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WILL THE ROBERTS SUPREME COURT SHRED AMERICA'S HEALTH SAFETY NET?

A Paper Presented To A Conference Of The Justice Partnership:
"Forgotten Americans: The Future Of Support For Low-Income Older Adults"

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Introduction and Summary

Everyone knows that America's system of entitlement to adequate health care is fraying badly –

- Most attention is focused on the fact that upwards of 47 million Americans are uninsured.

- Beyond the uninsured, 61 million Americans are counted among the insured because they are covered by Medicaid. But Medicaid has come under increasing pressure in many states to cut the scope of coverage as well as the scope of the covered.

- As for the vast majority of Americans who have health insurance through employer-sponsored plans – and quite apart from pervasive fear of losing insurance by losing their jobs – many find that coverage on which they have counted is not there when they need it, that insurers and providers deny coverage or care without explanation or legal or medical basis, then systematically stonewall to discourage them from pursuing treatment or asserting claims.

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The intense national debate over what to do to restore the nation's health safety net is focused on Congress, as the venue for improving existing programs and enacting new ones. This is both understandable and appropriate. What is a little less understandable, and quite inappropriate, is that zero attention is paid to the courts. There is virtually no focus on the role that the judicial branch has played, can play, and will play in ensuring – or undermining – the access of American citizens to affordable and adequate health care.

In fact, during the near-half century since the contemporary structure of national health entitlement programs was put in place, federal (and state) courts have hosted endless, wide-ranging, fierce battles over their terms, governance, availability to beneficiaries, and, especially, remedial options for beneficiaries to vindicate their rights and interests. The decisions yielded by those battles have significantly affected the scope, effectiveness, and impact of those programs.

Regrettably, in the past two decades under the Rehnquist Court, much of that impact has been negative – that is, the jurisprudence spawned by the Rehnquist Court more often than not narrowed the scope of the nation's health safety net laws, insulated officials from accountability for maladministration of them, and disrupted or blocked citizens' access to benefits to which they were entitled. More often than not, these decisions frustrated rather than furthered the broad and generous goals that animated the Congresses which enacted the programs in question.

There is good reason to anticipate that this disconnect between liberal statutory policy objectives and judicial administration of the nation's health laws will grow sharper and more bitter, and stay that way for a long time.

- The electorate, Congress and, even more so, state governments appear to be shifting left – especially on issues related to health security. "The political landscape of the nation has shifted," an early 2007 Pew study concluded, "from one of partisan parity to a sizable Democratic advantage."[1] The same Pew survey found significantly increased public support for government guarantees of health security.[2] `A few months earlier Gallup reported that more than two-third of Americans consider it the federal government's responsibility to ensure health care coverage for all.[3]

- Simultaneously, the Court has shifted further right, especially on the key issue areas in which the court battles over health entitlements have been fought. Already, the electorate appears to have grasped this shift. Gallup recently reported that public approval of the Supreme Court declined in 2007, with a third of Americans saying the Court is too conservative, and approval of the Court much higher among Republicans than among Democrats or Independents.[4]

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[1] PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, TRENDS IN POLITICAL VALUES AND CORE ATTITUDES: 1987-2007 7 (2007), *available at* http://people-press.org/reports/pdf/312.pdf.
[2] Id. at 12-16.
[3] *Gallup's Pulse of Democracy: Healthcare Costs*, THE GALLUP POLL (Nov. 2006), http://www.galluppoll.com/content/default.aspx?ci=4708.
[4] Joseph Carroll, *One-Third of Americans Say the U.S. Supreme Court is "Too Conservative,"* THE GALLUP POLL (Oct. 2, 2007), http://www.galluppoll.com/content/default.aspx?ci=28861.

- This prospective gap between an electorate demanding a stronger safety net and an activist judiciary hostile to that goal should be among the most important issues at stake as judicial nominees, especially Supreme Court nominees, are selected and vetted – whether the next President with a chance to offer nominations is a Republican or a Democrat.

We have seen this movie before. Or rather we have read the story in American history class. During the first third of the twentieth century, the Supreme Court gave itself the mission of blocking liberal social legislation at both the state and federal levels. The case that kicked off this long campaign was called *Lochner v. New York*, and the era is known to lawyers as "The *Lochner* Era." The conservative bloc that dominated that era – the Four Horsemen of the Apocalypse as they were sometimes called – conjured a principle of "freedom of contract" from the provision in the fourteenth amendment that bars states from depriving persons of liberty without due process of law. This confection, in turn, was held to forbid states from enacting guarantees for workers, such as maximum hours, minimum wages, workplace safety, or child labor prohibitions. Then, to squelch federal legislative reforms, the justices came up with a tortured narrow reading of the clause in the Constitution that empowers Congress to regulate interstate commerce; "interstate commerce," they concluded, meant only trade between states – so Congress had no power to regulate manufacturing or agriculture or mining or other such activities, regardless of their impact on interstate commerce or the national economy.

The *Lochner* Court pushed its reactionary agenda for three decades, finally attempting to stop the New Deal in its tracks. The Court was turned back only by a political tidal wave led by President Franklin Roosevelt. In the face of his attacks, one of the five hard-line conservative justices defected; then new vacancies yielded new judicial appointments and a Court that, by the end of the 1930s, had flatly repudiated the old Court's constitutional jurisprudence. What has survived is Justice Oliver Wendell Holmes' famous sound-bite dissenting in the 1905 *Lochner* decision itself: "The Constitution," he said, "does not enact Mr. Herbert Spencer's Social Statics." The serious point of Holmes' quip was that the majority was reading into the Constitution a controversial ideology – social Darwinism, of which Spencer was known as a leading exponent – with no warrant in the text or history of the Constitution itself. While the justices happened to believe in Spencer's creed, most of the nation, Holmes noted, did not. Hence, the Court had no business dreaming up far-fetched constitutional theories to impose its own ideological view. Since the New Deal, "*Lochnerism*" has been (almost) universally scorned on the right as well as the left as the apogee of judicial activism run amok in the history of the Supreme Court.

The new breed of conservative activists have not, by and large, sought expressly to exhume *Lochner* itself . For the most part – at least so far – they have avoided the audacious path of attempting to impose unreviewable constitutional limitations on Congress or the states. Instead, they have been groping toward an alternative approach – indirect but potentially highly effective. They have sought to throw sand in the gears of the machinery of the welfare state, by proliferating a potpourri of obstructionist rules

about litigation procedure and governmental structure. In the main these rules and doctrines purport to rest not at all or only implicitly or indirectly on the Constitution. Nevertheless, they amount to an "obfuscation" strategy that has proven remarkably potent, and could prove much more so in the hands of a judiciary more dominated by militantly ideological conservatives than was the Rehnquist Court.

The principal vehicle for this new activism has been a schizophrenic approach to policing the boundaries between state and federal power – maintaining the "proper balance" of "federalism." First, the conservative bloc has sought to constrain Congress' power to enact progressive legislation, and in particular to limit citizens' ability to enforce federal statutory rights in court. To justify this side of their agenda, the justices have elaborated a quirky notion of "federalism," emphasizing states' rights. Second, without missing a beat, the Court has developed doctrines enabling federal judges to "preempt" state laws that conflict with or "frustrate" federal laws – and aggressively deployed these doctrines. In the main, the Court's trigger-happy use of its preemption power has been used to strike down state regulatory laws at the behest of industries or businesses seeking regulatory relief.

Together, these – mutually contradictory – constellations of vague and elastic legal theories and doctrines arm the Supreme Court to play a role as arbiter of acceptable state as well as federal regulation. As observed by Professor Ernest Young of the University of Texas, a conservative but consistently states' rights-oriented expert prominent in Federalist Society circles, "This 'libertarian vision' sees *federalism as a tool of deregulation with the potential to keep both national and state governments within relatively narrow bounds*."[5] (Emphasis added) In other words, this new breed of activism has found a new way to say that the Constitution does, after all, enact Mr. Herbert Spencer's *Social Statics*.

This paper will spotlight two arenas of the contemporary struggle over the federal courts' role in shaping and implementing components of the nation's statutory safety net. The first is Medicaid, particularly the ability of Medicaid beneficiaries to enforce their statutory rights in court. Here, the Rehnquist Court's legacy is a web of superficially mere procedural rules that are, as candidly acknowledged by prominent conservative scholar-advocate Michael Greve of the American Enterprise Institute, "The Supreme Court's *anti-entitlement* doctrines." These doctrines are, Greve further notes (with enthusiasm) "connected, such that plaintiffs who manage to evade one obstacle are bound to stumble over another."[6]

The second area on which the paper will focus is employer-sponsored health plans, again looking in particular at the availability to beneficiaries of judicial remedies for violations of their rights. Here the Court has turned a landmark 20th century reform, the

[5] Ernest A. Young, *Federal Preemption and State Autonomy*, in RICHARD A. EPSTEIN & MICHAEL S. GREVE (EDS.), FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 249, 249 (2007)
[6] Michael S. Greve, *Federalism, yes. Activism, No*, at 3 (Jul. 2001), http://federalismproject.org/depository/FederalistOutlook.7.pdf (emphasis added)

Employee Retirement And Income Security Act of 1974 (ERISA), into what the late Judge Edward Becker – a Reagan-appointed Republican – describes as having:

> Evolved into a shield that insulates HMOs from liability for even the most egregious acts of dereliction committed against plan beneficiaries, a state of affairs . . . directly contrary to the intent of Congress.[7]

To the 134 million Americans covered by employee-sponsored plans, the Court has delivered a double-whammy – eviscerating ERISA's remedial provisions while preempting state alternatives. Supreme Court justices Ruth Ginsburg and Stephen Breyer have endorsed the frustration voiced by Judge Becker and many other judges and scholars that under the Court's rules, "Virtually all state law remedies are preempted but very few federal substitutes are provided."[8]

ERISA is but one of many regulatory arenas in which the Court has wielded its preemption veto over state initiatives. Although rarely noticed beyond the industries affected by a given controversy, preemption cases accounted for a staggering eight percent of the total number of cases heard by the Court during the entire eighteen years of William Rehnquist's tenure as Chief Justice.[9]

After reviewing the above-noted substantive areas, the paper will briefly critique the ideas invoked by the new breed of conservative judicial activists in support of their double-edged "federalism" anti-regulatory agenda. Finally, I will briefly suggest action agendas for the courts, for Congress, and, especially for advocates concerned with the integrity of these and other programs addressing the economic welfare of vulnerable individuals and constituencies.

The afore-mentioned advocates include many of the participants in the conference for which this paper has been written. For us, I offer a suggestion to close out this opening section. The suggestion is that the fault is not in our stars but in ourselves. We could be witnessing the birth of a truly radical third branch of our federal government – a Supreme Court, with faithful legions in the lower federal courts, as well as conservative advocacy, academic, and political circles, dedicated to a vision of reactionary change that goes well beyond the culture war issues that monopolized public and political attention throughout the Rehnquist era. This has been a secret hiding in plain sight for well over a decade. Yet we, who have had the facts before our eyes, have not taken the full measure of what they could portend. More important, we have done far, far too little to bring the issues we have been fighting in court to the attention of the public, or to the bar of politics, where they belong. When most Americans hear liberals warn of the dangers of a Supreme Court dominated by a John Roberts or a Samuel Alito, they think the threat is just about abortion rights or religious autonomy or the civil liberties of suspected terrorists.

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[7] Difelice v. Aetna US Healthcare, 346 F.3d 442, 553 (3d Cir. 2004)
[8] Aetna Health Inc v. Davila, 542 U.S. 200, 222 (2004) (Justice Ginsburg, with whom Justice Breyer joins, concurring)
[9] Michael S. Greve and Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 50 (2006)

Virtually no one has any notion that a militantly activist conservative Court could threaten safeguards critical to their health, their savings, and kindred bottom-line, economic security interests. That neither voters nor politicians know this, let alone act on it, is our fault. Changing that misperception should be, I suggest, a challenge at the top of our advocacy agendas.

Recently, Jonathan Chait observed in the *New York Times*, after noting Republican presidential candidates' embrace of demonstrably counter-factual supply-side tax-cut theology, that liberals and pundits alike have made a mistake in long parroting that "the Republican nominating process is controlled by social conservatives." On the contrary, Chait noted, the debates have made it "increasingly clear that a different tiny minority – the economic far right – truly calls the shots," and it is to them that the candidates are most frantic to "kowtow."[10] While the analogy is not precise, a similar astigmatism has skewed perceptions of issues at play in the courts. It would be a considerable over-statement to say that liberals have been the victims of anything so calculated as a vast right-wing head-fake. Perhaps it would be more accurate to say that we have faked out ourselves. In any event, we have not trained a political spotlight on court-centered issues that may well matter the most to most Americans, certainly to constituencies we represent. That is an omission we should urgently correct.

[10] Jonathan Chait, *Captives of the Supply Side*, THE NEW YORK TIMES, October 9, 2007, online at http://www.nytimes.com/opinion/09chait.html

I. What's at Stake and Where We Stand: Medicaid and Judicial Enforcement.

More than ever, Medicaid is a cornerstone of the nation's social safety net. In 2006, nearly 61 million people were covered by Medicaid.[11] These individuals are counted among the nation's "insured,"[12] and Medicaid "insures" more Americans than any other entity, including Medicare.[13] Moreover, Medicaid is the only guarantor of health care for nearly 30 million children in families below the poverty line – over 50% of poor children and 20% of all children.[14] It is likewise the only guarantor for more than five million older Americans, and around ten million Americans with disabilities.[15] Medicaid covers all or part of the cost of approximately 58% of all nursing home residents, accounts for 49% of all funds spent on nursing homes,[16] and Medicaid regulations are the principal legal guarantees of minimum safety and quality of care standards for nursing homes nationwide. Without question, Medicaid deserves the Urban Institute's Alan Weil's characterization as "the workhorse of the U.S. health care system."[17]

The Courts Establish the Medicaid Entitlement

This outcome was neither inevitable, nor widely foreseen when Congress passed the Medicaid Act more than four decades ago. As Sara Rosenbaum has observed, Medicaid was enacted as a "legislative afterthought" to Medicare.[18] Medicaid, indeed, came into being in the form an extension of an existing, though comparatively modest statutory program providing grants to states to provide medical assistance to the poor. The new extension was unprepossessingly entitled "Grants to States for medical Assistance Programs," and declared its aim as providing funds "for the purpose of enabling each State, as far as practicable under the conditions in such state," to provide medical assistance to welfare recipients and the medically needy. Medicare was unambiguously crafted as a federally funded and administered mechanism for providing benefits directly to beneficiaries "entitled" to receive them. While the Medicaid statute is also peppered with individual provisions that appear to state, assume, or imply that individual aid recipients are similarly entitled to receive benefits, it less clear on this point than the Medicare statute.[19] As a hybrid state-federal program, with mainly federal

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[11] Congressional Budget Office, *Fact Sheet for CBO's March 2007 Baseline: Medicaid* (Mar. 2007).
[12] *See* U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2006 18 (2007) (defining "health insurance").
[13] *See* Congressional Budget Office, *Fact Sheet for CBO's March 2007 Baseline: Medicare* (Mar. 2007) (showing 42.6 million enrolled in Medicare Part A in 2006 and 39.9 million in Part B).
[14] Congressional Budget Office, *supra* note 1.
[15] *Id.*
[16] Georgetown University Long-Term Care Financing Project, *Fact Sheet: National Spending for Long-Term Care* (Feb. 2007), *available at* http://ltc.georgetown.edu/pdfs/natspendfeb07.pdf.
[17] Alan Weil, *There's Something About Medicaid*, 22 HEALTH AFFAIRS 13 (2003)
[18] Sara Rosenbaum, *Health Policy Report: Medicaid*, 347 N. ENGL. J. MED. 635 (2002)
[19] *Compare* 42 U.S.C. § 1801 *et seq.* (Medicare), *with* 42 U.S.C. § 1396 *et seq.* (Medicaid); *see also* TIMOTHY S. JOST, DISENTITLEMENT? THE THREATS FACING OUR PUBLIC HEALTH-CARE PROGRAMS AND A RIGHTS-BASED RESPONSE 86-88 (2003) (discussing entitlement language in both statutes). For example, § 1802(a) of the Medicare law states: "Any individual entitled to insurance benefits under this title may obtain health services from any institution, agency, or person qualified to participate under this title if such

funding but with state administration and considerable discretion about structuring coverage and the delivery of care, it is subject to federal statutory criteria, regulations refining those criteria, and supervision by the Federal Department of Health and Human Services.

Certainly, large political forces and pervasive public needs get most of the credit for evolving Medicaid from its unheralded start into the behemoth that it is today. But a significant, and little appreciated, player was the federal judiciary – as well, it should be stressed, as the advocacy community which originated goals and executed strategies for court enforcement. First, in the years immediately following the creation of Medicaid, and other historic programs under the Social Security Act, the Supreme Court in a series of decisions made clear that these programs created requirements enforceable by individuals against the states.[20] In one such decision in 1970, the Court explicitly rebuffed the notion that review by federal regulators was the only recourse when state ignored these requirements, refusing to "assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program."[21] Second, the lower federal courts gave definition to Medicaid's mandates of broad inclusion,[22] comprehensive treatment,[23] preventive screening,[24] and reasonably prompt determinations[25] – thus ensuring that states could not belittle these duties while accepting federal funds.

The Anti-Entitlement Attack

When the new breed of ideological conservatives took control of Congress in 1994, the Medicaid entitlement immediately became a priority target. Legislation to abolish the program and replace it with a block grant concept labeled "Medigrants" was passed the next year. But this repeal attempt was by President Clinton's veto. After that failure, even though Republicans have until 2006 commanded majorities in both houses on the Hill, and since 2000 held the White House as well, they have not been prepared to make a direct run at repealing Medicaid or extinguishing its entitlement status. Instead, conservative advocates and some federal judges have turned to a back-door judicial

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institution, agency, or person undertakes to provide him such services." By contrast, the Medicaid Act states: "A State plan for medical assistance must provide for making medical assistance available...to all individuals" meeting certain requirements. 42 U.S.C. § 1396a(a)(10)(A).

[20] *See* Id. at 91-93 (summarizing cases).

[21] Rosado v. Wyman, 397 U.S. 397, 420 (1970).

[22] *See, e.g.*, Hayes v. Stanton, 512 F.2d 133 (7th Cir. 1975) (mandatory coverage for categorically needy precludes "spend down" requirement); Fabula v. Buck, 598 F.2d 869 (4th Cir. 1979) (more restrictive eligibility for medically needy vs. SSI recipients prohibited).

[23] *See, e.g.*, White v. Beal, 555 F.2d 1146 (3d Cir. 1977) (required optical services include eyeglasses for impairment of vision not caused by pathology); Philadelphia Welfare Rights Organization v. Shapp, 602 F.2d 1114 (3d Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980) (required dental services include orthodontic care).

[24] *See, e.g*, Stanton v. Bond, 504 F.2d 1246 (7th Cir. 1974), *cert. denied*, 420 U.S. 984 (1975), *appeal after remand*, 655 F.2d 766 (7th Cir.), *cert. denied*, 454 U.S. 1063 (1981) (ordering state to aggressively pursue and track EPSDT rather than wait for individuals to request services).

[25] *See, e.g.*, Smith v. Miller, 665 F.2d 172 (7th Cir. 1981) (enforcing time limits for eligibility determinations by ordering all applications not resolved within limits automatically approved).

strategy to neutralize the entitlement status of Medicaid requirements by rendering them unenforceable. This "Plan B" has continually gained momentum while attracting little notice from the press, public, or Congress.

This judicial anti-entitlement strategy surfaced in what remains its most blatant manifestation in a 2001 Michigan district court opinion in the case of *Westside Mothers v. Haveman*. [26] There, Judge Robert Cleland launched a fusillade of over-the-top legal theories to conclude that, even though Michigan systematically failed to provide screening, diagnosis and treatment services for children that were mandated under Medicaid, those affected had no recourse to challenge the state's violation of federal law. Most eye-catching of these confections was the Judge's claim that these programs enacted pursuant to the Constitution's Spending Clause, such as Medicaid, are merely contracts between the Federal government and individual recipient states. Such contracts, he contended, register agreements between "sovereigns" – implicitly equal and independent sovereigns, as if the states were, in effect, nation-states. Hence, the obligations arise from the agreements, not a statute enacted by Congress, and are not the supreme law of the land within the meaning of the Supremacy Clause. Through this and similar flights of sophistry, Judge Cleland sought to turn *all* federal-state spending programs – essentially the nation's entire public safety net – into a set of discretionary block grants, with the stroke of a judicial pen.

Cleland's far-reaching distortion of the law was curtly reversed by the Sixth Circuit Court of Appeals, [27] and has been generally repudiated by other courts.[28] Nevertheless, Judge Cleland's disentitlement objective, and even pieces of the doctrinal tactics he developed to reach that objective, may be down, but they are definitely not out. The *Westside Mothers* decision was immediately hailed as a model by conservatives advocating "a litigation-centered anti-entitlement strategy."[29] A prominent Bush Circuit Court appointee hailed the decision as "brilliant" and "sublime."[30] Another Bush appointee, who as an advocate argued in the *Westside Mothers* case itself and supplied some of the arguments adopted by Judge Cleland, now sits on the very Court of Appeals that reversed Cleland's ruling.

Most important, significant elements of Judge Cleland's theories are similar to those endorsed by three members of the Supreme Court. In a 1997 concurrence that inspired much of Cleland's analysis, Justice Scalia, joined by Justice Kennedy, floated the possibility – contrary to four decades of precedent[31] – that the provisions of Spending

[26] Westside Mothers v. Haveman, 133 F. Supp.2d 549 (E.D. Mich. 2001)
[27] Westside Mothers v. Haveman, 289 F.3d 852 (6th Cir.), *cert. denied*, 537 U.S. 1045 (2002).
[28] *See, e.g.*, Antrican v. Odom, 290 F.3d 178, 188 (4th Cir.), *cert. denied*, 537 U.S. 973 (2002); Missouri Child Care Ass'n v. Cross, 294 F.3d 1034, 1040 (8th Cir. 2002).
[29] Michael S. Greve, *Business, the States, and Federalism's Political Economy*, 25 HARV. J. L. & PUB. POL. 895, 921 (2002).
[30] William H. Pryor, *The Demand for Clarity: Federalism, Statutory Construction, and the 2000 Term*, 32 CUMB. L. REV. 361, 372 (2002).
[31] *See* King v. Smith, 392 U.S. 309, 332 n. 34 (1968) ("There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and

Clause programs might be wholly unenforceable in court.[32] If programs like Medicaid are "contracts," Scalia reasoned, then individuals covered by Medicaid are third-party beneficiaries to that "contract." And since 42 U.S.C. § 1983, the statute under which Medicaid enforcement suits have traditionally been brought, was originally enacted in 1871, such suits are subject to contract law principles as they were understood shortly after the Civil War – which, unlike today (Scalia concluded) did not allow third-party beneficiaries to sue to enforce a contract. In a 2003 concurrence, Justice Thomas gave credence to this far-fetched theory, writing that he "would give careful consideration" to arguments that these laws are "contracts" that cannot be enforced by private individuals.[33]

The upshot of these theories is that the sole "remedy" for Medicaid abuses is for the federal government to threaten or execute a cutoff of Medicaid funding for the state – a remedy the Court itself has previously recognized as inadequate, by itself, to protect individual beneficiaries.[34] Reasons for the Court's view are not hard to find. To begin with, cutting off funds does less harm to the state or state officials than it does to beneficiaries urgently in need of medical assistance – the very population that the program is intended help. Second, for many, indeed, most instances of errant state administration, a fund cut-off is raising a sledgehammer to tap in a nail, or even a thumb-tack. Third, even in cases where threatening a cut-off of funds might be proportional to a state's default, resources in the Department of Health and Human Services are scarce, and of necessity, this nuclear weapon is reluctantly and rarely invoked. And, finally, from the standpoint of beneficiaries and advocacy groups supporting their interests, generating a serious funding cut-off threat – and fighting off opposition from the state in question – requires re-mobilizing the relevant constituencies and players to win a political battle perhaps as challenging as the original battle to secure enactment of the statutory provision the state is finding inconvenient to obey. For all these reasons, without the option of taking the state to court, ensuring fidelity to Congressional mandates by administering officials is necessarily an uphill struggle. Indeed, given this cumbersome and ultimately discretionary federal mechanism, administrators could in many cases bet on getting away with even blatant violations for a considerable time, if not indefinitely, before being forced to stop.

Death of a Thousand Cuts: The Drive to Cut Back Court Access under Section 1983

As yet, no Supreme Court majority has embraced the Scalia-Thomas Spending Clause-contract theory, nor otherwise voted to eliminate Medicaid enforceability wholesale. But throughout the Rehnquist era, shifting majorities were frequently

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conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid").

[32] Blessing v. Freestone, 520 U.S. 329, 349 (1997) (Scalia, J., concurring).

[33] Pharmaceutical Research & Mfrs. v. Walsh, 538 U.S. 644, 683 (2003) (Thomas, J., concurring in the judgment).

[34] *See* Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 522 (1990).

assembled to pursue an alternative, incremental strategy – which could ultimately prove equally effective.

Like many federal programs, the Medicaid statute does not itself contain an explicit private right of action in the federal courts. But in 1980 – after Rehnquist joined the Court but before he became Chief Justice – the Supreme Court confirmed the obvious: that in expressly referencing deprivation of rights "secured by the Constitution *or laws*" of the United States, 42 U.S.C. § 1983 authorizes vindication of statutory rights as well as constitutional rights. But in the years following that – seemingly straightforward and logical – decision, Supreme Court majorities have repeatedly cut it back, sometimes appearing to foreshadow an ultimate goal of taking it back altogether. After a 1992 decision rendered federal adoption assistance requirements unenforceable under Section 1983,[35] Congress amended the Medicaid Act in an attempt to avoid the same logic being applied to Medicaid requirements.[36] Nevertheless, the Supreme Court has never acknowledged Congress's corrective enactment, and the lower federal courts, accordingly, have given it short shrift.

Erratically but persistently, Court majorities have created new obstacles to plaintiffs seeking to enforce federal constitutional and, especially, statutory rights via Section 1983. The Court's most recent attempt to narrow Section 1983, in the 2002 case of *Gonzaga University v. Doe*, added a requirement that the statute in question must "unambiguously" employ what it called "rights-creating" language in order to make a requirement enforceable in court.[37] This *Gonzaga* test is difficult if not impossible to square with the text and purpose of Section 1983. As was recognized in a 2005 opinion by Seventh Circuit Judge Frank Easterbrook, a prominent Reagan appointee, it is an apparent "oxymoron" to make actionability under Section 1983 turn on "unambiguous" expression of Congressional intent;[38] this is so, Easterbrook explained, since Section 1983 comes into play only in the case of laws for which Congress has not included an express statute-specific right of action – but which nevertheless creates "rights, privileges, or immunities." One 2003 Third Circuit decision wryly observed that the analysis compelled by the *Gonzaga* recipe for "unambiguous rights-creating" language is "assuredly not for the timid."[39] So narrowly does the oxymoronic *Gonzaga* rule restrict access to court that under it some courts have simply disregarded the saving language Congress added to Medicaid a dozen years ago.[40]

By narrowly interpreting statutes to make private enforcement harder and harder to secure, *Gonzaga* effectively insulates large sectors of Medicaid and other safety net programs from judicial enforcement. For example, a lawsuit filed in 2000 charged that

[35] *See* Suter v. Artist M., 503 U.S. 347 (1992).
[36] *See* 42 U.S.C. §§ 1320a-2, 1320a-10 (stating that a Medicaid "provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan").
[37] 536 U.S. 273, 283-84 (2002).
[38] McCready v. White, 417 F.3d 700, 703 (7th Cir. 2005).
[39] Sabree ex rel. Sabree v. Richman, 367 F.3d 180, 183 (3d Cir. 2004).
[40] *See, e.g.*, Sanchez v. Johnson, 416 F.3d 1051, 1057 n.5 (9th Cir. 2005) (dismissing the *Suter* fix language as "an opaque item of legislative history" that "does not disturb the general framework" of *Gonzaga*).

California had so grossly and inadequately funded community-based services for the developmentally disabled that individuals were being needlessly institutionalized and given inadequate care, in violation of Medicaid rules. After five years in court, without reaching the merits, a conservative judicial panel threw out the case, holding that Medicaid's guarantees of quality care and adequate access to services are unenforceable under *Gonzaga*[41] -- a conclusion embraced by three other Courts of Appeal.[42] Even where discrete provisions of Medicaid may remain enforceable, the Court's intricate and shifting standards have bogged private suits down in endless litigation merely to establish the plaintiffs' right to be in court.

The Court's iteration of new and ever more obscure and onerous criteria has not only denied the vindication of individuals' rights, but frustrated Congress in its efforts to address judicial concerns but preserve court access. The *Harvard Law Review* observed that these rules function "not as 'tie-breakers' that might be justified on various institutional grounds," but as "initial presumptions that erect potential barriers to the straightforward effectuation of legislative intent."[43] Court majorities have repeatedly and retroactively changed and tightened the applicable restrictions. Justice John Paul Stevens spotlighted this "moving the goal posts" pattern, dissenting from a 1999 5-4 decision in which the majority denied private judicial enforcement against states, via a novel presumption similar to those employed to defeat Section 1983 actions. Justice Stevens wrote:

> It is quite unfair for the Court to strike down Congress' Act based on a . . . requirement this Court had not yet articulated. The legislative history . . . makes it abundantly clear that congress was attempting to hurdle the then-most-recent barrier this Court had erected in [a prior case involving a similar law].[44]

The Disentitlement Project

The Court has explained and justified this proliferation of labyrinthine restrictions on citizen court access part of its broader effort to promote "federalism" and protect states' rights. But as candidly acknowledged by prominent conservative expert Michael Greve, Director of the Federalism Project of the American Enterprise Institute, the Rehnquist and, now, the Roberts' Court's campaign to narrow Section 1983 has not merely been driven by neutral concerns for governmental structure or fair procedure. Rather, a role has been played by philosophical animus against private court enforcement and, indeed, against the very substance of the laws and programs which plaintiffs in these cases seek to enforce. Greve has noted:

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[41] *Id.* at 1059-62 (holding that 42 U.S.C. § 1396a(a)(30) creates no private right of action for beneficiaries).
[42] *See* Long Term Pharmacy Alliance v. Ferguson, 362 F.3d 50, 57 (1st Cir. 2004); Westside Mothers v. Olszewski, 454 F.3d 532, 542-43 (6th Cir. 2006); Mandy R. ex rel. Mr. and Mrs. R. v. Owens, 464 F.3d 1139, 1146-48 (10th Cir. 2006) (same).
[43] Note, *Clear Statement Rules, federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1959 (1994)
[44] Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 654 (1999) (Stevens, J., dissenting).

> The Supreme Court's *anti-entitlement* doctrines are connected, such that plaintiffs who manage to evade one obstacle are bound to stumble over another. Plaintiffs who escape from restrictive statutory interpretation into Section 1983 will find that route, too, strewn with obstacles. They may find that their purported right was unrecognized in 1871 [a reference to Justice Scalia's contract/ third party-beneficiary doctrine, noted above]. Or, they may find that their claims for monetary damages *which are often the only effective means of forcing state and local governments into compliance* are blocked by a slew of Supreme Court decisions granting the states sovereign immunity. . . . Let plaintiffs argue that the state has waived its immunity by accepting federal funds, and they will lose. Let plaintiffs seek to obtain relief by naming a state's officers, rather than the state itself, as a defendant, and they will find that this so-called *Ex Parte Young* rule, once readily available, has become the exception.[45]

Yale Law professor William Eskridge, one of a very few experts who have recognized the significance of the Court's below-the-radar campaign against citizen enforcement, has written that its so-called clear statement rules and kindred techniques for "promoting federalism and other structural values . . . amount to a 'backdoor' version of the constitutional activism that most Justices on the current Court have publicly denounced."[46] In effect, while President Bush and his compatriots denounce judges who "legislate from the bench," their favored jurists do their best to "repeal from the bench."

In response to critics such as Professor Eskridge, Michael Greve contends that it is unfair to label the drive to shut down Section 1983 as "activist." Rather, he says, it is an appropriate rollback of an "activist" drive led by Justice William Brennan "to enlist the judiciary in the expansion of the national welfare state." He explains:

> Throughout the 1970s and 1970s, the Brennan Court eagerly expanded the ability of private litigants, especially the intended beneficiaries of congressional statutes, to find their way into the courthouse and, having entered, to prevail." [Pursuing this agenda] Justice Brennan discovered that Section 1983 was an all-purpose vehicle to make a federal case of alleged violations of garden-variety federal statutes – a thought that had not occurred to anyone for over a century since the enactment of Section 1983.[47]

Greve recognizes that, without private judicial enforcement, such programs may turn out to mean less in practice than Congress intends. "Congress can make a commitment," he observed, "to provide housing and financial assistance for the poor, but it cannot easily ensure that government agencies translate those commitments in practice." This problem should prove especially acute for programs which, like Medicaid, are delegated to the

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[45] Michael S. Greve, *Federalism, Yes. Activism, No*, at 3 (Jul. 2001), http://federalismproject.org/depository/FederalistOutlook7.pdf (emphasis added).
[46] William N. Eskridge, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992).
[47] *Id.* at 4

states to administer: "Since those agencies usually like the federal money better than the restrictions that come along with it, they may ignore or violate funding conditions and, in setting priorities, violate the intent of Congress, if not the letter of the law."[48]

None of this, of course, is to dispute that rational criteria are needed for identifying the types of federal requirements that can be enforced under Section 1983. Amorphous platitudes written into statutes, that smack more of aspiration than specific mandate, should not provide a basis for hauling municipalities or state agencies into court, certainly not for imposing monetary damages.[49] The poorly drafted legislation at stake in *Gonzaga* itself – the Family Educational Rights and Privacy Act (FERPA), under which liability might be triggered by a teacher's reading aloud students' grades in class – is an example. Up through the 1990s, the Court appeared for the most part to be engaged in an earnest if awkwardly executed effort to clarify those criteria. But in *Gonzaga* Chief Justice Rehnquist seized the occasion of a hard case to make very bad law, coming up with a reformulation that made court access under Section 1983 less clear and much less available. As the post-*Gonzaga* shake-out has unfolded in the lower federal courts, major Medicaid mandates are no longer enforceable.

Grim Prospects?

In addition to targeting court access via Section 1983, judges unfriendly to entitlements have recently unveiled other strategies for redefining and drastically weakening Medicaid. In the past four years, three federal Courts of Appeals have ruled that Medicaid does not provide beneficiaries with the right to receive medical services, but merely with the right to be reimbursed for any services they do receive.[50] Seizing on an ambiguity in the statute that courts had long, and without difficulty, resolved in favor of furthering the statutory purpose of comprehensive care, these rulings constitute another way to empty many Medicaid provisions of their meaning. Payment for services actually received is meaningless if the services themselves are unavailable, and a right to sue is meaningless if the substantive statutory right is whittled away to nothing. The practical upshot will be, if this eviscerating theory is allowed to stand, that states will have little or no responsibility if their policies contribute to situations where, although payment for services is available, the services themselves are not available, or are only available in a distant corner of the state, or only after long delays.

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[48] *Id.* Intriguingly, this prominent conservative advocate, who both speaks for and influences others among the conservative legal intelligentsia, here articulates the vital difference that the courts and private rights of action can make on the real-world effectiveness of federal safety-net programs – with more insight and precision than has been mustered by most proponents of those programs.

[49] *See, e.g.*,Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) (holding unenforceable "Bill of Rights" provisions of statute providing funds to support sate programs for the developmentally disabled §1983)

[50] *See* Oklahoma Chapter of Am. Acad. of Pediatrics v. Fogarty, 472 F.3d 1208 (10th Cir. 2007), *cert. petition filed* May 7, 2007 (holding that (a)(8) only concerns "medical assistance," which is payment not actual services); Mandy R. v. Owens, 464 F.3d 1139 (10th Cir. 2006) (same); Westside Mothers¸454 F.3d 532 (6th Cir. 2006) (same, but remanding to allow plaintiffs to amend complaint); Bruggeman v. Blagojevich, 324 F.3d 906 (7th Cir. 2003) (same in strong dicta).

Further damage could be just around the corner. There are some areas, such as environmental protection, for example, in which five votes have not yet solidified for seizing every opportunity that comes up to roll back interpretations and protections of the landmark laws and programs and constitutional decisions established over the course of the last 2/3 of the 20th century. But entitlement programs, and citizen enforceability in particular, is not one of those areas. As noted above, Justices Scalia, Thomas, and Kennedy have all registered their inclination to move as far and as fast as they can in this area, and they have elaborated their doctrinal strategies for succeeding in that mission.

Just a year before he was nominated to the Supreme Court, then-Third Circuit Judge Samuel Alito opined that "future Supreme Court cases" could tighten the *Gonzaga* test to the point where Medicaid would become unenforceable across-the-board.[51] Nothing Alito said during his confirmation hearings contradicted this prospect, and his opinions on the Supreme Court suggest that he will do his best to make his grim prophecy self-fulfilling.[52]

As for the Chief Justice, he has not made his intentions explicit. But it is not hard to guess where his sympathies lie. He appeared as an advocate, arguing to narrow Section 1983, in several of the most important Supreme Court decisions over the two decades before he was confirmed as a member of the District of Columbia Court of Appeals in 2003, including *Gonzaga*.[53] In his confirmation testimony, he was critical or non-committal about the Rehnquist Court's most aggressive "federalism" decisions constraining federal power. But he appeared to stand firm behind the Court's drive to limit private judicial enforcement of federal laws. As an assistant to President Reagan's first attorney general, William French Smith, Roberts referred in a memo to the "damage" wrought by the Supreme Court's 1981 decision construing 42 U.S.C. § 1983 to support individual lawsuits against state officials for violating federal statutory rights, as well as federal constitutional rights. [54]

The bottom line is that the Supreme Court, which as we have seen was instrumental in defining and giving realistic shape to the status of Medicaid as an entitlement program worthy of the name, is on track to totally unravel those great

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[51] Sabree ex rel. Sabree v. Richman, 367 F.3d 180, 194 (3rd Cir. 2004) (Alito, J., concurring). In this case, the Third Circuit reversed a district court decision that would effectively have turned the *Gonzaga* test into an across-the-board bar to Medicaid enforcement suits. Alito concurred in the reversal but gratuitously observed that its decision "may reflect the direction that future Supreme Court cases in this area will take."

[52] While stopping short of embracing theories that would wholly block private enforcement of Medicaid, Justice Alito in a recent opinion dictated a special rule making Spending Clause legislation harder to enforce in court. *See* Arlington Cent. School Dist. v. Murphy, 126 S. Ct. 2455, 2459 (2006) (Opinion of the Court by Alito, J.) (reading into Court precedents a special "clear notice" rule for Spending Clause cases).

[53] As counsel of record for the university in Gonzaga Univ. v. Doe, 536 U.S. 273 (2002), the new Chief Justice advocated the "contract" theory, citing Westside Mothers Brief for Petitioners, 2002 WL 332055, *39-42. In his nomination hearings, however, he distanced himself from this view, stating "[t]here's no dispute" that Spending Clause legislation is controlling law, but that it is "sometimes" enforceable in court and sometimes not.

[54] See Simon Lazarus, *Federalism R.I.P.? Did the Roberts Hearings Junk the Rehnquist Court's Federalism Revolution?* 56 DEPAUL L. REV. 1, 13 n. 45 (2006)

accomplishments. There are two possible ways of preventing this reactionary outcome. First, Congress could act to unambiguously register its insistence on holding states accountable in court for their administration of the billions of dollars entrusted to them under Medicaid. Second, Medicaid advocates could find a legal strategy for reconfiguring the Medicaid enforcement issue that could all or most of the damage portended by the Roberts Court's hostility to Section 1983. Both of these approaches are challenging, but, as is briefly suggested below in Section IV, each is possible.

II. What's At Stake And Where We Stand: ERISA And Preemption.

The doctrines sketched above, that conservative jurists and advocates have marshaled to insulate state governments from accountability in court, all purport to protect "federalism" and "states' rights." A strong indication that the proponents of these theories are focused on outcome rather than principle lies in their transparently stitched-together, sophistic, and sometimes mutually contradictory character. For example, there is no basis in logic, common-sense, or the relevant case-law for the Scalia-Thomas assertion that statutes enacted pursuant to the "spending clause" (like Medicaid) are some sort of second-class mandate less entitled to judicial enforcement than laws authorized by other constitutional provisions. A law is a law.

But the most telling evidence of the result-driven impetus for "federalism" doctrines that close courthouse doors is the blinding speed with which conservative jurists ignore states' rights when business plaintiffs ask the Court to "preempt" – which is to say, invalidate – state laws on the ground that they are incompatible with a federal law. For example, Justice Scalia recently registered "no doubt that federal courts have jurisdiction" to entertain a suit alleging that a state requirement "is pre-empted by a federal statute, which, by virtue of the Supremacy Clause of the Constitution, must prevail . . . ."[55] In that case, the plaintiff was Verizon of Maryland, challenging an order issued by the Maryland Public Service Commission. All told, between 1996 and 2003, the Court considered nine cases in which plaintiffs sought redress for "violations" by state officials of federal civil rights and safety net laws, including the Voting Rights Act, the Americans with Disabilities Act, the Fair Labor Standards Act, and Title IV-D of the Social Security Act, which creates federal programs for child support enforcement. During the same period, it considered 10 cases in which business plaintiffs sought to "preempt" state regulatory or common-law requirements. "The pattern," according to the principal study of the Court's approaches to these issues, "is clear." When state or local officials are charged with violating federal civil rights or safety net requirements, "the Court does not reach the merits . . . unless plaintiffs can establish an explicit statutory right of action, either under the federal statute that creates the substantive right at issue, or under [what we have seen to be the formidably exactly screens imposed on] Section 1983." In contrast, in the otherwise similar, business-generated "preemption" challenges to state laws, regulations, and decisions, "the Court decides the merits of cases without considering whether plaintiffs have a private right of action under the preemptive federal statute or Section 1983."[56]

Although as yet little noted by the press or Congress – and much less visible to the public – preemption cases have long been a major preoccupation of the Court. Indeed, for the duration of William D. Rehnquist's tenure as Chief Justice, from 1986 to 2004, preemption cases accounted for 8% of the Court's civil docket[57] – a proportion

[55] Verizon Md. Inc. v. Pub. Serv. Comm'n. of Med., 535 U.S. 635, 642 (2002)
[56] David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 365-69 (2004)
[57] Out of 1,302 civil cases decided by the Rehnquist court over that time, 105 were preemption cases. Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 50 (2006).

greater than many high-voltage constitutional issues. The bulk of these cases involved business challenges to state regulatory statutes or, very often, common-law tort remedies.[58] And in preemption conflicts with private parties, businesses usually prevailed.[59] Individually and collectively, this preemption campaign by the Court has had large impacts on the availability of remedies for a wide variety of injuries and losses. En route to compiling this record, the Court has ruled, for example, that: federal regulations phasing in mandatory airbag requirements preempted state tort law claims against auto manufacturers for failing to provide airbags earlier that the federal phase-in date;[60] federal railroad regulations preempted state tort law claims against railroads for failure to maintain adequate warning signals;[61] federal employee benefit rules preempted state tort law claims against health plan administrators for wrongful denials of coverage that led to physical injury;[62] federal cigarette labeling requirements preempted state wrongful death claims against cigarette manufacturers;[63] and, most recently, federal banking regulations preempted state predatory lending and other consumer protection laws. [64]

While the Court's preemption doctrine is cutting a wide swath through standards and remedies applicable to many important sectors of the economy, in no area has the incidence of litigation, nor the frequency with which cases reach the Supreme Court, been higher than the 1974 Employee Retirement and Income Security Act, otherwise known as ERISA. ERISA governs the employer-sponsored plans on which by far the vast majority of Americans depend for retirement and health security. As Professor Timothy Jost has explained,[65] such plans and the legal framework governing them are not only critical as a practical matter for ensuring that 134 million[66] Americans are legally entitled to adequate and affordable health care. The existence of these plans and the huge role they play in the national health care system is a creature of federal government policy – tax and regulatory policy, to be specific. The mainstream system of employee-sponsored health plans is as much a component of the U.S. government's system for ensuring that Americans are "entitled" to health coverage, as are its direct government-administered components, Medicare and Medicaid. And the courts' – in particular, the Supreme Court's – role in implementing the goals of this huge branch of the system has been, if anything, more significant than with the two government-administered programs. Regrettably, the Court's impact has in major respects undercut, rather than enhanced

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[58] *See id.* at 52-53 (noting cases concerning preemption of tort law constituted 40% of the relevant case universe, and preemption was much more likely in tort cases). For their part, Greve and Kirk argue that a perception of "judicial hostility to state common law...is likely unwarranted," as the difference in results is likely accounted for by the non-participation of states as parties in tort cases. Whatever the role of judicial attitudes, the effect on state tort remedies is significant.

[59] *See id.* at 67-68 (Table 8) (showing businesses were markedly more likely to obtain reversal by the Court in disputes with private parties than private parties were to obtain reversal in disputes with business).

[60] Geier v. American Honda Motor Co., 529 U.S. 861 (2000)

[61] Norfolk Southern Railway Co. v. Shanklin, 529 U.S. 344 (2000).

[62] Aetna Health Inc. v. Davila, 542 U.S. 200 (2004).

[63] Lorillard Tobacco Co. v. Reilly, 535 U.S. 635 (2002)

[64] Watters v. Wachovia Bank, 126 S.Ct. 1559 (2007)

[65] Timothy S. Jost, DISENTITLEMENT? THE THREATS FACING OUR PUBLIC HEALTH-CARE PROGRAMS AND A RIGHTS-BASED RESPONSE 96-98 (2003)

[66] Employee Benefits Security Administration, *Fact Sheet: Workers' Right to Health Plan Information* (n.d.), http://www.dol.gov/ebsa/newsroom/fserisa.html.

Congress's goal of ensuring that employer-sponsored health care is an entitlement that individuals can count on.

ERISA was enacted after years of investigation and debate by Congress and the Departments of Labor, Justice, and Treasury, in addition to Presidential commissions. Its principal focus was on employee retirement plans, and ensuring that funds would actually be available to provide bargained-for benefits to workers when they retired. However, Congress also included so-called "welfare benefit" plans within the scope of ERISA, which in the main meant health plans. To ensure that employees and their families receive health and similar benefits as required, Congress specified certain remedies and procedures available to beneficiaries, in the event that plan administrators failed to meet their obligations. But necessarily, as with other broad-ranging, complex statutory programs, there were large spaces that the courts needed to fill in, in order to achieve Congress's broad goal of enhanced security for beneficiaries.

With Medicaid, as we have seen, at least at the outset, the courts stepped up to fill in most of those empty spaces with generous interpretations that established a robust health care entitlement program in line with the intent of the Congresses that enacted, modified, and expanded its provisions. Not so with ERISA on its health care side. Relevant scholarship has documented that Congress's strategy for securing health care access for American workers was to carry over and "subject these [employer-sponsored health] plans to the pre-existing [state law-based] regime of trust law rather than to invent a new regulatory structure."[67] No such detailed new regulatory structure was needed, because of the potency of core trust law principles, elucidated and elaborated through decades and hundreds if not thousands of state court decisions, and codified in restatements of the law by the American Law Institute. By making plan administrators fiduciaries, Congress imposed on them the traditional duties of loyalty and prudence that fiduciaries owe to trust beneficiaries, and all that that has been held to entail. As the leading expert, Yale professor John Langbein, notes, most important was the centuries-old trust law principle driving remedies for violations of those duties of loyalty and prudence: "Equity suffers not a right to be without a remedy." Tightly linked to this bedrock principle is the maxim that, if wronged, a beneficiary should be entitled to be "made whole" – to receive whatever is necessary to restore the state in which he or she would have been but for the HMO's default. "Make whole" included monetary compensation where necessary. But, very unfortunately, just as Rehnquist Court interpretations have trumped the principle of "Where there is a right, there is a remedy" for Medicaid patients, the same Court perversely read that principle out of ERISA as well.

The damage was done in a series of three cases, decided in 1985, 1993, and 2002.[68] Instead of nationalizing and strengthening trust protections for plan beneficiaries, these three decisions – what Professor Langbein characterizes as "The Supreme Court's

[67] John H. Langbein, *What ERISA means by "Equitable": The Surpeme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1318 (2003)
[68] Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985); Mertens v. Hewitt Associates, 508 U.S. 248 (1993); Great-West Life & Annuity Insurance Co. v. Knudson, 434 U.S. 204 (2002)

Trail of Error" – held that Congress had not focused on the rights of beneficiaries at all, but on protecting the plans themselves against possible abuse by administrators. Compounding this erroneous conception, the Court held that the specific remedies for beneficiaries spelled out in the Act were meant to be in lieu of, not supplementary to, state trust law remedies. A specific catch-all provision in the Act, authorizing courts to ward injunctive or "other appropriate equitable relief" was construed to mean only certain prospective, injunctive relief – no monetary compensation, even though it was surely pointed out to the Court that equitable relief had long included restitution – or such other remedial steps necessary in a given state of circumstances. Instead of embracing the "make-whole" and "where there is a right there is a remedy" principles at the heart of trust law, the Court disparaged full restitution as involving "extra-contractual" damages – damages which, if not specifically provided for in the terms of the plan, were beyond the power of federal courts to award.

This narrowing interpretation grievously misread Congress's intent, as noted by powerful dissents in these cases, and a rising chorus of scholarly writing and elaborate critiques by federal appellate judges. Justice Scalia, who wrote the opinions for 5-4 majorities in the 1993 and 2002 cases, conceded that this result – which required courts to decide whether a given form of relief would have been available a century or more ago when courts were divided into courts of law and courts of equity – was "unlikely," and not consistent with the oft-repeated goals of the sponsors of the legislation. But this was irrelevant: "Vague notions of a statute's 'basic purpose,'" Scalia scornfully charged, "are nonetheless inadequate to overcome the words of its text,"[69] as if this strange reading were the only one possible.

Justice Scalia and his colleagues have a chance to reverse their Trail of Error. The opportunity comes in the form of a petition for certiorari filed on August 29 of this year. The petition challenges an *en banc* decision of the Third Circuit Court of Appeals, in which the court ruefully barred relief, while critically noting that the Supreme Court's repeated misinterpretations is that in many cases where employers and plan administrators violate ERISA, there is really no remedy at all.[70] Where an employer can find a way to prevent employees' pension rights from ever vesting rather than actually breaching the terms of the pension plan, the court held, they can get off scot-free. One judge wrote a concurring opinion condemning the Supreme Court's ERISA decisions. But none of the circuit's 14 judges denied that this perverse result was required by those decisions.

However misguided, the perversion of ERISA itself by Justice Scalia and his colleagues wouldn't be totally fatal to beneficiaries' chances of recouping losses caused by plan administrator's violations of their duties of prudence or loyalty, as long as pre-existing state trust law remedies remained available. But therein lies the rub. Not only

[69] Mertens v. Hewitt Associates, 508 U.S. at 261.

[70] Eichorn v. AT&T, 484 F.3d 644 (3d Cir. 2007), *rehearing en banc denied*, 489 F.3d 590, *petition for cert. filed Aug. 29, 2007.*

has the Court gutted the remedial impact of ERISA itself. The Court has declared that Congress in passing ERISA meant to preempt, *i.e.*, extinguish, traditional, pre-existing state trust law remedies. Thus, the millions of workers and their family members covered by federally-subsidized, employer-sponsored health care plans are left without the guarantee of the "make-whole" remedy they previously enjoyed under state law, but without any replacement federal remedy. In short, there is no way to ensure that they get the benefits to which they are in principle entitled.

The grotesque perversity of this situation has nowhere been better captured, nor more insightfully explained, than in a remarkable 2004 opinion by the late former Chief Judge of the U.S. Court of Appeals for the Third Circuit, Edward Becker. Hardly a radical firebrand – he was named a District Judge by President Nixon and an appellate judge by President Reagan, and was among the lower-court federal judges most cited by the Rehnquist Court – Judge Becker decried the Court's double-whammy of misconstruing ERISA to exclude fundamental traditional trust law remedies while simultaneously preempting state remedies. The result, Judge Becker, explained, has been that ERISA has:

> evolved into a shield that insulates HMOs from liability for even the most egregious acts of dereliction committed against plan beneficiaries, a state of affairs that I view as directly contrary to the intent of Congress.[71]

The impact of this regime is not limited to particular individuals who have cause to challenge HMO coverage and/or treatment determinations. On the contrary, Judge Becker contends, insulation from liability inevitably drives the HMOs to incorporate systematic stonewalling of claims into their business model:

> [As construed by the Court, ERISA] creates strong incentives for HMOs to deny claims in bad faith or otherwise 'stiff' participants. ERISA preempts the state tort of bad-faith claim denial, so that if an HMO wrongly denies a participant's claim even in bad faith, the greatest cost it could face is being compelled to cover the procedure, the very cost it would have faced had it acted in good faith. Any rational HMO will recognize that if it acts in good faith, it will pay for far more procedures than if it acts otherwise, and punitive damages, which might otherwise guard against such profiteering, are no obstacle at all. Not only is there an incentive for an HMO to deny any particular claim, but to the extent that this practice becomes widespread, it creates a 'race to the bottom' in which, all else being equal, the most profitable HMOs will be those that deny claims most frequently.[72]

Becker's devastating critique concludes that "[the Court's perverse construction of] ERISA's remedial scheme gives HMOs every incentive to act in their own, and not in their beneficiaries', best interest while simultaneously making it incredibly difficult for

[71] Difelice v. Aetna US Healthcare, 346 F.3d 442, 553 (3d Cir. 2004)
[72] Id. at 459

plan participants to pursue what meager remedies they possess, a confounding result for a statute whose original purpose was to protect employees."[73]

The source of this "confounding result," Becker suggests, is not hostility on the part of the Court or of Congress, but their mutual failure to adapt to unforeseen changes in the healthcare marketplace. HMOs and other managed care arrangements, which now dictate the terms of health care for 75% of American workers, did not exist at the time ERISA was enacted or the first Supreme Court first established precedents that still hold sway, narrowly construing its remedial provisions and expansively construing its preemption provisions. At that time, independent doctors prescribed treatments and insurance companies determined whether their contracts covered such treatments and how much they should pay. But in managed care regimes, the insurer decides not only whether a particular treatment is covered, but whether it is medically necessary or appropriate for that person.

Hence, for example, in the case that occasioned Judge Becker's remarkable opinion, Aetna overrode the plaintiff's personal physician's judgment that an customized tracheostomy tube was required to cure his sleep apnea; Aetna insisted that plaintiff needed only a standard (much less expensive) tube, even though the plaintiff had already had such a tube implanted and it had "continually extubated" from the plaintiff's neck. Acquiescing in Aetna's decision despite this history, the plaintiff developed a "serious and progressive soft tissue and bone infection" that necessitated re-hospitalization, removal of "significant portions of his bone and tissue, and surgical reconfiguration of his pectoral muscle.[74] Becker's point in elaborating these facts appears to have been to suggest that this would have been a strong case either for a determination of bad-faith administration of the plan – *i.e.*, violation of the administrators' duty of loyalty under traditional trust law – if ERISA had been construed to permit (and compensate) such claims, or in the alternative, for medical malpractice under state law, if ERISA were not construed to preempt claims of that nature.

Another case illustrating the HMO misfeasance encouraged by the Court's ERISA decisions, and its tragic consequences, brought a plea for reform by former Yale Law Dean and 2nd Circuit Judge Guido Calabresi. There, a man suffering from multiple myeloma was denied coverage, without explanation, for the life-saving stem cell transplant urged by his oncologist. After two months of wrangling between doctor and HMO, the man was no longer a candidate for the procedure, and shortly died. The Second Circuit, by Herculian feats of logic, managed to square his widow's tort lawsuit with the harsh ERISA preemption regime, but Judge Calabresi lamented that even this just result was probably inconsistent with ERISA jurisprudence.[75] He was right: the Supreme Court intervened, and a helpless Second Circuit dismissed the suit.[76]

[73] Ibid.
[74] Id. at 463
[75] Cicio v. Does, 321 F.3d 83 (2d Cir. 2003).
[76] Cicio v. Does, 385 F.3d 156 (2d Cir. 2004) (per curiam).

None of this is to suggest – nor, presumably, was it Judge Becker's point to imply – that HMOs or other managed care arrangements that mix medical and cost decisions are a bad development. On the contrary, such regimes certainly help to control medical costs – an important national goal, by any measure. Big organizations that turn down requests for care by sympathetic beneficiaries are unlikely ever to be popular. But it is hardly sound policy to confer the vast power over individuals' and the society's health and well-being that managed care organizations appropriately wield, with no meaningful avenue of individual redress for inappropriate denials of care. To do so only creates incentives to systematically deny needed care.

However that may be, for our purposes here, it is enough to note the substantial role that the courts, and specifically the Supreme Court, have had in defining what this landmark enactment has meant in practice, and in determining whether the important social goals Congress had in mind when it passed the law have been realized. In particular, it bears emphasis that to make its mark on the ERISA entitlement regime, the Court has invoked conceptions of federalism – *i.e.*, conceptions of the respective roles of the federal and state governments, and the judiciary's role in sorting out the federal-state relationship.

As noted above, the area of employee benefits is by no means the only one in which the Rehnquist and Roberts Courts, through aggressive concepts of federal preemption, have in effect imposed national deregulatory policies constraining state and local lawmakers. On the contrary, in recent years, business groups, by now long accustomed to turning to the federal judiciary for preemptive relief from state regulators and juries, have taken this strategy to a new level – encouraging Bush administration agencies to promulgate sweetheart regulations, precisely for their anticipated preemptive effect. The press has – at long last – begun to take note. Recent articles in the *Washington Post* and *New York Times* have spotlighted this "recent surge of requests for new regulations [to] block consumer lawsuits in state and federal courts."[77] The *Times* listed such preemption initiatives in 14 industry sectors – including auto fuel efficiency standards, carbon monoxide emissions, light-bulb energy efficiency, predatory lending restrictions, fire-resistant furniture upholstery, and popcorn flavoring. Industry's new enthusiasm for increasing federal (de)regulation, together with the sheer volume of preemption cases on the Supreme Court's docket, suggest that the Court's vaguely demarcated preemption jurisprudence has made it a target for special interest manipulation, turning it into a roving busy-body, blundering into areas where it has little expertise and less awareness of unintended consequences. Certainly, in no area is the destructive impact of over-reaching more evident than in the Court's scuttling of meaningful remedies for employee health plan beneficiaries under ERISA.

[77] Eric Lipton and Gardiner Harris, *In Turnaround, Industries Seek U.S. Regulations; A Broad Tactical Shift; Trying to Fend Off Suits, Foreign Competitors and State Efforts*, N.Y. TIMES, page A1 (Sept. 16, 2007); Cindy Skrzycki, *Trial Lawyers on the Offensive in Fight Against Preemptive Rules*, WASH. POST., page D2 (Sept. 11, 2007).

III. Back to the Future? "Federalism" as the "Lochnerism" of the 21st Century

The Long Reign and Abrupt Fall of the Reactionary "Lochner" Constitution

As noted above, a century ago the Supreme Court committed itself to impose a constitutionally compelled national mandate for rigid *laissez-faire* economic and social policy. Justice Oliver Wendell Holmes, dissenting from a 1905 decision in which the Court struck down a maximum hours law for bakeries, famously skewered the Court's activism by noting that "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics**."**[78] The serious point of Holmes' quip was that the majority was reading into the Constitution a controversial ideology – social Darwinism, of which Spencer was known as a leading exponent – with no warrant in the text or history of the Constitution itself. While the justices happened to believe in Spencer's creed, most of the nation, Holmes noted, did not. Hence, the Court had no business dreaming up far-fetched constitutional theories to impose its own ideological view. Thanks in part to Justice Holmes's *bon mot*, that case now stands among lawyers as a kind of negative icon, the symbol of all that was wrong with the anti-regulatory jurisprudence of that era. The case was styled *Lochner v. New York*, and the arsenal of constitutional doctrines that the early 20th century Court marshaled to attack regulatory legislation is near-universally scorned as "Lochnerism."

In the *Lochner* case itself, the Court needed to look for authority to strike down state regulatory legislation of which it disapproved. The conservative justices conjured their legal theory from an unlikely source. They converted the Fourteenth Amendment, originally adopted primarily to prevent recalcitrant post-Civil War Southern states from denying African-American citizens equal treatment and basic rights, into an instrument for shielding businesses from state workplace protections and other regulatory initiatives. The Court's theory was that legislation banning child labor or prescribing maximum hours deprived workers and employers alike of "freedom of contract" – and that this "freedom" was protected against legislative interference by the Fourteenth Amendment's requirement that states not deprive any person of life, liberty, or property without due process of law.[79]

In addition to containing state regulatory initiatives, the *Lochner* Court's conservative majority was also focused on keeping Congress from enacting federal legislation it regarded as excessively intrusive – or at least limiting the permissible scope of any such legislation. For this purpose, the Court turned to a different constitutional provision, the "Commerce Clause," which authorizes Congress to "regulate commerce among the states." In Chief Justice John Marshall's heyday in the early 19th century, the Commerce Clause was given an expansive, nationalist spin, encompassing all commercial matters "which concern[ ] more states than one," and empowering Congress

[78] *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).
[79] *See, e.g.*, Hammer v. Daggenhart, 247 U.S. 251 (1918) (invalidating child labor law); Adkins v. Children's Hosp., 261 U.S. 525 (1923), *overruled by* West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (invalidating minimum wage law)

to regulate those matters to the "utmost extent."[80] But the turn-of-the-twentieth-century conservatives turned Marshall's Commerce Clause on its head. In the words of a seminal treatise by Harvard's Laurence Tribe, these justices jettisoned Marshall's broad, functional definition of commerce and "substituted a formal classification of economic activity far more restrictive of congressional power."[81] Thus, "manufacturing" and "agriculture" were not "commerce," and, moreover – since they actually occurred in one place – they were inherently local, not interstate.[82] Hence, the Court held, they were categorically beyond Congress's reach, regardless of the real-world impact of such activities on interstate commerce and the national economy.

The Court's two-pronged doctrinal strategy worked extremely well for the first third of the twentieth century. During those three decades, numerous state and federal programs fell before the Court majority's relentless activism, including, most dramatically, minimum wages laws and restrictions on child labor. The Court's clash with popular demands for progressive reform came to a head in 1935 and 1936, when the Court struck down core New Deal programs – the Railroad Retirement Act,[83] the National Recovery Administration,[84] and the Agricultural Adjustment Administration.[85] Indeed, only then, after a ferocious political backlash, led by a popular President with one of the largest Congressional majorities in American history, did the Court back down. Then, a succession of vacancies allowed President Roosevelt to transform the Court's political and ideological profile. By 1940, the pre-New Deal doctrines authorizing the Court to obstruct regulation of business and the economy had been scrapped. In the new constitutional order, the Court committed to give Congress and the states virtually unlimited freedom to target social and economic problems, and to configure solutions to those problems.[86] This type of forbearance was a large and critical change, as the analytical core of the *Lochner* Court's activist jurisprudence had been to narrowly define the goals appropriate for Congress (or state legislatures) to pursue, and, even when they selected obviously appropriate goals, the Court arrogated to itself the power to strictly scrutinize and freely reject the means legislatures chose to advance their goals.[87]

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[80] Gibbons v. Ogden, 22 U.S. 1, 194-96 (1824). While the Court did recognize a sphere of economic activity immune from federal power, it consisted only of those activities "completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." *Id.* at 195.

[81] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 307-08 (2d ed. 1988).

[82] *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 12-13 (1895) (holding that "Commerce succeeds to manufacture, and is not a part of it," and distinguishing commerce from "agriculture, horticulture, stock-raising, domestic fisheries, [and] mining").

[83] Railroad Retirement Board v. Alton R. Co., 295 U.S. 330 (1935).

[84] A.L.A. Schechter Poultry v. United States, 295 U.S. 495 (1935).

[85] United States v. Butler, 297 U.S. 1 (1936).

[86] *See, e.g.*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upholding Washington state minimum wage law); *Helvering v. Davis*, 301 U.S. 672 (1937) (upholding the retirement security provisions of the Social Security Act); National Labor Relations Board v. Bethlehem Steel, 301 U.S. 1 (1937) (upholding the National Labor Relations Act protections for collective bargaining); United States v. Darby, 312 U.S. 100 (1941) (upholding Fair Labor Standards Act)..

[87] *See, e.g.*, JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 172-80, 442-46 (7th ed. 2004) (summarizing the restrictive *Lochner*-era doctrines).

When the New Deal constitutional revolution arrived, it hit with such force that, ever since, federal courts and court-watchers of all political stripes have borne its imprint. In 1938, the Court explicitly embraced a platform of general deference to democratic outcomes, with exceptions only for laws abridging individual rights or targeting minority groups.[88] Known thenceforth as "Footnote 4," after the location in one of its opinions in which the Court articulated this rationale, this regime of restraint stuck for the duration of the 20th century. No one on the Court and few elsewhere challenged the maxim that, outside of areas threatening individual and minority rights, that judges should avoid second-guessing the goals and especially the means reflected in legislation. Thus, in matters of general economic regulation, labor policy, and social spending, the federal judiciary's protocol required that legislation be upheld if it was *possible* to conjure a constitutionally permissible goal and rational connection between the contents of the legislation and that goal – regardless of whether any evidence existed that Congress had actually undertaken such an ends-and-means analysis when it wrote the law.[89]

Congress responded with a sustained series of landmark laws that reshaped the economy and society, and revolutionized the role of government – safety net laws like Social Security, Medicare, Medicaid, and ERISA; economic regulatory laws and agencies like an expanded Federal Trade Commission, an expanded Food and Drug Administration, the Securities and Exchange Commission; the Consumer Product Safety Commission, the National Labor Relations Board, and the Occupational Safety and Health Administration; environmental laws like the Clean Air and Clean Water Acts, the Toxic Substances Control Act, and the Endangered Species Act; antidiscrimination laws like the Civil Rights Acts of 1964 and 1968, the Voting Rights Act of 1965, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act (1990) – to name just a few of the more visible and important measures.

As noted above, until the 1980s, the Supreme Court and the lower federal courts did not merely get out of Congress's way as it built the modern regulatory and administrative state. The courts construed critical foundational terms of these statutes broadly, to promote the far-reaching purposes that drove Congress to enact them. In addition, they opened the door to private citizens and advocacy organizations to enforce rights under these laws in court, generously construing express statutory provisions creating private rights of action, implying the existence of such a right when it was not expressly spelled

[88] *See United States v. Carolene Products*, 304 U.S. 144, 152 n. 4 (1938) (suggesting that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry")

[89] *See, e.g.*,United States v. Darby, 312 U.S. 100, 115 (1941) ("Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause"); Wickard v. Filburn, 317 U.S. 111, 129 (1942) ("The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do"); Gonzales v. Raich, 545 U.S. 1, 22 (2005) ("We need not determine whether [activities regulated by Congress], taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding").

out by Congress, and, finally, construing the Reconstruction-era statute 42 U.S. §1983 to permit citizen enforcement suits even when neither express nor implied authorization could be gleaned from the relevant statute.

In the 1980s, as we have seen, the Rehnquist Court retrenched on private enforcement of federal statutory rights, and expanded preemption of state regulatory laws. But these arcane doctrinal changes have not been widely perceived as potentially presaging a return to pre-New Deal conservative activist scrutiny of New Deal, Fair Deal, New Frontier, Great Society, and similar social and economic legislation. To be sure, a handful of passionately ideological libertarian academics and advocates have openly championed just such a back-to-the-future scenario. But that line has been broadly spurned, even by most conservatives. Conservative legal luminaries like Edwin Meese, Robert Bork, and, most recently, John Roberts have all joined liberals in condemning "Lochnerism." Indeed, they have often cited that spasm of judicial activism as Exhibit A in their case against the Warren-Burger Court's alleged "activism" on cultural and other issues; *Lochner v. New York* was wrong, they reiterate, for the same reasons that *Roe v. Wade* was wrong. Roberts seized on *Lochner* on his confirmation hearings as an example of judicial "immodesty,"[90] and spoke in a May 2007 opinion of the danger of the judiciary "presum[ing] to make... binding [policy] judgments for society," again citing *Lochner*.[91]

Flank Attack on the New Deal Constitution: Where It Will Come From

Notwithstanding such paeans to judicial restraint, it would be most imprudent to assume that the Roberts Court will forego the temptation to aggressively seek to invalidate and undermine progressive social and economic legislation. To be sure, it is unlikely, even if a Republican wins the White House and the right to nominate additional justices in 2008, that we will see a frontal assault on Congressional or state legislative authority to create the welfare state – that is, a literal return to the constitutional ideology of the *Lochner* era, with the exhumation of substantive concepts such as the notion of a constitutional right to freedom of contract to outlaw workplace protections for employees. As noted, there is a vocal cadre of libertarian conservatives who yearn openly for such a scenario (one of whom, Judge Janice Rogers Brown of the D.C. Court of Appeals, is considered a potential Supreme Court nominee[92]). But for a variety of reasons, an attempt at restoration of the substantive foundations of the early 20th century Constitution is not in the cards. What is plausible, however, is a flank attack, or more precisely a pincer attack on two flanks, utilizing the dense but potentially potent doctrines

[90] Roberts hearings, Day 3, http://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/AR2005091402346.html.
[91] United Haulers Ass'n v. Oneida-Hermiker Solid Waste Mgmt. Auth., 127 S.Ct. 1786, 1798 (2007).
[92] Prior to her elevation to the D.C. Circuit, while a member of the Supreme Court of California, Judge Brown bemoaned the New Deal Supreme Court's "Revolution of 1937" as a "disaster" of "epic proportions," and specifically praised the *Lochner* decision itself. Janice Rogers Brown, *"A Whiter Shade of Pale": Sense and Nonsense – The Pursuit of Perfection in Law and Politics*, address to the Federalist Soc., Univ. of Chi. L. Sch. (Apr. 20, 2000).

about federal structure and legal process nurtured, as we have seen, by the Rehnquist Court.[93]

The Roberts Court and the lower federal courts could readily seize upon and grow its predecessor's legacy – particularly its double-edged vision of federalism-as-states'-rights and federalism-as-preemption-of-state-laws. Both sides of this federalism coin give the Court tremendous potential leverage to constrain the authority of legislatures to pass laws and the ability of governments and private citizens and groups to implement and enforce them. From the standpoint of raw legal logic, committed ideologues on the federal judiciary would have no trouble deriving clusters of arcane rules with far-reaching impacts difficult for anyone but specialized experts to appreciate, or for Congress to correct. Over the three or four decades during which John Roberts and Samuel Alito can expect to serve, with complementary efforts by right-wing advocacy and business groups, in court and on Capitol Hill, they could go far toward matching the destructive record of the *Lochner* Court a century ago.

Admittedly, this is a worst-case scenario. How likely is it to actually unfold? Obviously, the range of answers to this question will narrow drastically a year from now, when we know whether Democrats will regain the White House and/or add to their currently thin House and Senate majorities, particularly the latter.

But regardless of the results of the 2008 elections, it is critical for concerned citizens, and progressive advocates in particular, to grasp the significance of these issues, to ensure that they can be addressed as effectively as circumstances permit, both in court and in Congress and state legislatures. Without question, they will form a significant battleground for progressives struggling to preserve the robust statutory and administrative enactments of the 20th century, and to enact and implement new legislative initiatives for the 21st century. This will probably not be an easy or straightforward challenge.

To begin with, the issues are neither simple nor one-sided. As noted above, while private rights of action play a critical role in implementing federal protections for vulnerable constituencies, conservatives do have a valid point in urging limitations. Some boundaries do need to be drawn, to avoid overwhelming state and local governments with frivolous lawsuits, especially the potentially intimidating threat of actions for damages. Unsurprisingly, justices regarded as members of the "liberal" bloc on the Court have endorsed sensible boundaries and even "clear statement" presumptions against state liability – when fairly and *prospectively* applied, in order to enable Congress to choose whether to authorize right of action authority for a given statutory scheme, as distinguished from blind-siding Congress by repeatedly changing the rules and inventing new hurdles, in order to defeat congressional intent. Fair-minded, good-faith analysis could readily yield sensible, consensus standards that would ensure that state and federal agencies implementing federal laws are accountable to citizens and, ultimately, to federal

[93] Needless to say, my knowledge of military strategy and terminology being what one might expect, the metaphors in the text may be less than precise.

judges, without unduly burdening either the courts or administering officials. The Rehnquist Court's doctrines and decisions have not met that mark. As noted above, they have too often frustrated congressional intent and statutory purpose, and choked off, rather than appropriately channeled, citizen court access and judicial oversight.

With respect to preemption, the picture is far more complicated. Federal judicial preemption of state laws is neither a recent development nor, even in its current iteration, dismissible as simply a right-wing conspiracy. Since Chief Justice Marshall's tenure, the federal courts have played an active – in fairness, since no clear authorization for this role appears in the text of the Constitution itself, an "activist" – role in enforcing the Constitution's Supremacy Clause, via unilateral preemption of state laws. Furthermore, preemption is, at least in principle, a statute-by-statute exercise. In each case, it is necessary to review in detail the text, purpose, and operational impact of the federal law in question, as well as the relevant state or local requirements, before determining whether the two schemes are compatible or incompatible. Indeed, many federal regulatory statutes contain express preemption provisions. In such cases – ERISA is one – the question is the *scope* of preemption Congress intended; such interpretative questions often carry vast consequences for preserving or eliminating state roles, and Congress has often been quite imprecise in assessing or prescribing those consequences.

Finally, while in federalism-states' rights cases, the Court has almost always split along sharp ideological 5-4 lines, in preemption cases, the combinations have been more varied and fluid. Thus, when the Court this Spring held 5-3 that the National Bank Act immunizes subsidiaries of national banks from all state banking laws, including predatory lending and other consumer protections, Justice Ginsburg wrote the majority opinion and Justice Stevens wrote a passionate dissent for himself, Justice Scalia, and Justice Roberts.[94] Members of the comparatively "liberal" bloc have frequently voted to preempt progressive state laws, though, more and more, with stated misgivings and suggestions that Congress change the relevant federal law or that, in future cases, the Court might revisit its own precedents. Conservative members have sometimes voted against preemption (and conservative constituencies) out of regard for their often-repeated (and often-finessed) concern for states' rights and local autonomy. Indeed, in the later Rehnquist years, the Court voted to preempt state laws less frequently than in the first half of his tenure.[95]

Why the Worst-Case Scenario May Be The Most Likely One

Despite the mixed record sketched above, if we project forward, there are compelling reasons for concern that the Roberts Court will, in the end, opt to energize the Rehnquist Court's "federalism" legacy, and charge off down the path of the worst-case scenario sketched above. First among these indicators is that, despite exceptions, the predominant pattern of the justices' past behavior is clear, and clearly ideological. The

[94] Watters v. Wachovia Bank, 127 S. Ct. 1559 (2007). Justice Thomas recused himself.
[95] *See, e.g.*, N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) (unanimously recognizing unhelpfulness of prior ERISA preemption decisions giving unlimited breadth to concept of "relat[ion] to" an ERISA plan); Medtronic Inc. v. Lohr, 518 U.S. 470 (1996).

Rehnquist Court's doctrinal ideas and rulings related to "federalism," both on the states' rights side and the preemption side, have had a transparent rightward bias. Harvard's Richard Fallon, in a 2002 article delineating (and entitled) "The Conservative Paths of the Rehnquist Court's 'Federalism' Decisions," noted that, between 1991 and 2001, the Court heard 35 preemption cases and ruled against the states in 22, including all 7 of the preemption cases heard in the 1999 and 2000 terms.[96] Fallon noted also that "some of the Court's most prominently pro-federalism justices [in cases limiting federal regulatory or citizen enforcement authority] are quick to find that federal regulatory statutes displace or preempt state regulations."[97] Professor Calvin Massey of Hastings Law School observed, "It is hard to understand why justices who are so aware of the values of federalism in [cases limiting federal authority to implement gun control and civil rights statutes] exhibit such blindness to those values when presented with a preemption case."[98]

In assessing what the justices' past behavior might portend for the future, it is essential to remember that the trade of former Justice O'Connor for Justice Alito has already created a visibly different environment, in which conservative justices have been willing, or driven, to take more confrontational positions than before. Obviously, the easier it is to assemble a five vote majority, not only will individual justices be able to vote their consciences more often, they are likely to redefine just what their consciences dictate. If past behavior (by liberal majorities as well as conservative majorities) is any guide, the more dominant one side of the Court becomes, the more likely the justices in the majority are to equate their views of what the law is or should be with their own ideological preferences. This tendency appears already to be evident in the behavior of members of the current Court

A more specific consequence of Justice O'Connor's departure is the fact that Justice Kennedy has replaced her as the swing vote, who effectively decides most of the "hot button" cases. On the Rehnquist Court, Kennedy tended to be a bit less "moderate" than the pragmatic O'Connor on federalism issues, both on the states' rights side – especially in cases involving private right of action issues – and the preemption side. For this reason alone, this Court can be expected to swing to the right on such issues more often, and further, than its predecessor.

Another important variable will be the Chief Justice. How far and how hard the new Court charges toward the right will depend in part on the personal designs of its young leader. Prior to and for some months after his confirmation as Chief Justice, many court-watchers made much of Roberts' reverence for Chief Justice John Marshall. They saw this as a reason to predict that as Chief Justice, he would be more a consensus-seeking institutionalist than a political or ideological radical. Under Marshall's leadership two centuries ago, consensus decisions were indeed the rule, and individual

[96] Richard Fallon, *The Conservative Paths of the Rehnquist Court's 'Federalism' Decisions*, 69 U.CHI.L. REV. 429, 462-63 (2002)
[97] *Id.* at 432. Conservative scholar Michael Greve acknowledges "substantial evidence" for Fallon's characterization, arguing only that there is somewhat more "fluidity" to the preemption lineups than he suggests. See Greve, supra note __, at pp. 4 and 51.
[98] Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 508 (2002)

dissenting or concurring opinions a rarity. A Chief Justice who wished to emulate that aspect of Marshall's record would necessarily have to steer himself and his colleagues toward the ideological center. But so far that has not happened. Roberts' Court is even more polarized than Rehnquist's, and the Chief Justice himself is the principal reason why. Time after time, he has passed up opportunities to forge broad-based moderate majorities, and come down instead hard to the right.[99] The reason for the errant forecasts[100] may be that Roberts is focused on a facet of Chief Justice Marshall's legacy other than his consensus-building talents.

Marshall's unique historical stature and impact is owed mainly to his persistent, though flexible and politically deft, 34-year drive to put in place the building blocks of his Federalist Party's "Big Government" vision of the Constitution. Far more than the hot-button constitutional issues of today, the Federalists' constitutional goals were politically volcanic – a Supreme Court empowered to invalidate "unconstitutional" federal and state laws; a federal Congress vested with broad discretion to establish major programs not specifically authorized by the written Constitution (like the national banking system); and a Supremacy Clause with teeth, that authorized federal courts to displace state law when it clashed with federal law or even unwritten constitutional principles. At the outset of his tenure, Marshall and the Federalist majority on his Court were far more politically outgunned by President Thomas Jefferson's Republicans, than Roberts and his conservative colleagues are by their liberal and moderate adversaries on or off the Court. The Jeffersonian Republicans, who favored a "Small Government" vision of a decentralized union, won the fiercely-contested 1800 election. They took control of the White House and Congress, determined to squelch the Federalists' constitutional design and, indeed, drive leading Federalists, including Marshall, from the bench altogether. But Marshall persevered, and, by strategically interspersing bold and epochal decisions with long periods of decisional tranquility, he ultimately prevailed. The Constitution he left, and in great measure, the Constitution we have today, fit his vision, not Jefferson's. If that monumental accomplishment is Roberts' model, this brash young Chief Justice could be looking long-term to build a durable legacy of fundamental change – reactionary change – more than contemporary intra-Court harmony.

Apart from the internal dynamic among the Court's conservative members, pressures to embrace an ideological agenda will also emanate from kindred spirits off the Court. And, it should be stressed, there is an articulate and intellectually potent cadre of scholars and advocates who openly tout the notion of using federalism as a double-edged anti-big government sword against both Washington and state capitols. In the vanguard are Richard Epstein of the University of Chicago and Michael Greve of AEI. They are among the leading exponents of both the Rehnquist Court's pro-states' rights federalism, and of aggressive judicial preemption of state regulatory initiatives. As noted above, Professor Ernest Young of the University of Texas, a conservative but consistently states' rights-oriented federalism expert prominent in Federalist Society circles, the Epstein-Greve "libertarian vision" sees "federalism as a tool of deregulation with the potential

[99] Some of those by-passed opportunities are noted in my article, *More Polarizing Than Rehnquist*, THE AMERICAN PROSPECT, May 2007, pages 23, 24-26.
[100] One of the errant forecasters was myself, *id.* at 27.

keep both national and state governments within relatively narrow bounds."[101] Professor Epstein is a full-blown libertarian whose druthers would be to bring back the *Lochner* Constitution more or less *in toto*.[102] But he apparently sees the pragmatic virtue of achieving the same radical deregulatory goal indirectly, by arguing that the founding fathers created the nation's dual form of government precisely to minimize the size of both state and local governments, on the one hand, and the federal government, on the other.[103] While this claim is not widely considered to jibe with the historical record, Epstein, Greve, and the real-world business advocates promoting aggressive preemption also put forward arguments that are less radical and far-reaching, but also less easily dismissed. For example, they emphasize, multimillion- or even multibillion-dollar state tort judgments have vast impacts on the economy nationwide; isn't it appropriate, therefore, that governance of affected sectors of the economy be nationalized, at least where federal regulatory schemes indicate some interest on Congress' part to establish national ground rules?[104] Hence, they contend, it is perfectly appropriate to contend simultaneously that in some areas, such as product liability litigation, states wield excessive power over national matters, while in other areas, such as the threat of damage judgments against financially stressed states and municipalities, federal law enforcement must be tempered to accommodate legitimate state interests.

What matters, or could matter, about the work of anti-government federalism theorists like Greve and Epstein is the encouragement they may give conservative judges to just go for it – to stop feeling like hypocrites for waving banners for states' rights on one day and for federal supremacy the next. Until now, views like theirs have been too far from the mainstream to have much influence on the justices or the development of the law. But that could change. Devoutly ideological scholars may find a more attentive audience, if members of the Roberts Court incline toward pushing ideological envelopes and testing their own political limits.

Capitol Hill Gridlock as the Court's Enabler

There are good reasons to think that those political limits may be less constraining than one might expect. Till now, Congress has generally been slow to react, and slower still to act, when Supreme Court majorities have limited Congressional authority, misconstrued isolated statutory terms to undermine broad statutory purposes, or twisted statutory language to justify aggressive judicial displacement of progressive state and local laws. Obviously, the Democrats' victories in 2006 could change this picture. But, even if the Democrats not only retain, but expand their House and Senate majorities in coming elections, chronic legislative gridlock could continue to trump efforts to reverse

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[101] Ernest A. Young, *Federal Preemption and State Autonomy*, in RICHARD A. EPSTEIN & MICHAEL S. GREVE (EDS.), FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 249, 249 (2007).
[102] The extraordinarily prolific Epstein has articulated this view in many places – most succinctly in a short Cato Institute tract, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006).
[103] *See* Richard A. Epstein & Michael Greve, *Preemption Doctrine and Its Limits*, in EPSTEIN & GREVE (EDS.), *supra* note __, 309, 310-12 (2007) (attributing the search for a "regulatory optimum" to an "original constitutional logic".
[104] *Id.* at 323-36.

or otherwise respond to runaway activism on the Supreme Court or the lower federal courts. Specifically, overturning state' rights-oriented curbs on enforcement of federal safety net laws like Medicaid will remain a significant challenge. This is because legislative "fixes" to overturn such decisions are likely to be opposed by many state governments, including state governments controlled by Democratic governors influential with Democrats as well as Republicans on their states' Congressional delegations. Hence, Democratic committee chairs and staffs may prefer to focus on legislative initiatives that provoke less opposition from within their own party. Similarly, while states will favor efforts to overturn preemption over-reaches, such initiatives are likely to mobilize fierce industry opposition. The contemporary Senate, in which 60 votes are needed to pass any significant bill, could be a chronic graveyard for attempts to overturn Supreme Court decisions. Hence, would-be activists on the Court could come to feel quite insulated from realistic threats of rebuke or reversal from Capitol Hill.

Instructive on this point is the status of the current effort to "fix" last term's notorious *Ledbetter* decision. In that case, a 5-4 majority ruled threw out the complaint of a female worker who discovered when she retired that her pay had for many of her 20 years with her employer been 15-40% lower than all employees in similar positions, all of whom were male. The majority held that the statutory 180 day statute of limitations ran from the time at which the original decision to shunt the complainant to a lower pay track, rather than, as the Equal Employment Opportunity Commission and all but one Circuit Court of Appeals had long maintained, from the last discriminatory paycheck she received. In effect, as Justice Ginsburg stated in an angry and unusual verbal dissent, the majority "grand-fathered" and immunized companies against redress for many, perhaps most instances of discriminatory pay, as such decisions typically are discovered long after they occur. The Court's decision not only gutted the equal pay provisions of the 1964 Civil Rights Act (and the 1967 Age Discrimination in Employment Act), but effectively ripped up an earlier 1991 legislative "fix" that Congress passed (and President George H.W. Bush signed) to overturn a Rehnquist Era misreading of a similar civil rights provision. More important, unlike many Court decisions that distort Congressional intent and adversely affect many people's lives, the patent unfairness of the *Ledbetter* decision caught the attention of the press and the public, creating a genuine groundswell for another Congressional reversal. And just such a reversal cleared the House as Congress left for its August recess this summer – though strong business community opposition kept all but a few Republicans from voting for the bill. Even still, the legislation now appears to be mired in the Senate. Senators Kennedy and Specter, its two principal co-sponsors, have warned advocates that they must find 60 votes to expect the bill to be voted out of committee. Given the intensity of business opposition, the current Senate almost surely does not have 60 votes to block a filibuster of this bill – despite the relative visibility and popularity of the issue.

This paradigm, of an aggressive Court to the right of Congress, many state governments, and a majority of the national electorate – but unchecked because of chronic Capitol Hill gridlock – could become a basic structural feature of the early 21st century political environment. One upcoming manifestation, especially central to the

subject-matter of this paper and of significant concern to the audience of this conference, could decide the fate of state efforts to promote universal health insurance. The fact that such efforts are occurring, in Massachusetts, Vermont, and California so far, is itself testimony to the impact of the Congressional gridlock syndrome. The ability of well-organized groups with major stakes in the status quo to block complex federal health care legislation has driven reform advocates to promote state-level initiatives. Needless to say, designing and enacting such legislation, even if confined to a single state, is a formidable undertaking. But probably the biggest threat to the viability and effectiveness of individual state health reform plans, and to the general strategy of state-by-state reform, is the threat of ERISA preemption. The sweeping, and shifting, criteria announced in the Supreme Court's numerous ERISA preemption decisions impose severe and arbitrary constraints on state legislators seeking rational solutions to the costs and problems generated by their burgeoning uninsured populations. And no matter how they construct their plans, court challenges on ERISA preemption grounds are a sure bet. [105] Moreover, it is by no means a sure bet that plans such as that already adopted by Massachusetts and Vermont, or the measure advancing in California, will survive review under the Court's bloated ERISA preemption regime.

In sum, there are good reasons to anticipate that the early 21st century Supreme Court will, after all, attempt a reprise of the early 20th Century Court's drive to overturn and undermine progressive legislation, including health care and other safety net guarantees, at both the federal and state levels. Further, contrary to the Founding Fathers' view that the judiciary would be the "least dangerous branch,"[106] a Court with such a calculated reactionary agenda could well become a formidable adversary to states and a Congress enfeebled by chronic gridlock. If we do see this movie again, it will not be billed as an overt re-enactment of the old Court's attempt to enact Mr. Herbert Spencer's Social Statics. Instead, a drive by the Roberts Court to set itself up as what Senator Arlen Specter termed a "super legislature"[107] will be principally shrouded in the camouflage of federalism-as-states' rights and federalism-as-preemption. This approach is conveniently at hand, and would lend itself to the new Chief Justice's already apparent preference for what his more forthright colleague, Justice Scalia, has derided as "obfuscation" strategies. But it would amount to more or less the same thing – an effort by an ultraconservative bloc of life-tenured justices to impose, to the extent feasible, a "national policy of *laissez-faire*."

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[105] Alaready, a federal court of appeals has invalidated under ERISA, by a 2-1 vote, Maryland's attempt require large employers to provide adequate health coverage. *See Retail Indus. Leaders Ass'n v. Fielder*, ___F.3d ___, 2007 WL 102157 (4th Cir. 2007).

[106] *The Federalist* No. 78 ("Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them").

[107] Opening Statement of Sen. Arlen Spector, Hearing on the Nomination of John Roberts to Be Chief Justice of the Supreme Court (Sep. 12, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300693.html

IV. What to Do? Preserving and Enhancing the Progressive Statutory Legacy In The 21st Century.

This paper has sought to suggest five principal points:

1. The federal judiciary has played a significant role in making or breaking the great federal statutory safety net programs (and complementary state laws that furthered federal progressive objectives) enacted during the last 2/3 of the 20th century. This paper focused on two such programs or program areas – Medicaid and employee-sponsored health plans. But the same point could be made regarding many of the other major 20th century progressive statutory initiatives, such as civil rights, workplace protection, consumer protection, and environmental laws.

2. The Warren and especially the Burger Supreme Courts tended to use their power to help make progressive laws stronger and more effective. The Rehnquist Court tended to rein in and curb these programs, in particular (in the cases on which the paper focused) with regard to the availability of private and individual remedies through the courts.

3. The Roberts Court may ratchet up the Rehnquist Court's drive to limit and narrow these programs, and set out to "break" them as much as possible, by eliminating private judicial enforcement altogether and hollowing out the substance of federal laws, especially remedial provisions, while simultaneously preempting alternative state remedies.

4. The bottom-line is that, given the significant breadth of judicial discretion in construing and enforcing these laws, the fate of many landmark New Deal-New Frontier-Great Society programs, as well as potential 21st century initiatives, will be in the hands of a cadre of ideologically conservative jurists hostile to their objectives.

5. A major battleground in 21st century judicial struggles to preserve and implement the goals of 20th century progressive laws will be "federalism" – doctrines that the Rehnquist Court developed to restrict federal interference with "states' rights," on the one hand, and doctrines to "preempt" state laws that interfere with federal laws and constitutional principles and provisions, on the other.

In short, we are, potentially, at an historical turning point. In this section, I will briefly consider basic requisites for an action agenda to ensure that, as this turn unfolds, it winds up in an acceptable direction.

1. The Courts and Court Advocacy

As noted above, there are good reason to fear the materialization of a "worst-case scenario" for the future of the federal courts' treatment of safety net and other progressive legislation,

specifically Medicaid and ERISA-regulated employee-sponsored health insurance. But at this point, all is not lost. Better outcomes are realistically possible. Both sympathetic judges and court advocates are relatively well attuned to the issues and the stakes. So below is a brief summary of the state of play in the federal courts on the issues on which this paper has focused – judicial enforcement of Medicaid and judicial remedies for ERISA-regulated employee-sponsored health plans.

Medicaid Rights Enforcement

With respect to the availability of a private right of action to enforce Medicaid rights to treatment, the initial question is whether the Supreme Court will maintain the narrowed room for such actions under Section 1983 prescribed in *Gonzaga v. Doe*? Or will the Court narrow or eliminate altogether any real room for private judicial enforcement of Medicaid requirements under that traditionally available provision. Any realistic assessment of the inclinations of existing Court members must yield the conclusion that five votes probably exist for the latter option, or even for overturning *Maine v. Thiboutot* and precluding the use of Section 1983 as a vehicle for securing judicial enforcement of federal statutory rights, as distinguished from constitutional rights.[108]

In addition to working to avoid this draconian outcome, court advocates are pursuing a promising Plan B: an alternative doctrinal route for getting into court to challenge unlawful state action, to complement or replace Section 1983. In 2002, soon after the Supreme Court's *Gonzaga* decision, as the access-denying impact of that decision was beginning to sink in, the late Herbert Semmel, then Director of NSCLC's Federal Rights Project, came up with just such a legal theory. His idea was in essence to suggest that sauce for the goose must be sauce for the gander. He proposed transplanting the welcoming rules that the Court applies to (mainly business) plaintiffs seeking to "preempt" allegedly unlawful state laws to challenges of state noncompliance with federal safety net or civil rights laws.[109]

In the five intervening years, Semmel's preemption theory has been deployed by advocates in several cases, as an alternative to Section 1983. So far, the two courts of appeal to address the issue have ruled in favor of permitting these suits to proceed, even in circumstances where they would be out of court under Section 1983, post-*Gonzaga*. Of course, at least five members of the Supreme Court will ultimately have to sustain this approach. But to reject NSCLC's preemption theory, the Court will have to apply a blatant double-standard to individual rights plaintiffs, as distinguished from the business plaintiffs who are the protagonists in most preemption cases. So, with good lawyering and good luck, this doctrinal innovation may just work, thereby reopening courthouse doors that have over the past decade have been closing on safety net beneficiaries and civil rights victims.

Remedies for Employer-sponsored Benefit Plan Beneficiaries

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[108] Lauren Saunders, *Are There Five Votes to Overrule Thiboutot*: *The Threat to Enforcement of Federal Medicaid, Housing, Child Welfare, and Other Safety Net Programs*, 40 CLEARINGHOUSE REV. 380 (2006).

[109] Herbert Semmel, *Enforcing Federal Rights Through 1331/Supremacy Clause Jurisdiction*, NAT'L SENIOR CITIZENS L. CENTER, http://www. Nsclc.org/federalrights/1331 article 102102.htm. As Tim Jost points out, the very first Warren Court decisions upholding rights of action to enforce the Social Security Act (of which Medicaid is a title) were based on preemption principles and the Supremacy Clause, not on §1983.

Will beneficiaries of employer-sponsored health plans continue to confront the large barriers the courts have built to remedying violations of federal or state law, or the terms of their plan agreements? Or will the damage done by the Court's double-whammy – too narrowly construing ERISA's own remedial scheme while too broadly preempting traditional complementary state law remedies – metastasize? Here, too, there is some room for realistic hope that, with effective work by patients' advocates, the courts themselves will move the law back in directions more rational and humane, and in line with the purposes of the Congress that enacted ERISA.

As described in some detail above, the late Judge Becker has cogently shown how current Supreme Court doctrine departs from Congress's intent in enacting ERISA, shields HMOs from liability for denial-of-treatment decisions, and incentivizes them to deny or stonewall claims, regardless of policy terms or best medical practice. Justices Ginsburg and Breyer in 2004 expressly embraced Becker's analysis. It is plausible, if not necessarily likely, that five or more members of the current Court will recognize the grotesque injustice and inappropriateness of the current state of the law, and embrace something akin to the view expounded by Judge Becker, Professor Langbein and many other scholars and judges.[110]

On the preemption side of the ERISA remedy gap, it is potentially significant that the Court has not, at least not yet, hardened into immutable blocs on the right and the left. In the most recent major preemption case, the Court's April 2007 decision that the National Banking Act bars application of state consumer safeguards to national bank subsidiaries, Chief Justice Roberts and Justice Scalia joined Justice Stevens's passionate dissent. [111] (Justice Thomas recused himself.) So a number of conservatives recognize the inconsistency of the Court's preemption jurisprudence with their on-again, off-again genuflection to states' rights, and are, at least in some instances, willing to vote consistently with the latter.

It will soon, in any event, be apparent whether reform of the law of ERISA remedies and preemption can come from within the Court itself. One potential bellwether case is on the Court's docket for this term[112], and Supreme Court review has been requested in a second.[113] Broad-based advocacy organizations steeped in ERISA jurisprudence, including AARP, the National Employment Lawyers Association, Community Rights Counsel, and the Pension Rights Center have submitted *amicus curiae* briefs in both of these cases.

2. Will Congress Keep the Supreme Court from Shredding the National Safety Net?

Congress remains the key variable in trying to project whether a hyper-activist 21st century judiciary will seek to roll back the progressive reforms of the 20th century, and whether they will succeed if they try. In limiting Congressional authority and aggressively misconstruing major

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[110] *See, e.g.*, Eichorn v. AT&T,489 F.3d 590, 591 (3d Cir. 2007) (Ambro, J., concurring in denial of en banc rehearing) (citing nine lower court opinions and 26 law review articles criticizing the Court's ERISA remedy and preemption jurisprudence).

[111] Watters v. Wachovia Bank, 127 S. Ct. 1559, 1573 (2007)

[112] Larue v. Dewolff, Boberg & Assoc., Inc., cert. granted, 127 S.Ct. 2971 (2007) – lower court decision, 450 F.3d 570 (4th Cir. 2007) (raising the question whether ERISA permits a plan participant to sue for monetary "make-whole" relief to compensate for losses caused by breach of fiduciary duty by the plan administrator)

[113] Eichorn v. AT&T, petition for cert. filed, ___ U.S. ___ (2007); lower court decision, 484 F.3d 644, *reh'g en banc denied*, 489 F.2d 590 (3d Cir. 2007) (holding that participants may not recover losses directly caused by employer's actions, even if these actions violated ERISA)

federal statutes, the Court has been picking a fight with Congress. Up to this point, Congress has for the most part turned the other cheek. As noted above, there have been some stirrings on Capitol Hill. During the Roberts confirmation hearings, members of both political parties attacked the Court's federalism rulings as usurpations of Congressional authority – in particular Senators Specter, Leahy, and Schumer. This past Spring Congress initially reacted with commendable dispatch to the Court's May 2007 *Ledbetter* decision, which emasculated equal pay guarantees of the 1964 Civil Rights Act and ignored the 1991 Act Congress passed to reverse a Rehnquist Court decision that gutted the 1964 Act in substantially identical ways. But, other than a tough-talking July 2007 speech by Senator Charles Schumer to the American Constitution Society, there has been little follow-up to the Judiciary Committee's protests about conservative judicial activism in the Roberts hearings. And the *Ledbetter* fix legislation, though it passed the House, seems mired in the Senate, as noted above.

As the *Ledbetter* fix fizzle demonstrates, Congress will continue to have difficulty reversing Supreme Court decisions that gut progressive statutory programs like ERISA and Medicaid. But, apart from enacting corrective legislation, there is much that liberal and moderate members of Congress can do. To begin with, they can force these issues, rather than let them drop. As with other initiatives facing White House veto threats and/or Senate filibuster threats, there is value in moving legislation forward to raise the visibility and public appeal of issues, underscore their priority, and compel opponents to cast votes. In addition, other avenues are open to rally public support and jawbone the Court – for example, repeated, strong condemnations of conservative judicial activism, rapid responses to important court decisions and related developments, and hearings to spotlight the Court's flouting of precedent, Congressional intent, and manifest public needs. Finally, Congress needs to become more strategic and focused about drafting legislation, to minimize opportunities for hostile judges to twist statutory terms to defeat Congressional purposes.

Again, there have been some steps in the right direction. In September 2007, for example, Senator Patrick Leahy's Judiciary Committee held a day of hearings to spotlight the recent collaboration among industry lobbyists, Bush administration regulatory agencies, and sympathetic courts to choke off effective regulation through promulgation of weak federal regulations and preemption of stronger state standards.[114] Senator Specter has threatened hearings on the Roberts Court's disregard for precedent. Focus on such issues is all to the good. But to register either with the Court, the press, or the public, a good deal more is needed. Congress needs to raise a serious and sustained ruckus. If Congress *does* show that it is on the case, that it could get mad enough to get even, at this preliminary stage, that much could dull the Court's appetite for confrontation. In any event, one thing is clear: If Congress does not begin to make a serious fuss about the Court's incipient right-wing activism, nothing else will matter. Certainly, the Court's hard-line conservative bloc is unlikely to refrain from scratching its manifest activist itch, if all it hears in return are protests from liberal editorialists, advocates, and academics, and sporadic grumblings from a few members of Congress.

3. The Make-or-Break Variable: Progressive Advocacy Communities and the Need to Unite Law with Politics.

[114] *Regulatory Preemption: Are Federal Agencies Usurping Congressional and State Authority*, September 12, 2007, http://judiciary.senate.gov/hearing.cfm?id=2935

There are many reasons why the battles over judicial enforcement of entitlements have been waged in comparative isolation from the press, public, and Congress. In particular, there are reasons why Congress has been chronically slow to respond to curtailment of its powers and prerogatives, and neutralization of some of its most significant, and difficult-to-achieve legislative accomplishments. One reason, of course, is the simple fact that the Democrats had been until last year been out of power for 12 years. Republican majorities and committee chairs were (predictably) not hugely interested in challenging court decisions that undermined statutes embodying predominantly Democratic ideals and rewarding Democratic constituencies. Another factor is the peculiarities of the breed of new conservatives who increasingly dominated the Republican majorities in both houses. Compared to prior generations of Republicans, the Gingrich generation had less historical engagement with the programs under attack in the courts, and much less institutional commitment to the Senate or House or Congressional prerogatives. Historical trends and factors such as these are difficult to change or influence.

But there is a major variable that the progressive expert and advocacy communities represented in this conference can decisively affect: our own goals, priorities, and strategies. In recent decades, as this paper has reflected, court advocates for federal safety net and kindred statutory programs have fought valiant and often brilliant battles. But in the main they have been forced to retreat, and in the end they are probably on a trajectory to lose the war. The principal reason is that these court struggles have been waged in relative isolation – isolation from public opinion, from politics, and, hence, from Congress.

The Roberts Court can be turned around. More particularly, its conservative bloc can be turned away from any designs it may have on reprising the early 20th century Supreme Court's reactionary activist assault on social and economic legislation. But to achieve this result, a conservative judiciary must not be allowed to continue down this road free from public scrutiny or political discipline. It is up to the advocacy communities threatened by an aggressively activist judiciary to make that change in the political and legal environments. This essential project is not simple, but it is doable.

To map the agenda that we need to pursue, I suggest the starting point is to recognize that there are three distinct progressive advocacy communities to be engaged. First, there is the substantial community of court advocates for the causes of vulnerable constituencies. For many decades, they have done a magnificent job in court – so magnificent that they have triggered a potent political backlash. Some of the groups have, some of the time, attempted to reach out to the media and political worlds to address that backlash. But by and large, public interest lawyers handling economic issues for vulnerable constituencies – health and retirement security, workplace fairness, consumer protection, access to public benefits and similar matters – have stuck to what they do and know best – litigating. Some of these lawyers, or organizations which they represent or with which they ally, have reached out on a technical level to like-minded members and especially staff in Congress and state capitols. Such lawyerly outreach is critical, to alert Congressional allies to needs they would not necessarily spot on their own, and to ensure that legislative provisions are well-crafted to actually meet those needs. Nevertheless, technical advocacy falls well short of what is needed to win the larger political war – a war, as noted above, ignited by the litigators' own successes in court.

There is a second advocacy community relevant to the fate of progressive statutory programs in the Roberts Court. These are organizations that handle the same, largely economic issues and

represent the same constituencies as the public interest litigators. But this second group consists of public interest lobbyists and policy advocates. In some cases, close connections and integrated strategies link the litigators and the lobbyists. But this seems to me to be the exception, and major disconnects are the rule. At least the strategic integration is far less consistent and less systematic than is needed. In many cases, leading constituent and advocacy groups on health and retirement security, workplace fairness, equal opportunity, and similar bread-and-butter issues are focused more or less exclusively on legislative agendas, principally in Washington but also in some cases in the states. These advocates tend not to pay much attention, certainly not priority attention, to what has happened and what is likely to happen in the future to their programs and proposed programs in court.

This prioritization manifests itself in many ways. For example, policy and legislative advocates for seniors, organized labor, and beneficiaries of low-income health programs, and the issues with which they are concerned, have played lesser roles, or no role at all, in the politically charged process of vetting judicial nominees. Similarly, in constructing the legislative agenda for the 110th Congress, proposed "fixes" for Rehnquist Court decisions gutting safety net guarantees such as those described earlier in this paper, were assigned low priority by the leading advocacy groups, and by Democratic legislators and staff. And though one important "fix" proposal actually resulted in proposed legislation this year – the *Ledbetter* bill described above – this project has not received sustained and focused support from either the relevant advocacy communities nor from its co-sponsors on the Hill, especially in the Senate. More generally, if, over the past three or four decades, these advocacy groups had been more attuned to relevant court developments, their Congressional allies could not and would not have paid so little attention as hostile court decisions diminished their authority, flouted their intent, and undermined laws they had worked hard to enact

There is a third group of progressive advocates. In contrast to the-above described economic issue advocates, this third group does integrate their judicial, legislative, and political agendas. We could label them the individual rights communities. Their focus is the so-called culture war issues – abortion rights, religious freedom, gay rights, civil liberties, and affirmative action. These groups have a clear grasp of both the centrality of the courts to their overall goals, and of the larger political environment that will ultimately dictate whether the courts promote or undermine those goals. Because of this recognition, these groups have not only fought in court, put have worked tirelessly to keep their court issues up-front when the media, the public, and politicians think about what the courts do that matters. In particular, as *New Yorker* and CNN pundit Jeffrey Toobin observes in his new book, *The Nine*, in the past three decades,

> There were two kinds of cases before the Supreme Court. There were abortion cases – and there were all the others. Abortion . . . dominated the nomination and confirmation process. It nearly delineated the difference between the national Democratic and Republican parties . . . [115]

Certainly, it is true that liberal and moderate politicians look mainly to abortion rights and other progressive culture warriors for cues as to what court developments merit their attention, and which judicial nominees merit their support or opposition. As noted above, some inroads were made during the Roberts and Alito confirmations, when some senators targeted the Rehnquist

[115] JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 36 (2007)

Court's federalism decisions as "usurpations" of Congressional authority. But overall, Toobin's assessment is unchallengeable.

In fact, as this paper has shown, issues affecting day-to-day pocket-book concerns, such as the health care access issues on which we have focused here, occupy a large part of the agenda of the Supreme Court and the lower federal courts. Moreover, these issues matter to millions of Americans – workers, retirees, single-parent households, persons with disabilities, minorities, uninsured or under-insured persons, and other vulnerable constituencies. But they see no stake, and hence, have no interest in court decisions or judicial appointments. This is surely understandable. The only things they hear about the courts have to do with culture war issues, in which they have relatively little interest. Turning this situation around, and reconnecting law and politics, is a primary challenge for advocates dedicated to ensuring the economic welfare of vulnerable Americans.