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Co-Managers? The Need for Clarification Regarding State and Federal Powers in Federal Elections

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Co-Managers? The Need for Clarification Regarding State and Federal Powers in Federal Elections

I. Introduction

What happens when Congress and the states have similar but distinct powers that overlap? Who wins? If it's anything like in *The Office*, when Jim and Michael have to share the power of office manager, no one wins as chaos controls.[1] Like Jim and Michael, the state and federal governments also share some areas of overlapping power - including election administration.[2] Under the Election Clause, Congress has the ultimate power over the "[t]imes, [p]aces, and [m]anner" of elections, a power the Supreme Court has determined covers voter registration.[3] Under the Qualifications Clauses, states have the duty of setting voter qualifications for both state and federal elections.[4] A federal agency, the Election Assistance Commission (EAC), controls the Federal Voter Registration Form, the means by which the agency enforces voter qualifications.[5] However, the Federal Form carries several questions regarding state and federal power. In *Arizona v. Inter Tribal Council of Arizona, Inc.* (ITCA), the Supreme Court determined that states must accept the Federal Form as sufficient and cannot add requirements to it; instead, states must request an amendment to the form and show that the

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[1] *The Office: The Promotion* (NBC television broadcast Oct. 1, 2009).

[2] *See* U.S. CONST. art. I, § 2; U.S. CONST. art. I, § 4, cl. 1.

[3] U.S. CONST. art. I, § 4, cl. 1. This clause empowers the legislatures of the States to set the "[t]ime, [p]laces, and [m]anner of holding" Congressional elections, but then allows Congress to "make or alter such Regulations…."

[4] U.S. CONST. art. I, § 2; U.S. CONST. amend. XVII.

[5] Help America Vote Act of 2002, 52 U.S.C. §§ 20901-21145.

additional information is "necessary" under the National Voting Rights Act.[6] However, the Court failed to clarify the line between federal and state power and the manner in which a reviewing court must make the "necessity" determination.[7]

This article argues that the Court needs to clarify the distinction between the state and federal government's roles in federal elections to avoid chaos and unconstitutional overreach. As a part of this clarification, the Court should also clarify how information is deemed "necessary." This article looks specifically at one potential consideration: public fears regarding election security. Data and logic indicate that such fears should not be a consideration in the necessity determination as they are unreliable.

Section II examines the background of the Election Assistance Commission, the applicable law, as well as criticism and support the agency has received since its creation in 2002. This history explains how the EAC came to oversee the Federal Form and why it is an important tool in election administration. Section III explains the Supreme Court's decision in *ITCA*. Section IV then looks at the history of the Election and Qualification Clauses to show that any involvement of the EAC in setting voter qualifications would violate the Constitution. Section V evaluates interpretations and analysis of *ITCA* to show that the Supreme Court needs to clarify the distinction between the federal and state roles in federal elections to protect the state's constitutional right to set voter qualifications. Finally, Section VI looks at the broader issue of election security and its relation to the adjudication of election issues to show that voters' concerns about election security should not play a role in the court's determination of whether to add a particular qualification enforcement method to the Federal Form.

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[6] Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 19 (2013).

[7] *Cf. Id.*

II. The Election Assistance Commission

A. General Background of the EAC

Under the Federal Election Campaign Act of 1971, Congress created a National Clearinghouse for Information on the Administration of Elections within the General Accounting Office (GAO).[8] The Clearinghouse compiled "information and review of procedures" of Federal elections.[9] Congress established the Clearinghouse, in part, to allow election administrators to easily exchange information that would allow them to "more efficiently administer elections."[10] Congress amended the Act in 1974 to establish the Federal Election Commission (FEC), tasked with maintaining a clearinghouse.[11] At that time, the FEC formed the National Clearinghouse on

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[8] *Help America Vote Act*, U.S. ELECTION ASSISTANCE COMM'N, https://www.eac.gov/about_the_eac/help_america_vote_act.aspx, (last visited Oct. 26, 2022). The GAO is a legislative agency that was created to "assist in the discharge of its core constitutional powers--the power to investigate and oversee the activities of the executive branch, the power to control the use of federal funds, and the power to make laws." *The Role of the GAO in Assisting Congressional Oversight*, GAO (June 5, 2002), https://www.gao.gov/products/gao-02-816t.

[9] *Help America Vote Act, supra* note 8.

[10] *Id.*

[11] *Id.* The Help America Vote Act currently states:

> The Commission shall serve as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections by - (1) carrying out the duties described in part 3 (relating to the adoption of voluntary voting system guidelines), including the maintenance of a clearinghouse of information on the experiences of State and local governments in implementing the guidelines and in operating voting systems in general; (2) carrying out the duties described in subtitle B (relating to the testing, certification, decertification, and recertification of voting system hardware and software); (3) carrying out the duties described in subtitle C (relating to conducting studies and carrying out other activities to promote the effective administration of Federal elections); (4) carrying out the duties described in subtitle D (relating to election assistance), and providing information and training on the management of the payments and grants provided under such subtitle; (5) carrying out the duties described in subtitle B of title III (relating to the adoption of voluntary guidance); and (6) developing and carrying out the Help America Vote College Program under title V.

52 U.S.C § 20922.

Election Administration. The purpose of the Clearinghouse was to compile information regarding election procedures to allow election administrators easy access to information to improve elections.[12] To carry out this duty, the FEC formed the National Clearinghouse on Election Administration.[13]

After years of attempting to reform voter registration procedures,[14] Congress passed the National Voter Registration Act of 1993 (NVRA).[15] A so-called "motor-voter" law, the NVRA requires states to establish procedures so eligible voters can register to vote in federal elections (1) at the same time as applying for a driver's license, (2) "by mail application," and (3) by applying in person at designated registration sites or offices.[16] The Act does not apply to states with "no voter registration requirement[s]" or states that allow voters to register at polling places on election day.[17]

The NVRA created two additional duties for the FEC Clearinghouse: (1) to "develop a mail voter registration application form for elections for Federal office" and (2) to submit to

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[12] *See History of the National Clearinghouse on Election Administration*, U.S. ELECTION ASSISTANCE COMM'N, https://www.eac.gov/sites/default/files/eac_assets/1/28/History%20of%20the%20National%20Clearinghouse%20on%20Election%20Administration.pdf (last visited on Jan. 4, 2023).

[13] *Id.*

[14] *See* Royce Crocker, CONG. RSCH. SERV., R40609, THE NATIONAL VOTER REGISTRATION ACT OF 1993: HISTORY, IMPLEMENTATION, AND EFFECTS (2013).

[15] National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (1993) (codified at 52 U.S.C.S. §§ 20501-20511).

[16] National Voter Registration Act of 1993, 52 U.S.C.S. § 20503(a)(1)-(3).

[17] 52 U.S.C.S § 20503(b)(1)(2). The bill originally contained an exemption cutoff date of March 11, 1993, which was amended in 1996 to August 1, 1994. North Dakota, Minnesota, Wisconsin, Wyoming, New Hampshire, and Idaho either had no registration requirements or allowed registration on election day prior to August 1, 1996, and are exempt from the NVRA. *The National Voter Registration Act of 1993 (NVRA)*, CIVIL RIGHTS DIVISION U.S. DEPT. OF JUSTICE, https://www.justice.gov/crt/national-voter-registration-act-1993-nvra (last visited Jan. 3, 2019).

Congress a biennial report "assessing the impact of [the NVRA] on the administration of elections for Federal office."[18] By 1984 "[t]he Clearinghouse organized its activities into six program areas: research; information; public speaking; election legislation; voting system standards; and voting accessibility."[19]

In 2002, Congress passed the Help America Vote Act (HAVA).[20] HAVA established the Election Assistance Commission (hereafter sometimes referred to as "EAC").[21] The Commission consists of four appointed members, an Election Assistance Commission Standards Board, and an Election Assistance Commission Board of Advisors.[22] The EAC is designated "as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections."[23] This Act transferred some of the Federal Election Commission's duties under the National Voter Registration Act of 1993 to the Election Assistance Commission.[24]

Under the NVRA, the Election Assistance Commission took on developing a federal mail voter registration form.[25] Initially, this duty belonged to the FEC, but as explained above, with

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[18] 52 U.S.C. § 20508(a)(2)-(3) (2023).

[19] Help America Vote Act, *supra* note 8.

[20] Help America Vote Act of 2002, Pub. L. No. 107-252 (codified as amended at 52 U.S.C.S §§ 20901-21145).

[21] Help America Vote Act of 2002, 52 U.S.C. § 2092 (2002).

[22] *Id.*

[23] 52 U.S.C. § 20922 (2023).

[24] 52 U.S.C. § 21132 (2023).

[25] 52 U.S.C. § 20508(a)(2) (2023).

the enaction of HAVA, Congress transferred the responsibility to the EAC in 2002.[26] The NVRA states that the form "may require only such identifying information . . . and other information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process."[27]

In 1994, the FEC issued rules regarding the "design and content of the mail registration form."[28]

> The form required eight data items: (1) full name of applicant; (2) address where applicant lives; (3) mailing address, if different from where applicant lives; (4) month, day, and year of birth; (5) telephone number (optional); (6) voter identification number, if required by state law; (7) political party preference, if required by state law; and (8) race for states required to collect such data under the Voting Rights Act of 1965 (optional for all other states). In addition, certain information had to be included on the form. Among other items were (1) eligibility requirements (including citizenship); (2) an attestation that the applicant met the state's requirements; (3) a signature and date field; (4) a warning about the penalties for submitting false information; (5) a field for the name and address of anyone who helped the applicant to complete the form; (6) a statement that a refusal to register to vote will remain confidential; and (7) a statement that if the applicant does register, the place of registration remains confidential.[29]

Then, in 2002, HAVA added several more requirements to the form, including a question asking whether the person registering was a citizen.[30] This addition did not require additional proof of citizenship beyond the applicant's signature under penalty of perjury.[31]

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[26] 52 U.S.C. § 21132.

[27] 52 U.S.C. § 20508(b)(1) (2023).

[28] Royce Crocker, *supra* note 14, at 10.

[29] *Id.*

[30] *Id.*

[31] *Id.* There have been multiple attempts in Congress to explicitly allow states to include a proof of citizenship requirement in the federal voter registration form. During the legislative deliberations for the

Along with the set requirements, a state may request that the EAC amend the Federal Form to include state-specific requirements necessary to determine voter eligibility.[32] The Federal Form contains several pages explaining the individual requirements of each state.[33] However, the Commission may deny such a request and the state may then challenge the denial "in a suit under the Administrative Procedure Act."[34]

Under the NVRA, a state may create its own voter registration form, provided it contains all the information the NVRA requires for the national mail voter registration form.[35] As a result, a State's form may contain more, but not less, requirements than the national form.[36]

A. The Current State of the EAC

Despite the controversy surrounding the EAC and the potential distrust that presidential administrations creating independent election commissions has signaled, which will be discussed

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NVRA, the Senate proposed an amendment that would have allowed states to include proof of citizenship requirements, however, this was rejected by the Conference Committee. *See "'Motor Voter' Bill Enacted After 5 Years."* CQ ALMANAC, 1994, http://library.cqpress.com/cqalmanac/cqal93-1105383. Since then, there have been attempts by members of Congress to amend the NVRA to include the rejected amendment. *See* H.R. 8223, 117th Cong. (2022).

[32] Arizona v. Inter Tribal Council of Ariz., 570 U.S. 1, 19 (2013). The Court stated that "[t]he EAC is explicitly instructed . . . to develop the Federal Form 'in consultation with the chief election officers of the States," and "[t]he Federal Form thus contains a number of state-specific instructions, which tell residents of each State what additional information they must provide and where they must submit the form." *Id.* at 5–6.

[33] *See National Mail Voter Registration Form*, pp. 3-22, https://www.eac.gov/sites/default/files/eac_assets/1/6/Federal_Voter_Registration_ENG.pdf (last visited Mar. 15, 2023).

[34] Inter Tribal Council of Ariz., 570 U.S. at 19.

[35] 52 U.S.C.S. § 20505(a)(2).

[36] *Id.*

below,[37] the EAC continues to play a role in election administration.[38] The Election Assistance Commission's four commissioner seats are currently filled, and the Commission has taken a somewhat active role in pursuing election security.[39] Additionally, the Election Assistance Commission continues to serve as a clearinghouse and execute its HAVA and NVRA-assigned duties.[40] The Commission's execution of these duties, particularly the duty to develop a federal mail voter registration form, has led to the contentious litigation discussed below.[41] Much of this controversy has focused on voter identification laws and has questioned the competing roles of Congress and the States in election administration.[42]

B. Attempts to Eliminate the EAC

Since its establishment in 2002, the Election Assistance Commission has proven to be somewhat controversial.[43] The Commission has gone through periods with no appointed commissioners, and Congress has introduced several bills to eliminate the Commission altogether.[44]

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[37] *See infra* Section III.

[38] *See generally*, U.S. ELECTION ASSISTANCE COMM'N, https://www.eac.gov/ (last visited Mar. 22, 2023).

[39] *Help America Vote Act*, *supra* note 5.

[40] *Id.*

[41] *See infra* Section III.

[42] *See Arizona v. Inter Tribal Council of Arizona*, 127 HARV. L. REV. 198, 205 (Nov. 2013), https://harvardlawreview.org/wp-content/uploads/pdfs/vol127_arizona_v_inter_tribal_council_of_arizona.pdf.

[43] *See* Dave Levinthal, *Kill the Election Assistance Commission?*, THE CENTER FOR PUBLIC INTEGRITY (Dec. 12, 2013), https://publicintegrity.org/politics/kill-the-election-assistance-commission/.

[44] H.R. Rep. No. 114-361, at 2 (2015), https://www.govinfo.gov/app/details/CRPT-114hrpt361/CRPT-114hrpt361/summary (stating that the EAC had "no commissioners from 2011 to 2014, no quorum of commissioners from 2010 to 2014, no executive directors from 2011 to 2015 and no general counsel from

In 2011, Republican members of the House, led by Republican Gregg Harper, introduced two bills attempting to eliminate the Election Assistance Commission; the first failed to pass the House[45] and the second passed the House, but failed to move forward in the Senate.[46] In 2015, Representative Harper introduced The Election Assistance Termination Act.[47] The Committee on House Administration created a report on The Election Assistance Termination Act, which described the Election Assistance Commission as "a bureaucracy with a history of poor financial and managerial decisions and (apparently meritorious) claims of employment discrimination based on political viewpoint and military service."[48] The report further stated, "[t]he EAC has repeatedly become mired in partisan controversies."[49] It also noted that "[t]he National Association of Secretaries has in 2005, 2010, and 2015 called on Congress to dissolve the EAC," and mentioned the periods in which the Commission existed with several empty positions.[50] The report contained a small "Minority Views" section in which the democratic members of the Committee expressed their disapproval of the Act.[51] The members first noted that the

2012 to 2015"); *see also* Levinthal, *supra* note 43 (noting that as of 2013 "[a]ll four commissioner positions [] have been vacant since 2011, and [the EAC] hasn't conducted a public meeting since then.").

[45] H.R. 672, 112th Cong. (2011).

[46] H.R. 3463, 112th Cong. (2011). This bill was reintroduced in 2013 by Representative Gregg Harper (R-MS) and referred to the Committee on House Administration but did not pass the House a second time. H.R. 260, 113th Cong. (2013).

[47] H.R. 195, 114th Cong. (2015).

[48] H.R. Rep. No. 114–361, *supra* note 44, at 2.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 17.

Commission was bipartisan and claimed it needed to be "renewed and strengthened."[52] The members further argued that the flawed administration of the 2012 election and support from state and local election officials' concerns that election costs would fall on them demonstrated the continued need for the EAC.[53] Other supporters of the EAC have echoed the minority's sentiment, arguing that "eliminating the United States Election Assistance Commission will lead to less secure and more costly elections in the future."[54] The Election Assistance Termination Act failed in 2015[55] and then failed again when Harper reintroduced it in the House in 2017.[56]

C. Signs of Distrust in the EAC

The previously discussed Acts sought to amend HAVA to eliminate the Election Assistance Commission.[57] Additionally, these Acts sought to return certain duties to the General Accounting Office (GAO) and the Federal Election Commission (FEC) that HAVA had given to the EAC.[58] These bills evidence distrust in the Election Assistance Commission and demonstrate the Commission's opponents belief that it is a waste of taxpayer dollars.[59] Further, the bills show an existing notion that the Election Assistance Commission is performing functions that could be

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[52] *Id.*

[53] *Id.*

[54] Matthew Weil, *Why We Need the Election Assistance Commission*, BIPARTISAN POL'Y CENTER (Feb. 09, 2017), https://bipartisanpolicy.org/blog/why-we-need-the-election-assistance-commission/.

[55] H.R. 195, 114th Cong. (2015-2016).

[56] H.R. 634, 115th Cong. (2017).

[57] H.R. 672, *supra* note 45; H.R. 3263;, 117th Cong. (2021); H.R. 195, *supra* note 47; H.R. 634, *supra* note 56; See *supra* Section IIC.

[58] H.R. 672, *supra* note 45; H.R. 3263, *supra* note 57; H.R. 195, *supra* note 47; H.R. 634, *supra* note 56.

[59] *See* H.R. Rep. No. 114–361, *supra* note 44, at 2 (describing the EAC as "a bureaucracy with a history of poor financial and managerial decisions.").

managed just as well by larger, pre-existing government agencies.[60] However, proponents of the EAC have suggested that removing the EAC and giving its duties back to the FEC would be problematic as the FEC's mission is too narrow, and registration issues would be no more than the "agency's side project."[61] Further, the legislation introduced by members of Congress to eliminate the EAC would also eliminate some of the agency's responsibilities, including some of the data collection, which some critics have argued "no private organization has the capacity to replicate."[62] These concerns regarding the complete elimination of the EAC have merit, as removing the clearinghouse and registration duties that fall under the EAC to a larger organization would increase the likelihood that they would receive less funding and attention.[63]

In addition to congressional efforts to eliminate the Election Assistance Commission, election officials have alleged that the EAC failed to adequately support election officials.[64] One report alleged that after the 2018 midterm elections, over a dozen election officials claimed the EAC was either entirely absent or "working to thwart their efforts."[65] Officials reportedly relied on the Department of Homeland Security for election security training due to the Elections

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[60] *See generally*, H.R. 672, *supra* note 45; H.R. 3263, *supra* note 57; H.R. 195, *supra* note 47; H.R. 634, *supra* note 56. All of these bills sought to give duties currently held by the EAC to larger organization such as the GAO and FEC, evidencing the sentiment that these larger agencies could manage the duties as well as, if not better than, the EAC.

[61] Weil, *supra* note 54.

[62] *Id.*

[63] *See generally*, *Id.*

[64] Jessica Huseman, *How the Election Assistance Commission Came Not to Care So Much About Election Security*, PROPUBLICA (Nov. 5, 2018, 7:31 PM), https://www.propublica.org/article/election-assistance-commission-came-not-to-care-so-much-about-election-security.

[65] *Id.*

Assistance Commission's failure to provide such training.[66] Several of the allegations concern a lack of preparedness and disinterest in cybersecurity, as well as allegations that the commissioners had taken overtly partisan actions.[67] On the other hand, proponents have asserted that prior to the creation of the EAC, voting technology standards were lower and states would perhaps be unable to replicate the EAC's rigorous standards.[68] As will be discussed later in this article, technological advances have complicated election security.[69] With these new problems and the public concern that has grown with them, having an agency dedicated to improving election technology and security is an important tool.[70]

This article does not disagree with the criticism facing the EAC. Any signs of partisanship–in what Congress intended to be a nonpolitical agency dedicated to ensuring safe and fair elections–is concerning and should be called out. However, both the monetary and partisan concerns should be addressed through reorganization and executive control of the EAC. Completely upending the agency and giving its duties to a larger agency could open the door to even more partisan actions, with less oversight and publicity than a smaller agency.[71] In its final note attached to the 2015 report, the Committee on House Administration's minority opinion stated that a proposed amendment aimed at reducing the EAC's costs rather than eliminating it all together had been suggested but "was defeated in a party-line vote."[72] However, this article

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[66] *Id.*

[67] *Id.*

[68] *See* Weil, *supra* note 54.

[69] *See infra* Section VI.

[70] *See, e.g.,* Huseman, *supra* note 64.

[71] *See, e.g.,* Weil, *supra* note 54.

[72] *Id.*

argues that such a compromise would be ideal as it would help keep the important duties regarding election registration under a smaller agency. This approach would be easier to oversee than a larger agency and help address the monetary and partisanship concerns.

The executive branch has also shown signs of distrusting the EAC.[73] Even after the EAC's creation, presidential administrations have taken independent actions in election integrity.[74] For example, in 2013, then-President Barack Obama signed an executive order establishing the Presidential Commission on Election Administration.[75] "Its mission[s] [were] to identify best practices in election administration and to make recommendations to improve the voting experience."[76] Once the Presidential Commission on Election Administration became inactive, the EAC's website acquired and posted its report and recommendations, though the EAC website disclaims the views in the report as not belonging to the Commission.[77]

President Trump again involved the executive branch in evaluating election administration when he issued an executive order in 2017 to establish the Presidential Advisory Commission on Election Integrity.[78] The Commission's stated mission was to "study the

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[73] *See, e.g.*, *Presidential Commission on Election Administration*, BIPARTISAN POL'Y CENT., https://bipartisanpolicy.org/the-presidential-commission-on-election-administration/ (last visited Oct. 28, 2022); Exec. Order No. 13,799, 82 F.R. 22389 (2017).

[74] *See Presidential Commission on Election Administration, supra* note 73*;* Exec. Order No. 13,799.

[75] *Presidential Commission on Election Administration, supra* note 73.

[76] *Id.*

[77] *PCEA*, U.S. ELECTION ASSISTANCE COMM'N (Mar. 11, 2022), https://www.eac.gov/pcea/pcea.

[78] Exec. Order No. This proved extremely controversial, leading to an attempt by Congress to nullify the effect of the Executive Order. *See* H.R. 3214, 115th Cong. (2017). Due to intense pushback by States, this Commission was officially disbanded in 2018; *See* Jessica Taylor, *Trump Dissolves Controversial Election Commission*, NPR (Jan. 3, 2018 PM), https://www.npr.org/2018/01/03/575524512/trump-dissolves-controversial-election-commission.

registration and voting processes used in federal elections."[79] More specifically, the executive order required the commission to create a report on election practices "that enhance the American people's confidence in the integrity of the voting processes used in federal elections," practices that "undermine" the people's confidence, and vulnerabilities in the voting systems that could lead to fraud.[80]

While the Presidential Commission on Election Administration and the Presidential Advisory Commission on Election Integrity had slightly different aims, they both sought to involve the executive branch in maintaining and improving election administration.[81] For the EAC to meet its goals, the confidence and support of the executive branch is necessary. The creation of these commissions calls into question the extent to which the executive branch trusts the Election Assistance Commission to operate effectively.[82] This article advocates for presidential administrations to promote collaboration between the branches of the federal government. Such collaboration would enrich research on election administration and integrity more than creating independent commissions. Additionally, increased collaboration would potentially bolster confidence in the EAC and election security.

III. Litigation: Arizona v. Inter Tribal Council of Arizona, Inc.

The seminal case on the legitimacy of the Federal Form is *Arizona v. Inter Tribal Council of Arizona, Inc.* (hereafter referred to as "*ITCA*").[83] In 2004, Arizona adopted Proposition 200,

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[79] Exec. Order No. 13,799, § 3.

[80] *Id.*

[81] *See Presidential Commission on Election Administration, supra* note 73*;* Exec. Order No. 13799.

[82] *See e.g.,* Levinthal *supra* note 43.

[83] *Arizona v. Inter Tribal Council of Az., Inc.* (ITCA)*,* 570 U.S. 1.

which "amended the states election code to require county recorders to 'reject any application of registration that is not accompanied by satisfactory evidence of United States citizenship.'"[84]

The Court ultimately determined that under the Elections Clause, the NVRA's requirement that States "accept and use" the Federal Form preempted the Arizona state-law requirement.[85] In coming to this conclusion, the Court had to interpret the meaning of "accept and use" as used in the NVRA.[86] Arizona argued the Court should have read the NVRA as requiring states to willingly receive the Federal Form and incorporate it into the states' voter registration process.[87] While the Court recognized that the "accept and use" language could be interpreted in the way Arizona argued, the Court ultimately determined that "[t]he implication of such a mandate is that its object is to be accepted as *sufficient* for the requirement it is meant to satisfy."[88] The Court also noted that Arizona's proposed reading of "accept and use" was "difficult to reconcile with neighboring provisions of the NVRA."[89] Additionally, the Court noted that, unlike the Supremacy Clause presumption against preemption, no such presumption exists under the Elections Clause.[90]

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[84] *Id.* at 6 (citing Ariz. Rev. Stat. Ann. § 16-166(F)).

[85] *Id.* at 20.

[86] *See id.* at 9–13.

[87] *Id.* at 9.

[88] *Id.* at 10.

[89] *Id.* at 11. The Court first decided that it could not be reconciled with the provision that refers to the Federal Form as "the valid voter registration form of the applicant," as a completed form would not be a valid form under Arizona's reading. *Id.* at 11-12. It also found that the NVRA's allowance for states "to create their own state-specific voter-registration forms," which can require information that is not on the Federal Form, indicates that the Federal Form was meant to be a "backstop" and it would no longer serve that purpose if states could require whatever they desired on it. *Id.* at 12-13.

[90] *Id.* at 14.

Affirming the states' right to determine who may vote in federal elections, the Court stated that the federal government has no place in determining voting qualifications.[91] Applying that rule to the context of the Federal Form, the Court expressed that constitutional problems could potentially arise "if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications."[92] However, rather than address this Constitutional question, the Court determined that because Arizona had not renewed a request for the EAC to amend the Federal Form, after which the State would have the opportunity to challenge a denial of such a request in court, "no constitutional doubt" had yet been raised.[93] Therefore, the ITCA Court did not determine whether the EAC's denial of a state's amendment request would violate the Constitution, as Arizona had not yet requested such an amendment.[94] Rather, the Court deferred this question as it was not at issue in the case.[95]

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[91] *Id.* at 17 ("Prescribing 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.'").

[92] *Id.* "[T]he Court's analysis seemed to imply that state authority would likely prevail in this hypothetical conflict, but since the Court found that there were other means to resolve the issue, it chose not to squarely consider a resolution of these constitutional concerns." *Arizona v. Inter Tribal Council of Arizona*, *supra* note 42 at 206.

[93] *Inter Tribal Council*, 570 U.S. at 19–20. The Court noted that, "alternative means of enforcing its constitutional power to determine voting qualifications remains open to Arizona here." The Court further stated, "[s]hould 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." *Id.*

[94] *Id.*

[95] *Id.*

Justice Kennedy concurred in finding the NVRA "unambiguous in its pre-emption of Arizona's statute."[96] In his dissent, Justice Thomas argued for states' right to create and enforce voter qualifications.[97] Additionally, he argued the NVRA should be read in such way that would avoid a constitutional question, allowing states to require additional information as they please.[98] Justice Alito's separate dissent argued first that a presumption against preemption should be applied, second, that "[t]he canon of constitutional avoidance" should be applied and, third, that the NVRA should be read as only requiring a state to accept and use the Federal Form as a part of its registration process which could require supplemental information.[99]

IV. Background of the Election and Qualifications Clauses

The Elections Clause is central to the Supreme Court's decision regarding the Commission's power to require States to use the Federal Mail Registration Form.[100] Found in Article I, Section 4, Clause 1, the Elections Clause provides state legislatures control the "[t]imes, [p]laces, and [m]anner" of federal elections, subject to Congressional override.[101] However, the Elections Clause does not give Congress the power to set voter qualifications.[102] Rather, Article 1, Section 2 provides states the power to determine voter qualifications in

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[96] *Id.* at 22 (Kennedy, J., concurring).

[97] *Id.* at 38 (Thomas, J., dissenting).

[98] *Id.*

[99] *Id.* at 38–47 (Alito, J., dissenting).

[100] *See generally*, *id.* at 7–9, 16–17 (Majorities discussion of the Election Clause's impact).

[101] U.S. CONST. art. 1, § 4, cl. 1. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *Id.*

[102] *See Inter Tribal Council*, 570 U.S. at 17.

elections for the House of Representatives.[103] The Seventeenth Amendment provides the states the same power in Senate elections.[104]

The Supreme Court first thoroughly examined the Elections Clause in *Ex parte Siebold*.[105] *Siebold* concerned habeus corpus petitions of several judges who had been criminally convicted for election interference.[106] The Court determined that, under the Election Clause, Congress's authority over congressional elections is "paramount" to that of the States.[107]

> The State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by Congress has the effect to supersede those made by the State so far as the two are inconsistent, and no farther. There is no such conflict between them as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such.[108]

The *Siebold* Court further asserted that in a conflict between officers appointed by state and federal governments, the duties of the national officers supersede those of the state officials.[109]

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[103] U.S. CONST. art. 1, § 2. This directly ties the qualifications for federal election to those for states elections, stating, "[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." *Id.*

[104] U.S. CONST. amend. XVII. This amendment also ties the qualifications for federal elections to those set for state elections: "[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." *Id.*

[105] *Ex* Parte Siebold, 100 U.S. 371, 382–87 (1880).

[106] *Id.* at 373.

[107] *Id.* at 385–86.

[108] *Id.* at 386.

[109] *Id.* at 386–87. In explaining the federal governments primacy, the Court reasoned:

> 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.

After *Siebold*, the Court continued to construe the Clause to grant Congress broad authority over federal elections.[110] The next major case relating to the Elections Clause was *Smiley v. Holm*.[111] In *Smiley*, the petitioner challenged a congressional districting plan.[112] The Court found that "the function contemplated by article 1, s 4, is that of making laws."[113] Further, the Court stated, in dictum, that things such as voter registration fall under Congress's power to regulate "times, places, and manner."[114] The Court continued to interpret the Elections Clause broadly and reasoned that Congress's overriding authority over the "times, places and manner of holding elections for senators and representatives" provides Congress with the ability to "provide a complete code for congressional elections, not only as to times and places, but in relation to . . . registration."[115] The Court bolstered this contention, citing directly to the Constitution:

Id. at 386.

[110] *See* Robert A. Kengle, *To Accept or Reject: Arizona v. Inter Tribal Council of Arizona, the Elections Clause, and the National Voter Registration Act of 1993*, 57 HOW. L.J. 759, 762–63 (2014). The Court continued to expand Congress's power:

> 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. In 1888, the Court affirmed the authority of Congress to regulate conduct at any election being conducted together with a federal contest. In 1915, the Court recognized the congressional power to ensure that eligible voters can have their ballots counted. The Court reaffirmed its previous expansive readings of the Elections Clause powers in 1917 in United States v. Gradwell.

Id. at 763.

[111] Smiley v. Holm, 285 U.S. 355, (1932).

[112] *Id.* at 361–62.

[113] *Id.* at 366.

[114] *Id.*

[115] *Id.* The Court further explained that Congress had the power "to enact numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Id.*

> This view is confirmed by the second clause of article 1, s4, 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.[116]

In *United States v. Classic,* the Court determined that Congress's authority under the Elections Clause included the ability to regulate primary elections.[117] Regarding the right to vote "as a right derived from the states," the Court stated,

> [T]his. . . is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution 'To make all Laws which shall be necessary and proper for carrying into Execution of the foregoing Powers.'"[118]

The notion that states may only legislate on voting within the bounds set by Congress suggests Congress may have some power over voter qualifications.[119] Similarly, Justice Black's opinion in *Oregon v. Mitchell* would have greatly expanded the meaning of "times, places and manner" to include voter qualifications.[120] In *Mitchell*, the Court held that Congress could lower

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[116] *Id.* at 366–67. However, Justice Thomas vigorously argued in his dissent in *Arizona v. Inter Tribal Council* that "because *Smiley* involved congressional redistricting, not voter registration," the statement regarding registration was merely dicta and holds no precedential value. Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1, 34 (2013).

[117] United States v. Classic, 313 U.S. 299, 317 (1941) (stating that Congress's Election Clause power "includes the authority to regulate primary elections when, as in this case, they are a step in the exercise by the people of their choice of representatives in Congress"). *Id.*

[118] *Id.* at 315 (internal citations omitted).

[119] *See Arizona v. Inter Tribal Council of Arizona*, *supra* note 42. In *Classic*, the Court "declared that Congress possessed authority to regulate voter qualifications by reading the Elections Clause in conjunction with the Necessary and Proper Clause." *Id.* at 205.

[120] Oregon v. Mitchell, 400 U.S. 112 (1970).

the voting age to eighteen in federal elections but not state elections.[121] Citing *Classic*, Justice Black determined that "the power of Congress to make election regulations in national elections is augmented by the Necessary and Proper Clause."[122] His opinion conferred upon Congress ultimate authority over all things related to federal elections and included voter qualifications in the definition of "regulations."[123] However, it is important to note that Justice Black's opinion in this case was not supported by a majority of the Court.[124] These decisions have contributed to some scholars "argu[ing] that the states' right to regulate voter qualifications has, in practice, become more or less illusory."[125]

Roughly 30 years later, the Supreme Court decided *Foster v. Love*, and continued its tradition of reading the Clause as granting Congress broad power over federal elections.[126] Regarding Article 1 Section 4 clause 1, the Court delineated the Elections Clause as "a default provision."[127] In explaining this conclusion, the Court stated that while the Elections Clause gave

[121] *Id.* at 117–18. The Court's reasoning in this decision was split. *Id.*

[122] *Id.* at 120.

[123] *Id.* at 123–24.

[124] *Id.* In Justice Thomas's ITCA dissent he stated, "[I]n Oregon v. Mitchell . . . a majority of this Court, 'took the position that [Article 1, § 4] did not confer upon Congress the power to regulate voter qualifications in federal elections . . . .'" Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 34 (2013) (citation and emphasis omitted). The other Justices provided several dissenting and concurring opinions, and several relied on the Equal Protection Clause and the Privileges and Immunities Clause to argue Congress lowering the voting age was constitutional. *See* Mitchell, 400 U.S. at 135-50 (Douglas, J., concurring in part and dissenting in part). However, not all the Justices believed this was a constitutional action; Justice Harlan and Justice Stewart, in separate dissenting opinions, argued that "Congress exceeded its delegated powers." *Id.* at 213, 281–82.

[125]*Arizona v. Inter Tribal Council of Arizona*, *supra* note 42 at 206.

[126] Foster v. Love, 522 U.S. 67, 68–70 (1997); Kengle, *supra* note 110 at 764.

[127] Foster, 522 U.S. at 69.

states authority over "the mechanics of congressional elections," that authority only exists "so far as Congress declines to pre-empt state legislative choices."[128] The Court went on to affirm that the Elections Clause provides Congress the ability to "'override state regulations' by establishing uniform rules for federal elections, binding on the States."[129]

The history of the Elections Clause demonstrates that the framers did not intend for Congress to determine voter qualifications in either state or federal elections.[130] The framers separated qualifications from the elections clause, indicating an intent that voter qualifications remain separate.[131] The founders intentionally linked federal voter qualifications to state qualifications, showing that state power was to extend over both, and congressional power over neither.[132] As one scholar concluded, "[n]othing in the historical record shows that even a single Framer fathomed giving Congress the power to disenfranchise voters in state elections."[133] Rather, "[a]ll evidence indicates that the Framers drafted the Voter Qualifications Clause with the opposite goal in mind: to allow states to decide who could vote in federal elections."[134] In 1788, James Madison wrote that "to have left [voter qualifications] open for the occasional

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[128] *Id.*

[129] *Id.*

[130] Stephen E. Mortellaro, *The Unconstitutionality of the Federal Ban on Noncitizen Voting and Congressionally Imposed Voter Qualifications*, 63 LOY. L. REV. 447, 484–85 (2017).

[131] *Id.* at 483.

[132] *See* U.S. CONST. art. 1, § 2; U.S. CONST. amend. XVII. *See also* Mortellaro, *supra* note 130, at 483. ("This Clause textually separates the entire topic of voter qualifications from the Elections Clause; the Framers apparently believed voter qualifications were important enough for the Constitution to address directly." *Id.* "The textual separation alone suggests that the Framers did not believe voter qualifications were a subject encompassed by the Elections Clause.") *Id.*

[133] Mortellaro, *supra* note 130, at 484.

[134] *Id.*

regulation of the Congress would have been improper."[135] Another indication that the framers did not intend for Congress to have any power over voter qualifications is that while the clauses were being debated, the framers explicitly rejected the suggestion that Congress have creation or amendment power over voter qualifications.[136] The Supreme Court in *ITCA* also supported this point when it stated, "[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."[137]

Stephen Mortellaro, a professor at George Washington University Law School, argued that congressionally created voter qualifications offend the principles of federalism.[138] First, he argued, it deprives people of the right to vote on a mass scale, whereas state-imposed qualifications are geographically bound.[139] Additionally, when Congress creates qualifications,

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[135] Kyle E. Calvin, Comment, *Just Check the Box: The Tenth Circuit's Decision Leaves Voter Qualifications in Agency's Trust*, 55 WASHBURN L.J. 269, 285 (2015) (quoting The Federalist No. 52, at 272 (James Madison) (Liberty Fund, 2001)). *See also* Mortellaro, *supra* note 130, at 484 (providing a concise explanation of the framers' rejection of the idea that Congress control voter qualifications).

[136] Mortellaro, *supra* note 130, at 484.

[137] Arizona v. Inter Tribal Council of Ariz., Inc. (ITCA), 570 U.S. 1, 17 (2013) (emphasis omitted).

[138] Mortellaro, *supra* note 130, at 484. This article was not addressing whether Congress could remove a state's voter qualification, but only if Congress could impose its own.

[139] *Id.* at 456–57. On the point of Congress creating voter qualifications, Professor Mortellaro makes an interesting point that "congressionally-imposed voter qualifications prevent states from engaging in the types of suffrage-expanding experiments that have historically led to cherished constitutional protections for women and people of color." *Id.* at 460. He further explained that "Congressionally-imposed voter qualifications hamper nascent suffrage movements by requiring them, from their inception, to engage in national campaigns to overturn federal laws," and concluded that "[t]his is an exorbitant political cost to bear for people who are already disenfranchised, and it flies in the face of how suffrage movements have historically succeeded in the country - through state innovation." *Id.* at 460–61.

it harms the state's ability to "pass innovative election laws and experiment with welcoming new groups of voters into the political community."[140]

Professor Mortellaro's reasoning is also applicable to the restriction of state-established voter qualifications. When the EAC restricts a state from enforcing a voter qualification, the state's ability to set voter qualifications will essentially become null and void.[141] Current case law supports the notion that any such restriction by the EAC would be an unconstitutional overreach.[142] In *ITCA*, the Supreme Court noted that states' "power to establish voting requirements" is essentially futile if the States do not also have "the power to enforce those requirements."[143] As a result, "it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications."[144] The *ITCA* Court's affirmation of States' interest in setting and enforcing voter qualifications, coupled with the historical background, indicates that it would certainly be a Constitutional violation for Congress or the EAC to prevent a state from enforcing its voter qualifications.

V. ITCA's Constitutional Impact

A. A Need for Clarification

Since the *ITCA* decision, there have been several opinions regarding the case's impact on the Election Clause.[145] One author argued that *ITCA* did not mark any major changes and

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[140] *Id.* at 460.

[141] Inter Tribal Council, 570 U.S. at 17.

[142] *See id.*; Kobach v. United States Election Assistance Comm'n, 772 F.3d 1183 (2014).

[143] Inter Tribal Council, 570 U.S. at 17.

[144] *Id.*

[145] *See e.g.,* Kengle, *supra* note 110; *Arizona v. Inter Tribal Council of Arizona*, *supra* note 42; Mortellaro, *supra* note 130.

provided clear support for congressional superiority in federal elections.[146] This author asserted that the Court "strongly reaffirmed its prior Elections Clause jurisprudence and did not map out any major new doctrinal ground."[147] They further argued that "the majority showed no inclination to" weaken Congress's authority under the Election Clause.[148] However, this imprecise view ignores the complexity and confusion surrounding the Election and Qualifications clauses. The majority in *ITCA* provided a rather confusing analysis of the issue.[149] First, citing *Smiley v. Holm,* the Court asserted that "registration" fell under the Elections Clause definition of regulation and the EAC could therefore regulate registration issues.[150] However, the Court's later comments reserved to states the power to set and enforce voter qualifications and expressed concern if a federal law prevented states from receiving information necessary to determine voter qualifications.[151] Reserving that power to states also cuts into the claim that "the Court squarely recognized that the regulation of voter registration procedures is a 'manner' of conducting federal elections."[152] Had the Court not undercut its statement that registration fell under Congress's power,[153] it would be reasonable to say Congress could override the states regarding registration requirements and enforcement.

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[146] Kengle, *supra* note 110.

[147] *Id.* at 760. "[A]t 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." *Id.* at 806.

[148] *Id.* at 761.

[149] *See* Inter Tribal Council, 570 U.S. at 7–9.

[150] *Id.* at 8–9.

[151] *Id.* at 17 (stating it would "raise serious constitutional doubts").

[152] Kengle, *supra* note 110 at 803.

[153] Inter Tribal Council, 570 U.S. at 9.

> The result in Inter Tribal Council thus does little to clarify congressional authority in federal elections. If anything, the decision invites future conflicts over the reach of federal power vis-à-vis the states in the realm of federal election administration. . . . Inter Tribal Council leaves open the question of whether the Elections Clause is a broad mandate of congressional authority or a hollow power wrought with exceptions.[154]

The Court needs to further clarify where the line between state and federal power in federal elections is drawn. Additionally, the "manner" distinction should apply strictly to what form enforcement takes and not what qualifications are allowed on the form entirely. The *ITCA* Court described the "times, places and manner" as "the mechanics of congressional elections."[155] The Court should therefore clarify that registration as a whole does not fall under the Election Clause, as that implies Congress has the ability to control the entire registration process, including the setting of voter qualifications.[156] As explained above, States have the right to set and enforce voter qualifications.[157] However, the Constitution does not include any guarantee that states may enforce the qualifications in any way they please.[158] The clauses merely give states the right to set the qualifications and ties the federal qualifications to the States.[159] Rather, it is more logical to read the clauses together because of the impact they have on one another and

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[154] *Arizona v. Inter Tribal Council of Arizona*, *supra* note 42 at 207.

[155] Inter Tribal Council, 570 U.S. at 9.

[156] *See generally, Arizona v. Inter Tribal Council of Arizona, supra* note 42 (arguing that the ITCA Court left several questions surrounding the intersection of federal and state power in federal elections).

[157] *Supra* Section IV Background of the Election and Qualifications Clauses.

[158] *Cf.* U.S. CONST. amend. XVII; U.S. CONST. art. 1, § 2. Neither of these clauses provides states with the right to decide how to enforce voter qualifications. U.S. CONST. amend. XVII; U.S. CONST. art. 1, § 2.

[159] *See id.*

election regulation in general, with the setting of voter qualifications falling to the States and the method of enforcement—a procedural issue—falling to Congress and, by extension, the EAC.

B. Lower Court Interpretations

In addition to academic interpretations, lower courts have also had to interpret *ITCA*. Less than two years after *ITCA*, *Kobach v. United States Election Assistance Commission* became the first case to address EAC denial of a state's request to amend the Federal Form to add citizenship requirements.[160] After *ITCA*, Arizona and Kansas abided by the Supreme Court's holding and asked the EAC to amend the Federal Form to add a proof of citizenship requirement.[161] The EAC denied both requests, "conclud[ing] that the additional language was unnecessary."[162] In *Kobach*, the Tenth Circuit reversed the district court and held that the EAC did not have a non-discretionary duty to grant the states' requests.[163] Rather, the court found that "[w]ere the agency's duty 'nondiscretionary,' the *ITCA* majority would have so concluded and arrived at an opposite result."[164] "This would, of course, have rendered the Court's suggested option of Administrative Procedure Act ("APA") appellate review both unnecessary and inapplicable."[165] The *Kobach* court emphasized the EAC's duty under ITCA to conduct an APA review to determine whether omitting the State's request to alter the Federal Form would prevent proper voter qualification enforcement.[166] So, the *Kobach* court did not hand the EAC unbridled

[160] Kobach v. United States Election Assistance Comm'n, 772 F.3d 1183 (2014).

[161] *Id.* at 1187–88.

[162] *Id.* at 1188.

[163] *Id.* at 1188.

[164] *Id.*

[165] *Id.*

[166] *Id.* at 1196.

power to deny a State's request, but acknowledged there a reviewing court provides a backstop to the EAC's discretion.

Some critics, however, have argued that the 10th Circuit's decision in *Kobach* ultimately granted the power to control voter qualifications to an administrative agency.[167] This interpretation would be very concerning because, as explained above, this is a power that not even Congress has.[168] However, this argument mischaracterizes *Kobach*.[169] The court did not hand the EAC a right to set voter requirements.[170] Rather, it concluded that the EAC had a discretionary duty to determine whether a state's method of enforcing a qualification was "necessary" and should be added to the Federal Form.[171] However, the court even limited this power, noting that both the EAC and the states' must provide evidence indicating whether information is "necessary" to a reviewing court, which then makes the final determination.[172] This argument also ignores the fact that *Kobach* did not prevent the state from enforcing a voter qualification, which is what the *ITCA* court said would create constitutional problems.[173] Rather,

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[167] *See* Calvin, *supra* note 135, at 270.

[168] *Supra* Section IV.

[169] *See generally,* Kobach, 772 F.3d at 1196.

[170] *See generally, id.*

[171] Kobach, 772 F.3d at 1194.

[172] *Id.* at 1196–97.

[173] *See* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 17 (2013) (stating that constitutional questions would arise "if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications."). *Id.*

it determined that the EAC, and ultimately a reviewing court, could determine the means by which qualifications are enforced.[174]

The above critiques of Kobach echo Justice Thomas's *ITCA* dissent, in which he argued that "[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."[175] To support this point, Justice Thomas pointed to the majority's admission that the power to enforce voter qualifications is central to the power to create them.[176] He also argued that at the founding, states implemented their own enforcement procedures, indicating the right to do so.[177] However, as explained above, the majority did not remove the power to enforce the qualifications, simply the power to autonomously decide how to enforce them.[178] This article asserts that the states previous use of their own enforcement methods does not indicate that the federal government has no right under its election clause power to exercise control over that procedure. The plain Constitutional text makes no references to the enforcement method of voter qualifications being reserved for the states.[179] Further, Justice Thomas does not cite any historical evidence, other than the states' ability to choose enforcement methods at the founding, to support the conclusion that the framers intended to reserve that power to the states under the Qualifications Clauses.[180] Additionally, the

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[174] Kobach, 772 F.3d at 1196.

[175] Inter Tribal Council, 570 U.S. at 36 (Thomas, J., dissenting).

[176] *Id.* at 28 (Thomas, J., dissenting).

[177] *Id.* at 28–29 (Thomas, J., dissenting).

[178] Inter Tribal Council, 570 U.S. at 17.

[179] *See* U.S. CONST. amend. XVII; U.S. CONST. art. 1, § 2.

[180] Inter Tribal Council, 570 U.S. at 29–35 (Thomas J., dissenting).

concerns involved in the EAC completely preventing a state from enforcing a qualification are absent when the EAC is merely determining the necessary method of enforcement as the qualification is still being applied and enforced.[181]

The *Kobach* Court noted that "the Executive Director's decision discussed in significant detail no fewer than five alternatives to requiring documentary evidence of citizenship that states can use to ensure that noncitizens do not register using the Federal Form."[182] Additionally, the Federal Form already contained a requirement that applicants attest to their citizenship by signing the form under penalty of perjury.[183] Requiring voters to attest to their citizenship still enforces the requirement, despite it not being as strict of an enforcement as the States wanted. By focusing on the necessity requirement of the Federal Form, it becomes clear that allowing the EAC to decide what information is "necessary" to enforce a qualification is not the same as deciding if a qualification itself is valid.[184] Therefore, *ITCA* and the reasons mentioned above,[185] indicate Congress has infringed the states' right to enforce its voter qualification.

Critics have also questioned whether states would be able to use their preferred enforcement methods for state elections through other means, such as by using a dual registration system.[186] Kyle Calvin contended that due to legal challenges surrounding dual registration

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[181] *See generally id.* at 17.

[182] Kobach, 772 F.3d at 1197.

[183] 52 U.S.C. § 20508(b)(2).

[184] *See generally* Kengle, *supra* note 109.

[185] *Supra* Section IV.

[186] *See* Calvin, *supra* note 135 at 287–88. *Cf.* Julie Wikle Sims, *ARTICLE: In Purgatory: The Unconstitutionality of the Kansas Voting System*, 49 URB. LAW. 149 (2017).

systems, states would have no option but to fall in line with the EAC's permitted qualifications.[187] But, this argument has proven weak over time because while dual registration systems have faced several legal challenges,[188] states have also successfully implemented such systems. For example, Arizona implemented such a system after *ITCA*, under which the Federal Form registers applicants only for federal elections, and additional proof of citizenship is required to register for state elections.[189] This requirement remains in place today.[190]

In sum, neither *ITCA* nor *Kobach* gave the EAC the power to create voter qualifications.[191] That is a duty reserved for the states.[192] However, these decisions continue to blur the line between state and federal power in federal elections.[193] The judiciary must establish a clear line between what areas of voter registration are "procedural" and what areas are "substantive."[194] If the courts continue to blur the lines and assert that registration as a whole

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[187] Calvin, *supra* note 135 at 287–88.

[188] *See Court Permanently Blocks Kansas' Dual Voter Registration System*, ACLU (Nov. 6, 2016 2 PM), https://www.aclu.org/press-releases/court-permanently-blocks-kansas-dual-voter-registration-system; *Lawsuit Challenges Arizona's Overly Burdensome Dual Voter Registration System*, CLC (Nov. 7, 2017), https://campaignlegal.org/press-releases/lawsuit-challenges-arizonas-overly-burdensome-dual-voter-registration-system.

[189] *See* Mary Jo Pitzl, *Arizona Plans Dual System For Voting*, USA TODAY (Oct. 8, 2013), https://www.usatoday.com/story/news/nation/2013/10/08/ariz-plans-dual-system-for-voting/2944703/.

[190] *See Proof of Citizenship Requirements*, ADRIAN FONTES SECRETARY OF STATE, https://azsos.gov/elections/voters/register-vote-update-voter-information/registration-requirements/proof-citizenship (last visited Feb. 12, 2023).

[191] *See generally,* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 17 (2013); Kobach v. U.S. Election Assistance Comm'n, 772 F.3d 1183 (2014).

[192] *See* Inter Tribal Council, 570 U.S. at 17.

[193] *Supra* Section V subsection A.

[194] *See generally Arizona v. Inter Tribal Council of Arizona, supra* note 42.

falls under the Election Clause, there is a danger that the federal government will encroach upon the states' right to create voter registration requirements.[195]

VI. Public Concerns of Voter Fraud as a Factor in the Necessity Determination

As elections have modernized, concerns over election security have grown exponentially.[196] One 2018 poll found that 55% of Americans are "not too" "or not at all" confident in the security of US elections systems.[197] Further, while 45% of respondents were "somewhat confident" in the system, only 8% were "very confident" in the U.S. election system security.[198] Another poll from 2020 found 37% of people were "very confident" in the U.S. election system, but a similar poll in 2022 saw that number drop to 20%.[199] While these polls indicate that slightly different percentages of Americans trust the security of elections, they all indicate a lack of trust in the United States election system.[200]

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[195] *See generally Arizona v. Inter Tribal Council of Arizona, supra* note 42.

[196] Frank Bajak, *EXPLAINER: Threats to U.S. Election Security Grow More Complex*, AP NEWS (Nov. 3, 2022), https://apnews.com/article/2022-midterm-elections-technologyd6bf92f594343d7a489d40394e56e2a1.

> Disinformation is rampant. Foreign rivals are capable of potent cyber mischief. And the insider threat is considered greater than ever. On top of the physical threats and intimidation of election officials — which is authorities' overriding concern — security experts are particularly worried about tampering by those who work in local election offices or at polling stations.

Id.

[197] *Elections in America: Concerns Over Security, Divisions Over Expanding Access to Voting*, PEW RSCH. CTR (Oct. 29, 2018), https://www.pewresearch.org/politics/2018/10/29/election-security/ (Hereafter "*Elections in America*") (providing a partisan breakdown of the poll results).

[198] *Id.*

[199] Brittany Shepherd, *Americans' Faith in Election Integrity Drops: POLL*, ABC NEWS (Jan. 6, 2022), https://abcnews.go.com/Politics/americans-faith-election-integrity-drops-poll/story?id=82069876.

[200] *See* Noah Pransky, *Half of America Expecting Fraud in Midterm Elections, Poll Finds*, 4WASHINGTON, https://www.nbcwashington.com/news/politics/half-of-america-expecting-fraud-in-

In the specific context of voter fraud,[201] many experts agree that election fraud is not as much of a problem as one might expect.[202] While there are instances of voter fraud every year,[203] the impact of that fraud is not a settled issue. Some argue that voter fraud is nearly nonexistent and most supposed instances are actually just system or human error and, thus, inconsequential.[204] On the other hand, some argue that any amount of fraud can change the results of an election, and states should act to prevent any occurrences of fraud.[205] Regardless of which side is correct, if either, it has become increasingly common for politicians to make claims regarding voter fraud, leading media and the opposing political party to staunchly deny such

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midterm-elections-poll-finds/3186528/ (last updated Oct. 20, 2022 7:10 AM) (finding that "[o]ne in five Americans say fraud will be significant enough to change the balance of power in Congress").

[201] While there are several kinds and definitions of "voter fraud," this article is using a broad definition that includes any intentional manipulation of the vote by an individual or group. For a breakdown of different kinds of fraud, *see Heritage Explains Voter Fraud,* THE HERITAGE FOUND., https://www.heritage.org/election-integrity/heritage-explains/voter-fraud (last visited February 19, 2023), Justin Levitt, *The Truth About Voter Fraud*, BRENNAN CTR. FOR JUST., (2007), https://www.brennancenter.org/our-work/research-reports/truth-about-voter-fraud.

[202] *See* Resources on Voter Fraud Claims, BRENNAN CTR. FOR JUST. (June 26, 2017), https://www.brennancenter.org/our-work/research-reports/resources-voter-fraud-claims.

[203] *See A Sampling of Recent Election Fraud Cases from Across the United States*, THE HERITAGE FOUND., https://www.heritage.org/voterfraud/#choose-a-state (last visited Feb. 19, 2023).

[204] *See* Levitt *supra* note 201, at 7.

[205] *See id.* (giving several recommended courses of action for states to take in order to guard against fraud); *see also* Calvin, *supra* note 135 at 289–92.

claims.[206] As a result, voter fraud has become a serious point of contention among political circles and, as demonstrated above, a topic of concern among voters.[207]

Even government agencies have taken an active role in addressing rumors regarding election security.[208] For example, the Cybersecurity and Infrastructure Security Agency website contains a page dedicated to "inform[ing] voters and help[ing] them build resilience against mis-, dis-, and mal-information (MDM) narratives about election infrastructure."[209] Despite this government reassurance and the intense media and expert reports concerning a lack of evidence of fraud, concerns of widespread voter fraud remain common.[210]

The Help America Vote Act was a bipartisan law that sought to address the concerns of both the Republican and Democratic Parties.[211] However, the Republican Party still felt that

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[206] For example, *see* Christina A. Cassidy, *AP Review Finds Far Too Little Vote Fraud to Tip 2020 Election to Trump*, PBS (Dec. 14, 2021, 4 PM), https://www.pbs.org/newshour/politics/ap-review-finds-far-too-little-vote-fraud-to-tip-2020-election-to-trump. "An [AP] review of every potential case of voter fraud in the six battleground states disputed by former President Trump found fewer than 475." *Id.* The review found that nearly every case was a person acting alone to cast more than one ballot, and not all of the fraudulent votes were counted. While this report only surveyed six states, its results indicated that there was no widespread fraud in the 2020 election. *Id.* *See also* Dan Merica, *Abrams Defends Lack of Concession After 2019 Gubernatorial Loss*, CNN POLITICS (Dec. 3, 2021, 10:21 AM), https://www.cnn.com/2021/12/03/politics/stacey-abrams-concession-2018-georgia/index.html. In another example of politicians claiming election interference, Stacey Abrams claimed her 2018 loss in the Georgia governor's race was caused by "voter suppression" and refused to concede. *Id.*

[207] *See Elections in America, supra* note 197; Shepherd, *supra* note 199; Pranksy, *supra* note 200.

[208] *See Election Security Rumor vs. Reality*, CYBERSECUIRTY AND INFRASTRUCTURE SEC. AGENCY, https://www.cisa.gov/rumorcontrol (last updated Nov. 8, 2022).

[209] *Id.*

[210] *See Elections in America, supra* note 197; Shepherd, *supra* note 199; Pransky, *supra* note 200; Cassidy, *supra* note 206; Merica, *supra* note 206.

[211] *See Help America Vote Act, supra* note 5.

voting reforms opened the door to election fraud.[212] For example, some Republicans have expressed concerns over absentee ballots and ballot harvesting.[213] As evidenced in *ITCA*, one concern that arose out of HAVA is the Federal Voter Registration Form.[214] Much of this controversy is related to state attempts to require forms of voter identification, which has led to discussion on the impact of such requirement on voter confidence in election security.[215] This Section will evaluate the case law and common critiques of it to determine if courts should take increasing voter confidence into account when determining if a particular method of qualification enforcement is "necessary."

In *Purcell v. Gonzalez*, in which the Court was assessing an injunction of Arizona's Prop 200 proof of citizenship requirement which was challenged as violating the Voting Rights Act (VRA), the Court took into consideration the preservation of the integrity of elections.[216] The Court reaffirmed that "a state indisputably has a compelling interest in preserving the integrity of its election process"[217] and that "[c]onfidence in the integrity of our electoral process

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[212] *Making it Easier to Vote vs. Guarding Against Election Fraud*, CONSTITUTIONAL RIGHTS FOUNDATION, https://www.crf-usa.org/bill-of-rights-in-action/bria-24-2-b-making-it-easier-to-vote-vs-guarding-against-election-fraud (last visited Feb. 18, 2023).

[213] *See* Ken Paxton, *OP-ED: Mail-In Ballots: A Threat to Democracy*, KEN PAXTON ATT'Y GEN. OF TEX. (Sept. 1, 2020), https://www.texasattorneygeneral.gov/news/releases/op-ed-mail-ballots-threat-democracy.

[214] *Id.*

[215] *See generally id.*

[216] Purcell v. Gonzalez, 549 U.S. 1, 3–4 (2006). The Court ultimately vacated the Ninth Circuit's "injunction suspending the voter identification rules" after determining the appellate court had failed to give deference to the district court's findings and provided no explanation for permitting the injunction. *Id.* at 6.

[217] *Id.* at 4. The Court noted that, "[c]ountering the State's compelling interest in preventing voter fraud is the plaintiffs' strong interest in exercising the 'fundamental political right' to vote." *Id.* (citing Dunn v. Blumstein, 405 U.S. 330, 336 (1972)).

is essential to the functioning of our participatory democracy."[218] Two years later, in *Crawford v. Marion County Election Board*, the Supreme Court evaluated the constitutionality of a different state voter identification law.[219] The Court again took into consideration the public perception of voter fraud, stating, "[p]ublic confidence in the integrity of the electoral process has independent significance, because it encourage[s] citizen participation in the democratic process."[220] Finally, in *Brnovich v. Democratic National Committee*, a 2021 case in which a voting law was challenged under the VRA, the Court noted, "[f]raud can … undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome."[221]

The Court's decisions on this issue have faced staunch criticism.[222] For example, one study evaluating data "about the relationship between strict voter ID laws, citizen confidence, and voter turnout" and sought to show that the court's adoption of voter perception as a legitimate concern is erroneous.[223] By using several polls and methods to analyze the data, the

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[218] *Id.* The Court went on to state that, "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Id.*

[219] Crawford v. Marion County Election Board, 553 U.S. 181 (2008).

[220] *Id.* at 197.

[221] Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2340 (2021). In this case, Arizona's ballot collection and "out-of-precinct" rule, which required those voting in person on election day to vote in their assigned precincts, were challenged as violating Section 2 of the VRA. *Id.*

[222] *See* Charles Stewart III, Stephen Ansolabehere & Nathaniel Persily, *Revisiting Public Opinion on Voter Identification and Voter Fraud in an Era of Increasing Partisan Polarization*, 68 STAN. L. REV. 1455, 1458–59 (2016); Joel A. Heller, Note, *Fearing Fear Itself: Photo Identification Laws, Fear of Fraud, and the Fundamental Right to Vote*, 62 VAND. L. REV. 1871; Michael Alvarez, Delia Bailey, Jonathan Katz, *THE EFFECT ON VOTER IDENTIFICATION LAWS ON VOTER TURNOUT*, CALTECH/MIT VOTING TECHNOLOGY PROJECT (Oct. 2007), http://dspace.mit.edu/bitstream/handle/1721.1/96594/vtp_wp57.pdf?sequence=1.

[223] Stewart, *supra* note 222, at 1458–59.

study's authors determined that strict voter ID laws do not correlate with voter confidence or participation.[224] While the study was heavily focused on the partisan breakdown, this article is more focused on the overall conclusions the research produced.[225] The results indicated that "if there has been an effect of enacting strict photo ID laws, it has been subtle."[226] By comparing data between states with the minimum required voter identification laws, and those with strict voter identification laws, the authors concluded that "there is no evidence that the passage of strict photo ID laws has led to a decrease in the belief of the frequency of voter impersonation."[227] The study directly addressed the concerns expressed in *Crawford* and *Purcell*

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[224] *Id.* at 1458–59. Describing the purpose of their research and article, the authors stated,

> Beliefs about voter fraud have been at the center of justifications for the passage of voter ID laws. If it is true that "voter fraud drives honest citizens out of the democratic process and breeds distrust of our government," and that the presence of strict voter ID laws instills a greater sense of citizen trust and confidence in our government, then the growth in the number of voter ID laws over the past decade should have decreased the public's belief that fraud is prevalent in elections and increased citizen trust and confidence in government. The public opinion evidence is contrary to this expectation and, once again, consistent with the pattern of opinion we would expect from this becoming an issue polarized by partisanship.

Id. at 1466.

[225] *See id.* at 1458–59.

[226] *Id.* at 1472.

[227] *Id.* at 1472.

> Finally. . . we explore whether living in a state that had adopted a strict photo ID law influenced attitudes about voter impersonation fraud. The most direct comparison is between respondents living in states that had adopted strict photo ID laws and those that had maintained ""HAVA minimum" laws, i.e., laws that only required documentary identification under the conditions specified in the Help America Vote Act (HAVA) for first-time voters who had registered by mail. In 2008, there were only two states in the "strict photo ID" category, Georgia and Indiana. In 2012 that number had grown to four (adding Kansas and Tennessee); in 2014, three more states had become strict photo ID states (adding Mississippi, Texas, and Virginia). Conversely, there were 24 states (including the District of Columbia) that had HAVA-minimum laws in 2008, dropping to 19 in 2014.

that voter turnout would decrease due to perceptions of fraud.[228] Ultimately, the study found there was little correlation between fraud perception and voter turnout.[229] Rather, this study affirmed a previous study,[230] in finding that voter ID laws have virtually no "effect in improving voter confidence."[231]

Additionally, some have critiqued the lack of guidance for courts when they are asked to consider voter concerns about election fraud.[232] Such authors have focused on the difficulties of defining "fear" and the problems such an inquiry can create in adjudication.[233] Boldly stating,

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Id.

[228] *Id.* at 1474.

[229] *Id.* at 1473.

[230] Michael W. Sances & Charles Stewart III, *Partisanship and Confidence in the Vote Count: Evidence from U.S. Nat'l Elections Since 2000*, 40 ELECTORAL STUD. 176, 176 (2015) (indicating that voters whose party won tend to have more confidence in the system as opposed to those whose party lost (the "winner effect").)

[231] Stewart, *supra* note 223, at 1479.

> Consistent with Sances and Stewart, we find that by far the most important predictor of whether a respondent believes votes were counted as cast, at all levels of government, is whether the candidate from the respondent's party won the popular vote in the respondent's state. After controlling for the "winner's effect," there is generally only a weak and nonsignificant relationship between the stringency of ID laws and a belief that votes were counted as cast.

Id. It is interesting to note that the study did indicate that there is a difference in Republican and Democrat confidence, with the former being more confident in strict photo ID states, and the latter being more confident in HAVA-minimum states. *Id.*

[232] Joel A. Heller, *Fearing Fear Itself: Photo Identification Laws, Fear of Fraud, and the Fundamental Right to Vote*, 62 VAND. L. REV. 1871, 1874 (2019). This author argued that "[t]o justify their acceptance of voter fear as rationale for lawmaking and for the sake of consistency and manageability, courts must articulate the legal principles behind such decisions and establish a generally applicable standard for the evaluation of such laws." *Id.* at 1873–74.

[233] See *id.* at 1888–89.

"[f]reedom from fear is not a fundamental right, but the right to vote is," one author expressed concern that in an effort to quell some voters' fears of fraud, other voters' right to vote would be harmed.[234] No matter what course of action was taken, considering voter fear or not, voter confidence in the system would be damaged because some voters' perspectives would be disregarded.[235] One 2007 study indicated that strict voter ID laws may depress voter turnout.[236]

> In his inaugural address, President Roosevelt warned against acting pursuant to fear, since fear is often "nameless, unreasoning, unjustified." Reliance on perceptions such as fear is generally a tenuous rationale for lawmaking. Fear is often irrational; it may or may not have a basis in fact. And even if reasonable at one point in time, fear, like other forms of public opinion, is fickle and malleable; worse, it is easily manipulable. Finally, fear is a vague, undefined harm. *Id.* at 1885.

[234] *Id.* at 1873 (noting that "[f]ear in the photo ID context is particularly problematic, since such laws completely deny the right to vote to one group of legitimate voters – individuals without a photo ID, who are typically indigent, elderly, or members of minority populations – in order to calm the fears of another group of voters.").

[235] *Id.* at 1890. In explaining that considering voter fears is illogical because one voter fear being addressed may create a new fear for other voters, this author argued that "steps undertaken to address one harm may create new harms, what Professor Sunstein refers to as 'substitute risks.' The most obvious substitute risk stemming from a photo ID law is the disenfranchisement of voters who lack an ID." *Id.* at 1890–91. The author went on to critique the Court, stating that when it "expressed concern in Purcell v. Gonzalez for voters who 'feel disenfranchised' by their fear of fraud, it failed to acknowledge that new, empirically unfounded restrictions on the right to vote that fall disproportionately on certain groups of voters may cause those voters to feel disenfranchised." *Id.* As a result, "[s]uch voters are unlikely to have much confidence in a system that appears to single them out for harsher treatment. Even if the government is justified in responding to voter fear, it quickly faces a no-win situation, as one group will always fear that their votes have been somehow discounted." *Id.*

[236] Michael Alvarez, Delia Bailey, Jonathan Katz, *THE EFFECT ON VOTER IDENTIFICATION LAWS ON VOTER TURNOUT*, CALTECH/MIT VOTING TECHNOLOGY PROJECT (Oct. 2007), http://dspace.mit.edu/bitstream/handle/1721.1/96594/vtp_wp57.pdf?sequence=1.

> Looking first at trends in the aggregate data, there is no evidence that voter identification requirements reduce participation. Once we turn to the individual-level data, however, we find that the strictest forms of voter identification requirements — combination requirements of presenting an identification card and positively matching one's signature with a signature either on file or on the identification card, as well as requirements to show picture identification — have a negative impact on the participation of registered voters relative to the weakest requirement, stating one's name. In general, there does not seem to be a discriminatory impact of the requirements on some subpopulations of registered voters, in particular minority registered voters; however we do find evidence that the stricter voter identification requirements do depress turnout to a greater extent for less educated and lower income populations. *Id.* at 3.

Opponents to the *Crawford* opinion have also recognized that vote dilution is not a valid harm in this context, as a voter's fear of fraud does not actually dilute their vote like actual fraud.[237]

Criticisms of using voter concerns or fears in the adjudication of voting and election issues have merit because, as demonstrated by the studies discussed above, the data shows that enacting voter identification laws, such as a proof-of-citizenship requirement, have little effect on the mindset and concerns of voters.[238] Additionally, due to the diversity of voters in the United States, some voters's concerns may differ from other voter's concerns.[239] This data and logic compels the conclusion that the unsoundness of the state interest in maintaining election integrity and considering voter concerns of fraud will remain when determining if a method of enforcement was "necessary."

Despite the criticism, *Brnovich* indicates the Court intends to continue its consideration of the public concern over election fraud as a valid state interest.[240] These cases all show that when evaluating the legitimacy of election security laws, the Supreme Court has found that maintaining the integrity of elections is a valid reason for states to implement such laws.[241] Based on this precedent, it would make sense for courts to look at public perception when reviewing a state's decision to require additional information from individuals seeking to register

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[237] Heller, *supra* note 232, at 1896. "[T]he Purcell Court seemingly fails to recognize the disparity in value between a fearful vote and no vote at all." *Id.*

[238] *See* Stewart, *supra* note 222, at 1480.

[239] *See* Heller, *supra* note 232.

[240] *See generally*, Brnovich v. Democratic Nat'l Committee, 141 S. Ct. 2321, 2332 (2021). The recent decision in *Brnovich*, in which the Court took public concerns into account, indicates the Court does not intend to pivot from this approach. *See id.*

[241] *See id.*; Crawford v. Marion County Election Board, 553 U.S. 181, 197 (2008); Purcell v. Gonzalez, 549 U.S. 1, 3–4 (2006).

to vote.[242] However, there are important differences between these past cases and the addition of requirements on the Federal Form that indicate that may not be the case. For instance, the required "necessity" determination here differs from the VRA Section 2 "totality of the circumstances" test applied in *Brnovich* and the weighing of the evidence in *Purcell*.[243] In *Brnovich*, the Court specifically noted that Section 2 of the VRA "does not require a State to show that its chosen policy is absolutely necessary or that a less restrictive means would not adequately serve the State's objectives."[244] The NVRA, on the other hand, states that the form "may require only such identifying information as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process."[245] So, does the NVRA's necessity requirement mean courts cannot take public perception into account?

Unfortunately, the Supreme Court has not provided a clear answer to this question.[246] The statement in *Brnovich* is dictum, and the Court has not addressed this question otherwise.[247] In *ITCA,* the Court did not clearly indicate who was responsible for the necessity determination nor how a reviewing court should determine if the information is "necessary."[248] Rather, the

[242] *See* Brnovich 141 S. Ct. at 2332; Crawford 553 U.S. at 197; Purcell 549 U.S. at 3–4.

[243] *See* Brnovich 141 S. Ct. at 2332 (requiring a totality of the circumstances evaluation under the VRA); Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (When determining whether to provide an injunction, "the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures.").

[244] Brnovich, 141 S. Ct. at 2345–46.

[245] 52 U.S.C.S. § 20508(b)(1).

[246] *See* Brnovich, 141 S. Ct. at 2345–46.

[247] *See id.*

[248] Arizona v. Inter Tribal Council of Az., Inc. (ITCA), 570 U.S. 1 (2013).

Court's decision provided somewhat conflicting implications on the issue.[249] The Court noted that a state can request that the EAC alter the Federal Form to include the information "*the state deems necessary* to determine eligibility."[250] This language might suggest that whether information is necessary is for the states to decide; it could also simply indicate that a state would first need to conclude it was necessary before sending it to the EAC in the first place, giving the EAC control over the statutory necessity determination.[251] But the Court also stated that if the EAC refused to amend the form, "Arizona would have the opportunity to *establish in a reviewing court* that a mere oath" is insufficient.[252] This indicates that the state must provide evidence in a reviewing court to prove that the information is necessary, and the court would then hold the power to decide if the States evaluation was correct. Further, by stating the state could "establish . . . a mere oath *will not suffice* to effectuate its citizenship requirements," it seems implied that the NVRA's necessity requirement demands the least restrictive means.[253]

While the Supreme Court has left several questions remaining, some circuit courts have attempted to fill in the gaps. Relying on *ITCA*, the Tenth Circuit in *Kobach v. U.S. Election Assistance Commission* determined that information is not "necessary" when there are other ways to enforce a qualification.[254] This certainly indicates that, at least in this circuit and others

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[249] *See generally*, *id.* at 19–20.

[250] *Id.* at 19.

[251] See *id.*

[252] *Id.* at 20.

[253] *Id.*

[254] Kobach v. U.S. Election Assistance Commission, 772 F.3d 1183, 1197 (2014)

> [T]he Executive Director's decision discussed in significant detail no fewer than five alternatives to requiring documentary evidence of citizenship that states can use to ensure that noncitizens do not register using the Federal Form. Kobach and Bennett do not dispute

following suit,[255] states must prove to a reviewing court that the means by which it seeks to enforce qualifications is the least restrictive.[256] The court also determined that if the EAC denied a state's request and the state challenged that denial under APA, the agency was required to show the court such necessity existed.[257] The Tenth Circuit's decision essentially left the necessity determination up to the courts.[258] "[T]he EAC has a duty to include a state's requested text on the Federal Form only if a reviewing court holds, after conducting APA review, that excluding the requested text would preclude the state from enforcing its voter qualifications."[259]

So, while current precedent indicates that public concerns of voter fraud should be a consideration, empirical studies and logical conclusions lead this article to conclude that voter confidence in elections is unlikely to be changed by the inclusion of additional requirements on the voter registration form and should therefore play a minimal role in the court's necessity requirement. And, considering the dicta in *Brnovich* in cohesion with the Tenth Circuit's

> that these means exist, and merely contend that they are overly onerous. But, in ITCA, the Court stated that the states must carry their burden "to establish in a reviewing court that a mere oath will not suffice." ITCA, 133 S.Ct. at 2260. Generalized complaints that the memorandum's suggested approaches present logistical difficulties do not meet ITCA's standard.

Id.

[255] *See* League of Women Voters of United States v. Newby, 838 F.3d 1, 11 (2016) (finding that "[o]nly after the Commission (or a reviewing court) determines necessity is the Commission 'under a nondiscretionary duty to include [a state proof-of-citizenship] requirement on the Federal Form.'").

[256] *See* Kobach, 772 F.3d 1199.

[257] *Id.*

[258] *See id.*

[259] *Id.* at 1196.

decision in *Kobach*, courts should not consider public perception when determining if additional information is "necessary" to enforce voter qualifications.

VII. Conclusion

Setting voter qualifications for both state and federal elections is a right that belongs to the states.[260] However, this right collides with Congress's right to control the "times, places, and manner" of federal elections.[261]

This collision has occurred as the Supreme Court has determined that voter registration falls under the power of Congress but that the power to set voter requirements remains with the states.[262] The Election Assistance Commission is caught in the middle of this power struggle, as it has the duty to maintain the Federal Voter Registration Form, including deciding what information is necessary.[263] As demonstrated by *ITCA*, the struggle comes to a head when the states determine that information is necessary to determine voter qualifications, but the EAC disagrees.[264] Both the historical background of the Election and Qualification Clauses, as well as Supreme Court precedent demonstrate that any attempt by the EAC, or any other federal entity, to create or control the states' ability to create voter qualifications is a constitutional violation.[265]

While the Court has continued to defend that right of the states, its failure to create a firm distinction between the two powers has left the door open to potential constitutional violations by

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[260] U.S. CONST. art. 1, § 2; U.S. CONST. amend. XVII.

[261] *See* U.S. CONST. art. 1, § 4, cl. 1.

[262] *See supra* Section IV.

[263] *See supra* Section II.

[264] *See supra* Section III.

[265] *See supra* Section IV.

the federal government. The best solution to this is for the Court to remove the language suggesting voter registration as a whole is procedural and within Congress's reach.[266] There is no evidence indicating that the states' right to set qualifications carries with it the right to decide how it should be enforced, provided that it is enforced in some way.[267] While historically the states decided how to enforce their qualifications, there is nothing in the constitutional text to indicate this was the intention of the framers.[268] Additionally, the discriminatory ways states used this ability indicate that it may be an area the federal government should step in to prevent future misdeeds.[269] Instead, the Court should clarify that setting voter qualifications remains with the states, and the EAC and a court reviewing an amendment denial may only determine whether a method of enforcement is necessary and allowed to be put on the form.

Further, the lack of clarity surrounding the form's necessity requirement may lead to courts using unreliable factors, such as public perception of voter fraud.[270] Studies have shown that voter concerns of election fraud are not decreased by the enaction of stricter qualification enforcement.[271] Courts should evaluate the impact, or rather the lack of it, as evidence that such a factor should not be considered when determining if a specific voter requirement is necessary.

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[266] *See supra* Section V.

[267] *See supra* Section V.

[268] *See supra* Section IV.

[269] For example, "African Americans in the South faced tremendous obstacles to voting, including poll taxes, literacy tests, and other bureaucratic restrictions to deny them the right to vote." *Voting Rights Act (1965)*, NATIONAL ARCHIVES, https://www.archives.gov/milestone-documents/voting-rights-act (last visited February 8, 2022).

[270] *See generally, supra* Section VI.

[271] *Supra* note 215.

The Constitution establishes the states' rights to set voter qualifications.[272] The Court should continue to defend this right, but base this defense on clear and established definitions and factors that indicate a true need for specific qualification enforcement methods.

[272] *See* U.S. CONST. art. 1, § 2; U.S. CONST. amend. XVII.