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## Border Patrol

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## Border Patrol

by Carl E. Schneider

Recently, the Supreme Court has encountered cases that concern perhaps our weightiest bioethical issue—how medical care is to be rationed. But this does not mean that the Court must therefore assess the justice of rationing, as many people incited by many journalists now fondly and firmly believe. In explaining why, we begin with a story about how Learned Hand remembered saying one day to Justice Holmes, “Well, sir, goodbye. Do justice!” Holmes turned quite sharply and said: “That is not my job. My job is to play the game according to the rules.”

If the Court doesn't do justice, what does it do? Partly, it does the crucial if dismal work of interpreting ambiguous federal statutes. But more centrally, the Supreme Court is a border guard that confines legal actors within the boundaries of their authority. It shows them where the frontiers are and sends them packing when they cross illegally. It tends the borders between individuals and their governments, between the state and federal governments, among the branches of the federal government, and even within branches of government, especially the judiciary.

The Court is additionally constrained from grappling with what justice requires by its border-patrol methods. Borders are best which are clear; good fences make good neighbors. The Court thus devises and deploys bright-line rules and rules of thumb, rules that sacrifice something in justice to achieve something in efficiency. Such rules give legal actors relatively clear notice of

where the boundaries are and how boundary disputes will be resolved, thus reducing the many costs of uncertainty and litigation.

Consider *Pharmaceutical Research and Manufacturers of America v. Walsh*.<sup>1</sup> In 2000, Maine proved that Yankee ingenuity is not dead by adopting the “Maine Rx Program.” Maine Rx used the state's buying power to negotiate lower drug costs for Medicaid patients. It then asked drug companies to sell their products at the lower rate to *all* Maine residents. Should a company refuse, the state would make its drugs available to Medicaid patients only on advance approval.

An association of drug companies challenged Maine Rx in federal court. But you can't just tell a court you don't like a statute or even that it's foolish. You need a legal argument. What could the drug companies say? If the people of Maine acting through their legislature want to do foolish things or wise things companies don't like, they may.

The Framers of the Constitution gave the states primary authority to legislate in areas of domestic concern, like health care. However, the federal government may spend money and regulate interstate commerce, and in the last century it used this authority to reach deeply into areas originally confided to the states. A classic example is Medicaid. Congress made the states an offer they could not refuse: It proffered contributions to health care programs for the poor if the states would adopt programs that met various federal standards. The

states acceded, and Congress enacted Medicaid.

Maine, you will recall, used Medicaid funds to pressure drug companies to lower their rates for everyone. The drug companies argued that the Maine statute (Maine Rx) therefore conflicted with the federal statute (Medicaid). The Supremacy Clause of the Constitution provides that federal law preempts conflicting state law. The drug companies, then, did not contend that Maine Rx was unfair or that it recklessly disrupted free markets; they contended that Medicaid preempts Maine Rx. In other words, they said Maine had crossed the borders of its authority.

There are boundaries within the judicial branch, and one of them allocates to the District Courts (federal trial courts) the initial authority to hear claims. The drug companies—now the petitioners—asked such a court to declare the law invalid and to issue a preliminary injunction putting the law in abeyance during the litigation since, they said, they were being irreparably damaged by a law that was surely void. To receive the injunction, they had to show that they would probably convince the court by the end of the litigation that the statute was invalid.

The petitioners introduced affidavits contending that prior-approval requirements deter doctors from prescribing drugs. If so, said the petitioners, Medicaid recipients were hindered from receiving some drugs (those of companies not acquiescing in Maine Rx) in order to serve the interests of non-Medicaid recipients (everybody else in Maine). Maine replied, so what? The Medicaid statute allows us to require prior approval, and it matters not why we choose to do so.

The district court disagreed and granted the preliminary injunction. Maine went to the U.S. Court of Appeals for the First Circuit, which quashed the injunction. The petitioners asked the Supreme Court to hear them, and the Supreme Court agreed.

The Supreme Court confronted two boundary disputes: one between the federal government and Maine, and one between the district court and the appel-

late court. But the Supreme Court did not try to identify optimal borders between the actors. Rather, it used rules of thumb to simplify its analysis. Unfortunately, those rules were not entirely consistent with each other. Indeed, so inconsistent were they that, while six justices joined in upholding the First Circuit's decision, they could not agree on a reason.

Essentially, the majority invoked two rules of thumb. First: state statutes presumptively do not conflict with federal statutes. In interpreting statutes, courts generally defer to democratically elected bodies and assume that legislatures are acting legitimately and that federal and state governments are cooperating. If this means a court sustains a state statute that Congress thinks impedes a federal statute, then Congress can always exercise its power of preemption more explicitly. Furthermore, as one justice noted, Congress had already protected its Medicaid statute by authorizing the Secretary of Health and Human Services to reject important aspects of state Medicaid plans. Finally, buttressing this first rule of thumb was a second: preliminary injunctions are disfavored, since they are issued before any court has heard all the evidence and arguments.

In light of these two rules of thumb, the majority subjected Maine Rx only to sympathetic scrutiny. Maine Rx did not conflict with the Medicaid statute because the justices could imagine ways Maine Rx promotes Medicaid goals: Maine Rx serves medically needy people, just as the Medicaid does. Making drugs cheaper might help people remain healthy enough to stay off the Medicaid rolls, thus saving Medicaid dollars. And prior authorization would actually benefit Medicaid clients, since it would discourage doctors from prescribing inappropriate drugs and encourage them to prescribe cheaper ones.

The three dissenters relied on yet a third rule of thumb: appellate courts should overturn preliminary injunctions only if the trial court "abused its discretion" in issuing it. Appellate courts are loath to say a trial court has abused its discretion, so the rule of thumb basically means that in these matters appellate

courts should defer to trial courts, which are closer to the evidence and the situation than appellate courts. In addition, courts want to discourage "interlocutory appeals," appeals before the trial court has issued its final decision, since they can prolong litigation and can require appellate courts to confront questions that might have been resolved had the litigation proceeded uninterrupted.

Animated by this rule of thumb, the dissenters thought the Medicaid purposes the majority attributed to Maine Rx absurdly speculative. The dissenters observed that the trial court had held no hearings and that there was thus no evidence that Maine Rx would actually promote those purposes. And the dissenters said, Come on, it's obvious that Maine Rx puts barriers between Medicaid patients and the drugs of companies that resist the pressure of Maine Rx. Furthermore, if Maine Rx could use Medicaid to raise money to subsidize drug purchases by non-Medicaid patients, what stops states from using their Medicaid power to raise money for ridiculously unrelated projects like building bridges?

So what does this case tell us about the desirability of any rationing method or any other health care issue? Nothing. The Court did not even decide whether the Medicaid statute preempts Maine Rx. The Court concluded that the trial court abused its discretion in issuing the preliminary injunction, but this just means that the plaintiffs are back in the District Court seeking a permanent injunction. They have not yet had, but presumably will want, a chance to prove that Maine Rx impedes the Medicaid statute. And the HHS Secretary may still attempt to use his authority to cause Maine to repeal its statute.

Indeed, one might wonder whether the Supreme Court did not violate one of its own rules of thumb. The Court's principal job is not to correct errors by courts below. Litigants have one bite at that apple, and that is in the Courts of Appeal. The Supreme Court's principal job is to resolve disagreement among those Courts of Appeal about points of law and, where an issue is exceptionally

important, to advise those courts even before disagreements arise. The Court's rule of thumb is thus something like "when in doubt, refuse to hear a case." The Court receives requests in thousands of cases and typically rejects all but about a hundred.

Were I a justice, I would have voted to "DIG" the case—to "dismiss" the petition for certiorari as "improvidently granted." The Court granted that petition because "the questions presented are of national importance." Perhaps, but "national importance" usually means *really* important; for example, is the draft unconstitutional? In any event, the Court took the case before the trial court had gathered evidence and made a final ruling, before the HHS Secretary had proffered his department's expert views, before the First Circuit had contributed its mature reflections, and before the various Courts of Appeal had begun their conversation. The Court consequently had little evidence about Maine Rx's actual effects and little help in deciding whether it affronted the Medicaid statute. Perhaps consequently, the Court could proffer no lucid guidance to lower courts or the state and federal governments.

But such is life on border patrol. This is constitutional law in a literal sense. The Constitution constitutes a government. The Supreme Court tries to ensure that its constituent parts work and work together as the Framers intended. To interpret the Court's pursuit of that assignment as an attempt to assess the wisdom and justice of legislation is to mistake steel for silver.<sup>2</sup> Steel may lack the glitter, but it's got the strength, and it should be assayed and appreciated for what it is.

1. 123 S Ct 1855 (May 19, 2003).

2. While it is not the Court's assignment to decide what justice requires, it is conventionally said that its members cannot help being influenced even in border-patrol work by their private sense of the justice of the policies at stake. No doubt. But consider that the majority here comprised Justices Stevens, Souter, Ginsburg, Breyer, Scalia, and Thomas and that the dissenters were Justices O'Connor and Kennedy and Chief Justice Rehnquist.