

## The Breakfast Club

### Constitutional Minute for 14 June 2022

#### The Supreme Court Gets it Wrong – Again

I started writing Constitutional Corner in 2013. My plan was a weekly essay sent to my subscriber list and that year (Volume 1 of Constitutional Corner) I indeed managed to publish 52 essays. A lot of the essays focused on headlines with a constitutional connection. With our current focus on election integrity, I've decided to "dust off" this 2013 essay since it deals with the "tension" between federal and state voting laws, particularly surrounding to the [National Voter Registration Act](#), more commonly called the "Motor Voter Act." The NVRA, signed into law by President Bill Clinton, required the states to offer voter registration when citizens applied for their initial drivers licenses. Here's what I said about the situation then:

"As they did in deciding that Obamacare's non-compliance penalty was instead a "tax," the Supreme Court has again reached the wrong conclusion, in my humble opinion.

On June 17th, 2013, the Court announced their decision in [Arizona vs. Inter Tribal Council Of Arizona \(ITCOA\)](#), Inc. The citizens of Arizona had passed Proposition 200, which required a person requesting voter registration present proof of citizenship. The ITCOA argued that the "motor voter" form issued under the National Voter Registration Act of 1993 (NVRA) required no such documentation of citizenship and it thus preempted the state requirement. The Court, in a 7-2 ruling, found that Arizona was operating beyond its authority in requiring proof of citizenship, that no evidence of citizenship should be required beyond the person affirming that they are one (as the form required). Although the 7-2 result seems lopsided, the constitutional case could not be more clear; and both dissenting Justices, Thomas and Alito, provide it. I think they make the more compelling argument -- and they focus on the Constitution to boot! Fancy that! By way of contrast, the majority opinion's first citation is a previous SCOTUS case. As Thomas succinctly puts it: "Finding no support in the historical record, respondents and the United States instead chiefly assert that this Court's precedents ... give Congress authority over voter qualifications."

Ever since the Constitution was ratified in 1788, the States have been responsible for setting the suffrage qualifications of their citizens, and choosing the means of verifying those qualifications. The 1787 Constitutional Convention wrestled with the issue and wisely decided not to intrude on the State's powers in this area. First, it would have been difficult to standardize the variety of qualifications then in force in the thirteen States (most states had some sort of property-owning requirement, but they varied significantly), and second, it was clear that to do so would have put ratification of the Constitution at risk. As Justice Thomas points out in his dissent, there was extensive discussion of Article I, Section Four's "Times, Places and Manner Clause" during the ratification debates and the states clearly thought they were retaining the qualification prerogative.

Over our 200+ years since, the State's powers in this area have been subject only to occasional restrictions imposed by Constitutional amendments. For instance, the 15th Amendment mandated that slaves, freed by the 13th Amendment, be provided suffrage, and the 19th

Amendment extended suffrage to women. To suppress the black vote in post-reconstruction southern states, Democrat-controlled state governments imposed poll taxes. This onerous requirement was finally shuttered in 1962 by the 24th Amendment (the ITCOA had also argued that Arizona's citizenship proof constituted a "poll tax!" Good grief!). Finally, the 26th Amendment lowered the national voting age to 18.

So which takes precedent, a law passed by Congress or the Constitution? In Alexander Hamilton's view; the Constitution. In Federalist 78 he explained: "A constitution, is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."

So yes, while the NVRA form did not require evidence of citizenship, I believe the States are well within their constitutional rights to demand such evidence, even among people using the "motor-voter" form to register." The result of this week's ruling is that the Court would require the States to register anyone to vote who says they are a citizen. Would they also have the States grant suffrage to anyone who merely says they are 18 or older? I think not.

Despite this wrong ruling there exists an "out" for the States. Since state and national elections are nearly always coincident, states can impose a "proof of citizenship" requirement to vote in the coincident state election, which will have the effect they desire. In addition, some Congressmen have already stated they will work to clarify the National Voting Rights Act wording that precipitated the case in the first place.

To read any Supreme Court opinion (and some - but certainly not all - make great constitutional primers), go to <http://www.supremecourt.gov/opinions/slipopinions.aspx>.

Note: That's what I said in 2013 and my opinion has not changed. In fact, it has only become clearer that Democrats want to make voting available to every warm body in the USA whether citizen or not. The only way they can stay in power is a massive turnout of uninformed "rote"-voters.

We have to continue to resist such measures and here in Virginia, when we retake the Senate in 2023, the voting laws must once again be tightened up, to include requiring some proof of citizenship. The new law will be opposed by the Left, which will be great. The suit will produce a case on appeal which will allow the present Court, to overturn their terrible 2013 decision.

But first, we must retake the VA Senate.

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