

January 11, 2012

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Health Care, Immigration, and Voting: The Supreme Court and Judicial Power

Posted: 1/10/12 03:38 PM ET

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[Much has been written](#) over the last few months about the "big three" cases concerning health care, voting rights, and immigration policy that the Supreme Court has decided to hear during the second half of its 2011-2012 term. These cases are often discussed together in the context of the ongoing debate over the appropriate power of the Supreme Court. In reality, however, only two of the cases implicate serious issues of judicial authority, and both of those cases should be resolved in favor of Congress. The third case has little to do with the debate over the proper judicial role.

The primary constitutional issue in the [health care](#) case is whether Congress' power to regulate "commerce among the states," gives it the authority to require Americans to purchase health insurance so that a complicated and overarching system of medical care will function more effectively and cover more people.

The case raises fundamental questions about Congress' power to regulate the national economy. The issues in the Texas case ([which was argued on Monday](#)) involve Section 5 of the Fourteenth Amendment, which gives Congress the power to enforce the "equal protection of the law," and Section 2 of the 15th Amendment, which gives Congress the power to stop discrimination in voting on account of race. Pursuant to these express grants of authority, Congress has required states with checkered histories of anti-minority voting procedures and practices to obtain permission (or in legal terms preclearance) from the Department of Justice (or a special court), before implementing new voting rules. One of the foremost election law experts in the country, Rick Hasen, has [warned](#) that "this crown jewel of the civil rights movement" may be in jeopardy, and, recently the conservative Cato Institute filed [an amicus brief](#) in the Texas case asking the Court to formally review the constitutionality of the Voting Rights Act. Although the Court may (and should) decide the case on narrow grounds, there are ominous signs the Court may invalidate the Act finding it beyond Congress' power, if not in this case, then is [other redistricting cases](#) that may get to the Court this term. Even apart from the constitutional issues, this case directly raises questions concerning the role the federal courts should play in our political and election systems.

The voting rights cases and the individual mandate controversy raise similar constitutional questions because they involve important policy determinations by Congress based on less than clear constitutional text with somewhat contested historical foundations.

The third of the big cases, however, is fundamentally different. The [Arizona immigration case](#), in its current form, raises no constitutional questions. The issue the Court will tackle is whether Arizona's new immigration law, which among things, requires local police to determine the immigration status of anyone they stop if the police "have reasonable suspicion" that the person is an "unauthorized immigrant," is invalid, not because it violates the federal Constitution, but because it violates federal statutory law. Under the Supremacy Clause, Congress has the power to preempt state laws in all areas where Congress has the power to enact legislation. There is no issue in this case as to whether Congress has passed an invalid immigration law or has violated the Constitution in any way. Rather, the United States Government is arguing that the state of Arizona has violated the will of Congress.

No matter what the Court rules, or who wins or loses the Arizona case, Congress has the final say on this immigration question, not the Supreme Court. If the Court rules in favor of Arizona, Congress can pass a much more specific law making its intent crystal clear that federal immigration policy would be impeded by Arizona's actions, and if the Court strikes down the Arizona law, then Congress could make it clear in future laws that what Arizona has done does not interfere with national immigration policy. Because it is almost unanimously conceded that Congress has the authority to control immigration, this case rests on congressional intent not congressional power.

It is important that these three cases not be lumped together in the debates currently swirling around the Supreme Court. For those of us who believe in judicial deference to elected officials, the health care and voting act cases should be resolved in favor of deferring to Congress. The individual mandate contained in the Affordable Care Act may or may not be good public policy but it is part of a massive regulation of economic and commercial activity. As Chief Justice John Marshall held in [the very first opinion](#) defining the commerce clause in 1824, the commerce power is only limited by other constitutional provisions and by the requirement that the challenged law concerns economic activity that involves more states than one. There is nothing in the Constitution that says Congress can regulate commerce "unless it does so through an individual mandate," and the ACA is a commercial statute that affects more than a single state. For the Court to impose a non-textual "no mandate" limitation on the commerce clause where it does not exist in the Constitution would be an improper exercise of its power.

Similarly, it is Congress that has the "power" to enforce the equal protection clause of the Fourteenth Amendment as well as the voting guarantee in the Fifteenth Amendment. Those Amendments were ratified to give African-Americans equal rights after the Civil War. If Congress believes that certain states or local governments have a history of enacting voting restrictions designed to impede the rights of minority voters, that determination should be given significant deference by the Supreme Court, and Congress has made that determination as to the district at issue in the Texas case. The Court should leave this issue to Congress and the Department of Justice which is authorized by Congress to enforce the Act. If the states are truly upset, the people can elect politicians who will repeal the Voting Rights Act.

The Arizona immigration case may or may not raise difficult issues of statutory interpretation but it raises no question of judicial activism, no matter how the case comes out. Any decision by the Court can be changed by Congress, and hence the people. The same is simply not true about the other cases if the Court decides to invalidate the individual mandate or overturn or weaken the Voting Rights Act. Hopefully, the Court will leave those laws alone.