THE SUPREME COURT AND UNCONSTITUTIONAL CONDITIONS: FEDERALISM AND INDIVIDUAL RIGHTS

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The Supreme Court's record when enforcing the general prohibition against unconstitutional conditions has been quite mixed. Though the Court's efforts have been fairly vigorous in regard to individual rights, its efforts in regard to national power's constitutional limits vis-a-vis the states have been minimal. I agree with these choices. Nonetheless, the Supreme Court's rationale for the distinction between individual rights and states' rights is seriously flawed.

Here is a brief review of the Court's position. For nearly four decades the Supreme Court, in regard to individual rights, has quite forcefully held that the Government cannot accomplish indirectly — through conditioning the allocation of benefits such as employment or tax subsidies — that which it is barred from doing directly.

The 1958 case of *Speiser v. Randall*[1] held that the state could not deny a property tax exemption to members of the Communist Party. In 1963, *Sherbert v. Verner*[2] held that the state could not deny unemployment compensation benefits to a Sabbatarian who left her job because of her religion. In 1984, *Federal Communications Commission v. League of Women Voters*[3] held that Congress could not award subsidies to public broadcasting stations on the condition that they not engage in any editorializing.

On the other hand, the Court's record on unconstitutional conditions for the exercise of individual rights has not been unexceptionably protective. Its most egregious failure has been in regard to abortion. The important cases are *Maher v. Roe*[4] in 1977, and *Harris v. McRae*[5] in 1980, in which the Court reviewed state and federal limitations on the use of medical

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[1] 357 U.S. 513 (1958).

[2] 374 U.S. 398 (1963).

[3] 468 U.S. 364 (1984).

[4] 432 U.S. 464 (1977).

[5] 448 U.S. 297 (1980).

benefits for an abortion. The issue in those cases was not, as it is often phrased, whether there is some constitutional entitlement to government funding for the full enjoyment of a constitutional right. The issue, then, was not whether government must support public transportation because there is a constitutional right to travel, or whether the government must supply people with funds adequate to exercise their free speech rights and rights of free association. Rather, the *Maher* and *Harris* cases presented situations in which both states and the Federal Government funded all medical costs including the cost of childbirth, but excluded abortion.

Roe v. Wade[6] is a very difficult and highly problematic decision. However, under the principle of *Roe v. Wade*, the abortion-funding cases constitute a plain example of intentional discrimination against the exercise of a constitutional right. The record demonstrates that these laws were enacted to discourage abortion, and were not enacted for any other purpose. This is only slightly different from when a state funds private organizations engaged in racial segregation, but does not fund organizations which promote racial integration, or when a state funds the campaign costs of one major political party, but does not fund the costs of a different party. In sum, because there is a constitutional right to an abortion, and a constitutional right to childbirth, it appears that if government funds the exercise of one right, and deliberately refuses to fund the exercise of another because it disapproves of that right, it is a clear violation of the prohibition against unconstitutional conditions.

In contrast, I believe *Rust v. Sullivan*,[7] a recent, highly-publicized case involving the prohibition of abortion counseling by any agency concerned with family planning which receives federal funding, did not present an unconstitutional condition. Indeed, given the existing state of the law, the decision was probably correct. It is clear that no matter what the scope of the First Amendment right to free speech may be, it does not ordinarily prevent government from telling its employees what advice they may give in the course of their employment. For example, the Department of Agriculture can surely instruct its agricultural agents that they may not recommend use of certain toxic pesticides, nor may these agents urge that certain crops be grown when this would be against Department policy.

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[6] 410 U.S. 113 (1973).

[7] 500 U.S. 173 (1991).

The real problem in *Rust* was not simply that the Government was telling its funded agencies what advice their employees could, or could not, give in order to carry out a government-sponsored program. Instead, government required these employees to favor one constitutional right (childbirth) over another (abortion). As I said earlier in my review of the *Maher* and *Harris* cases, this deliberate discrimination against the exercise of a constitutional right violates the bar on unconstitutional conditions. However, the Court had already held that this practice was valid. Therefore, *Rust v. Sullivan* followed quite naturally from reasoning of the *Maher* and *Harris* decisions.

Finally, I will now discuss unconstitutional conditions and national power versus states' rights. I have three main points. First, I will state my own general view: the Supreme Court should not decide constitutional questions with regard to the scope of national power versus the scope of states' rights. Instead, such issues ought to be treated as non-justiciable political questions. Final resolution of these issues should rest with other political branches. Indeed, in *Garcia v. San Antonio Metropolitan Transit Authority*,[8] the Supreme Court partially adopted my theory.

In summary, the states have strong representation in the national political process, and the substantive constitutional issue of where the line should be drawn between states' rights and federal power lends itself to a more practical, than principled, solution. A helpful way to describe the constitutional federalism issue is to ask whether the states are separately competent to deal with the problem under consideration, or whether a national solution is instead needed. This issue is a matter with regard to which Congress has special qualifications that the judiciary does not have.

Secondly, whether you agree or disagree with my theory, under the existing doctrine, the unconstitutional conditions principle has little practical significance in the federalism area because there is virtually nothing that Congress does not have the regulatory power to accomplish. The Supreme Court's doctrine since 1937, has been that there is very little, if anything, Congress cannot do under the Commerce Clause, except it cannot violate constitutionally protected individual rights.

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[8] 469 U.S. 528 (1985).

In 1976, there was "a blip" when *National League of Cities v. Usery*[9] was decided. In 1985, this "blip" was removed from the screen by the Court's holding in *Garcia*. However, in 1992, *New York v. United States*[10] held that Congress cannot "commandeer" state legislative processes. This decision may be more than "a blip" and is a potentially very expansive ruling, especially when it is applied to unfunded mandates in many areas such as environmental and health care issues. However, *New York v. United States*[11] only concerns Congressional regulation of the states themselves. In this Term, the Court is again deciding a Commerce Clause issue in *United States v. Lopez.*[12] This case questions the constitutionality of a federal statute forbidding an individual to possess firearms within 1,000 feet of a school. My prediction is that the Supreme Court will reverse the lower court's decision, and uphold the constitutionality of this exercise of congressional power over individuals (rather than the states themselves). The true surprise will be if there are many dissenting votes.

Third, assuming there is no federal regulatory power over an activity, the Supreme Court has effectively abdicated all responsibility in respect to unconstitutional conditions in this area, in both theory and practice. In theory, the Court held that Congress may achieve indirectly through the spending power that which it is forbidden to do directly through use of one of its regulatory powers. Thus, Congress may "encourage" states to do certain things that it cannot command them to do. In fact, the Court has declared that Congress may impose "pressure" on states through use of conditioned spending as long as the "encouragement" or "pressure" does not amount to "coercion."

If I believed the Court should engage in judicial review in this area, I would disagree with the Court's approach that "coercion" ought to be the test for unconstitutional conditions. Certainly, that is not the test in regard to constitutional provisions protecting individual rights. For example, suppose Con-

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[9] 426 U.S. 833 (1976).

[10] 112 S.Ct. 2408 (1992).

[11] *Id.*

[12] United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993), *cert. granted*, 114 S.Ct. 1536 (1994) (No. 93-1260). [On April 26, 1995, the Supreme Court (5-4) affirmed the lower court's decision that the statute was beyond Congress' power under the Commerce Clause. No. 93-1260, 1995 U.S. LEXIS 3039 (Apr. 26, 1995)].

gress decreed that persons would receive a dollar each year from the government if they practiced Catholicism. I do not think many people would become Catholics to receive a dollar a year. However, it is clear that this completely non-coercive, non-pressure-laden, and unencouraging law is unconstitutional.

The Court has been hesitant to impose marked limits on the Congressional spending power because it has adopted the Hamiltonian view that the spending power is an independent power. There is a feeling that if the spending power is an independent power, then Congress must be able to engage in conditioned spending. However, that does not logically follow. The Court could hold that Congress has an independent spending power, but does not have authority to condition its spending on conduct it could not directly require using one of its regulatory powers. For example, suppose Congress has no power to require tiny lakes throughout the nation be free of pollution. Nonetheless, if Congress wishes to spend federal money to accomplish this goal, it may accomplish it through the independent use of the spending power.

This approach would bar Congress from doing indirectly what it is forbidden to do directly and would suggest different results in several cases. For example, in *South Dakota v. Dole*,[13] the Court assumed Congress could not regulate the drinking age, but still permitted Congress to withhold five percent of Federal highway funds from any state which did not raise the drinking age to 21. Also, in *Oklahoma v. Civil Service Commission*,[14] when Congress wished to extend a nonpolitical civil service to the states by limiting federal funds for state employees based upon the states placing restrictions upon the states officials' partisan political activities, the Court also allowed it. Both of these cases would have had different outcomes if the Court had seriously applied the principle of unconstitutional conditions.

Finally, in practice, as well as in theory, the Court has failed to provide any real protection against unconstitutional conditions in the federalism area. It has even refused to recognize "coercion" when it has "stared the Court in the face". The most notable example of this "refusal to see" is the landmark case of *Steward Machine Company v. Davis*,[15] which involved

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[13] 483 U.S. 203 (1987).

[14] 330 U.S. 127 (1947).

[15] 301 U.S. 548 (1937).

Congress' efforts to establish an unemployment compensation system. The federal statute imposed a payroll tax on employers within the state. The proceeds went into the federal government's general funds. The Government, then, in effect, returned ninety percent (90%) of these funds to those states adopting a federally-approved unemployment compensation system. There was no refund or credit, however, if the employer's state did not comply. State Governments may be slow, but they are not dumb. They all immediately complied with this statute and adopted federally-approved unemployment compensation programs. There is no clearer example of coercion. The national government took the states' money. The states received nothing in return if they did not comply with the federal government's demands. However, the states did regain ninety percent (90%) of the funds if they established a proper unemployment compensation system.

In summary, although I do not believe the Court should be an enforcer of the values of federalism through its power of judicial review, if the Court chooses to be active in this area, there is room for it to expand its authority in regard to unconstitutional conditions.