Is Constitution Day Constitutional?

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We are here to observe Constitution Day,[1] but this is not exactly a spontaneous gathering. The university has been told, by no less an authority than the United States Congress, that we *must* hold a program about the Constitution at this time every year. But must we, really?

The statute in question is an appropriations act that directs the expenditure of money on a great variety of activities, including financial assistance to educational institutions like George Mason. One provision, known as the Byrd Amendment,[2] states:

> Each educational institution that receives Federal funds for a fiscal year shall hold an educational program on the United States Constitution on September 17 of such year for the students served by the educational institution.[3]

Since we're observing Constitution Day, let's resist the lawyer's habit of beginning with constitutional law (sometimes referred to as the Living Constitution), and start instead with something very different, namely the Constitution. This interesting document (sometimes thought of as the Dead and Just as Well Forgotten Constitution) is preserved, mummy-like, in the National Archives on the aptly named Constitution Avenue in downtown Washington.

The question I want to ask is whether

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1 September 17 is designated as Constitution Day and Citizenship Day by statute. 36 U.S.C. § 106. Because September 17 falls on a Saturday this year, we are observing it a day early.

2 This is not by any means the only Byrd Amendment to have graced the Statutes at Large during the long career of West Virginia's senior Senator.

3 Consolidated Appropriations Act, 2005, Pub. L. No. 108–447, § 111, 118 Stat. 2809, 3344–45 (Dec. 8, 2004). The statute includes a proviso saying that if September 17 is on a weekend, the program can be held the previous or following week.

the Constitution gives Congress the authority to dictate that we hold the program that the Byrd Amendment purports to require. This Amendment applies to educational institutions that receive Federal funds, and I suppose Congress can impose conditions on such grants only if it has the authority to make the grants in the first place. Accordingly, it seems that the first question is whether Congress is authorized by the Constitution to provide such funds.

That question seems to me to be impossible to answer at this level of generality. If Congress provided federal funds for the purpose of teaching people how to operate a post office, or to coin money, or to serve as a military officer, or to be a federal judge, the Necessary and Proper Clause makes it clear that there would be constitutional authority for the appropriation. On the other hand, if Congress provided federal funds to teach people how to stage a performance of *Hamlet* or how to read Xenophon in the original Greek, let alone how to skateboard or needlepoint, it would be much more difficult to identify a source of authority for such spending in the Constitution.

At least for the sake of the argument, I'll assume that all of the schools affected by the Byrd Amendment receive at least *some* federal funds that Congress is no doubt constitutionally authorized to provide, such as money to operate ROTC programs or to conduct research on protecting our nation's critical infrastructure from terrorist attacks.[4]

The next question is whether Congress may grant the money on condition that the school conduct educational programs about the Constitution at a specified time each year. The natural first response might be: "Why not?" As a general rule, anyone who gives money away is free to attach conditions to the gift. Why should Congress be any different?

One exception to the general rule, easily inferred from the Constitution, is that conditions on grants should not themselves violate the Constitution. How might they do that? One obvious way would be by requiring the grantee to violate somebody's constitutional rights. If, for example, Congress required schools receiving federal funds to coerce their faculty into electioneering for the incumbent Member of Congress during the next campaign, that would be an unconstitutional condition. Another case might be one in which Congress required a grant recipient to relinquish his own constitutional rights as a condition of receiving the grant. Once you start thinking about this case, though, it starts to look a little tricky.

Here's why. I have a constitutional right to stay in bed each morning, and the Thirteenth Amendment forbids the government or anyone else from forcing me to get up and go to work. Therefore, when the government offers me money to come into my office at George Mason, it is trying to induce me not to exercise my constitutional right to stay in bed. Similarly, you have a First Amendment right to say that Senator Byrd is a pompous busybody. But if you were hired to be the Senator's press secretary, you would be required as a condition of receiving your salary to stifle your desire to express that sentiment. I think it must be perfectly permissible for the government to impose such conditions on those who accept salaries (which are equivalent to conditional grants) from

4 Consider, for example, H.R. Conf. Rpt. 109–272, at 143 (Nov. 7, 2005), which directs that $6.5 million of an appropriation for the National Institute of Standards and Technology be used for a certain critical infrastructure program that had "received similar funding in previous fiscal years." Those who are knowledgeable about such matters will recognize that this is an almost unbelievably worthy program made possible by a federal grant to George Mason University.

the government, and I've never heard anyone suggest otherwise.

But what if the government offers to hire me as a janitor, on the condition that I refrain from owning a foreign-made automobile, or on the condition that I change my religion, or (and here I hate to let the thought even cross my mind) relinquish my firearms? Intuitively this seems different, perhaps because the conditions appear to have nothing to do with being a janitor. Would it make a difference if I were being hired to perform janitorial services at the White House, where I would be part of a staff that the President wishes to present to the nation as a model of Episcopalian rectitude, every member of which supports his goals of nurturing the American automobile industry back to health and halting the proliferation of guns in civilian hands?

Does the Constitution give us a way to distinguish a press secretary from a janitor with respect to the freedom of speech? Or to differentiate between the janitor's right to the free exercise of religion and his right to own a Toyota? I'm not even sure that it is possible to articulate a usefully precise legal test that can sensibly answer such questions, let alone to find one that can be derived directly from the Constitution. It is not surprising that the doctrine of unconstitutional conditions, as Richard Epstein has pointedly noted, "roams about constitutional law like Banquo's ghost, invoked in some cases, but not in others."[5]

That said, the Byrd Amendment hardly seems to present a problematic case. This legal provision seems more like the government paying me to get out of bed and go to work than like the government offering me a job on the condition that I change my religion. I imagine that most or all federal grants to schools require them to spend the money by engaging in specified activities in support of their educational mission. The Byrd Amendment merely adds one more tiny little educational project to the list of projects that schools have to carry out in return for the money they get from Congress.

I don't see how this could violate, or even threaten, anyone's constitutional rights. Congress didn't dictate what must be taught about the Constitution, and it even left the schools free to conduct programs making fun of the Byrd Amendment or questioning its constitutionality. There's even a plausibly legitimate federal interest in promoting knowledge or discussion about the federal Constitution, so it's not as though Congress is up to no good, or is meddling in things that are none of its concern. I therefore provisionally conclude that the Byrd Amendment is probably constitutional.

By this point, I imagine that many of you are wondering why I'm engaging in this self-indulgent exposition of what I think the Constitution means. I'm not a court, so why should anyone care what I think? Fair enough. So let's turn finally to what the Supreme Court thinks.

Right off the bat, I have to say that the Supreme Court has taken a very different approach than I did. According to the Justices, there is no need to find a specific constitutional provision – like the Post Office Clause[6] or the Raise and Support Armies Clause[7] – that would justify spending money subsidizing educational programs. The Su-

5 Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 10–11 (1988). *See also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1416 (1989) (as applied by the Supreme Court, "the doctrine of unconstitutional conditions is riven with inconsistencies").

6 Art. I, § 8, cl. 8.

7 *Id.* cl. 12.

preme Court thinks that congressional authority to do this sort of thing is provided in Article I, Section 8, Clause 1, which reads:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States … .

Although the Court has not explained its thinking in much detail, the idea is that this provision gives Congress a general power to spend money, so long as the spending is for the common defense or general welfare.

The Court has been extremely deferential to Congress in deciding what kinds of spending will promote the "general welfare." Indeed, the Court has actually come close to saying that anything Congress decides to spend money on is ipso facto to be regarded as serving the general welfare.[8] Of course the text of this clause says nothing at all about any power to spend money. And, as James Madison and others have argued, reading this clause to give Congress a general power to provide for the general welfare, or even to spend money for the general welfare, is difficult to square with the legislative history of the Constitution, and would seem to render most of the remainder of Section 8 redundant.[9] More significantly, in my view and I think Madison's as well, the reading adopted by the Supreme Court effectively provides Congress with an almost plenary legislative authority that makes a mockery of the Constitution's carefully enumerated and limited list of legislative powers.

If the Supreme Court's interpretation is so troublesome, what *does* that language about the "general welfare" mean? Madison himself suggested that the clause in question simply gives Congress "Power To lay and collect Taxes, Duties, Imposts and Excises" *in order* "to pay the Debts and provide for the common Defence and general Welfare of the United States." That is a perfectly natural reading of the language, and one that is consistent with the structure and history of the Constitution.

Whatever problems there may be with the Supreme Court's interpretation, this is one of those matters that we call "settled law." It may not meet the strictest test of stare decisis, which requires that a precedent receive the approval of Justice Thomas,[10] but it may at least qualify for the status of what Senator Specter calls a "super precedent," if not quite that of a "super-duper precedent."[11]

So, let's assume that the underlying congressional authority to spend money on all kinds of education is unchallengeable under current doctrine. We then have to ask whether the condition imposed by the Byrd Amendment is constitutional. Most of the

8 *See South Dakota v. Dole*, 483 U.S. 203, 207 & n.2 (1987).

9 *See*, for example, James Madison, Speech on the Bank Bill, U.S. House of Representatives, Feb. 2, 1791 (reprinted in P. Kurland and R. Lerner, 2 *The Founders' Constitution* 446 (U. Chicago Press 1987)); James Madison, Letter to Andrew Stevenson, Nov. 27, 1830 (reprinted *id*. at 453–59); Thomas Jefferson, Letter to Albert Gallatin, June 16, 1817 (reprinted *id*. at 452); David P. Currie, *The Constitution in the Supreme Court: The Second Century 1888–1986* 230–31 (U. Chicago Press 1990).

10 *See Sabri v. United States*, 541 U.S. 600 (2004), and especially Justice Thomas's opinion concurring in the judgment.

11 *See* Charles Babington, *Specter Asks; Roberts Answers, for the Most Part*, Washington Post, September 7, 2005, at A9 (reporting that Arlen Specter asked John Roberts, "Is Roe a super-precedent?"); Robin Toner, *In Complex Dance, Roberts Pays Tribute to Years of Precedent Behind Roe v. Wade*, N.Y. Times, September 14, 2005 (reporting that at Roberts's confirmation hearings, Specter suggested that by now "Roe might be a super-duper precedent").

cases involving challenges to such conditions have arisen in connection with conditions on grants to states, rather than to private parties, and I'm going to focus on that context. Doing so is certainly appropriate here today at George Mason, which is a state school.

In 1987, in *South Dakota v. Dole*,[12] the Court summed up its current position. As a general matter, Congress can advance its conception of the "general welfare" by offering money to the states on the condition that the states comply with congressional instructions.[13] No surprise there. But there are a few exceptions:

First, the Court has suggested that a condition that is insufficiently related to the federal interest in a program might be invalid. With droll understatement, *Dole* noted that this suggestion had not been accompanied by "significant elaboration,"[14] and the Court has never invalidated any statute for failing to comply with this unelaborated thought. So nobody knows what it means, if anything.

In any event, the Byrd Amendment seems very likely to pass whatever test might be adopted, since the federal government manifestly has a much greater interest in promoting knowledge about the federal Constitution than it does in lots of other things on which it routinely spends money from the federal treasury, such as an award of $72,000 to the Jackson County Library System in Ripley, West Virginia.[15] Perhaps you can guess which member of Congress first realized that this appropriation would serve the general welfare of the nation.

The Court has also said that spending restrictions may not contravene other, independent constitutional restrictions on congressional power.[16] The only possible restriction I can think of in this context is the First Amendment, and its applicability seems quite far-fetched even with respect to private universities, let alone a state school like George Mason. If the First Amendment allows Congress to give schools money on the condition that they teach about physics or history, which everybody assumes is perfectly permissible, it's hard to see why they can't command that there be a tiny bit of teaching about the Constitution as well.

The Court has also said that "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[17] I don't think anybody knows what this means. But there is at least one educational institution that has refused all federal aid,[18] and I believe that federal aid provides a pretty small part of the budget of most or all institutions that do accept it. So it seems hard to find anything like compulsion even lurking in the Byrd Amendment.

That brings me to the final element of the test laid out in *South Dakota v. Dole*. Conditions imposed by Congress must be unambiguous, in order to provide fair notice, thus "enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation."[19] It's not entirely clear that the Byrd Amendment passes this

12 483 U.S. 203.

13 *Id.* at 207.

14 *Id.* at 207–08.

15 Consolidated Appropriations Act, 2005 (full cite in note 3 above), title IV, 118 Stat. at 3156.

16 *Dole*, 483 U.S. at 208.

17 *Id.* at 211.

18 *See* www.hillsdale.edu/admissions/faq/faq_list.asp?iSectionID=1&iGroupID=45&iQuestionID=108.

19 *Dole*, 483 U.S. at 207.

test: so far as I am aware, Congress has not spelled out any adverse consequences that would ensue if a school failed to comply with the Byrd Amendment. The Amendment says that schools that receive federal funding "shall hold" a Constitution Day program, but the statute does not seem to specify any penalty for noncompliance. If the federal government tried to enforce it by imposing sanctions on non-complying schools, such enforcement might be found unconstitutional on the ground that the state grant recipient didn't get adequate notice of the consequences of non-compliance.

Alternatively, the Byrd Amendment might be read as a precatory, non-binding provision. By failing to specify a penalty, Congress may have implied that it does not wish to have the Byrd Amendment actually enforced. This interpretation might be supported by comparing the Byrd Amendment with other conditional spending grants. Take, for example, the Solomon Amendment, which requires educational institutions that accept federal funding to give military recruiters access to their campuses that is at least equal in quality and scope to the access granted to other prospective employers.[20] In this case, Congress has specifically required the Department of Defense and other federal agencies to deny funding to institutions that violate the equal access requirement.[21]

If the Byrd Amendment, unlike the Solomon Amendment, were meant to be a precatory provision, would that make it an exercise in silliness? I don't think so. On the contrary, I think it would make the Byrd Amendment an admirable piece of legislation, with which every covered school should comply.

Why do I say this? The Supreme Court would almost certainly permit Congress to compel all the schools that accept federal money to offer programs about the Constitution. But rather than unambiguously exercising this power, the Byrd Amendment is written in such a way that it could, and maybe should, be treated as a strong but non-binding request, rather than as a command. That would make the Byrd Amendment an example of congressional restraint in the exercise of its power. And since the request that Congress has made is actually an excellent suggestion, I think every school should comply.

Just as I complied with Dean Polsby's decision to assign me to speak today at this event. He didn't ask me if I'd *like* to speak, and he certainly didn't offer me any extra money for doing so. But I thought it would be churlish to refuse the assignment, and I think it would be even more churlish for George Mason to refuse to comply with the Byrd Amendment. So I'm happy to have obeyed both Dean Polsby and the U.S. Congress this morning, even though I almost certainly could have gotten away with staying in bed. GB

20 10 U.S.C. § 983(b)-(b)(1).

21 *Id.* Recently, the Supreme Court unanimously upheld the constitutionality of the Solomon Amendment against a far-fetched unconstitutional conditions challenge. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 2006 WL 521237. Along with Dean Polsby and Professor Zengerle, I assisted Andrew McBride, Will Consovoy, and Seth Wood of Wiley Rein & Fielding in drafting the only law professors' brief that supported the statute's constitutionality.