Free Speech & Election Law

Part II: Can States Require Proof of Citizenship for Voter Registration?: *Arizona v. Inter Tribal Council of Arizona*

*By Anthony T. Caso**

Note from the Editor:

This article discusses the *Arizona v. Inter Tribal Council of Arizona* decision by the United States Supreme Court. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about the issues involved. To this end, we offer links below to the decision and another perspective on the case, and we invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

Related Links:

• Arizona v. Inter Tribal Council of Arizona, 133 S. Ct. 2247 (2013): http://www.supremecourt.gov/opinions/12pdf/12-71_7l48.pdf

• Arizona v. Inter Tribal Council of Arizona, Brennan Center for Justice (June 17, 2013): http://www.brennancenter.org/legal-work/arizona-v-inter-tribal-council-arizona-inc-amicus-brief

Introduction

Last term the Court heard a case examining a perceived clash between state and federal law on voter registration.[1] The Court ruled that the federal law preempted Arizona's state law, thus relegating states' constitutional authority to regulate voter qualification to federal supervision.

The federal law is the National Voter Registration Act ("NVRA")—commonly known as "Motor-Voter" for the requirement that states provide voter registration materials when someone applies for a driver's license.[2] Under the NVRA, the Election Advisory Commission creates registration forms (in consultation with the states) that states must "accept and use."[3] The Arizona law at issue required people registering to vote to provide proof of citizenship.[4] A federal voter-registration form that is not accompanied by proof of citizenship was not accepted.[5] The Ninth Circuit ruled that the NVRA preempted the state law proof of citizenship requirements and the Supreme Court affirmed.

In resolving this issue, the Court decided that voter registration is governed by the Elections Clause of Article I, Section 4—or at least that Arizona had not challenged the assertion of congressional authority under Section 4 as encompassing the power to regulate the registration process. State power to set voter qualifications under the Voter Qualification Clause of Article I, Section 2 could still be given effect, but the state will be required to apply to a federal commission for permission to enforce its qualification requirements.

I. Background

The general intent of the National Voter Registration Act is to increase registration of "eligible" voters and protect the integrity of the election process.[6] The Act seeks to accomplish this goal by requiring states to combine the application for voter registration with the application for a driver's license.[7] The Act empowers the Election Advisory Commission, a federal entity, to design the form that states must use for voter registration, but requires the Commission to consult with state election officials in designing that form.[8] This means that the registration form in California (which requires a driver's license or identification number) differs from the registration form in Hawaii (which requires a Social Security number). The regulations specifically provide for these state variations in the "federal form."[9] In designing the form, the Commission cannot require any information that is already required on the driver's license application[10] and, for mail-in voter registration forms, cannot require "notarization or other formal authentication."[11] States are required to "accept and use" the federal form for voter registration.[12]

In 2004, Arizona voters adopted Proposition 200 to crack down on problems with fraudulent voter registrations and illegal voting. The principal provisions of Proposition 200 required applicants to submit proof of citizenship when they registered to vote.[13] The law barred state election officials from accepting registration forms without the requisite proof.[14] Arizona submitted these changes to the Election Advisory Commission for inclusion in Arizona's version of the federal form. Commission staff, however, refused to include the new requirements and the Commission upheld the staff on a 2-2 vote.[15] Arizona did not file a challenge to the Commission action but instead chose to move forward with implementation of the new requirements of Proposition 200 on its own.[16] By choosing this route,

**Anthony T. (Tom) Caso is an Associate Professor at Chapman University School of Law.*

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Arizona law rejected "federal forms" that are not accompanied by proof of citizenship. The issue in the case was whether this refusal to accept federal forms without proof of citizenship was preempted by the NVRA requirement that states "accept and use" the federal form.

II. Constitutional Provisions: The Elections Clause and the Qualifications Clause

There are two constitutional provisions governing the authority of states and Congress in this area: Article I, Section 4—the Elections Clause—and Article I, Section 2—the Voter Qualification Clause.

Article I, Section 4 of the Constitution grants power to Congress to override state regulation of the mechanics of federal elections. Specifically, Congress is given the power to "make or alter" regulations regarding the "times places, and manner of holding elections for Senators and Representatives."[17] The text is quite explicit in outlining the power of Congress to regulate federal elections. However, Congress was not given general power over all matters relating to an election. Instead, the text expressly defines only three areas of regulation in which congressional control is appropriate: the time, the place, and the manner of holding the election.

In the debate over the ratification of the Constitution, Alexander Hamilton argued that Congress' power to regulate elections was "expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections."[18] James Madison explained that the purpose of the provision was to prevent dissolution of the federal government by state regulation that prevented a House of Representatives from being formed.[19]

The ratification debates emphasized the limitation on this delegation of power to Congress: "Congress therefore were vested also with the power just given to the legislatures—that is, the power of prescribing merely the circumstances under which elections shall be *holden*, not the qualifications of the electors, nor those of the elected."[20] In essence, this power extends only to the "*when, where,* and *how*" of elections.[21]

The central concern of the Framers was the timing of the elections in the states. Unless there was federal control over that timing, states could prevent a full House from being elected in time to allow a session of Congress.[22] A number of the arguments in the ratification debates used Rhode Island as an example of what a dissenting state might do to prevent the House of Representatives from sitting.[23] Rhode Island's anti-federalist legislature refused to call a convention to consider the new Constitution.[24] The power of Congress to regulate the time of federal elections prevents states that oppose the federal government from refusing to schedule a federal election.[25]

The regulation of the place of federal elections was thought to be a tool against disenfranchisement.[26] There were several exchanges in the ratification debates noting that Charleston, South Carolina had 30 representatives in the state legislature out of a total of 200. Rural areas argued that this arrangement gave all the political power in the state to Charleston.[27] Section 4 of Article I was meant to ensure that Congress had the power to designate the place of the election in order to prevent similar unequal representation from occurring in the House of Representatives.

There are a few mentions of different election mechanical issues regarding the manner of holding election. One commenter supposed that under the Elections Clause Congress could require a paper ballot rather than a voice vote.[28] Another argued that the provision allowed Congress to choose between a majority or a plurality vote requirement.[29] The common feature is that all of these concerns are with the mechanics of the actual election rather than the qualifications of the electors.[30]

The Supreme Court's earlier holdings on the reach of Section 4 are not to the contrary. Dicta in those opinions, however, supported a more expansive power under Section 4.

The Court has acknowledged that Section 4 gives Congress to set a uniform national date for elections.[31] The Court has also long-recognized that the "manner" of election included a power to compel selection of representatives by district.[32] Congress further has power over redistricting and political gerrymandering pursuant to this section.[33]

Justice Black argued in *Oregon v. Mitchell*, 400 U.S. 112 (1970), that the power in Section 4 to override state regulation also extended to overriding state elector qualifications identified in Section 2.[34] No other Justice accepted this reasoning. Indeed, Justice Harlan convincingly demonstrated that such a result was contrary to the intent behind Section 2.[35] Justice Harlan was correct. Section 2 expressly recognizes state control over voter qualifications.

While these Court holdings may have been limited to mechanical election issues, the dicta in those opinions is not so limited. Thus, in *Smiley* v. *Holm*, 285 U. S. 355, 366 (1932), the Court speaks of a Congressional power to enact a complete national code for elections. This includes complete control over voter registration for federal elections.[36]

While the text of the Constitution assigned ultimate control over the mechanics of federal elections to Congress, it assigned to the states exclusive control over the *qualifications* of the electors. This was, in part, a recognition that the new Constitution created a government that was both "federal" and "national" in character. States already controlled the qualification of voters for the state legislature. The Framers and Ratifiers saw no good reason to create a national uniformity on voter qualification. There was express recognition that different states would have different voter qualification requirements.[37] So long as the qualification was tied to the state qualification to vote for the most numerous branch of the state legislature, the people had the ability and motive to protect their franchise.[38] On the other hand, there were good reasons to keep the power out of the hands of Congress.

At the convention, James Madison argued forcefully against granting Congress the power to dictate the qualifications of electors. If Congress could regulate the qualifications of electors, Madison argued, "it can by degrees subvert the Constitution."[39] Madison made a similar argument in *The Federalist Papers*: Leaving qualification of electors to Congress would have "violated a fundamental article of republican government."[40]

Even beyond this political design, the commitment of voter qualification to state law served another purpose during the ratification debate. One of the chief fears of those arguing against ratification was that the new federal government would annihilate the states. This significant fear was addressed in

the ratification debates in Connecticut, Massachusetts, and Virginia.[41] The chief argument against this fear was the Elector Qualification Clause.

How could Congress do away with the states when the states had so much control over the election of federal representatives? "Congress cannot be organized without repeated acts of the legislatures of the several states."[42] The same point was argued in Virginia and other states.[43] This provision vesting voter qualification in state law was carried through in the 17th Amendment.

III. Arguments of the Parties

In its merits brief, Arizona argued that preemption under Section 4 must start with a presumption of state law validity, that the state law does not conflict with the NVRA, and that an interpretation of the NVRA finding conflict with the state law would raise serious constitutional questions that the NVRA intrudes on state authority to determine voter qualifications under the Qualifications Clause.

On the issue of the preemption test, Arizona relied on Supremacy Clause preemption cases to argue for a presumption against preemption where states were regulating within their traditional police powers.[44] In making this argument, however, the State did not develop the interrelationship between state conduct of a *federal* election (something not within traditional police power) with state regulation of voter qualification (something expressly delegated to the states). Arizona did take up the latter point in arguing that any interpretation of the NVRA must take into account state powers under the Qualifications Clause.[45]

The State also argued that there is no conflict between the state law and the NVRA. Arizona argued that it did "accept and use" the federal form, but it also required proof of citizenship just as California requires a driver's license or state ID number and Hawaii requires a Social Security number. The only difference is that the Elections Assistance Commission acceded to the request of California and Hawaii for inclusion of such information on the federal form, but rejected Arizona's request for inclusion of an instruction to submit proof of citizenship with the form.[46] Thus, the State argued that the Ninth Circuit gave preemptive effect to the Commission rather than the statute. Arizona claimed that this was improper in light of the fact that the Commission has no rulemaking authority.[47]

Finally, the State argued that a broad interpretation of the NVRA prohibiting states from requiring proof of eligibility would run afoul of the Qualifications Clause. As noted above, Article I, Section 2 ties voter qualification in federal elections to state voter laws. If Congress intended the NVRA to interfere with states' enforcement of their voter qualification rules by prohibiting proof of eligibility, the NVRA would violate the Qualifications Clause. Thus, the State argued, the Court should interpret the NVRA as permitting additional state requirements regarding proof qualification.[48]

The Respondents' arguments tracked the Ninth Circuit opinion. They argued that there is a different standard for preemption under the Elections Clause than the Supremacy Clause.[49] The Respondents did not, however, push the Ninth Circuit's test for preemption ("If the two statutes do not operate harmoniously in a single procedural scheme for federal voter registration, then Congress has exercised its power to "alter" the state's regulation, and that regulation is superseded"[50]). Instead, they argued that there is clear "conflict" between the Arizona law and the NVRA.[51] The focus of the Respondents' argument was on the "accept and use" language of 42 U.S.C. § 1973gg-4. According to the Respondents, so long as the state is requiring something in addition to the federal form, the state has failed to "accept and use" the federal form.

Supporting the Respondents, the United States also argued that the Arizona law is in conflict with the NVRA. In particular, the United Stated argued that the Arizona law requiring proof of citizenship conflicts with 42 U.S.C. § 1973gg-6 which requires state to ensure that "any eligible applicant is registered to vote in an election" if the mail-in form is postmarked in a timely manner.[52] A state that requires any proof of eligibility beyond the completed mail-in form, according the Solicitor General, violates this section. The United States reads this provision to have the same general meaning as the requirement of § 1973gg-4 which requires states to "accept and use" the mail in form created by the Election Advisory Commission.[53] Again, the argument is that a state that requires more than completion of the form has failed to "accept and use" the federal form.

On the preemption question, the United States argued in support of the Ninth Circuit's test of whether the provisions are "harmonious."[54] It said that this test is consistent with early Elections Clause decisions of the Supreme Court and, further, that this is no different than standard conflict preemption under the Supremacy Clause.[55]

The United States also disputed the argument that the Qualifications Clause limits Congress' authority under the Elections Clause. Citing to the *dicta* in prior Supreme Court cases noted above, the federal government argued that the "manner" of an election includes all of the regulations necessary for an election, including registration.[56]

IV. The Supreme Court Ruling

A. *Majority Opinion*

The Supreme Court rejected Arizona's argument, but offered the State a path to achieving its desired result. The Court's opinion was authored by Justice Scalia and joined by the Chief Justice and Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Kennedy concurred in part and concurred in the judgment. Justices Thomas and Alito each filed a dissenting opinion.

Justice Scalia noted that Arizona had not challenged Congress' authority to impose regulations for registering voters for federal elections.[57] Without such a challenge, there was no reason for the Court to examine the prior cases ruling that the Elections Clause gave broad power to Congress "'to provide a complete code for congressional elections.'"[58] From that base, the Court took a fairly conventional approach to the statutory interpretation question and ruled that the requirement for Arizona to "accept and use" the federal form precluded Arizona from denying registration to anyone who submitted a completed federal form without the additional state-required proof of citizenship.[59]

The Court rejected Arizona's argument for a presumption against preemption. Although the Court has mentioned such a presumption in Supremacy Clause cases, the Court majority in *Arizona* ruled that the presumption could not be applied to the Elections Clause: "The assumption that Congress is reluctant to pre-empt does not hold when Congress acts under that constitutional provision which empowers Congress to 'make or alter' state election regulations."[60] Under this provision, *any* action Congress takes will *necessarily* displace contrary state regulation.

It was on this question of how to analyze preemption that Justice Kennedy parted company with the majority. According to Justice Kennedy, "There is no sound basis for the Court to rule, for the first time, that there exists a hierarchy of federal powers so that some statutes pre-empting state law must be interpreted by different rules than others, all depending upon which power Congress has exercised."[61] Apart from that distinction, however, Justice Kennedy agreed with the Court that Congress had preempted Arizona's law requiring additional information for voter registration.

As noted above, the Court did offer Arizona a path to achieving its goal of requiring proof of citizenship as a prerequisite to registering to vote. Arizona had argued that its interpretation of the statute should be adopted in order to avoid doubts as to the NVRA's constitutionality. The Qualifications Clause assigns the question of voter qualifications exclusively to the states. The Court agreed that "[p]rescribing voter qualifications . . . forms no part of the power to be conferred upon the national government' by the Elections Clause."[62] The Court ruled, however, that Congress had left a means for Arizona to enforce its voter qualifications requirements. Arizona can ask the Election Assistance Commission to include Arizona's requirements on the federal form, just as it includes other state-specific requirements. If the Commission refuses Arizona's request, the state will have an appeal under the Administrative Procedure Act and can claim that the Commission's action is arbitrary.[63] The Court did acknowledge that the Commission currently has no active commissioners and thus is legally incapable of taking any action on a request by Arizona to alter the federal form. Indeed, the Court noted: "It is a nice point, which we need not resolve here, whether a court can compel agency action that the agency itself, for lack of the statutorily required quorum, is incapable of taking."[64] Nonetheless, the Court ruled that Arizona must apply to a federal commission that currently has no members and no legal authority to act in order to enforce the state's exclusive constitutional power to define the qualifications for voters.

B. *Dissents*

For Justice Thomas—who, along with Justice Alito, dissented—the plain text of the Qualifications Clause gives states the power to set the qualifications for voters and that "necessarily includes the related power to determine whether those qualifications are satisfied."[65] Justice Thomas argued that the text of the NVRA should be construed in light of this constitutional command and that Arizona's interpretation should be adopted in order to avoid finding the NVRA unconstitutional.[66] Justice Alito took a similar approach: "The Court reads an ambiguous statute in a way that brushes aside the constitutional authority of the States and produces truly strange results."[67] The strange result, according to the dissenters, is that the success of an applicant for voter registration in Arizona now rests on which application the registrant chooses to complete. The state application, which the Court acknowledged was not affected by its decision, continues to require proof of citizenship. Failure to include that proof with the registration application will result in a denial of registration. On the other hand, if the voter chooses the federal form and provides all of the same information as required by the state form but does not include the proof of citizenship requirement, the applicant will be successful. Justice Alito noted, "I do not think that this is what Congress intended."[68]

Endnotes

1 At one point, the case also raised the constitutionality of Arizona's voter ID law. Purcell v. Gonzalez, 549 U.S. 1, 2 (2006). The Ninth Circuit rejected the plaintiffs' arguments on that point and that issue was not included in the case before the Supreme Court. Gonzalez v. Arizona, 677 F.3d 383, 410 ((9th Cir. 2012).

2 42 U.S.C. §§ 1973gg, *et seq*.

3 42 U.S.C. § 1973gg-7.

4 A.R.S. §16-166.

5 *Id*.

6 42 U.S.C. § 1973gg.

7 42 U.S.C. § 1973gg-3.

8 42 U.S.C. § 1973gg-7.

9 11 C.F.R. § 9428.4.

10 42 U.S.C. § 1973gg-3.

11 42 U.S.C. § 1976gg-7.

12 42 U.S.C. § 1973gg-4.

13 A.R.S. § 16-166F.

14 *Id*.

15 Arizona v. Inter Tribal Council of Arizona, 133 S.Ct. 2247, 2259 (2013).

16 *Id*. at 2260

17 U.S. Const., art. I, § 4.

18 The Federalist No. 60, at 371 (Alexander Hamilton) (Clinton Rossiter, ed., 1961) (emphasis in original).

19 James Madison, *Debates*, *reprinted in* 10 The Documentary History of the Ratification of the Constitution (Virginia, No. 3), at 1260 (John P. Kaminski et al. eds, Univ. Virginia Press 2009) [hereinafter The Documentary History].

20 *A Pennsylvanian to the New York Convention*, *Pennsylvania Gazette*, June 11, 1788, *reprinted in* 20 The Documentary History, *supra* note 19, at 1145 (New York No. 2) (emphasis in original).

21 Sedgwick, *Theophilus Parsons: Notes of Convention Debates*, January 16, *reprinted in* 6 The Documentary History, *supra* note 19, at 1211 (Massachusetts No. 3) (emphasis in original).

22 *James Madison*, *Debates*, *reprinted in* 10 The Documentary History, *supra* note 19, at 1260 (Virginia, No. 3); The Federalist No. 59 (Alexander Hamilton), *supra* note 16, at 362 ("*every government ought to contain in itself the means of its own preservation*." (Emphasis in original.); The Federalist No. 61 (Alexander Hamilton), *supra* note 16, at 375.

23 *A Pennsylvanian to the New York Convention*, *Pennsylvania Gazette*, 11 June 1788, *reprinted in* 20 The Documentary History, *supra* note 19, at 1144 (New

York No. 2); *A Landholder IV*, *Connecticut Currant*, November 26, *reprinted in* 3 The Documentary History, *supra* note 19, at 479 (Delaware, New Jersey, Georgia, and Connecticut).

24 *See Massachusetts Centinel*, *26 December*, *reprinted in* 5 The Documentary History, *supra* note 19 (Massachusetts No. 2).

25 The Federalist No. 61, *supra* note 18, at 375; James Madison, *Convention Debates*, *reprinted in* 10 The Documentary History, *supra* note 19, at 1260 (Virginia No. 3).

26 James Madison, *Convention Debates*, *reprinted in* 10 The Documentary History, *supra* note 19, at 1260 (Virginia No. 3); Jeremy Belknap, *Notes of Convention Debates*, *21 January*, *reprinted in* 6 The Documentary History, *supra* note 19 (Massachusetts No. 3); King, *Convention Debates*, *21 January*, *reprinted in* 6 The Documentary History, *supra* note 19, at 1279 (Massachusetts No. 3).

27 *Id.*

28 Thomas McKean, *Convention Debates*, *reprinted in* 2 The Documentary History, *supra* note 19, at 537 (Pennsylvania); U.S. Term Limits v. Thorton, 514 U.S. 779, 833 (1995) (quoting James Madison during convention debates).

29 *Federal Farmer: An Additional Number of Letters to the Republican*, New York, 2 May 1788, *reprinted in* 20 The Documentary History, *supra* note 19, at 1021 (New York No. 2).

30 *Convention Debates*, *21 January*, *reprinted in* 6 The Documentary History, *supra* note 19, at 1279 (Massachusetts No. 3) ("for the power of controul given by this sect, extends to the *manner* of election, not the *qualifications* of the electors." (Emphasis in original)).

31 Foster v. Love, 522 U.S. 67, 68-72 (1997).

32 Ex parte Siebold, 100 U.S. 371, 384 (1879).

33 Branch v. Smith, 538 U.S. 254, 259 (2003); Vieth v. Jubelirer, 541 U.S. 267, 275-76 (2004).

34 *See* Oregon v. Mitchell, 400 U.S. 112 (1970) (Black, J.)

35 *Id.* at 210 (Harlan, J., concurring in part and dissenting in part).

36 *Id.*

37 *King*, *Theophilus Parsons: Notes of Convention Debates*, *17 January*, *reprinted in* 6 The Documentary History, *supra* note 19, at 1240-41 (Massachusetts No. 3).

38 *A Landholder IV*, *Connecticut Courant*, *26 November*, *reprinted in* 14 The Documentary History, *supra* note 19, at 233 (Commentaries on the Constitution, No. 2) ("Your own assemblies are to regulate the formalities of this choice, and unless they betray you, you cannot be betrayed").

39 *Oregon* , 400 U.S at 210 (Harlan, J.) (quoting Madison during Convention Debates).

40 The Federalist No. 52, *supra* note 18, at 325–26.

41 A Landholder IV, *Connecticut Currant*, *November 26*, *reprinted in* 14 The Documentary History, *supra* note 19, at 233 (Commentaries No. 2); *Gen. Brooks*, *Convention Debates*, January 24, *reprinted in* 6 The Documentary History, *supra* note 19 (Massachusetts No. 3); *Virginia Independent Chronicle*, November 28, *reprinted in* 8 The Documentary History, *supra* note 19, at 177–78 (Virginia No. 1).

42 Gen. Brooks, *Convention Debates*, *January 24*, *reprinted in* 6 The Documentary History, *supra* note 19 (Massachusetts No. 3).

43 *An Impartial Citizen VI*, *Petersburg Virginia Gazette*, March 13, *reprinted in* 8 The Documentary History, *supra* note 19, at 495 (Virginia No. 1) ("How can there be a House of Representatives, unless its members be chosen? How can its members be chosen, unless it be known and ascertained who have a right to vote in their election?"); A Landholder IV, *Connecticut Currant, November 26*, *reprinted in* 3 The Documentary History, *supra* note 19, at 480 (Delaware, New Jersey, Georgia, and Connecticut) ("The national Representatives are to be chosen by the same electors, and under the same qualifications, as choose the state representatives; so that if the state representation be dissolved, the national representation is gone of course. State representation and government is the very basis of the congressional power proposed.").

44 Brief of Petitioner-Appellant at 32, Arizona v. Inter Tribal Council of Arizona, 133 S.Ct. 2247, 2259 (2013) (citing Wyeth v. Levine, 555 U.S. 555, 565 (2009)).

45 *Id.* at 46.

46 *Id.* at17-18.

47 *Id.* at 44-46.

48 *Id.* at 48-53.

49 Brief of Respondent-Appellee Inter Tribal Council at 30, Arizona v. Inter Tribal Council of Arizona, 133 S.Ct. 2247 (2013).

50 *Id.* at 394.

51 Brief of Respondent-Appellee Inter Tribal Council at 34-38, Arizona v. Inter Tribal Council of Arizona, 133 S.Ct. 2247 (2013); Brief of Respondent-Appellee Gonzalez at 36-40, Arizona v. Inter Tribal Council of Arizona, 133 S.Ct. 2247 (2013).

52 Brief for the United States as Amicus Curiae Supporting Respondents at 14-15, Arizona v. Inter Tribal Council of Arizona, 133 S.Ct. 2247 (2013).

53 *Id.* at 15.

54 *Id.* at 25.

55 *Id.*

56 *Id.* (citing Smiley v. Holm, 285 U.S. 355, 366 (1932) (The issue in *Smiley* was whether state redistricting legislation that was vetoed by the Governor could nonetheless by implemented because the Elections Clause referred to regulations created by the state legislature)).

57 *Arizona*, 133 S.Ct. at 2253.

58 *Id.*

59 *Id.* at 2254-55.

60 *Id.* at 2256-57.

61 *Id.* at 2260 (Kennedy, J., concurring in part and concurring in the judgment).

62 *Id.* at 2258.

63 *Id.* at 2260 n.10.

64 *Id.*

65 *Id.* at 2262 (Thomas, J., dissenting).

66 *Id.*

67 *Id.* at 2270 (Alito, J., dissenting).

68 *Id.*