To Accept or To Reject: *Arizona v. Inter Tribal Council of Arizona*, the Elections Clause, and the National Voter Registration Act of 1993

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INTRODUCTION

On June 17, 2013, the United States Supreme Court decided *Arizona v. Inter Tribal Council of Arizona, Inc.* ("*Arizona v. ITCA*").[1] The Court held that a 2004 proof of citizenship requirement for voter registration in Arizona ("Proposition 200") was preempted by the National Voter Registration Act of 1993 ("NVRA") as it applied to federal mail-in voter registration applications.[2] In contrast to the instantly-momentous ruling that followed just days later in *Shelby County v. Holder*,[3] the Court's decision in *Arizona v. ITCA* created few ripples.

The Court's majority opinion, with only two dissenters, spanned the usual ideological divide. The decision nominally turned upon a narrow question of textual analysis: whether the NVRA's requirement that states "accept and use" federal voter registration forms preempted, under the Constitution's Elections Clause, Arizona's requirement to "reject" such forms if they are not accompanied by what the state deems to be satisfactory proof of citizenship.[4] The Court strongly reaffirmed its prior Elections Clause jurisprudence, and did not map out any major new doctrinal ground. Apart from its brevity, the majority's conflict analysis tracked the same basic approach as the Ninth Circuit en banc decision that it affirmed.

So why then did the Supreme Court use one of the valuable spots on its docket to hear this case? The most likely answer is that Justice Kennedy was uneasy with the Ninth Circuit's discussion of preemption principles in its en banc decision, which induced him and one other Justice to vote for certiorari, but did not ultimately prevent him, along with six other Justices, from finding that a textual conflict was present and that preemption was required.

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

2. *See* Pub. L. No. 103-31 (codified at 42 U.S.C. § 1973gg *et seq* (2012)); *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2260.

3. Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013). An in-depth discussion of the *Shelby County* decision by three of the author's colleagues appears elsewhere in this volume. *See* Jon M. Greenbaum et al., *When the Rational Becomes Irrational*, 57 How. L.J. 3, 811 (2014).

4. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2251.

Did the Court perhaps leave troubling implications lurking beneath the surface of what appeared to be a fairly routine case of textual interpretation? In a word, no. Despite invitations to begin weakening Congress's Elections Clause authority, the majority showed no inclination to do so. To observers of the Court for the past several decades, this may be the most significant aspect of the Court's decision.

This Article attempts to place the *Arizona v. ITCA* decision in context. Section I reviews the Supreme Court's prior Elections Clause preemption decisions. Section II provides the structure and interlocking components of the NVRA. Section III discusses Arizona's Proposition 200. Section IV summarizes the case in the lower courts, with particular attention to the Ninth Circuit's preemption analysis. Section V reviews the Supreme Court's decision, focusing upon the scope of the Elections Clause authority, the Court's preemption analysis, and the rejection of a "Hail Mary" constitutional argument by Arizona. Section VI discusses the implications of the decision with respect to the scope of the Elections Clause powers, the Elections Clause preemption analysis, Arizona's constitutional argument, and the future of the NVRA.

The dispute over Proposition 200 is not over, but because the Court's decision squarely held that Congress controls voter registration procedures for federal elections, and because it confirmed that the NVRA rests upon solid constitutional ground, it represents a meaningful and welcome respite from the typical outcome of recent voting rights cases before the Court.

I. THE ELECTIONS CLAUSE

Congress enacted the NVRA in reliance upon its authority under the so-called Elections Clause of the Constitution of the United States.[5] The Elections Clause provides that:

> The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.[6]

Prior to its decision in *Arizona v. ITCA*, the Supreme Court had reviewed Congress's powers under the Elections Clause *vis-à-vis* the

5. *See* U.S. CONST. art. I, § 4.
6. *Id.*

States in only a relative handful of cases. Those cases, however, consistently recognized the plenary constitutional authority of Congress in regulating the conduct of congressional elections.

The Supreme Court first addressed the Elections Clause powers of Congress in detail in *Ex parte Siebold*.[7] Hearing a habeas corpus petition arising from a criminal conviction for interference with the conduct of a congressional election in Baltimore, Maryland, the Court established the principle that the regulations of Congress are "paramount" with respect to the conduct of congressional elections:

> As to the supposed conflict that may arise between the officers appointed by the State and national governments for superintending the election, no more insuperable difficulty need arise than in the application of the regulations adopted by each respectively. The regulations of Congress being constitutionally paramount, the duties imposed thereby upon the officers of the United States, so far as they have respect to the same matters, must necessarily be paramount to those to be performed by the officers of the State. If both cannot be performed, the latter are pro tanto superseded, and cease to be duties. If the power of Congress over the subject is supervisory and paramount, as we have seen it to be, and if officers or agents are created for carrying out its regulations, it follows as a necessary consequence that such officers and agents must have the requisite authority to act without obstruction or interference from the officers of the State. No greater subordination, in kind or degree, exists in this case than in any other. It exists to the same extent between the different officers appointed by the State, when the State alone regulates the election. One officer cannot interfere with the duties of another, or obstruct or hinder him in the performance of them. Where there is a disposition to act harmoniously, there is no danger of disturbance between those who have different duties to perform. When the rightful authority of the general government is once conceded and acquiesced in, the apprehended difficulties will disappear. Let a spirit of national as well as local patriotism once prevail, let unfounded jealousies cease, and we shall hear no more about the impossibility of harmonious action between the national and State governments in a matter in which they have a mutual interest.[8]

The Court's description and application of the Elections Clause in *Siebold* became the touchstone for its subsequent Elections Clause

7. *See Ex parte* Siebold, 100 U.S. 371, 383–84 (1879); *see also Ex parte* Clarke, 100 U.S. 399, 404 (1879) (illustrating another habeas action argued with *Siebold*).

8. *Ex parte* Siebold, 100 U.S. at 386–87.

jurisprudence, as the Court continued to broadly construe Congress's authority. In 1884, the Supreme Court upheld the authority of Congress under the Elections Clause to enact federal criminal penalties to protect the exercise of the right to vote in congressional elections from violence and intimidation.[9] In 1888, the Court affirmed the authority of Congress to regulate conduct at any election being conducted together with a federal contest.[10] In 1915, the Court recognized the congressional power to ensure that eligible voters can have their ballots counted.[11] The Court reaffirmed its previous expansive readings of the Elections Clause powers in 1917 in *United States v. Gradwell*.[12]

In 1932, the Supreme Court ratified and expanded upon *Siebold*'s description of the breadth of the Article I, Section 4 powers in *Smiley v. Holm*:[13]

> Consideration of the subject matter and of the terms of the provision requires affirmative answer. The subject matter is the "times, places and manner of holding elections for senators and representatives." It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. All this is comprised in the subject of "times, places and manner of holding elections," and in-

9. *See Ex parte* Yarbrough (The Ku–Klux Cases), 110 U.S. 651, 661–62 (1884).

10. *See Ex parte* Coy, 127 U.S. 731, 752–53 (1888).

11. United States v. Mosley, 238 U.S. 383, 386 (1915).

12. *See* United States v. Gradwell, 243 U.S. 476, 483 (1917).

> Whatever doubt may at one time have existed as to the extent of the power which Congress may exercise under [the Elections Clause] in the prescribing of regulations for the conduct of elections for Representatives in Congress, or in adopting regulations which states have prescribed for that purpose, has been settled by repeated decisions of this Court in Ex parte *Siebold,* 100 U.S. 371, 100 U.S. 391 (1879); Ex parte *Clark,* 100 U.S. 399 (1879); Ex parte *Yarbrough,* 110 U.S. 651 (1884), and in United States v. Mosley, 238 U.S. 383 (1915).

Id. at 482. *Gradwell* described the 1870 congressional election legislation, 16 Stat. p. 144, 16 Stat. p. 254, and its 1872 amendments, 17 Stat. 347-349, as a "comprehensive system" giving "[f]ederal officers a very full participation in the process of the election of Congressmen, from the registration of voters to the final certifying of the results, and that the control thus established over such elections was comprehensive and complete." *Id.* at 482–83 (citations omitted).

13. *See* Smiley v. Holm, 285 U.S. 355, 366–67 (1932).

> volves lawmaking in its essential features and most important aspect.
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> This view is confirmed by the second clause of [A]rticle I, [§] 4, which provides that "the Congress may at any time by law make or alter such regulations," with the single exception stated. The phrase "such regulations" plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own. It may impose additional penalties for the violation of the state laws or provide independent sanctions. It "has a general supervisory power over the whole subject." But this broad authority is conferred by the constitutional provision now under consideration, and is exercised by the Congress in making "such regulations"; that is, regulations of the sort which, if there be no overruling action by the Congress, may be provided by the Legislature of the state upon the same subject.[14]

In 1941, the Court found that Congress could reach the conduct of primary elections for federal office under the Elections Clause in *United States v. Classic.*[15] The Court continued its expansive reading of Congress's Elections Clause powers in 1972, invoking *Smiley* for the "breadth" of those powers in the context of a dispute as to whether a state has authority to regulate U.S. Senate election recounts (versus the Senate's authority to determine the seating of its members).[16]

The Supreme Court's most recent Elections Clause preemption case prior to *Arizona v. ITCA* was *Foster v. Love*.[17] In *Foster*, the Court maintained its broad reading of the scope of the Elections Clause. "The [Elections] Clause gives Congress 'comprehensive' authority to regulate the details of elections, including the power to impose 'the numerous requirements as to procedure and *safeguards* which experience shows are necessary in order to enforce the fundamental right involved.'"[18] "[I]t is well settled that the Elections

14. *Id.* (citations omitted).
15. *See* United States v. Classic, 313 U.S. 299, 317 (1941).
16. *See* Roudebush v. Hartke, 405 U.S. 15, 24–25 (1972).
17. Foster v. Love, 522 U.S. 67 (1997) (concerning Louisiana's schedule and method for electing members of Congress). Under the state's unique "open-primary" system, a winning candidate for Congress could be determined before the general election required under 2 U.S.C. §§ 1–3 was ever conducted, and under the challenged statute, over eighty percent of the contested congressional elections in Louisiana had ended as a matter of law with the open primary. *See id*. at 69–70.
18. *Id.* at 71 n.2 (quoting *Holm*, 285 U. S. at 366) (emphasis added).

Clause grants Congress 'the power to override state regulations' by establishing uniform rules for federal elections, binding on the States."[19] The Court concluded that preemption results once a conflict with federal law is shown: "When Louisiana's statute is applied to select from among congressional candidates in October, it conflicts with federal law and to that extent is void."[20]

While Article I places final authority to set the time, place, and manner of congressional elections with Congress, Article I elsewhere places the authority to set voter qualifications for House elections with the states. Article I, Section 2 provides that electors in each state for the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[21] The Seventeenth Amendment does the same with respect to Senate elections.[22] Article II, Section 1 provides that each state shall appoint presidential electors "in such Manner as the Legislature thereof may direct."[23]

In *Oregon v. Mitchell*,[24] the Supreme Court grappled, inter alia, with challenges to the power of Congress to enact two different voting qualifications: then-Section 302 of the Voting Rights Act,[25] which set the minimum age for voting nationwide at eighteen for both state and federal elections; and Section 202 of the Voting Rights Act,[26] which established nationwide residency rules for voting in presidential and vice-presidential elections.[27]

With respect to the age provisions contained in Section 302, Justice Black's opinion in *Mitchell*, which expressed his own views and announced the Court's decisions, concluded that "the 18-year-old vote provisions of the Voting Rights Act Amendments of 1970 are constitutional and enforceable insofar as they pertain to federal elections and unconstitutional and unenforceable insofar as they pertain to state and local elections."[28] Justice Black's view was that Congress had the

19. *Id.* at 69 (quoting U.S. Term Limits, Inc. v. Thornton, 514 U. S. 779, 832–33 (1995)).
20. *Id.* at 74.
21. U.S. CONST. art. I, §2, cl. 1.
22. *See* U.S. CONST. amend. XVII.
23. U.S. CONST. art. II, § 1, cl. 2.
24. Oregon v. Mitchell, 400 U.S. 112 (1970).
25. Pub. L. No. 91-285, § 302, 84 Stat. 314, 318 (1970), *invalidated by* Oregon v. Mitchell, 400 U.S. 112 (1970).
26. Pub. L. No. 91-285, § 202, 84 Stat. 314, 316 (codified at 42 U.S.C. § 1973aa-1 (2012)).
27. *See Mitchell*, 400 U.S. at 133 (upholding a nationwide ban on literacy tests based upon the Reconstruction Amendments, without the implication of the Elections Clause).
28. *Id.* at 118.

Elections Clause authority to set the age (or any other) qualification for voting in federal elections, but that it lacked the authority to do so for state elections.[29] However, no other member of the Court adopted Justice Black's view. Justice Douglas voted to uphold the challenged age provision, citing the Equal Protection Clause and the Privileges and Immunities Clause of the Fourteenth Amendment, with respect to both state and federal elections.[30] Justices Brennan, White, and Marshall likewise voted to uphold Section 302 with respect to both state and federal elections on Fourteenth Amendment grounds.[31] Chief Justice Burger and Justices Harlan, Stewart, and Blackmun voted to strike down Section 302 as applied to both state and federal elections.[32] Section 302 subsequently was mooted by the adoption of the Twenty-Sixth Amendment in 1971.[33]

The Court upheld Section 202 in *Mitchell*, with only Justice Harlan dissenting. Justice Black's view was that Section 202 was constitutional, for the same reasons he cited with respect to Section 302.[34] Justice Douglas concurred in the judgment but not with Justice Black's reasoning, relying upon the Privileges and Immunities Clause of the Fourteenth Amendment.[35] Justices Brennan, White, and Marshall concurred in the judgment but not with Justice Black's reasoning, relying on the right of interstate travel enforced through Section 5 of the Fourteenth Amendment.[36] Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, also concurred in the judgment but not

29. *See id.* at 117–18. "Any doubt about the powers of Congress to regulate congressional elections, including the age and other qualifications of the voters, should be dispelled by the opinion of this Court in *Smiley* v. *Holm,* 285 U. S. 355 (1932)." *Id*. at 122.

30. *See id.* at 135 (Douglas, J., concurring in part with judgment and dissenting in part from judgment) ("I dissent from the judgments of the Court insofar as they declare [§] 302 of the Voting Rights Act, 84 Stat. 318, unconstitutional as applied to state elections and concur in the judgments as they affect federal elections, but for different reasons. I rely on the Equal Protection Clause and on the Privileges and Immunities Clause of the Fourteenth Amendment.").

31. "We would uphold [§] 302 as a valid exercise of congressional power under [§] 5 of the Fourteenth Amendment." *Id.* at 240 (Brennan, J., White, J., and Marshall, J., concurring in part with judgment and dissenting in part from judgment).

32. *See id.* at 281–82 (Stewart, J. concurring in part with judgment and dissenting in part from judgment); "Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress." *Id.* at 210 (Harlan, J., concurring in part with judgment and dissenting in part from judgment).

33. *See* U.S. CONST. amend. XXVI.

34. "What I said in Part I of this opinion applies with equal force here. Acting under its broad authority to create and maintain a national government, Congress unquestionably has power under the Constitution to regulate federal elections." *Mitchell*, 400 U.S. at 134.

35. *See id.* at 135. "The right to vote for national officers is a privilege and immunity of national citizenship." *Id*. at 149 (Douglas, J., concurring in judgment).

36. "Whether or not the Constitution vests Congress with particular power to set qualifications for voting in strictly federal elections, we believe there is an adequate constitutional basis

with Justice Black's reasoning, basing their concurrence upon the Privileges and Immunities Clause of the Fourteenth Amendment.[37] Accordingly, no other member of the Court agreed with Justice Black's reading of the Elections Clause in *Oregon v. Mitchell*.[38]

The Supreme Court summarily addressed the Elections Clause in *McConnell v. Federal Election Commission*, finding that challengers to campaign finance reform legislation had offered "no reason to believe that Congress has overstepped its Elections Clause power."[39]

II. THE NATIONAL VOTER REGISTRATION ACT OF 1993

Congress enacted the NVRA in 1993.[40] The NVRA, commonly known as the "Motor Voter Law,"[41] culminated years of unsuccessful efforts to pass legislation standardizing voter registration for federal

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for § 202 in § 5 of the Fourteenth Amendment." *Id.* at 237 (Brennan, J., White, J. and Marshall, J., concurring in judgment) (footnote omitted).

37. *See id.* at 286–87 (Stewart, J., concurring with judgment). "In the light of these considerations, [§] 202 presents no difficulty. Congress could rationally conclude that the imposition of durational residency requirements unreasonably burdens and sanctions the privilege of taking up residence in another State." *Id*. at 286.

38. It is not surprising that the Court closed off Justice Black's line of reasoning in *Arizona v. ITCA*. *See infra* Section VI.4. But, today's Supreme Court is also unwilling to give an expansive reading to the fundamental right to vote under the Equal Protection Clause. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202 (2008).

39. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 101 (2003). "Congress has a fully legitimate interest in maintaining the integrity of federal officeholders and *preventing corruption of federal electoral processes through the means it has chosen*." *Id*. at 187 (emphasis added).

40. 42 U.S.C. § 1973gg *et seq*. A comprehensive profile of the newly-enacted NVRA was issued in the Federal Election Commission in 1994. NAT'L CLEARINGHOUSE ON ELECTION ADMIN., FED'L ELECTION COMM'N, IMPLEMENTING THE NATIONAL VOTER REGISTRATION ACT OF 1993: REQUIREMENTS, ISSUES, APPROACHES, AND EXAMPLES (1994).

An excellent recent survey of the NVRA is presented in a September 2013 Congressional Research Service study. *See* ROYCE CROCKER, CONG. RESEARCH SERV., THE NATIONAL VOTER REGISTRATION ACT OF 1993: HISTORY, IMPLEMENTATION, AND EFFECTS (2013); *see also* Kurtis A. Kemper, Annotation, *Validity, Construction, and Application of National Voter Registration Act, 42 U.S.C.A. §§ 1973gg et seq.*, 185 A.L.R. FED. 155 (2003).

The biennial reports issued initially by the FEC, and later by the EAC, provide the essential data points by which to assess the effect of the NVRA over time. For these reports, and numerous additional materials, see *NVRA Studies*, U.S. ELECTION ASSISTANCE COMM'N, http://www.eac.gov/registration-data/ (last visited Feb. 18, 2014). For discussions of NVRA compliance and related issues, see DOUGLAS R. HESS & SCOTT NOVAKOWSKI, UNEQUAL ACCESS: NEGLECTING THE NATIONAL VOTER REGISTRATION ACT, 1995-2007 (2008); Estelle H. Rogers, *The National Voter Registration Act at Fifteen*, *in* AMERICAN CONSTITUTION SOCIETY (2009); and Estelle H. Rogers, *The National Voter Registration Act Reconsidered*, *in* AMERICAN CONSTITUTION SOCIETY (2011). For the scope of congressional election authority generally, see KENNETH R. THOMAS, CONGRESSIONAL AUTHORITY TO STANDARDIZE NATIONAL ELECTION PROCEDURES (2003); U.S. GEN. ACCOUNTING OFFICE, ELECTIONS: THE SCOPE OF CONGRESSIONAL AUTHORITY IN ELECTION ADMINISTRATION (2001).

41. *See* United States v. Lara, 181 F.3d 183, 191 (1st Cir. 1999).

elections.[42] There had been success, however, with the passage of laws providing for an increased federal role in two specific areas of voter registration: voter registration for elderly and handicapped voters,[43] and voter registration for military and overseas voters.[44] A direct predecessor to the NVRA was vetoed by President George H.W. Bush after passing both houses in the 102nd Congress.[45] President Clinton signed the NVRA into law on May 20, 1993,[46] and it went into effect for most states on January 1, 1995.[47]

For states that employ voter registration as a prerequisite to voting, the NVRA provides a set of standards and procedures for each

42. A series of bills in the 1970s and 1980s unsuccessfully attempted to establish a national "postcard" or mail registration system, including the 92nd Congress, in which a Senate bill reached the floor but was tabled. *See* CROCKER, *supra* note 40, at 1. In the 93rd Congress, a bill to create a national mail-out postcard voter registration system, to be administered by a new National Voter Registration Administration located in the Census Bureau (S. 352, S. Rept. 93-91) (H.R. 8053, H. Rept. 93-778), passed the Senate but never was brought to the floor of the House. *See id.* In the 94th Congress, a bill establishing a modified postcard voter registration system, making postcards available at post offices and other public offices (H.R. 11552, H. Rept. 94-798), passed the House but did not move in the Senate. *See id.* In the 95th Congress, bills to provide for national election-day registration (H.R. 5400, H. Rept. 95-318, S. 1072, S. Rept. 95-171) were reported out of committee but never brought to a vote. *See id.* Other voter registration reforms were proposed between 1983 and 1988, but no bill reached the floor of either the Senate or the House. *See id.* at 2.

43. The Voting Accessibility for the Elderly and Handicapped Act, which was signed into law by President Reagan on September 28, 1984, established polling place accessibility requirements for elderly and handicapped voters, required each state to provide "a reasonable number of accessible permanent registration facilities," to "make available registration and voting aids for Federal elections for handicapped and elderly individuals," and required "[n]o notarization or medical certification . . . of a handicapped voter with respect to an absentee ballot or application for such ballot." Pub. L. No. 98-435, 98 Stat. 1678 (codified at 42 U.S.C. § 1973ee (2012)).

44. The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), signed into law by President Reagan on August 28, 1986. Pub. L. No. 99-410, 100 Stat. 924, inter alia, required the creation of an official postcard form containing a voter registration and absentee ballot application, and required each state to "permit absent uniformed services voters and overseas voters to use absentee registration procedures" in all federal elections. *See also* KEVIN J. COLEMAN, CONG. RESEARCH SERV., THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT: OVERVIEW AND ISSUES (2014).

45. In the 101st Congress, a "motor-voter" bill (H.R. 15, as modified by H.R. 2190, H. Rept. 101-243) passed the House, but in the Senate (S. 874, S. Rept. 101-140) it was not brought to a vote. *See* CROCKER, *supra* note 40, at 2–3. In the 102nd Congress, the National Voter Registration Act of 1991 passed in the Senate (S. 250, S. Rept. 102-60) and the House, but President George H. W. Bush vetoed it. *Id.* at 3; *see also* Denise M. Crump, *The National Voter Registration Act of 1991: Keeping the Voter Motor Running*, 17 SETON HALL LEGIS. J. 473, 485–94 (1993).

46. The National Voter Registration Act of 1993 was introduced in the 103rd Congress as H.R. 2 in the House and as S. 460 in the Senate. CROCKER, *supra* note 40, at 3. H.R. 2 passed the House (H. Rept. 103-9) and, with some amendments, the Senate (S. Rept. 103-6). *Id.* The House and Senate then adopted the conference report (Conf. Rept. 103-66). *Id.*

47. *See* Pub. L. No. 103-31, § 13, 107 Stat. 77 (1993). For the states (Arkansas, Vermont, and Virginia) that had to amend their state constitutions, the effective date was January 1, 1996, or 120 days after implementing legislation could be passed under the amended state constitutions, whichever came later. *See id.*

major step in the voter registration process.[48] The NVRA does not attempt to govern every aspect of the voter registration process; instead, it provides a baseline set of uniform procedures under which eligible citizens can register, be accurately listed on the voting rolls, and vote in federal elections, so long as they maintain their eligibility. The NVRA provides for three specific forms of voter registration opportunities, establishes rules and limits for voter purging and other list maintenance activities, and provides election-day procedures for eligible voters to reaffirm their registration status and vote. In addition, the NVRA establishes a system for centralized reporting of voter registration data, requires each state to designate a chief election official, and provides substantial criminal penalties for fraudulent voter registration.

The NVRA begins with the findings that "the right of citizens of the United States to vote is a fundamental right," that "it is the duty of the Federal, State, and local governments to promote the exercise of that right," and that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities."[49] The NVRA identifies its purposes as the following:

> [T]o establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; to make it possible for Federal, State, and local governments to implement this subchapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office; to protect the integrity of the electoral process; and to ensure that accurate and current voter registration rolls are maintained.[50]

Section 4(a) of the NVRA requires states to provide three forms of voter registration procedures for federal elections: federal mail-in voter registration applications, voter registration at the time of drivers' license applications, and voter registration at public assistance agencies and other state-designated offices.[51]

48. Section 4(b) of the NVRA exempts states from coverage if the state has no voter registration requirement for federal elections under the law in effect continuously on and after August 1, 1994, or if the state allows all voters in the state to register to vote at the polling place during federal general elections under the law that in effect continuously on and after August 1, 1994, or that was enacted on or prior to August 1, 1994. *See* 42 U.S.C. § 1973gg-2(b) (2012).

49. § 1973gg(a).

50. § 1973gg(b).

51. *See* § 1973gg-2(a).

Most pertinent here, Section 6 of the NVRA requires states to "accept and use" federal mail-in voter registration applications (the "Federal Form"); this was the statutory language directly at issue in *Arizona v. ITCA*.[52] Section 6(a)(1) of the NVRA requires that "[e]ach State *shall accept and use* the [Federal Form] . . . for the registration of voters in elections for Federal office."[53] Section 6(a)(2) provides that, "[i]n addition to *accepting and using* [the Federal Form], a State may develop and use a mail voter registration form that meets all the criteria" of the Federal Form.[54] Section 6(b) requires states to make the mail registration form "available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs."[55]

Section 6 works in tandem with Section 9 of the NVRA. Section 9(a) assigns to the federal Election Assistance Commission ("EAC") the responsibility for creating the Federal Form and for consulting with state officials.[56] Section 9(b) requires certain elements to be included on the Federal Form, prohibits certain other elements, and allows the exercise of some agency discretion as to including other elements. In particular, the Federal Form "may require only such identifying information" as is necessary to allow the state to determine the eligibility of the applicant and to administer the voter registration and election process; it must inform the applicant as to every eligibility requirement "including citizenship;" and it must require the applicant to attest, under penalty of perjury, that the applicant meets each such requirement.[57]

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52. § 1973gg-4; *see* Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2251. Section 6(c) allows states to require citizens who register by mail to vote in person, subject to certain exceptions, if they have not previously voted in the jurisdiction. § 1973gg-4(c).

53. § 1973gg-4(a)(1) (emphasis added).

54. § 1973gg-4(a)(2) (emphasis added).

55. § 1973gg-4(b).

56. *See* § 1973gg-7(a)(2). The EAC is required to work "in consultation with the chief election officers of the States" in crafting the Form's contents. *Id.*

57. § 1973gg-7(b). Specifically, Section 9(b) of the NVRA provides that the Federal Form:

> (1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), 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;
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> (2) shall include a statement that—
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> (A) specifies each eligibility requirement (including citizenship);
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> (B) contains an attestation that the applicant meets each such requirement; and
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> (C) requires the signature of the applicant, under penalty of perjury;
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> (3) may not include any requirement for notarization or other formal authentication; and

Section 5 of the NVRA provides a second uniform means for voter registration, using applications for motor vehicle drivers' licenses.[58] Section 7 of the NVRA provides for a third means of voter registration: at designated registration sites and offices, including public assistance offices.[59]

Voter registration list maintenance is covered by Section 8 of the NVRA, which establishes several important national standards for voter registration list maintenance. On the one hand, the NVRA eliminated the practice of purging otherwise eligible voters based solely upon their failure to vote during a specified time period, and it requires list maintenance activities to be uniform and non-discriminatory. On the other hand, Section 8 balances the restrictions against improper purging with affirmative requirements for election officials

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> (4) shall include, in print that is identical to that used in the attestation portion of the application—
> (i) the information required in [Section 8(a)(5)(A) and (B)] of this title; (ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and (iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

Id. (emphasis added). Sections 8(a)(5)(A) and (B) of the NVRA require states to provide all voter registration applicants with information about voter eligibility requirements and the penalties provided by law for submission of a false voter registration application. § 1973gg-6(5).

58. *See* § 1973gg-3. Section 5 of the NVRA provides that any application for a driver's license submitted to a state motor vehicle authority "shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application." § 1973gg-3(a)(1). The voter registration form must be part of the driver's license application, and "may not require any information that duplicates information required in the driver's license portion of the form." § 1973gg-3(c)(2)(A). The form may require only the minimum amount of information necessary to prevent duplicate voter registrations and to enable state election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process. *See* § 1973gg-3(c)(2)(B).

59. *See* § 1973gg-5. Section 7 of the NVRA requires states to provide for federal registration at "all offices in the State that provide public assistance," § 1973gg-5(a)(2)(A), and "all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities," § 1973gg-5(a)(2)(B). Section 7 also provides that the state shall designate additional government offices such as "public libraries, public schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, unemployment compensation offices, and [other offices] that provide services to persons with disabilities" as voter registration agencies. § 1973gg-5(a)(3). The rationale for Section 7 was to complement the enhanced voter registration opportunities provided at motor vehicle agencies under Section 5 by providing voter registration for "the poor and persons with disabilities who do not have driver's licenses and will not come into contact with" motor vehicle agencies. H.R. Rep. No. 103-66, at 19 (1993), *reprinted in* U.S.C.C.A.N. 140, 144 (1993). Section 7 requires designated agencies to provide applicants with the Federal Form issued pursuant to Sections 6 and 9 of the NVRA, to help them complete the form, and it requires the agencies' "[a]cceptance of completed voter registration application forms for transmittal to the appropriate State election official." 42 U.S.C. § 1973gg-5(a)(4)(A). Designated state agencies are permitted to distribute their own state's registration form, "if it is equivalent" to the Federal Form. § 1973gg-5(a)(6)(A)(ii).

to conduct an orderly and non-discriminatory list maintenance program to remove ineligible voters.[60]

Section 10 of the NVRA requires each state to designate a chief election official who will be responsible for NVRA compliance.[61] Section 11 of the NVRA regulates civil enforcement of the NVRA's provisions and designates a private right of action under the statute, subject to certain notice requirements.[62]

Section 12 of the NVRA provides substantial criminal penalties for the submission of fraudulent voter registration applications.[63] Section 12 also added criminal penalties for knowingly and willfully intimidating or coercing prospective voters in registering to vote, or for voting, in any election for federal office.[64]

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60. *See* § 1973gg-6. Section 8(a)(3)–(4) of the NVRA provides that a registered voter's name may not be removed from the voter registration list except at the request of the applicant, by reason of criminal conviction or mental incapacity, by the death of the applicant, or by the applicant moving out of the jurisdiction. § 1973gg-6(a)(3)–(4). Section 8(b)(2) prohibits the removal of registered voters solely upon the grounds that they have failed to vote. § 1973gg-6(b)(2). Section 8(b)(1) requires registration list maintenance activities to be conducted in a "uniform, nondiscriminatory" fashion and "in compliance with the Voting Rights Act of 1965." § 1973gg-6(b)(1). Section 8(c)(1) provides a set of procedures, based upon the U.S. Postal Service's "National Change Of Address," that states may use to maintain accurate voter registration rolls. § 1973gg-6(c)(1). Section 8(d)(1) provides that states can remove names from the their registration lists if the registrants have notified their election office that they have moved out of the jurisdiction, or if the registrant has failed to respond to a forwardable notice sent by the registrar and failed to vote or appear to vote in two federal general elections. § 1973gg-6(d)(1).

61. § 1973gg-8; *see also* Harkless v. Brunner, 545 F.3d 445, 450 (6th Cir. 2008).

62. *See* 42 U.S.C. § 1973gg-9.

63. *See* § 1973gg-10; CRAIG C. DONSANTO & NANCY L. SIMMONS, FEDERAL PROSECUTION OF ELECTION OFFENSES 1, 1 (7th ed. 2007).

> The NVRA enacted a new criminal statute that reaches the knowing and willful submission to election authorities of false information that is material under state law. 42 U.S.C. § 1973gg-10(2). Because all states currently make citizenship a prerequisite for voting, statements by prospective voters concerning citizenship status are automatically "material" within the meaning of this statute. Therefore, any false statement concerning an applicant's citizenship status that is made on a registration form submitted to election authorities can involve a violation of this statute. Such violations are felonies subject to imprisonment for up to five years.
>
> For jurisdictional purposes, the statute requires that the fraud be "in any election for Federal office." As discussed above, voter registration in every state is unitary in the sense that an individual registers to vote only once for all elective offices – local, state, and federal. Thus the jurisdictional element of Section 1973gg-10(2) is satisfied whenever a false statement concerning citizenship status is made on a voter registration form.
>
> The use of the word "willful" suggests Section 1973gg-10(2) may be a specific intent offense. This means federal prosecutors may have to prove that the offender was aware that citizenship is a requirement for voting, and that the registrant did not possess United States citizenship. In most instances, proof of the first element is relatively easy because, since 1993 when the NVRA was enacted, the citizenship requirement must be stated on the voter registration form, and the form requires that the voter check a box indicating that he or she is a citizen.

Id. at 67–68.

64. *See* 42 U.S.C. § 1973gg-10(1); DONSANTO & SIMMONS, *supra* note 63, at 54.

One particularly noteworthy aspect of the legislative deliberations, for this discussion, occurred when the Conference Committee rejected a proposed amendment that had been passed by the Senate, which would have allowed states to add proof of citizenship requirements to the Federal Form.[65] While this did not form any part of the Supreme Court's rationale, it was noted by the Ninth Circuit's en banc decision, and credited in particular by Judge Kozinski's en banc concurrence.[66]

The EAC has issued regulations concerning the requirements for applicants to successfully complete the Federal Form.[67] The regulations address voter eligibility by directing that the Federal Form will identify the state eligibility requirements—with special attention to citizenship—and that the applicant will attest under oath that she meets each of them.[68] The regulations provide for general instructions,[69] as well as state-specific instructions to identify the voting eligibility requirements of each State.[70] The regulations also identify three types of information about the applicant that may be the subject of state-specific instructions, but none are used to determine eligibility.[71]

The Help America Vote Act of 2002 ("HAVA") modified some pre-existing portions of the NVRA.[72] HAVA reassigned the responsibilities that originally had been assigned to the Federal Election Com-

65. S. 460, the Senate bill for the 1993 legislation, contained a provision that did not appear in the House bill, which would have allowed States to implement a citizenship verification procedure more demanding than attestation of voting eligibility under oath. *See* H.R. Rep. No. 103-66, at 23–24 (1993) (Conf. Rep.), *reprinted in* 1993 U.S.C.C.A.N. 140, 148–49. The Senate provision stated that "nothing in this Act shall prevent a State from requiring presentation of documentation relating to citizenship of an applicant for voter registration." *Id.* at 148. The conference committee rejected the Senate language, explaining that it was "not necessary or consistent with the purposes of this Act." *Id.* The conference committee report stated that it was "concern[ed]" that the Senate's provision "could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act," and that it might "adversely affect the administration of the other registration programs as well." *Id.* The House and Senate both adopted the Conference Committee language without the Senate provision. *See* 139 CONG. REC. H2276 (daily ed. May 5, 1993); 139 CONG. REC. S5747–48 (daily ed. May 11, 1993).

66. *Infra* Part D.

67. *See* National Voter Registration Act, 11 C.F.R. §§ 9428.1–9428.7 (2014).

68. *See* § 9428.4(b).

69. *See* § 9428.3(a).

70. *See* § 9428.3(b); § 9428.4(a).

71. *See* § 9428.4(a)(6)–(8) (illustrating that the three items are: the voter identification number; the voter's political party preference (in closed primary states); and the voter's race or ethnicity, if applicable).

72. 42 U.S.C.A. *§§* 15301–15545 (West 2002); *see* ERIC A. FISCHER & KEVIN J. COLEMAN, CONG. RESEARCH SERV., RL 32685, THE HELP AMERICA VOTE ACT AND ISSUES FOR CONGRESS (2008); KEVIN J. COLEMAN & ERIC A. FISCHER, CONG. RESEARCH SERV., RS 20898, THE HELP AMERICA VOTE ACT: OVERVIEW AND ISSUES (2013).

mission, including creating the Federal Form and conducting the biennial survey of election data to the newly-created EAC.[73] HAVA also required each state to create a statewide voter registration database, and added provisions for verification of voter registration applications.[74]

Litigation under the NVRA focused initially upon a set of cases involving states that refused to implement the NVRA, based upon their contention that the law was unconstitutional. All of these cases were decided against the states, and the Supreme Court denied certiorari in the case involving California.[75] The lower court decisions consistently read the Election Clause as providing Congress with full authority to regulate voter registration for federal elections. Subsequent NVRA enforcement litigation has concerned, inter alia, designation of state agencies as voter registration sites,[76] the provision of public assistance agency registration,[77] voter registration list maintenance procedures,[78] and voter registration application handling procedures.[79]

While the Supreme Court discussed the operation of the NVRA in 1997 in *Young v. Fordice*,[80] the claim at issue in *Young* was an enforcement action under Section 5 of the Voting Rights Act.[81] The defendants in the case unsuccessfully invoked the NVRA in an attempt to insulate the challenged voter registration procedures from the Section 5 preclearance requirement, and the Court did not address the constitutionality of the NVRA or the state's compliance with the

73. 42 U.S.C.A. § 15386(a).

74. Many states had pre-existing programs to collate county-level registration records but HAVA formalized the process and, as a consequence, gave state election directors a more day-to-day role in the maintenance of the "live" voter registration records. *See* NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, IMPROVING STATE VOTER REGISTRATION DATABASES: FINAL REPORT vii (2009), *available at* http://www.eac.gov/assets/1/workflow_staging/Page/52.PDF.

75. *See* Voting Rights Coal. v. Wilson, 60 F.3d 1411, 1413 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996); *see also* Ass'n. of Cmty. Orgs. for Reform Now v. Miller, 129 F.3d 833, 834 (6th Cir. 1997); ACORN v. Edgar, 56 F.3d 791, 798 (7th Cir. 1995); Condon v. Reno, 913 F. Supp. 946, 967 (D.S.C. 1995); Virginia v. United States, No. CIV.A. 3:95CV357RLW, 1995 WL 928433, at *1 (E.D. Va. 1995); ACORN v. Ridge, Nos. CIV. A. 94-7671, CIV. A. 95-382, 1995 WL 136913 (E.D. Pa. 1995).

76. *See* United States v. New York, 255 F. Supp. 2d 73, 74 (E.D.N.Y. 2003).

77. *See* Valdez v. Squier, 676 F.3d 935, 938 (10th Cir. 2012); Harkless v. Brunner, 545 F.3d 445, 447 (6th Cir. 2008).

78. *See* United States v. Missouri, 535 F.3d 844, 846 (8th Cir. 2008).

79. *See* Charles H. Wesley Educ. Found. v. Cox, 408 F.3d 1349, 1351 (11th Cir. 2005).

80. 520 U.S. 273, 275 (1997); *see* Brenda Wright, Young v. Fordice*: Challenging Dual Registration Under Section 5 of the Voting Rights Act*, 18 MISS. C. L. REV. 67, 68–69 (1997).

81. *See* 42 U.S.C. § 1973c (2012).

NVRA, other than to conclude that the state retained discretion as to how it would implement certain provisions of the NVRA. Thus, the Supreme Court's decision in *Arizona v. ITCA*, coming twenty years after passage of the NVRA,[82] was the first case in which the Supreme Court directly addressed the requirements of the NVRA.

III. ARIZONA'S PROPOSITION 200

Arizona v. ITCA concerned one of the election-related provisions of Arizona's Proposition 200, which was enacted by state initiative on November 2, 2004. Proposition 200 amended the procedures for voter registration and for checking voter identification at polling places in both state and federal elections, and made other changes to state law to restrict public benefits.[83]

Proposition 200 amended two sections of the Arizona election code concerning voter registration. Proposition 200 added an evidence of citizenship requirement to Section 16-152 of the Arizona Revised Statutes, which specifies the contents of the state voter registration form.[84] Proposition 200 also amended Section 16–166 of the Arizona Revised Statutes to state that: "The County Recorder *shall reject* any application for registration that is not accompanied by

82. *See* J. Mijin Cha, *Registering Millions: The Success and Potential of the National Voter Registration Act at 20*, DEMOS (May 2013), http://www.demos.org/registering-millions-success-and-potential-national-voter-registration-act-20.

83. The "Findings and declaration" provided in the Secretary of State's ballot book for Proposition 200 state in their entirety that:

> This state finds that illegal immigration is causing economic hardship to this state and that illegal immigration is encouraged by public agencies within this state that provide public benefits without verifying immigration status. This state further finds that illegal immigrants have been given a safe haven in this state with the aid of identification cards that are issued without verifying immigration status, and that this conduct contradicts federal immigration policy, undermines the security of our borders and demeans the value of citizenship. Therefore, the people of this state declare that the public interest of this state requires all public agencies within this state to cooperate with federal immigration authorities to discourage illegal immigration.

Proposition 200, ARIZ. SEC. OF STATE (2004), *available at* http://www.azsos.gov/election/2004/Info/PubPamphlet/english/prop200.pdf (last visited Feb. 18, 2014).

There was no finding that any "illegal immigrants" had registered to vote or voted, nor was there any claim that the NVRA Federal Form had been used by *any* non-citizen to register to vote. Thus, there was no explanation of how the stated goal of "discourag[ing] illegal immigration," *id.*, would be advanced by adding an evidence of citizenship procedure to the voter registration provisions of the state's election code.

84. The revised section provides that "[t]he form used for the registration of electors shall contain . . . [a] statement that the applicant shall submit evidence of United States citizenship with the application and that the registrar shall reject the application if no evidence of citizenship is attached." ARIZ. REV. STAT. ANN. § 16-152(A)(23) (2011).

satisfactory evidence of United States citizenship."[85] In addition to voter registration, Proposition 200 imposed new polling place identification procedures.[86]

The Arizona Secretary of State sent an e-mail to the EAC on December 12, 2005, in response to an inquiry from the EAC, which asked the EAC to alter the Arizona-specific instructions on the Federal Form to incorporate the Proposition 200 citizenship procedure.[87] The EAC's Executive Director responded in a letter dated March 6, 2006, denying the Secretary's request.[88] The EAC concluded that "[w]hile Arizona may apply Proposition 200 requirements to the use of its state registration form in Federal elections (if the form meets the minimum requirements of the NVRA), the state may not apply the scheme to registrants using the Federal Registration Form."[89] The Arizona Secretary of State wrote two subsequent letters asking the EAC to reconsider its decision,[90] which the EAC declined to do.[91]

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85. ARIZ. REV. STAT. ANN. § 16-166(F) (2011) (emphasis added). Satisfactory evidence of United States citizenship is defined as including a driver's license or similar identification license issued by a motor vehicle agency, a birth certificate, passport, naturalization documents or other specified immigration documents, or specified cards relating to Native American tribal status:

> 1. The number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship.
> 2. A legible photocopy of the applicant's birth certificate that verifies citizenship to the satisfaction of the county recorder.
> 3. A legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number or presentation to the county recorder of the applicant's United States passport.
> 4. A presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder.
> 5. Other documents or methods of proof that are established pursuant to the immigration reform and control act of 1986.
> 6. The applicant's bureau of Indian Affairs card number, tribal treaty card number or tribal enrollment number.

Id.

86. Proposition 200 amended Section 16-579 of the Arizona Revised Statutes to require that voters "shall present . . . a valid form of identification that bears the photograph, name and address of the elector . . . [or] two different items [of identification] that contain the name and address of the elector." ARIZ. REV. STAT. ANN. § 16-579(A)(1)(a)–(b) (2011). The Secretary of State issued rules specifying the forms of identification that would be accepted under the statute, which included photograph-bearing documents, such as driver's licenses and non-photograph-bearing documents, such as utility bills or bank statements; these rules were legislatively adopted in 2009 as an amendment to Section 16-579. *See id.*

87. *See* Joint Appendix, Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247 (2013) (No. 12-71), 2012 WL 6198263, at *181–82.

88. *See id*. at *181–87.

89. *Id*. at *187.

90. *See id*. at *188–89, *216–20.

IV. LOWER COURT LITIGATION

A. Initial Stages

Two lawsuits filed in 2006 challenging the election-related provision of Proposition 200 were consolidated, heard, and decided together.[92] The NVRA claims in both cases rested upon the directive language in Section 6(a)(1) of the NVRA that states "accept and use" the Federal mail-in voter registration form. Both sets of plaintiffs moved for preliminary relief prior to the 2006 general election, which the district court denied.[93] On appeal, a Ninth Circuit motions panel reversed the district court and granted an injunction against both the voter identification and proof of citizenship requirements pending disposition of the merits on appeal.[94] In a per curiam order, the Supreme Court vacated the panel's injunction.[95] The Supreme Court explained

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91. *See id*. at *225.

92. Inter Tribal Council of Ariz., Inc. v. Brewer, No. 2:06-cv-1362 (D. Ariz.), consolidated with Gonzalez v. State of Arizona, No. 2:06-cv-1268 (D. Ariz.). Gonzalez v. Brewer, 2:06-cv-1268, at 2 (D. Ariz. June 6, 2006), Dckt. No. 33 (order granting consolidation). One group of plaintiffs ("Gonzalez Plaintiffs"), comprised of individual Arizona residents and organizational plaintiffs, claimed that Proposition 200 violated the NVRA, was a poll tax under the Twenty-fourth Amendment, violated the Equal Protection Clause of the Fourteenth Amendment due to its burden upon naturalized citizens, and violated the "results test" under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. *See* First Amended Complaint for Declaratory and Injunctive Relief, Gonzalez v. Arizona, 435 F. Supp. 2d 997, (D. Ariz. 2006) (No. CV-06-1268-PHX-ROS) 2007 WL 2406532. Another group of plaintiffs ("ITCA Plaintiffs"), comprised of several organizations and one individual plaintiff, claimed that Proposition 200 violated "the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-4(a), which mandates that states 'shall use and accept' the Federal Mail Voter Registration Form to register voters," and that Proposition 200 was an unauthorized and unnecessary burden on the fundamental right to vote in violation of the Fourteenth and Twenty-fourth Amendments, the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(A) and (a)(2)(B), and Section 2 of the Voting Rights Act, 42.U.S.C. § 1983(a). *See* Plaintiff's Complaint at 2, Inter Tribal Council of Ariz., Inc. v. Brewer, No. 2:06-cv-1362 (D. Ariz. May 24, 2006), Dckt. No. 1. A third case was filed on June 20, 2006. *See* Verified Complaint at 26, Navajo Nation v. Brewer, No. 2:06-cv-1575 (D. Ariz. June 20, 2006), Dckt. No. 1. The *Navajo Nation* case was later consolidated with the *Gonzalez* and *ITCA* cases, but dismissed before trial. *See* Gonzalez v. State, No. 2:06-cv-1268, at 1 (D. Ariz. Aug. 2, 2006), Dckt. 142 (order granting consolidation). *But see* Gonzalez v. State, No. 2:06-cv-1268, at 2 (D. Ariz. May 27, 2008), Dckt. No. 775 (order dismissing consolidation).

93. Gonzalez v. Arizona, No. 2:06-cv-1268, at 1–2 (D. Ariz. Sept. 11, 2006), Dckt. No. 183.

94. Gonzalez v. Arizona, Nos. 06-16702, 06-16706, at 1–2 (9th Cir. Oct. 5, 2006) (mem).

> Appellants' emergency motion for injunction pending interlocutory appeal is granted. The court enjoins implementation of Proposition 200's voting identification requirement in connection with Arizona's November 7, 2006 general election; and enjoins Proposition 200's registration proof of citizenship requirements so that voters can register before the October 9, 2006 registration deadline. This injunction shall remain in effect pending disposition of the merits of these appeals.

Id. at 1–2.

95. Purcell v. Gonzalez, 549 U.S. 1, 6 (2006) (*per curiam*). The Court's rationale rested upon the absence of factual findings or reasoning in the motions panel's reversal of the district court and issuance of a preliminary injunction with respect to the approaching general election:

its vacatur as being required for consideration of the district court's findings of fact.[96]

On remand to the Ninth Circuit, both groups of plaintiffs limited their requests for an injunction to the Proposition 200 proof of citizenship requirement for voter registration. The panel decision affirmed the district court's denial of preliminary relief.[97] The panel held that the proof of citizenship requirement was not a poll tax.[98] With respect to the NVRA claims, the panel found that the plaintiffs had "not demonstrated a likelihood of succeeding on the merits."[99]

> Although at the time the Court of Appeals issued its order the District Court had not yet made factual findings to which the Court of Appeals owed deference, *see* FED. R. CIV. 52(a), by failing to provide any factual findings or indeed any reasoning of its own the Court of Appeals left this Court in the position of evaluating the Court of Appeals' bare order in light of the District Court's ultimate findings. There has been no explanation given by the Court of Appeals showing the ruling and findings of the District Court to be incorrect. In view of the impending election, the necessity for clear guidance to the State of Arizona, and our conclusion regarding the Court of Appeals' issuance of the order we vacate the order of the Court of Appeals.

Id. at 5. The Court did not address the merits.

> We underscore that we express no opinion here on the correct disposition, after full briefing and argument, of the appeals from the District Court's September 11 order or on the ultimate resolution of these cases. As we have noted, the facts in these cases are hotly contested, and "[n]o bright line separates permissible election-related regulation from unconstitutional infringements."

Id. at 5 (quoting *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 359 (1997)) (alteration in original). The Court also stated that:

> Countering the State's compelling interest in preventing voter fraud is the plaintiffs' strong interest in exercising the "fundamental political right" to vote. Although the likely effects of Proposition 200 are much debated, the possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs' challenges.

Id. at 4 (citation omitted). This was a somewhat unfortunate construction of the issue, to the extent that it might be read to suggest that compliance with the NVRA is in opposition to the state and federal interest in preventing election fraud. As became clear in the subsequent stages of the case, Congress incorporated multiple protections against voter fraud in the NVRA; the dispute was more whether an Arizona ballot proposition billed as discouraging "illegal immigration" was entitled to countermand the judgment of Congress as to the appropriate protection against fraud in federal elections.

96. *See id.* at 5–6.

97. *See* Gonzalez v. Arizona (Gonzalez I), 485 F.3d 1041, 1047 (9th Cir. 2007).

98. *See id*. at 1049.

99. *Id.* at 1050–51. The entire *Gonzalez I* discussion of the merits of the NVRA claims was as follows:

> Appellants next claim that Proposition 200 is preempted by the NVRA because, they say, the NVRA prohibits states from requiring that registrants submit proof of citizenship when registering to vote. The NVRA mandates that states either "accept and use the mail voter registration form prescribed by the Federal Election Commission[,]" or, in the alternative, "develop and use [their own] form," as long as the latter conforms to the federal guidelines.
>
> The NVRA also prohibits states from requiring that the form be notarized or otherwise formally authenticated. Appellants interpret this as a proscription against states requiring documentary proof of citizenship. The language of the statute does not prohibit documentation requirements. Indeed, the statute permits states to "require[ ] such identifying information . . . as is necessary to enable . . . election official[s] to assess the eligibility of the applicant." The NVRA clearly conditions eligibility to vote on United

On remand to the district court, the district court granted Arizona's motion for summary judgment, ruling in August 2007 that based upon the *Gonzalez I* decision, Proposition 200 was not preempted by the NVRA and was not an unconstitutional poll tax.[100] After trial, the district court held in August 2008 that Proposition 200 did not violate either Section 2 of the Voting Rights Act or the Equal Protection Clause, with respect to either the proof of citizenship registration requirement or the polling place identification requirement.[101] The district court did find that between January 25, 2005 (the date Proposition 200 became effective), and September 2007, the "evidence of citizenship" requirement resulted in the rejection of 31,550 registration applications (in the fourteen of Arizona's fifteen counties reporting data).[102]

B. Ninth Circuit Panel Decision

Before the Ninth Circuit, the Gonzalez Plaintiffs and the ITCA Plaintiffs each appealed the district court's summary judgment rulings with respect to their NVRA and Twenty-Fourth Amendment claims. The ITCA Plaintiffs also appealed the denial of their Fourteenth Amendment poll tax claim, and the Gonzalez Plaintiffs appealed the district court's denial of their Voting Rights Act claim and equal protection challenges. On October 26, 2010, the Ninth Circuit panel held that the NVRA preempted the Proposition 200 proof of citizenship requirement.[103] The Court held that "the NVRA supersedes Proposition 200's voter registration procedures, and that Arizona's documen-

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> States citizenship. Read together, these two provisions plainly allow states, at least to some extent, to require their citizens to present evidence of citizenship when registering to vote. Thus, again plaintiffs have not demonstrated a likelihood of succeeding on the merits of this claim.

Id. (alterations in original) (citations omitted). The fundamental flaw in this cursory analysis was to interpret 42 U.S.C. § 1973gg-7(b)(1) as delegating authority to states, when in fact it governs the EAC's determination of the contents of the Federal Form.

100. Gonzalez v. Arizona, No. 2:06-cv-1268, at 1, 2–3 (D. Ariz. Aug. 28, 2007), Dckt. No. 330.

101. Gonzalez v. Arizona, No. 2:06-cv-1268, at 36, 47 (D. Ariz. Aug. 20, 2008), Dckt. Nos. 1041, 1042.

102. Gonzalez v. Arizona, No. 2:06-cv-1268, at 13 (D. Ariz. Aug. 20, 2008), Dckt. No. 1041. This number did not include forms where the applicant answered "no" to the U.S. citizenship question. Approximately thirty percent of the 31,550 applicants had gone on to successfully register as of July 2008. *Id.* The court's finding did not differentiate between rejected Federal Forms and rejected state forms.

103. Gonzalez v. Arizona, 624 F.3d 1162, 1169 (9th Cir. 2010). The panel ruled in favor of the Defendants on all other claims. *See id.* at 1169. The panel was comprised of Chief Judge Kozinski, Circuit Judge Ikuta, and retired Supreme Court Associate Justice Sandra Day O'Connor, sitting by designation pursuant to 28 U.S.C. § 294(a). *See id.* at 1168.

tary proof of citizenship requirement for registration is therefore invalid."[104]

Although the panel opinion subsequently was vacated by the grant of en banc review, it bears close attention for several reasons. First, much of the reasoning with respect to the Elections Clause was carried over to Judge Ikuta's en banc majority opinion. In addition, the reach of the panel's preemption decision was surprisingly broad, in contrast to the subsequent en banc decision. Finally, the presence of retired Justice O'Connor—the author of *Gregory v. Ashcroft*[105]—lent persuasive authority to the panel's distinctions between the Supreme Court's Elections Clause and Supremacy Clause jurisprudences.

Part II-A of Judge Ikuta's majority opinion began with a review of the historical background of the Elections Clause,[106] then moved to the critical construction of the Elections Clause:

> [T]he Elections Clause empowers both the federal and state governments to enact laws governing the mechanics of federal elections. By its plain language, the Clause delegates default authority to the states to prescribe the "Times, Places, and Manner" of conducting national elections in the first instance. The states would not possess this authority but for the Clause: As the Supreme Court has noted, the authority to regulate national elections "aris[es] from the Constitution itself," and is therefore "not a reserved power of the States." Because federal elections did not come into being until the federal government was formed, individual states have no inherent or preexisting authority over this domain.
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> While the states have default responsibility over the mechanics of federal elections, because Congress "may at any time by Law make or alter such Regulations" passed by the state, power over federal election procedures has been described by the Supreme Court as ultimately "committed to the exclusive control of Con-

104. *Id.* at 1169.

105. 501 U.S. 452, 455 (1991). *Gregory v. Ashcroft* was a federalism decision concerning Congress's powers under the Commerce Clause to address age discrimination claims with respect to appointed state officials. In passing, *Gregory v. Ashcroft* referenced the states' power to set the qualifications of their officials as one guaranteed to them under the Constitution. *See id.* at 463 ("[T]he United States guarantee[s] to every State in this Union, a Republican form of Government." (citing U.S. CONST. art. 4, § 4 ("Guarantee Clause"))). The Guarantee Clause has effectively been set aside under the political question doctrine, but it may be time, as the Supreme Court retrenches on the deference extended to Congress under the Reconstruction Amendments, to reconsider the argument that the Guarantee Clause can provide a textual basis to preserve individual rights. *See* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. COLO. L. REV. 849, 860–71 (1994). In the meantime, the Guarantee Clause remains a federalist shibboleth. *See* Shelby Cnty. v. Holder, 133 S.Ct. 2612, 2623 (2013).

106. *See Gonzalez*, 624 F.3d at 1171–73.

> gress." Accordingly, "the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them."[107]

The panel opinion identified several characteristics that distinguish the Supremacy Clause.[108] "The primary function of the Supremacy Clause is to define the relationship between state and federal law. It is essentially a power conferring provision, one that allocates authority between the national and state governments."[109] Under the Supremacy Clause, the conclusion that federal law preempts state law requires maintaining the "'delicate balance' between the States and the Federal Government."[110] "Only where no reconciliation between state and federal enactments may be reached do courts hold that Congress's enactments must prevail."[111]

The panel opinion read the Supreme Court's Elections Clause jurisprudence as obviating the need to "strike any balance between competing sovereigns"; the Elections Clause instead "establishes its own balance, resolving all conflicts in favor of the federal government."[112] It therefore found that the presumption against preemption and plain statement rule that are applied in Supremacy Clause pre-

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107. *Id.* at 1172–73 (second alteration in original) (citations omitted). The panel noted, as a further illustration of Congress's Elections Clause powers, a pair of Ninth and Seventh Circuit decisions that upheld the constitutionality of the NVRA's conscription of states to implement federal election requirements without compensation. *See id*. at 1173 (citing Voting Rights Coal. v. Wilson, 60 F.3d 1411, 1415 (9th Cir. 1995); ACORN v. Edgar, 56 F.3d 791, 794 (7th Cir. 1995)).

108. *See Gonzalez*, 624 F.3d at 1173–74. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

109. *Gonzalez*, 624 F.3d. at 1173 (quoting White Mountain Apache Tribe v. Williams, 810 F.2d 844, 848 (9th Cir. 1985)).

110. *Id.* at 1173 (quoting Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)). The opinion singled out state legislation exercising traditional police powers as requiring particular consideration. "Courts thus endeavor to preserve the states' authority when possible, particularly where a congressional enactment threatens to preempt a state law regulating matters of its residents' health and safety, an area to which '[s]tates traditionally have had great latitude to . . . legislate' as a matter of local concern." *Id*. at 1173–74 (alteration in original) (citations omitted).

111. *Id.* at 1174 (citing Altria Group v. Good, 555 U.S. 70, 76–77 (2008)); *see also* THE FEDERALIST NO. 33 (Alexander Hamilton).

112. *Gonzalez*, 624 F.3d. at 1174 (citing Foster v. Love, 522 U.S. 67, 71 (1997)). The panel noted that the Supreme Court never mentioned a presumption against preemption or requirement of a plain statement of congressional intent to preempt in *Foster*. *See id*. at 1174–75.

emption cases are "unsuited" to Elections Clause cases.[113] The panel concluded that its review of Supreme Court Elections Clause decisions revealed "no case where the Court relied on or even discussed Supremacy Clause principles."[114]

The panel opinion centered its analysis of the "accept and use" language of the NVRA, and the Proposition 200 language directing election officials to "reject" non-compliant voter registration applications around "consider[ing] the state and federal laws as if they comprise a single system of federal election procedures."[115] "If a natural interpretation of the language of the two enactments leads to the conclusion that the state law does not function consistently and harmoniously with the overriding federal scheme, then it is replaced by the federal statute."[116] Relying upon *Foster v. Love* and *Siebold*, the panel found it unnecessary to "strain to reconcile the state's federal election regulations with those of Congress under the Elections Clause; rather, we consider whether the additional registration requirement mandated by Proposition 200 is harmonious with the procedures mandated by Congress under a natural reading of the statutes."[117]

The panel opinion concluded that the proof of citizenship requirement in Proposition 200 "conflicts with the NVRA's text, struc-

113. *See id.* at 1174 (comparing *Gonzalez* to *Gregory*). Both the plain statement rule and the presumption against preemption trace to federalism concerns not presented in Elections Clause cases:

> In light of the different history and purpose of these constitutional provisions, it is not surprising that the preemption analysis for the Supremacy Clause differs from that of the Elections Clause. In its Supremacy Clause jurisprudence, the Supreme Court has crafted special guidelines to assist courts in striking the correct balance between federal and state power. First, in examining claims that a federal law preempts a state statute through the Supremacy Clause, the Supreme Court instructs courts to begin with a "presumption against preemption." This principle applies because, as the Court has recently noted, "respect for the States as independent sovereigns in our federal system leads us to assume that Congress does not cavalierly pre-empt state-law causes of action." Second, the Court has adopted a "plain statement rule," holding that a federal statute preempts a state statute only when it is the "clear and manifest purpose of Congress" to do so. Like the presumption against preemption, this rule "is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."

Id. at 1174–1175 (citations omitted).

114. *Id*. at 1175.

115. *Id*. at 1169, 1176, 1207 (citing *Ex parte* Siebold, 100 U.S. 371, 384 (1879)). Note that the panel opinion refers to sections of the NVRA by their U.S. Code section numbers, in contrast to the generally-used reference tracing to the public law text. For example, the panel opinion refers to 42 U.S.C. § 1973gg-4 as Section 4 of the NVRA, while the generally-accepted reference for that provision is Section 6 of the NVRA. *See id.* at 1205.

116. *Id.* at 1181.

117. *Id*. at 1183 (citing *Foster*, 522 U.S. at 74; *Ex parte* Siebold, 100 U.S. at 384).

ture, and purpose."[118] "Under Congress's expansive Elections Clause power, we must hold Arizona's documentary proof of citizenship requirement superseded by the NVRA."[119]

The panel explained its reasoning by noting that, because the NVRA is more specific than Proposition 200 about the information required to ensure eligibility to vote in federal elections, the NVRA leaves "no room for Arizona to impose sua sponte an additional identification requirement as a prerequisite to federal voter registration for registrants using that form."[120] Information for state officials to assess eligibility is provided by attestation under oath.[121] The panel concluded that, if Proposition 200 is viewed as a second enactment by the same legislature, it is "clearly subsume[d]" by the NVRA.[122] The panel further reasoned that it would defeat the purpose of the Federal Form if states "could add any requirements they saw fit to registration for federal elections through the Federal Form."[123]

The panel's textual analysis found that the NVRA's mandate in Section 6gg-4(a) to "accept and use" the Federal Form when applicants register by mail is, "when read in an unstrained and natural manner, . . . inconsistent with the [Proposition 200]" prohibition of registering applicants who have completed and submitted the Federal Form that have not provided documentary proof of citizenship.[124]

118. *Id.* at 1181.

119. *Id*. at 1183 (citation omitted).

120. *Id*. at 1181. The panel opinion pointed to Section 9 of the NVRA, which specifies that the Federal Form "may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1).

121. *See Gonzalez*, 624 F.3d. at 1181. Section 9(b)(2) of the NVRA requires applicants to attest that they meet every eligibility requirement, under penalty of perjury. *See* 42 U.S.C. § 1973gg-7(b)(2)(B). The panel found that Congress addressed the states' interests in voter eligibility by permitting states to provide the EAC with their input on the contents of the Federal Form in an advisory capacity. *See* 42 U.S.C. § 1973gg-7(a)(2). Attestation under oath was for practical purposes the universal means of obtaining evidence of citizenship for purposes of voter registration, including in Arizona, where attestation under oath continues to be the means of establishing an applicant's prima facie eligibility for all other qualifications.

122. *See Gonzalez*, 624 F.3d. at 1181.

123. *Id*. The panel cited the institution of a notarization requirement for registration, in contravention of the prohibition of such a requirement under Section 9(b)(3) of the NVRA, as an example of the "discriminatory or onerous registration requirements" that Arizona's theory would allow states to impose. *See id.*

124. *Id*. at 1182.

The panel found that the state law requirement is "displaced by the NVRA's 'notwithstanding' language" in Section 4(a).[125]

The panel then examined the overall structure of the NVRA, concluding that "allowing states to impose their own requirements for federal voter registration on registrants using the Federal Form would nullify the NVRA's procedure for soliciting state input, and aggrandize the states' role in direct contravention of the lines of authority prescribed by Section 7."[126] Because Congress has the ultimate authority over the federal voter registration process under the Elections Clause, "such a reading of the NVRA is untenable."[127]

The panel noted that Arizona had implemented the Proposition 200 registration requirement after its petition to include the requirement in the Federal Form was denied by the EAC, and that the EAC had "warned" Arizona that it may not refuse to register individuals to vote in a federal election for failing to provide supplemental proof of citizenship, if they have properly completed and timely submitted the Federal Registration Form.[128] The panel reasoned that "[i]f the NVRA did not supersede state-imposed requirements for federal voter registration, this type of end-run around the EAC's consultative process would become the norm, and Congress's control over the requirements of federal registration would be crippled."[129]

Examining the purpose of the NVRA, the panel opinion contrasted the intent of the NVRA to reduce state-imposed obstacles to federal registration with the "indisputable" fact that Proposition 200 creates an additional state hurdle to registration finding them not "in harmony."[130] Looking at the EAC's decision as to the contents of the Federal Form, the panel found that Proposition 200 is not consistent with the EAC's balancing of the need to establish procedures to increase the number of eligible citizens who register to vote in elections for federal office and the need to protect the integrity of the electoral process.[131]

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125. *See Gonzalez*, 624 F.3d. at 1182. The panel also noted that Section 7(a)(4)(iii) of the NVRA requires "acceptance" of completed Federal Form at state office buildings for transmittal to election officials. *See id.*; 42 U.S.C. § 1973gg-5(a)(4)(iii).

126. *Gonzalez*, 624 F.3d. at 1182. The panel noted that the NVRA allows states to suggest changes to the Federal Form, but the EAC has the ultimate authority to adopt or reject those suggestions. *See id*. (citing 42 U.S.C. § 1973gg-7(a)).

127. *Id.*

128. *See id*.

129. *Id*.

130. *See id*.

131. *See id*.

The panel opinion disclaimed any reliance upon the legislative history of the NVRA or the EAC's interpretation of the NVRA. The panel opinion "merely note[d] that both are consistent with our holding."[132] The panel cited the portion of the NVRA conference report, which explained why the conference rejected a provision in the Senate bill that "nothing in this Act shall prevent a State from requiring presentation of documentation relating to citizenship of an applicant for voter registration."[133]

The panel then discussed and rejected Arizona's arguments against preemption. These included Arizona's argument that, because the NVRA does not expressly prohibit states from imposing requirements in addition to those of the Federal Form, Proposition 200 does not conflict with the NVRA.[134] The panel rejected this argument that Arizona did "accept and use" the Federal Form per Section 6(a)(1) of the NVRA, so long as the Federal Form was accompanied by documentary proof of citizenship, as a "creative interpretation" of the state and federal statutes.[135] The panel did not accept Arizona's argument that the state was free to reject Federal Forms on Proposition 200 grounds because the NVRA anticipates that some Federal Forms may be rejected; the panel concluded that the proper understanding of the NVRA is that the statute contemplates the applicants who are ineligible, or whose forms are incomplete, inaccurate, or illegible.[136]

The panel also rejected Arizona's arguments that it needed to apply Proposition 200 in order to combat voter fraud. The panel concluded that "federal law contains a number of safeguards against vote fraud, and it is entirely conjectural that they are inferior to the protections that [state] law offers."[137] The panel noted that "Congress was well aware of the problem of voter fraud when it passed the NVRA, as evidenced by the numerous fraud protections built into the act. . . . Because Congress dealt with the issue of voter fraud in the NVRA, we

132. *Id.* at 1210 n.15.

133. *Id*. (quoting H.R. Rep. No. 103-66, at 23 (1993)). The panel described the conference report, which stated that the amendment was not consistent with the purposes of the NVRA and could effectively eliminate, or seriously interfere with, the mail registration program of the Act, as "the most authoritative and reliable legislative material." *Id.* (citing Nw. Forest Res. Council v. Glickman, 82 F.3d 825, 835 (9th Cir. 1996)).

134. *See id*. at 1182–83.

135. *See id*. at 1183 (citing Foster v. Love, 522 U.S. 67, 72 (1997).

136. *See id*. at 1183–84.

137. *Id*. at 1184 (alteration in original) (quoting ACORN v. Edgar, 56 F.3d 791, 795–96 (7th Cir. 1995)).

are not persuaded by Arizona's claim that states must be permitted to impose additional requirements to address the same issue."[138]

Finally, the panel found that Congress's enactment of the Help America Vote Act[139] did not alter its finding of preemption. "The NVRA and HAVA operate in separate spheres: while the NVRA regulates voter registration, HAVA is concerned with updating election technologies and other election-day issues at polling places. As relevant here, HAVA interacts with the NVRA only on a few discrete issues."[140] The panel concluded that "HAVA expressly provides that 'nothing [in HAVA] may be construed to authorize or require conduct prohibited under [the NVRA].' This language indicates Congress's intent was to prevent HAVA from interfering with NVRA's comprehensive voter registration system. Accordingly, Arizona's reliance on HAVA is unavailing."[141]

Having found preemption, the majority opinion then conducted a detailed analysis of the law of the case, concluding that the 2010 panel decision was "clearly erroneous," a recognized exception to the law of the case doctrine.[142] This is an important issue for parties contemplat-

138. *Id*. The panel cited Section 10 of the NVRA, which provides federal criminal penalties for knowingly and willingly engaging in fraudulent registration tactics, *see* 42 U.S.C. § 1973gg-10(2); Sections 3 and 7 of the NVRA, which require the Federal Form and the combined motor vehicle-voter registration form to contain an attestation clause that sets out the requirements for voter eligibility, *see* § 1973gg-3(c)(2)(C)(i)–(ii); § 1973gg-7(b)(2)(A)–(B); and the requirement that applicants must sign Federal Forms under penalty of perjury, *see* § 1973gg-3(c)(2)(C)(iii), § 1973gg-7(b)(2)(C). *See Gonzalez*, 624 F.3d. at 1184. The panel also noted that Section 4 of the NVRA permits states to verify the eligibility and identity of voters by requiring first-time voters who register by mail to appear at the polling place in person, where the voter's identity can be confirmed, *see* § 1973gg-4(c); and that Section 6 of the NVRA allows states to detect fraudulent registrations by means of notices to applicants of the disposition of their registration applications, *see* § 1973gg-6(a)(2). *See Gonzalez*, 624 F.3d. at 1184.

139. 42 U.S.C. § 15301 (2012).

140. *Gonzalez*, 624 F.3d at 1184. These issues were: (1) HAVA's addition of two checkboxes to the Federal Form, requiring applicants to check off whether they are citizens of the United States and whether they are old enough to vote; (2) HAVA's authorization for mail registrants who have not previously voted in a federal election to submit documents verifying their identity along with the Federal Form; and (3) HAVA's requirement that states assign each registrant a "unique identifier" capable of being cross-checked against voters' identities at the polls. *See id.* (citing 42 U.S.C. § 15483(a)(1)(A), 15483(b)(3)–(b)(4)). Based upon the plain language of the provision, the panel also rejected Arizona's reliance upon 42 U.S.C. § 15545, the portion of HAVA providing that "nothing in this title shall be construed to prevent a State from establishing election technology and administration requirements that are more strict than the requirements so long as such State requirements are not inconsistent with the Federal requirements under this subchapter or any law [including the NVRA and other federal voting regulations]." *Id*. at 1185.

141. *Id.* at 1185 (alterations in original) (citations omitted).

142. *See id.* at 1185–91. "Because, as set forth above, the prior panel's decision on the NVRA issue meets the standard of a recognized law of the case exception, we have discretion to review that decision, and we have chosen to exercise that discretion here." *Id*. at 1191.

ing whether to appeal preliminary injunction rulings, and it was especially important to Chief Judge Kozinski, who insisted in his dissent that the panel's hands were tied by the law of the case and law of the circuit doctrines.[143]

The panel decision found that the Proposition 200 proof of citizenship requirement was preempted for purposes of federal elections without distinguishing between the Federal Form and the state's own mail-in form.[144] The panel's decision to broadly invalidate the Proposition 200 proof of citizenship requirement is indicated by the panel's conclusion that it did not need to reach the Plaintiffs' non-NVRA claims.[145] The panel's broad invalidation is further indicated by its reasoning that, if Arizona did not employ a unified federal/state voter registration system, other live claims would remain in the case.[146]

Chief Judge Kozinski dissented from the panel opinion, based in large part upon the law of the case and law of the circuit doctrines,[147] but also based upon his disagreement with the majority's conflict analysis.[148]

143. *See id*. at 1199–1205 (Kozinski, C.J., dissenting).

144. *See id.* at 1191 ("In light of Congress's paramount authority to 'make or alter' state procedures for federal elections, we hold that the NVRA's comprehensive regulation of federal election registration supersedes Arizona's documentary proof of citizenship requirement." (citations omitted)); *Id.* at 1198 ("Given the paramount authority delegated to Congress by the Elections Clause, we conclude that the NVRA, which implemented a comprehensive national system for registering federal voters, supersedes Arizona's conflicting voter registration requirement for federal elections.").

145. *See id*. at 1191 ("Because we hold Arizona's registration requirement void under the NVRA, we need not reach Gonzalez's claim that the documentary proof of citizenship requirement imposes greater burdens of registration on naturalized citizens than on non-naturalized citizens and burdens the fundamental right to vote in violation of the Fourteenth Amendment's Equal Protection Clause.").

146. *See id*. at 1192 n.20 ("Because Congress's authority under the Elections Clause is limited to preempting regulations related to federal elections, our holding invalidating Proposition 200's registration requirement does not prevent Arizona from applying its requirement in state election registrations. However, Arizona has presented its system of voter registration under Proposition 200 as concurrently registering voters for state and federal elections, and has not indicated that, in the event Gonzalez prevails on the NVRA claim, it plans to establish a separate state registration system. We therefore do not consider whether Proposition 200's registration requirement, as applied only to state registrations, is valid under Gonzalez and ITCA's remaining claims.").

147. *See id*. at 1199–1205 (Kozinski, C.J., dissenting).

148. *See id*. at 1207–08 ("There's no conflict based on the text of the statutes. Arizona gladly accepts and uses the federal form, it just asks that voters also provide some proof of citizenship.").

C. En Banc Decision

The Ninth Circuit issued an order in April 2011 setting the case for en banc review.[149] After reargument in June 2011, the en banc opinion was issued on April 17, 2012, written once again by Judge Ikuta.[150] The majority opinion reversed the district court with respect to the NVRA claim against the Proposition 200 proof of citizenship requirement, and affirmed the district court decision on all other issues.[151] Chief Judge Kozinski concurred,[152] as did Judge Berzon, joined by Judge Murguia.[153] Judge Pregerson concurred with respect to the NVRA claim but dissented with respect to the affirmance of the district court's dismissal of the Gonzalez Plaintiffs' Section 2 claim against the Proposition 200 polling place ID requirement.[154] Judge Rawlinson, joined by Judge Smith, dissented with respect to the NVRA claim and concurred with respect to the disposition of the remaining claims.[155]

The en banc analysis tracked the panel decision. Perhaps the most significant difference between the panel and the en banc opinions, although it was not directly discussed, was the limitation of the en banc holding (notwithstanding some ambiguity) to voter registration applications using the Federal Form. The en banc majority opinion framed the NVRA issue as whether "the NVRA's requirement that states 'accept and use' the Federal Form supersedes Proposition 200's registration provision as applied to applicants using the Federal Form."[156] The question as to whether a preemption ruling could extend to the state mail-in registration form as used for federal elections, as the panel decision contemplated, was taken off the table: "Gonza-

149. Gonzalez v. Arizona, No. 08-17094, at 5 (9th Cir. Apr. 27, 2011), Dckt No. 146. "Filed Order for PUBLICATION (ALEX KOZINSKI) Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit." *Id.*

150. *See* Gonzalez v. Arizona, 677 F.3d 383, 383, 387, 442 (9th Cir. 2012).

151. The Ninth Circuit normally sits en banc in eleven-judge panels. *See* 9TH CIR. R. 35-3. The en banc panel was comprised of Chief Judge Kozinski and Judges Pregerson, Rymer, Graber, Berzon, Rawlinson, Clifton, Bubee, Ikuta, Smith and Murguia. Judge Rymer participated in oral argument and deliberations but passed away before joining any opinion. *See Gonzalez*, 677 F.3d at 387.

152. *See id.* at 439–42.

153. *See id.* at 442.

154. *See id.* at 442–44.

155. *See id.* at 444–53.

156. *See id.* at 398.

lez and ITCA do not challenge Proposition 200's registration provision as applied to Arizona's State Form."[157]

The en banc majority emphatically rejected Arizona's efforts to apply Supremacy Clause limiting principles to Elections Clause disputes. Like the panel majority opinion, the en banc opinion sharply distinguished the balancing of federal and state interests under the Supreme Court's Supremacy Clause jurisprudence from the Court's Elections Clause jurisprudence, tracing the difference to the allocation of pre-existing versus newly-created governmental powers under the Constitution. Specifically, the en banc opinion stated that "[i]n contrast to the Supremacy Clause, which addresses preemption in areas within the states' historic police powers, the Elections Clause affects only an area in which the states have no inherent or reserved power: the regulation of federal elections."[158] The en banc majority found this lack of reserved authority to be a far-reaching distinction, such that "courts deciding issues raised under the Elections Clause need not be concerned with preserving a 'delicate balance' between competing sovereigns."[159] The Elections Clause is a "standalone preemption provision," which "establishes its own balance."[160]

The en banc opinion rejected outright the applicability of the "presumption against preemption" and "plain statement rule" to Elections Clause preemption disputes.[161] Looking to the Supreme Court's decision in *Foster v. Love*, the en banc majority found a telling absence of either a presumption against preemption or plain statement rule, notwithstanding the Fifth Circuit's Supremacy Clause analysis.[162] The en banc opinion further concluded that its "survey of Supreme Court opinions deciding issues under the Elections Clause reveals no case where the Court relied on or even discussed Supremacy Clause principles."[163]

Like the panel, the en banc majority described its preemption analysis as follows:

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157. *Id*. at 398 n.24.

158. *Id*. at 392 (citing U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 804–05 (1995)).

159. *Id*. at 392.

160. *Id*.

161. *See id*. The opinion cited one other circuit that declined to apply Supremacy Clause principles to NVRA preemption claims. *Id*. (citing Harkless v. Brunner, 545 F.3d 445, 454 (6th Cir. 2008)).

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

163. *Id*. at 392.

> Reading *Siebold* and *Foster* together, we derive the following approach for determining whether federal enactments under the Elections Clause displace a state's procedures for conducting federal elections. First, as suggested in *Siebold*, we consider the state and federal laws as if they comprise a single system of federal election procedures. If the state law complements the congressional procedural scheme, we treat it as if it were adopted by Congress as part of that scheme. If Congress addressed the same subject as the state law, we consider whether the federal act has superseded the state act, based on a natural reading of the two laws and viewing the federal act as if it were a subsequent enactment by the same legislature. If the two statutes do not operate harmoniously in a single procedural scheme for federal voter registration, then Congress has exercised its power to "alter" the state's regulation, and that regulation is superseded.[164]

The en banc majority's conflict analysis and conclusions followed the panel opinion.[165] The en banc majority opinion stated that "[h]ere, under a natural reading of the NVRA, Arizona's rejection of every Federal Form submitted without proof of citizenship does not constitute 'accepting and using' the Federal Form."[166] Like the panel, the majority rejected Arizona's "creative interpretation" of the state and federal laws,[167] and it rejected arguments based upon HAVA,[168] Section 6(a)(2) of the NVRA[169] and Section 9 of the NVRA.[170] The majority also credited the protections against voter fraud built into the NVRA and the Federal Form.[171]

The en banc majority concluded that "[i]n sum, the NVRA and Proposition 200's registration provision, when interpreted naturally, do not operate harmoniously as a single procedural scheme for the registration of voters for federal elections. Therefore, under Congress's expansive Elections Clause power, we must hold that the registration provision, when applied to the Federal Form, is preempted by the NVRA."[172]

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164. *Id*. at 394 (citations omitted).
165. *Id*. at 398–403.
166. *Id*. at 398.
167. *See id*. at 398.
168. *See id*. at 401–03.
169. *See id*. at 399. *See generally* 42 U.S.C. § 1973gg-(4)(a)(2) (2012) (authorizing state mail-in forms).
170. *See Gonzalez*, 677 F.3d at 399–400. *See generally* § 1973gg-(7)(a)–(b) (authorizing issuance of Federal Form).
171. *See Gonzalez*, 677 F.3d at 403.
172. *Id*. at 403.

The majority opinion then affirmed the district court's denial of the remaining claims at issue, which the majority identified as the ITCA Plaintiffs' and Gonzalez Plaintiffs' challenges to the Proposition 200 polling place identification requirement.[173] While this theoretically left some loose ends in terms of the plaintiffs' challenges to the proof of citizenship requirement as applied to the state's own mail-in form, the plaintiffs did not pursue the issue.[174]

In an intriguing turn of events, Chief Judge Kozinski switched his dissenting vote from the panel decision and concurred with the en banc majority opinion.[175] This is explained in part by his apparent satisfaction with the resolution of the law of the circuit issue in the majority opinion.[176] But with respect to the merits of the preemption issue, Chief Judge Kozinski took a different, though equivocal, approach to the statutory texts than he did in his panel dissent.[177] He resolved the ambiguity that he saw in the text of the NVRA by reference to the legislative history of the NVRA, reasoning that the conference committee decision to remove the Senate language that would have allowed states to impose proof of citizenship requirements was more probative than a mere statement of legislative purpose, because it represented a legislative action with substantive meaning.[178] In the

173. *See id*. at 404–10.

174. The majority found that because Congress's authority under the Elections Clause is limited to preempting state regulations as they relate to federal elections, its holding invalidating Proposition 200's registration provision with respect to the Federal Form did not prevent Arizona from applying the proof of citizenship requirement to voter registrations for state elections. *See id*. at 404 n.30 ("[B]ecause Arizona has presented its system of voter registration as concurrently registering voters for state and federal elections, we do not consider whether Proposition 200's registration provision, as applied only to voter registrations for state elections, is valid under Gonzalez and ITCA's remaining claims."); *cf.* Gonzalez v. Arizona, 624 F.3d 1162, 1191 n.20 (9th Cir. 2010).

175. *See Gonzalez*, 677 F.3d at 439 (Kozinski, C.J., concurring in judgment).

176. *See id*. at 389 n.4. The majority opinion dealt with the law of the case and circuit issues presented in the panel decision by clarifying the impact of published Ninth Circuit panel decisions in a footnote:

> We now hold that the exceptions to the law of the case doctrine are not exceptions to our general "law of the circuit" rule, i.e., the rule that a published decision of this court constitutes binding authority which "must be followed unless and until overruled by a body competent to do so." To the extent that our prior cases suggested otherwise, they are overruled. This determination, however, does not affect other recognized exceptions to the law of the circuit rule.

Id. (citations omitted). While this was strictly an "in-circuit" issue, it should be a consideration for parties weighing the potential consequences of appeals from the denial of motions for preliminary injunctions or other interlocutory orders.

177. "I find this a difficult and perplexing case." *Id*. at 439. While he did not question the power of Congress to require that Federal Forms be processed per the majority's reading of the statute, Chief Judge Kozinski found the statutory language "tantalizingly vague." *See id*. at 440.

178. *See id*. at 440–42.

end, the simple fact that Chief Judge Kozinski voted en banc to reverse the district court, as much as his rationale,[179] no doubt gave a substantial boost to the weight of the en banc ruling before the Supreme Court.

Arizona filed a motion to stay the issuance of the mandate while it sought certiorari.[180] The ITCA Plaintiffs opposed the motion,[181] which the en banc panel denied on June 7, 2012.[182]

V. *ARIZONA V. INTER TRIBAL COUNCIL OF ARIZONA*

After the Ninth Circuit denied Arizona's stay application, the State sought a stay of the mandate from Justice Kennedy, who granted it on June 14, 2012,[183] but referred the application to the full Court. On June 28, 2012, the Court issued an order vacating Justice Kennedy's stay, noting that Justice Alito would grant the stay.[184] Arizona filed its petition for certiorari on July 16, 2012, which the Court granted on October 15, 2012. The Court heard argument on March 18, 2013.[185]

The Supreme Court ruled on June 17, 2013, that the NVRA preempted the Proposition 200 proof of citizenship requirement.[186] Justice Scalia wrote the opinion for the Court affirming the Ninth Circuit

179. *See id*. at 442. Chief Judge Kozinski carefully harmonized his prior dissent and his en banc concurrence as reflecting his continued view that the *Gonzalez I* panel was not *clearly* wrong. *See id.* ("As an en banc court, we cannot defer to *Gonzalez I.* Rather, we must come up with what we think is the best construction of the statute. For the reasons outlined above, and those in Judge Ikuta's very fine and thorough opinion, I believe the preemptive reading of the statute is *somewhat* better than the alternative." (emphasis added)).

180. *See* Motion to Stay Mandate, Gonzalez v. Arizona, No. 08-17094 (9th Cir. Apr. 24, 2012) Dckt. 213. Arizona made no constitutional argument with respect to voter qualifications in its stay application, nor had it done so at any prior stage of the case.

181. *See* Response of Inter Tribal Council of Ariz., et al in Opposition to Defendants-Appellees' Motion to Stay Mandate, Gonzalez v. Arizona, No. 08-17094, ITCA Plaintiffs' Response Opposing Motion to Stay the Mandate (9th Cir. May 4, 2012), Dckt. 218.

182. *See* Gonzalez v. Arizona, No. 08-17094, at 9–8 (9th Cir. June 7, 2012) (en banc), Dckt. 232. The panel found that Arizona had not demonstrated a reasonable probability that the Supreme Court would grant certiorari or a reasonable possibility that the Supreme Court would reverse, that the equities did not weigh in favor of granting a stay, and that Arizona had not made an adequate showing of good cause. *Id*.

183. Arizona v. Gonzalez, No. 11A1189 (U.S. June 14, 2012) (order granting stay).

184. *See* Arizona v. Abeytia, No. 11A1189 (U.S. June 28, 2012) (order vacating stay in pending case). The mandate issued from the Ninth Circuit on June 29, 2012. Following a short round of briefing, the district court issued interim injunctive relief in the run-up to the 2012 general election. *See* Gonzalez v. Arizona, No. 2:06-cv-1268, at 2 (D. Ariz. Aug. 15, 2012), Dckt. No. 1093 (mem).

185. The case for the Gonzalez Plaintiffs and the ITCA Plaintiffs was argued by Patricia A. Millett in her last argument before her confirmation as a judge of the U.S. Court of Appeals for the District of Columbia Circuit.

186. *See Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2260.

en banc decision, joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor and Kagan. Justice Kennedy joined in part with the majority opinion and concurred in the judgment. Justices Thomas and Alito filed separate dissents.

A. The Majority Opinion

Justice Scalia's majority opinion opened by framing the issue in direct textual terms:

> The National Voter Registration Act requires States to "accept and use" a uniform federal form to register voters for federal elections. The contents of that form (colloquially known as the Federal Form) are prescribed by a federal agency, the Election Assistance Commission. The Federal Form developed by the EAC does not require documentary evidence of citizenship; rather, it requires only that an applicant aver, under penalty of perjury, that he is a citizen. Arizona law requires voter-registration officials to "reject" any application for registration, including a Federal Form, that is not accompanied by concrete evidence of citizenship. The question is whether Arizona's evidence-of-citizenship requirement, as applied to Federal Form applicants, is pre-empted by the Act's mandate that States "accept and use" the Federal Form.[187]

1. The Scope of the Congressional Article I Authority

Part I of the majority opinion sets out the basics of the dispute before the Court. Describing the NVRA as "a complex superstructure of federal regulation atop state voter-registration systems,"[188] the majority opinion summarized the relevant federal and state statutory provisions giving rise to the dispute and the procedural history of the case.[189]

Part II-A of the majority opinion delimits the function and scope of the Elections Clause.[190] The Elections Clause imposes what the Court describes as a "duty" upon the States to prescribe the time, place, and manner for conducting congressional elections, but it places with Congress the power to alter the states' regulations or to supplant them altogether.[191]

187. *Id.* at 2251.
188. *Id*.
189. *See id*. at 2251–53.
190. *See id*. at 2253–54.
191. *See id*.

Calling the Elections Clause "the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress,"[192] Justice Scalia quoted Federalist No. 59 for the original reason that the Elections Clause established *both* a state duty to conduct federal elections *and* a congressional prerogative to set the terms for how they are to be their conducted:

> "[E]very government ought to contain in itself the means of its own preservation," and "an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs." That prospect seems fanciful today, but the widespread, vociferous opposition to the proposed Constitution made it a very real concern in the founding era.[193]

The majority opinion then moved directly to ratify the Court's prior holdings adopting a broad reading of "Times, Places, and Manner," within the Elections Clause, including regulations relating to voter registration. The Court explicitly relied upon the formulation of the Elections Clause employed in *Smiley v. Holm* and *Ex parte Siebold* to succinctly set out the scope of the Elections Clause:

> The [Election] Clause's substantive scope is broad. "Times, Places, and Manner," we have written, are "comprehensive words," which "embrace authority to provide a complete code for congressional elections," including, as relevant here and as petitioners do not contest, regulations relating to "registration." In practice, the Clause functions as "a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices." The power of Congress over 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; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith."[194]

Justice Scalia's majority opinion obviated any potential question about the precedential force of *Smiley*'s listing of regulations relating

192. *Id*. at 2254.

193. *Id.* at 2253 (alteration in original) (citation omitted); *see also* Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here Than Meets the Eye?*, 14 WM. & MARY BILL RTS. J. 243, 243 (2005).

194. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2253–54 (citations omitted).

to voter registration as an example of time, place, and manner regulations. The majority opinion held without qualification that Congress's authority to provide regulations "relating to 'registration'" is "relevant here" and within the meaning of "Times, Places, and Manner."[195]

2. Conflict Analysis

Part II-B of the majority opinion explains its conclusion that a textual conflict existed between the "seemingly incompatible" texts of the NVRA and Proposition 200.[196] The Court treated Arizona's textual argument as being that the "NVRA . . . requires merely that a State receive the Federal Form willingly and use that form as one element in its (perhaps lengthy) transaction with a prospective voter."[197] Not surprisingly for an opinion authored by Justice Scalia, the majority opinion resolved the issue by conducting a close textual analysis of the statutes, with no reference to either statute's legislative history.

The majority opinion began by granting that "accept and use"—if viewed in isolation—might be amenable to Arizona's reading.

> Taken in isolation, the mandate that a State "accept and use" the Federal Form is fairly susceptible of two interpretations. It might mean that a State must accept the Federal Form as a complete and sufficient registration application; or it might mean that the State is merely required to receive the form willingly and use it somehow in its voter registration process. Both readings—"receive willingly" and "accept as sufficient"—are compatible with the plain meaning of the word "accept." *See* 1 OXFORD ENGLISH DICTIONARY 70 (2d ed. 1989) ("To take or receive (a thing offered) willingly"; "To receive as sufficient or adequate"); WEBSTER'S NEW INTERNATIONAL DICTIONARY 14 (2d ed. 1954) ("To receive (a thing offered to or thrust upon one) with a consenting mind"; "To receive with favor; to approve"). And we take it as self-evident that the "elastic" verb "use," read in isolation, is broad enough to encompass Arizona's preferred construction. *Smith v. United States*, 508 U. S. 223, 241 (1993) (Scalia, J., dissenting). In common parlance, one might say that a restaurant accepts and uses credit cards even

195. *See id.* at 2253. Inasmuch as *Smiley* concerned the consequences of a gubernatorial veto of a congressional redistricting plan, there was an opportunity for the majority to dismiss *Smiley* as *dictum* had the Court been disposed to qualify the extent to which voter registration is considered a "manner" regulation. As Justice Scalia noted, however, Arizona did not contest this point. *See id*. at 2268 (Thomas, J., dissenting).

196. *Id*. at 2254–57.

197. *Id*. at 2254.

> though it requires customers to show matching identification when making a purchase.[198]

However, the majority opinion also looked for the meaning of the "accept and use" language within the NVRA's overall statutory scheme. "Words that can have more than one meaning are given content, however, by their surroundings."[199] "Reading 'accept' merely to denote willing receipt 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."[200]

The majority opinion found Arizona's reading "difficult to reconcile with neighboring provisions of the NVRA."[201] Specifically, the Court cited the requirement in Section 8(a)(1)(B) of the NVRA, which requires that an applicant who submits a "valid voter registration form" by a specified time prior to an election must be registered for that election.[202] The Court reasoned that if Arizona's reading of the NVRA was correct, then completed Federal Forms that are not accompanied by additional information could not be considered "valid," and that it is "improbable that the statute envisions a completed copy of the form it takes such pains to create as being anything less than 'valid.'"[203]

The Court also pointed to the wording Section 6(a)(2) of the NVRA, which authorizes states to create their own mail-in registration forms "in addition to accepting and using" the Federal Form.[204] This allows the Federal Form to serve as a backstop, guaranteeing a simple means of registering to vote in federal elections, "[n]o matter what procedural hurdles a State's own form imposes."[205] The Federal Form would cease to perform any meaningful function under Ari-

198. *Id.*

199. *Id*. (quoting Whitman v. American Trucking Ass'ns., Inc., 531 U.S. 457, 466 (2001)).

200. *Id.* at 2250 (emphasis added). The Court cited a series of federal statutes that "contemplate more than mere willing receipt" for the term "shall accept." *See id*. at 2254–55 (citing 5 U.S.C. § 8332(b), (m)(3) (2012) (civilian-employee retirement); 12 U.S.C.A. § 2605(*l*)(2) (Supp. 2013) (federally-related mortgage servicing); 16 U.S.C. § 1536(p) (2012) (Endangered Species Act Committee); § 4026(b)(2), 118 Stat. 3725, note following 22 U.S.C. § 2751 (2012) (certification of missile defense system); 25 U.S.C. § 1300h-6(a) (2012) (distribution of tribal funds); 30 U.S.C. § 923(b) (2012) (medical certification); 42 U.S.C. § 1395w-21(e)(6)(A) (2012) (health insurance coverage elections)).

201. *Id.* at 2255.

202. *See id*. (citing 42 U.S.C. § 1973gg-6(a)(1)(B) (2012)).

203. *Id*.

204. *See id*.

205. *Id*.

zona's reading, however, because it would permit states to demand that the Federal match the state's own form.[206] In rejecting Justice Alito's dissent, which would have accepted Arizona's reading, the Court recognized a core principle of the NVRA: that "every eligible voter can be assured that if he does what the Federal Form says, he will be registered."[207]

The majority opinion then considered and rejected Arizona's "presumption against preemption" arguments, concluding that "there is no compelling reason not to read Elections Clause legislation simply to mean what it says."[208] Confirming the Ninth Circuit's reading of the Supreme Court's precedent, the Court found that it had "never mentioned such a principle in [its] Elections Clause cases."[209] The Court found good reason for treating Elections Clause cases differently than ones under the Supremacy Clause, namely that the underlying assumption that Congress is reluctant to preempt does not hold under the Elections Clause, which necessarily displaces some element of a pre-existing state congressional election system.[210] The Court explained that "[b]ecause the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent."[211] In addition, the Court found the federalism concerns under the Supremacy Clause "somewhat weaker" than under the Elections Clause because the states' role has always been subject to a congressional decision to override it.[212]

The majority opinion concluded that "the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is 'inconsistent with' the NVRA's mandate that States 'accept and use' the Federal Form.[213] This did not

206. *See id*. at 2256.

207. *Id*. at 2255 n.4.

208. *See id*. at 2256–57.

209. *Id*. at 2256.

210. *See id*. at 2256–57. Countering Justice Alito's dissent, the Court, by definition, found no room for ambiguity about Congress's intent under the Elections Clause. *See id.* at 2257 n.6 ("Put differently, *all* action under the Elections Clause displaces some element of a pre-existing state regulatory regime, because the text of the Clause confers the power to do exactly (and only) that.").

211. *Id*. at 2257.

212. *See id*.

213. *Id*. (citing *Ex parte* Siebold, 100 U.S. 371, 397 (1879)). The Court noted that the NVRA does not preclude States from "deny[ing] registration based on information in their possession establishing the applicant's ineligibility." *Id.* "The NVRA clearly contemplates that not every submitted Federal Form will result in registration." *Id*. (citing 42 U.S.C. § 1973gg-7(b)(1) (2012)

conclude the majority's analysis, however, as it went on to consider a constitutional issue raised by Arizona.

3. Rejection of Arizona's Constitutional Argument

Part III of the majority opinion rejected Arizona's argument that the Ninth Circuit's construction of the phrase "accept and use" was in tension with Arizona's enforcement of its voting qualifications.

Arizona had argued in its merits brief that "if the NVRA precludes Arizona from requiring registrants to show satisfactory evidence of citizenship, the NVRA intrudes on Arizona's determination that only citizens are qualified to vote."[214] In support of that argument, Arizona twice raised the prospect that the Ninth Circuit ruling would interfere with the enforcement of its "evidence-of-citizenship qualification," without elaborating on why such "evidence" should be categorized as a voter qualification.[215] In its reply brief, Arizona attempted to argue, for the first time, that the Proposition 200 evidence-of-citizenship registration procedure was itself a voter qualification. However, the Court did not accept this last-ditch argument, and treated U.S. citizenship—not "evidence" of U.S. citizenship—as the voter qualification that Arizona sought to enforce.[216]

(State election officials use Federal Form to assess eligibility)); 42 U.S.C. § 1973gg–6(a)(2) (2012) (States required to send notice of disposition to each applicant).

214. Brief for Petitioner at 50, Arizona v. Inter Tribal Council of Ariz., Inc., (No. 12-71). Arizona had not made this argument before. For example, Arizona's certiorari petition did not cite Art. 1 § 2, and its certiorari petition only used the term "qualification" with reference to members of Congress in discussing *Roudebush v. Hartke, supra. See* Arizona v. Inter Tribal Council of Ariz., Inc., (No. 12-71), Cert. Pet. at 18.

215. The state argued that:

> [T]here is a persuasive argument that the Elections Clause does not authorize the NVRA to preclude Arizona from enforcing its *evidence-of-citizenship qualification* for voting in federal elections. Therefore, to avoid the constitutional question of whether the Elections Clause authorized Congress to enact the NVRA's provision that precludes Arizona from enforcing its *evidence-of-citizenship qualification* for voting in federal elections, this Court should adopt Arizona's interpretation of term "accept and use" the Federal Form in the NVRA.

Brief for Petitioner at 52–53, Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247 (2013) (No. 12-71) (emphasis added). With Arizona having laid no groundwork for its conclusory characterization of the evidence of citizenship procedure as a voter qualification, the Court effectively read the state's use of the term "evidence-of-citizenship qualification" in its merits brief as referring to the Proposition 200 evidence-of-citizenship registration procedure.

216. The majority opinion noted that Arizona's reply brief argued: "[F]or the first time that 'registration is itself a qualification to vote.' We resolve this case on the theory on which it has hitherto been litigated: that citizenship (not registration) is the voter qualification Arizona seeks to enforce." *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2259 n.9 (citations omitted). Had the Court given any credence to Arizona's last-ditch argument that its voter registration procedure was a voter qualification; the majority opinion surely would have hedged its conclusion that voter registration is a time, place, and manner regulation.

The Court observed that "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them."[217] To the extent that there was any lingering question as to whether the Supreme Court's decision in *Oregon v. Mitchell* was good authority for the proposition that Congress possesses at least some Elections Clause authority to set voter qualifications for federal elections, the Court removed it.[218] The Court accorded *Mitchell* "minimal precedential value," given that Justice Black stood alone in his opinion that the eighteen-year age qualification set by Congress could be sustained on Elections Clause grounds.[219] "Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress."[220] The Court thus concluded that "[p]rescribing voting qualifications . . . 'forms no part of the power to be conferred upon the national government' by the Elections Clause, which is 'expressly restricted to the regulation of the times, the places, and the manner of elections.'"[221]

The Court further observed that a federal statute, which precluded a state from obtaining the information necessary to enforce its voter qualifications, would raise serious constitutional doubts.[222] However, the Court concluded that it was not necessary to resort to constitutional avoidance doctrine in this case,[223] because Arizona may request that the EAC alter the Federal Form to include information that it deems necessary to determine eligibility, and may challenge the EAC's rejection of that request in a suit under the Administrative Procedure Act.[224] The Court concluded for this reason that giving the "accept and use" provision of the NVRA its fairest reading raised "no constitutional doubt."[225]

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217. *Id.* at 2257. "[Under] Article I, § 2, cl. 1, . . . electors in each State for the House of Representatives 'shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature,' [which] the Seventeenth Amendment adopts for purposes of senatorial elections. *Id.* at 2258 (comparing Article II, § 1, cl. 2, which requires each state to appoint presidential electors as the legislature directs).

218. *See id.*

219. *See id.* at 2258 n.8.

220. *Id.* at 2258 (quoting Oregon v. Mitchell, 400 U.S. 112, 210 (Harlan, J., concurring in part and dissenting in part)) (citing U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833–34 (1995); Tashjian v. Republican Party of Conn., 479 U.S. 208, 231–32 (1986) (Stevens, J., dissenting)).

221. *Id.* (quoting THE FEDERALIST NO. 60, at 371 (Alexander Hamilton)).

222. *See id.* at 2258–59.

223. *Id.* at 2259.

224. *Id.; see also* 5 U.S.C. §§ 701–706; 42 U.S.C. § 1973gg-7(a)(2); Transcript of Oral Argument at 55, Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247 (2013) (No. 12-71).

225. *Inter Tribal Council of Ariz., Inc.*, 133 S.Ct. at 2259.

The Court viewed the EAC's decision as to whether to grant a renewed request by Arizona as cabined by Section 9(b)(1) of the NVRA, which "acts as both a ceiling and a floor with respect to the contents of the Federal Form."[226] The Court noted ambiguity about the meaning of the term "may require" in Section 9(b)(1), which the United States and the ITCA respondents argued should be read as meaning "shall require" necessary information.[227] However, the Court did not attempt to conclusively interpret the meaning of "may" in this context because it accepted the United States' suggestion that "validly conferred discretionary executive authority is properly exercised to avoid serious constitutional doubt."[228]

The Court noted that although Arizona did not challenge the EAC's inaction on its 2005 request to modify the Federal Form, nothing prevented Arizona from renewing its request. "Should the EAC's inaction persist, Arizona would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include Arizona's concrete evidence requirement on the Federal Form."[229]

Having addressed Arizona's constitutional argument, the majority opinion concluded:

> We hold that 42 U.S.C. § 1973gg-4 precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself. Arizona may, however, request anew that the EAC include such a requirement among the Federal Form's state-specific instructions, and may seek judicial review of the EAC's decision under the Administrative Procedure Act.[230]

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226. *Id.* at 2259.

> Section 1973gg-7(b)(1) of the Act provides that the Federal Form "may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), 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."

Id.

227. *See id.* at 2259 (citing Transcript of Oral Argument at 55, 37–39, Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247 (2013) (No. 12-71); Brief for ITCA Respondents at 46, Arizona v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247 (2013) (No. 12-71)).

228. *See id.* ("That is to say, it is surely permissible if not requisite for the Government to say that necessary information which may be required will be required.").

229. *Id.* at 2260 (citing 5 U.S.C. § 706(1)). The Court noted that the EAC divided 2-to-2 in 2005 on Arizona's request to modify the state-specific instructions on the Federal Form, which meant that no action could be taken, and the EAC currently lacks a quorum. The Court contemplated, but did not attempt to decide whether a writ of mandamus could lie in such a posture. *See id.* at 2259–60 & n.10.

230. *Id.* at 2260.

4. Kennedy Concurrence, Thomas Dissent and Alito Dissent

Justice Kennedy's concurrence stated that "[h]ere, in my view, the Court is correct to conclude that the National Voter Registration Act of 1993 is unambiguous in its preemption of Arizona's statute. For this reason, I concur in the judgment and join all of the Court's opinion except its discussion of the presumption against pre-emption."[231] Justice Kennedy found it "unnecessary for the proper disposition of the case and . . . incorrect in any event" to conclude that the normal "starting presumption that Congress does not intend to supplant state law" does not apply to legislation under the Elections Clause.[232]

Justice Thomas accepted Arizona's constitutional avoidance argument, writing in dissent that "[t]o avoid substantial constitutional problems created by interpreting § 1973gg-4(a)(1) to permit Congress to effectively countermand this authority, I would construe the law as only requiring Arizona to accept and use the form as part of its voter registration process, leaving the State free to request whatever additional information it determines is necessary to ensure that voters meet the qualifications it has the constitutional authority to establish."[233] To Justice Thomas, "[i]t matters not whether the United States has specified one way in which *it* believes Arizona might be able to verify citizenship; Arizona has the independent constitutional authority to verify citizenship in the way it deems necessary."[234]

Justice Alito's dissent concluded that "[p]roperly interpreted, the NVRA permits Arizona to require applicants for federal voter registration to provide proof of eligibility."[235] Justice Alito did not accept the majority's treatment of the presumption against preemption.[236]

231. *Id.* at 2261–62 (Kennedy, J., concurring in part and concurring in judgment).

232. *Id.* at 2260. Justice Kennedy may have been contemplating a future Elections Clause case in which a preemption claim is not based upon a direct conflict. *Cf.* Arizona v. United States, 132 S. Ct. 2492, 2519 (2012) (finding field preemption with respect to immigration). There was no argument in *Arizona v. ITCA* that federal preemption of immigration, *id.*, extended to Proposition 200.

233. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2262 (Thomas, J., dissenting).

234. *Id.* at 2269.

235. *Id.* at 2275 (2013) (Alito, J., dissenting).

236. *See id.* at 2271.

> In light of the States' authority under the Elections Clause of the Constitution, Art. I, § 4, cl. 1, I would begin by applying a presumption against pre-emption of the Arizona law requiring voter registration applicants to submit proof of citizenship. Under the Elections Clause, the States have the authority to specify the times, places, and manner of federal elections except to the extent that Congress chooses to provide otherwise. And in recognition of this allocation of authority, it is appropriate to presume that the States retain this authority unless Congress has clearly manifested a contrary intent.

Accusing the majority of "refusing to give any weight to Arizona's interest in enforcing its voter qualifications," Justice Alito argued that "[t]he canon of constitutional avoidance also counsels against the Court's reading of the Act."[237] Justice Alito also cautioned that "[t]he Court sends the State to traverse a veritable procedural obstacle course in the hope of obtaining a judicial decision on the constitutionality of the relevant provisions of the NVRA. A sensible interpretation of the Act would obviate these difficulties."[238]

VI. IMPLICATIONS OF *ARIZONA V. ITCA*

Expansion of the franchise has been the historical trend in the United States, but it is neither inevitable nor continuous.[239] The adoption of national voter registration standards, after all, had to overcome multiple previous failed attempts and a presidential veto before they became the law of the land under the NVRA. As *Shelby County v. Holder* vividly illustrated, it would be a mistake to suppose that the current Supreme Court will not radically recast Congress's powers. The Supreme Court's strong affirmation of Congress's Elections Clause authority in *Arizona v. ITCA* therefore provided a welcome reprieve from a long series of decisions that progressively limited and weakened federal protections against voting discrimination.[240]

A. The Elections Clause

The Court's treatment of the scope of the Elections Clause in *Arizona v. ITCA* was brief, but significant in at least three ways. First and foremost, the Court reaffirmed the "paramount" authority of Congress over the regulation of congressional elections. There was no effort in the majority opinion to use this case as an opportunity to

Id.

237. *Id.* at 2273.

238. *Id.*

239. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE, THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000).

240. *See* Shelby County v. Holder, 133 S. Ct. 2612 (2013); Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193 (2009); Bartlett v. Strickland, 556 U.S. 1 (2009); Riley v. Kennedy, 128 S. Ct. 1970 (2008); Georgia v. Ashcroft, 539 U.S. 461 (2003); Reno v. Bossier Parish Sch. Bd, 528 U.S. 320 (2000); Reno v. Bossier Parish Sch. Bd, 520 U.S. 471 (1997); Abrams v. Johnson, 521 U.S. 74 (1997); Shaw v. Hunt, 517 U.S. 899 (1996); Vera v. Bush, 517 U.S. 962 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Holder v. Hall, 512 U.S. 874 (1994); Shaw v. Reno, 509 U.S. 630 (1993). While those cases involved racial discrimination in one form or another, the fundamental right to vote under the Fourteenth Amendment was also seriously jeopardized in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

narrow the Court's previous expansive constructions of the Elections Clause in *Ex parte Siebold* and *Smiley v. Holm*.[241] While Justices Alito and Thomas seemed eager to do so, the majority was not.

Second, the Court squarely recognized that the regulation of voter registration procedures is a "manner" of conducting federal elections.[242] The Court did not attempt to qualify any portion of the voter registration process as resting outside the scope of time, place and manner regulations. Accordingly, the Court created no toehold for arguments that voter registration, or some aspects of registration procedures, should be regarded as forms of state voter qualifications.

Third, the Court's boundary between Elections Clause powers and the Article I voter qualification provisions tracked the constitutional text, but went no further. The Court's statement that "the Elections Clause empowers Congress to regulate how federal elections are held, but not who may vote in them" only recapitulates the respective constitutional provisions.[243] In short, the Court's opinion affirmed that voter registration procedures lie within the scope of Congress's Elections Clause powers, and the Court gave no basis to think that it had begun to read them out.

B. Preemption Jurisprudence

The Court's preemption analysis was uncomplicated, well-supported by the Court's precedent and did not criticize the Ninth Circuit en banc decision. The Court's decision explicitly reaffirmed the Elections Clause preemption analysis that had been applied in previous Supreme Court decisions, up to and including *Foster v. Love*. As would be expected in a Justice Scalia opinion, the conflict analysis revolved around the plain meaning of the respective state and federal statutory texts. The Court construed the Elections Clause to place an *ab initio* duty upon the states to provide rules for conducting federal

241. It would not have been entirely surprising if Chief Justice Roberts, or Justices Scalia or Kennedy, had adopted a reading of time place and manner that sounded in federalism principles. The Court's approach to the Voting Rights Act in the past two decades has represented an increasingly aggressive questioning of Congress's judgments about the exercise of its enforcement powers under the Reconstruction Amendments, based in part upon the "federalism burden" of Section 5 of the Voting Rights Act. *See Nw. Austin Mun. Util. Dist. No. 1*, 557 U.S. at 202–03.

242. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2265–66.

243. *Id.* at 2257. To the extent that some vestigial precedent survived from Justice Black's reading of the Elections Clause in *Oregon v. Mitchell,* there should be no surprise that the Court overruled it. As discussed *supra* at 6–7, Justice Black's view did not garner the support of any other Justice even then.

elections, with a federal right to override those rules, and thus left no logical room to apply the Supremacy Clause's presumption against preemption. Justice Scalia did not even bother to discuss that other Supremacy Clause principle, the plain statement rule. The decision leaves little question about how lower courts should review similar claims in the future.[244]

Still, it seems most likely that the Court granted certiorari in *Arizona v. ITCA* due to the Ninth Circuit's discussion of preemption standards. Justice Kennedy's concurrence, as well as his questions during argument, made clear that he would have decided the case without categorically excluding the presumption against preemption from Elections Clause analysis. It is curious, however, that although only one Justice voted to stay the Ninth Circuit's issuance of the mandate after it was referred to the full Court, at least four Justices voted to grant certiorari. Although Justice Kennedy granted a preliminary stay, when he referred the application to the full Court only Justice Alito voted to grant it. This normally would make four votes for certiorari highly unlikely, since the Court's standards for granting a stay specifically include whether four justices are likely to grant certiorari. One possibly intervening factor was the Fifth Circuit decision in *Voting For America, Inc. v. Andrade*,[245] which was called to the Court's attention after certiorari. briefing was completed, and may have prompted Justice Kennedy and one or more members of the Court to agree to hear the case even though they later voted to affirm, due to concerns that denying certiorari might leave a circuit split on preemption issues.[246] In the end, however, the *Andrade* decision played no role in the Court's decision.

As noted earlier, one potential issue that did not come before the Court was the extent to which the NVRA might preempt the application of Proposition 200 to Arizona's *state* mail-in voter registration form. Judge Ikuta's panel decision, for herself and Justice O'Connor, found that all applications of the Proposition 200 proof of citizenship

244. How the Court would treat a field preemption claim under the Elections Clause remains an open question. Because the textual, conflict-based claim in this case avoided the more complex issues that would arise under a field preemption claim, the Court might well come to a different conclusion as to the presumption against preemption and plain statement rule.

245. 488 Fed. Appx. 890 (5th Cir. 2012).

246. *See* Petitioners' Supplemental Brief in Support of Petition for Writ of Certiorari, Arizona v. Inter Tribal Council of Ariz., 133 S. Ct. 2247 (2013) (No. 12-71), 2012 WL 7008874, at *1; Gonzalez Respondents' Brief in Response to Petitioners' Supplemental Brief, Arizona v. Gonzalez (No. 12-71), 2012 WL 7008875, at *1.

requirement were preempted, including the State's own mail-in voter registration form, at least to the extent that it is used for federal elections.[247] This would have presented a more challenging set of preemption issues for the Supreme Court had it been followed in the en banc decision. However, the en banc decision, despite some ambiguous language, was limited to whether Proposition 200 could be applied to the Federal Form.[248] The Supreme Court treated the en banc decision as extending only to the state's handling of Federal Forms and not to the state's disposition of its own mail-in voter registration application.[249] Furthermore, Justice Scalia's reasoning was based, in part, on the Federal Form being able to serve as an easy method for eligible applicants to register regardless of the hurdles that states build into their own forms,[250] and that rationale would not have been present if the preemption had extended to the state form as well. It is not clear to what degree any of the Justices would have agreed with the panel's broader reading of preemption.

C. Voter Qualifications

It would be a grave problem if racially discriminatory, excessively burdensome or irrational procedural barriers to voting could be legitimized by cloaking them in the garb of "letting states decide who is allowed to vote." But voter qualifications are anything but exempt from federal review. The Fourteenth Amendment has long provided protection from excessive and racially discriminatory prerequisites to voting.[251] The Fifteenth Amendment prohibits voter qualifications that discriminate on the basis of race, color, or previous condition of servitude.[252] The Nineteenth Amendment prohibits voting discrimination on the basis of gender.[253] The Twenty-Fourth Amendment prohibits conditioning voting in federal elections upon payment of any

247. *Supra* pp. 27–28.

248. *Supra* p. 31.

249. *See* Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2251 (2013). "The question is whether Arizona's evidence-of-citizenship requirement, as applied to Federal Form applicants, is pre-empted by the Act's mandate that States 'accept and use' the Federal Form." *Id.*

250. *See id.* at 2255.

251. *See* U.S. CONST. amend. XIV, §§ 1–2; *see, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969); Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966).

252. *See* U.S. CONST. amend. XV, § 1; *see, e.g.*, Rice v. Cayetano, 528 U.S. 495 (2000); Lane v. Wilson, 307 U.S. 268 (1939); Guinn v. United States, 238 U. S. 347 (1915).

253. *See* U.S. CONST. amend. XIX.

poll tax or other tax.[254] The Twenty-Sixth Amendment prohibits denying the right to vote to persons age eighteen or over.[255] The Supreme Court's record in enforcing these protections in recent decades generally has been undistinguished and often has been deeply disturbing. However, these Amendments, and the "appropriate" legislation enforcing them, can and do reach voter qualifications, even if the Elections Clause does not.

That being said, the Court properly rejected Arizona's constitutional avoidance argument, finding that "no constitutional doubt is raised by giving the 'accept and use' provision of the NVRA its fairest reading."[256] The Court reasoned that Arizona could request a new administrative determination from the EAC, and/or bring a challenge under the Administrative Procedure Act,[257] but those options already were available to the state. The Supreme Court's decision thus did not open the door for Arizona to pursue such challenges; at most the Supreme Court provided guidance to the EAC and the trial court that their decisions should turn on the extent to which Proposition 200 is "necessary" to enforce the states' citizenship qualifications.

Recognizing the availability of these forms of redress provided a safety valve that kept the Court from making premature or unnecessarily broad judgments about Arizona's actual need for Proposition 200, and by extension, judgments about the constitutionality of the EAC's decision-making or potentially the NVRA itself. If the Court had found that Arizona had no judicial recourse for an argument based upon the explicit text of Article I, that very likely would have been the springboard for the Court to take on the constitutionality of the NVRA, a far more troubling prospect.

Had the Court considered Arizona's argument that the NVRA unconstitutionally interferes with the enforcement of the state's citizenship qualification, it would have seen that the Proposition 200 evidence of citizenship procedure was neither a historical necessity, nor was it a response to a recent pattern of widespread or organized fraud or criminal activity that made it imperative to tighten the voter regis-

254. *See* U.S. CONST. amend. XXIV, § 1; *see, e.g.*, Harman v. Forssenius, 380 U.S. 528 (1965).

255. *See* U.S. CONST. amend. XXVI, § 1.

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

257. The NVRA has no provision exempting the EAC's decisions from judicial review, and the fact that Arizona is pursuing an APA claim following the Supreme Court's decision, *see infra* Part F.4, does not mean that the state could not have done so earlier; it simply had failed ever to do so.

tration process.[258] On the other hand, in *Crawford v. Marion County Election Board*,[259] the Supreme Court recognized that states have a strong interest in preventing election fraud.[260] Had Congress mandated acceptance and use of the Federal Form with an indifference or disregard for the prospect of fraudulent or mistaken registration by non-citizens, the Court surely would have found real teeth in Arizona's argument. However, the NVRA contains multiple protections against fraud.[261] As it should have, the Supreme Court left it to the lower courts to consider in the first instance whether Arizona can make a particularized showing of necessity for Proposition 200.

D. Implications for the NVRA and Other Federal Election Legislation

Without question, *Arizona v. Inter Tribal Council* broadly affirmed the constitutional underpinnings of the NVRA. Although the Court denied certiorari in one early case that questioned the constitutionality of the NVRA,[262] a decades-old certiorari denial could hardly have been expected to dissuade a determined majority of the Justices from drawing the constitutionality of the NVRA into question, had they wished to pursue the invitation to do so.[263] But the Court did not, and that fact is the short but important takeaway from this case. Moreover, Congress can now legislate under the Elections Clause with a clear contemporary endorsement of the breadth of its powers.

With regard to the Court's dismissal of Justice Black's reading of Congress's power to set age and residency qualifications under the

258. When Proposition 200 was adopted in 2004, Arizona accepted affirmation under oath as fully sufficient evidence of citizenship, as did every other state that conducted voter registration. Arizona continues to accept affirmation under oath as sufficient evidence for every other voter qualification. Existing registered voters were "grandfathered in" under Proposition 200 without having to prove their citizenship, undermining not only the state's claim that Proposition 200 was a voter qualification, but also the state's claim that that Proposition 200 was essential to enforcing its citizenship qualification. Viewed most favorably to the state, the record contained only a handful of criminal convictions for non-citizen registration, none of which were shown to have occurred via the Federal Form.

259. 553 U.S. 181 (2008).

260. *See id.* at 196; *see also* Purcell v. Gonzalez, 549 U.S. 1, 4 (2006).

261. *See* Gonzalez v. Arizona, 677 F.3d 383, 403 (2012); *see also* ACORN v. Edgar, 56 F.3d 791, 795 (7th Cir. 1995).

262. *See* Voting Rights Coal. v. Wilson, 60 F.3d 1411, 1412–12 (9th Cir. 1995).

263. *See, e.g.*, Brief for American Civil Rights Union and 12 Civil Rights Lawyers as Amicus Curiae Supporting Petitioners, Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247 (2013) (No. 12-71), 2012 WL 6694057, at *7(raising constitutional issues regarding Ninth Circuit *en banc* decision). "If the NVRA is read as preempting Arizona's Proposition 200, then it is the NVRA that is unconstitutional." *Id.* at *16 (capitalization removed).

Elections Clause in *Oregon v. Mitchell*, there was nothing surprising in that and the effect is minimal. No current federal legislation under the Elections Clause sets voter qualifications; the eighteen-year-old voting qualification sustained in *Oregon v. Mitchell* was mooted by the passage of the Twenty-sixth Amendment, and Section 202 of the Voting Rights Act, which remains in effect, was sustained by a majority of the Court in *Mitchell* on various interstate travel grounds.[264]

The principal unfinished business after *Arizona v. ITCA* is a challenge to the EAC's Federal Form instructions for Arizona and Kansas under the Administrative Procedure Act ("APA").[265] The plaintiffs are the States and the Secretaries of State of Kansas and Arizona; the defendants are the EAC and its executive director; a number of affected individuals and organizations have intervened as defendants. The *Kobach* case is the type of action that the Court's majority opinion noted was "happily" available to Arizona.[266] After initial briefing, the district court deferred ruling and gave the plaintiffs an opportunity to make a new request to the EAC to modify the Federal Form.[267] On January 17, 2014, the EAC's executive director issued an extensive ruling denying the states' requests.[268] As this Article was going to print, on March 19, 2014, the district court issued an order that found the EAC to be under a ministerial duty to modify the instructions for

264. Section 202 of the Voting Rights Act allows otherwise qualified residents who apply to register no later than thirty days (or less if permitted by state law) prior to a presidential election to vote in that election notwithstanding any state durational residency requirement. *See* 42 U.S.C. § 1973aa-1(d) (1970). Citizens who move to another state after the 30th day preceding a Presidential election may vote in their former state. *See* 42 U.S.C. § 1973aa-1(e). The Supreme Court upheld these residency provisions for presidential elections in *Oregon v. Mitchell* separately from its holding concerning age qualifications. *See* Oregon v. Mitchell, 400 U.S. 112, 134, 237–36, 285–86 (1970). The Court gave no indication in *Arizona v. ITCA* that it intended to reconsider that aspect of *Mitchell,* or any of the Court's line of jurisprudence concerning Congress' regulation of Presidential elections. *See, e.g.*, Burroughs v. United States, 290 U.S. 534 (1934).

265. Kobach v. U.S. Election Assistance Comm'n, No. 13-cv-4095 (D. Kan.). *See* 5 U.S.C. §§ 551–59.

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

267. State officials in Arizona and Kansas also reacted to the *Arizona v. ITCA* decision by announcing plans to create dual registration systems, under which citizens who have registered using the Federal Form will only be permitted to vote in federal contests, unless and until they comply with the state evidence of citizenship requirements. *See* Brief in Support of Plaintiffs' Motion for Preliminary Injunctive Relief, Kobach v. EAC (No. 13-409) 2013 WL 7702029 (D. Kan. Oct. 23, 2013) . Such "dual systems" are not precluded on the face of the NVRA, and at this time there have been no legal challenges claiming that these particular dual systems violate state or other federal laws.

268. *See* U.S. Election Assistance Comm'n, Memorandum of Decision Concerning State Requests to Include Additional Proof-of-Citizenship Instructions on the National Mail Voter Registration Form (Docket No. EAC-2013-0004) (Jan. 17, 2014).

Kansas and Arizona to accommodate the States' proof of citizenship requirements, and ordered the EAC to do so immediately.[269]

CONCLUSION

The defiance of the EAC's rulemaking authority displayed in *Arizona v. ITCA* is a case in point of the problem contemplated in *Ex parte Siebold*: that "officers or agents" of Congress might face "obstruction or interference from the officers of the State," and that in the absence of "harmonious action" by the states, there must be the "requisite authority" to enforce Congress's "constitutionally paramount" regulations.[270] The Supreme Court's resolution of Arizona's appeal did not end the dispute over Proposition 200 and similar provisions, but the Court's decision settled the important point that Congress controls voter registration procedures for federal elections, and it showed that the NVRA rests upon solid constitutional ground.

269. Kobach v. U.S. Election Assistance Comm'n, No. 13-cv-4095, (D. Kan. Mar. 19, 2014) (mem.). As of March 21, 2014, no notices of appeal had been filed, although appeals are highly likely. The defendant-intervenors filed notices of appeal on March 27, 2014.

270. *See Ex parte* Siebold, 100 U.S. 371, 387 (1879).