LEADING CASES

CONSTITUTIONAL LAW

Elections Clause — Federal Preemption of State Law — Federal Voter Registration —
Arizona v. Inter Tribal Council of Arizona, Inc.

The question of who is entitled to vote — and what evidence a voter needs to produce to demonstrate that entitlement — has become an important issue in states across the nation.[1] This increased focus on voter identification and registration requirements has renewed debates concerning the balance of power between states and the federal government in the administration of federal elections.[2] One of the key grants of power to Congress in the conduct of federal elections is the Elections Clause of the Constitution, which gives states the authority to regulate the "Times, Places and Manner" of federal elections, but notes that Congress "may at any time by Law make or alter such Regulations."[3] Last Term, in *Arizona v. Inter Tribal Council of Arizona, Inc.*,[4] the Supreme Court held that the federal National Voter Registration Act of 1993[5] (NVRA) preempts Arizona's requirement that voters produce evidence of citizenship in order to register to vote. While ostensibly an affirmation of expansive congressional power to supersede state law and regulate elections under the Elections Clause, *Inter Tribal Council*'s unclear analysis of the distinction between congressional authority to mandate the "Times, Places and Manner" of federal elections and the states' authority to prescribe individual voter qualifications actually leaves the reach of congressional power under the Elections Clause ambiguous.

The NVRA requires that all states "accept and use" a uniform federal form (the "Federal Form") when registering voters for federal elections.[6] The content of this form is prescribed by the Election Assistance Commission (EAC) and, rather than requiring documentary evidence of citizenship, stipulates that an applicant swear, under pen-

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[1] *See* Justin Levitt, Forum, *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 ELECTION L.J. 97, 98 n.7 (2012) (describing the volume of election legislation in recent years).

[2] *See, e.g.*, Holly Yeager, *Justice Dept. Sues Texas over New Voter ID Measure*, WASH. POST, Aug. 22, 2013, at A1 (discussing Senator John Cornyn's belief that the federal government was "inserting itself into the sovereign affairs of Texas" through a Justice Department lawsuit challenging Texas's 2013 voter identification law).

[3] U.S. CONST. art. I, § 4, cl. 1.

[4] 133 S. Ct. 2247 (2013).

[5] 42 U.S.C. §§ 1973gg to 1973gg-10 (2006).

[6] *Id.* § 1973gg-4(a)(1).

alty of perjury, that she is a United States citizen.[7] In November 2004, Arizona voters passed Proposition 200, an initiative that enacted various revisions to the state's election law.[8] One modification required that a county recorder "reject any application for [voter] registration that [wa]s not accompanied by satisfactory evidence of United States citizenship."[9] This proof-of-citizenship requirement could be satisfied by: "(1) a photocopy of the applicant's passport or birth certificate, (2) a driver's license number, if the license states that the issuing authority verified the holder's U.S. citizenship, (3) evidence of naturalization, (4) tribal identification, or (5) '[o]ther documents or methods of proof'" as established elsewhere in federal immigration law.[10] Hence, Arizona's law would have required a county recorder to reject a properly completed Federal Form absent one of these types of evidence.

Following the passage of Proposition 200, many plaintiffs filed lawsuits to enjoin these changes. The United States District Court for the District of Arizona consolidated the various complaints and ultimately held that Proposition 200's registration provision did not conflict with the NVRA.[11] The plaintiffs appealed this decision.[12]

A panel of the Ninth Circuit affirmed in part and reversed in part.[13] Writing for the court, Judge Ikuta[14] found that Proposition 200's proof-of-citizenship requirement conflicted with the NVRA and was preempted.[15] Following Judge Ikuta's ruling, a majority of the active judges of the Ninth Circuit voted to rehear the case en banc.[16]

The Ninth Circuit, sitting en banc, also affirmed in part and reversed in part.[17] Judge Ikuta,[18] writing again for the en banc court, distinguished the considerations related to Elections Clause preemption from those concerning Supremacy Clause preemption, because — unlike the Supremacy Clause — the Elections Clause "affects only an area in which the states have no inherent or reserved power: the regulation of federal elections."[19] Comparing Proposition 200 and the NVRA, the court found that Proposition 200's proof-of-citizenship re-

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[7] *See id.* § 1973gg-7(b)(2)(A)–(C).

[8] *See* Gonzalez v. Arizona, 485 F.3d 1041, 1047 (9th Cir. 2007).

[9] Gonzalez v. Arizona, 624 F.3d 1162, 1169 (9th Cir. 2010).

[10] *Inter Tribal Council*, 133 S. Ct. at 2252 (quoting ARIZ. REV. STAT. ANN. § 16-166(F) (2012)).

[11] *See Gonzalez*, 624 F.3d at 1170–71.

[12] *See id.* at 1171.

[13] *See id.* at 1169.

[14] Judge Ikuta was joined in her opinion by retired Justice O'Connor, sitting by designation.

[15] *Gonzalez*, 624 F.3d at 1181.

[16] Gonzalez v. Arizona, 677 F.3d 383, 390 (9th Cir. 2012) (en banc).

[17] *See id.* at 388.

[18] Chief Judge Kozinski filed a concurrence. Judge Berzon, joined by Judge Murguia, filed another concurrence. Judge Pregerson filed a partial concurrence and partial dissent. Judge Rawlinson, joined by Judge N. Randy Smith, also filed a partial concurrence and partial dissent.

[19] *See Gonzalez*, 677 F.3d at 392.

quirement would require a county recorder to reject any voter registration — including a Federal Form — unaccompanied by adequate proof of citizenship, and that this provision could not be reconciled with the NVRA's mandate that states "accept and use" the Federal Form.[20] While the court noted Arizona's concerns regarding fraudulent voter registration, it found that the Elections Clause gave Congress the last word on how to address this issue in federal elections.[21]

The Supreme Court affirmed.[22] Writing for the Court, Justice Scalia[23] began by observing that the Elections Clause (1) imposes a duty on states to regulate the times, places, and manner of elections; and (2) grants Congress the right to supplement those regulations or supplant them altogether.[24] The Court found the substantive scope of the Clause to be broad, noting that times, places, and manner are "'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections.'"[25] The question thus became whether the federal statutory requirement that states "accept and use" the Federal Form preempted Arizona's requirement that officials "reject" any application unaccompanied by documentary evidence of citizenship.[26]

Justice Scalia proceeded to undertake a textual analysis of the NVRA's phrase "accept and use." He first noted that, in isolation, the phrase could mean either that a state "must accept the Federal Form as a complete and sufficient registration" or merely that a state must "receive the form willingly and use it *somehow* in its voter registration process."[27] Considering the phrase in the context of the surrounding language of the NVRA, Justice Scalia found it hard to agree with Arizona's preferred interpretation of the word "accept" — "merely to denote willing receipt" — in the context of an official mandate to accept and use something for a stated purpose.[28] Furthermore, such a read-

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[20] *See id.* at 397–99.

[21] *Id.* at 403.

[22] *Inter Tribal Council*, 133 S. Ct. at 2260.

[23] Justice Scalia was joined in his opinion by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Kennedy joined in part.

[24] *Inter Tribal Council*, 133 S. Ct. at 2253.

[25] *Id.* Justice Scalia quoted *Smiley v. Holm*, 285 U.S. 355, 366 (1932), while also citing *Roudebush v. Hartke*, 405 U.S. 15, 24–25 (1972), and *United States v. Classic*, 313 U.S. 299, 320 (1941), for his contention regarding the broad scope of the phrase "Times, Places and Manner." *See Inter Tribal Council*, 133 S. Ct. at 2253. Further expounding on the powers this phrase grants, Justice Scalia noted that Congress's power to regulate the times, places, and manner of congressional elections is "paramount, and may be exercised at any time, and to any extent which it deems expedient." *Id.* at 2253–54 (quoting *Ex parte* Siebold, 100 U.S. 371, 392 (1880)).

[26] *Inter Tribal Council*, 133 S. Ct. at 2254.

[27] *Id.*

[28] *Id.* As an example of its preferred interpretation, Arizona pointed out that "[a]n airline may advertise that it accepts and uses e-tickets . . . , yet may still require photo identification before one could board the airplane." *Id.* (alteration in original) (quoting State Petitioners' Brief on the Merits at 40, *Inter Tribal Council*, 133 S. Ct. 2247 (No. 12-71)) (internal quotation marks omitted).

ing would be "difficult to reconcile with neighboring provisions of the NVRA."[29] For example, § 1973gg-6(a)(1) provides that a state shall "ensure that any eligible applicant is registered to vote in an election . . . if the *valid voter registration form*" is mailed in a timely manner.[30] Arizona's reading would hence only be correct if a properly completed Federal Form were not considered a "valid voter registration form" — an unlikely result.[31] Section 1973gg-4(a)(2) of the law permits states, "'*[i]n addition to* accepting and using the' Federal Form," to create and use a state-specific form to register voters.[32] Arizona's reading would permit a state to demand the same information from Federal Form applicants that it required on its state-specific form.[33] These results would conflict with the NVRA's purpose, as the Federal Form would "cease[] to perform any meaningful function."[34]

Justice Scalia next conducted a comparison of the Elections Clause and the Supremacy Clause that was similar to the analysis performed by the Ninth Circuit. First, the structure of the Elections Clause shows that the assumption that Congress is reluctant to preempt state law — an assumption that the Court follows in its Supremacy Clause analysis — does not hold under an Elections Clause analysis.[35] Second, the federalism concerns implicated in Supremacy Clause analysis are weaker when considering laws through the prism of the Elections Clause.[36] Unlike the states' police powers, "the States' role in regulating congressional elections — while weighty and worthy of respect — has always existed subject to the express qualification that it 'terminates according to federal law.'"[37] Based on these considerations and "the fairest reading of the statute," Justice Scalia found Arizona's proof-of-citizenship requirement to be "'inconsistent with' the NVRA's mandate that States 'accept and use' the Federal Form."[38]

The Court then considered Arizona's claim that its construction of the phrase "accept and use" was the only way to avoid a conflict between the NVRA and Arizona's constitutional authority to establish voter qualifications.[39] The Court first noted that Arizona was correct that the Elections Clause gave Congress the power "to regulate *how*

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[29] *Id.* at 2255.
[30] *Id.* (quoting 42 U.S.C. § 1973gg-6(a)(1) (2006)) (internal quotation marks omitted).
[31] *Id.*
[32] *Id.* (alteration in original).
[33] *Id.* at 2256.
[34] *Id.*
[35] *See id.* at 2256–57.
[36] *Id.* at 2257.
[37] *Id.* (quoting Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347 (2001)).
[38] *Id.* (quoting *Ex parte* Siebold, 100 U.S. 371, 397 (1880)).
[39] *Id.* at 2257–58.

federal elections are held, but not *who* may vote in them."[40] The states' exclusive power to determine voter qualifications — and to "obtain[] the information necessary to enforce" those qualifications — is well established.[41] Therefore, if — but for Arizona's interpretation of "accept and use" — Arizona would be precluded from obtaining the information necessary to enforce its voter qualifications, the Court would have to consider whether Arizona's reading of the statute, "though plainly not the best reading, [wa]s at least a possible one."[42]

The Court found, however, that such consideration was not required because the statute allowed Arizona to seek reconsideration of the EAC's refusal to alter the Federal Form through other avenues.[43] Since the NVRA allowed a state to "request that the EAC alter the Federal Form to include information the State deem[ed] necessary to determine eligibility," and the state had the ability to challenge any EAC failure to act through the Administrative Procedure Act, giving the phrase "accept and use" its fairest reading raised "no constitutional doubt."[44] While Arizona had previously requested that the EAC include Arizona's proof-of-citizenship requirement in the state-specific instructions on the Federal Form, it had not challenged the EAC's failure to act on this request in federal court.[45] The Court thus affirmed the Ninth Circuit while suggesting that judicial review of the EAC's decision remained available to Arizona.[46]

Justice Kennedy concurred in part and concurred in the judgment. He wrote separately to emphasize his disagreement with the majority's Elections Clause preemption analysis, opining instead that — regardless of which power Congress invoked — the Court should always take the same caution when considering if a congressional act preempts state law.[47] Nonetheless, Justice Kennedy concurred in the judgment because he agreed that the NVRA was unambiguous in its preemption of Arizona's statute.[48]

Justice Thomas and Justice Alito each wrote separately to dissent. Justice Thomas agreed with the majority that states have the authority to set qualifications for those who vote in elections for federal office and also noted that the power to set qualifications must include the "power to determine whether those qualifications are satisfied."[49]

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[40] *Id.* at 2257.
[41] *Id.* at 2259.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* at 2259–60.
[46] *Id.* at 2260.
[47] *Id.* at 2260–61 (Kennedy, J., concurring in part and concurring in the judgment).
[48] *Id.* at 2261.
[49] *Id.* at 2262 (Thomas, J., dissenting).

However, the majority's decision "permit[ted] Congress to effectively countermand this authority."[50] Justice Thomas suggested that the majority's position allowed Congress to determine whether a state's voter qualifications were satisfied, and hence effectively read Article I, section 2 — which provides constitutional authority for the states' regulation of voter qualifications for the House of Representatives — "out of the Constitution."[51] In order to avoid this constitutional problem, he would have instead read the law as requiring only that Arizona "accept and use" the form as a part of its registration process; under this reading, Arizona had "accept[ed] and use[d]" the Federal Form.[52]

Justice Alito wrote to express his belief that the presumption against preemption should have applied here because the federalism concerns present in Supremacy Clause analysis were at least as relevant when considering the Elections Clause.[53] Because the Elections Clause grants states the authority to make regulations concerning the "times, places, and manner of federal elections except to the extent that Congress chooses to provide otherwise," the Court should "presume that the States retain[ed] this authority unless Congress has clearly manifested a contrary intent."[54] The canon of constitutional avoidance also counseled against the Court's reading of the NVRA.[55] Justice Alito would have avoided these constitutional concerns by reading the Act to say that states may decide for themselves what information is necessary to assess the eligibility of applicants "both by designing their own forms and by requiring that federal form applicants provide supplemental information when appropriate."[56]

At first glance, *Inter Tribal Council*'s language seems to support broad congressional powers in federal elections. However, despite the Court's affirmation of expansive congressional power to supersede state law and regulate federal elections, *Inter Tribal Council* may not stand for as robust an Elections Clause as its plain language suggests. The Court's unclear analysis of the distinction between congressional authority to mandate the times, places, and manner of federal elections and the states' authority to prescribe voter qualifications portends an uncertain future for the reach of any future congressional legislation enacted pursuant to the Elections Clause.

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[50] *Id.*

[51] *Id.* at 2264. "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2, cl. 1.

[52] *Inter Tribal Council*, 133 S. Ct. at 2262 (Thomas, J., dissenting)..

[53] *Id.* at 2271–72 (Alito, J., dissenting).

[54] *Id.* at 2271.

[55] *Id.* at 2273.

[56] *Id.* at 2274.

There is little question that *Inter Tribal Council* provided the Court's most comprehensive and far-reaching analysis of the Elections Clause to date.[57] The Court's analysis suggests that the Elections Clause is among the broadest grants of power to Congress, as it allows Congress to override state regulations unencumbered by federalism concerns. Indeed, the *Inter Tribal Council* majority further stated that, far from the presumption against preemption present in other realms, all congressional power under the Elections Clause "*necessarily* displaces some element of a pre-existing legal regime erected by the States."[58] While the Court had previously implicitly read the Elections Clause this way,[59] Justice Kennedy's concurrence and Justice Alito's dissent demonstrate that this approach is not the only possible understanding of Elections Clause preemption. The majority's opinion makes clear that congressional authority to regulate elections is explicitly found in the Constitution, and therefore the power of the states in the federal elections context — at least relating to the times, places, and manner of elections — "terminates according to federal law."[60]

Beyond the Court's Elections Clause preemption analysis, the reading given to the phrase "Times, Places and Manner" in *Inter Tribal Council* also suggests that the Elections Clause provides a robust mandate for congressional authority. While Justice Scalia cited to numerous precedents in order to ground his assertion that the Elections Clause's grant of congressional authority to regulate the "Times, Places and Manner" of elections should be read broadly,[61] the Court had previously only mentioned in passing the applicability of the Elections Clause to voter registration.[62] *Inter Tribal Council* was the Court's first Elections Clause case to involve the validity of a federal registra-

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[57] *See* Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 111 (2013) (suggesting the Court had never previously analyzed the Elections Clause in this manner); Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 5–6 (2010) ("Although the Supreme Court has heard several challenges to [elections statutes], it never has examined thoroughly the intended scope of the congressional power under the Times, Places and Manner Clause." (citation omitted)).

[58] *Inter Tribal Council*, 133 S. Ct. at 2257.

[59] *See, e.g.*, Roudebush v. Hartke, 405 U.S. 15, 24 (1972) ("Unless Congress acts, Art. I, § 4, empowers the States to regulate . . . .").

[60] *See Inter Tribal Council*, 133 S. Ct. at 2257 (quoting Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347 (2001)) (internal quotation marks omitted). Both Justice Thomas and Justice Alito suggested that this approach is an incorrect reading of the history and text of the clause, and Justice Alito also suggested that intervention by the federal government in election regulation is no different from any other intervention into a realm where the states traditionally maintain authority. *See id.* at 2265 (Thomas, J., dissenting); *id.* at 2271 (Alito, J., dissenting).

[61] *See supra* note 25.

[62] Marty Lederman, *Pyrrhic Victory for Federal Government in Arizona Voter Registration Case? [UPDATED with Reference to Shelby County]*, SCOTUSBLOG (June 17, 2013, 3:02 PM), http://www.scotusblog.com/2013/06/pyrrhic-victory-for-federal-government-in-arizona-voter-registration-case.

tion statute itself, and — coupled with the Court's previous rulings — the Elections Clause has now been extended to cover registration, recounts, and primaries.[63] Professor Samuel Issacharoff argues that the Court's willingness to extend the Clause in this manner likely means that Congress has the power under the Elections Clause to reach many of the voting rights issues that have made headlines in the past years, and the Court's language seems to support this assertion.[64] Based on this analysis, *Inter Tribal Council* appears to confirm Congress's sweeping authority under the Elections Clause.

The Court did, however, qualify this authority in one important way. Both the majority and the dissenters agreed that, while Congress may regulate the times, places, and manner of federal elections, states have the authority to determine who is entitled to vote in both federal and state elections.[65] While this division may be the clearest reading of the plain language of the Elections Clause and the various constitutional clauses related to the qualifications for electors for the Senate, House of Representatives, and presidential elections,[66] it is not the only reading of the interaction between these clauses, and it is certainly not the only reading that the Court has advanced. Indeed, *United States v. Classic*,[67] a case in which the Court upheld congressional power to regulate primaries and to which Justice Scalia cited in *Inter Tribal Council* for the idea that the terms "Times, Places and Manner" should be read broadly,[68] declared that Congress possessed authority to regulate voter qualifications by reading the Elections Clause in conjunction with the Necessary and Proper Clause.[69] Justice Black's opinion in *Oregon v. Mitchell*,[70] in which the Court affirmed congressional authority to enfranchise eighteen-year-olds in federal elections, also stated that the interaction of the Elections Clause with Congress's authority under the Necessary and Proper Clause gave Congress essentially un-

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[63] *See Roudebush*, 405 U.S. at 24–25 (recounts); United States v. Classic, 313 U.S. 299, 320 (1941) (primaries).

[64] Issacharoff, *supra* note 57, at 112–13.

[65] *Inter Tribal Council*, 133 S. Ct. at 2257; *id.* at 2265 (Thomas, J., dissenting); *id.* at 2273 (Alito, J., dissenting).

[66] *Compare* U.S. CONST. art. I, § 4, cl. 1 (Senate), *with* U.S. CONST. art. I, § 2, cl. 1 (House of Representatives), *and* U.S. CONST. art. II, § 1, cl. 2 (President).

[67] 313 U.S. 299.

[68] *See Inter Tribal Council*, 133 S. Ct. at 2253–54.

[69] *Classic*, 313 U.S. at 315 ("While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, . . . this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.'").

[70] 400 U.S. 112 (1970).

limited authority to control the mechanics of federal elections — including voter qualifications.[71] These pronouncements, coupled with the changes in the balance of power between the federal government and the states brought about by the Reconstruction Amendments,[72] have led some to argue that the states' right to regulate voter qualifications has, in practice, become more or less illusory.[73]

Rather than reconciling the tension between the powers of Congress and the states regarding federal elections, however, the Court's opinion merely acknowledged the issue and then skirted resolution of the conflict. When considering the fairest construction of "accept and use," the Court noted that Arizona's "power to establish voting requirements is of little value without the power to enforce [them]," and that a serious constitutional issue would arise if there was no way to reconcile Arizona's constitutionally granted authority to mandate the qualifications of electors with the NVRA.[74] Indeed, the Court's analysis seemed to imply that state authority would likely prevail in this hypothetical conflict, but since the Court found that there were other means to resolve the issue, it chose not to squarely consider a resolution of these constitutional concerns.[75]

By failing to address these concerns, however, the Court has made it difficult to reconcile the scope of the states' authority with Congress's Elections Clause power.[76] Professor Marty Lederman notes

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[71] *Id.* at 123 ("[T]he Constitution allotted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them."). While the Court has thus read "Times, Places and Manner" more broadly than it did in *Inter Tribal Council*, there is certainly no reason why the words could not also be read to apply merely to the procedural aspects of an election. Indeed, it appears that the Supreme Court and lower federal courts have read the Elections Clause more narrowly in different contexts. *See, e.g.*, Schaefer v. Townsend, 215 F.3d 1031, 1038 (9th Cir. 2000) (noting that the Supreme Court has rejected "a broad reading of the Elections Clause" in the context of requirements for candidates running for office). Justice Thomas's dissent in *Inter Tribal Council* also suggested that a narrow reading would be appropriate. 133 S. Ct. at 2265–66 (Thomas, J., dissenting).

[72] *See* Alexander Tsesis, *Principled Governance: The American Creed and Congressional Authority*, 41 CONN. L. REV. 679, 706 (2009) (discussing the Reconstruction Amendments' goal of "expand[ing] legislative authority into matters that previously had been the states' sole province").

[73] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 363–64 (1972) (Burger, C.J., dissenting); *cf.* Michael M. Uhlmann, *Federalism and Election Reform*, 6 TEX. REV. L. & POL. 491, 508 (2002) ("The fact is that Congress has in the past forty years rewritten much of our electoral law, almost without exception at the expense of powers once deemed to be substantially within the power of the states. And, again with few exceptions, these revisions have been sustained by the courts.").

[74] *Inter Tribal Council*, 133 S. Ct. at 2258–59.

[75] *See id.* at 2259.

[76] The Court's failure to provide an explicit constitutional basis for the broad and important powers granted to states to regulate voter qualifications is also troubling. Justice Scalia quoted Article I, section 2, clause 1 of the Constitution and the Seventeenth Amendment for this authority, *see id.* at 2258, but neither is precisely on point. Specifically, neither provision suggests that states necessarily have the constitutional authority to determine the qualifications of their own electors. Professor Deborah Jones Merritt notes that, if the Constitution does not grant states this

that *Inter Tribal Council*'s language regarding states' authority casts doubt on the constitutionality of numerous federal laws that impact specific populations' eligibility to vote in federal elections.[77] Conversely, others have argued that *Inter Tribal Council*'s expansive language regarding the Elections Clause grants Congress the ability to address many of the nation's recent voting rights issues.[78] The Court's opinion is open to both interpretations, and the issue in *Inter Tribal Council* itself illustrates one permutation of this unresolved balance of powers: if Congress has the power to control registration, and states have the power to control voter qualifications, why does it necessarily follow that states have the power to perform voter verification through the registration process?[79]

The result in *Inter Tribal Council* thus does little to clarify congressional authority in federal elections. If anything, the decision invites future conflicts over the reach of federal power vis-à-vis the states in the realm of federal election administration. Given the Court's recent contraction of Congress's powers under the Reconstruction Amendments[80] — the other congressional powers historically used to ensure broad voter participation — a clearer explanation of Congress's Elections Clause power would have been useful to understand the reach of federal authority in this arena. Instead, *Inter Tribal Council* leaves open the question of whether the Elections Clause is a broad mandate of congressional authority or a hollow power wrought with exceptions.

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authority, Congress could arguably simply control state voter qualifications — and, by extension, federal voter qualifications — under one of its delegated powers. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 37–38 (1988).

77 Lederman, *supra* note 62 (suggesting that the Uniformed and Overseas Citizens Absentee Voting Act is a law with questionable constitutionality following *Inter Tribal Council*); *see also id.* (noting that *Inter Tribal Council* may foreclose federal efforts to address felon disenfranchisement laws).

78 *See, e.g.*, Issacharoff, *supra* note 57, at 112–13; Jesse Wegman, *Plan B for Voting Rights*, N.Y. TIMES, Sept. 1, 2013, at SR10.

79 The Court's failure to confront the tension in its Elections Clause analysis in *Inter Tribal Council* — and its implicit suggestion that the state's concerns would likely prevail in any hypothetical conflict — may be seen as a stronger harbinger for a weak Elections Clause following the Court's disregard of Elections Clause arguments last Term in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). Numerous amici in *Shelby County* filed briefs suggesting that, whatever the Court's resolution regarding the constitutionality of section 5 and section 4(b) of the Voting Rights Act under the Fourteenth Amendment, both portions remained constitutional when considering federal elections in light of Congress's authority under the Elections Clause. *See* Brief of Gabriel Chin et al. as *Amici Curiae* in Support of Respondents at 9–27, *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12-96); Brief of Reps. F. James Sensenbrenner, Jr. et al. as *Amici Curiae* in Support of Respondents at 33–38, *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12-96). Indeed, a reading of "Times, Places and Manner" in the broad way suggested by Justice Scalia in *Inter Tribal Council* would seem to require such a finding. And yet the Court invalidated section 4(b) — and, for all practical purposes, section 5 — in *Shelby County* while failing to give even a passing mention to the Elections Clause.

80 *See* Issacharoff, *supra* note 57, at 110.