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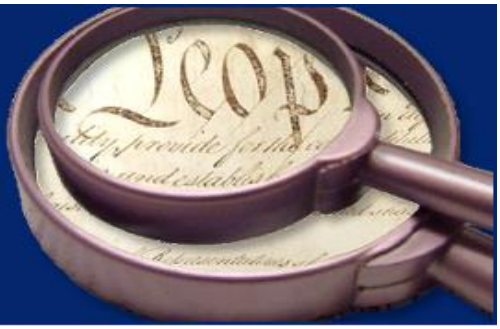

Another Attack on Election Reform: Congressional Redistricting Commissions

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I. Introduction

Many Americans, in Arizona and elsewhere, believe that our democracy could be improved by reducing money in politics and by assigning the drawing of district lines for the U.S. House of Representatives and state legislatures to bodies that are less subject to political gerrymandering than state legislatures. In 1998, the citizens of Arizona, acting through the State's initiative process, passed a law providing for public financing of state elections, with the amount of money available to candidates who opted into the system dependent in part on how much money was spent to support their opponents. In short, publicly financed candidates would receive an initial sum that would be supplemented if and when their opponents raised more than that initial sum. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,[2] the Supreme Court, by a vote of 5-4, held that the First Amendment prohibited such a system of supplemental funding. The majority concluded that it penalized those making independent expenditures by making those expenditures less valuable because they would trigger additional state funds for the candidate they opposed. Given the Court's rulings in other cases such as *Citizens United v. Fed. Election Comm'n*,[3] and *McCutcheon v. Fed. Election Comm'n*,[4] it is not surprising that proponents of campaign finance reform are now pressing for a constitutional amendment to re-balance the Supreme Court's rules for financing elections.

It is Arizona's second effort at electoral reform, also passed by an initiative two years after public financing was approved by the voters, that is currently before the Supreme Court. On March 2, 2015, the Court will hear oral argument in a constitutional challenge to the Arizona law that takes congressional redistricting out of the hands of the state legislature and assigns that job to an independent commission.[5] The claim is that Article I, Section 4 of the U.S. Constitution, The Elections Clause,[6] requires that the "Legislature" of each state perform the task of drawing congressional districts and that assigning it to another entity is unconstitutional.[7]

Allowing state legislatures to draw district lines is thought to produce two evils: incumbent protection and gerrymandering (enabling the party in control to draw districts in a

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[2] 131 S. Ct. 2806 (2011).
[3] 558 U.S. 310 (2010).
[4] 134 S. Ct. 1434 (2014).
[5] Arizona State Legislature v. Arizona Independent Redistricting Commission, No. 13-1314.
[6] "The 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, except as to the places of Chusing [sic] Senators." U.S. CONST. art. I, § 4.
[7] The law applies to the districts for the Arizona State Legislature, but the challenge asserted in this case only applies to congressional redistricting because the constitutional provision relied on by the challengers applies only to elections to Congress.

way likely to produce more seats for that party than would result based on its overall strength in the state). One way to combat these evils is to create a non-partisan commission, independent of the legislature, to do the line drawing, which is what Arizona voters did. The pending challenge does not object to the form of the Arizona Commission, or argue that the goals underlying the initiative are ill-advised or unconstitutional. Rather, the claim is that the U.S. Constitution requires that *only* a state legislature may draw the lines for that state's congressional districts and that *any* assignment to another body is forbidden.

II. Standing

In its order granting review in this case, the Supreme Court directed the parties to brief an issue that the Commission had not raised in its motion to affirm: whether the Arizona legislature has standing to challenge the alleged violation. The Court has been quite aggressive in dismissing cases arising from the federal courts based on lack of standing. The most recent example occurred in the pair of same-sex marriage cases before the Court two years ago. In the case challenging Section 3 of the Defense of Marriage Act (DOMA), although the parties agreed that the Court could hear the case, the Court appointed law professor Vicki Jackson to argue that there was no standing.[8] In the end, the Court, by a vote of 6-3, agreed that it could decide the merits, and 5 Justices found the challenged provision of DOMA unconstitutional. On the same day, by a margin of 5-4 (with some of the Justices switching their positions in both directions), the Court declined to decide the claim that California's ban on same-sex marriages was unconstitutional, finding that the party defending the law had no standing to appeal the district court's adverse ruling.[9]

While the two same-sex marriage cases reflect the Court's general disposition to deny standing, especially in cases with political overtones, its decision in *Raines v. Byrd*[10] is more similar to the case against the Arizona Redistricting Commission. At issue in *Raines* was the constitutionality of the Line Item Veto Act that had recently been passed by Congress, giving the President authority to prevent spending on items that he thought unwise but which were part of a larger bill that he could not or would not veto. Members of Congress sued over the veto's constitutionality, as expressly authorized in that Act. The Supreme Court found that there was no "case or controversy" under Article III and dismissed their case for lack of standing. According to the Court, the members had suffered no injury in their personal capacities, but only as members of Congress. The Court relied in part on the fact that Congress as a whole had not sued and that the plaintiffs were, in effect, trying to win in court a victory that they had lost in Congress. While the Arizona legislature as a whole has sued in the present case, it is unclear how much that will distinguish this case since the very law that was being challenged in *Raines* authorized individual members of Congress to sue.

If the Court were inclined to uphold the standing of the Arizona legislature, it should consider the implications for other cases involving congressional or, in some instances, senatorial standing. For example, in *Goldwater v. Carter*,[11] the Court declined to reach the merits of a

[8] United States v. Windsor, 133 S. Ct. 2675, 2684 (2013).
[9] Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).
[10] 521 U.S. 811 (1997).
[11] 444 U.S. 996 (1979).

challenge by eight Senators (and others) to the President's decision to withdraw from the U.S.'s treaty with Taiwan. Plaintiffs sued on the ground that, when the Senate has approved the creation of the treaty relationship on the front end, it must likewise approve its termination on the back end. There was no opinion for the Court explaining why it declined to reach the merits, but several Justices found there to be problems with standing that were exacerbated by the lack of support from the Senate as a whole. If the Court upholds the standing of the Arizona legislature in the current case, would that give the full Senate standing to object to future U.S. withdrawals from Senate-approved treaties? Suppose that the President entered an executive agreement on trade with other countries, claiming that he had the power to do so unilaterally. Could Congress go to court if it obtained a majority vote in both the House and Senate, based on claims that the agreement either had to be approved as a treaty, requiring two-thirds of the Senate, or as a law, requiring majority approval of both houses of Congress?

Similarly, last term in *Nat'l Labor Relations Bd. v. Noel Canning*,[12] the Court sustained a challenge to the President's exercise of the limited recess appointment powers granted to him by the Constitution, where the challenger was directly injured by a decision of an agency with a majority of recess appointees. Suppose the President decided to make recess appointments for positions such as ambassadorships or in the Departments of State or Defense, for which no private party is likely to be able to establish the kind of injury the Court has required in *Noel Canning* and similar cases. Would a resolution passed by the Senate authorizing a suit to challenge such appointments overcome the *Raines* standing objection? The Court will not necessarily have to decide these other questions when it decides whether the Arizona legislature has standing, but it surely needs to keep them in mind.

Another factor that may affect the Court's thinking in the Arizona case is that there are others who might have standing, depending in part on what harms they allegedly suffered, a fact that influenced some of the Justices in *Raines*. Among those who might have standing here are a political party that did better under the prior legislatively-determined districts; a candidate or member of the House whose prior district was much more favorable than the one drawn by the Commission; and perhaps voters who preferred the former system because more of their candidates were likely to be elected under it than under the Commission's system. Unlike the claim of diminished legislative power advanced by the appellant (and seconded by its amicus National Council of State Legislatures), those other potential plaintiffs would have claims of direct injury to them as political parties, candidates, or voters and not just a disagreement with how the voters of Arizona decided to allocate the legislative function of drawing congressional district lines.

The U.S. Solicitor General filed an amicus brief in support of the Commission on both standing and the merits. It is not surprising that the Executive Branch has urged the Court to take a narrow view of standing, but its main argument concerning jurisdiction is actually one based on ripeness.[13] The Solicitor General points out that the initiative at issue did not divest the Arizona legislature of the power to write redistricting laws and, since the passage of the initiative, the

[12] 134 S. Ct. 2550 (2014).

[13] The line between standing and ripeness is not always clear. *See* National Park Hospitality Association v. Department of Interior, 538 U.S. 803, 811, 813-17 (2003) (majority dismissing case on ripeness grounds, with Justice Stevens concurring on basis of lack of standing).

legislature has not attempted to pass such a law. But if it did enact one in opposition to what the Commission did, the Arizona Secretary of State, who must implement such laws, might agree with the legislature on its constitutional argument. In that case, there would be no need for the legislature to go to court. But at least until it has enacted a plan that differs from one that the Commission has promulgated, the Solicitor General argues that the legislature has suffered no injury and any claim that it might have is not yet ripe. In addition, if such an impasse is reached, the Solicitor General suggests that bringing the case in state, rather than federal, court, may ease the path to the Supreme Court because some states have standing rules that are less demanding than those applicable to the federal courts.

The Solicitor General's suggested approach has two benefits that the Court may find attractive. First, the Court need not say the Arizona legislature can never sue on its claim, just not yet. Second, it can avoid trying to distinguish the standing issues in the present case, and in *Raines*, from the state legislature's standing in *Coleman v. Miller*.[14] In *Coleman*, the Court upheld the standing of state legislators whose stake in the case was not personal to them, the very problem the Court identified as fatal in *Raines.* To be sure, the case came to the Supreme Court from a state court, but unless the requirements of Articled III as applied by the Court differ based on whether the case came from a state rather than a federal court, that difference would not support a different standing result.

The Court has been tough on standing, and because it is a requirement of Article III and cannot be overcome even by a statute creating a right to immediate judicial review (as was present in *Raines*), a finding of standing here will be a decidedly uphill battle. On the other hand, when the Court wants to get to the merits, it does. For example, the fact that no one had yet been harmed by the Affordable Care Act's "individual mandate," requiring that most, but not all, individuals have health insurance starting in 2014, did not prevent the Court from deciding the constitutionality of the mandate in 2012.[15] Further, if the Court decides to reach the merits in this case, it's almost certain that it won't be to affirm the lower court's ruling upholding the constitutionality of the Arizona Commission.

III. Interpretation of Article I, Section 4

Turning to the merits, there are two basic arguments to uphold the Commission. First, the reference in Article I, Section 4 to the "Legislature" does not dictate which legislative powers, including the initiative power, must be used to do the redistricting. The second, which is not raised by the Commission, is that the Elections Clause in Article I, Section 4, on which the Arizona legislature relies, has no bearing on redistricting. Rather, it only deals with the mechanics of how congressional elections are conducted and in no way constrains a state in deciding how to draw congressional districts.

The first argument is that the Elections Clause does no more than make it clear that decisions about how federal elections are to be conducted must be made by the legislative branch and not by, for example, the executive or judicial branch of a state. Thus, the Clause's reference to the "Legislature" applies broadly to a state's entire legislative power, which, as the lower

[14] 307 U.S. 433 (1939).
[15] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012).

court explained, "plainly includes the power to enact laws through initiative."[16] The Arizona legislature argues that the reference to the legislature was express and meant to be exclusive; the fact there were no initiatives in 1789 means that they are simply not included in this grant of power, just as they would be excluded from any grant of federal legislative power as an alternative to Congress. On the other side, supporters of the Commission ask, quite sensibly, why the Framers would have wanted to preclude states from making their own choices as to how to allocate their legislative functions between their legislatures and other processes, such as amending their constitutions to take certain choices off the table for a state legislature. They also note that, unlike the limit on the federal government, any supposed limit here would raise questions of federalism.

The Arizona legislature's insistence that it has the exclusive power to draw district lines relies on the argument that the Framers "delegated" to the state legislatures the power to make rules relating to the conduct of Congressional elections. Ironically, that argument seems to turn federalism on its head. Federalism is the principle that unless the federal government was expressly granted a power, or states were expressly denied one, states maintain the power to make all the laws they need by default. Accordingly, the Elections Clause is merely a means of assuring that *federal* interests in federal elections could be protected if necessary, not that the federal government magnanimously allowed the states to make time, place, and manner rules for the conduct of elections that they would otherwise be unable to do.

If the narrow reading of Article I, Section 4 is accepted, it would have ramifications far beyond striking down the Commission. If a Commission is off limits, voters might seek to tie the hands of the legislature by amending the state constitution to require that all congressional districts be as compact and contiguous as possible, and providing state courts with de novo review of the lines drawn including the right to re-draw the lines if the legislature has not complied with these requirements. Would that also run afoul of Section 4 because it significantly reduces the power of the legislature, or would it be sustained because the legislature retains its formal, but very much diminished, role?

Section 4 covers the "Times, Places, and Manners" of holding congressional elections, subject to a congressional override. Assuming that Congress has not acted, suppose a state amended its constitution to require that polls be open from 6 am to 9 pm, that the only places where ballots can be cast are public schools, or that certain kinds of voting machines are forbidden. Would such an amendment unconstitutionally restrict the future power of the state legislature over congressional elections? If so, why would the Framers have wanted to forbid a state from making those kinds of choices in its constitution?

Similarly, the Arizona Constitution allows the voters to override legislation, in whole or in part, through a referendum process. If the voters acted under that power regarding a redistricting law passed by the legislature, would that also violate Section 4 by placing the final decisional authority outside the legislature? Or, as the brief of the Commission points out, would requiring state legislatures to enact all laws relating to the times, places, and manners of congressional elections override state laws that give localities the power to decide, for example,

[16] Arizona State Legislature v. Arizona Independent Redistricting Comm'n, et al., No. CV-12-01211-PHX-PGR-MMS-GMS, 2014 WL (D. Ariz., 2014).

what kinds of voting machines will be used, what hours the polls will be open for early voting, and how the ballot should be designed in light of the many local races and local ballot issues that are presented to the voters? Perhaps such a system might be justified if there were sound reasons to support imposing such constraints on the states, but the Arizona legislature has not offered any justification that is consistent with principles of federalism or the need for limited federal supervision of congressional elections.

There is another argument against a narrow reading of "Legislature" that is based on the text of Section 4 itself. If Section 4 is applicable to redistricting (a question which is discussed in more detail below), and if a state carries out its process of redistricting in an unreasonable way, such as by delegating its function to a partisan commission, there is a built-in remedy that is far less of an intrusion on principles of federalism — Congress can change the result by utilizing its express powers under that very provision. Having Congress solve any problem created by a state's exercise of its Section 4 powers would preserve for the states generally the option of using their initiative powers under that Section, while enabling Congress to repair the specific problem before it. Indeed, as both the Solicitor General and the Commission argue in their briefs, Congress has enacted a law – 2 U.S.C. § 2a(c) – that sets forth rules for what will happen if a state fails to re-draw the district lines for members of the House of Representatives. In its current form, that statute looks to state "law," and not to what the state "legislature" did, a change that was first made when initiatives began to be used. Thus, even if the term "Legislature" were read literally, as the Arizona lawmakers suggest, 2 U.S.C. § 2a(c) is a federal override, expressly authorized by the Constitution, thereby curing any potential problem.

IV. An Alternative to Article I, Section 4

The second argument in favor of upholding the Arizona Redistricting Commission avoids construing the term "Legislature" in Article I, Section 4 by concluding that the provision has no bearing on the question at all. The starting place for this claim is the language at issue: "The 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, except as to the place of chusing [sic] Senators."[17]

To begin, the phrase "Times, Places, and Manner of holding Elections" does not, in ordinary parlance, include the substance of what the voters will decide when electing Representatives and Senators. Indeed, those subjects are covered elsewhere. For Senators, the Seventeenth Amendment now mandates that there be two from each state elected on a state-wide basis for six year terms, with no district lines to be drawn,[18] thereby making any redistricting function in Section 4 irrelevant for one of the two bodies expressly covered by it. For Representatives, Article I, Section 2, requires that the apportionment of Representatives be based on population, with each State to have at least one representative.[19] If the Framers were intent on prescribing how a state must allocate its seats in the House, and requiring that it be done by the state legislature, this is the place one would expect to find such a mandate, and not in a provision

[17] U.S. CONST. art. I, § 4.
[18] U.S. CONST. amend. XVII.
[19] U.S. CONST. art. I, §2, cl. 3.

dealing with "holding Elections"[20] for both Representatives and Senators. Moreover, Article I, Section 2 specifies that the members of the House shall be "chosen every second Year by the People of the several States," adding that "the Electors in each State shall have the Qualifications requisite for Electors for the most numerous Branch of the State Legislature."[21] Given these specific requirements for elections to both Houses, it seems quite odd that the Framers would have indirectly – and through the phrase "Times, Places and Manners of holding Elections" – imposed an additional limitation on the sovereign states, with no obvious justification for doing so.

Given the importance of assuring that congressional districts are fairly apportioned, it would be strange for the Framers not to have provided for any federal role in the districting process until it added Section 4, near the end of the process of drafting Article I, and then to have done so by such an indirect method. As the Commission points out, Section 4 assures a federal role in the conducting of elections for federal offices, and there is no hint anywhere that the provision was intended to limit states in their choice of how their laws are made. Yet that is what the Arizona legislature suggests Section 4 did. What Justice Scalia said about significant changes in regulatory legislation applies equally to what the Framers did in deciding by whom redistricting decisions must be made: they did not, "one might say, hide elephants in mouseholes."[22]

Furthermore, although not in the Constitution and arising in a different context, the phrase "time, place and manner" is used to distinguish those kinds of modest, temporal limits on First Amendment activities that do not violate the Constitution, in contrast to those that interfere with the substance of what the speaker wishes to say.[23] In the present case, the challenge to the Commission is a direct challenge to the substance of the choice that Arizona has made. This comparison to the phrase "time, place and manner" in First Amendment jurisprudence further supports the conclusion that Section 4 of the Elections Clause is not directed at which governmental body within a State may and may not draw districting lines for the House of Representatives, but at assuring that it be done by whatever means the state has chosen to enact laws relating to elections.

Taking the redistricting out of Section 4 has, at least in theory, one possible downside for those who wish to reduce gerrymandering. It could potentially strip Congress of the power to address it, leaving voters with no federal remedy. In the Court's most recent decision holding that the federal courts cannot remedy partisan gerrymandering, it concluded that the choice among remedies lacked judicially manageable standards by which lines can be redrawn and hence involved a political question. The Court suggested, but did not hold, that Congress has the power under Article I, Section 4, to set standards, and perhaps even draw the lines itself to replace those of the States.[24] It even cited a number of laws enacted by Congress dealing with the rules for creating House districts, though many of those laws could be defended as "necessary

[20] U.S. CONST. art. 4, cl. 1.
[21] US CONST. art. I, §3, cl 2.
[22] Whitman v. American Trucking Association, 531 U.S. 457, 468 (2001).
[23] Ward v. Rock Against Racism, 491 U.S. 781 (1989).
[24] Vieth v. Jubelirer, 541 U.S. 267, 274-77 (2004).

and proper"[25] to implement Article I, Section 2, which is discussed above.[26] Thus, if the Court were to determine that Article I, Section 4 does not speak to redistricting, it would arguably deprive Congress of a means for addressing gerrymandering. On the other hand, the existence of the laws cited by the Court does not establish that Section 4 is the *only* basis on which they could be defended, let alone that Section 4 also speaks to the precise means by which states must draw their congressional districts. Accordingly, even if the Court were to rule that Section 4 does not speak to how district lines may or must be drawn, and thereby reject the challenge to the Arizona Commission, it would not automatically preclude Congress from setting requirements for redistricting under Section 2. Even if that were the result, it would hardly be a loss for reformers because of the virtual certainty that Congress will never undertake such an effort, let alone actually enact a law that would make gerrymandering much less likely to occur.

There is also a federalism argument against allowing the Court to step in and overrule a state that decides to employ an independent commission to draw House district lines on "Times, Places, and Manners" grounds. Assuming, contrary to the arguments made above, that Congress has no authority other than Section 4 with respect to House elections, it is difficult to identify the federal interest in overruling *how* a state chooses to exercise the redistricting function under its own constitution. It is perfectly understandable why the Framers would have wanted Congress to have a backup role on the rules applicable to what happens on Election Day, but it is far less obvious why that rationale would carry over to allowing the federal judiciary to second-guess a state's internal lawmaking norms for drawing legislative districts applicable to the House of Representatives.

V. Conclusion

For those who still sustain a hope that non-partisan redistricting commissions can reduce the likelihood of partisan gerrymandering, and thereby increase democracy in the process of selecting members of the House of Representatives, they should be rooting hard that the Court rejects the position of the Arizona legislature.

[25] U.S. CONST. art. I, sec. 8, cl. 18.
[26] US CONST. art. I, § 2.