>.

1. The Court could find that (a) a congressional mandate to shift redistricting power from state legislatures to independent commissions violates Article I, § 4, Clause 1 of the Constitution, and (b) state-level commissions implemented by ballot initiative unconstitutionally circumvent state legislatures.

Conservatives on the Court have advanced this argument against independent redistricting commissions enacted by ballot initiative. When Arizona voters enacted independent redistricting reform through referendum, a liberal majority of the Supreme Court held that it did not violate Article I, § 4, Clause 1 of the Constitution, which stipulates that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations...”²¹ The majority held that a ballot initiative represents the legislative power of the people, and was therefore in accordance with that clause.²² However, conservative justices were not persuaded. In his dissenting opinion, Chief Justice Roberts read “legislatures” quite literally, and found that any redistricting process that does not include the state legislature in some form would be unconstitutional.²³ A conservative court could adopt such reasoning to rule that any independent redistricting commission imposed by Congress is unconstitutional.²⁴

The Court’s reasoning could reach beyond federally-imposed redistricting reforms to state-level reforms passed by ballot initiative. If an independent commission established by referendum, similar to the Arizona case, is challenged in court again, the Supreme Court could use the opportunity to

apply the textualist interpretation of the elections clause described *supra* in Chief Justice Roberts’s dissent. This could foreclose *all* avenues of ending partisan gerrymandering. If the Court rules that redistricting reform imposed by state ballot initiative is unconstitutional, a conservative judicial priority of protecting state legislatures’ power of redistricting over the interests of abolishing partisan gerrymandering would be firmly established.

While the Supreme Court may well conclude that congressional mandates shifting redistricting power from state legislatures to independent commissions violate the Constitution and that state-level commissions implemented by ballot initiative unconstitutionally circumvent state legislatures, such findings would be unpersuasive. The Court recently recognized the principle that Congress may “make or alter” congressional districts in response to partisan gerrymandering, and ruled just four years ago that Arizona’s independent redistricting referendum is constitutional.²⁵

2. The Court’s 14th Amendment jurisprudence would almost certainly prohibit Congress from intervening in the drawing of state legislative districts.

If the Court rules that independent commissions are unconstitutional, redistricting would be left exclusively in the hands of state legislatures. Because state legislative districts are smaller and more numerous than congressional districts, they are easier to manipulate for partisan advantage. Thus, congressional maps would be left in the hands of legislatures that are often gerrymandered themselves.

While H.R. 1 does not attempt to regulate state legislative maps, a future reform might address this issue, especially if independent commissions

²¹ U.S. Const. Art. I, § 4, cl. 1.

²² Arizona State Legislature v. Arizona Indep. Redistricting Com’n, 135 S.Ct. 2652 (2015).

²³ *Id.* at 2687 (Roberts, C.J., dissenting).

²⁴ Elections Clause—Legislative Control Of Redistricting—Arizona State Legislature v. Arizona Independent Redistricting Commission, 129 Harv. L. Rev. 191 (2015).

²⁵ Vieth v. Jubelirer, 541 U.S. 267, 275 (2004).

are struck down. Congress's constitutional power to regulate elections extends to legislative maps, but only for the purpose of *federal* elections.²⁶ To regulate state legislative maps, Congress would have to invoke its enforcement power under § 5 of the Fourteenth Amendment. Over the past 20 years, the Supreme Court has dramatically restricted Congress's power to address equal protection violations under the Fourteenth Amendment. The Court has ruled that Congress's remedy must be "congruent and proportional" to the problem it is trying to address.²⁷ Given the current Court's emphasis on federalism, Congress's perceived intrusions into the state redistricting process likely would not satisfy this standard. More fundamentally, the Court has not found that gerrymandering constitutes a judicially recognized constitutional harm. Therefore, it is unlikely that the Court would uphold attempts to address the gerrymandering of state legislative districts on the basis of its Fourteenth Amendment powers.

The Court's likely construal of its Fourteenth Amendment powers would be unpersuasive, as it should recognize its guarantee of "both formal and substantial equality among voters."²⁸ The Equal Protection Clause "does not make some groups of citizens more equal than others," and therefore should not only prohibit racial gerrymandering, but also partisan gerrymandering.²⁹ The Court has upheld a constitutional guarantee of both formal and substantive equality under the Fourteenth Amendment, and partisan gerrymandering should be seen as a denial of that substantial equality.³⁰ Once that constitutional violation is accepted, it follows that Congress can intervene under § 5 of the Fourteenth Amendment.

3. Congressional efforts to end partisan gerrymandering for all states could be struck down on federalism grounds.

While a textualist reading of the clause seems to find that Congress could "make or alter" redistricting laws, the Court could invoke broader principles of federalism to justify a different interpretation of that portion of the clause.³¹ Conservative justices



...the current Court can be expected to strike down independent redistricting reforms, locking in the power of state legislatures to create disproportionate representation at the state and federal level through partisan gerrymandering.

could argue that, under the Tenth Amendment, principles of federalism preserve the right of states to interpret their own laws. More specifically, the Anti-Commandeering Principle, itself created out of whole cloth by a resurgent Conservative majority in the 1990s, could be used to assert that the federal government "cannot require states to regulate."³² It is an amorphous principle that could apply to nearly any federal regulation, and Conservative justices often use it pretextually to find that any federal regulation that is not to their liking "impermissibly transgresses the Constitution's boundary between state and federal authority," which "runs counter to this Nation's system of federalism."³³ It has been used

26 U.S. Const. Art. I, § 4, cl. 1.

27 *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

28 *Vieth*, 541 U.S. at 343 (Souter, J. dissenting).

29 *Karcher v. Daggett*, 462 U.S. 725, 749 (1983).

30 *Vieth*, 541 U.S. at 343 (2004) (Souter, J. dissenting).

31 U.S. Const. Art. I, § 4, cl. 1.

32 See *New York v. United States*, 488 U.S. 1041 (1992); *Printz v. United States*, 521 U.S. 898 (1997). However, this principle is not universally accepted, see Steven Schwinn, Symposium: It's Time to Abandon Anti-Commandeering (But Don't Count on This Supreme Court to Do It), SCOTUSblog (Aug. 17, 2017), <https://www.scotusblog.com/2017/08/symposium-time-abandon-anti-commandeering-dont-count-supreme-court/>.

33 *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 523 (2012).

as a cudgel against legislation, such as the Affordable Care Act, passed by Democratic majorities.³⁴ Because H.R. 1 would compel states to establish independent redistricting commissions for congressional elections, a justice motivated to invalidate it could simply cite principles of federalism to rule that requiring such commissions are an unconstitutional overreach of the federal government.³⁵

However, it is uncontroversial that Congress has the power to intervene in the drawing of congressional districts. In an opinion joined by three other conservative justices, Justice Antonin Scalia accepted Congress's authority to "make or alter" congressional districts in response to partisan gerrymandering.³⁶ Congress's enumerated power to regulate federal elections should neutralize any federalism argument. Further, the idea of the judiciary acting to promote, rather than combat, entrenchment of the legislative branch runs counter to a foundational principle of constitutional law accepted by the Court since 1938.³⁷

4. The Court is less likely than ever to intervene against partisan gerrymandering itself.

In *Vieth v. Jubelirer*, Justice Kennedy indicated that he was open to an evidence-based "workable standard" to limit partisan gerrymandering.³⁸ In response, legal scholars and political scientists developed empirical methods of identifying partisan gerrymandering, most notably the "efficiency gap,"³⁹

the theory on which *Gill v. Whitford*, the challenge to Wisconsin's partisan gerrymander, was based.⁴⁰ While the Court in *Gill* did not rule on the merits of the efficiency gap, instead sidestepping the issue on technical grounds,⁴¹ conservatives on the Court viewed the metric skeptically at oral argument—notably, Chief Justice Roberts dismissed it as "sociological gobbledygook."⁴² Moreover, the Court's conservative majority could invoke new arguments questioning the value and accuracy of the "efficiency gap" to justify dismissing such data entirely.⁴³ The loss of Justice Kennedy's swing vote will likely mean the Court is less receptive to data-based arguments for the necessity of redistricting reform and therefore skeptical of congressional reform.

In fact, the current Court might preemptively establish precedent that is unfavorable to interventions against partisan gerrymandering, foreshadowing conservative jurisprudence on the issue that any congressional redistricting reform would have to overcome. The Court will hear two cases of partisan gerrymandering this term, both which it previously heard and remanded.⁴⁴ These cases will offer a glimpse of how the replacement of Justice Kennedy's swing vote with Justice Kavanaugh's conservative vote will affect the Court's stance on partisan gerrymandering. But the Federalist Society has already made its position clear: it has heralded *Gill v. Whitford* as "the end of partisan gerrymandering litigation."⁴⁵

³⁴ See *id.*

³⁵ Cf. Printz, 521 U. S. at 935.

³⁶ *Vieth*, 541 U.S. at 275.

³⁷ See *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

³⁸ See *Vieth*, 541 U.S. at 311 (Kennedy, J. concurring).

³⁹ See Nate Cohn and Quoc Trung Bui, *How the New Math of Gerrymandering Works*, *The New York Times*, <https://www.nytimes.com/interactive/2017/10/03/upshot/how-the-new-math-of-gerrymandering-works-supreme-court.html>.

⁴⁰ *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

⁴¹ See *id.* at 1931.

⁴² Philip Rocco, *Justice Roberts Said Political Science Is 'Sociological Gobbledygook.' Here's Why He Said It, and why he's mistaken*, *Wash. Post* (Oct. 4, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/04/justice-roberts-said-political-science-is-sociological-gobbledygook-heres-why-he-said-it-and-why-hes-mistaken/>

⁴³ See Sam Kean, *The Flaw in America's 'Holy Grail' Against Gerrymandering*, *Atlantic* (Jan. 26, 2018), <https://www.theatlantic.com/science/archive/2018/01/efficiency-gap-gerrymandering/551492/>.

⁴⁴ See Richard Hasen, *The Supreme Court Could Make Gerrymandering Worse*, *Atlantic* (Jan. 7, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/supreme-court-will-rule-gerrymandering-md-and-nc/579550/>.

⁴⁵ Richard B. Raile, *Partisan Gerrymandering and Party Rights: Why Gill v. Whitford Undermines All Future Partisan-Gerrymandering Claims*, *Federalist Society* (Aug. 15, 2018), <https://fedsoc.org/commentary/publications/partisan-gerrymandering-and-party-rights-why-gill-v-whitford-undermines-all-future-partisan-gerrymandering-claims>.

III. AUTOMATIC VOTER REGISTRATION

Background

H.R. 1 would establish a system of nationwide voter registration to automatically register eligible voters whenever they interact with government agencies such as the Department of Motor Vehicles or Social Security Administration. Like the National Voter Registration Act of 1993⁴⁶ (“NVRA”), which required states to allow people to register when applying for or renewing a driver’s license, H.R. 1 would leverage existing government infrastructure to promote voter registration. H.R. 1 goes further by moving from the current “opt-in” system to an “opt-out” system in which eligible voters are registered unless they affirmatively decline. National automatic registration could add nearly 60 million voters to the rolls.⁴⁷

Similar programs have already been approved in fifteen states and Washington D.C., and early results look promising.⁴⁸ Oregon, the first state to enact automatic voter registration (“AVR”), had the largest voter turnout increase in the nation in the first election after it implemented AVR.⁴⁹ The increase in turnout was especially pronounced among young people, people of color, and low-income people.⁵⁰ Beyond the states where AVR has already been implemented, the policy enjoys broad public support, with a recent survey reporting that 67 percent of respondents mostly or completely agree that all citizens should be automatically registered to vote.⁵¹

Arguments

While AVR has managed to avoid any serious legal challenges to date, it is drawing increased scrutiny from conservatives now that it is on the national

stage. When Congress expanded voting access through the NVRA, states raised a series of legal challenges. While those challenges were ultimately defeated, automatic voter registration is likely to face similar obstacles today. If H.R. 1 is signed into law, its provisions expanding voter registration might not withstand judicial review.

1. The Court could strike down AVR on First Amendment grounds.

Conservative think tanks and commentators have raised the concern that automatic voter registration would “remov[e] civic participation as a voluntary choice.”⁵² Relying on the idea that some non-registrants are “expressing displeasure with the

If H.R. 1 is signed into law, its provisions expanding voter registration might not withstand judicial review.

electoral process by not participating,” a legal challenge would frame automatic voter registration as compelled speech.⁵³ In a 2017 speech, Chair of the U.S. Election Assistance Commission and member of President Trump’s “voter fraud” commission Christy McCormick suggested that AVR would violate the Constitution, noting, “The First Amendment includes the right not to speak as well as the right to speak.”⁵⁴ Conservative critiques have already equated the choice to vote with the choice to register. This could also lead to a claim that Supreme Court precedents

46 52 U.S.C. §§ 20501–20511.

47 Eric Holder, 2016: The Right to Vote at Risk and the Promise of Automatic Voter Registration, Brennan Center for Justice, <https://www.brennancenter.org/analysis/2016-right-vote-risk-and-promise-automatic-voter-registration>.

48 See Automatic Voter Registration, Brennan Center for Justice (Nov. 7, 2018), <https://www.brennancenter.org/analysis/automatic-voter-registration>.

49 Sean McElwee, Brian Shaffner & Jesse Rhodes, Automatic Voter Registration in Oregon, *Demos*, 4 (2017), <https://www.demos.org/sites/default/files/publications/AVR%20in%20Oregon%20FINAL.pdf>.

50 See *id.* at 2–3.

51 PRRI/The Atlantic 2018 Voter Engagement Survey, Public Religion Research Institute, 11 (July 17, 2018), <https://www.prrri.org/wp-content/uploads/2018/07/PRRI-The-Atlantic-2018-Voter-Engagement-Survey-Topline.pdf>.

52 Conservatives Oppose H.R. 1, the Ultimate Fantasy of the Left, Conservative Action Network (Jan. 28, 2019), <http://conservativeaction-project.com/conservatives-oppose-h-r-1-the-ultimate-fantasy-of-the-left/>.

53 See Robert Knight, Opinion, ‘Mandatory Voter Registration’ Is a Bad Idea, *Wash. Times* (Sept. 18, 2016), <https://www.washingtontimes.com/news/2016/sep/18/mandatory-voter-registration-is-a-bad-idea/>.

54 Sam Levine, Three Members of Trump Panel Warn of Voter Fraud to Influential Conservative Group, *HuffPost* (Dec. 7, 2017), https://www.huffingtonpost.com/entry/trump-voter-fraud-commission-alec_us_5a29bfbde4b069ec48abff48.

applying careful and meticulous scrutiny to barriers to the right to vote pertain equally to supposed infringements on the right *not to register* to vote.⁵⁵ Under this theory, H.R. 1 would be subject to the same kind of heightened scrutiny as threats to voting rights.

With some conservative observers arguing that citizens have a “basic right to choose whether they wish to participate in the U.S. political process” and branding AVR as an authoritarian “[threat] to one of America’s most cherished liberties: the freedom to be left alone by the government,” the Supreme Court could entertain a First Amendment challenge to the AVR provisions of H.R. 1.⁵⁶

But given that H.R. 1 does not compel any individual to register—much less to affirmatively vote—it should not raise any First Amendment concerns. H.R. 1’s AVR provisions specifically require that every individual be given the opportunity to decline to register to vote, the bill merely provides that any eligible person who does not expressly decline will be registered. Supreme Court protection of negative speech rights has only extended to circumstances where individuals were made to actually speak, such as carrying messages on license plates⁵⁷ or being made to disclose their views.⁵⁸ The Court has not ruled that other forms of compulsory government registration, such as Social Security cards, violate the First Amendment. Given the Court’s authorization of voter purges (see VI *infra*), in which state governments terminate voter registrations, it would be inconsistent to find that voter registration implicates an important First Amendment interest.

2. The Court could strike down the law on the basis that it is outside the scope of congressional power.

The Court may invoke the Tenth Amendment and federalism concerns (see II.3 *supra*) to invalidate federal intervention into state election law. A broad reading of this amendment supports a general principle of federalism beyond the Constitution’s explicit provisions, a reading that has been used to restrict application of federal legislation to states.⁵⁹ Similar logic could be used to limit the reach of national automatic voter registration. Alleging that H.R. 1 as a whole “yanks election authority away from the states,” conservatives have rejected the requisite state cooperation as “[eliminating] the federalism that keeps elections transparent, local, and fair.”⁶⁰ And they have noted that use of state resources for AVR would divert these resources from other state functions.

In addition to an argument about federalism, the Supreme Court could find that the statute falls outside of Congress’s enumerated powers in the Elections Clause (see III.1 *supra*). Congressional authority is limited to the powers granted in the Constitution, and conservative scholars have argued that this prevents congressional regulation of some elections.

But because HR1’s AVR provision is limited to registration for federal elections, it cannot be said to be an intrusion on state election law. The aforementioned Elections Clause grants Congress authority to intervene in the “Times, Places and Manner” of federal elections, and HR1’s AVR provision falls safely within this enumerated power.

55 See *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

56 Hans A. von Spakovsky, *Mandatory Voter Registration: How Universal Registration Threatens Electoral Integrity*, Heritage Found. (Mar. 27, 2013), http://s3.amazonaws.com/thf_media/2013/pdf/bg2780.pdf.

57 See *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

58 See *Pacific Gas & Electric Co. v. Public Util. Comm’n of Cal.*, 475 U.S. 1, 11 (1986).

59 See *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

60 *Conservatives Oppose H.R. 1, the Ultimate Fantasy of the Left*, *supra*.

IV. PUBLIC CAMPAIGN FINANCING

Background

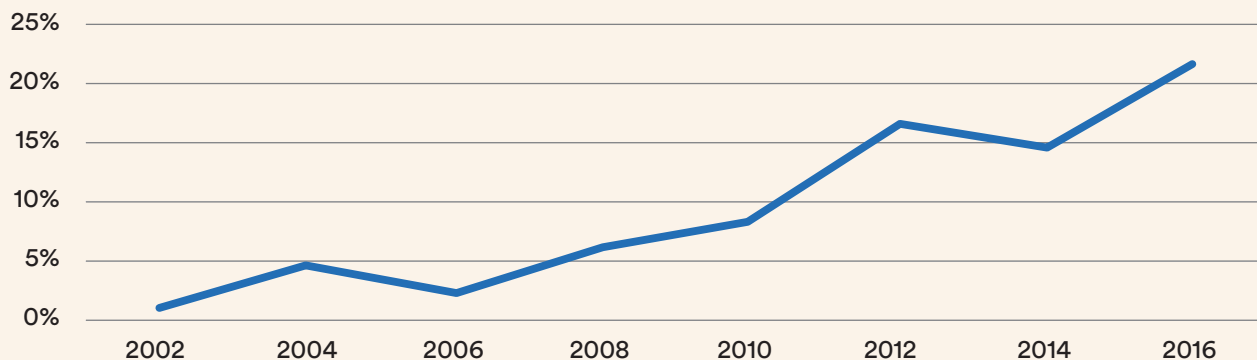
Over the past generation, the Supreme Court has dismantled campaign finance regulations, striking down limits on expenditures⁶¹ and contributions.⁶² The result is a deregulated system that favors wealthy donors and corporations.⁶³ Short of a constitutional amendment, legislation mandating public campaign financing is perhaps the only avenue for reform. Public financing would crowd out contributions of wealthy individuals and corporations and incentivize candidates to spend more time fundraising from constituents in their districts and less time cold-calling potential major donors.

New York City and other municipalities have implemented effective public financing systems for

local elections. The New York model matches all donations under \$250 by a 5-to-1 ratio, such that a \$100 donation becomes a \$600 donation, and the results have been effective in democratizing campaign contributions. In New York City, 63 percent of funds raised by participating candidates were from individual donations under \$250.⁶⁴ Those donors were also more geographically representative of New York City. New York City Council elections, which use matching contributions, attracted small-dollar donors from 90 percent of census blocks, while New York State Assembly elections, which do not use matching, drew small-dollar donors from just 30 percent of those same census blocks.⁶⁵ As a result of public financing, corruption in New York City government has plummeted.⁶⁶

H.R. 1 applies the New York model to federal elections, creating a system in which donations

FIGURE 2 | Outside Spending (not parties) as % of Total Federal Election Spending



Source: Open Secrets.

61 See *Citizens United*, 558 U.S. at 365.

62 See *McCutcheon v. FEC*, 572 U.S. 185 (2014).

63 Eleanor Neff Powell, Dollars to Votes: The Influence of Fundraising in Congress, Annual Meeting of the American Political Science Association 5 (2012), <https://apw.polisci.wisc.edu/archives/Powell%20-%20PPT%20April%202013.pdf>.

64 See Michael J. Malbin, Peter W. Brusoe & Brendan Glavin, Small Donors, Big Democracy: New York City’s Matching Funds as a Model for the Nation and States, 11 *Election L.J.* 3, 15 (2012).

65 See Elisabeth Genn et al., Donor Diversity Through Public Matching Funds, Brennan Center for Justice, 4 (2012), http://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF.

66 See *The Case for Small Donor Public Financing in New York State*, Brennan Center for Justice, 10 (2019), <https://www.brennancenter.org/sites/default/files/publications/CaseforPublicFinancingNY.pdf>.

up to \$200 are matched 6-to-1. To qualify for the program, a candidate would first have to receive 1,000 contributions under \$200, or \$50,000 in such contributions. In order to preserve the integrity of the small-dollar system, candidates who opt into the system would be foreclosed from accepting contributions greater than \$1,000 from individuals.

Argument

1. The Court could find that H.R. 1's public financing system violates the First Amendment.

The First Amendment says that Congress “shall make no law . . . abridging the freedom of speech.” The Supreme Court has held that money is speech as part of a dramatic expansion of the First Amendment led by former Justice Lewis Powell.⁶⁷ In recent campaign finance cases, the Court has focused solely on First Amendment interests, rejecting rationales for campaign finance regulation based on egalitarian concerns⁶⁸ or concerns over systemic corruption.⁶⁹ While the Court has signaled an openness to regulate quid-pro-quo corruption, it has created a bar to finding such corruption so high that only the most extreme cases could clear it.⁷⁰

The Supreme Court has expanded this First Amendment doctrine to strike down prohibitions on corporate expenditures⁷¹ and aggregate donation limits.⁷² In this money-as-speech line of campaign finance cases, the Court disfavors government regulations that burden the First Amendment right

to spend money on political speech. The Court could extend this line of reasoning to the restrictive portions of the public financing scheme in H.R. 1, and could find that foreclosing candidates who opt into the public financing system from accepting contributions of \$1,000 or more burdens the speech of donors who would like to give more than \$1,000 to a candidate. While the Court has left intact the contribution limits imposed in the Federal Elections Campaign Act of 1971 (\$2,700 per person per election in 2018), it has found that state-level contribution limits below the FECA maximum unconstitutionally burden speech.⁷³ The Court could similarly rule that the contribution limits in H.R. 1 are low enough to constitutionally burden speech.

The Court could take issue with the structure of a matching system, finding that it impermissibly deters the speech of private donors and candidates who wish to raise funds from private donors. In a 5–4 decision, the Court struck down a state-level matching system in Arizona.⁷⁴ That system provided block-grant public funds to candidates who opted in. If a participating candidate was out-raised by a privately-funded candidate, the state matched the funds raised by the privately-funded candidate. While the Court left the block-grant portion of the system intact, it invoked a somewhat novel reading of the First Amendment to strike down the matching portion of the law. Chief Justice Roberts wrote that the triggered funds arrangement “substantially burdens the speech of privately-financed candidates” by deterring them from raising money and was not justified by a “compelling state interest.”⁷⁵ The Court

⁶⁷ See *Buckley v. Valeo*, 424 U.S. 1, 16 (1976); Joe Pinsker, *How Corporations Took Over the First Amendment*, Atlantic (Apr. 1, 2015), <https://www.theatlantic.com/business/archive/2015/04/how-corporations-took-over-the-first-amendment/389249/>.

⁶⁸ See *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 749 (2011).

⁶⁹ See *McCutcheon*, 572 U.S. at 208.

⁷⁰ See *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016).

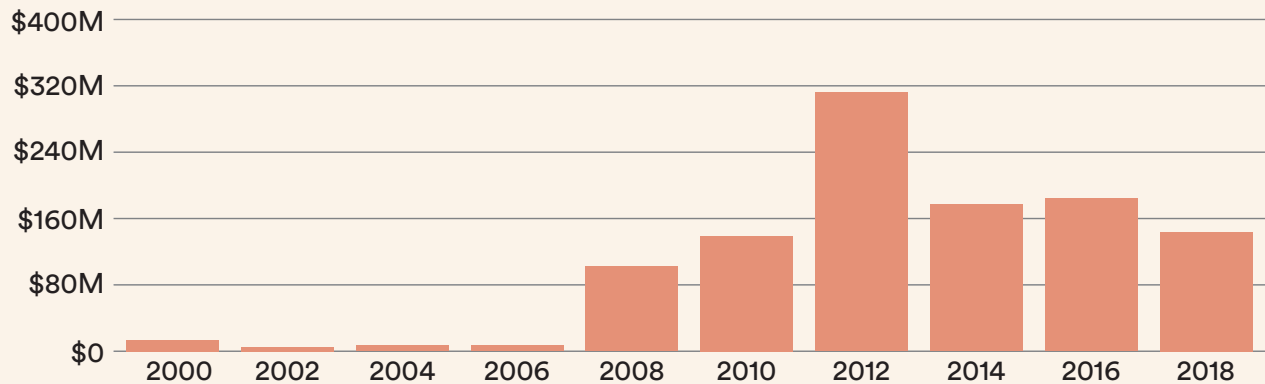
⁷¹ See *Citizens United*, 558 U.S. at 365.

⁷² See *McCutcheon*, 572 U.S. at 193.

⁷³ See *Randall v. Sorrell*, 548 U.S. 230, 250 (2006).

⁷⁴ See *Arizona Free Enterprise Club*, 564 U.S. at 753.

⁷⁵ *Id.* at 754–55.

FIGURE 3 | Total Outside Spending with No Disclosure of Donors, 2000–2018

Source: Dark Money.

could extend that logic to H.R. 1's system, finding that the public matching funds triggered by qualifying candidates unduly burden the speech of non-participating candidates.

However, the constitutionality of public campaign financing is well-established. The Court has upheld block-grant public financing programs⁷⁶ under the General Welfare Clause of the Constitution. Moreover, the Roberts Court's reading of the First Amendment ignores its core purpose of promoting "uninhibited, robust, and wide-open" debate that provides "opportunity for free political discussion to the end that government may be responsive to the will of the people."⁷⁷ Matching programs cannot be seen as restricting speech, because such programs do not prohibit candidates who opt out of the system from spending freely in accordance with existing campaign finance law. Rather, they promote the speech of candidates who elect to opt into the system. These subsidies should be seen as expanding

speech, not restricting it, a principle accepted by the pre-Roberts Court in a substantial body of case law.⁷⁸ As the Court said in *Citizens United*, "more speech, not less, is the governing rule."⁷⁹

2. The Court may find that all contribution limits violate the First Amendment.

The Supreme Court could go well beyond striking down H.R. 1 to invalidate contribution limits entirely, allowing wealthy donors and corporations to donate unlimited sums directly to candidates. While serving in the George W. Bush Administration, Justice Kavanaugh said that contribution limits "have some constitutional problems."⁸⁰ Justice Thomas has been clear about his belief that any contribution limit violates the First Amendment.⁸¹

While that view is contrary to established precedent,⁸² it does represent a long-held view in some conservative legal circles.⁸³ In recent years, the

76 See *Buckley*, 424 U.S. at 89.

77 *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

78 *Arizona Free Enter. Club's Freedom Club PAC*, 564 U.S. at 763 (Kagan, J. dissenting).

79 See *Citizens United*, 558 U.S. at 911.

80 Ariane de Vogue, Documents: Kavanaugh Saw 'Some Constitutional Problems' in Campaign Contribution Limits, CNN (Sept. 1, 2018), <https://www.cnn.com/2018/08/31/politics/kavanaugh-documents-contribution-limits/index.html>.

81 See *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 640–41 (1996) (Thomas, J., concurring in the judgment and dissenting in part).

82 See *Buckley*, 424 U.S. at 29.

83 See, e.g., Roger Pilon, Constitutional Issues Related to Campaign Finance Reform, CATO Institute (July 22, 1999), <https://www.cato.org/publications/congressional-testimony/constitutional-issues-related-campaign-finance-reform>.

Court has not shied away from overruling precedent on campaign finance matters. *Citizens United* was a direct rebuke of *Austin v. Michigan Chamber of Commerce*,⁸⁴ decided just 20 years prior.

3. The Court may find that publicly-financed elections are unconstitutionally coercive.

The Court has ruled that even for nominally voluntary programs, when the federal government attaches incentives to forego a constitutional right, those incentives can “cross[] the line distinguishing encouragement from coercion” if the inducement is too attractive to turn down.⁸⁵ For example, in *NFIB v. Sebelius*,⁸⁶ the Court held that threatening states’ existing Medicaid grants in order to induce those states to expand Medicaid under the Affordable Care Act impermissibly coerced states to forego their Tenth Amendment rights.⁸⁷ The Supreme Court has breathed new life into this doctrine, and could apply it outside of the federalism context to H.R. 1’s public financing program, as the Roberts Court places substantial value on both anti-coercion and money-as-speech First Amendment rights. It may find that the attractiveness of the small-dollar matching program, while voluntary, is an impermissible inducement to candidates to forego their First Amendment rights.

However, this argument would represent a significant extension of the anti-coercion principle. The Court has never recognized First Amendment rights as constitutional rights to be protected from coercion.

Moreover, the anti-coercion principle is exclusively applied to situations in which Congress threatens a penalty for noncompliance. Under H.R. 1’s public financing system, candidates who do not opt in may continue to operate in the status-quo regulatory framework.

V. DISCLOSURE REQUIREMENTS

Background

In 2010, the Supreme Court ruled in *Citizens United* that federal restrictions on corporations and unions making independent expenditures in political campaigns are unconstitutional. As a result of *Citizens United* and its progeny, a torrent of dark money from mostly anonymous donors has poured into the electoral process through super PACs and other unaccountable organizations. One study estimates that the top 15 most politically active nonprofits have collectively spent over \$600 million in dark money since 2010.⁸⁸ The Supreme Court itself has not been immune from this spending: during Neil Gorsuch’s confirmation process, a single donor funneled \$28.5 million through a nonprofit into the Judicial Crisis Network, which was supportive of Gorsuch’s appointment.⁸⁹

In 2010, legislators introduced the DISCLOSE Act, which would require any group that spends more than \$10,000 on political advertisements to disclose its donors. It would also strengthen prohibitions against foreign spending in U.S. elections, especially

84 494 U.S. 652 (1990).

85 *New York v. United States*, 505 U.S. at 175.

86 567 U.S. 519 (2012).

87 *Id.* at 581.

88 See *Dark Money Illuminated, Issue One*, 5 (2018), <https://www.issueone.org/wp-content/uploads/2018/09/Dark-Money-Illuminated-Report.pdf>.

89 See Andrew Perez and Margaret Sessa-Hawkins, *Tax Returns Identify Dark Money Organization as Source of GOP Supreme Court Attacks*, *MapLight* (Nov. 21, 2017), <https://maplight.org/story/tax-returns-identify-dark-money-organization-as-source-of-gop-supreme-court-attacks/>.

through foreign-owned corporations and shell companies. While the bill had majority support in the Senate, Republicans successfully filibustered it in both 2010 and 2012. It has been reintroduced in each congressional session since its introduction, and was included this January as a part of H.R. 1.

Argument: The Court could find that disclosure requirements violate the First Amendment.

The Supreme Court can be expected to strike down disclosure requirements on First Amendment grounds. Clarence Thomas has repeatedly asserted a broad “right to anonymous speech” on First Amendment grounds.⁹⁰ Justice Kavanaugh’s jurisprudence on the D.C. Circuit suggests that he is sympathetic to dark money nonprofits’ invocation of the First Amendment to justify the nondisclosure of their donors.⁹¹ Justices Roberts and Alito have signaled a willingness to carve out exceptions to the disclosure requirements upheld in *Buckley v. Valeo* when such requirements are likely to result in “harassment,”⁹² which is the same term that some donors have used to describe the consequences of disclosure requirements.⁹³

The disclosure requirements of H.R. 1 are more restrictive than anything that Justices Thomas, Kavanaugh, and Roberts have considered, and they are so strict that free speech absolutists such as the ACLU expressed opposition as well.⁹⁴ While the Court recently declined to intervene in disclosure cases,⁹⁵ these abstentions came before the confirmation of Justice Kavanaugh. The Court has generally given greater weight to the First Amendment concerns of individuals than the anticorruption interests promoted by abridging

speech. If H.R. 1 is signed into law, its provisions requiring disclosure of major campaign contributions might not withstand judicial review.

While the Court may find that disclosure requirements violate the First Amendment, it has consistently held that such requirements “do not prevent anyone from speaking.”⁹⁶ Disclosure requirements may somewhat burden speech, but the Court has recognized the government’s interest in protecting the “integrity...transparency and accountability” of the electoral process.⁹⁷ Striking down the disclosure provisions of H.R. 1 would represent a marked departure from precedent in a case where, given the recent evidence of the deleterious effect of dark money on our electoral process, Congress’s transparency interests are clear.

VI. PROHIBITIONS ON VOTER PURGES

Background

Voter roll purges have prevented millions of eligible voters from casting ballots in recent years. In the two years leading up to the 2018 election, Georgia and North Carolina purged over ten percent of their voter rolls.⁹⁸ Many, if not most, of these voters remained eligible to vote. They had not moved, or changed their names, or died. They were purged because they had not voted recently. The state government of Ohio deleted registrations of 1.2 million voters for voting infrequently between 2011 and 2016.⁹⁹ Even though the NVRA declares that no person can be purged “by reason of the person’s failure to vote,”¹⁰⁰ the Supreme Court upheld Ohio’s policy—which has been copied

90 See, e.g., *Citizens United*, 558 U.S. at 480 (Thomas, J., concurring in part and dissenting in part).

91 See, e.g., *Indep. Inst. v. FEC*, 816 F.3d 113 (D.C. Cir. 2016).

92 See *Doe v. Reed*, 561 U.S. 186, 200 (2010).

93 See Juliegrace Brufke, *House Votes to Stop IRS from Collecting Nonprofit Donors’ Information*, Daily Caller (June 15, 2016), <https://daily-caller.com/2016/06/15/house-votes-to-stop-irs-from-collecting-nonprofit-donors-information>.

94 See Kate Ruane and Sonia Gill, *Congress, Let’s Fix the Problems in H.R. 1 so We Can Enact the Bill’s Much-Needed Reforms*, ACLU (Mar. 5, 2019), <https://www.aclu.org/blog/free-speech/campaign-finance-reform/congress-lets-fix-problems-hr-1-so-we-can-enact-bills-much>.

95 See *Crossroads Grassroots Policy Strategies v. Citizens for Responsibility & Ethics in Washington*, 139 S. Ct. 50 (2018) (mem.) (denying application for stay of an order requiring disclosure of some “dark money” contributions).

96 *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 201 (2003).

97 See *Doe v. Reed*, 561 U.S. at 188.

98 See Kevin Morris and Myrna Pérez, *Florida, Georgia, North Carolina Still Purging Voters at High Rates*, Brennan Center for Justice (Oct. 1, 2018), <https://www.brennancenter.org/blog/florida-georgia-north-carolina-still-purging-voters-high-rates>.

99 Carol Anderson, *One Person, No Vote: How Voter Suppression Is Destroying Our Democracy* 75 (2018).

100 52 U.S.C. § 20507(b)(2).

by Georgia and over half a dozen other states¹⁰¹—by a 5–4 vote in 2018.¹⁰²

Another tool for purging voter registrations is the interstate data-sharing system Crosscheck. Crosscheck purports to prevent voter fraud by matching voter records from numerous states to identify people who have moved and who have registered or voted in different locales. Its track record is inaccurate, as over 99 percent of the matches it identifies are false positives, and it has identified only a handful of cases of actual double voting.¹⁰³

Both of these voter purge tactics disproportionately affect people of color. The only warning that Ohio voters receive before being purged is a postcard from the Secretary of State. Census Bureau research shows that white voters are significantly more likely to respond to official requests than black or Hispanic voters.¹⁰⁴ Moreover, minorities in the United States tend to have common or shared last names and so are more likely to be falsely purged by states relying on Crosscheck.¹⁰⁵

H.R. 1 addresses both of these issues, and bars states from purging voters without “objective and reliable” evidence of their ineligibility. It closes the loophole that the Supreme Court carved into the NVRA to prevent voter purges based only on failure to vote and failure to return a postcard. The bill specifies that failure to respond to Ohio’s postcard system never qualifies as objective and reliable evidence, but more broadly, the terms “objective and reliable” exclude any similarly pretextual criteria that cannot definitively show that someone has moved or is otherwise ineligible.

The bill also places unambiguous restrictions on the use of Crosscheck and similar systems. States can only use matches that include all of a voter’s full name, date of birth, and last four digits of the voter’s



The Supreme Court can be expected to strike down disclosure requirements [for campaign contributions] on First Amendment grounds.

social security number, making false positives far less likely. Furthermore, Crosscheck-like removal systems must comply with the Act’s other voter removal provisions, including the “objective and reliable” criteria for all voter purge processes. Thus, a Crosscheck-like system must not only comply with the specific matching requirements mentioned above, but also must be able to correctly identify people who have actually moved.

Argument: The Court may narrowly construe the anti-voter purge protections in H.R. 1.

The Court could recycle its interpretation of the NVRA to weaken H.R. 1’s voter purge protections. The Supreme Court’s opinion upholding Ohio’s purge policy in *Husted v. A. Philip Randolph Institute* illustrates how a textual reading can subvert the purpose of almost any statute. Congress passed the NVRA in 1993 to “promote the exercise” of the “fundamental right” to vote, primarily by requiring states to offer voter registration at departments of motor vehicles, at public assistance offices, and by mail.¹⁰⁶ The law also provided states with guidelines for removing voters who were no longer eligible.¹⁰⁷ While many of these guidelines are flexible, the NVRA is clear that failure to vote is not a permissible reason to remove a voter from voter rolls.

Ohio’s policy purges voters for precisely that reason. The Secretary of State targets Ohio voters for removal if they do not vote for two years and sends

101 See Johnny Kauffman, Six Takeaways from Georgia’s ‘Use It or Lose It’ Voter Purge Investigation, NPR (Oct. 22, 2018), <https://www.npr.org/2018/10/22/659591998/6-takeaways-from-georgias-use-it-or-lose-it-voter-purge-investigation>.

102 *Husted*, 138 S. Ct. at 1842.

103 See Christopher Ingraham, This Anti-Voter-Fraud Program Gets It Wrong over 99 Percent of the Time. The GOP Wants to Take It Nationwide, Wash. Post (July 20, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/07/20/this-anti-voter-fraud-program-gets-it-wrong-over-99-of-the-time-the-gop-wants-to-take-it-nationwide>

104 Anderson, *supra*, at 76.

105 *Id.*, at 88.

106 See 52 U.S.C. §§ 20501, 20503.

107 See 52 U.S.C. § 20507.

them a postcard. They are then purged if they do not vote in the following four years and do not return the postcard. The Court reasoned that as long as Ohio voters did not return their postcards, their failure to vote was not the *sole reason* for their removal.¹⁰⁸ The Court was untroubled by the fact that Congress did not use the phrase “sole reason” and in fact recommended procedures that provided far more protections against inaccurate purges. The Court’s interpretation went beyond even what Ohio itself had asked for and essentially nullified Congress’s attempt to protect the right not to vote.

It is not difficult to imagine similar interpretations of H.R. 1. The bill closes the particular loophole on which Ohio relied by stating that neither failure to vote *nor* failure to return a postcard or other notice is grounds for removal. However, the Court could use the logic of *Husted* to allow purges based on (1) failure to vote, (2) failure to return a postcard, and (3) one other equally unreliable indicator of eligibility to vote. This third factor could be a Crosscheck match. The Court could interpret H.R. 1’s Crosscheck safeguards to apply only when Crosscheck is the *sole* criteria used to purge voters. If the Supreme Court is intent on suppressing voting rights, no law can be written with sufficient precision to prevent states from exploiting such loopholes.

¹⁰⁸ *Husted*, 138 S.Ct. at 1842.

¹⁰⁹ *Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (2013).

H.R. 1 makes Congress’s intent clear, and the voter purge provisions in the bill amend the NVRA to expressly prohibit the procedure that the Court approved in *Husted*. When Congress amends a law in direct response to a narrow interpretation by the Supreme Court, it sends the clearest signal of its intent, and the Court owes great deference to that intent. Especially in light of evidence of widespread voter suppression since *Shelby County*, a Court decision striking down the voter purge provisions of H.R. 1 would be based on unpersuasive reasoning.¹⁰⁹

VII. CONCLUSION

For more than a decade, the Supreme Court arguably has compromised democracy by enabling states to block access to the voting booth, removing limits on dark and corporate money in the political process, and allowing partisan gerrymandering. H.R. 1 is designed to undo some of this damage, but there is little doubt that if Congress enacted the law, the Supreme Court would look skeptically at its restorative provisions, and would strike down its key elements on the basis of unpersuasive constitutional analysis.



BOARD

Professor Mark Tushnet, *Chair*
Harvard University Law School

W. Kamau Bell
CNN Host and ACLU Ambassador for Racial Justice

Professor Annelien de Dijn
Utrecht University

Professor Samuel Moyn
Yale University Law School

Professor Aziz Rana
Cornell University Law School

Professor Stephanie Rose Spaulding
University of Colorado, Colorado Springs

Professor Carol Anderson
Emory University

STAFF

Aaron Belkin, PhD, *Director*

Kate Kendell, JD, *Campaign Manager*

Rodney Nickens, JD, *Field Director*

Sean McElwee, *Director of Polling and Research*

Alicia Barnes, *Director of Digital Communications*

Jameson Casentini, *Executive Assistant*