



SUPREME COURT WOULD LIKELY INVALIDATE H.R.1

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I. Summary

Since 2005, the conservative Supreme Court, led by Chief Justice Roberts (“the Roberts Court”), has consistently undermined the right and ability of minorities and other disenfranchised people to exercise the hallmark of democracy—the right to vote. The Court has dismantled the Voting Rights Act of 1965,¹ upheld restrictive Voter ID laws in Indiana² and North Dakota,³ upheld restrictions on absentee voting in Alabama⁴ and Texas,⁵ authorized voter purges in Ohio,⁶ abandoned any judicial control over partisan gerrymandering,⁷ allowed dark money to flood the electoral process,⁸ and forced Wisconsin voters to risk their lives in order to exercise their right to vote. House Resolution 1 (“H.R. 1”), originally named the “For the People Act,” is intended to undo much of this damage, and includes provisions to end gerrymandering, register every eligible American voter automatically, reinstate the protections of the Voting Rights Act, authorize absentee mail-in voting, reduce the influence of big money in federal elections, and prohibit voter purges.⁹ Then, in 2019, the House passed the “Voting Rights Advancement Act” to restore the Voting Rights Act in light of the Supreme Court’s 2013 ruling in *Shelby County v. Holder*. In July 2020, 48 Senators sponsored companion legislation, named the “John Lewis Voting Rights Advancement Act” (“JLVRAA”).¹⁰

While H.R. 1 and JLVRAA would enhance the robustness of American democracy, there is little doubt that if Congress were to enact these laws, the Supreme Court would look skeptically at their restorative provisions, and would likely strike down their key elements on the basis of implausible constitutional analysis. Even though arguments, discussed below, that the Court’s majority is likely to deploy are unpersuasive, the conservative majority has issued rulings that dismantle democracy and voting rights repeatedly, often relying on questionable rationales.¹¹ Justice Roberts, for example, cast the deciding vote dismantling the Voting Rights Act based on the arguably risible contentions that racial disparities in voting access are no longer significant and that because the

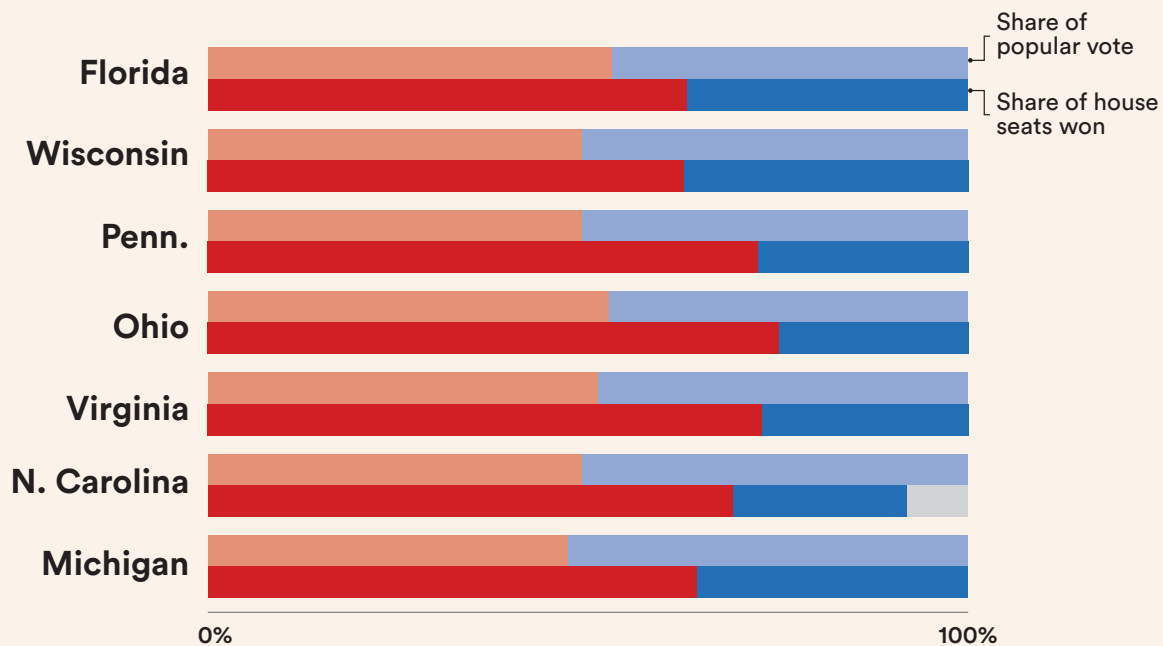
Voting Rights Act protected racial minorities from discrimination they would have faced without it, the Act is no longer necessary. Justices who have relied on implausible arguments to undermine democracy on a repeated basis are likely to do so again.

II. Independent Redistricting

BACKGROUND

In 31 states, the power to redraw electoral districts lies with the state legislature.¹² 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 election, Republicans received 1.4 million fewer votes for the House of Representatives than Democrats, but held onto a 33-seat congressional majority thanks to gerrymandering by GOP-controlled state governments.¹³ In Maryland in 2016, however, Republican candidates for U.S. House seats won 37 percent of the vote, but only won one race “because of the way Democrats drew district boundaries after the 2010 Census.”¹⁴ 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.¹⁵ While both parties have engaged in gerrymandering, the Republican Party has done so far more aggressively and successfully.¹⁶

The Supreme Court has ruled that race-based gerrymandering violates the Voting Rights Act,¹⁷ but at the same time 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.¹⁸ The Roberts Court resisted challenges to partisan gerrymandering under several theories,¹⁹ and in 2019 the Court

FIGURE 1 | GOP Gerrymandering at its Best

Source: Mother Jones.

abandoned any possibility of judicial review of partisan gerrymandering cases,²⁰ even as evidence of Republicans' race-based approach to gerrymandering has become undeniable.²¹

Since this Supreme Court has declined to review state redistricting plans that enhance the influence of some votes while discounting others, the fairness of elections depends entirely on states, or on Congress's ability to override state decisions. Some states have turned to their own constitutions to implement redistricting reform.²² Voters in other states have passed redistricting reform by ballot measures which include independent redistricting commissions and limits on the criteria state legislatures can use to draw district maps.²³ But while some 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.²⁴ If Congress were to pass H.R. 1 and the President were to sign 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.²⁵ In his absence, it is unlikely that the current Supreme Court will be more amenable to arguments for judicial intervention in partisan gerrymandering.²⁶ 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.

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...”²⁷ The majority held that a ballot initiative represents the legislative power of the people, and was therefore in accordance with that clause.²⁸ 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.²⁹ A conservative court could adopt such reasoning to rule that any independent redistricting commission imposed by Congress is unconstitutional.³⁰

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, were to be 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 for 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 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 not be expected from a less partisan Supreme Court.³¹

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

If the Court were to rule that independent commissions mandated by Congress 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 have often been 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 are struck down. Congress’s constitutional power to regulate elections extends to legislative maps, but only for the purpose of *federal* elections.³² 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.³³ 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, since the conservative majority has ruled that gerrymandering is not a “justiciable” issue to be

addressed by the Court, 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 a partisan outcome, and a less partisan Court could be expected to recognize its guarantee of "both formal and substantial equality among voters."³⁴ 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.³⁵ 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.³⁶ 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, and thus that Congress could draw district maps for federal elections, the Court could invoke a broader federalism argument to justify a different interpretation of that portion of the clause.³⁷

Conservative justices 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."³⁸ 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."³⁹ It has been used as a cudgel against legislation, such as the Affordable Care Act, passed by Democratic majorities.⁴⁰ Because H.R. 1 would compel states to establish independent redistricting



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commissions for congressional elections, a justice motivated to invalidate it could simply cite principles of federalism to rule that requiring such commissions is an unconstitutional overreach of the federal government.⁴¹

However, it should be uncontroversial for a non-partisan Court to determine 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.⁴² 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 1938.⁴³

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 1993⁴⁴ ("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.⁴⁵

Similar programs have already been approved in fifteen states and Washington D.C., and early results look promising.⁴⁶ 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.⁴⁷ The increase in turnout was especially pronounced among young people, people of color, and low-income people.⁴⁸ 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.⁴⁹

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 by an activist conservative court hostile to voting rights.

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

Conservative think tanks and commentators have raised the argument that automatic voter registration would “remov[e] civic participation as a voluntary choice.”⁵⁰ Relying on the idea that some non-registrants are “expressing displeasure with the electoral process by not participating,” a legal challenge would frame automatic voter registration as compelled speech.⁵¹ 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.”⁵² 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 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.⁵³ Under this theory, H.R. 1 would be subject to the same kind of heightened scrutiny as threats to voting rights.

With some conservative activists 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. 1.⁵⁴

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 plates⁵⁵ or being forced to disclose their views.⁵⁶ 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.⁵⁷ 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



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state cooperation as “[eliminating] the federalism that keeps elections transparent, local, and fair.”⁵⁸ 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.

IV. Public Campaign Financing

BACKGROUND

Over the past generation, the Supreme Court has dismantled campaign finance regulations, striking down limits on expenditures⁵⁹ and contributions.⁶⁰ The result is a deregulated system that favors wealthy donors and corporations.⁶¹ 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 communicating with constituents in their districts and less time cold-calling potential major donors across the country.

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 \$250.⁶² 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.⁶³ As a result of public financing, corruption in New York City government has plummeted.⁶⁴

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

ARGUMENTS

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.⁶⁵ In recent campaign finance cases, the Court has focused solely on First Amendment interests, rejecting rationales for campaign finance regulation based on egalitarian concerns⁶⁶ or concerns over systemic corruption.⁶⁷ 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.⁶⁸

The Supreme Court has expanded this First Amendment doctrine to strike down prohibitions on corpo-

rate expenditures⁶⁹ and aggregate donation limits.⁷⁰ 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.⁷¹ 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.⁷² That system provided block-grant public funds to candidates who opted in. If a participating candidate was outraised 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.”⁷³ The Court 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 programs⁷⁴ 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.”⁷⁵ 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.⁷⁶ As the Court said in *Citizens United*, “more speech, not less, is the governing rule.”⁷⁷

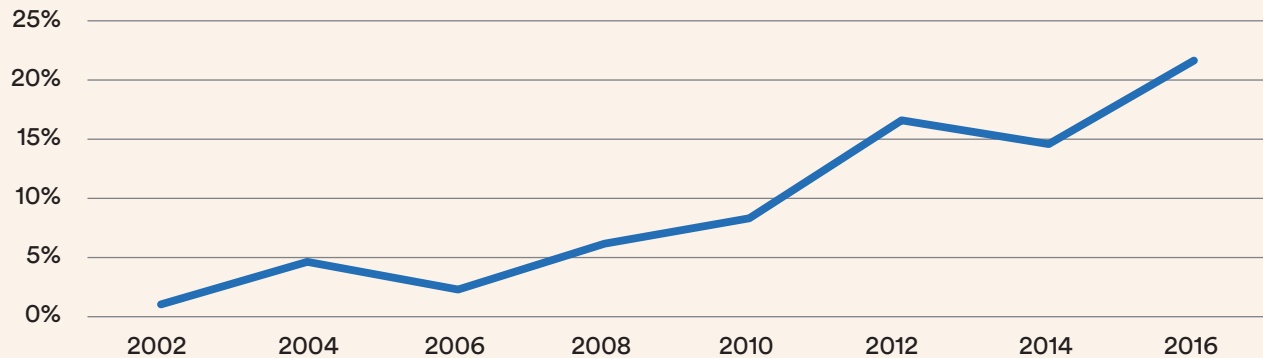
2. The Court may find that all contribution limits violate the First Amendment.

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.”⁷⁸ Justice Thomas has been clear about his belief that any contribution limit violates the First Amendment.⁷⁹

While that view is contrary to established precedent,⁸⁰ it does represent a long-held view in some conservative legal circles.⁸¹ In recent years, the 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*,⁸² 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

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

Source: Open Secrets.

too attractive to turn down.⁸³ For example, in *NFIB v. Sebelius*,⁸⁴ 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.⁸⁵ 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 collectively spent over \$600 million in dark money between January 2010 and December 2016.⁸⁶ The Supreme Court's composition has been shaped by 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.⁸⁷ A similar flood of dark money supported Brett Kavanaugh's appointment to the Court a year later.

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 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.⁸⁸ 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.⁸⁹ 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,”⁹⁰ which is the same term that some donors have used to describe the consequences of disclosure requirements.⁹¹ 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.⁹² While the Court recently declined to intervene in disclosure cases,⁹³ 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.

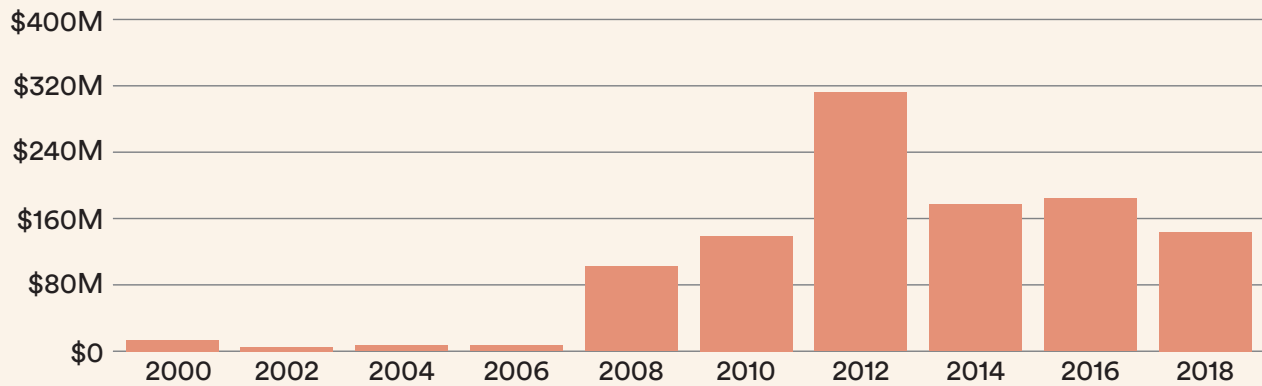
While the Court may find that disclosure requirements violate the First Amendment, such a finding would be at odds with its consistent holding that such requirements “do not prevent anyone from

speaking.”⁹⁴ 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.⁹⁵ 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. Voting Rights

While many of the struggles during the 1960s concerned Black Americans’ right to register to vote, registration provides little benefit if one’s ability to cast a ballot is denied or limited as a practical matter. Voting rights were substantially protected by the preclearance provision of the 1965 Voting Rights Act, which was reauthorized by Congress multiple times, most recently in 2006. But the Supreme Court dismantled the preclearance provisions of the VRA in its *Shelby County* ruling, thus rendering toothless any protections against limitations on the right to vote. The John Lewis Voting Rights Advancement Act was written with the express purpose of establishing new voter protections that conform with standards that the Court articulated in *Shelby County*. Our argument, however, is that voting rights advocates cannot be confident that any effort to meaningfully protect Black and Brown voters’ access to the ballot box will survive judicial review of a court that accepted, in *Shelby County*, the patently false assertion that racism and voter suppression are unconnected.

Since *Shelby County*, numerous states have denied poor, minority, and disenfranchised citizens the right to vote by adopting draconian voter identification requirements,⁹⁶ purging voters from voter rolls,⁹⁷ limiting times for early voting, reducing opportunities to vote by mail, and cutting the number of polling stations.⁹⁸ The Brennan Center for Justice reports that 20 states enacted restrictive voting laws between 2010 and 2018.⁹⁹ Unfortunately, the Supreme Court has declined to provide any meaningful review of such provisions, and is likely to find any Congressional attempts to reimpose federal oversight over voting rules to be unconstitutional.

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

Source: Dark Money.

BACKGROUND

Voter roll purges have prevented millions of eligible voters from casting ballots in recent years, and have frequently been found to impact racial minorities disproportionately.¹⁰⁰ In the two years leading up to the 2018 election, Georgia and North Carolina purged over ten percent of their voter rolls.¹⁰¹ Many, if not most, of these voters remained eligible to vote. They had not moved, 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 2016.¹⁰² Even though the NVRA declares that no person can be purged “by reason of the person’s failure to vote,”¹⁰³ the Supreme Court upheld Ohio’s policy—which has been copied by Georgia and over half a dozen other states¹⁰⁴—by a 5–4 vote in 2018.¹⁰⁵

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.¹⁰⁶ It is also important to note that voter fraud is extraordinarily rare, suggesting that the true intention of purported efforts to prevent fraud is in fact to suppress legal votes.

Both of these voter purge tactics disproportionately affect people of color. For example, 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.¹⁰⁷ 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.¹⁰⁸

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 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 system such as Crosscheck 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.¹⁰⁹ The law also provided states with guidelines for removing voters who are no longer eligible.¹¹⁰ 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 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.¹¹¹ 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.

Indeed, the Court has bent over backward to prevent expanding the right to vote. When voters in Florida passed a constitutional amendment in 2018 to expand ex-felons' right to vote, state officials imposed financial requirements to dissuade ex-felons from voting, even though lower courts had found in no uncertain terms that such requirements constitute an unconstitutional poll tax.¹¹² While the Fifth Circuit generally agreed with the lower court, it stayed the permanent injunction so as to allow the state to appeal, just days prior to the deadline for voter registration in 2020.¹¹³ The Supreme Court declined to reverse that stay, and as a result, almost one million ex-felons in Florida will not be able to vote this November.

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.¹¹⁴ Given that the conservative majority relied on unpersuasive reasoning to reach its decision in *Shelby County* in the first place, there is little if any reason to expect that voter purge provisions of H.R. 1 would survive judicial review.

VII. Conclusion

For more than a decade, the Supreme Court 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 were to enact 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.

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