

# The Supreme Court Term That Was and the One That Will Be

By Michael S. Greve

*Though largely quiet, the Supreme Court's past term provided further evidence that the justices are fond of federalism—but also somewhat confused about it. Doctrinal incoherence did not matter all that much when the Court, after six decades of abdication, first rediscovered federalism as a constitutional principle: baby's first steps are rarely accompanied by parental distress about the stumbles. Now that judicial federalism has moved past toddlerdom, however, one should expect a sense of purpose and coordination. The issue most urgently in need of revision is the federal preemption of state law, especially tort law. The Court's docket for the coming term suggests that the justices may be prepared to set about that task. They will likely have to do so without help from any political quarter, and they must squarely confront the constitutional legacy of the New Deal.*

## Federalism's Frontier

The Supreme Court's federalism, like Gaul, falls into three parts. One set of cases and doctrines revolves around “moral federalism”—that is, the authority of state and local governments to regulate or, as the case may be, improve their citizens' social mores. A second set of cases governs the national entitlement state. The central question in this arena is the extent to which the private beneficiaries of the welfare state may sue in court to enforce federal rights, mandates, and policies against the states. A third set of cases and doctrines deals with the regulatory state—that is, the authority of the states and the national government, respectively, to muck around in the economy. The justices' record in those areas is mixed. With respect to moral and social questions, the states appear to enjoy judicial permission to regulate as

they see fit—unless they offend Barbra Streisand's sensibilities (for example, on homosexual rights or the death penalty), in which case they run the risk of nationalist judicial injunctions. In the entitlement arena, the justices have developed a remarkably consistent and coherent set of federalism doctrines. The precedents have developed a force of their own and, barring a personnel change on the Court, will continue to push toward more federalism and a more realistic, public-spirited version of the welfare state. The judicial record on regulatory programs and competencies is not nearly so heartening. The profederalist justices recognize that more “states' rights” in this area might turn federalism, and the economy, into a playpen for trial lawyers, ambitious state attorneys general, and parochial state legislatures. The place where the spirit of federalism meets the fear of balkanization is federal preemption—that is, the question of when and to what extent federal law trumps contravening state law. Preemption will prove the central federalism question during the coming term—and beyond.

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## Moral Matters

States are sometimes asked to tolerate federal legislative or executive interferences with their efforts to regulate—or to deregulate, as in the case of state laws permitting medicinal uses of marijuana—their citizens' social mores and conduct. By and large, though, moral federalism is a function of the Supreme Court's individual rights decisions. As judicially protected constitutional rights expand, federalism's sphere contracts.

Exhibiting a consistency of sorts, the Rehnquist Court has interspersed a general, albeit often grudging, respect for state autonomy with bolts of nationalist judicial activism. This past term, the justices let stand a local zoning ordinance governing adult entertainment operations (*City of Los Angeles v. Alameda Books*); sustained local schools' antidrug policies (*Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*); and, in the term's most consequential decision, upheld Cleveland's school choice experiment against an attack under the establishment clause (*Zelman v. Simmons-Harris*). The year's nationalist howler is *Atkins v. Virginia*, where a six-to-three majority invalidated state statutes that permit capital punishment for mentally retarded convicts. Although the Court had sustained such laws as recently as 1989, the *Atkins* majority thought that the abolition of the death penalty for the retarded in some eighteen states, national opinion polls, and international human rights norms now indicate a "national consensus" to the effect that the practice is cruel, unusual, and hence unconstitutional.

*Atkins* galls because it substitutes for the republican forms through which we ordinarily shape and enforce a consensus (juries, elections, federalism, and other such formalities) a regime that has the Supreme Court acting as a kind of Committee for Public Safety and enforcing purportedly consensual standards of decency.<sup>1</sup> (Without the democratic pretense, *Atkins* is simply an exercise of raw judicial will.) Naturally, Justice Antonin Scalia caught the point. If the Supreme Court must advert to a national consensus, he argued in his *Atkins* dissent (joined by Chief Justice William H. Rehnquist and Justice Clarence Thomas), it ought to be "a consensus of the sovereign states that form the Union, not a nose count of Americans for and against."

Federalism purposefully fractures inchoate national sentiments—first, because divergent preferences among citizens of a vast country are more easily accommodated in differing, competing states than through a national,

one-size-fits-all compromise; second, because decentralization and institutional competition inhibit and misdirect the designs of ambitious rabble-rousers and "little demagogues" (to quote Alexander Hamilton's excellent phrase). The appeal to an unstructured national will and consensus is the demagogue's quintessential move. Its purported commitment to federalism notwithstanding, the Supreme Court has practically institutionalized that move. Unfortunately, that is not going to change.

## Entitlements

As explained in an earlier *Outlook*, the campaign against entitlements is the hard core of the Supreme Court's federalism.<sup>2</sup> For over a decade, the Supreme Court has systematically curtailed the rights of private litigants to sue state and local governments under federal statutes. The Court's numerous Eleventh Amendment decisions, extending the states' sovereign immunity from suits in federal and state courts, fit this pattern, as do the still more numerous cases in which the Court has propped narrow constructions of federal statutes. That trend, too, continued this past term.

The most important of several Eleventh Amendment decisions of the past year is *Federal Maritime Commission v. South Carolina*. The Court ruled that the states' sovereign immunity extends not only to suits in actual courts but also to certain adjudicatory proceedings before federal agencies that look and act like courts.

Perhaps more significant, and certainly more telling, is a pair of statutory-right-of-action cases. *Barnes v. Gorman* held that private litigants may not enforce federal civil rights statutes by means of punitive damages (unless Congress has explicitly provided for that remedy). In *Gonzaga University v. Doe*, the Court extended earlier rulings to the effect that federal "spending clause statutes"—that is, statutes that impose regulatory obligations on the states in exchange for federal funds—may be enforced by private litigants only if Congress has specifically authorized private actions against the states.

While *Barnes* and *Gonzaga* were easy cases (the outcome in both was a foregone conclusion), the majority opinions articulated, more forcefully than past opinions, the theory that spending clause statutes are essentially contracts between the federal and state governments, rather than federal regulations of the states. That perspective implies that the states are subject to only those obligations that are explicitly stated in federal law. (In doubtful cases,

a contract will be construed against the party that wrote it—here, Congress.) It implies, moreover, that *no* federal spending clause statute is enforceable by private litigants. Since those litigants—the ostensible beneficiaries of federal “entitlement” statutes—are merely third parties to a contract between the feds and the states, third parties are not allowed to meddle (again, subject to the qualification that the states may agree to an explicit congressional authorization of such lawsuits).

While the Rehnquist Court’s antientitlement federalism has so far escaped wide public or journalistic notice, that is about to change. Private entitlements, enforceable in court, are the engine of the American welfare state, and the coming term will bring head-on collisions between the Court’s doctrines and federal programs with huge constituencies and congressional support. In *Nevada Department of Human Resources v. Hibbs*, the Supreme Court will address the question whether the states are immune from lawsuits under the federal Family and Medical Leave Act. Under settled law, states enjoy immunity from suit under federal statutes for the benefit of the elderly, the handicapped, and other groups that are not thought to enjoy special protection under the Fourteenth Amendment. The FMLA, in contrast, is advertised, albeit absurdly, as a federal protection against discrimination on account of *sex*, a classification as to which the Fourteenth Amendment has been presumed to provide Congress with greater regulatory authority.

Not much further down the road, the Supreme Court’s federalism will hit the mother of all entitlements, Medicaid. Stripped of legal details, the central question in cases banging around in several federal circuits is whether Medicaid benefits are an entitlement for individuals *or for the states*. The former answer—Justice William Brennan’s answer, which is still enshrined in law—means that Medicaid benefits will be defined and enforced by Senator Hillary Clinton’s friends at the Children’s Defense Fund in some federal court. The latter answer implies that Medicaid benefits are shaped in a negotiating process between the states and the national government, with some prospect of cost control and good sense.<sup>3</sup>

Prediction: On a 1-to-10 scale (10 indicating metaphysical certainty), the outcome of those cases rates a 9.5. The states will win both the FMLA and the Medicaid cases by the same “Federalist Five” majority (Chief Justice William H. Rehnquist and Justices Anthony M. Kennedy, Sandra Day O’Connor, Antonin Scalia, and Clarence Thomas) versus “Fab Four” dissenters (Justices Stephen Breyer, Ruth Bader Ginsburg, David H. Souter, and John

Paul Stevens) that has decided just about every previous case in this area.

## Commerce?

Unlike entitlements and mandates, where federalism unmistakably points in one direction, regulatory issues implicate two problems that appear to require different solutions—one federalist, the other nationalist. The first problem is federal meddling in corners of the economy that should, as a matter of constitutional principle and public policy, be left to the states. That problem calls for decentralization and federalism. The second problem is the states’ tendency to bury the economy under a flood of conflicting regulations. That tendency can be arrested only by a central authority, usually Congress. Parochialism calls for federal preemption and for judicial doctrines that facilitate preemption—a distinctly nationalist solution, at least at first sight.

On the question of federal overreach, the division on the Court is clear. The Fab Four believe that no such thing exists, at least not in a judicially recognizable form. The Federalist Five hold that federal meddling ought to stop at the water’s edge of economic regulation: a federal regulation that is “economic” in character is *ipso facto* constitutional, whereas “noneconomic” conduct is beyond the scope of the commerce clause. This line was established in *United States v. Lopez* (1995) and *United States v. Morrison* (2000), and the Court has shown no inclination to revisit it. The central commercial federalism question, then, comes down to the federal (constitutional or statutory) preemption of state regulation.

The Fab Four want no constitutional limits on Congress’s regulatory authority and no judicial rule that would facilitate congressional preemption. Federalism, on their theory, works best when governments at all levels operate without constraint. Individual justices will occasionally defect from this regulation-maximizing rule. Justice Breyer may permit preemption upon a showing that the federal regulators are, or acted as if they were, as smart as he is; Justice Stevens turns aggressively preemptive when he himself, rather than some mere legislator or bureaucrat, does the preempting.<sup>4</sup> Still, the regulation-maximizing default rule is clear. The Federalist Five, in contrast, are torn between their states’-rights impulse and the recognition that a collection of fifty regulatory fiefdoms—the natural result of a narrow preemption doctrine—cannot really be the face of modern federalism nor, for that matter, what the Founders had in mind.

Consequently, the arguments and votes in preemption cases have been all over the map. The term just concluded brought *Rush Prudential HMO v. Moran*, where a five-to-four majority (Justice O'Connor defecting from the Federalist Five) determined that the federal Employee Retirement Income Security Act, one of the most intensely preemption-litigated federal statutes, permits states to legislate and enforce the sort of "patients' bill of rights" measures that have consistently failed to pass the U.S. Congress. *Rush Prudential* departs from precedents in which the Supreme Court had expressed a broad understanding of ERISA preemption. In *City of Columbus v. Ours Garage* seven justices sustained a local ordinance concerning consensual towing, which has to do not with sex but with local trucking monopolies, against a federal preemption challenge. Justice Scalia dissented, joined only by Justice O'Connor.

The past term's preemption cases pale against the stuff that will come down the pike when the Court reconvenes in October. In *PhRMA v. Concannon* the Court will determine whether states may leverage the federal Medicaid program to exact price concessions from pharmaceutical firms for *non-Medicaid* consumers. ("Maine Rx," the state statute at issue, would effectively exclude manufacturers who fail to make price concessions from the list of Medicaid-approved prescription drugs.) In another ERISA case, *Kentucky Association of Health Plans v. Miller*, the Court will determine whether the law preempts the state's "all willing provider" statute, which guarantees health maintenance organization-insured consumers access to doctors outside the organization's list of approved practitioners.

Over half of all states have enacted "all willing provider" statutes, and states are eager to enact "Maine Rx"-style programs just as soon as the preemption cloud lifts. Along with *Rush Prudential*, the two upcoming cases involve an enormous economic problem—the galloping regulatory disintegration of the health care system, about which a bit more below.

## Torts

The most important preemption cases of the coming term arise over state *tort* law rather than state legislation. That reflects the fact that tort actions, not statutes, now generate the most serious state impositions on interstate commerce and on sister states. Nationwide class actions and arbitrary punitive damage awards, often in a handful of hellhole state court jurisdictions, provide the most familiar

illustration. Even so, state tort cases rarely appear on the Supreme Court's docket; the general presumption is that tort law is the near exclusive province of the states. For the coming term, though, the Supreme Court has already agreed to decide no fewer than six tort cases.

- Two cases on the docket present statutory preemption questions. The more important of them, *Sprietsma v. Mercury Marine*, concerns the question whether a manufacturer's failure to install a propeller guard for outboard motors is a product design defect for which the manufacturer may be held liable under state tort law. The defendants argue that the Federal Boat Safety Act, which grants the U.S. Coast Guard exclusive authority to establish boat safety standards, preempts such lawsuits. The plaintiffs argue that preemption requires an actual Coast Guard rule; the agency's mere decision *not* to require propeller guards should have no preclusive effect.

- *Ford Motor Co. v. McCauley* goes to the seemingly arcane but enormously important question of "diversity" jurisdiction in class actions—that is, the question whether class actions involving parties from different states are to be heard in state or federal court. Plaintiffs' lawyers prefer state courts, where parochial judges and juries have every incentive to maul out-of-state manufacturers. Corporate defendants prefer a more impartial federal forum. Diversity cases may be removed to federal court only if the amount in controversy for each member of a class exceeds \$75,000. Trial lawyers argue that the amount should be determined by the plaintiff's expected benefit (which the lawyers can manipulate to keep the case in state court); the corporate defendants claim that the cost to the defendant, which may exceed the plaintiff's benefits, should also satisfy the federal amount-in-controversy requirement.

- The Supreme Court will wade back into the out-of-control thicket of asbestos litigation. The justices have agreed to review a state court verdict, under the Federal Employers Liability Act, awarding \$5.8 million in emotional distress damages to six retired railroad workers who showed neither asbestos-related symptoms nor a physical manifestation of their emotional injury (*Norfolk & Western Railway Co. v. Ayers*).

It is just possible that the outcome of those and the other tort cases on the Court's docket—including *State Farm v. Campbell*, a \$145 million punitive damage case from the Utah Supreme Court—will fail to indicate a

clear direction. Still, the sheer number of cases cannot be a coincidence. It signals a judicial recognition that we have a federalism problem with torts and state court class actions. No kidding.

## The Stakes

Three considerations render preemption, and in particular the federal preemption of state tort law, the most serious federalism issue on the horizon. First, plaintiffs' lawyers and state attorneys general constitute a serious threat to a functioning economy—more serious than state legislatures and far more serious than creative accountants. (The exploits of the attorneys general and the trial lawyers are technically legal.) Second, the Supreme Court's doctrines on the federal preemption of state law, including and especially tort law, are confused and incoherent. (No lawyer, judge, or legal scholar would contest the point.) Third, the doctrines—such as they are—are on a collision course with the rest of the Supreme Court's federalism, in spirit and in point of doctrine. Sooner or later, something will have to give, and preemption will be it.

Extant preemption law, for example, encompasses something called “implied preemption,” meaning that the intent to preempt need not be stated explicitly. (The scope of implied preemption is a central issue in next term's *Sprietsma v. Mercury Marine*.) We know, however, on the excellent authority of a slew of precedents, that Congress may not impose regulatory obligations under federal entitlement statutes unless those obligations are clearly stated in the law. The obligations may not be implied. Why then should Congress or federal agencies be allowed to *preempt* state regulation without a comparably clear statement?

The Supreme Court has never articulated a clear answer to that question. Waffling and indecision at this front, though, will eventually have fateful consequences. Were the Court's “clear statement” rule, as applied in entitlement cases, to spill over into preemption, almost no federal statute would preempt much of anything at all.<sup>5</sup> That result will obtain whenever one or more of the Federalist Five conclude that state impositions on interstate commerce are the price we must pay for “states' rights” and, on those grounds, defect to the four regulation maximizers. (Justice O'Connor's defection in *Rush Prudential* illustrates the point.) And there you have it: the menace of federalism as a charter for commercial balkanization.

Averting that threat will ultimately require a set of preemption-related constitutional and interpretive doctrines that are consistent with the Supreme Court's federalism, *without* laying waste to interstate commerce in the process. In going about that daunting enterprise, the justices would greatly benefit from outside assistance—specifically, parties and lawyers who present the right cases and the right arguments with consistency and force. Unfortunately, help may not be forthcoming.

## Helpless

The importance of supply-side guidance is illustrated by the Court's coherent and principled entitlement jurisprudence. Among the reasons for that salutary development is the fact that those cases have a ready-made constituency—the states and in particular state attorneys general. The attorneys general are repeat players in case after case, and they coordinate their litigation activities (for example, through the National Association of Attorneys General). So the cases keep coming, and they tend to reach the Court in roughly the right order—one incremental step after another toward the well-defined federalism objective of state immunity against private lawsuits.<sup>6</sup>

Preemption litigation presents an entirely different picture. Here, too, the states are repeat players. But they (and their trial lawyer clientele) will insist on their parochial advantages. Balkanization suits them just fine, and they will actively resist any move toward legal doctrines that forestall that result. Corporations, for their part, rarely look beyond the immediate case at hand and are in any event compelled to argue within the confines of the extant, confused law. To expect coordination and strategic sense from that quarter is to hope against evidence and logic.

The one institution that could provide guidance and a broader view is the U.S. Department of Justice—specifically, the Office of the Solicitor General. The solicitor general participates in every preemption case, and since those cases turn on the interpretation of federal statutes, his views are accorded special weight. Lo, the Bush administration has taken a somewhat consistent stand on federalism issues. Unfortunately, though, it is a shade to the left of Justice Souter.

In entitlement and sovereign immunity cases, the solicitor general's office has often taken a remarkably nationalist position. In *Gonzaga University v. Doe*, for example, the office pointedly distanced the administration

from the states' brief and articulated a minimally federalist, plaintiff-friendly position that the Supreme Court held a decade ago—and has since modified, in a more state-friendly direction in case after case (including, as it turned out, in *Gonzaga University*). One might attribute that stance to the solicitor general's traditional duty and institutional inclination to defend federal supremacy and, to that end, to afford congressional statutes a broad sweep. But that fails to explain why the administration has, in preemption cases, defended an exceedingly *narrow* view of federal authority.

In *Rush Prudential* the administration's antipreemption position was too expansive even for Justice Souter, who wrote for the antipreemption Supreme Court majority in that case. The administration's brief in *Sprietsma* avows that the Coast Guard never intended to preempt design defect suits under state tort law and moves on to a preemption doctrine that amounts to a trial lawyers' bill of rights. A mealy-mouthed solicitor general brief in *PhRMA* conceded that the lower court "almost certainly" erred in finding the Maine Rx program consistent with the federal Medicaid statute—and still urged the Court to let the lower court's ruling stand. Now that the Court has agreed to hear the case—despite the administration's urging to deny review—the solicitor general may well disavow his earlier qualms and endorse Maine Rx. (Call it an 8 on the prediction scale.) In the Kentucky "all willing provider" case, the administration's brief observes that the wisdom of such legislation "can certainly be debated" and urges "that the permissible scope and limits of state authority in this area be defined." Instead of assisting in that task, however, the brief proposes to *unshackle* state authority from ERISA preemption.

While the administration will occasionally get a case right (for example, when the feds' own money, rather than the states' or corporate America's, is on the table),<sup>7</sup> the administration has on the whole adopted litigation positions that promote nationalization and regulatory balkanization at the same time. No plausible reason explains why a probusiness administration would throw a case like *Sprietsma*—of potentially enormous precedential value in a large number of regulatory contexts—to the trial lawyers. In other instances, a possible explanation can be found—outside the solicitor general's office, in White House policy.

To wage war against terrorism, the administration believes that it must avoid undue strife and challenges at the domestic front. That often means pacifying noisy constituencies, especially those that might swing closely

contested states and districts. That is how we got an education "reform" written by Senator Edward Kennedy and the National Education Association, a farm bill of European proportions, and a steel tariff. Like John Wayne, the administration protects its back by sitting up against the wall—except it never shoots the evildoers who barge in through the barroom door. It buys them a drink.

Against that backdrop, the Justice Department's take on the health care and pharmaceutical cases makes sense. Powerful constituencies, including the states, holler for more benefits at lower costs. An insistence on the states' Medicaid obligations and on traditional preemption doctrines under ERISA would increase political pressure on Congress and on the administration to "do something" about prescription drug prices and HMOs. That would force the administration to underwrite yet another expensive program or else explain to the voters why the answer is no—at a political cost that is deemed intolerable. The path of least resistance is to let the rapacious interests run riot in the states. The solicitor general is just the guy to perform that maneuver—because he can and because nobody notices when he does.

That calculus would be irresponsible, even if nothing more than the small matter of the nation's health care system hung in the balance. Preemption, however, ultimately involves the larger question whether we really want to hand the trial lawyers—and the state judges and politicians they have bought and paid for—the keys to the national economy. The answer should be obvious. The solicitor general's office is no place to launch a federalism or any other revolution. Neither, however, need the tenth justice limp behind, let alone impede, the constitutional procession that may at long last be getting on its way.

## Big New Deal

In reexamining the preemption case law and in (hopefully) putting that case law on a more solid footing that is consistent with the Supreme Court's federalism, the justices would do well to start with a broader question: How did it happen in the first place that commercial regulation and preemption became a zero-sum game, such that enhanced state autonomy invariably produces a regulatory nightmare? The culprit—modern federalism's pink pachyderm—is the New Deal.

Contrary to widespread belief, the New Deal Court did not simply unleash the national government from constitutional constraints. In an effort to facilitate

regulatory intervention at all levels, the New Deal unleashed the national government *and the states*.

Before the New Deal, for example, tort cases among parties from different states were typically decided not under state law but under *federal* common law. Under that rule, even the most venal state jurisdictions would have to abide by the federal rules, and we would have no tort crisis. The 1938 *Erie Railroad* case, however, substituted state common law for federal law, even in federal courts. That switch is what now allows plaintiffs' lawyers to shop for favorable jurisdictions—that is, for judges and juries who will cheerfully redistribute wealth from out-of-state defendants to in-state plaintiffs. That mad-cap regime, in turn, necessitates drastic federal preemption and interferences with the states' "traditional" prerogatives.

Before the New Deal, for another example, the Supreme Court enforced due process and commerce clause constraints on state laws that interfered with interstate commerce, exploited sister states, or regulated transactions outside the states' boundaries. When those limitations went by the boards, states pursued their natural tendency to tax, regulate, and exploit outsiders. Federal statutory preemption again emerged as the only viable means of protecting interstate commerce.

The tension between state autonomy and national power is, of course, built into the federal architecture. The modern preemption dilemma, however, is a direct consequence of judicial abdication on federalism's horizontal dimension—that is, rules that govern what states may and may not do to one another and to each other's citizens. When those rules fall into disrepair, as they have, relations among states become a game of mutual regulatory aggression, with debilitating consequences on interstate commerce. Let the *Sprietsma* plaintiffs win their state law case, and a single local jurisdiction will have established a propeller guard standard for all states. Let Maine R<sub>x</sub> go into effect, and the program will induce pharmaceutical firms to make up the money "rebated" to the state in other states and in turn will induce those states to join the racket. And so on. Preemption is the only stopping point. It is made to do all the work that the now defunct horizontal federalism doctrines used to do, which is far more than it will bear.

Any plausible preemption doctrine, therefore—any preemption doctrine that is consistent with federalism—presupposes credible horizontal federalism rules, based on the elementary principle that "states' rights" must

end where another state's rights begin. That means, for example, the restoration of federal diversity jurisdiction—which federal judges hate to exercise (too much work in boring cases that involve nothing but oodles of money) but which the Founding Fathers instituted precisely because they anticipated that out-of-state defendants would never get a fair shake in state courts. It means revamping the rules governing the choice of state law in multistate disputes (which *Erie Railroad's* progeny treats, insanely, as a *state* law question, meaning that state courts get to choose their home state law over a sister state's). It means serious limitations on extraterritorial state regulation. It means, in short, that the Supreme Court has to reinvent all the stuff that the New Deal swept aside.

With the possible exception of Justice Thomas, the Federalist Five appear unprepared to confront that challenge. In fact, the justices have gone out of their way to reaffirm central New Deal precedents.<sup>8</sup> That reluctance is at some level understandable. The country's interests and institutions have come to rely on the New Deal regime, and changing the political equilibrium—without causing a massive backlash—is a tricky business. Also, Jeffrey Rosen, Laurence Tribe, and other experts have described the Supreme Court's federalism, modest though it is, as a return to an "antebellum jurisprudence" and the Articles of Confederation. Were the Court to mount an outright attack on New Deal precepts and precedents, our constitutional sages will yelp that they *knew it all along!* And then we will have to scrape them off the ceiling. Two potent reasons, however, counsel a more ambitious judicial approach.

First, federalism is plainly the legacy that the Rehnquist Court intends to bequeath us. That being so, it might as well bequeath us a coherent legacy. Federalism will have no staying power if it looks like a judicial fancy rather than a constitutional mandate. The preemption dilemma proves that the attempt to rebuild federalism amid the New Deal rubble has reached its limits; the time has come to reach deeper and to clear the rubble.

Second, the judicial enforcement of serious, constitutional federalism provides an opening for a more limited, disciplined, constitutional government (at all levels). That is not much of an opening. Democratic passions and interest group demands invariably push toward a bloated, irresponsible, centralized government. No constitution or Court can in the end arrest those forces. Our Constitution and our federalism, however,

can limit them at the margin. That chance is well worth taking—especially since it may be our only chance.

## Notes

1. More irritating still is the invocation—increasingly common in Supreme Court opinions—of *international* norms and practices. If there is any consensus among Americans (outside Harvard Law School), it is that we really do not care very much what the Europeans or Zimbabweans think about us. Justice Scalia’s *Atkins* dissent rightly rejects the majority’s appeal to the beliefs of a virtual “world community,” whose notions of justice are (thankfully) not always those of our people.”

2. See “Federalism, Yes. Activism, No.” *Federalist Outlook*, no. 7 (July 2001).

3. A Supreme Court decision against individual Medicaid entitlements would be the functional equivalent of the 1996 welfare reform legislation. The central element of that enactment was the abolition of judicially created individual entitlements to welfare benefits. Freedom from judicial oversight, more than anything else, has since enabled states to experiment with policies to reduce welfare dependency. The results are almost uniformly viewed as remarkably successful.

4. For Justice Breyer, see his pro-preemption opinion for a five-to-four Court in *Geier v. Honda Motor Co.*, 529 U.S. 861 (2000), which was plainly driven by his conviction that the preemptive rule at issue—mandating a graduated phase-in of automobile airbags—was the efficient rule. Justice Stevens, for his part, is the Court’s most forceful advocate of constitutional preemption under the due process clause and the dormant commerce clause. See, for example, his opinions for the Court in *BMW v. Gore*, 517 U.S. 559 (1996); and *Healy v. Beer Institute*, 491 U.S. 324 (1989).

5. Federal regulatory statutes typically do contain an explicit preemption provision—and an equally explicit “savings clause” that protects state law (such as tort law, contract and fraud law, and—in the case of ERISA—state insurance, banking, and securities law) from federal preemption. Naturally, the most vexing preemption cases (such as *Geier*, *Sprietsma*, and *Rush Prudential*) arise when the state’s action can be interpreted as falling under either the savings clause or the preemption provision or both. Under a straightforward “clear statement” test, conflicting federal provisions would plainly defeat a preemption claim. Under existing law, preemption may still be implied if the statute at issue otherwise indicates a “clear and manifest” congressional intent to supersede the state’s historic police powers.

6. Establishment clause cases have also been directed and ordered by parties and lawyers who think beyond the bounds of the immediate case. The preexisting trends and cooperative relations came together in this term’s *Zelman* decision, upholding Cleveland’s school voucher program. Ohio’s attorney general Betty Montgomery, a Republican, strongly supported by a coalition of other state attorneys general (led by Democrat Robert Butterworth of Florida), persuaded the Court that a provoucher decision followed ineluctably from a decade’s worth of precedents obtained by repeat establishment clause litigators.

7. A pro-plaintiff outcome in *Norfolk & Western Railway v. Ayers* (the asbestos emotional distress case on next term’s docket) might expose the federal government to substantial liabilities. The government’s brief in support of the defendant petitioner prominently mentions that consideration.

8. Conversely, the nationalist entitlement doctrines that the sitting justices have largely overturned and will soon overturn in toto are precisely not a legacy of the New Deal. They are a legacy of the Brennan Court and its agenda to expand the national welfare state by judicial means. Since that inheritance is not nearly so sacrosanct as the nostrums of the New Deal, the justices have felt free to ditch it. Good riddance!