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Federalism, Elections, Preemption, and Supremacy: The Aftermath of Inter Tribal Council

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FEDERALISM, ELECTIONS, PREEMPTION, AND SUPREMACY: THE AFTERMATH OF *INTER TRIBAL COUNCIL*

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ABSTRACT

This Note examines *Arizona v. Inter Tribal Council*, a recent United States Supreme Court case dealing with the constitutionality of an Arizona voter identification law. The law required Arizona election officials to reject any application to register to vote that was not accompanied by satisfactory evidence of United States citizenship. The Supreme Court held that Arizona's law conflicted with, and was therefore preempted by, the National Voter Registration Act, but was quick to acknowledge States' rights in the area of elections. *Inter Tribal* raises interesting issues regarding the extent of federal and state power regarding elections, as well as the Elections Clause and the Supremacy Clause. This case is not limited to Arizona. Rather, *Inter Tribal* will prove to shape elections, as well as voting rights and procedures nationwide in the immediate future.

PART I: INTRODUCTION

Picture it: a clash[1] between federal and state law involving voter registration and identification. Can these laws coexist? Can a State have its own scheme regulating state elections while the federal government regulates federal elections? Should the Supremacy Clause[2] or the Elections Clause[3] govern the analysis? Should a state election law that conflicts with a federal election law always be preempted? Would this usurp the authority of the States? These questions were recently addressed by the Supreme Court in *Arizona v. Inter Tribal Council of Arizona*.[4] All justices of the Court affirmed the principle that States can impose their own respective voter qualifications in both federal and state elections.[5] However, the

* J.D. Candidate, 2015. I would like to express my utmost gratitude to Professor Bradley A. Smith, Professor Mark R. Brown, Professor Janet George Blocher, Judge Teresa L. Liston, ret., Judge Robert A. Burnside, Jr., my mother, Mona Wilson Floyd, Mona Sprague, and the editors and staff of the *Mississippi College Law Review*. This Note would not have been possible without all of their collective support and guidance. The views expressed herein are my own and do not necessarily represent the views of these respective persons or publication.

1. This Note will argue that such a clash existed in Arizona v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247 (2013). *See infra* Part IV.A.

2. U.S. CONST. art. VI, cl. 2.

3. U.S. CONST. art. I, § 4, cl. 1.

4. Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247 (2013).

5. *Id.* at 2257-60 (citing U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. amend. XVII; Oregon v. Mitchell, 400 U.S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part)); *Id.* at 2261 (Kennedy, J., concurring in part and concurring in the judgment); *Id.* at 2263 ("Congress has no role in setting voter qualifications, or determining whether they are satisfied, aside from the powers conferred

Court further held that when a state voter registration and identification law conflicts with a federal law regarding how federal elections are held, the state law is preempted by the federal law under the Elections Clause.[6]

The purpose of this Note is to argue that regulations[7] addressing the fundamental right to vote should be analyzed according to the principles of federalism: *when*, *where*, and *how*, or the "manner" in which federal elections are held should be determined by Congress pursuant to the Elections Clause, while States should be given leeway when deciding *who* may vote in federal and state elections pursuant to the Voter Qualifications Clause and the Seventeenth Amendment, as held by all justices of the Court. Of course, States must comply with the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, section 2 of The Voting Rights Act,[8] and the Court's holding in *Crawford v. Marion County Election Board*.[9]

Part II of this Note contains a general background discussion of relevant statutes and cases leading up to *Inter Tribal*. Part III discusses the facts immediately leading up to *Inter Tribal*, the procedural history of *Inter Tribal*, and the various positions taken by the members of the Court in the *Inter Tribal* case. Part IV analyzes the Court's decision by taking a more in-depth look at the Supremacy Clause, the Elections Clause, and the opinions of Justices Scalia, Kennedy, Thomas, and Alito. This Note will argue that even given the valid respective points raised by Justices Kennedy, Thomas, and Alito, the majority was correct to accept Justice Scalia's position notwithstanding its deficiencies. Part V discusses the significance of *Inter Tribal* by pointing out its practical implications and its anticipated impact on future cases by mentioning the possibility that a portion of a prior decision by the Court has been repudiated. This part also presents the reader with interesting hypotheticals applying the rule articulated in *Inter Tribal*. This Note concludes with Part VI, which summarizes all main points and argues that Justice Scalia was correct in finding that Arizona's law was preempted.[10]

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by the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments . . . . This power is instead expressly reposed in the States") (Thomas, J., dissenting); *Id.* at 2273 (Alito, J., dissenting); *see* Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (citing Carrington v. Rash, 380 U.S. 89, 91 (1965)); *see also* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 675 n.4 (1966) (Black, J., dissenting).

6. *Inter Tribal*, 133 S. Ct. at 2257-58.

7. Including, but certainly not limited to, voter identification laws.

8. 42 U.S.C. § 1973 (2006).

9. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

10. An in-depth analysis of voter identification laws is beyond the scope of this Note. Rather, this Note examines broader, far more pressing and fascinating questions regarding federalism and the scope of federal and state power present in *Inter Tribal*. For an overview of recent voter identification and election law litigation, see The Ohio State University, *Election Law at Moritz*, (June 25, 2014, 2:15 PM), http://moritzlaw.osu.edu/electionlaw/litigation/.

PART II: BACKGROUND

A. *The National Voter Registration Act*[11]

In 1993, pursuant to its power to regulate the time, place, and manner of federal elections under the Elections Clause,[12] Congress passed The National Voter Registration Act ("NVRA") to assist would-be voters in registering to vote and to protect the integrity of the election process.[13] Under the NVRA, one way voters can register to vote in federal elections is by using a uniform, national "federal form" through the mail.[14] The Election Advisory Commission, ("EAC"), in consultation with "the chief election officers of the States," developed such form pursuant to the NVRA.[15] The NVRA requires state agencies to "accept and use"[16] the federal form when registering voters for federal elections.[17] The federal form only requires that a voter swear, under penalty of perjury, that he or she is a United States Citizen.[18] The form "may require only such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process."[1920] Further, the federal form "may not include any requirement for notarization or other formal authentication."[21]

The NVRA is, by its very name, a law regulating voter registration—it does not affect state elections or States' voter qualification laws.[22] Indeed, States are still charged with enforcing their own respective voter qualifications under state law.[23] In fact, the NVRA permits a State to request the EAC to include state-specific instructions on the federal form for the purpose of enforcing its voter qualification requirements.[24] Further, the NVRA allows States to create their own specific voter registration form in order to register voters for both federal and state elections, so long as they still accept and use the federal form and the state form conforms to the framework for the contents of the federal form.[25]

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11. 42 U.S.C. § 1973gg (2006).

12. Arizona v. Inter Tribal Council of Ariz., Inc. 133 S. Ct. 2247, 2251, 2253 (2013); Gonzalez v. Arizona, 677 F.3d 383, 403 (9th Cir. 2012), *aff'd sub nom.* Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247 (2013).

13. § 1973gg(b)(3).

14. § 1973gg-4.

15. § 1973gg-7(a)(2).

16. Remember this phrase. It plays a pivotal role in *Inter Tribal.* What could it mean? Could it have more than one meaning? *See infra* Part IV.A-B.

17. § 1973gg-4(a)(1).

18. § 1973gg-7(b)(2)(C).

19. § 1973gg-7(b)(1).

20. Is a mere oath enough to prove United States citizenship? Who should make this call? The States? The courts? The federal government? *See infra* Part V.

21. § 1973gg-7(b)(3).

22. Ass'n of Cmty. Org. for Reform Now (ACORN) v. Edgar, 56 F.3d 791, 794 (7th Cir. 1995).

23. *Id.*

24. § 1973gg-7(a)(2); Arizona v. Inter Tribal Council of Ariz., Inc. 133 S. Ct. 2247, 2259 (2013).

25. § 1973gg-4(a)(2); § 1973gg-7(b); *Inter Tribal,* 133 S. Ct. at 2255.

B. *The Help America Vote Act*[26]

In response to the 2000 presidential election,[27] Congress passed the Help America Vote Act ("HAVA") in 2002, which complemented the NVRA.[28] HAVA requires, among other things, that voters provide an ID when registering for a federal election.[29] This requirement can be satisfied by the applicant's current and valid driver's license number. If the applicant does not have a current and valid driver's license number, the applicant can provide a valid social security number.[30] If an applicant has neither a valid driver's license number nor a social security number, a state is required to assign the voter an identification number. Additionally, HAVA requires that States verify that the information the voter provided on his or her voter registration satisfies HAVA's requirements under state law.[31] Further, HAVA establishes minimum requirements; States may still establish election technology and administer requirements that are stricter than HAVA, so long as they are not inconsistent with the federal requirements under HAVA or the NVRA, among other laws.[3233]

C. Crawford v. Marion County Election Board[34]

Crawford provides the "test" for determining whether or not a voter identification law is facially constitutional under the United States Constitution.[3536] Although this case is a plurality decision, a majority of the justices agreed to a "balancing test" to determine whether a voter identification law is constitutional.[37] *Crawford* involved an Indiana statute requiring voters to present photo identification for voting.[38] Justice Stevens wrote the plurality opinion and was joined by Chief Justice Roberts and Justice Kennedy.[39] Justice Stevens held that "a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands."[40] Justice Stevens found a minimal burden on the

26. 42 U.S.C. § 15483 (2006).

27. Fla. State Conference of NAACP v. Browning, 552 F.3d. 1153, 1155 (11th Cir. 2008).

28. *See* 42 U.S.C. § 15484 (2002); 42 U.S.C. § 15545(a) (2002); Gonzalez v. Arizona, 677 F.3d 383, 402 (9th Cir. 2012).

29. § 15483(a)(5)(A)(i); *Gonzalez*, 677 F.3d at 402.

30. § 15483(a)(5)(A)(i); *Gonzalez*, 677 F.3d at 402.

31. § 15483 (a)(5)(A)(ii); *Gonzalez*, 677 F.3d at 402.

32. § 15484; § 15545(a); *Gonzalez*, 677 F.3d at 402.

33. For HAVA's role in *Inter Tribal*, *see infra* Part IV.A.

34. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

35. *Id.* at 190 (plurality opinion).

36. The reader will soon learn that *Crawford* is very much distinguishable from *Inter Tribal*. This case is introduced here for context. *See infra* Part IV.

37. *Crawford*, 553 U.S. at 190 (plurality opinion), 209 (Souter, J., dissenting).

38. *Id.* at 185 (plurality opinion).

39. *Id.* (plurality opinion). Justice Scalia authored a concurring opinion that was joined by Justices Thomas and Alito. *Id.* at 204 (Scalia, J., concurring). This opinion is not material to this Note. Additionally, Justice Souter dissented and was joined by Justice Ginsburg. *Id.* at 209 (Souter, J., dissenting). Justice Souter would have held that the Indiana statute was unconstitutional under the balancing test. *Id.*

40. *Id.* at 190 (plurality opinion) (citing Anderson v. Celebrezze, 460 U.S. 780 (1983)).

right to vote, as Indiana provided the photo identification cards to voters for free.[41] Justice Stevens further found that the inconvenience of making a trip to an Indiana Bureau of Motor Vehicles office, the gathering of required documents to obtain the free photo identification card, and the posing for a photograph did not qualify as a substantial burden on the right to vote or represent a significant increase over the usual burdens of voting.[42]

PART III: *INTER TRIBAL*

A. Facts Immediately Leading Up to Inter Tribal

In November 2004, Arizona voters approved Proposition 200, a law designed to address alleged illegal voting and fraudulent voter registrations.[43] Arizona requires that a person must be a United States citizen in order to qualify to vote.[44] As a method of enforcing this, Proposition 200 required Arizona's election officials to "reject any application for registration that is not accompanied by satisfactory evidence" of United States citizenship.[45] Under Proposition 200, such evidence included: (1) a photocopy of the applicant's passport or birth certificate; (2) a driver's license number, provided that the license indicates that the issuing state verified that the applicant was a United States Citizen; (3) naturalization evidence; (4) tribal identification, or (5) "[o]ther documents or methods of proof . . . established pursuant to the Immigration Reform and Control Act of 1986."[46] Since the EAC denied Arizona's request to include this requirement on the state-specific instruction to the federal form, the NVRA form only requires that applicants swear, under penalty of perjury, that they comply with Arizona's voting requirements, but does not actually require the evidence of citizenship that Arizona demands.[47][48]

B. Procedural History

In 2006, a group of Arizona citizens and a group of Native Americans filed separate suits against the state of Arizona challenging the validity of the law.[49] The trial court consolidated these cases and denied the plaintiffs' motions for a preliminary injunction.[50] The Ninth Circuit then enjoined Proposition 200 pending appeal, which was later vacated, and the case was

41. *Id.* at 198.

42. *Id.*

43. ARIZ. REV. STAT. ANN. § 16-166(F) (2006), *invalidated by* Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247 (2013); Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2252 (2013) (citing Purcell v. Gonzalez, 549 U.S. 1, 2 (2006) (per curiam)).

44. *Inter Tribal*, 133 S. Ct. at 2252 (citing ARIZ. CONST. art. VII, § 2; ARIZ. REV. STAT. ANN. § 16 (2006)).

45. ARIZ. REV. STAT. ANN § 16-166(F).

46. *Id.*

47. *Inter Tribal*, 133 S. Ct. at 2252.

48. Are these laws consistent with one another?

49. *Inter Tribal*, 133 S. Ct. at 2252. Jesus Gonzalez was the lead plaintiff, and the Native Americans composed a group of nonprofit organizations that were led by the Inter Tribal Council of Arizona.

50. *Id.*; Gonzalez v. Arizona, 485 F.3d 1041, 1048-51 (9th Cir. 2007) [hereinafter *Gonzalez I*] (the plaintiffs originally claimed, among other things, that Proposition 200 constituted a poll tax under the

remanded by the Supreme Court.[51] On remand, the Ninth Circuit affirmed the trial court's denial of the preliminary injunction as to the claim that the NVRA preempts Proposition 200's registration rules.[52] The trial court then granted Arizona's motion for summary judgment on this claim, finding that the NVRA did not preempt Proposition 200.[53] A Ninth Circuit panel reversed, as relevant here, holding that the Arizona law conflicts with the NVRA.[54] This was later affirmed by an en banc Ninth Circuit.[55] Arizona appealed to the United States Supreme Court.[56]

C. Majority Holding

The United States Supreme Court affirmed the judgment of the Ninth Circuit[57] with Justice Scalia writing for the majority.[58] Justice Scalia began his analysis by discussing the Elections Clause, noting that the Elections Clause charges the States with selecting the time, place, and manner of federal elections.[59] He further noted that Congress can opt to alter or amend such selections through preemption at any time.[60] Adhering to his originalist philosophy, Scalia noted that the Elections Clause was designed to redress the Framers' fear that States would refuse to hold federal elections.[61] Thus, the simple question in this case, according to Justice Scalia, was: whether Proposition 200, a state law prescribing the manner of federal elections, was inconsistent with the NVRA, a law that was passed pursuant to Congress' power under the Elections Clause.[62] Justice Scalia stated that if Proposition 200 were found to conflict with the NVRA, the Arizona law must "give way."[63]

Justice Scalia acknowledged that the phrase "accept and use" in the NVRA could be interpreted in two different ways: (1) States must accept the federal form as an adequate registration application, or (2) States must

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Twenty-Fourth Amendment; that the law imposed a severe burden on the right to vote; that the law burdened naturalized citizens disproportionately; and that the law was preempted by the NVRA).

51. *Inter Tribal*, 133 S. Ct. at 2252 (citing Purcell v. Gonzalez, 549 U.S. 1, 5-6 (2006) (per curiam)).

52. *Id* (citing *Gonzalez I*, 485 F.3d at 1050–51).

53. *Id.*

54. *Id.* at 2253 (citing Gonzalez v. Arizona, 624 F.3d 1162, 1181 (9th Cir. 2010) [hereinafter *Gonzalez II*]).

55. *Id* (citing Gonzalez v. Arizona, 677 F.3d 383, 403 (9th Cir. 2012)).

56. *Id.*

57. *Id.* at 2260.

58. *Id.* at 2251 (Justice Scalia was joined by Chief Justice Roberts and Justices Ginsburg, Kagan, Breyer, Sotomayor, and Kennedy (in part)).

59. *Id.* at 2253 (citing U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 804-05 (1995) (Thomas, J., dissenting)).

60. *Id.* at 2253-54 (citing Foster v. Love, 522 U.S. 67, 69 (1997); *Ex parte* Siebold, 100 U.S. 371, 392 (1880)).

61. *Id.* at 2253 (citing THE FEDERALIST No. 59, at 362–63 (Alexander Hamilton) (C. Rossiter ed. 1961) (emphasis omitted)).

62. *Id.* at 2254.

63. *Id.* at 2257.

use the form to *some extent* in the registration process.[64] Justice Scalia reasoned that merely using the form to some extent "seems out of place in the context of an official mandate to accept and use something for a given purpose. The implication of such a mandate is that its object is to be accepted *as sufficient* for the requirement it is meant to satisfy."[65] Employing his textualism, Justice Scalia further noted that neighboring provisions of the NVRA require States to register eligible applicants to vote in an election, provided that the applicant's "valid voter registration form" is postmarked within a certain number of days before an election.[66] Justice Scalia dismissed Arizona's contention that § 1973gg-4(a)(1) of the NVRA allows it to reject the federal form if a voter does not attach additional information required to comply with state law, as such a reading would imply that the federal form is invalid.[67] According to Justice Scalia, it would defy logic for Congress to pass a law providing for the creation of a form that is invalid under the law in which it was created.[68]

Justice Scalia then turned to Arizona's attempt to apply a Supremacy Clause analysis to what he dubbed an Elections Clause case.[69] Justice Scalia noted that the Court's Supremacy Clause jurisprudence has occasionally employed a presumption that Congress did not intend to preempt state law.[70] Justice Scalia further noted that the Court has never used the presumption against preemption principle in Election Clause cases.[71] Scalia reasoned that each time Congress legislates under its Elections Clause power, "it *necessarily* displaces some element of a pre-existing legal regime erected by the States."[72]

Turning to Arizona's contention that its version of what "accept and use" should mean in order to enforce its constitutional authority to establish voter qualifications, Justice Scalia acknowledged that if a federal statute prevented a state from gathering the information necessary to enforce its voter qualifications, such statute would likely not pass constitutional muster.[73] Citing to the Voter Qualifications Clause, the Seventeenth Amendment, as well as the Framers' original intent, Justice Scalia held that while "the Elections Clause empowers Congress to regulate *how* federal elections are held," it is for the States to decide "*who* may vote in them."[74] Justice Scalia declined to adopt Arizona's interpretation of the NVRA, noting that the federal form can only require enough information to allow

64. *Id.* at 2254 (emphasis added).

65. *Id.* Justice Scalia further noted that many federal statues contain similar "shall accept" mandates that do not make willing receipt optional. *Id.* at 2254-55.

66. *Id.* at 2255 (citing 42 U.S.C. § 1973gg-4(a)(1) (2006) (emphasis omitted)).

67. *Id.*

68. *Id.*

69. *Id.* at 2256.

70. *Id.*

71. *Id.*

72. *Id.* at 2257.

73. *Id.* at 2258-59.

74. *Id.* at 2257-58 (citing THE FEDERALIST No. 60, at 371 (Alexander Hamilton) (C. Rossiter ed. 1961)).

the States "to assess the eligibility of the applicant and to administer voter registration and other parts of the election process."[75]

Although Justice Scalia held that the NVRA preempted Proposition 200, he noted that Arizona could always renew its request to the EAC to include its evidence of citizenship requirement in the state-specific instructions on the federal form so that it could enforce its voter qualifications.[76] Justice Scalia noted that if the EAC denied Arizona's request, Arizona may challenge such denial under the Administrative Procedure Act.[77][78]

D. Concurrence

Justice Kennedy filed an opinion concurring in part and concurring in the judgment of the Court, which took issue with the Court's discussion regarding the Supremacy Clause.[79] Justice Kennedy criticized the majority for holding that a hierarchy exists for federal powers such that courts are required to use different preemption rules.[80] Justice Kennedy argued that courts should not "give an unduly broad interpretation to ambiguous or imprecise language Congress uses. . . . "[Courts] must confine their opinions to avoid overextending a federal statute's preemptive reach."[81] Justice Kennedy concluded by agreeing with the Court that the NVRA preempted Proposition 200.[82]

E. Dissent

Justices Thomas and Alito each filed separate dissenting opinions.[83] Justice Thomas would have held that the Seventeenth Amendment, as well as the Voter Qualifications Clause, allows States to not only establish voter qualifications but also to determine whether or not such qualifications have been satisfied.[84] He would have read the phrase "accept and use" to only require Arizona to use the federal form "as a *part* of its voter registration

75. *Id.* at 2259 (citing 42 U.S.C. § 1973gg-7(b)(1) (2006)).

76. *Id.* at 2259-60.

77. *Id.* at 2259 (citing 5 U.S.C. §§ 701-06 (2006)).

78. Under federal law, the EAC is required to have at least three of its commissioners approve any of its actions under 42 U.S.C. § 15328 (2006). The Commission currently has no active commissioners. *Inter Tribal*, 133 S. Ct. at 2260 n.10. However, the EAC recently determined that its Executive Director had the authority to act on the Commission's behalf pursuant to an internal policy delegating commissioner authority as relevant here to the Executive Director. *Elections Assistance Comm'n*, MEMORANDUM OF DECISION CONCERNING STATE REQUESTS TO INCLUDE ADDITIONAL PROOF-OF-CITIZENSHIP INSTRUCTIONS ON THE NATIONAL MAIL VOTER REGISTRATION FORM 14 -20 (Jan. 17, 2014) [hereinafter MEMORANDUM OF DECISION], *available at* http://www.eac.gov/assets/1/Documents/20140117%20EAC%20Final%20Decision%20on%20Proof%20of%20Citizenship%20Requests%20-%20FINAL.pdf (last visited Oct. 20, 2014).

79. *Inter Tribal*, 133 S. Ct. at 2261 (Kennedy, J., concurring in part and concurring in the judgment).

80. *Id.* at 2260.

81. *Id.* at 2261.

82. *Id.*

83. *Id.* (Thomas, J., dissenting); *Id.* at 2270 (Alito, J., dissenting).

84. *Id.* at 2262.

process," thereby allowing a State to verify that applicants meet its qualifications by whatever additional information it deems necessary.[85] According to Justice Thomas, the Elections Clause is a general provision governed by the more specific Voter Qualification Clause.[86] Justice Thomas indicated that he was "concerned" that the phrase "accept and use" would not pass constitutional muster.[87] However, Justice Thomas stated that he would rely on the Voter Qualifications Clause rather than the majority's interpretation under § 1973gg-7(b)(1) to avoid such a conflict.[88]

On the other hand, Justice Alito expressed the view that the presumption against preemption present in a Supremacy Clause analysis should apply in Elections Clause cases.[89] He reasoned that because States have the ability to make regulations regarding the "time, places, and manner of federal elections" under the Elections Clause by default, the federalism concerns underlying the presumption against preemption principle are far more pervasive than what the majority would admit.[90]

PART IV: ANALYSIS

Before discussing the Supremacy Clause and the Elections Clause, there are certain preliminary matters that must be addressed. It is first of critical importance to realize that although the underlying issue in *Inter Tribal* was a voter identification law (which springs forth numerous controversies in its own right[91]), in order to be properly understood, *Inter Tribal* must be classified as a preemption case involving federalism concerns.[92] It is not a voter identification case, *per se*.[93] Indeed, the Supreme Court of

85. *Id* at 2262-63 (citing U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 864-65 (1995) (Thomas, J., dissenting)) (emphasis added).

86. *Id.* at 2266 (citing RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2071 (2012)).

87. *Id.* at 2269.

88. *Id.* at 2269-70.

89. *Id.* at 2271-72 (Alito, J., dissenting).

90. *Id.* (citing Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam) (quoting Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 231 (1989) (Alito, J., dissenting))).

91. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008); Common Cause/Ga. v. Billups, 554 F.3d 1340 (11th Cir. 2009); League of Women Voters of Ind., Inc. v. Rokita, 929 N.E.2d 758 (Ind. 2010).

92. *See Inter Tribal*, 133 S. Ct. at 2256-57, 2263 (Thomas, J., dissenting), 2271 (Alito, J., dissenting) (". . . the federalism concerns underlying the presumption in the Supremacy Clause context are somewhat weaker [in Elections Clause cases]. . . . [This case] . . . raise[s] significant constitutional issues concerning Congress's power to decide who may vote in federal elections."); Gonzalez v. Arizona, 677 F.3d 383, 410 (9th Cir. 2012) (quoting Printz v. United States, 521 U.S. 898, 921 (1997) ("Our system of dual sovereignty, which gives the state and federal governments the authority to operate within their separate spheres, 'is one of the Constitution's structural protections of liberty.' . . . '[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.' Despite our respect for the state's exercise of its sovereign authority, however, the Constitution's text requires us to safeguard the specific enumerated powers that are bestowed on the federal government. The authority granted to Congress under the Elections Clause to 'make or alter' state law regulating procedures for federal elections is one such power. The Framers of the Constitution were clear that the states' authority to regulate federal elections extends only so far as Congress declines to intervene.").

93. *But see infra* Part V.

Tennessee recognized *Inter Tribal* as a distinct and separate preemption case in its recent affirmation of a Tennessee voter identification law.[94] Moreover, neither the *Inter Tribal* majority nor the dissent ever mentioned *Crawford*. Arguably, if *Inter Tribal* truly centered on voter identification laws, the Court would have at least mentioned *Crawford*—the case articulating the test which is used to assess a voter identification law's constitutionality. Further, in its en banc decision, the Ninth Circuit held that Arizona's argument that its proof of citizenship requirement was not excessively burdensome under *Crawford* "misses the mark."[95] As noted by the Ninth Circuit, *Crawford* considered whether an Indiana law imposed a substantial burden on the right to vote in violation of the Fourteenth Amendment, rather than whether a state law was preempted by a federal law under an Elections Clause analysis.[96]

Contrary to Arizona's assertions, *Inter Tribal* has little to do with HAVA.[97] Arizona argued before the en banc Ninth Circuit that it had the authority to enact Proposition 200, as HAVA only establishes minimum requirements regarding voter registration.[98] Arizona further argued that since HAVA requires States to verify the applicant's driver's license or social security numbers submitted on the federal form, it must also have the power to verify other information submitted with the federal form, such as an applicant's citizenship claim.[99] The Ninth Circuit was unpersuaded by this contention in light of HAVA's savings clause that prohibits States from "supersed[ing], restrict[ing], or limit[ing] the application of [the NVRA]."[100] The Supreme Court did not question this determination.

A. The Supremacy Clause[101]

When one hears of a clash between a federal law and state law, one might immediately (and correctly) think of preemption. Admittedly, one might also be tempted to apply a Supremacy Clause analysis to the conflict, as the Fifth Circuit has previously done.[102] However, a careful reading of the Court's jurisprudence reveals that the Supremacy Clause does not apply to all preemption cases.

The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme law of the land; . . . anything in the constitution or laws of any state to the contrary notwithstanding."[103] As such,

94. City of Memphis v. Hargett, 414 S.W.3d 88, 96 n.6 (Tenn. 2013).

95. *Gonzalez*, 677 F.3d at 401.

96. *Id.*

97. *But see infra* Part IV.A.

98. *Gonzalez*, 677 F.3d at 402.

99. *Id.* at 402-03.

100. *Id.* at 403 (citing 42 U.S.C. § 15545(a) (2006)).

101. This section will demonstrate why the majority was correct in not applying the Supremacy Clause in *Inter Tribal*.

102. Foster v. Love, 90 F.3d 1026 (5th Cir. 1996), *aff'd*, 522 U.S. 67 (1997).

103. U.S. CONST. art. VI, cl. 2.

"state laws that conflict with federal law are 'without effect.'"[104] In other words, as a general principle, when state and federal laws are in conflict, the federal law preempts the state law, as a federal law that passes constitutional muster is supreme.[105] Preemption can be accomplished by Congress under the Supremacy Clause "through a statute's express language or through its structure and purpose."[106]

When beginning a Supremacy Clause analysis, the Court first keeps Congressional intent at the forefront.[107] Second, the Court "'assum[es] that the'" federal law does not supersede the state law, unless there is a "'clear and manifest purpose of Congress'" to supersede such law.[108] With these principles in mind, a court must then "fairly but-in light of the strong presumption against pre-emption-narrowly construe the precise language of [the statute]. . ." to determine if preemption is present.[109]

The presumption against preemption was formulated out of respect for States' historic police powers based on the Supreme Court's respect "for the States as 'independent sovereigns in our federal system.'"[110] The Court endeavors to maintain the "delicate balance" of power between the federal government and the States by assuming that Congress does not excise its preemption power lightly.[111] Although the presumption against preemption is particularly prevalent "in a field which the States have traditionally occupied," it applies to "*all* pre-emption cases" analyzed under the Supremacy Clause.[112] When a statute is susceptible to more than one plausible reading, the Court ordinarily "'accept[s] the reading that disfavors pre-emption.'"[113] Only when such laws cannot be construed harmoniously must the state law give way.[114]

It was very clever for Arizona to assert the presumption against preemption in *Inter Tribal*, as this may have saved its law had the Supremacy Clause applied. Arizona wrongly assumed that the Supremacy Clause applied here and responded accordingly.[115] Arizona was likely concerned that its law would be preempted, as it was impossible to comply with both

104. Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008) (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)).

105. *See id.*; Gibbons v. Ogden, 22 U.S. 1, 129-31 (1824).

106. *Altria Grp.*, 555 U.S. at 76.

107. Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

108. Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

109. *Id.* at 523.

110. *Wyeth*, 555 U.S. at 565 n.3 (quoting *Medtronic*, 518 U.S. at 485).

111. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

112. *Wyeth*, 555 U.S. at 565 (citing *Medtronic*, 518 U.S. at 485) (quoting *Rice*, 331 U.S. at 230)) (emphasis added); United States v. Locke, 529 U.S. 89, 108 (2000).

113. Altria Grp., Inc. v. Good, 555 U.S. 70, 77 (quoting Bates v. Dow Agrosciences, LLC, 544 U.S. 431, 432 (2005)).

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

115. Arizona could have also asserted the plain or clear statement rule, had the Supremacy Clause applied. This rule is premised on the Tenth Amendment. When Congress "enact[s] legislation affecting the balance in our federal system between the national and state governments [Congress] must by plain statement make clear that it has duly deliberated the issue and fully intended to reach that result." *In*

the NVRA and the Arizona law.[116] Arizona was also likely concerned that its law impeded federal goals and objectives.[117]

Under the Court's precedent, a state law may be implicitly preempted by a federal law in the absence of an express preemption provision in the federal law when there is a conflict between the laws. Such is the case here, as the NVRA does not expressly preclude States from requiring additional documentation.

A conflict exists for the purposes of implied preemption when it is impossible to comply with both the federal and state law.[118] For example, in *McDermott v. Wisconsin*,[119] the Court held that a state law prohibiting the labeling of maple syrup in a manner that federal law required was preempted by the federal law, as it was physically impossible to comply with both laws.[120] Additionally, in *Hisquierdo v. Hisquierdo*,[121] the Court invalidated a state law that would have divided railroad retirement income in divorce cases when federal law prohibited the same.[122]

Not all cases are as straightforward, however. Cases where it is possible that Congress has established merely *minimum* requirements are especially difficult for courts.[123] Minimum federal requirements allow States to impose stricter standards. Thus, the issue becomes whether the federal law establishes minimum or exclusive standards.[124] In *Florida Lime*, the Court reiterated that Congressional intent is paramount in this determination.[125]

Florida Lime involved federal regulations that measured the maturity of avocados.[126] California adopted a more stringent rule, which resulted in Florida avocados in compliance with federal regulations becoming illegal for the purposes of sale or transportation under California law.[127] The Court held that the federal regulations were minimum requirements.[128] When determining Congressional intent, the Court found that such regulations were the result of campaign efforts by Florida avocado growers "to promote orderly competition . . . ."[129]

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re Brentwood Outpatient, Ltd., 43 F.3d 256, 264 (6th Cir. 1994); *see Wyeth*, 555 U.S. at 565; *see also Gregory*, 501 U.S. at 460-61.

116. Provided, of course, that one accepts the majority's interpretation of "accept and use."

117. As we now know from *Inter Tribal*, even if the Supremacy Clause did apply here and the Court was unpersuaded by Arizona's presumption against preemption and plain statement rule arguments, Arizona may have been able to successfully assert that the NVRA is unconstitutional as applied here under the Voter Qualifications Clause and the Seventeenth Amendment by arguing that preempting Arizona's law would not allow Arizona to enforce its own voter qualifications requirements.

118. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

119. McDermott v. Wisconsin, 228 U.S. 115 (1913).

120. *Id.* at 124-26, 133-34, 137.

121. Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979).

122. *Id.* at 577-79, 590.

123. *Florida Lime*, 373 U.S. at 132.

124. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES & POLICIES 420 (4th ed. 2011).

125. *Florida Lime*, 373 U.S. at 151, 172, 175.

126. *Id.* at 133-34.

127. *Id.*

128. *Id.* at 152.

129. *Id.* at 151.

This line of cases indicates that the Court was correct in finding that Arizona's law conflicted with, and was therefore preempted by, the NVRA, albeit using an Elections Clause analysis.[130] Just as it was physically impossible to comply with both the federal and state law regarding the labeling of maple syrup in *McDermott*, as well as to comply with both the federal and state law regarding railroad retirement income in *Hisquierdo*, it was physically impossible to comply with both the NVRA and Arizona's law in *Inter Tribal*.[131] Indeed, as stated by the Ninth Circuit, the NVRA required an Arizona "county recorder to accept and use the [f]ederal [f]orm to register voters for federal elections . . . ."[132] The federal form does not require proof of U.S. citizenship. Yet, at the same time, Arizona's law requires that a county recorder reject the federal form "as insufficient for voter registration if the form does not include proof of U.S. citizenship."[133]

As Justice Alito highlighted, another way of looking at *Inter Tribal* would be to say that the phrase "accept and use" is ambiguous.[134][135] As Judge Rawlinson stated, when interpreting a statute, courts first consider the plain meaning of the law.[136] Unfortunately, this is not particularly helpful here, as the phrase "accept and use" could have two meanings: i.e. the NVRA sets either the minimum or the exclusive standard. Judge Rawlinson adopted Arizona's proffered interpretation that it must only use the federal form to some extent in the voter registration process by relying heavily on § 1973gg-4(a)(2).[137] This section allows States to develop a state form, as long as it contains the same information as the federal form.[138] Judge Rawlinson is correct that the NVRA neither expressly prohibits States from requiring additional information nor does any provision in the NVRA hold that States must use *only* the information contained in the federal form, making Arizona's interpretation plausible[139]–at first. Indeed,

130. I condition this statement on the fact that the Court provided Arizona with a means to enforce its voter qualifications. This Note will further argue that the Court was correct in analyzing this case using the Elections Clause. *See infra* Part IV.D.

131. Of course, if the NVRA only established *minimum* requirements, it would have been possible to comply with both federal and state law, as Arizona would have "accept[ed] and use[d] the federal form" as part of the voter registration process.

132. Gonzalez v. Arizona, 677 F.3d 383, 398 (9th Cir. 2012).

133. *Id.*

134. Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2270 (2013) (Alito, J., dissenting).

135. Justice Kennedy stated that the "accept and use" provision is unambiguous. *Id.* at 2261 (Kennedy, J., concurring in part and concurring in the judgment). He was mistaken.

136. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); *Gonzalez*, 677 F.3d at 445-46 (Rawlinson, J., dissenting) (citing Siripongs v. Davis, 282 F.3d 755, 758 (9th Cir. 2002)).

137. *Gonzalez*, 677 F.3d at 444-45.

138. Justice Alito would have adopted a more "compromised" approach; he would have held that Arizona must "us[e] the form as a meaningful part of the registration processes." *Inter Tribal*, 133 S. Ct. at 2274 (Alito, J., dissenting). As held by Justice Scalia, this "meaningful part" standard is as amorphous as it is unworkable. *Id.* at 2255 n.3.

139. Even Justice Scalia concedes this. *Id.* at 2254.

§ 1973gg-7(b) uses the term "shall include," which allows States to add requirements to their respective state forms, provided they comply with § 1973gg-7(b). That is to say that States could require proof of citizenship on their state forms for federal elections purposes, so long as they require that voters include their signature under penalty of perjury. However, this does not mean that States may reject the federal form, as this would lead to absurd results by rendering the federal form meaningless.[140]

Yet, Chief Judge Kozinski offered a "belt and suspenders" analogy in his concurring opinion in the Ninth Circuit decision for allowing States to require documentation confirming the contents of the federal form.[141] This would further safeguard against fraudulent voter registrations. While this may at first seem appealing, this approach would render the form redundant and unnecessary, as well as go against one of Congress' stated purpose of enacting the NVRA by making it harder to use the form and harder to register to vote in general. Nevertheless, Judge Kozinski's inclusion of the legislative history to the NVRA is more than appropriate in light of the ambiguities present here.[142] Congress expressly rejected the notion that States could require "presentation of documentary evidence of citizenship of an applicant for voter registration."[143][144] It is particularly noteworthy that the Court did not question Judge Kozinski's use of such history. While it may be that the Court did not feel the need to discuss this concurring opinion, one cannot help but speculate that some members of the majority were influenced by it, as Judge Kozinski's opinion supports the majority's conclusion.[145]

If anything, Judge Kozinski's concurring opinion makes it clear that Congress needed to include greater specificity and clarity in the NVRA. While it could certainly be said that Arizona's law enhances two other purposes of the NVRA by helping "to ensure that accurate and current voter registration rolls are maintained," and "to protect the integrity of the electoral process,"[146] the Court, in affirming the Ninth Circuit, implicitly held that Congress already provided sufficient safeguards in the NVRA to further the NVRA's stated goals.[147]

Arizona's law also impedes federal objectives by making it harder to register to vote. When a state law interferes with the goals, objectives, and purposes of Congress when enacting the federal law, a state law is deemed

140. *Id.* at 2255-56; *Gonzalez,* 677 F.3d at 399.

141. *Gonzalez,* 677 F.3d at 439-40 (Kozinski, J. concurring).

142. *Id.* at 440-41.

143. *Id.* at 440 (citing 139 Cong. Rec. 5098 (Mar. 16, 1993)); H.R. Rep. No. 103-66, at 23 (1993), *reprinted in* 1993 U.S.C.C.A.N. 140, 148 (Conf. Rep.).

144. Contrary to the beliefs of Congress, a state must be allowed to add state-specific requirements to the federal form that are necessary to enforce its voter qualifications. *See infra* Part V. However, this does not justify a state flat-out rejecting the federal form, as Congress has the authority to set the times, places, and manner of federal elections. *See supra* Part II.A.; *see also infra* Part IV.B, Part V.

145. *Gonzalez,* 677 F.3d at 441 (Kozinski, J., concurring) (citing H.R. Rep. No. 103-66, at 23-24 (1993), *reprinted in* 1993 U.S.C.C.A.N. 140, 148-49).

146. 42 U.S.C. § 1973gg (2006).

147. *See Gonzalez,* 677 F.3d at 403.

to be preempted.[148] Unlike the federal regulations in *Florida Lime* and contrary to the contentions of Judge Rawlinson and Justice Thomas,[149] Congress intended for the NVRA to be *the* standard, not just the *minimum* standard.[150][151] Congress' main intent was to streamline the voter registration process in federal elections; Congress wanted to "assume exclusive control of the *whole* subject."[152]

Arizona's law is similar to other state laws that the Court has deemed to impede federal objectives. In *Nash v. Florida Industrial Commission*, the Court held that the National Labor Relations Act preempted a Florida law that disqualified the filer of an unfair labor practice charge from unemployment compensation.[153] The Court emphasized that the Florida law went against a key goal of Congress—for filers "to be completely free from coercion against reporting [unfair practices]. . . ."[154] Further, in *Perez v. Campbell*, the Court held that an Arizona state motor vehicle law, which provided for the suspension of the driver's licenses of judgment debtor-defendants involved in automobile accidents, was preempted by a federal bankruptcy law.[155] The Court held that Congress' goal was to give debtors "freedom from most kinds of preexisting tort judgments" and that the state law ran contrary to this.[156] Like the state law in *Nash*, which frustrated Congress' goal of encouraging whistleblowing, and the state law in *Perez*, which frustrated Congress' goal of providing a fresh start to debtors, the Arizona law in *Inter Tribal* frustrates Congress' goal of "increase[ing] the number of eligible citizens who register to vote in elections for Federal office"[157] when enacting NVRA.[158] Indeed, Arizona's law directly inhibits this.[159] This goal is further evidenced by the enactment of HAVA.[160][161]

148. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Felder v. Casey, 487 U.S. 131, 138 (1988); Perez v. Campbell, 402 U.S. 637, 649 (1971)).

149. *Gonzalez*, 677 F.3d at 445-46, 449 (Rawlinson, J., dissenting); Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2262 (2013) (Thomas, J., dissenting).

150. *See supra* Part IV; *see also Inter Tribal*, 133 S. Ct. at 2254.

151. As held by the Court in *Hamdan v. Rumsfeld*, when Congress rejects language that would have resulted in a party's proffered interpretation of a statute, such rejection weighs heavily against that interpretation. Hamdan v. Rumsfeld, 548 U.S. 557, 579-80 (2006).

152. *See Ex parte* Siebold, 100 U.S. 371, 383 (1879).

153. Nash v. Florida Indus. Comm'n, 389 U.S. 235, 239 (1967).

154. *Id.* at 238.

155. Perez v. Campbell, 402 U.S. 637, 656 (1971).

156. *Id.* at 648.

157. 42 U.S.C. § 1973gg (b) (2006).

158. Over 31,000 applicants were "unable (initially) to register to vote because of Proposition 200" between January 2005 and September 2007. Gonzalez v. Arizona, No. 06-CV-1268, slip op. at 13 (D. Ariz. Aug. 20, 2008). Only about thirty percent (11,000) of these applicants were subsequently allowed to register. *Id.* at 14.

159. Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2275 (2013) (Alito, J., dissenting); Gonzalez v. Arizona, 677 F.3d 383, 400-01 (9th Cir. 2012).

160. *See* Midatlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot., 474 U.S. 494, 505 (1986) (indicating that the presence of other federal statutes on related topics can shed light on Congressional goals for preemption purposes). One of HAVA's stated goals was "to establish minimum election administration standards . . . for the administration of Federal elections. . . ." 42 U.S.C. § 15301 (2006).

161. I include this point as further evidence that the majority was correct in finding that Arizona's law was preempted by the NVRA. This may at first appear to be inconsistent with Justice Scalia's

B. *The Elections Clause*[162]

Inter Tribal stands for the proposition that Congress has broad authority to regulate federal elections by virtue of the Elections Clause.[163] There is good reason for this, as the Elections Clause *expressly* allows "Congress to 'make or alter' state elections regulations."[164] The Elections Clause provides that "[t]he Times, Places, and Manner of holding [federal elections][165] shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ."[166] The Framers decided to vest such great authority in the federal government out of concerns that States would threaten the very existence of our nation by failing to hold federal elections.[167] The Elections Clause was also designed to discourage voter disenfranchisement by preventing unequal representation in Congress.[168][169]

In a footnote, Justice Scalia equated the Elections Clause to the Commerce Clause; he said that "*all* action under the Elections Clause displaces

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holding that the EAC could be forced to include Arizona's verification requirements to the federal form: i.e. because the NVRA was designed to facilitate voting and because the Arizona law interferes with this goal, it necessarily follows that the latter must be preempted. However, a federal law must pass constitutional muster if it is to have preemptive effect. Thus, if it were found that the NVRA prohibits Arizona from enforcing its voter qualifications, the NVRA would be unconstitutional as applied here. *See supra* Part III.C.

162. This section demonstrates that the majority was correct in finding that Arizona's law was preempted under the Elections Clause.

163. *See Inter Tribal*, 133 S. Ct. at 2257.

164. *Id.* at 2256-57.

165. As stated by Judge Posner, the Elections Clause does not mention Presidential elections, as the Framers did not contemplate general elections for the office of the President. Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar, 56 F.3d 791, 793 (7th Cir. 1995). However, Article II, section 1 of the Constitution states that "Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes . . . ." This gives Congress the power to regulate Presidential elections, which is done through the Electoral College. Burroughs v. United States, 290 U.S. 534, 545, 547-48 (1934).

166. U.S. CONST. art. I, § 4, cl. 1.

167. Gonzalez v. Arizona, 677 F.3d 383, 390 (9th Cir. 2012) (citing U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 808-09 (1995); THE FEDERALIST NO. 59, at 168 (Alexander Hamilton) (Ron P. Fairfield ed., 2d ed. 1981)); THE FEDERALIST NO. 60, at 371 (Alexander Hamilton) (Clinton Rossiter, ed., 1961); James Madison, *Convention Debates*, *reprinted in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Virginia, No. 3) 1260 (John P. Kaminski et al. eds., 1993).

168. James Madison, *Convention Debates*, *supra* note 165 at 1260.

169. The Voter Qualifications Clause and the Seventeenth Amendment work in tandem with the Elections Clause–they provide *explicit* support for the notion that States can establish their own respective voter qualifications in federal elections. James Madison stated that allowing Congress to set elector qualifications violated "a fundamental article of republican government." THE FEDERALIST NO. 52, at 325-26 (James Madison) (Clinton Rossiter, ed., 1961). In *Oregon v. Mitchell*, five Justices held that the Elections Clause did not allow Congress to regulate voter qualifications in federal elections. Oregon v. Mitchell, 400 U.S. 112, 143 (opinion of Douglas, J.); *Id.* at 210 (opinion of Harlan, J.); *Id.* at 288 (opinion of Stewart, J., joined by Burger, C.J., and Blackmun, J.); *see* Gregory v. Ashcroft, 501 U.S. 452, 462 (1991); Tashjian v. Republican Party, 479 U.S. 208, 227–29 (1986); Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar, 56 F.3d 791, 794 (7th Cir. 1995). Thus, the Framers created a true system of checks and balances—state legislatures could not destroy Congress without destroying themselves. *Edgar*, 56 F.3d at 794.

some element of a pre-existing state regulatory regime . . . "[170] but Congressional actions taken under the Commerce Clause do "not always implicate concurrent state power . . . ."[171] Thus, implicitly, *Inter Tribal* states that Congress' power under the Elections Clause is greater than that of even the Commerce Clause.[172] While this may appear to be quite expansive,[173] it is really just a reiteration of prior precedents.[174]

Historically, the Court has always held, in one form or another, that Congress has *broad* authority under the Elections Clause. Numerous cases are illustrative of this. In *Ex parte Siebold*,[175] the Court held that Congress could "assume the entire control and regulation of the election of representatives"[176] and that Congress "has a general supervisory power over the whole subject" under the Elections Clause.[177] When Congress passes a law under the Elections Clause that comports with all other provisions of the Constitution, any state regulation to the contrary is superseded.[178] However, unlike the Supremacy Clause, there is no presumption against preemption in Elections Clause cases, as Congress is not "regulating an area 'traditionally occupied by the States.'"[179][180] While States' rights are certainly worthy of respect in this area,[181] such rights have always been subservient to Congressional oversight.[182] For this reason, Justice Kennedy and Justice Alito's call for applying the presumption against preemption in Elections Clause cases must fail.[183] Indeed, as stated by the Sixth Circuit, the Elections Clause "treats States as election administrators rather than sovereign entities."[184]

Subsequent to *Siebold*, the Court continued to hold that Congress' power under the Elections Clause was broad. In 1932, the Court in *Smiley v. Holm*,[185] held that the Elections Clause allowed Congress "to provide a

170. Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2257 n.6 (2013).

171. *Id.*

172. *See id.*

173. One commentator called *Inter Tribal* "the most expansive account to date of federal power under the Elections Clause." Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 111 (2013).

174. Admittedly, the Court has never compared the Commerce Clause and the Elections Clause in such a manner before.

175. *Ex parte* Siebold, 100 U.S. 371 (1879) (holding the Congress could compel the selection of district representatives).

176. *Id.* at 396.

177. *Id.* at 387; *see Ex parte* Yarbrough, 110 U.S. 651 (1884).

178. *Siebold*, 100 U.S. at 384.

179. Gonzalez v. Arizona, 677 F.3d 383, 392 (9th Cir. 2012) (quoting United States v. Locke, 529 U.S. 89, 108 (2000)); *see supra* Part IV.A.

180. *See supra* Part IV.A.

181. *Siebold*, 100 U.S. at 394.

182. Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2257 (2013) (citing Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347 (2001)).

183. Justice Kennedy would have applied the same "cautionary principle" in *all* preemption cases. Some prior decisions have referred to this principle as a "presumption against preemption." *See, e.g.*, Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 523 (1992).

184. Harkless v. Brunner, 545 F.3d 445, 454 (6th Cir. 2008) (citing Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Miller, 129 F.3d 833, 836 (6th Cir. 1997)).

185. Smiley v. Holm, 285 U.S. 355 (1932).

complete code for congressional elections . . . in relation to . . . registration . . . ."[186][187] In 1934, the Court held in *Burroughs v. United States* that Congress had the power to regulate Presidential and Vice Presidential elections.[188] In 1941, the Court held that Congress had the authority to regulate primary elections and political party nominations procedures in *United States v. Classic.*[189] Moreover, in 1946, the Court again held that Congress is given "*exclusive control*" over federal election procedures in *Colegrove v. Green.*[190] The Court further held that Congress could force the States to allow eighteen-year-olds to vote in *Oregon v. Mitchell* in 1970.[191] In 1972, the Court held that Congress could regulate recounts in *Roudebush v. Hartke.*[192] In *Buckley v. Valeo*, a 1976 decision, the Court acknowledged that it was "well established" that Congress could regulate campaigns leading up to federal elections under the Elections Clause, so long as such regulations were consistent with the First Amendment.[193] In 1995, the Court indicated in *U.S. Term Limits, Inc. v. Thornton* that Congress had the power to override state regulations on federal elections.[194] Finally, in 1997, the Court held that Congress had the power to set a national date on which federal elections must be held.[195]

Lower courts have also embraced this broad interpretation of Congressional power under the Elections Clause. Indeed, prior to *Siebold*, one court said of the Elections Clause: "There is little regarding an election that is not included in the terms, time, place and manner of holding it."[196] More recently, Judge Posner of the Seventh Circuit noted that "Congress [is] given the *whip hand*" when acting pursuant to its powers under the Elections Clause and that Congress could compel the States to pay the expense of the federal scheme.[197][198] During the same year, the Ninth Circuit held

186. *Id.* at 366 (emphasis added); *see* United States v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330, 351-55 (E.D. La.1965).

187. Justice Thomas argued that this was merely dicta, as *Smiley* involved Congressional redistricting, rather than voter registration and that two subsequent cases (Roudebush v. Hartke, 405 U.S. 15, 25 (1972) and Cook v. Gralike, 531 U.S. 510, 523 (2001)) had simply quoted the term "registration" from *Smiley. Inter Tribal*, 133 S. Ct. at 2268 (Thomas, J., dissenting). While this may be true, it does not negate the fact that the Court has always held that Congress has broad authority in the area of how federal elections are held.

188. Burroughs v. United States, 290 U.S. 534, 545, 547-48 (1934).

189. United States v. Classic, 313 U.S. 299, 320 (1941).

190. Colegrove v. Green, 328 U.S. 549, 554 (1946) (emphasis added).

191. Oregon v. Mitchell, 400 U.S. 112, 118 (1970).

192. Roudebush v. Hartke, 405 U.S. 15, 24-25 (1972).

193. Buckley v. Valeo, 424 U.S. 1, 13 (1976).

194. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832-34, 864 (1995). This statement could be dicta, however, as *Thornton* involved a state's regulation regarding the qualifications necessary to become a member of Congress.

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

196. United States v. Munford, 16 F. 223, 228 (E.D.Va. 1883).

197. Ass'n of Cmty. Orgs. For Reform Now (ACORN) v. Edgar, 56 F.3d 791, 794 (7th Cir. 1995) (emphasis added).

198. Judge Posner further noted that the Elections Clause does not mention voter registration, as this "did not exist in the eighteenth century as a separate stage of the electoral process." *Id.* at 793.

that Congress could "conscript state agencies" to implement federal regulation.[199] The Sixth Circuit subsequently noted that the Elections Clause allowed Congress "to force states to alter their regulations regarding federal elections."[200] Eleven years later, the Sixth Circuit pointed out that the Elections Clause stood "in stark contrast to virtually all other provisions of the Constitution, which merely tell the states 'not what they must do but what they can or cannot do.'"[201] Rather, the Elections Clause commands that States "prescribe the details necessary to hold congressional elections."[202]

The Framers originally intended that Congressional power under the Elections Clause was to be "expressly restricted to the regulation of the times, the places, the manner of elections."[203] Alexander Hamilton asserted that "every government ought to contain in itself the means of its own preservation." However, as stated by Judge Posner, "laws frequently outrun their rationales. The [Elections Clause] is broadly worded and has been broadly interpreted. Nor is it certain that its rationale is as limited as Hamilton suggested."[204]

Consistent with Judge Posner's statement and the express terms of the Constitution, the Court has made it clear that it will not strain the natural reading of statutes when performing an analysis under the Elections Clause in order to avoid preemption, unlike a Supremacy Clause analysis.[205] In *Foster*, a Louisiana statute provided that an open primary would occur in October to determine party candidates for the United States House of Representatives and for the Senate.[206] Yet, federal law provided that Congressional elections would occur on the Tuesday after the first Monday in November.[207] Louisiana argued that its law related to the "manner" of electing candidates for federal office, rather than the "time" that such elections take place.[208] Thus, according to Louisiana, the federal law and the state law at issue regulated different areas. The Court characterized Louisiana's argument as "merely wordplay" and an "imaginative characterization."[209] The Court declined to strip the statutes down to their "definitional bone."[210] Thus, the Court's unwillingness to harmonize the NVRA and the Arizona law is consistent with the broad authority of Congress and numerous prior precedents.

199. Voting Rights Coal. v. Wilson, 60 F.3d 1411, 1415 (9th Cir. 1995) (citing *Ex parte* Siebold, 100 U.S. 384, 386 (1879)).

200. Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Miller, 129 F.3d 833, 836 (6th Cir. 1997).

201. Harkless v. Brunner, 545 F.3d 445, 454 (6th Cir. 2008) (quoting *Edgar*, 56 F.3d at 794).

202. *Id.*

203. THE FEDERALIST NO. 60, at 271 (Alexander Hamilton) (Clinton Rossiter, ed., 1961) (emphasis omitted).

204. Ass'n of Cmty. Orgs. For Reform Now (ACORN) v. Edgar, 56 F.3d 791, 794 (7th Cir. 1995).

205. Foster v. Love, 522 U.S. 67, 72-73 (1997).

206. *Id.* at 70.

207. *Id.* at 68.

208. *Id.* at 72.

209. *Id.* at 72-73.

210. *Id.* at 72.

PART V: SIGNIFICANCE

The Court makes clear in *Inter Tribal* that *States* determine who is eligible to vote in federal elections notwithstanding the Elections Clause. Moreover, the Court rightly intended to preserve States' rights. *Inter Tribal* also adds significant clarification to the Court's preemption jurisprudence that Congress may only use the Elections Clause to preempt state regulations insofar as they apply to federal elections.[211] Arizona, as well as any other State, is free to impose proof of citizenship requirements for voter registrations in state elections[212] under the Voter Qualifications Clause and the Seventeenth Amendment even when Congress decides to use its Election Clause power.[213] Yet, as stated by Justice Alito and Judge Rawlinson in the dissenting opinion to the Ninth Circuit's en banc decision, the practical application of this principle results in a burdensome undertaking for States; States may choose to concurrently register voters in state and federal elections, as Arizona had previously done in *Inter Tribal*, rather than maintain separate state and federal registration procedures and separate state and federal voter rolls.[214]

Inter Tribal further demonstrates the difficulty of attempting to apply universal standards regarding voter registration and voter identification laws. For example, suppose that Congress, in an attempt to quell modern-day voter identification law controversies, amends the NVRA to require national voter identification in *all* elections using futuristic technology (such as the scanning of thumbprints, hair follicle tests, voice recognition devices, and retinal scans).[215] This, in and of itself, would be unconstitutional under *Inter Tribal*, as States may decide who may vote in elections under the Voter Qualifications Clause, as well as the Seventeenth Amendment.[216] However, under the Elections Clause, Congress could amend the NVRA to require States to verify the eligibility of voters *under state law* using thumbprints, hair follicle tests, voice recognition devices, and retinal scans for the purposes of *federal* elections.[217]

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211. *See supra* Part I; Gonzalez v. Arizona, 677 F.3d 383, 404 n.30 (9th Cir. 2012).

212. Arizona's Attorney General recently issued an advisory opinion indicating that it would be permissible under federal and Arizona law for Arizona to establish separate voter rolls for state and federal elections. Op. Ariz. Att'y Gen. 113-011 (R13-016) (2013).

213. Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2258-60 (2013) (citing U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. amend. XVII)); *Id.* at 2262 (Thomas, J., dissenting); *Id.* at 2272 (Alito, J., dissenting); *Gonzalez*, 677 F.3d, at 404 n.30.

214. *Inter Tribal*, 133 S. Ct. at 2272 (Alito, J., dissenting); *Gonzalez*, 677 F.3d at 449 (Rawlinson, J., dissenting); *see id.* at 404 n.30.

215. I recognize that this hypothetical may be prohibitively expensive and impact federalism, individual rights, and privacy rights, among other things. Right or wrong however, using such technologies in the voting process is likely the way of the future. How the Court's jurisprudence will eventually evolve to allow this remains to been seen. I hope that when this is accomplished, it will be done in a manner that preserves States' rights and individual rights to the fullest extent possible.

216. *See supra* Part III.C, Part IV.B.

217. *See supra* Part III.C, Part IV.B.

The reader must understand that there are questions arising out of *Inter Tribal* that still remain. Although the Court upheld the constitutionality of the NVRA,[218] it remains to be seen whether the EAC's recent actions are constitutional.[219] The key issue is whether the oath prescribed by the federal form is sufficient for Arizona to enforce its voter qualifications: i.e. that a prospective voter is a United States citizen.[220] Justice Thomas would have held that a State could "verify citizenship in any way it deems necessary."[221] Justice Alito made a similar argument.[222] Justice Scalia indicated during the oral argument of *Inter Tribal* that an oath in this context was "virtually meaningless."[223] Yet, Justice Scalia's opinion is far less clear as to whether the EAC must automatically approve a State's request to add state-specific instructions to the federal form.[224] While the Court makes it clear that it would "raise serious constitutional doubts" if Arizona could not "enforce its voter qualifications,"[225] the Court goes on to suggest that Arizona bears the burden of proof with regard to establishing that a change to the federal form is warranted.[226] The EAC determined, rightly or wrongly, that Arizona had failed to present sufficient evidence to warrant the additional proof-of-citizenship instructions to the federal form.[227] Yet, the District Court of Kansas recently held that inasmuch as States have the power to establish voter qualifications under the Voter Qualifications Clause, Arizona's legislature was free to decide that a mere oath was insufficient to satisfy its citizenship requirement to vote without more.[228] How

218. The Court interpreted § 1973gg-7(b)(1) so as to allow States to enforce their respective voter qualifications. *Inter Tribal*, 133 S. Ct. at 2259; *Id.* at 2270 (Thomas, J., dissenting). Indeed, even the United States conceded during the oral argument of *Inter Tribal* that § 1973gg-7(b)(1) allows States to enforce their respective voter qualifications. *Id.* at 2259 (citing Tr. of Oral Arg. 52). Justice Thomas's criticism of the majority's refusal to settle the conflict between federal and state power in this area is well taken. Justice Scalia's opinion is certainly a roundabout way of allowing States to enforce their respective voter qualifications. Yet, it was probably best to apply the canon of constitutional avoidance here in order to build a record on whether Arizona truly needs this voter identification law in order to enforce its voter qualifications.

219. After *Inter Tribal* was decided, Arizona renewed its request to add state-specific instructions to the federal form. The EAC deferred this request until such a time as the EAC had a quorum of commissioners. Arizona, along with the state of Kansas, filed suit, challenging the validity of the deferral. The EAC subsequently denied Arizona's request on January 17, 2014. MEMORANDUM OF DECISION, *supra* note 78, at 3-4.

220. *Inter Tribal*, 133 S. Ct. at 2260.

221. *Id.* at 2269-70.

222. *Id.* at 2270, 2273.

223. MEMORANDUM OF DECISION, *supra* note 78, at 29.

224. *See id.* at 26-27.

225. *Inter Tribal*, 133 S. Ct. at 2258.

226. *Id.* at 2260 ("Arizona would have the opportunity to *establish* in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement . . . .") (emphasis added). The Southern District Court of Texas recently interpreted *Inter Tribal* in the same fashion in an unrelated case. Veasey v. Perry, 13-CV-00193, 2014 WL 3002413, at *14 (S.D. Tex. July 2, 2014).

227. MEMORANDUM OF DECISION, *supra* note 78, at 26-41.

228. Kobach v. EAC, 6 F. Supp. 3d 1252, 1271 (D. Kan. 2014).

the Tenth Circuit's response to Arizona's challenge to the EAC's determination will influence the evolution of the Court's jurisprudence in this area remains to be seen.[229]

For now, it is noteworthy that *Inter Tribal* appears to have the effect of repudiating a portion of at least one other decision. *Inter Tribal* holds that States have the ability to say who may vote in federal and state elections and that the Elections Clause cannot be used to change that principle. Yet, the majority makes no mention of the Necessary and Proper Clause. This would seem to run afoul of *United States v. Classic*, which held that States could establish voter qualifications under the Voter Qualifications Clause, but that this authority was subject to the Elections Clause. Additionally, the Court stated that Congress' power under the Elections Clause could be read together with the Necessary and Proper Clause.[230] Justice Thomas's opinion is exactly the opposite of the decision in *Classic*; he states that the more "general" Elections Clause is subject to the more "specific" Voter Qualifications Clause. Justice Thomas, like the majority, makes no mention of the Necessary and Proper Clause. Yet, Judge Posner indicated that the Necessary and Proper Clause displayed the extensive reach of Congress' power under the Elections Clause.[231] Since Justice Scalia cited *Classic* for the notion that Congress' authority under the Elections Clause is broad,[232] one might reasonably infer that the majority's omission of the Necessary and Proper Clause was a mere oversight. Yet, the majority made it clear that it would not be bound by implicit regulations when there are explicit regulations to the contrary.[233] Here, the Elections Clause is explicit on Congress' power, while the Necessary and Proper Clause is an implicit provision that is tied to Congress' explicit power. Justice Thomas's "specific governs the general" principle might be applied here.[234] Since the Elections Clause is specific with regard to Congress' power in this area, it must necessarily follow that the Necessary and Proper Clause is a more general provision. Indeed, even *Classic* indicates that the Necessary and Proper Clause is a general provision in this context.[235] In any event, the point is that the Necessary and Proper Clause is no longer *expressly* applicable to an Elections Clause preemption analysis.

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229. The Tenth Circuit held oral arguments on August 25, 2014. *See* Order Granting Intervenors Defendants Appellants' Request to Release the Oral Argument Recording, Kobach v. EAC and Inter Tribal Council of Ariz., Inc. (Nos. 14-3062 & 14-3072) (10th Cir. filed Sept. 2, 2014), http://moritzlaw.osu.edu/electionlaw/litigation/documents/Kobach138.pdf. As of October 29, 2014, no decision has been issued.

230. United States v. Classic, 313 U.S. 299, 315 (1941).

231. Ass'n of Cmty. Org. for Reform Now (ACORN) v. Edgar, 56 F.3d 791, 794 (7th Cir. 1995) (citing United States v. Classic, 313 U.S. 299 (1941)).

232. Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2253 (2013).

233. *Id.* at 2258 ("One cannot read the Elections Clause as treating implicitly what . . . other constitutional provisions regulate explicitly.").

234. *Id.* at 2266 (Thomas, J., dissenting) (citing RadLAX Gateway Hotel, LLC v. Amalgamated Bank,132 S.Ct. 2065, 2071 (2012) (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992)) ("'[I]t is a commonplace of statutory construction that the specific governs the general.'").

235. *Classic*, 313 U.S. at 315.

PART VI: CONCLUSION

Inter Tribal is a preemption case that deals with federalism concerns and the extent of federal and state power involving voter registration and identification. While the underlying issue in *Inter Tribal* was the constitutionality of a voter identification law, this case is far more than just a voter identification case. *Inter Tribal* deals with the delicate balance of power between the federal and state governments—*when*, *where*, and *how*, or the "manner" in which federal elections are held must be determined by Congress in order to prevent voter disenfranchisement and to force States to hold federal elections. Without federal elections, Congress could not exist. Yet, pursuant to the Voter Qualifications Clause and the Seventeenth Amendment, States must be able to establish *who* may vote in both federal and state elections. All justices upheld this proposition—and for good reason. Allowing the federal government to establish elector qualifications would put States at the mercy of Congress. This system of checks and balances is necessary for the preservation of our nation. This notion is well-established by prior precedents, as well as the Framers' intent. It was rightly upheld by all members of the Court. If States or the federal government became too powerful, we would cease to live in a republic. Rather, we would live in a country full of tyranny and oppression.

Justices Kennedy and Alito's disagreement with the majority's refusal to apply the presumption against preemption principle used in a Supremacy Clause analysis to an Elections Clause case is inconsistent with prior precedents, the intent of the Framers, and the express provisions of the Constitution. There is a reason why there is both a Supremacy Clause and an Elections Clause in the Constitution. An analysis under the former incorporates respect for States' historic police powers, while an analysis under the latter gives Congress, in the words of Judge Posner, "the whip hand" regarding federal elections—an area where States have no inherently reserved power. Congress has always correctly held broad authority under the Elections Clause.

There was understandably some disagreement about the meaning of the phrase "accept and use" in the NVRA. This phrase could have meant that States must use the federal form *as a part* of the voter registration process, or that States must accept and use the federal form *to the exclusion of all other materials*. However, when one considers the neighboring provisions of the NVRA, the legislative history of the NVRA, and the fact that the Arizona law would interfere with the Congressional goal of streamlining the voter registration process by making it more difficult to register to vote, as well as make the federal form redundant and unnecessary, the majority was correct to accept Justice Scalia's position. His interpretation correctly upholds the NVRA, while at the same time allows Arizona to enforce its voter qualifications (though in a roundabout way).

Finally, *Inter Tribal* adds significant clarification to the Court's preemption jurisprudence and demonstrates the difficulty of attempting to apply national standards for voter identification and registration. While this

case may have the effect of repudiating a portion of a prior decision of the Court in *Classic*, the majority still preserved the delicate balance of power between the federal and state governments. This, in one form or another, is surely what our founding Fathers intended.

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