

## Federalism, Yes. Activism, No.

By Michael S. Greve

*Recent federal court decisions have wiped out private entitlements under Medicaid and civil rights statutes. Real Federalism (AEI Press, 1999) anticipated those rulings two years ago but cautioned that the judiciary might not be willing to pursue the logic of the Supreme Court's federalism decisions to the point of slaughtering such sacred political cows. That caveat has proved unnecessary.*

*With the prompt fulfillment of Real Federalism's then quite daring prediction, I may soon have to find a new federalism riff. Renewed attacks on the Court's "activist" federalism decisions, however, provide occasion to examine the impact of the justices' sea-changing, but widely underestimated, statutory decisions on federalism—and to afford them a firmer defense than they have received to date.*

In anticipation of impending fights over judicial nominations, liberal pundits and advocates have renewed their attacks on the Supreme Court's supposedly "activist" federalism decisions. The *Washington Post*, for example, has outed Mr. Jeffrey Sutton, a prominent federalism attorney and a nominee to the Sixth Circuit Court of Appeals, as a rabid "activist" and placed him in the disreputable intellectual company of the AEI Federalism Project.<sup>1</sup> Senator Patrick Leahy (D-VT) has scheduled a Senate Judiciary Committee hearing, "The Rehnquist Court's Federalism Jurisprudence: Conservative Judicial Activism."

Unlike earlier, overwrought complaints about an impending return to an "antebellum jurisprudence" or perhaps the Articles of Confederation, the current liberal denunciations are directed primarily at the Rehnquist Court's interpretation of federal entitlement statutes (such as Medicaid and the Americans with Disabilities Act), rather than its constitutional rulings. As patient *Outlook* readers are about to discover, such statutory federalism cases are arcane and, moreover, fantastically boring. What the cases lack in sex

appeal, however, they make up in frequency (they are much more common than constitutional rulings) and in real-world impact. Judicially enforceable entitlements to welfare, housing, clean air, equality, wheelchair ramps, and a harassment-free environment are the engine of the nanny state—and of federalism's destruction. Each federal entitlement enables some constituency to run into court and demand that state and local governments provide services secured, more or less clearly, under federal law. That phenomenon is what mayors and governors have in mind when they complain, with considerable justice, about federal "mandates" and "commandeering."

Over the past two decades, the Supreme Court has brought the entitlement engine to a halt. Liberals are right in observing that the Rehnquist Court's antientitlement decisions have worked a large change in federalism's architecture and operation. They are also correct in characterizing the accumulated precedents as a wholesale reversal of the Brennan Court's entitlement-friendly jurisprudence (with the possible exception of race-based preferences, the only reversal of the Brennan legacy by this allegedly conservative Court). In the relevant, substantive sense, however, the "activism" charge is very nearly the opposite of the

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truth. Far from enlarging the federal judiciary's role, the purpose and effect of the Rehnquist Court's statutory federalism is to limit that role and to commit the pursuit of national purposes where it belongs—to the political branches of government.

## Untitled

With few exceptions (most important, the Social Security retirement program), federal entitlement statutes, as well as many regulatory programs, are administered by state and local governments. The generic federal statute provides some money for state or local entities, provided that those governments agree to administer the statute in accordance with federal guidelines and restrictions. Medicaid, the Clean Air Act, and virtually all major education statutes function on the principles of "conditional spending" and "cooperative federalism."

The question, so far as the federal judiciary is concerned, is the extent to which the terms of the federal-state bargains may be enforced, in federal court, by private parties—typically, advocacy groups that litigate on behalf of the constituencies Congress intended to benefit. That question is fundamentally "about" federalism. Increased exposure to private litigation means more subjugation of state and local governments and less federalism. Conversely, fewer entitlements mean more federalism.

In a sharp departure from the state of the case law, beginning circa 1980, the Supreme Court has taken a restrictive view of the courts' role in enforcing federal mandates. A good example of that perspective is U.S. District Judge Robert Cleland's March 2001 ruling in *Westside Mothers v. Haveman*.<sup>2</sup> Relying on the capable advocacy of Jeffrey Sutton, who served as an amicus attorney in the case, Judge Cleland determined that federal law provides no private rights or entitlements for Medicaid recipients. The task of ensuring that states observe Medicaid rules and guidelines falls to the secretary of Health and Human Services, not to private litigants or federal courts. With that ruling, Medicaid administration shifts from litigation-driven management under the watchful eyes of advocacy groups and federal judges to a bargaining process between the state and the HHS.

*Westside Mothers* rigorously applies the Rehnquist Court's accumulated precedents on federal entitlements, which hold that courts should decline to find and enforce statutory entitlements unless Congress has unmistakably expressed an intent to provide for judicial review. This

so-called clear-statement rule governs a wide range of legal issues.

**Private Rights.** Suppose that the federal government provides money to state or local governments, with instructions to "do (or not to do) *X*"—for example, not to discriminate on the basis of race, sex, handicap, national origin, ethnicity, et cetera. May private litigants sue the recipients of federal funds to observe those instructions?

Departing from precedents that liberally discovered "implied" private rights of action in funding conditions, the Rehnquist Court has held that state and local governments are exposed to private lawsuits only when Congress has clearly stated, in the language of the statute itself, that it intended such exposure. The latest example—and another offense on the part of Mr. Sutton, who argued the case to the justices—is the Supreme Court's April 2001 decision in *Alexander v. Sandoval*. *Alexander* holds that civil rights plaintiffs may not sue state and local agencies over practices that, while not intentionally discriminatory, have a "disparate impact" on racial minorities. Federally funded agencies are prohibited from engaging in such practices under Title VI of the 1964 Civil Rights Act, a civil rights statute heretofore subject to a very liberal, proplaintiff judicial construction. Departing from that construction, the Court held that the disparate impact provisions of Title VI can be enforced only by the federal government itself, not by private litigants.<sup>3</sup>

**Section 1983.** Dissenting in *Alexander*, Justice Stevens criticized the majority's holding as pointless: after all, he argued, plaintiffs could always bring an identical suit under section 1983 of volume 42 of the *United States Code*. That provision, enacted in 1871 to ensure the availability of federal civil rights remedies, opens federal courts for private lawsuits against "every person who, under color of [law]," violates "rights, privileges or immunities secured by the [federal] Constitution and laws."

That once open window, however, has probably closed. In a twenty-year campaign to limit section 1983 actions, the Rehnquist Court has determined that state governments are not "persons" within the meaning of section 1983 and therefore cannot be sued under it. The Court has also held that detailed statutory provisions for enforcement by the federal government, such as financial sanctions and lawsuits against noncompliant state and local governments, preclude section 1983 actions. Since

practically every federal statute that envisions state or local implementation, including Title VI, also contains some nonprivate enforcement mechanism, an expansive interpretation of the precedents would obliterate section 1983 enforcement.<sup>4</sup>

**Spending.** The Supreme Court has indicated and will likely soon hold that federal programs enacted under the Constitution's "spending clause" are not the supreme law of the land and therefore are unenforceable in federal court unless a state has specifically waived its defenses against private lawsuits.

That seemingly perplexing proposition is exactly right. Laws enacted under an "enumerated" power, such as the congressional power to regulate interstate commerce, trump every conflicting state or local law. That is why and how they are "supreme." Spending clause statutes, in contrast, do not trump anything at all. They are contractual, rather than coercive and preemptive. They owe their force to the states' acceptance of the money, not to their nature as a federal enactment.<sup>5</sup>

That perspective entails a very narrow view of the rights of private parties—and of the role of the courts—in enforcing the terms of state-federal contracts. Again, *Westside Mothers* provides an illustration. Relying on the Supreme Court's just mentioned decisions on section 1983, the district court reasoned that the "rights" that are "secured by law" under section 1983 must be rights that were recognized *in 1871*, when the provision was enacted. Medicaid and similar spending clause statutes, however, do not "secure" any rights at all, except among the contracting governments. The private beneficiaries of federally funded, state-administered programs are merely the incidental, third-party beneficiaries of a contract; and, whatever we may now think of third-party rights, they were not part of the legal landscape in 1871. If Michigan denies Medicaid benefits to individuals Congress might have considered eligible, too bad. Unless the state has unequivocally consented to third-party enforcement, the dispute is strictly between Michigan and the federal government.

**One Dang Thing after Another.** The Supreme Court's antientitlement 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. 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 against such lawsuits. (Even the Americans with Disabilities Act can no longer be enforced through damage judgments.) 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 a rare exception. True federalism aficionados, no doubt, would relish further illumination on the delicate interplay among section 1983, the Eleventh Amendment, and *Ex Parte Young*. But we must move on.

## True Activism

The Rehnquist Court's statutory federalism limits the judiciary's role in the administration of federal entitlement statutes, unless Congress has unmistakably provided for such a role. Whatever the merits of that jurisprudence (about which more in short order), it cannot be described as "activist." For true activism, one must look to the entitlement jurisprudence that the Rehnquist Court has effectively dismantled—Justice William Brennan's.

While the late Justice William Brennan is best remembered for the creative discovery of new rights under a "living Constitution," his proudest accomplishment was to enlist the federal judiciary in the expansion of the national welfare state. Throughout the 1960s 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. Implied private rights of action, for instance, were the Brennan Court's creation. When that modus operandi hit its limits, Justice Brennan discovered that section 1983 as 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. The only Supreme Court decision ever to find that Congress could abrogate state immunity under its Article I powers was penned by Justice Brennan. And so on.<sup>6</sup>

Brennan's ideological agenda had a kernel of truth: a Congress bent on expanding government confronts massive agency and monitoring problems. Congress can make a commitment to provide housing and financial assistance for the poor, but it cannot easily ensure that government agencies translate those commitments into practice. The difficulty of prodding and monitoring administrators is particularly acute when federally funded programs are administered, as most of them are, by state and local governments. 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.

Brennan found the solution to those problems—in himself and in his colleagues. His move was accompanied by much judicial throat clearing about “deference” to Congress and “the rule of law.” The will of Congress is the law of the land: who better to enforce it on the land than the federal courts? And how could the courts enforce the law, if not at the instigation of the private parties Congress intended to benefit? Brennan's ostensibly deferential approach, though, hid an exceedingly tendentious agenda.

Every federal spending statute reflects a compromise somewhere between the legislative “purposes” and commands and, on the other hand, congressional appropriations and enforcement provisions. For instance, the Clean Air Act commitment to absolutely, totally clean air—now!!—implies a level of industrialization we surpassed some time between Jamestown and Salem. Congress has rendered the act safe for America by building slack into the enforcement process and by depriving the Environmental Protection Agency and the states of sufficient funds to enforce the statutory mandates. Similarly, the congressional decision to provide for the enforcement of certain civil rights laws by the federal government—but not by private parties—reflects a concern that ambitious legislative commands, left to the unchecked discretion of private enforcers, might easily produce overenforcement and results that even the most zealous legislators did not intend. It is one thing—though probably not an entirely sensible thing—to instruct the federal Office for Civil Rights to see to it that school administrators provide protection against sexual harassment among students. Providing six-year-olds with a federal cause of action for a peck on the cheek is a different thing altogether.

Judicial review, though, focuses only on one-half of the bargain—the statutory language—and enforces that

purported command, “whatever the cost.”<sup>7</sup> Thus, even when faithfully practiced (an aspiration that did not rank high among Brennan's priorities), judicial enforcement of federal entitlements—where Congress has not explicitly provided for it—introduces a systematic bias toward program expansion.

And who, pray tell, will sue to ensure the observance of congressional “intent” of federal programs—say, Medicaid? Why, that would be either Medicaid providers (such as hospitals) that insist on more generous reimbursements or else Westside Mothers. Whoever those mothers might be, they are sure to be Medicaid Expansion Mothers. Privately initiated judicial oversight introduces a gross selection bias. It is not really “oversight” at all but rather an adverse possession of governmental programs by special-interest constituencies. Justice Brennan was fully aware of that bias; the point of his entitlement jurisprudence was to institutionalize it.

In that pursuit, Brennan was assisted by an eager Congress. Statutes that hand public programs over to private litigants and courts—without explicitly saying so—allow legislators to curry favor with interest groups while avoiding responsibility for economic costs and the erosion of local autonomy. When the local library is compelled to spend more money on accommodating the disabled than it spends on books, as on all the rare occasions when some segment of a rationally ignorant public wakes up to the consequences of federal statutes, Congress can deflect the blame on advocacy groups that brought suit under the Americans with Disabilities Act and the federal judge who let them prevail. Advocates and judges, for their part, can protest that they are only doing the will of Congress. We know that the Professional Golf Association tour must accommodate Casey Martin and his golf cart. We have no earthly idea whether that is the responsibility of the Congress that wrote the Americans with Disabilities Act or the justices who interpreted it. Far from ameliorating agency and monitoring problems, judicial intervention maximizes irresponsibility and unaccountability all around.

## Statutory Federalism

So long as liberals directed their “activism” charge at the Rehnquist Court's constitutional federalism decisions, sober minds could readily reply that the national regulatory state will surely survive the judicial invalidation of congressional press releases that masquerade as laws, such as the Gun Free School Zones Act (struck

down in *United States v. Lopez*, 1995) or the Violence against Women Act (invalidated by *United States v. Morrison*, 2000).<sup>8</sup> In contrast to those symbolic decisions, however, the Rehnquist Court's statutory federalism decisions have had a real effect. They have measurably increased the autonomy of state and local governments, diminished the role of special-interest advocacy groups, and increased the accountability of Congress.

That shift spells neither the end of the welfare state nor an "activist" judicial arrogation of power. The central theme of the Rehnquist Court's statutory federalism is democratic responsibility and accountability. Congress remains free to create private entitlements and to impose corresponding mandates on the states—so long as it clearly informs the states of their obligations. If Congress lacks the will or the votes to expose states to private enforcement, it can provide for enhanced federal agency oversight over the states or else administer welfare statutes with the federal government's own money and bureaucrats.

Liberal jurists and pundits have denounced that stance as "undemocratic," meaning that it often deprives the nanny state's constituencies of access to federal courts. Even leaving aside the strange notion of federal lawsuits as a vehicle for democratic government, though, no sentient citizen believes that those constituencies lack access elsewhere in the political system. The preposterous charge—peddled, in the wake of *Westside Mothers*, by a gaggle of liberal advocacy groups and columnists—that antientitlement decisions will render the welfare state "unworkable" merely hides a suspicion that political responsibility correlates inversely with the scope of government. Under the Rehnquist Court's precedents, Congress remains free to erect a larger version of the Swedish welfare state. Liberals fear, however, that Congress cannot actually pursue that project, since the justices have forced congressmen to cast a clean, responsible vote on the proposition. That apprehension is probably warranted, but it makes for a very odd indictment of the Rehnquist Court and its federalism.

The Supreme Court's statutory federalism deserves, and demands, a robust, substantive defense—not soothing assurances that it does not amount to a hill of beans. In Leslie Nielsen's immortal words, this is *our* hill, and these are *our* beans. It should be possible to defend federalism against federal micromanagement; political responsibility against special-interest shenanigans; congressional authority against judicial usurpation.

We will soon find out whether the stupid political party is capable of mounting such a defense against the

evil party's rants about federalist "activism." Statutory federalism cases are coming fast and furious, and all of them implicate federal interests. Since the Justice Department's views carry particularly great weight in statutory cases, much will depend on whether the department takes sides with the Rehnquist Court's constitutionalism or shows deference to "the will of Congress" and Brennekesque interest-group politics.

More immediately still, impending fights over appointments to the federal bench may put federalism's friends to the test. After the obligatory exercise in bipartisan congeniality ("Are you now, or have you ever been, a member of the Federalist Society?"), the senatorial inquisition is sure to focus on Jeffrey Sutton's federalism record. Since the *Washington Post* has already tagged him as an accomplice of the AEI Federalism Project, we probably do Mr. Sutton no further harm by expressing the conviction that his federalism advocacy warrants his confirmation, not an apology. It would help if Mr. Sutton's nominators made a forthright case to the same effect.

## Notes

1. Simon Lazarus, "Don't Be Fooled. They're Activists, Too," *Washington Post*, June 3, 2001.

2. 133 F. Supp. 2d 549 (2001). The AEI Federalism Project's Web site, <http://www.federalismproject.org>, provides a link to this important decision.

3. *Alexander v. Sandoval*, 121 S. Ct. 1511 (2001). The justices reserved the question whether the clear statement rule precludes any and all implied private rights under any statute. An explicit holding to that effect, however, is only a matter of time, since it is hard to imagine a right that is both clearly stated and implied.

4. *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) (states are not "persons"); *Middlesex County Sewage Authority v. National Seaclammers Association*, 453 U.S. 1 (1981) (detailed remedial scheme precludes private enforcement under section 1983); and *Smith v. Robinson*, 468 U.S. 992 (1984) (same). While *Seaclammers* suggests that the "remedial scheme" had to be quite specific, more recent case law indicates that most statutory, nonjudicial enforcement provisions may thwart private enforcement. See, for example, *Suter v. Artist M*, 503 U.S. 347, 361 (1992) (dictum); and *Westside Mothers v. Haveman*, 133 F. Supp. 2d 549, 587 (2001) (holding).

5. See, for example, *Pennhurst State Hospital v. Haldeman*, 451 U.S. 1 (1981). *Westside Mothers v. Haveman* rests almost

entirely on the proposition that Medicaid, as a spending clause statute, is not the supreme law of the land but merely a state-federal contract. For a powerful scholarly defense of that view, see David Engdahl, "The Spending Clause," *Duke Law Journal*, vol. 44 (1994), p. 1.

6. *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964) (implied private rights); *Maine v. Thiboutot*, 448 U.S. 1 (1980) (section 1983); and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

7. See, for example, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978) (Justice Brennan joining) (Endangered

Species Act evidences congressional intent to preserve Tennessee snail darter and all other endangered species, "whatever the cost.")

8. *United States v. Lopez*, 514 U.S. 549 (1995); and *United States v. Morrison*, 529 U.S. 598 (2000). See J. Harvie Wilkinson, "Is There a Distinctive Conservative Jurisprudence?" Bradley Lecture delivered at AEI, March 5, 2001 (available at <http://www.aei.org/bradley/bl010305.htm>); Pietro Nivola, "Does Federalism Have a Future?" *Public Interest*, no. 142 (Winter 2001), p. 44; and Kenneth W. Starr, "Judges and the GOP," *Wall Street Journal*, May 5, 2001.