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Border Patrol

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R
cently, the Supreme Court has
encountered cases that concern
perhaps our weightiest bioethical
issue—how medical care is to be ra
tioned. 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 jus
tice!” 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 bound-
daries of their authority. It shows them
where the frontiers are and sends them
packing when they cross illegally. It
does it do?

There are boundaries within the judi
cial 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 in
valid and to issue a preliminary injunc
tion 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 injunc
tion, they had to show that they would
probably convince the court by the end of
the litigation that the statute was in
valid.

The petitioners introduced affidavits
contending that prior-approval require
ments deter doctors from prescribing
drugs. If so, said the petitioners, Medic
aid recipients were hindered from receiv
ing some drugs (those of companies not
acquiescing in Maine Rx) in order to
serve the interests of non-Medicaid re
cipients (everybody else in Maine).

Maine replied, so what? The Medicaid
statue allows us to require prior ap
approval, 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 leg
islate in areas of domestic concern, like
health care. However, the federal gov
ernment may spend money and regulate
interstate commerce, and in the last cen
thury it used this authority to reach
deeply into areas originally confined to
the states. A classic example is Medicaid.
Congress made the states an offer they
could not refuse: It profered contribu
tions 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 con
flicting state law. The drug companies,
then, did not contend that Maine Rx
was unfair or that it recklessly disrupted
free markets; they contended that Med
icaid preempts Maine Rx. In other
words, they said Maine had crossed the
borders of its authority.

The district court disagreed and
granted the preliminary injunction.
Maine went to the U.S. Court of Ap
peals 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 fed
eral government and Maine, and one be
tween 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 statute that Congress thinks impedes a federal statute, then Congress can always exercise its power of preemption 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. 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 conventional-ly 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.