Supplementary Material

Chapter 11: The Contemporary Era—Federalism

Arizona v. Inter Tribal Council of Arizona, Inc., ___ U.S. ___ (2013)

The Inter Tribal Council of Arizona (ITCA) is a nonprofit organization that helps tribal governments comply with federal law and apply for federal grants. In 2004, Arizona voters passed Proposition 200, which required persons to present proof of citizenship before being allowed to vote. The ITCA filed a lawsuit asking federal courts to enjoin the enforcement of Proposition 200 on the ground that the ballot initiative was preempted by the National Voter Registration Act of 1993 (NVRA). The crucial provisions of the NVRA require states to allow voters to register by mail and require states to use a form for mail registration approved by the Election Assistance Commission (EAC). The Federal Form approved for Arizona requires persons to attest that they are citizens, but does not require them to submit proof of citizenship. After a good deal of procedural maneuvering, the Court of Appeals for the Ninth Circuit declared that the NVRA preempted the Arizona proof of citizenship requirement. After that decision was sustained by the Court of Appeals for the Ninth Circuit en banc, Arizona appealed to the Supreme Court of the United States.

The Supreme Court by a 7–2 vote ruled that Proposition 200 was preempted by federal law. Justice Scalia's opinion for the Court held that the Elections Clause of Article I gave the federal government broad power to regulate elections and that the justices should not invoke any antipreemption presumption when Congress acts under the Elections Clause. Why did Justice Scalia reject a presumption against preemption in this case? Why did Justices Kennedy, Thomas, and Alito disagree? Who has the better argument? All the justices agreed that the Elections Clause does not give Congress power to determine eligibility for voting. Did they disagree about whether Congress can determine the means by which a person must prove they are eligible to vote or is the sole issue in this case really whether states must use the Federal Form provided by the EAC as their means for proving eligibility? Suppose, as Justice Scalia suggested, Arizona asked the EAC to include in the Federal Form for Arizona a requirement that the applicant include proof of citizenship and the EAC either refused or was unable to meet (as several opinions noted, the EAC when the case was handed down had no members)? What result? In particular, might Justices Scalia and Chief Justice Roberts join the dissenters in the case raised by those facts?

JUSTICE SCALIA delivered the opinion of the Court.

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The Elections Clause has two functions. Upon the States it imposes the duty ("shall be prescribed") to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether. This grant of congressional power was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress. . . .

The 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."

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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." . . . In common parlance, one might say that a restaurant accepts and uses credit cards even though it requires customers to show matching identification when making a purchase.

"Words that can have more than one meaning are given content, however, by their surroundings." And 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. For example, a government diktat that "civil servants shall accept government IOUs for payment of salaries" does not invite the response, "sure, we'll accept IOUs—if you pay us a ten percent down payment in cash." Many federal statutes contain similarly phrased commands, and they contemplate more than mere willing receipt.

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Arizona appeals to the presumption against pre-emption sometimes invoked in our Supremacy Clause cases. Where it applies, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." That rule of construction rests on an assumption about congressional intent: that "Congress does not exercise lightly" the "extraordinary power" to "legislate in areas traditionally regulated by the States." We have never mentioned such a principle in our Elections Clause cases. . . . The assumption that Congress is reluctant to pre-empt does not hold when Congress acts under that constitutional provision, which empowers Congress to "make or alter" state election regulations. When Congress legislates with respect to the "Times, Places and Manner" of holding congressional elections, it necessarily displaces some element of a pre-existing legal regime erected by the States. Because 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. Moreover, the federalism concerns underlying the presumption in the Supremacy Clause context are somewhat weaker here. Unlike the States' "historic police powers," the States' role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that it "terminates according to federal law."

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Arizona contends, however, that its construction of the phrase "accept and use" is necessary to avoid a conflict between the NVRA and Arizona's constitutional authority to establish qualifications (such as citizenship) for voting. Arizona is correct that the Elections Clause empowers Congress to regulate how federal elections are held, but not who may vote in them. The Constitution prescribes a straightforward rule for the composition of the federal electorate. Article I, § 2, cl. 1, 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," and the Seventeenth Amendment adopts the same criterion for senatorial elections. One cannot read the Elections Clause as treating implicitly what these other constitutional provisions regulate explicitly. . . .

Since the power to establish voting requirements is of little value without the power to enforce those requirements, Arizona is correct that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications. If, but for Arizona's interpretation of the "accept and use" provision, the State would be precluded from obtaining information necessary for enforcement, we would have to determine whether Arizona's interpretation, though plainly not the best reading, is at least a possible one. Happily, we are spared that necessity, since the statute provides another means by which Arizona may obtain information needed for enforcement.

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Since . . . a State may request that the EAC alter the Federal Form to include information the State deems necessary to determine eligibility and may challenge the EAC's rejection of that request in a suit under the Administrative Procedure Act, no constitutional doubt is raised by giving the "accept and use" provision of the NVRA its fairest reading. That alternative means of enforcing its constitutional power to determine voting qualifications remains open to Arizona here. In 2005, the EAC divided 2–to–2 on the request by Arizona to include the evidence-of-citizenship requirement among the state-specific instructions on the Federal Form, which meant that no action could be taken. Arizona did not challenge that agency action (or rather inaction) by seeking APA review in federal court, but we are aware of nothing that prevents 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.

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JUSTICE KENNEDY, concurring in part and concurring in the judgment.

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There is no sound basis for the Court to rule, for the first time, that there exists a hierarchy of federal powers so that some statutes pre-empting state law must be interpreted by different rules than others, all depending upon which power Congress has exercised. If the Court is skeptical of the basic idea of a presumption against pre-emption as a helpful instrument of construction in express pre-emption cases, it should say so and apply that skepticism across the board.

. . . . [T]he Court has recognized that "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" This principle is best understood, perhaps, not as a presumption but as a cautionary principle to ensure that pre-emption does not go beyond the strict requirements of the statutory command. The principle has two dimensions: Courts must be careful not to give an unduly broad interpretation to ambiguous or imprecise language Congress uses. And they must confine their opinions to avoid overextending a federal statute's pre-emptive reach. Error on either front may put at risk the validity and effectiveness of laws that Congress did not intend to disturb and that a State has deemed important to its scheme of governance. That concern is the same regardless of the power Congress invokes, whether it is, say, the commerce power, the war power, the bankruptcy power, or the power to regulate federal elections under Article I, § 4.

Whether the federal statute concerns congressional regulation of elections or any other subject proper for Congress to address, a court must not lightly infer a congressional directive to negate the States' otherwise proper exercise of their sovereign power. This case illustrates the point. The separate States have a continuing, essential interest in the integrity and accuracy of the process used to select both state and federal officials. The States pay the costs of holding these elections, which for practical reasons often overlap so that the two sets of officials are selected at the same time, on the same ballots, by the same voters. It seems most doubtful to me to suggest that States have some lesser concern when what is involved is their own historic role in the conduct of elections. As already noted, it may be that a presumption against pre-emption is not the best formulation of this principle, but in all events the State's undoubted interest in the regulation and conduct of elections must be taken into account and ought not to be deemed by this Court to be a subject of secondary importance.

Here, in my view, the Court is correct to conclude that the National Voter Registration Act of 1993 is unambiguous in its pre-emption 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.

JUSTICE THOMAS, dissenting.

. . . . I think that both the plain text and the history of the Voter Qualifications Clause, U.S. Const., Art. I, § 2, cl. 1, and the Seventeenth Amendment authorize States to determine the qualifications of voters in federal elections, which necessarily includes the related power to determine whether those qualifications are satisfied. To 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. . . .

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The Voter Qualifications Clause, U.S. Const., Art. I, § 2, cl. 1, provides that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature" in elections for the federal House of Representatives. The Seventeenth Amendment, which provides for direct election of Senators, contains an identical clause. That language is susceptible of only one interpretation: States have the authority "to control who may vote in congressional elections" so long as they do not "establish special requirements that do not apply in elections for the state legislature." Congress has no role in setting voter qualifications, or determining whether they are satisfied, aside from the powers conferred by the Fourteenth, Fifteenth, Nineteenth, Twenty–Fourth, and Twenty–Sixth Amendments, which are not at issue here. This power is instead expressly reposed in the States.

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Respondents appear to concede that States have the sole authority to establish voter qualifications, but nevertheless argue that Congress can determine whether those qualifications are satisfied. The practical effect of respondents' position is to read Article I, § 2, out of the Constitution. As the majority correctly recognizes, "the power to establish voting requirements is of little value without the power to enforce those requirements." For this reason, the Voter Qualifications Clause gives States the authority not only to set qualifications but also the power to verify whether those qualifications are satisfied.

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. . . . The United States nevertheless argues that Congress has the authority under Article I, § 4, "to set the rules for voter registration in federal elections." Neither the text nor the original understanding of Article I, § 4, supports that position.

Article I, § 4, gives States primary responsibility for regulating the "Times, Places and Manner of holding Elections" and authorizes Congress to "at any time by Law make or alter such Regulations." Along with the Seventeenth Amendment, this provision grants Congress power only over the "when, where, and how" of holding congressional elections.

Prior to the Constitution's ratification, the phrase "manner of election" was commonly used in England, Scotland, Ireland, and North America to describe the entire election process. But there are good reasons for concluding that Article I, § 4's use of "Manner" is considerably more limited. The Constitution does not use the word "Manner" in isolation; rather, "after providing for qualifications, times, and places, the Constitution described the residuum as 'the Manner of holding Elections.' This precise phrase seems to have been newly coined to denote a subset of traditional 'manner' regulation." Consistent with this view, during the state ratification debates, the "Manner of holding Elections" was construed to mean the circumstances under which elections were held and the mechanics of the actual election. The text of the Times, Places and Manner Clause, therefore, cannot be read to authorize Congress to dictate voter eligibility to the States.

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Finding no support in the historical record, respondents and the United States instead chiefly assert that this Court's precedents involving the Times, Places and Manner Clause give Congress authority over voter qualifications. But this Court does not have the power to alter the terms of the Constitution. Moreover, this Court's decisions do not support the respondents' and the Government's position. Respondents and the United States point out that *Smiley v. Holm*, 285 (1932), mentioned "registration" in a list of voting-related subjects it believed Congress could regulate under Article I, § 4. But that statement was dicta because *Smiley* involved congressional redistricting, not voter registration.

285 U.S., at 361–362, 52 S.Ct. 397. Cases since *Smiley* have similarly not addressed the issue of voter qualifications but merely repeated the word "registration" without further analysis.

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I cannot, therefore, adopt the Court's interpretation that § 1973gg–4(a)(1)'s "accept and use" provision requires states to register anyone who completes and submits the form. Arizona sets citizenship as a qualification to vote, and it wishes to verify citizenship, as it is authorized to do under Article 1, § 2. It 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. By requiring Arizona to register people who have not demonstrated to Arizona's satisfaction that they meet its citizenship qualification for voting, the NVRA, as interpreted by the Court, would exceed Congress' powers under Article I, § 4, and violate Article 1, § 2.

Fortunately, Arizona's alternative interpretation of § 1973gg–4(a)(1) avoids this problem. It is plausible that Arizona "accept[s] and use[s]" the federal form under § 1973gg–4(a)(1) so long as it receives the form and considers it as part of its voter application process. Given States' exclusive authority to set voter qualifications and to determine whether those qualifications are met, I would hold that Arizona may request whatever additional information it requires to verify voter eligibility.

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Even if the EAC were a going concern instead of an empty shell, I disagree with the majority's application of the constitutional avoidance canon. I would not require Arizona to seek approval for its registration requirements from the Federal Government, for, as I have shown, the Federal Government does not have the constitutional authority to withhold such approval. Accordingly, it does not have the authority to command States to seek it. As a result, the majority's proposed solution does little to avoid the serious constitutional problems created by its interpretation.

JUSTICE ALITO, dissenting.

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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. . . . The presumption against pre-emption applies with full force when Congress legislates in a "field which the States have traditionally occupied" and the NVRA was the first significant federal regulation of voter registration enacted under the Elections Clause since Reconstruction.

The Court has it exactly backwards when it declines to apply the presumption against pre-emption because "the federalism concerns underlying the presumption in the Supremacy Clause context are somewhat weaker" in an Elections Clause case like this one. To the contrary, Arizona has a "'compelling interest in preserving the integrity of its election process'" that the Constitution recognizes and that the Court's reading of the Act seriously undermines.

By reserving to the States default responsibility for administering federal elections, the Elections Clause protects several critical values that the Court disregards. First, as Madison explained in defense of the Elections Clause at the Virginia Convention, "[i]t was found necessary to leave the regulation of [federal elections], in the first place, to the state governments, as being best acquainted with the situation of the people." Because the States are closer to the people, the Framers thought that state regulation of federal elections would "in ordinary cases . . . be both more convenient and more satisfactory."

Second, as we have previously observed, the integrity of federal elections is a subject over which the States and the Federal Government "are mutually concerned." By giving States a role in the administration of federal elections, the Elections Clause reflects the States' interest in the selection of the individuals on whom they must rely to represent their interests in the National Legislature.

Third, the Elections Clause's default rule helps to protect the States' authority to regulate state and local elections. As a practical matter, it would be very burdensome for a State to maintain separate federal and state registration processes with separate federal and state voter rolls. For that reason, any federal regulation in this area is likely to displace not only state control of federal elections but also state control of state and local elections.

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The Court answers that when Congress exercises its power under the Elections Clause "it necessarily displaces some element of a pre-existing legal regime erected by the States." But the same is true whenever Congress legislates in an area of concurrent state and federal power. A federal law regulating the operation of grain warehouses, for example, necessarily alters the "pre-existing legal regime erected by the States,"—even if only by regulating an activity the States had chosen not to constrain.

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I agree with the Court that the phrase "accept and use," when read in isolation, is ambiguous, but I disagree with the Court's conclusion that § 1973gg–4(a)(1)'s use of that phrase means that a State must treat the federal form as a complete application and must either grant or deny registration without requiring that the applicant supply additional information. Instead, I would hold that a State "accept[s] and use [s]" the federal form so long as it uses the form as a meaningful part of the registration process.

. . . . When the phrase is used in [the context of "what it normally means to 'accept and use' an application form"], it is clear that an organization can "accept and use" a form that it does not treat as a complete application. For example, many colleges and universities accept and use the Common Application for Undergraduate College Admission but also require that applicants submit various additional forms or documents. Similarly, the Social Security Administration undoubtedly "accepts and uses" its Social Security card application form even though someone applying for a card must also prove that he or she is a citizen or has a qualifying immigration status. As such examples illustrate, when an organization says that it "accepts and uses" an application form, it does not necessarily mean that the form constitutes a complete application.

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