Conditional Federal Spending as a Regulatory Device

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In 1936, the spending power was freed from the constraining doubt that it might be usable only to implement other enumerated powers of Congress. In *United States v. Butler*, decided that year, the Supreme Court declared that it was a freestanding power to expend money for the general welfare.[1] While the actual holding of the case was that a major program for farm relief was invalid, that result was soon bypassed both practically and conceptually.

Today, the federal spending power is an important tool for shaping our economy, our government, and our society. Debates about our political agenda turn at least as much on conflicting priorities for spending as on opposing policies for regulation. Although spending decisions may generate much political controversy, few constitutional questions are involved,[2] and they are not our concern in this context.

But there is more to the story than that. Government money is not normally handed out without restrictions. Conditions of one kind or another have almost always been imposed, at least to make sure that the money serves the purposes for which it was intended. From this point, it was a comparatively short step to cross over to the use of conditions to induce or deter conduct.

In many instances, the conduct could have been constitutionally controlled anyway, through the direct powers of Congress. For ex-

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1. United States v. Butler, 297 U.S. 1, 65-66 (1936).

2. For example, spending in aid of religion may give rise to establishment clause problems, and an increase in the salary of an incumbent president would violate U.S. CONST. art. II, § 1, cl. 6.

ample, since Congress may legislate to enforce the fourteenth amendment, it may give financial support to help school systems to desegregate, or refuse otherwise available funds to those that fail to do so. In such cases, there is no serious constitutional problem; the conditional spending can be regarded as a necessary and proper means for carrying out the regulatory power.

There are situations, however, in which the regulation would not have been within other powers of Congress, and the necessary-and-proper justification would not have sufficed. What are the tests for the constitutionality of conditional spending in those cases? In other words, in what circumstances may government condition spending so as to control conduct it could not regulate directly?

An answer of "none" is clearly unacceptable. Much that is salutary, and often uncontroversial, is handled in just that fashion. On the other hand, an answer of "all" is even more frightening. Such an answer would threaten compromises that emerged in the Constitutional Convention and doctrines that have evolved over the ensuing 200 years.

To what extent may the federal government bribe or threaten the states into surrendering some of their inherent powers? Or use money as a device to coerce individuals into giving up liberties otherwise protected by the Bill of Rights or other parts of the Constitution?[3] It may well be that these are two separate problem areas, with few common denominators. There are not many instances in which the courts have drawn on precedents or analysis applicable to one area in deciding a case arising in the other. Perhaps different standards are appropriate.

There does not seem to have been a single case in which conditional federal spending has been declared invalid by the Supreme Court on the ground that it interfered with state autonomy. While the Court has several times indicated in dicta that there are limits on this power,[4] it has always found them inapplicable. On the other hand, although there has been only one Supreme Court case invalidating federal conditional spending impinging on individual rights,[5] the approach of the Court implies that there will be more careful scrutiny. Moreover, there are many Supreme Court decisions invalidating conditional spending by the states that infringed upon individ-

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3. This paper is confined to these two problem areas, thus excluding questions relating to whether conditional spending may enable Congress (a) to regulate matters not related to its enumerated powers, or (b) to interfere with the separation of powers among the branches of the federal government. *See* Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1125, 1161 n.253 (1987).

4. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 207 (1987); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 n.13 (1981); Lau v. Nichols, 414 U.S. 563, 569 (1974); Steward Mach. Co. v. Davis, 301 U.S. 548, 590-91 (1937).

5. *See infra* note 29 and accompanying text.

ual rights.[6] Where the issue is one of federal intrusion on state autonomy, no analogue in state legislation can arise.[7]

Control experiments as devices for analysis of judicial decision making are rarely possible. But we can find some illumination by comparing two cases, each involving one of these two problem areas, in which two portions of the same statute with related policy goals were both challenged and both cases were decided on the same day.

A principal purpose of the Hatch Act[8] was the reduction of partisan political activity on the part of government employees.[9] One provision required the firing of members of the federal civil service who engaged in certain types of such activity.[10] Another provided for reductions of federal highway grants to a state if they were administered by an official who was also a political party leader.[11] Both provisions were upheld, but on different reasoning. In *United Public Workers v. Mitchell*,[12] the restrictions on federal employees were sustained on the basis of balancing the rights of the employees against the perceived need for insulating the federal service from partisan activity.[13] But in *Oklahoma v. Civil Service Commission*,[14] upholding the condition on highway grants to the states, no comparable balancing analysis was offered — rather the Court made a curt comment that seemed only to say that if the state did not like the condition it need not take the money.[15]

In the *Oklahoma* case,[16] and several times since, the Court has specifically indicated that some intrusions on state autonomy not permissible through direct regulation might nevertheless stand up where they were made as conditions to federal money. For example, in *National League of Cities v. Usery*,[17] invalidating the application

6. *E.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); Wyman v. James, 400 U.S. 309 (1971); Sherbert v. Verner, 374 U.S. 398 (1963).

7. State laws interfering with the functioning of the federal government would, of course, run afoul of the supremacy clause. U.S. CONST. art. VI, cl. 2.

8. 5 U.S.C. §§ 1501-08 (1982).

9. *See id.*

10. 5 U.S.C. § 1502 (1982).

11. 5 U.S.C. § 1506 (1982).

12. 330 U.S. 75 (1947).

13. *Id.* at 96-99.

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

15. "Oklahoma adopted the 'simple expedient' of not yielding to what she urges is federal coercion." *Id.* at 143-44 (citing Massachusetts v. Mellon, 262 U.S. 447, 482 (1923)).

16. *Id.* at 143.

17. 426 U.S. 833 (1976).

of the Fair Labor Standards Act to employees of state and local government, the majority opinion suggested in a footnote that the same result would not necessarily follow if adherence to federal minimum wage and maximum hour rules were made a condition to eligibility for federal funds.[18] In *South Dakota v. Dole*,[19] the Court upheld a law that denied some federal highway funds to states that failed to adopt twenty-one as the minimum age for drinking.[20] Direct federal regulation of the drinking age might have been barred, despite the relevance of the commerce power, because of possible home-rule implications of the twenty-first amendment; the Court assumed such invalidity arguendo, but nevertheless upheld the provision under the spending power.[21]

Perhaps the Court regards the states as strong enough politically to be able to protect themselves against most federal regulation that they believe threatens their interests. That premise seems to underlie *Garcia v. San Antonio Metropolitan Transit Authority*,[22] which overruled *National League of Cities* and revived the authority of Congress to prescribe minimum wages for state and local government employees; Professor Herbert Wechsler's "political safeguards of federalism"[23] were clearly influential.[24]

It seems likely that the Court regards the states as even more capable of protecting themselves politically against conditional spending that infringes on their basic autonomy. Apart from the *National League of Cities* footnote,[25] there have been a number of cases in which the Court has affirmed or let stand lower court decisions upholding conditional spending that put pressure on the states to do things that Congress probably could not have compelled through direct regulation.[26]

We ought, however, to take a fresh look at this apparent assumption of the Court that conditional spending is less of a threat to the states than is direct regulation. When appropriation of federal money for the states is under consideration, the lobbying efforts of states are necessarily directed toward securing such funds, and obtaining as much as possible. A diversion of lobbying effort, to prevent the placing of strings on these funds, would often be avoided,

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18. *Id.* at 852 n.17; *see also id.* at 880 (Brennan, J., dissenting).
19. 483 U.S. 203 (1987).
20. *Id.*
21. *Id.* at 206.
22. 469 U.S. 528 (1985).
23. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).
24. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. at 550-52.
25. *See supra* note 18 and accompanying text.
26. *See* Rosenthal, *supra* note 3, at 1138-39 & nn.152-60.

especially if the objection was more a matter of principle than because of direct and immediate damage to the state's ability to govern itself. Further empirical evidence is needed to explore whether the political clout of the states is more or less effective when the issue is conditional spending rather than direct regulation.

There are other reasons for hesitating to invalidate conditional federal grants to the states; indeed, in some circumstances we can conclude that our federalism is served rather than threatened by use of that device. We have a strong tradition that, with comparatively rare exceptions, police forces should not be part of the federal establishment but employees of the state and local governments. Conditional spending gives the federal government a mechanism for obtaining obedience to some federal policies without needing federal police. The fifty-five mile per hour speed limit and twenty-one year old drinking age are legislated and enforced by the states under threat of loss of federal highway funds if they fail to comply. Similar techniques may be effective in enforcing federal environmental regulations.[27]

There are some other variables that may be relevant. In past periods of generous federal subsidies to states and localities, such money constituted a significant fraction of the recipient governments' budgets; threats to cut off the subsidies could be coercive. Now, with sharp cutbacks in federal grants, it might be thought that the threat of withholding would be less effective. That may not be true, however, in the present period of readjustment, with many states themselves squeezed into cutting back on important programs. But it might be questioned whether constitutionality should depend on the vicissitudes of the fiscal cycle.

When we turn to interferences with individual rights, some other considerations come into play. The restraints on direct regulation by the federal government are more specific, and their enforcement is more frequent. The subordination of powers of Congress other than the spending power to constitutional restrictions such as those contained in the Bill of Rights is generally quite clear. For example, Congress may regulate interstate commerce but may not forbid the interstate transportation of *The New York Times*. But similar constitutional restraints do not apply as clearly to the spending power. We may assume that in some circumstances the right to strike is constitutionally protected; yet, Congress may deny food stamps to

27. *See id.* at 1135-36 & n.146.

strikers who might otherwise be eligible for them.[28]

I have found only one Supreme Court case holding that the conditioning of federal money on the relinquishment of individual rights is unconstitutional. In *Federal Communications Commission v. League of Women Voters*,[29] the Court held that Congress could not forbid radio and television stations that accepted funds from the Corporation for Public Broadcasting to broadcast editorials. One swallow may not make a summer, but if we see enough members of other species of migratory birds we may draw some conclusions. There has been a steady trickle of cases involving invalidation of state laws that used the power of the purse to put pressure on the exercise of individual rights.[30] An example cited frequently, and repeatedly followed by the Supreme Court, is *Sherbert v. Verner*,[31] in which the Court held that a state unemployment compensation provision which denied benefits to a Seventh Day Adventist who refused to work on Saturdays was unconstitutional.

What yardsticks are appropriate for judging the constitutionality of such statutes? Some decisions have been justified on the ground that the recipient has consented; others have found such consent vitiated by duress. Contract doctrines may be helpful, but should not be decisive; there are other interests at stake. We would not enforce even a private contract, free though it might be from duress or fraud, under which a person sold himself into slavery. The government is not, and should not be, as free as private parties to buy consent where public harm may result. It certainly should not have the options of a private employer to condition its employment contracts on relinquishment of rights to freedom of speech or religion or on the submission of employees to unreasonable searches and seizures.[32]

But suppose the other party to a contract with the government has his or her options broadened by entering into it? Where a medical student's education is paid for by the government in return for a commitment to spend a certain amount of time after graduation giving medical care in underserved neighborhoods, the interests of both the government and the medical student are advanced. Such an agreement ought not to be invalidated. But suppose, instead, that the government offers to pay tuition if the student agrees that after graduation he or she will not — or will — perform abortions. An opposite result seems indicated; yet, both parties may perceive them-

28. Lyng v. International Union, 485 U.S. 360 (1988); *see* Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 5, 96 (1988).

29. 468 U.S. 364 (1984).

30. *See supra* note 6 and accompanying text.

31. 374 U.S. 398 (1963).

32. *See* Linde, *Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector*, 39 WASH. L. REV. 4, 76 (1964).

selves to be better off as a result of the contract.

One factor that might limit the use of agreements that leave both the government and the other party better off than before is the likelihood of externalities — adverse effects upon persons other than the contracting parties, or upon some general public interest. In this regard, consider the case of *Snepp v. United States*.[33] Central Intelligence Agency employees were required, as a condition of employment, to agree that they would not, without prior government approval, publish anything learned in the course of their work.[34] Snepp had been a Central Intelligence Agency operative in Vietnam. He violated this pledge after leaving the Agency by writing a book critical of a number of aspects of the Central Intelligence Agency's activities that he had observed — most dramatically, the abandonment without warning of many Vietnamese who had helped us, when we departed from Saigon.[35] Although there was no showing that he had revealed any classified information, the Supreme Court imposed a constructive trust on his royalties.[36] The Court's per curiam opinion, without the benefit of briefs or arguments on the merits, was based largely on breach of contract. It did not rest primarily on the government's right to protect its intelligence activities by imposing such restrictions,[37] which might well have been persuasive.

Here, Snepp had apparently consented to the abridgment of his first amendment rights. But the right of the public to know about the government's conduct or misconduct in Vietnam was also cut off. There was good reason to believe that the subject of Snepp's writing was of substantial importance to the American public in keeping them informed about some activities of their government.[38] One result of enforcing such agreements is the drying up of information needed for public evaluation of government policies and practices — particularly information of its mistakes and wrongdoing, where the incentive to cover up is likely to be greatest.

A conclusion that both parties to an agreement are better off than they would have been without it should be the beginning of the in-

33. 444 U.S. 507 (1980) (per curiam).
34. *Id.* at 507-08.
35. *See* United States v. Snepp, 595 F.2d 926, 930-31 (4th Cir. 1979), *rev'd*, 444 U.S. 507 (1980) (per curiam).
36. 444 U.S. at 515-16.
37. *See id.*
38. *See* Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

quiry, not the end.[39] Economic efficiency is an appropriate objective of law, but not necessarily the sole criterion of constitutionality. The Constitution did not enact Pareto Optimality any more than it enacted Herbert Spencer's Social Statics.

Another problem in measuring who will be better or worse off is selecting the appropriate baseline. If government pays for all medical needs of the poor, and then stops paying for the cost of abortions, some prospective recipients are worse off than before. If government pays for nothing, and then adopts a program of paying for all medical costs except those for abortion, nobody is worse off than before. But it strains common sense to suggest that the boundary line between constitutionality and unconstitutionality should be drawn between those two situations.[40]

I have suggested elswhere[41] that with respect to individual rights, there should be a rebuttable presumption that a restriction that would have been unconstitutional if imposed through direct regulation would also be invalid if generated by conditional spending. This presumption would not be applicable to a "restriction" that was merely the purpose of the expenditure itself — for example, the rendition of services as part of an employment contract, or of attendance and performance by the recipient of a university scholarship. And the presumption would be rebuttable if the net effect was to increase the recipient's options without any serious adverse effect on other individuals or society. I have attempted to test this standard against a number of actual and hypothetical cases, with results that, not surprisingly, seemed persuasive at least to me.[42] But others should try alternative formulations, and subject them to similar tests, in the interest of developing a more satisfactory standard.

It should, perhaps, not be surprising that different yardsticks are employed in determining the validity of conditional spending where state government autonomy is at stake, than when the issue is one of individual rights. There appears to be a much stronger argument that the states are better able to protect themselves through the political process[43] than are the dissenters, minorities, and others who may comprise a large fraction of those likely to have their individual rights infringed. There has been a strong theme in American constitutional theory supporting the conclusion that judicial intervention is more appropriate when political remedies for abuse are not readily

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39. *See* Epstein, *supra* note 28, at 9-10.

40. *See* Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1359-63 (1984).

41. Rosenthal, *supra* note 3, at 1152-60.

42. *Id.* at 1156-60.

43. *See supra* text accompanying notes 22-24.

available.[44]

If, in fact, conditional spending is a serious and not sufficiently recognized threat to our constitutional balances, the problem may also be a growing one. It seems to be so, but I have not undertaken a count. Perhaps conditional spending is merely being noticed more. In any event, a partial list of recent uses is interesting.

Federal funding of some highway construction and maintenance expenses of the states has been a frequent subject of conditions. I have mentioned an early example — forfeiture of some funds if the state officials handling the federal money were also political party leaders.[45] Later came an easier case, the fifty-five mile per hour speed limit. This could probably have been legislated directly under the commerce power,[46] but the federal government was reluctant to assume direct enforcement responsibility. More recently, we have had the twenty-one year old drinking age, upheld in *South Dakota v. Dole*, discussed above.[47] One factor that may explain the ease with which these restrictions were sustained is that in each case the fraction of federal subsidy at risk was fairly small, suggesting that the states could have resisted without suffering crippling financial loss if they really thought their integrity was threatened.[48] Another factor is that, despite the small price of resistance, most states complied with little grumbling.[49] The power to condition is not necessarily the power to destroy.

Another recent use of the spending power was the conditioning of federal subsidies to the Long Island Railroad (owned and operated by a New York state agency) upon its prohibition of smoking in passenger cars.[50] Congress has also imposed a condition on federal grants to the states for Aid to Families with Dependent Children (AFDC) programs. The states must enact laws prescribing formulas for child support by divorced or separated parents that conform to a federal model.[51]

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44. *E.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); J. ELY, DEMOCRACY AND DISTRUST (1980); L. LUSKY, BY WHAT RIGHT? (1975); Wechsler, *supra* note 23.

45. *See supra* text accompanying notes 16-18.

46. Nevada v. Skinner, 884 F.2d 445 (9th Cir. 1989).

47. *See supra* text accompanying notes 19-21.

48. South Dakota v. Dole, 483 U.S. 203, 211 (1987).

49. *Id.*

50. *See* N.Y. Times, Dec. 23, 1987, § II, at 9, col. 1; *id.*, Jan 23, 1988, § I, at 29, col. 5.

51. 42 U.S.C. §§ 654, 667 (1982 & Supp. V 1987).

The child support regulations relate so significantly to the funding needs for AFDC that on that ground alone the conditions appear reasonable, even though they put financial pressure on many states to alter their own policies drastically. Thus far, there have not been any challenges to these regulations in court.

The Court in *South Dakota v. Dole* pointed out the relevance of the twenty-one year old drinking age to the safety purpose of the highway spending program,[52] but the link is certainly an attenuated one. Perhaps a stronger argument was the effect of state-by-state variations in drinking age on drinking and driving by young people crossing state boundaries — an externality especially appropriate for federal intervention.[53]

We can hardly speak of state autonomy with respect to the District of Columbia; Congress has plenary power to govern the District. But within the last year Congress has, for reasons of its own, sought to put financial pressure on the government of the District to adopt laws it didn't want to vote for. Rather than simply enacting federal statutes overriding disapproved provisions of District law, Congress used the device of conditioning appropriations for the District on its government's dancing to Congress' music. A cutoff of all federal appropriations for the District was threatened if its local government did not overturn laws requiring District of Columbia residence for certain jobs and forbidding insurance companies from requiring AIDS testing for insurance. Although compromises on these issues were worked out, such a statute was enacted by Congress to put pressure on the District of Columbia government to overturn a decision that Georgetown University could not bar gay organizations from its campus. The City Council challenged the statute, and a federal district court held it unconstitutional.[54] The decision was not predicated on autonomy of the District government, but on the denial of first amendment rights to members of the City Council, who would have preferred to vote against the measure.[55]

The Executive Branch's adoption of conditions seems to have become more frequent in the individual rights area. Such conditions have repeatedly been imposed without any express congressional

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52. 483 U.S. at 208.

53. *Id.*

The yardstick that I have suggested with respect to individual rights — a rebuttable presumption that conditional spending may not coerce where direct regulation would be invalid — is not readily workable in connection with intrusions on state government autonomy, because of the paucity, as baselines, of precedents concerning the validity of direct federal regulations that have the same effect. Moreover, the Court has stated quite strongly that in this area the fact that direct regulation would be invalid is not especially significant. *See id.* at 212.

54. Clarke v. United States, 705 F. Supp. 605 (D. D.C. 1988), *aff'd*, 886 F.2d 204 (D.C. Cir. 1989).

55. *Id.* at 609-10.

command, and sometimes where even implied authority is dubious. In 1984, the Reagan Administration announced a new policy denying family planning grants, under the foreign aid program, to health service providers and similar agencies that performed, gave referrals, or even provided neutral advice concerning abortions.[56] This prohibition specifically applied to potential recipients that used funds derived from other sources for these purposes. A federal district court decision that these restrictions were unconstitutional has been reversed on appeal.[57]

This regulation was followed soon after by a similar, although less stringent, restriction on funds for family planning within the United States[58] (held unconstitutional by two of the three district courts that have considered it),[59] and by amendments to the Adolescent Family Life Act of 1981 that used selective funding to discourage any references to abortion in youth counseling programs.[60] Also, the Legal Services Corporation recently adopted a regulation refusing federal funds to local legal aid organizations that, again even though using only nongovernment money, engaged in several types of instructional programs and grass-roots lobbying seemingly protected by the first amendment.[61] This regulation was overturned by Con-

56. *See* Policy Statement of the United States of America at the United Nations International Conference on Population, 2d Sess., Mexico City, Aug. 6-13, 1984; Rosenthal, *International Population Policy and the Constitution*, 20 N.Y.U. J. INT'L L. & POL. 301 (1977).

57. DKT Memorial Fund, Ltd. v. Agency for Int'l Dev., 691 F. Supp. 394 (D. D.C. 1988), *rev'd*, Nos. 88-5243, 88-5266 (D.C. Cir. Oct. 10, 1989) (WESTLAW, 1989 W.L. 118764). A number of analogous state laws had earlier been invalidated. Planned Parenthood v. Arizona, 789 F.2d 1348 (9th Cir.), *aff'd sub nom.* Babbitt v. Planned Parenthood, 479 U.S. 925 (1986); Planned Parenthood Ass'n Chicago Area v. Kempiners, 568 F. Supp. 1490 (N.D. Ill. 1983); *see also* Planned Parenthood v. Minnesota, 612 F.2d 359 (8th Cir.), *aff'd*, 448 U.S. 901 (1980); Valley Family Planning v. North Dakota, 489 F. Supp. 238 (D.N.D. 1980), *aff'd on other grounds*, 661 F.2d 99 (8th Cir. 1981). These precedents are vulnerable to any overruling or sharp curtailment of Roe v. Wade, 410 U.S. 113 (1973).

58. 53 Fed. Reg. 2922 (1988).

59. Planned Parenthood Fed'n of Am. v. Bowen, 680 F. Supp. 1465 (D. Colo. 1988) (order granting preliminary injunction); Planned Parenthood Fed'n of Am. v. Bowen, 687 F. Supp. 540 (D. Colo. 1988); Massachusetts v. Bowen, 679 F. Supp. 137 (D. Mass. 1988), *en banc reh'g granted*, No. 88-1279 (1st Cir. Aug. 9, 1989). *Contra* New York v. Bowen, 690 F. Supp. 1261 (S.D.N.Y.1988), *aff'd sub nom.* New York v. Sullivan, No. 88-6204 (2d Cir. Nov. 1, 1989) (WESTLAW, 1989 W.L. 131669).

60. 42 U.S.C. 300z to 300z-10 (1982 & Supp. V 1987); *see* Hirt, *Why the Government is Not Required to Subsidize Abortion Counseling and Referral*, 101 HARV. L. REV. 1895 (1988); Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 HARV. L. REV. 1916 (1988).

61. 51 Fed. Reg. 27,539 (1986); 52 Fed. Reg. 28,434 (1987).

gress at the instance of a Senate Appropriations subcommittee.[62]

Conclusion

This subject has not been receiving scholarly or judicial attention commensurate with its importance. I hope satisfactory principles can be formulated, by which to separate valid from invalid conditions. It will not be enough for such constructs to reflect some overriding political or economic philosophy, or to be merely internally consistent. Any theory ought to be tested against such case law as there is (although a proponent is of course not obliged to agree with the cases or tailor his or her theory to conform to them). More importantly, it should be tested against a wide range of hypothetical cases to ensure that it would be likely to conform to, rather than undercut, our constitutional system.

62. Act of Dec. 22, 1987, Pub. L. No. 100-202, 101 Stat. 1329-33.