
RECENT LEGISLATION

ANTICOMMANDEERING — GERRYMANDERING — HOUSE PASSES BILL THAT WOULD REQUIRE STATES TO ADOPT INDEPENDENT REDISTRICTING COMMISSIONS FOR CONGRESSIONAL MAPS. — H.R. 1, 116th Cong. (2019).

Last Term in *Rucho v. Common Cause*,¹ the Supreme Court declared partisan gerrymandering claims nonjusticiable in federal court.² For some, the decision was “an occasion for sorrow” that undermined American democracy.³ The *Rucho* Court held that hyperpartisan maps were political questions, best left to the legislature.⁴ Even before the Court’s decision, the House of Representatives had passed a bill with a provision requiring federally imposed independent redistricting commissions (IRCs). The House included the provision in the 2019 omnibus election reform bill, H.R. 1.⁵ H.R. 1 would require states to adopt IRCs, using state resources, to draw federal congressional maps.⁶ It is on this basis that scholars argue the redistricting provision in H.R. 1 faces its most serious constitutional challenge.⁷ While opponents of H.R. 1 allege the redistricting provision is unconstitutional on anticommandeering grounds, text, precedent, history, and purpose demonstrate otherwise.

The anticommandeering doctrine derives principally from two cases from the 1990s. The first, *New York v. United States*,⁸ struck down a provision in a federal law that attempted to regulate nuclear waste.⁹ The Court held that the federal government “commande[ring] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program” was inconsistent with principles of federalism.¹⁰ In the second case, *Printz v. United States*,¹¹ the Court found that a law requiring local law enforcement to administer background checks for gun sales was unconstitutional for the same reason.¹²

¹ 139 S. Ct. 2484 (2019).

² *Id.* at 2506–07.

³ Charles Fried, *A Day of Sorrow for American Democracy*, THE ATLANTIC (July 3, 2019), <https://www.theatlantic.com/ideas/archive/2019/07/rucho-v-common-cause-occasion-sorrow/593227> [<https://perma.cc/T7LF-QRD5>].

⁴ See *Rucho*, 139 S. Ct. at 2506.

⁵ H.R. 1, 116th Cong. (2019).

⁶ *Id.* § 2414 (“Each State shall establish a nonpartisan agency in the legislative branch of the State government to appoint the members of the independent redistricting commission for the State . . .”).

⁷ See, e.g., Nicholas Stephanopoulos, *H.R. 1 and Redistricting Commissions*, ELECTION L. BLOG (Jan. 9, 2019, 7:30 PM), <https://electionlawblog.org/?p=103123> [<https://perma.cc/9Z4S-SN95>].

⁸ 505 U.S. 144 (1992).

⁹ *Id.* at 188.

¹⁰ *Id.* at 161 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)).

¹¹ 521 U.S. 898 (1997).

¹² See *id.*

Justice Scalia, writing for the majority, held that “[t]he Federal Government may neither issue directives . . . nor command the States’ officers, or those of their political subdivisions”¹³ Professor Vicki Jackson identifies four main explanations Justice Scalia gives for the holding: the concept of dual sovereignty, the absence of a constitutional clear statement condoning the specific exercise of federal power, founding history, and a theory of political accountability of state and federal representatives.¹⁴ The Court has since struck down provisions in other federal laws on this theory.¹⁵

Symbolically introduced as the first bill of the 116th Congress, H.R. 1 attempts to overhaul federal elections by standardizing the process of voting across states.¹⁶ The core of this effort is in Title I of the bill. Provisions include automatic voter registration, felon enfranchisement, early voting days, and an expansion of vote-by-mail and the absentee ballot system.¹⁷ To circumvent state voter identification laws, it allows voters to submit sworn statements instead of providing ID.¹⁸ The bill also attempts to thwart voter intimidation and deceptive election practices by criminalizing distribution of false information about elections as well as making it unlawful to “hinder, interfere with, or prevent” an individual from registering to vote.¹⁹ Finally, it funds election administration efforts, such as requiring the Postal Service to deliver ballots free of charge and creating an information hotline.²⁰

Titles II and III tackle election integrity and security. Title II asserts Congress’s commitment to restoring the Voting Rights Act, protecting ballot access for Native Americans, and establishing District of Columbia statehood.²¹ It also tightens restrictions on a state’s ability to remove registered voters from the rolls.²² Title III approves funds for secure election infrastructure, including paper ballots, audits, and other measures.²³ Every state would vet election vendors and test voting

¹³ *Id.* at 935.

¹⁴ See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2195–202 (1998). Justice Scalia argued that constituents are prevented from holding the correct representatives accountable when the federal government is allowed to commandeer because doing so obscures the source of either action or inaction. *Id.* at 2200–01.

¹⁵ See, e.g., *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1484–85 (2018).

¹⁶ See DEMOCRACY REFORM TASK FORCE, H.R. 1: THE FOR THE PEOPLE ACT OF 2019 (2019), https://democracyreform-sarbanes.house.gov/sites/democracyreformtaskforce.house.gov/files/H.R.%201_Section-by-Section_FINAL.pdf [<https://perma.cc/8XKY-JD8D>].

¹⁷ H.R. 1 §§ 1012, 1402, 1611, 1621, 1704.

¹⁸ *Id.* § 1903.

¹⁹ *Id.* §§ 1071, 1303.

²⁰ *Id.* §§ 1904, 1906.

²¹ *Id.* §§ 2001, 2101, 2201.

²² *Id.* § 2502.

²³ *Id.* § 3001.

systems.²⁴ It also requires the Secretary of the Department of Homeland Security to implement new election security measures, such as producing a national strategy to prevent election hacking and foreign interference.²⁵

The redistricting provision in Title II could remedy partisan gerrymandering claims that are nonjusticiable in federal court. The provision creates a uniform set of rules that erases many of the incentives to draw unfair maps, leveling the playing field for states that have already adopted similar commissions.²⁶ The plan requires commissions comprised of fifteen individuals from different political parties.²⁷ Each map they draw must meet four criteria: it must equalize total population; “comply with the Voting Rights Act”; not diminish the opportunity for “racial, ethnic, and language minorities” to elect candidates; and not unduly divide “communities of interest, neighborhoods, and political subdivisions” or other areas with “recognized similarities of interest.”²⁸ The final plan must receive the support of a majority of the members of the commission, including the votes of members of each political affiliation.²⁹ Mid-decade redistricting is explicitly banned and the bill requires the IRC to maintain a public website and livestream official business.³⁰ Finally, the bill creates an additional cause of action (apart from constitutional claims) for litigants to challenge maps.³¹

H.R. 1 also expands existing campaign finance regulations and ethics requirements in all three branches. Titles IV, V, and VI include provisions requiring greater finance disclosure, an expansion of public finance matching, tighter rules on Super PACs, and the closure of contribution loopholes, to name a few.³² Other provisions attempt to expand opportunities for individuals to run for office.³³ Finally, Titles VII through X regulate ethics.³⁴ In the judicial branch, for example, it requires the development of a code of ethics for Supreme Court Justices.³⁵ In the executive branch, the act prohibits payments that indicate a conflict of

²⁴ *Id.* §§ 3001–02.

²⁵ *Id.* §§ 3401–03.

²⁶ Stephanopoulos, *supra* note 7.

²⁷ H.R. 1 § 2411.

²⁸ *Id.* § 2413; *see also* DEMOCRACY REFORM TASK FORCE, *supra* note 16, at 7.

²⁹ H.R. 1 § 2413. Commissions would be made up of members who are from the majority party, from the minority party, and unaffiliated. *Id.*

³⁰ *Id.* §§ 2402, 2413.

³¹ *See id.* § 2432.

³² *Id.* §§ 4111, 5111, 5211, 6102, 6103. The bill bans contributions from corporations with significant foreign ownership and requires the disclosure of dark money, large political ad buys, political spending by government contractors, political spending by publicly traded companies, and contributions to presidential inaugural committees. *See id.* §§ 4501, 4601, 4701.

³³ *See, e.g., id.* § 5302 (allowing for childcare expenses to be an authorized campaign expenditure).

³⁴ *See* DEMOCRACY REFORM TASK FORCE, *supra* note 16, at 19–25.

³⁵ H.R. 1 § 7001.

interest, such as payments from corporations to individuals entering government service.³⁶ In Congress, measures include preventing taxpayer funds from being used to settle employment discrimination cases, prohibiting members from serving on boards of for-profit entities, prohibiting the use of official positions to further financial interests, and requiring a database for reports from federal agencies mandated by Congress.³⁷ Finally, the bill requires Presidents and presidential candidates to release at least ten years of income tax returns.³⁸

The bill passed the House,³⁹ but Majority Leader Mitch McConnell has declined to take it up for debate in the Senate.⁴⁰ McConnell and other Republicans in Congress have argued that the bill's Democratic proponents are motivated by partisan advantage.⁴¹ Further, McConnell critiqued the bill's federalism implications, writing in an op-ed that H.R. 1 would "grow the federal government's power over Americans' political speech and elections."⁴² Specifically, McConnell pointed to its expansion of the Federal Election Commission's powers, public campaign finance matching system, and attempt to make it harder for states to clear voter registration rolls.⁴³ Both Republicans and more progressive groups claim that some of the campaign finance provisions unconstitutionally regulate speech.⁴⁴ And some legal scholars have argued that H.R. 1's redistricting provision could run afoul of the anticommandeering doctrine.⁴⁵ During oral argument in *Rucho*, Paul D. Clement, counsel for North

³⁶ *Id.* § 8002.

³⁷ *Id.* §§ 9001, 9101, 9102, 9303.

³⁸ *Id.* § 10001.

³⁹ *H.R. 1 — For the People Act of 2019*, CONGRESS.GOV, [https://www.congress.gov/bills/116th-congress/house-bill/1/all-actions?overview=closed&q={%22roll-call-vote%22:%22all%22}&KWICView=false](https://www.congress.gov/bills/116/congress/house-bill/1/all-actions?overview=closed&q={%22roll-call-vote%22:%22all%22}&KWICView=false) [<https://perma.cc/UFV2-9FRH>]. It passed 234–193 on a party-line vote. *Id.*

⁴⁰ See Marianne Levine, *McConnell Won't Allow Vote on Election Reform Bill*, POLITICO (Mar. 6, 2019, 4:42 PM), <https://www.politico.com/story/2019/03/06/mcconnell-election-reform-bill-1207702> [<https://perma.cc/P5MT-E33Q>].

⁴¹ *Id.*

⁴² Mitch McConnell, Opinion, *Mitch McConnell: Behold the Democrat Politician Protection Act*, WASH. POST (Jan. 17, 2019, 4:01 PM), https://www.washingtonpost.com/opinions/call-hr-1-what-it-is-the-democrat-politician-protection-act/2019/01/17/dcc957be-19cb-11e9-9ebf-c5fed1b7a081_story.html [<https://perma.cc/58UJ-HXJH>].

⁴³ *Id.*

⁴⁴ See, e.g., *id.*; Letter from Ronald Newman, Nat'l Political Dir., ACLU & Kate Ruane, Senior Legislative Counsel, ACLU, to Rep. Jim McGovern, Chairman, House Rules Comm. & Rep. Tom Cole, Ranking Member, House Rules Comm. (Mar. 1, 2019), <https://www.aclu.org/letter/aclu-letter-house-rules-committee-hr-1> [<https://perma.cc/63H6-QWY2>].

⁴⁵ Ilya Shapiro & Nathan Harvey, *What Left-Wing Populism Looks Like*, NAT'L REV. (Mar. 7, 2019, 6:30 AM), <https://www.nationalreview.com/2019/03/democrats-for-the-people-act-unconstitutional-left-wing-populism/> [<https://perma.cc/WB68-FNMF>]; see also HANS A. VON SPAKOVSKY, HERITAGE FOUND., H.R. 1, THE "FOR THE PEOPLE ACT OF 2019": TESTIMONY BEFORE COMMITTEE ON THE JUDICIARY 7 (2019).

Carolina, mentioned H.R. 1 as a possible fix to partisan gerrymandering but “quer[jied]” whether it was constitutional.⁴⁶

While some have argued that H.R. 1’s redistricting provision dictates state policy in violation of the anticommandeering doctrine, Congress has the authority to do so under the Elections Clause.⁴⁷ Some scholars claim that the Framers drafted the Constitution against the backdrop of certain unexpressed assumptions about state sovereignty.⁴⁸ Therefore, critics may argue judges ought to read the Elections Clause to avoid the sort of conflict that an otherwise broader interpretation might pose with federalism. And legislation like H.R. 1 that “essentially force[s] states”⁴⁹ to adopt IRCs is inconsistent with safeguarding state sovereignty and a general presumption against commandeering. At first glance, the arguments by H.R. 1’s detractors seem persuasive, but evidence suggests that the Elections Clause, much like the Supremacy Clause and the Full Faith and Credit Clause, immunizes certain exercises of federal power from the anticommandeering doctrine. Text, case law, and constitutional history support the proposition that Congress is within its authority under the Elections Clause to require states to adopt these commissions.

The clearest evidence of Congress’s ability to commandeer when acting under the Elections Clause is found in the Constitution’s text and structure. For one, the Elections Clause plainly states that “Congress may at any time by Law make or alter” the “Times, Places and Manner” of elections.⁵⁰ And, unlike the Commerce Clause (at issue in *New York and Printz*), the Elections Clause explicitly grants Congress authority to subvert state power. Opponents may argue that while the Elections Clause undoubtedly gives Congress the power to preempt, it does not give Congress the power to commandeer and where Congress makes changes to a state’s law it “must do so directly.”⁵¹ They argue that one can’t infer “command” by the words “make” and “alter.”⁵² Further, the Elections Clause provides “the same type of power that Congress is granted by the Commerce Clause,” so the two clauses should be governed by the same rule.⁵³

⁴⁶ Transcript of Oral Argument at 17, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (No. 18-422).

⁴⁷ U.S. CONST. art. I, § 4, cl. 1.

⁴⁸ See, e.g., Matthew D. Adler, *State Sovereignty and the Anti-commandeering Cases*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 166–68 (2001).

⁴⁹ Transcript of Oral Argument, *supra* note 46, at 17.

⁵⁰ U.S. CONST. art. I, § 4, cl. 1.

⁵¹ *New York v. United States*, 505 U.S. 144, 178 (1992); see also Kevin K. Green, Note, *A Vote Properly Cast? The Constitutionality of the National Voter Registration Act of 1993*, 22 J. LEGIS. 45, 68 (1996) (summarizing Supreme Court Justices’ arguments for why anticommandeering may apply to the National Voter Registration Act).

⁵² Paul E. McGreal, *Unconstitutional Politics*, 76 NOTRE DAME L. REV. 519, 569 (2001).

⁵³ *Id.* at 563. Professor Paul McGreal argues that the Elections Clause, unlike certain other constitutional clauses, does not explicitly allow federal actors to dictate state actors’ conduct. See *id.* at 566.

But there's no exercise of power by Congress based in the Elections Clause that *would not* pose commandeering concerns. First, the Court has determined that holding federal elections is not an inherent state power.⁵⁴ Unlike the Commerce Clause, the Elections Clause created a new power — it did not merely carve out a role for the federal government and abridge power the states had before ratification. Thus, federalism concerns in this arena are inapposite. Second, the Elections Clause itself imposes an obligation on the States. The Supreme Court has said that the Elections Clause is “one of the few areas in which the Constitution expressly requires action by the States.”⁵⁵ Third, as many scholars have acknowledged, any regulation of time, place, or manner would inevitably co-opt state resources because the states conduct elections.⁵⁶ Requiring Congress to fund or hold elections itself in order to avoid such a result would seem to contradict this grant of authority. Finally, if Congress could only preempt election law, and would therefore be required to carry out its own election regulations, the inclusion of the word “alter” would be redundant. Such an act would simply be “mak[ing]” law, not “alter[ing]” it. Hence, the Elections Clause is more like the Supremacy Clause.⁵⁷ If a state's power to draw federal congressional districts is not an inherent power,⁵⁸ and the Elections Clause grants Congress the power to override state regulations with respect to federal elections, then it must follow that Congress has the authority to require states to draw maps using IRCs.

Case law also supports this conclusion. The precedent establishing congressional power over states through the Elections Clause is clear.⁵⁹ In *Vieth v. Jubelirer*,⁶⁰ a plurality of the Court affirmed Congress's right to redraw congressional districts in response to partisan gerrymandering, holding that redistricting is within the power granted to Congress by this clause.⁶¹ More recently, Chief Justice Roberts cited H.R. 1 for its potential to remedy gerrymandering, adding that “the Framers gave Congress

⁵⁴ See *Cook v. Gralike*, 531 U.S. 510, 522–23 (2001).

⁵⁵ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804 (1995).

⁵⁶ See, e.g., *Branch v. Smith*, 538 U.S. 254, 279–80 (2003) (plurality opinion); Dan T. Coenen & Edward J. Larson, *Congressional Power over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 897 (2002).

⁵⁷ The Court has held that the Supremacy Clause's reference to state judges allows for commandeering because “the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions.” *Printz v. United States*, 521 U.S. 898, 907 (1997).

⁵⁸ *U.S. Term Limits*, 514 U.S. at 804 (“[T]he provisions governing elections reveal the Framers' understanding that powers over the election of federal officers had to be delegated to, rather than reserved by, the States.”).

⁵⁹ *Vieth v. Jubelirer*, 541 U.S. 267, 276 (2004) (plurality opinion) (“The power bestowed on Congress to . . . restrain the practice of political gerrymandering[] has not lain dormant.”).

⁶⁰ 541 U.S. 267.

⁶¹ See *id.* at 274–77.

the power to do something about partisan gerrymandering,” and referred to the bill’s redistricting commission provision.⁶² Moreover, in *Printz* Justice Scalia noted that three clauses contain particularized authorizations that exempt certain exercises of government power from the anticommandeering rule.⁶³ But the list is not exhaustive.⁶⁴ Justice Scalia generalized that “the Federal Government may [not] command the States’ executive power in the absence of a particularized constitutional authorization.”⁶⁵ This is the sort of “constitutional clear statement,”⁶⁶ as Jackson puts it, where the general assumption that Congress may not “command the States’ executive power” would be inoperable.⁶⁷ While some may argue that the Elections Clause is not quite the clear statement required,⁶⁸ the Court has already ruled that Congress does have the power to enact election laws that necessarily require commandeering of state resources.⁶⁹ Similarly, several courts of appeals rejected arguments that the National Voter Registration Act, requiring states to provide registration materials at public offices, violated the doctrine.⁷⁰

Finally, history, purpose, and practice are consistent with this reading. The Framers gave each chamber of Congress the power to “be the Judge of the Elections, Returns and Qualifications of its own Members.”⁷¹ In Alexander Hamilton’s view, to do otherwise “would leave the existence of the Union entirely at [the states’] mercy.”⁷² The Elections Clause is more concerned with safeguarding the “existence and legitimacy of federal elections” than with federalism or state sovereignty.⁷³ Some, however, argue that if fear of rebellion or defiance

⁶² *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019). Chief Justice Roberts reserved the question of whether this was constitutional. *See id.*

⁶³ *See Printz v. United States*, 521 U.S. 898, 906–09 (1997). These three were the Supremacy Clause, the Full Faith and Credit Clause, and the Extradition Clause. *Id.*

⁶⁴ And indeed, advocates of the doctrine read these “commandeering” clauses as evidence that Article I should generally be read with an assumption against commandeering. *Id.* at 907–08; *see also* Michael S. Greve, *Fallacies of Fallacies*, 94 B.U. L. REV. 1359, 1372 n.84 (2014).

⁶⁵ *Printz*, 521 U.S. at 909.

⁶⁶ Jackson, *supra* note 14, at 2197.

⁶⁷ *See Printz*, 521 U.S. at 909.

⁶⁸ *See* McGreal, *supra* note 52, at 565. McGreal suggests that if the Elections Clause did allow commandeering, it might look something like: “Congress shall make or alter such regulations *or direct the States to make or alter such regulations according to rules prescribed by Congress.*” *Id.*

⁶⁹ *See, e.g., Oregon v. Mitchell*, 400 U.S. 112, 117, 123–24 (1970) (holding that Congress can set the voting age for federal elections at eighteen); *Ex parte Siebold*, 100 U.S. 371, 392–96 (1880) (holding that Congress can set requirements for election administrators). In neither case did the Court require that Congress fund the changes or use federal resources to implement the new laws.

⁷⁰ *See Ass’n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1412–13, 1415 (9th Cir. 1995); *Ass’n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791, 792, 795 (7th Cir. 1995).

⁷¹ U.S. CONST. art. I, § 5, cl. 1.

⁷² THE FEDERALIST NO. 59, at 361 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁷³ Franita Tolson, *Election Law “Federalism” and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2218 (2018).

of the Constitution was the motivation for this clause, “an additional command from Congress [may not] fare any better.”⁷⁴ Further, Congress would need to direct federal resources to implement regulations against an unwilling state.⁷⁵ But one could say the same of the Supremacy Clause, Extradition Clause, and other clauses that allow some commandeering.⁷⁶ James Madison once asked: “What danger could there be in giving a controlling power to the National Legislature?”⁷⁷ Interpreting the Elections Clause to allow Congress to “make or alter” only so long as it incurs all the costs associated with implementation absolves states of their duty under the clause and is thus inconsistent with its purpose. And while some have distinguished between commandeering by the Constitution and commandeering by Congress,⁷⁸ historical gloss shows Congress was aware of the potential for commandeering under the clause. The Second Congress passed a bill imposing federal election duties on the state governors, even after debating the law’s constitutionality with respect to commandeering.⁷⁹ And as mentioned above, the federal government has at least incidentally co-opted state resources vis-à-vis stringent federal election regulation in more recent years.

Regardless of whether passing H.R. 1 is feasible or not, the claimed unconstitutionality of the redistricting provision in Title II ought not be reason for abandoning it. At bottom, claims that the provision violates anticommandeering do not hold water. Solutions like a law requiring IRCs will go a long way in stomping out partisan maps, and the law as written holds up against some of its toughest critiques. But even so, given the current political climate, certain tweaks such as giving states a choice between setting up an IRC themselves or turning to a federally created commission may help quell some of the bill’s critics.⁸⁰ In any event, in a post-*Rucho* world it is difficult to see a path forward on the partisan gerrymandering issue that does not include a federal legislative fix, and it ought to be high on the list of lawmakers’ priorities.

⁷⁴ McGreal, *supra* note 52, at 577.

⁷⁵ *See id.*

⁷⁶ *See* *Printz v. United States*, 521 U.S. 898, 906–09 (1997).

⁷⁷ Madison’s Notes (Aug. 6, 1787), reprinted in 1 WILBOURN E. BENTON, 1787: DRAFTING THE U.S. CONSTITUTION 647 (1986) (“[T]he States ought not to have the uncontroled right of regulating the times places and manner of holding elections. . . . It was impossible to foresee all the abuses that might be made of the discretionary power.”).

⁷⁸ *See* Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1138 (2013); McGreal, *supra* note 52, at 593–94 (arguing that the former is constitutional, while the latter is not because while “the Constitution commands the States to act,” it does not follow that “when exercising power in the same area” Congress can too, *id.* at 593).

⁷⁹ Campbell, *supra* note 78, at 1164–65.

⁸⁰ *See* Stephanopoulos, *supra* note 7.