Free Speech & Election Law

Can States Require Proof of Citizenship for Voter Registration—*Arizona v. Inter Tribal Council of Arizona*

*By Anthony T. Caso**

Introduction

This term the Court will hear a case examining a perceived clash between state and federal law on voter registration.[1] The federal law is the National Voter Registration Act (NVRA)—commonly known as "Motor-Voter" for the requirement that state's 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] Arizona law requires people registering to vote to provide proof of citizenship.[4] A federal form that is not accompanied by proof of citizenship is not accepted.[5] The Ninth Circuit ruled that the NVRA preempted the state law proof of citizenship requirements and the Supreme Court granted review.

To resolve this issue, the Court must decide whether voter registration is governed by the Voter Qualification Clause of Article I, Section 2 or the Elections Clause of Article I, Section 4. If the latter, the Court must decide what type of preemption test to apply to state law in the face of Congressional action under Section 4. Finally, the Court must decide whether the Arizona legislation fails any such preemption test.

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 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 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 principle 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. Arizona went forward with implementation of the new requirements of Proposition 200 on its own. In essence, Arizona law rejects "federal forms" that are not accompanied by proof of citizenship. The issue in the case is whether this refusal is 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. Thus far, the courts have focused all of their attention on Article I, Section 4—the Elections 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."[15] The text is quite explicit in outlining the power of Congress to regulate federal elections. 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 y the regulation of the *times*, the *places*, and the *manner* of elections."[16] 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.[17]

The ratification debates emphasize 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."[18] In essence, this power extends only to the "*when, where,* and *how*" of elections.[19]

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.[20] A number of the arguments in the ratification debates use Rhode Island as an example of what a dissenting state might do to prevent the House of Representatives from sitting.[21] Rhode Island's anti-federalist legislature refused to call a convention to consider the new Constitution.[22] The power of Congress to regulate the

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

time of federal elections prevents states that oppose the federal government from refusing to schedule a federal election.[23]

The regulation of the place of federal elections was thought to be a tool against disenfranchisement.[24] There were several mentions 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 the City of Charleston.[25] Section 4 of Article I was meant to ensure that Congress had the power 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 supposed it could require a paper ballot rather than a voice vote.[26] Another argued that the provision allowed Congress to choose between a majority or a plurality vote requirement.[27] The common feature is that all of these concerns are with the mechanics of the actual election rather than the qualifications of the electors.[28]

The Supreme Court's opinions on the reach of Section 4 are not to the contrary. The Court has acknowledged that Section 4 gives Congress authority to set a uniform national date for elections.[29] The Court has long-recognized that the "manner" of election included a power to compel selection of representatives by district.[30] Congress also has power over redistricting and political gerrymandering pursuant to this section.[31]

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.[32] No other justice accepted this reasoning. Indeed, Justice Harlan convincingly demonstrated that such a result was contrary to the intent behind Section 2.[33] Justice Harlan was correct—Section 2 expressly recognizes state control over voter qualifications.

While the Constitution assigned ultimate control over the mechanics of federal elections to Congress, states were assigned 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.[34] 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.[35] 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."[36] Madison made a similar argument in the Federalist Papers, saying that leaving qualification of electors to Congress would have "violated a fundamental article of republican government."[37]

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 was a significant fear and was addressed in the ratification debates in Connecticut, Massachusetts, and Virginia.[38]

The Elector Qualification Clause was the chief argument against this fear: 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."[39] The same point was argued in Virginia and other states.[40] This provision vesting voter qualification in state law was carried through in the 17th Amendment.

III. The Lower Court Ruling

As noted, the courts and parties have focused almost exclusively on Article I, Section 4.[41] Section 4 provides:

> 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 Senators.

The Ninth Circuit had previously given an expansive interpretation of Section 4, holding that the "make or alter" language allows Congress to "conscript state agencies" to implement the federal regulation.[42] In reviewing how preemption works pursuant to Section 4 the court noted: "In contrast to the Supremacy Clause, which addresses preemption in areas within the states' historic police powers, the Elections Clause affects only an area in which the states have no inherent or reserved power: the regulation of federal elections."[43] From this, the court concluded that standard preemption analysis under the Supremacy Clause, including the presumption against preemption, was not applicable to the "make or alter" analysis under Section 4. The court noted that "[b]ecause states have no reserved authority over the domain of federal elections, courts deciding issues raised under the Elections Clause need not be concerned with preserving a 'delicate balance' between competing sovereigns. Instead, the Elections Clause, as a standalone preemption provision, establishes its own balance."[44] Thus the court developed a new preemption test for Section 4 cases: "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."[45] Applying this new test, the Ninth Circuit ruled that Arizona's proof of citizenship requirement was "discordant" with the federal statute's goal of "streamlining registration." Proof of this, according to the court, lies in the fact that the Election Advisory Commission chose to design the federal form as a postcard "which could be easily filled out and mailed on its own [but] Proposition 200's registration provision makes the Federal Form much more difficult to use."[46]

IV. Arguments of the Parties

In its merits brief, Arizona launches a multi-pronged attack on the Ninth Circuit decision. Arizona argues that the

Ninth Circuit used the wrong preemption test, the state law does not conflict with the NVRA, the Ninth Circuit erred in according preemptive force to a decision of Elections Assistance Commission staff, and 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 argues for a form of conflict preemption that looks to whether state officials can comply with both the state and federal laws.[47] If so, and Arizona argues that this is the case, there is no conflict and thus no preemption.[48] In addition to early Elections Clause cases on conflicting state laws, Arizona also relies on Supremacy Clause preemption cases to argue for a presumption against preemption where states were regulating within their traditional police powers.[49] In making this argument, however, the state does not develop the interrelationship between state conduct of a *federal* election (something not within traditional police power) and state regulation of voter qualification (something expressly delegated to the states). Arizona does take up the latter point in arguing that any interpretation of the NVRA must take into account state powers under the Qualifications Clause.[50]

The State also argues that there is no conflict between the state law and the NVRA. Arizona argues that it does "accept and use" the federal form, but it also requires 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 requests 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.[51] Thus, the State argues that the Ninth Circuit gave preemptive effect to the Commission rather than the statute. Arizona argues that this is improper in light of the fact that the Commission has no rulemaking authority.[52]

Finally, the state argues 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 their voter qualification rules by prohibiting proof of eligibility, the NVRA would violate the Qualifications Clause. Thus, the State argues, the Court should interpret the NVRA as permitting additional state requirements regarding proof qualification.[53]

The plaintiffs' arguments track the Ninth Circuit opinion. First they argue that there is a different standard for preemption under the Elections Clause than the Supremacy Clause.[54] In this argument, plaintiffs mainly seek to avoid the Court's Supremacy Clause jurisprudence that imposes a presumption against preemption. Plaintiffs do not, however, push the Ninth Circuit's test for preemption. Instead, they argue that there is clear "conflict" between the Arizona law and the NVRA.[55] The focus of plaintiffs' argument is on the "accept and use" language of 42 U.S.C. §1973gg-4. So long as the state is requiring something in addition to the federal form, according to plaintiffs, the state has failed to "accept and use" the federal form.

Supporting the plaintiffs, the United States also argues that the Arizona law is in conflict with the NVRA. In particular, the United States argues that the Arizona law requiring proof of citizenship conflicts with 42 USC §1973gg-6 which requires states to ensure that "any eligible applicant is registered to vote in an election" if the mail-in form is postmarked in a timely manner.[56] 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 section 1973gg-4 which requires states to "accept and use" the mail-in form created by the Election Advisory Commission.[57] 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 argues in support of the Ninth Circuit's test of whether the provisions are "harmonious."[58] The United States argues that this test is consistent with early Elections Clause decisions of the Supreme Court. Significantly, however, the United States then argues that this is no different than standard conflict preemption under the Supremacy Clause.[59]

The United States also rejects the argument that the Qualifications Clause limits Congress' authority under the Elections Clause. Citing to *dicta* in prior Supreme Court cases, the United States argues that the "manner" of an election includes all of the regulations necessary for an election, including registration.[60] The Supreme Court has not, however, directly considered this question.

V. Potential Implications of the Court's Ruling

The Court can take three alternate paths to resolve this case. First, they can decide as a matter of statutory construction that Arizona's provision is consistent with the NVRA—specifically section 1973gg-7's provision stating that the mail-in form may require the information "necessary to enable the appropriate State election official to assess the eligibility of the applicant." Second, the Court could focus on the "preemption analysis" for Article I, Section 4. Under this analysis, the main issue would be whether the Court should apply the same analysis it uses for Supremacy Clause cases, or whether Section 4 has a "super" preemption provision that forbids not only conflicting state regulation or regulation that stands as an obstacle to the accomplishment of a federal purpose, but also "unharmonious" state regulation. Finally, the Court can decide on a limiting interpretation for the NVRA by finding that qualification of voters is a matter that rests with the states under Article I, Section 2.

The route the Court takes to the decision may have significant impact on state and federal election law. If voter qualifications are exclusively a state concern (other than Congress' enforcement power under the 14th Amendment), does that mean that Congress cannot forbid states from enacting voter ID requirements? On the other hand, if registration is a matter for Congress under the time, place and manner provisions of the Elections Clause, does that give Congress authority to empower an administrative agency to preempt state regulations that the agency deems unharmonious?

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 is 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 CFR §9428.4.

10 42 U.S.C. §1973gg-3.

11 42 U.S.C. §1976gg-7.

12 42 U.S.C. §1973gg-4.

13 ARS §16-166F.

14 *Id*.

15 U.S. Const. art. I, § 4.

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

17 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].

18 *A Pennsylvanian to the New York Convention*, *Pennsylvania Gazette*, June 11, 1788, *reprinted in* 20 The Documentary History, *supra* note 17, at 1145 (New York No. 2) (emphasis in original).

19 Sedgwick, *Theophilus Parsons: Notes of Convention Debates*, January 16, *reprinted in* 6 The Documentary History, *supra* note 17, at 1211 (Massachusetts No. 3) (emphasis in original).

20 *James Madison*, *Debates*, *reprinted in* 10 The Documentary History, *supra* note 17, 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.

21 *A Pennsylvanian to the New York Convention*, *Pennsylvania Gazette*, 11 June 1788*, reprinted in* 20 The Documentary History, *supra* note 17, at 1144 (New York No. 2); *A Landholder IV*, *Connecticut Currant*, November 26, *reprinted in* 3 The Documentary History, *supra* note 17, at 479 (Delaware, New Jersey, Georgia, and Connecticut).

22 *See Massachusetts Centinel*, *26 December*, *reprinted in* 5 The Documentary History, *supra* note 17 (Massachusetts No. 2).

23 The Federalist No. 61, *supra* note 16, at 375; James Madison, *Convention Debates*, *reprinted in* 10 The Documentary History, *supra* note 17, at 1260 (Virginia No. 3).

24 James Madison, *Convention Debates*, *reprinted in* 10 The Documentary History, *supra* note 16, at 1260 (Virginia No. 3); Jeremy Belknap*, Notes of Convention Debates*, *21 January*, *reprinted in* 6 The Documentary History, *supra* note 17 (Massachusetts No. 3); King, *Convention Debates*, *21 January*, *reprinted in* 6 The Documentary History, *supra* note 17, at 1279 (Massachusetts No. 3).

25 *Id.*

26 Thomas McKean, *Convention Debates*, *reprinted in* 2 The Documentary History, *supra* note 17, at 537 (Pennsylvania); U.S. Term Limits v. Thorton, 514 U.S. 779, 833 (1995) (quoting James Madison during convention debates).

27 *Federal Farmer: An Additional Number of Letters to the Republican*, New York, 2 May 1788, *reprinted in* 20 The Documentary History, *supra* note 17, at 1021 (New York No. 2).

28 *Convention Debates*, *21 January*, *reprinted in* 6 The Documentary History, *supra* note 17, 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)).

29 Foster v. Love, 522 U.S. 67, 68–72 (1997).

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

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

32 *Id*. at 315 (Black, J.)

33 *Id*. at 210 (Harlan, J.).

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

35 *A Landholder IV*, *Connecticut Courant*, *26 November*, *reprinted in* 14 The Documentary History, *supra* note 17, 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").

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

37 The Federalist No. 52, *supra* note 16, at 325–26.

38 A Landholder IV, *Connecticut Currant*, *November 26*, *reprinted in* 14 The Documentary History, *supra* note 17, at 233 (Commentaries No. 2); *Gen. Brooks*, *Convention Debates*, January 24, *reprinted in* 6 The Documentary History, *supra* note 17 (Massachusetts No. 3); *Virginia Independent Chronicle*, November 28, *reprinted in* 8 The Documentary History, *supra* note 17, at 177–78 (Virginia No. 1).

39 Gen. Brooks, *Convention Debates*, *January 24*, *reprinted in* 6 The Documentary History, *supra* note 17 (Massachusetts No. 3).

40 *An Impartial Citizen VI*, *Petersburg Virginia Gazette*, March 13, *reprinted in* 8 The Documentary History, *supra* note 17, 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 17, 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.").

41 Arizona argues in the Supreme Court that the Court should take note of the Qualifications Clause in order to avoid an unconstitutional interpretation of the NVRA.

42 Voting Rights Coalition v. Wilson, 60 F.3d 1411, 1415 (9th Cir. 1995).

43 Gonzalez v. Arizona, 677 F.3d 383, 392 (9th Cir. 2012).

44 *Id*.

45 *Id*. at 394.

46 *Id*. 401.

47 Brief of Petitioner at 30, Gonzalez v. Arizona, 677 F.3d 383 (9th Cir. 2012) (citing Ex Parte Siebold, 100 U.S. at 384, 386).

48 *Id*.

49 *Id*. at 32 (citing Wyeth v. Levine, 555 U.S. 555, 565 (2009)).

50 *Id*. at 46.

51 *Id*. at 17–18.

52 *Id*. at 44–46.

53 *Id*. at 48–53.

54 Brief of Respondents at 30, Arizona v. Inter Tribal Council of Arizona, Inc., No. 12-71, *filed* Jan. 14, 2013, *cert. granted*, 569 U.S. 2 (Oct. 15, 2012) [hereinafter ITC Brief].

55 ITC Brief, *supra* note 54, at 34–38; Brief of Respondents at 36–40., Gonzalez v. Arizona, 677 F.3d 383 (9th Cir. 2012).

56 Brief for the United States as Amicus Curiae Supporting Respondents at 14–15, Arizona v. Inter Tribal Council of Arizona, Inc., No. 12-71, *filed* Jan. 14, 2013, *cert. granted*, 569 U.S. 2 (Oct. 15, 2012).

57 *Id*. at 15.

58 *Id*. at 25.

59 *Id*.

60 *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)).