

A Federalist's Dilemma

Three cases before the U.S. Supreme Court pose a conflict for some who usually back states' rights.

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BY LISA SORONEN

As a state legislator, federalism is important to you, and you know where you stand on the subject. You are pro-state rights and anti-federal encroachment. It's simple, right?

Then consider the Affordable Care Act, Arizona's immigration law and the court cases over Texas' interim electoral map. These three examples may put your federalism principles and your political views on a collision course. It turns out it's just not that simple.

It is a rare Supreme Court term when the issue of federalism is raised in all the prominent cases, and these three are the biggest of this term. The issue of states' rights is central in each case, with the court's decision most likely to extend beyond the specific facts being litigated.

Lisa Soronen is executive director of the State and Local Legal Center in Washington, D.C.

Affordable Care Act

The court is considering four questions in the health reform case—two of which address federalism head on. First, the court will decide whether the individual mandate—that almost all Americans must obtain health insurance by 2014 or pay a fine—violates the Commerce Clause of the U.S. Constitution. One of the reasons the 11th U.S. Circuit Court of Appeals concluded the individual mandate is unconstitutional is that insurance and health care are traditional areas of state concern. Second, the act requires states to expand Medicaid coverage or lose all federal Medicaid funding, not just the additional funding needed to cover the expansion. The court will decide whether the expansion is permissible under the Constitution's Spending Clause or fails the coercion test because states are essentially compelled to participate in Medicaid.

Whatever the court decides will affect both legal doctrines beyond the individual mandate and Medicaid. The argument that Congress can regulate inactivity—not buying health insurance—is novel. Likewise, the court has only twice ruled on the coercion argument. That means any ruling—much less a ruling regarding a program as big as Medicaid—is significant.

Arizona Immigration

The Supreme Court also will decide whether federal law pre-empts four provisions of Arizona's immigration statute. The state has argued that the law "authorizes cooperative law enforcement and imposes sanctions that consciously parallel federal law." The Ninth U.S. Circuit Court of Appeals concluded, however, that all four provisions are preempted by federal immigration law.

1. Requiring police to determine if a person is in the country legally:

The court concluded the federal Immigration and Naturalization Act allows state and local police to aid in immigration enforcement only under the supervision of the U.S. attorney general.

2. Making it a crime not to carry immigration papers:

This requirement is preempted, the court concluded, because Congress didn't mention state participation in this section of the immigration act, though it did in other sections of the law.

3. Making it a crime for undocumented immigrants to work:

The court noted the federal law sanctions only employers.

4. Allowing police officers to arrest a person who is likely to be deported:

"States do not have the inherent authority to enforce the civil provisions of federal immigration law," the court concluded.

Other states have adopted similar immigration laws. These laws, too, may be preempted by federal law, depending on how the court rules.

Texas Redistricting

The issue in the Texas redistricting case was how much a federal district court, when creating interim electoral maps, must defer to a state legislature's plan. Texas gained four seats in the U.S. House of Representatives as a result of population gains in the 2010 census, requiring the Texas Legislature to redraw its electoral maps. The Republican Legislature's redistricting plan would likely allow Republicans to gain three of the four additional seats.

Under Section 5 of the Voting Rights Act, redistricting plans in states with a history of voting discrimination must be pre-cleared to make sure they are not discriminatory on the basis of race or color. While pre-clearance in the Texas case was still being litigated in a federal district court in Washington, D.C., the candidate filing period for the 2012 election was approaching. So a federal district court in San Antonio drew an interim redistricting map that would likely give Democrats two of the new congressional seats and, according to Texas officials, substantially changed all but nine of the 36 districts. Texas sued,

claiming the federal district court should have deferred to the Legislature's map when drawing the interim map.

The Supreme Court's opinion in this case was favorable to the Texas Legislature. The court instructed the district court to "take guidance from the state's recently enacted plan in drafting an interim plan. That plan reflects the state's policy judgments on where to place new districts and how to shift existing ones in response to massive population growth."

The Dilemma

Even if you are a committed federalist you may, because of your political views, reject the states' rights position in one or all of these cases.

Unlike some of the most prominent federalism cases of the last few decades, all these involve politically charged topics that divide mostly on party lines. In contrast, previous questions of whether the federal government could ban guns near schools (*United States v. Lopez*), criminalize violence against women (*United States v. Morrison*), or condition federal highway funds on states raising the drinking age (*South Dakota v. Dole*) lack the same partisan divisiveness of the three cases the court is deciding this term. Even if your political views about one of these ear-

lier cases didn't match your usual position on state's rights, you could have avoided talking, thinking and reading about them.

The Supreme Court's current federalism trilogy collision is unavoidable, however, for at least three reasons beyond the charged partisan nature of the cases.

First, they involve issues state legislatures currently might be considering, such as redistricting.

Second, they involve not just hot-button issues, but the most hot-button issues of the day. Arizona's immigration law, for example, is the first of its kind, is less than two years old, and has been rapidly replicated in other states.

Third, these cases affect the daily lives of ordinary Americans in a way few Supreme Court cases do. Even if the Affordable Care Act does not affect someone personally, some provision of it—such as expanded coverage for adult children or the pre-existing condition ban—may affect a family member or a close friend.

When federalism principles and partisan politics don't align, how is the conflict resolved? First, accept that such conflicts are inevitable. Federalism doesn't take outcomes into account. At some point, even the staunchest federalist will support federal expansion on some state issue. This time you don't have to resolve the dilemma, the Supreme Court will.

Also, remember this: No matter what the court decides, everyone will get something they want—a victory for federalism, for the issue they support or both. ■

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