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By Simon Lazarus and Harper Jean Tobin

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I. Introduction and Summary

The intense national debate over how to restore and improve the nation's health safety net is, understandably, focused on the new administration and Congress. What is a little less understandable is that zero attention is paid to the courts. In fact, during the near-half century since the contemporary structure of national health entitlement programs was put in place, federal courts have hosted wide-ranging and 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 much of that impact has been negative. The jurisprudence of the Rehnquist Court, largely carried forward under Chief Justice John Roberts, more often than not narrowed the scope of the nation's health safety net laws, insulated public and private administrators from accountability, and disrupted or blocked citizens' access to benefits to which they are entitled. More often than not, these decisions frustrated rather than furthered the broad and generous goals that drove Congress to enact these programs.

The principal vehicle for this constriction of federal health programs has been a contradictory approach to policing the boundaries between state and federal power – venerated in judicial boilerplate as the "delicate balance" of federalism. First, the conservative bloc on the Supreme Court 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 an idiosyncratic notion of "federalism," emphasizing states' rights. Second, the Court has narrowly construed protective federal statutory provisions, and (without missing a beat) expansively deployed doctrines enabling federal judges to "preempt" (i.e., invalidate) state laws that conflict with or "frustrate" federal laws. In the main, the Court's trigger-happy use of its preemption power has been used to strike down state common law and consumer protections at the behest of industries or businesses seeking regulatory relief.

Together, these antithetical doctrinal approaches advance a transparently ideological, deregulatory agenda, positioning a conservative Supreme Court as arbiter of acceptable state as well as federal regulation. As observed by Professor Ernest Young, "This 'libertarian vision'

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sees federalism as a tool of deregulation with the potential to keep both national and state governments within relatively narrow bounds."[1]

This paper spotlights two arenas in which the federal courts have been significant players in implementing – and undermining – the nation's statutory safety net. The first is the health insurance back-stop for low-income Americans, Medicaid, and particularly the ability of Medicaid beneficiaries to enforce their statutory rights in court. Here, the Court has woven a web of rules that, while superficially merely procedural, in fact implement a substantive, ideological agenda. They are, as candidly acknowledged by prominent conservative scholar-advocate Michael Greve of the American Enterprise Institute, "The Supreme Court's *anti-entitlement doctrines*," which are "connected, such that plaintiffs who manage to evade one obstacle are bound to stumble over another."[2]

The second area is the staple of middle-class health insurance, employer-sponsored health plans, again in particular the availability to beneficiaries of judicial remedies for violations of their rights. Here the Court has turned a landmark 20th century reform, the Employee Retirement Income Security Act of 1974 (ERISA),[3] into what the late Judge Edward Becker described as "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."[4] To the 134 million Americans covered by employer-sponsored plans, the Court has delivered a judicial one-two punch – eviscerating ERISA's remedial provisions while preempting state alternatives.

As the new administration and Congress roll out proposals for expanding health care protections, they need to be mindful of how the judicial branch has handled – and mishandled – these products of past reform Congresses. Contemporary reformers can maximize their own impact, both by carving out time and political energy to "fix" major court-imposed distortions of existing safeguards, and by using oversight powers, drafting strategies, and judicial nominations opportunities to minimize similar damage to new protections.

II. The Courts Nurture – then Undercut – Medicaid

More than ever, Medicaid is a cornerstone of the nation's health coverage structure. In 2008, nearly 63 million people were covered by Medicaid.[5] These individuals are counted among the nation's "insured,"[6] and Medicaid "insures" more Americans than any other entity, including

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[1] Ernest A. Young, *Federal Preemption and State Autonomy*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 249, 249 (Richard A. Epstein & Michael S. Greve eds., 2007).
[2] Michael S. Greve, *Federalism, yes. Activism, No*. FEDERALIST OUTLOOK (The AEI Federalism Project, Washington, D.C.), July 2001, at 1, 3, *available at* http://federalismproject.org/depository/FederalistOutlook7.pdf (emphasis added).
[3] 29 U.S.C. §§1001-1461 (2000).
[4] *Difelice v. Aetna US Healthcare*, 346 F.3d 442, 553 (3d Cir. 2004).
[5] CONGRESSIONAL BUDGET OFFICE, FACT SHEET FOR CBO'S MARCH 2008 BASELINE: MEDICAID (2008) (hereinafter CBO Baseline).
[6] *See* U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007 19 (2008).

Medicare.[7] Moreover, Medicaid is the only guarantor of health care for more than 30 million children in families below the poverty line – over 50% of poor children and 25% of all children.[8] It is likewise the only guarantor for more than five million older Americans, and around ten million Americans with disabilities.[9] 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,[10] and Medicaid regulations are the principal legal guarantees of minimum safety and quality of care standards for nursing homes nationwide. Without question, Medicaid deserves to be called "the workhorse of the U.S. health care system."[11]

A. The Courts Fortify 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.[12] 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 as the advocacy community that 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 and the lower federal courts (in tandem with guidance from the executive branch) gave definition to Medicaid's broadly-worded mandates. These include:

- *Services for all eligible recipients*. Courts made clear that where the federal law provides for eligibility for certain groups (called "categorically needy"), states may not add additional limits on eligibility.[13]
- *Minimum services*. Courts construed broadly the categories of services that states must provide.[14]
- *Preventive screening for children.* Courts held that states have a special duty under Medicaid's provision for Early and Periodic Screening, Diagnosis and Treatment (EPSDT). Rather than waiting for individuals to request these preventive services, states were required to aggressively promote them.[15]

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[7] *See* CBO Baseline, *supra* note 5.
[8] U.S. CENSUS BUREAU, *supra* note 6, at 66; CBO Baseline, *supra* note 5.
[9] CBO Baseline, *supra* note 5.
[10] GEORGETOWN UNIV. LONG-TERM CARE FIN. PROJECT, FACT SHEET: NATIONAL SPENDING FOR LONG-TERM CARE (2007), *available at* http://ltc.georgetown.edu/pdfs/natspendfeb07.pdf.
[11] Alan Weil, *There's Something About Medicaid*, 22 HEALTH AFF. 13 (2003).
[12] Sara Rosenbaum, *Health Policy Report: Medicaid*, 347 N. ENGL. J. MED. 635 (2002).
[13] *See, e.g., Hayes v. Stanton*, 512 F.2d 133 (7th Cir. 1975) (invalidating application of "spend down" requirement to categorically needy); *Fabula v. Buck*, 598 F.2d 869 (4th Cir. 1979) (states may not impose resource restrictions on medically needy recipients that are not applied to recipients' eligibly by virtue of receiving Supplemental Security Income).
[14] *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); *Phila. Welfare Rights Org. v. Shapp*, 602 F.2d 1114 (3d Cir. 1979) (required dental services include orthodontic care).
[15] *See, e.g, Stanton v. Bond*, 504 F.2d 1246 (7th Cir. 1974), *appeal after remand*, 655 F.2d 766 (7th Cir. 1981) (ordering state to aggressively pursue and track EPSDT rather than wait for individuals to request services).

- *Prompt provision of care*. Courts gave substance to the requirement that eligibility determinations be made and services provided with "reasonable promptness."[16]

- *Availability of services.* Courts scrutinized Medicaid reimbursement rates to ensure that Medicaid recipients have the same access to care as the general population.[17]

Second, in a series of decisions the Supreme Court made these requirements enforceable by individuals against the states.[18] The Court explicitly rebuffed the notion that review by federal regulators was the only recourse when a 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."[19]

Thus, in the early days of Medicaid, by broadly interpreting and ensuring the private enforceability of key substantive provisions, federal courts ensured that states could not belittle their commitments to health care access when accepting federal funds.

B. The Drive to Cut Back (or Cut Off) Court Access for Medicaid Beneficiaries

Unlike Medicare, Medicaid is administered by state agencies. While there is much to be said for this "cooperative federalism" approach, fluctuating political winds and state budgets make judicial enforcement of federal norms essential for ensuring that state governments are accountable for their administration of Medicaid. Since 1980, when the Court first held, in *Maine v. Thiboutot*, that 42 U.S.C. §1983 authorizes suits to redress state violations of federal statutory as well as constitutional provisions, this Reconstruction-era statute has been the primary mechanism for private enforcement of Medicaid requirements.[20]

But since the *Thiboutot* decision, judicial hostility has ever more tightly closed courthouse doors to individuals seeking to enforce Medicaid and other federal requirements against the states. Progressively stricter limitations on enforcement of federal mandates have been purportedly based on solicitude for state prerogatives and an asserted need to preserve the "constitutional balance" between the States and the Federal Government.[21] At the extreme,

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

[17] *See, e.g., Ill. Hosp. Ass'n v. Ill. Dep't of Pub. Aid.*, 576 F.Supp. 360 (N.D. Ill. 1983) (enjoining rate cuts that threatened to lead to severe cutbacks in hospital staff and services); *DeGregorio v. O'Bannon*, 500 F.Supp. 541 (E.D. Pa. 1980) (rejecting cross motions for summary judgment in suit alleging insufficient payments had led to shortage of nursing home beds); *Pharmacists Soc. of Milwaukee City v. Dep't of Health & Soc. Servs.*, 79 F.R.D. 405 (E.D. Wis. 1975) (rejecting summary judgment for defendants in suit alleging insufficient payments led participating pharmacists to drop out).

[18] *See King v. Smith*, 392 U.S. 309 (1968); *Rosado v. Wyman*, 397 U.S. 397 (1970); *Townsend v. Swank*, 404 U.S. 282 (1971); *Hagans v. Levine*, 415 U.S. 528 (1974); *see also* TIMOTHY S. JOST, DISENTITLEMENT? THE THREATS FACING OUR PUBLIC HEALTH-CARE PROGRAMS AND A RIGHTS-BASED RESPONSE 91-93 (2003) (summarizing cases).

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

[20] 448 U.S. 1 (1980). Section 1983 authorizes suits against persons who, "under color of" state law, deprive any person of "rights, privileges, or immunities secured by the Constitution or laws [of the United States]".

[21] *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242 (1985) (holding Congress failed to clearly indicate intention to subject states to suit under Rehabilitation Act); *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 28

Justices Scalia and Thomas would bar Medicaid beneficiaries from court under all circumstances. They have developed a theory that Spending Clause-based statutes, like Medicaid, are less deserving of judicial deference than other law. In the Scalia-Thomas construct, such laws merely authorize "contracts" between the federal and grantee state governments, the terms of which cannot be enforced in court by intended beneficiaries (whom they label mere "third-party" beneficiaries) without unambiguously specific direction in the statutory text – regardless of what ordinary canons of construction would treat as Congress' actual "intent."[22]

Fortunately, the Scalia-Thomas theory has not been embraced by a majority of the Court.[23] However, erratically but persistently, Court majorities have moved in the direction of limiting enforcement of federal law – and particularly statutory conditions on federal funding for the states – piling up new obstacles to plaintiffs seeking to enforce statutory rights via Section 1983.[24] The most recent attempt, in the 2002 case *Gonzaga University v. Doe,* a 5-4 majority led by then-Chief Justice William Rehnquist embraced a subtler way to restrict enforcement of safety-net programs. Seizing on briefs by the Bush Administration and future Chief Justice John Roberts (as counsel for the appellant), Rehnquist held that in order to be enforceable through § 1983, a statute must "unambiguously" employ what the Court called "rights-creating language."[25]

While not explicitly overruling *Thiboutot*, *Gonzaga* has effectively rendered large portions of Medicaid and other safety net programs unenforceable. As the *New York Times* put it succinctly in 2005, "court decisions [following *Gonzaga*] are raising questions about what it means to have health insurance, if the terms of such coverage cannot be enforced."[26] Conservative lower court judges have seized upon Rehnquist's "rights-creating" language to continually raise barriers to court access under §1983.[27] Moreover, in a possible harbinger of further erosion to come, Justice Alito, in a 5-4 Supreme Court opinion in 2005, ominously went out of his way to announce a new, similarly anti-Congressional interpretive rule: "In a Spending Clause case," he wrote, in a dictum unnecessary to the case before the Court, "*the key is not what a majority of the Members of both Houses intend* but what the States are clearly told [in the

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(1981). *See also* Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1967-74 (1994) (tracing development of "clear statement" rules to limit suits against states).

[22] *Blessing v. Freestone*, 520 U.S. 329, 349–50 (1997) (Scalia, J., concurring); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 674–75 (2003) (Scalia, J., concurring); *Id.* at 675–83 (Thomas, J., concurring).

[23] *See* Rochelle Bobroff, *Section 1983 and Preemption: Alternative Means of Court Access for Safety Net Statutes*, forthcoming, LOYOLA U. J. OF PUB. INT. L. (forthcoming 2009) (manuscript at 63-68, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1273664); Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 385-93 (2008).

[24] This history is recounted and analyzed by Bobroff, *supra* note 23, at 5-42.

[25] 536 U.S. 273, 283-84 (2002). The decision was 7-2 on the judgment, but 5-4 on the applicable standard: Justices Breyer and Souter agreed that the statute at issue, the Family Education Rights and Privacy Act, was not meant to be privately enforced, but relied on the Court's previous, less draconian § 1983 decisions and rejected Rehnquist's test.

[26] Robert Pear, *Rulings Trim Legal Leeway Given Medicaid Recipients*, N.Y. TIMES, Aug. 15, 2005, *available at* http://www.nytimes.com/2005/08/15/politics/politicsspecial1/15medicaid.htm.

[27] *See, e.g.*, *Equal Access for El Paso, Inc.v. Hawkins*, 509 F.3d 697 (5th Cir. 2007) (holding unenforceable the requirement of provider payments sufficient to ensure Medicaid patients equal access to quality services); *Sanchez v. Johnson*, 416 F.3d 1051, 1059-62 (9th Cir. 2005) (holding unenforceable Medicaid guarantees of quality care and adequate access to services).

statutory text] regarding the conditions that go along with the acceptance of those funds."[28] Justice Alito's gratuitous assertion, if it metastasizes, could entrench a non-constitutional rationale for express judicial disregard for Congressional intent in interpreting landmark safety net statutes like Medicaid.[29]

C. Dissing Congress

The Court's iteration of new and ever more obscure and onerous criteria has not only blocked the vindication of individuals' rights to treatment, but sandbagged Congress. A *Harvard Law Review* note observed some years ago 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."[30] Moreover, these decisions have repeatedly and retroactively changed and tightened the applicable restrictions. Justice Stevens protested this "moving the goal posts" pattern in his dissent from a 1999 decision on state sovereign immunity:

> 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].[31]

Professor William Eskridge has written that the conservatives' manipulation of 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."[32] Professor Sam Bagenstos shrewdly observes that this "super-strong clear statement" strategy not only "allows the Court to avoid the suggestion that it is second-guessing" Congress, but has the effect of undermining "spending clause statutes liberals care about," while avoiding "collateral damage to programs supported by conservatives."[33] Their efforts are close to yielding a result Congressional conservatives have tried and failed to achieve. As a leading health law expert has observed, "The idea of Medicaid as an enforceable entitlement is hanging by a thread."[34]

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[28] *Arlington Cent. Sch, Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006) (emphasis added). The case concerned remedies available under the Individuals with Disabilities in Education Act (IDEA). Notably, Justice Ginsburg concurred in the Court's judgment, but wrote separately to criticize Justice Alito's approach.

[29] Professor Bagenstos forecasts that Justice Alito's gratuitous shot in *Arlington Central School District* will prove the likely "paradigm" of the Roberts Court's strategic design for curbing progressive spending clause-based programs like Medicaid. Bagenstos, *supra* note 23, at 350.

[30] Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1959 (1994).

[31] *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 654 (1999) (Stevens, J., dissenting).

[32] William N. Eskridge, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992).

[33] Bagenstos, *supra* note 23, at 394, 408-09.

[34] Sara Rosenbaum, Dean of George Washington University's School of Public Health, quoted in Robert Pear, Legal *Rulings Trim Leeway Given Medicaid Recipients*, N.Y. TIMES, August 15, 2005. *But see* Bobroff, *supra* note 23, at

III. The Supreme Court Undermines Federal Guarantees of Health Coverage for Workers and Families

In addition to undercutting the nation's principal low-income health insurance program, the Court has also eroded the principal guarantor of health coverage for the middle class, the 1974 Employee Retirement Income Security Act, otherwise known as ERISA. ERISA governs the employer-sponsored plans on which the vast majority of Americans depend for retirement and health security. As Professor Timothy Jost has explained,[35] the legal framework governing such plans is critical for ensuring that 134 million[36] Americans are legally entitled to adequate and affordable health care. The courts' – in particular, the Supreme Court's – application of ERISA has frustrated Congress's goal of ensuring that employer-sponsored health care is an entitlement that individuals can count on.

A. The Court Guts ERISA Remedies

With Medicaid, as we have seen, at least at the outset, the courts stepped up to fill in empty statutory 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. ERISA was enacted after more than a decade of Congressional investigations, most notably by Arkansas Senator John McClellan and his Chief Counsel, Robert F. Kennedy, into widespread abuses of employee benefit plans by company and union administrators. ERISA mandated that, henceforth, plan administrators would be legal "fiduciaries," required as a matter of federal statutory law to act "solely in the interest of the participants and beneficiaries for the exclusive purpose of providing benefits" to them, and to do so with "care, skill, prudence, and diligence." But over thirty years, principally in two decisions by Justice Antonin Scalia, the Supreme Court has turned these admirable and common-sense goals upside-down.[37] Justice Scalia's handiwork on behalf of the Court has been repeatedly and widely condemned by what Justices Ginsburg and Breyer recently labeled "the rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime."[38] The late Justice Byron White called Justice Scalia's approach an "anomaly" for "construing ERISA in a way that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted."[39]

The Court arrived at this perverse result via a remarkable flight of interpretive fancy. Unlike Medicaid, ERISA expressly authorizes beneficiaries of employer-sponsored health and retirement plans to sue in federal court to redress violations of its substantive provisions. The Court, however, truncated this statutory authority to exclude meaningful monetary compensation

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55-63 (describing alternative strategy, so far successful, of enforcing some Medicaid provisions through federal preemption claims).

[35] JOST, *supra* note 18, at 96-98.

[36] DEP'T OF LABOR, EMPLOYEE BENEFITS SEC. ADMIN., FACT SHEET: WORKERS' RIGHT TO HEALTH PLAN INFORMATION, http://www.dol.gov/ebsa/newsroom/fserisa.html (last visited Jan. 16, 2009).

[37] John H. Langbein, *What ERISA means by "Equitable": The Supreme Court's Trail of Errors in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1318 (2003).

[38] *Aetna Health Inc. v. Davila*, 542 U.S. 200, 223 (2004) (citing *Difelice*, 346 F.3d 442, and other judicial and academic authorities).

[39] *Mertens v. Hewitt Associates*, 508 U.S. 248, 263 (1993) (White, J., dissenting).

for loss in virtually all circumstances. Writing for the Court, Justice Scalia contended that ERISA's remedial provisions, though enacted in 1974, specified only types of relief "typically available in equity" decades before, when there were separate courts of law and equity. To this dubious premise he boot-strapped the conclusion, repudiated by meticulously documented scholarship, that such remedies would have included only non-monetary redress, such as injunctions.[40] Justice Scalia admitted that his construction of the statute was "unlikely," given that its authors had no personal experience with the old-style divided bench, and, especially in light of their core purpose, to strengthen beneficiaries' access to health and retirement plan benefits. But he dismissed such "vague notions of a statute's 'basic purpose,'"[41] insisting that his tortured interpretation was the only appropriate way to read the relevant text.[42]

B. ERISA Preemption Cuts Off All Relief

However misguided, the Court's erosion of ERISA remedies would not be totally fatal to the claims of beneficiaries harmed by bad-faith denial of treatment, as long as pre-existing common law remedies remained available in state courts. Yet in a series of decisions over two decades, the Court has held that ERISA preempts substantially all claims under state law by employees or their family members seeking redress for a health plan's wrongful denial of treatment.[43] 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, and without any federal substitute. In short, there is no way to ensure that they get the benefits to which they are in principle entitled, let alone to help them if the denial of benefits leads to financial or physical injury. Justice Ginsburg decried the "regulatory vacuum" resulting from the Court's one-two punch of "an encompassing interpretation of ERISA's preemptive force [and] a cramped construction of the 'equitable relief' allowable under [the federal statute]."[44]

As Judge Becker cogently explained, the real-world impact of the Court's *de facto* deregulation is devastating, if predictable. Employers and their health insurers are driven to incorporate systematic stonewalling of claims into their business model:

> Any rational HMO will recognize that if it acts in good faith, it will pay for far more procedures than if it acts otherwise…. 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.[45]

This perverse incentive structure is not merely theoretical. A dramatic example was provided by a scandal involving the Unum/Provident Corporation, which in 2002 was revealed to have

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[40] *Mertens,* 508 U.S. at 255-60; *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212-19 (2002). Scalia's reasoning is dissected by Professor Langbein, *supra* note 37, at 1348-65.
[41] *Mertens*, 508 U.S. at 261.
[42] *Id.* at 258.
[43] *Davila.,* 542 U.S. 200; *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987).
[44] *Davila*, 542 U.S. at 222 (Ginsburg, J., joined by Breyer, J., concurring).
[45] *Difelic*e, 346 F.3d at 459.

engaged in a systematic practice of bad faith claim denial, resulting in millions in verdicts and fines from state insurance commissions and non-ERISA-covered lawsuits.[46] The litigation unearthed a 1995 internal memorandum which instructed claims processors to "get new and existing policies covered by ERISA," which entails "enormous" advantages. It identified 12 contested non-ERISA cases in which the company had paid out $7.6 million in claims; had the same matters been covered by ERISA, the memo stated, the total pay-out would have ranged from zero to no more than 10% of that sum. Simply put, the company would simply have not paid at least 90% of the claims at all.[47]

In sum, the Court has transmuted this landmark law, enacted after years of investigation and policy development by Congress, into a safe haven to which less-than-conscientious health insurers flock, precisely to avoid compensating the workers and families Congress intended to protect.

IV. Conclusion: Put a Stop to Repealing From the Bench

For contemporary health (and other) reformers, the bottom-line lesson from the Supreme Court's mishandling of Medicaid and ERISA is clear enough. Unlike the architects of the post-1937 New Deal, President Kennedy's New Frontier, and President Johnson's Great Society, they face a judiciary that, as a practical matter, stands as a political adversary as well as a necessary governmental partner. Cadres of life-tenured judges, led by members of the Supreme Court, have demonstrated their readiness to exploit – indeed, invent – opportunities to weaken or neutralize laws inconsistent with their own deregulatory policy preferences. They have brushed aside principle and consistency – embracing "states rights" to curb disfavored federal laws like Medicaid, while pushing the envelope of "federal supremacy" when targeting state laws such as common-law protections for health insurance beneficiaries. The Obama Administration and the 111th Congress must factor this reality into their policy agendas.

First, the administration and Congress need to address and undo the damage hostile courts have done to existing reforms. In limiting Congressional authority and aggressively misconstruing major federal statutes, the Court has been picking a fight with Congress. For decades, Congress has for the most part turned the other cheek. But in the 109th and 110th Congresses, there were some promising stirrings. 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.[48] In the Spring of 2007, Congress reacted with commendable dispatch to introduce legislation to overturn the May 2007 *Ledbetter* decision, which weakened equal pay guarantees of the 1964 Civil Rights Act and ignored a 1991 amendment passed to reverse a similar decision by the Rehnquist Court.[49] Although the bill was blocked by a Senate filibuster in the 110th Congress, the enhanced Democratic majority in the 111th Congress is sending similar legislation to the White House for

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[46] *See* John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials under ERISA*, 101 NW. U. L. REV. 1315 (2007).
[47] *Id.* at 1321 (quoting memo).
[48] *See* Simon Lazarus, *Federalism R.I.P.: Did the Roberts hearings Junk the Rehnquist Court's Federalism Revolution?*, 56 DEPAUL L.REV. 1, 9-14, 28-29 (2006).
[49] *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2183 (2007).

President Obama's signature simultaneous with the release of this issue paper. In addition to grasping what now appear to be low-hanging targets like *Ledbetter*, the new Congress should move decisively to overturn other decisions that have inappropriately blocked enforcement of important statutory safeguards like Medicaid and ERISA.

As important as it is to formally reverse incorrect judicial decisions, training an unwonted spotlight on the Court's dismantling of statutory "pocket-book" reforms also may have substantial impact on the Court itself. Continuing, broad-based criticism of the *Ledbetter* decision, by Congress, the press, and political candidates, may have influenced Justices Roberts and Alito during the 2007-2008 term to produce Supreme Court rulings in favor of employment discrimination plaintiffs that surprised all observers.[50] For example, during the summer of 2008, Judiciary Committee Chair Patrick Leahy held three oversight hearings focusing on the Court's relentlessly pro-business rulings. Senator Leahy stated, "Congress has passed laws to protect Americans in these areas, but in many cases, the Supreme Court has ignored the intent of Congress in passing these measures, oftentimes turning these laws on their heads, and making them protections for big business rather than for ordinary citizens."

To ensure that the Supreme Court in the first third of the 21st century does not become a graveyard for statutory safeguards like these, Congress needs to build on these first steps, voice sustained criticism, and ultimately enact corrective legislation. If this new, progressive Congress shows that its leaders are actively opposed to the Court's decisions, the Court may be influenced to take a more cautious and respectful approach. To protect future reforms, Congressional staff must treat legislative drafting as an adversarial exercise akin to litigation or contractual work, minimizing ambiguities and closing loopholes, and not trusting the courts to implement laws in ways that make them work as intended – particularly with regard to individual remedies. If Congress intends courts to align interpretation of particular provisions with certain core purposes – such as promoting health coverage for vulnerable individuals and groups – that intent will need to be spelled out in the statutory text. If Congress wants to ensure that private or governmental entities are accountable in court for compliance with statutory requirements, that intent will likely be ignored by the sort of judges who denied relief to Lilly Ledbetter, unless it is prescribed in highly specific terms. Finally, Congressional drafters need to define, as best they can, whether and precisely to what extent they intend any new federal laws to be construed to preempt existing state statutes or common law safeguards.

The new administration needs likewise to take due account of potential judicial obstructionism. The Solicitor General can stress the courts' obligation to "respect Congress' policy choices,"[51] by jettisoning interpretive methodologies and doctrines that inappropriately truncate federal remedies and preempt state protections.[52] In addition, together with allies in the Senate, the White House can sensitize prospective judicial nominees to the priority the President attaches to robust application of statutory protections for Americans' basic needs.

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[50] *See* Linda Greenhouse, *Justices Say Law Bars Retaliation Over Bias Claims*, N.Y. TIMES, May 28, 2008 (discussing *Gomez-Perez v. Potter*, 128 S.Ct. 1931 (2008), and *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008)).
[51] Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1078 (2001).
[52] *See* Rochelle Bobroff & Harper Jean Tobin, *A Course Correction for the Solicitor General*, NAT'L L. J. (forthcoming 2009).

Finally, as President, Barack Obama himself can do more than anyone to let the public in on the secret that federal judges, no less than elected politicians, make a big difference in how effectively government meets day-to-day needs of ordinary people. To make this point, he need not merely express preference for judges with "empathy" for vulnerable individuals, as he has on several well-publicized occasions. Standing alone, that prescription has invited charges from the Right that his nominees will be "activists" who put their own preferences above the law and "legislate from the bench." In fact, however, it is conservative judges who, as Senator Leahy stressed in his summer hearings, are bending and breaking laws enacted to protect people in need – in effect, repealing from the bench. By reframing the debate about the courts, and championing judges who will faithfully follow laws like Medicaid and ERISA, President Obama can ensure that Americans, whether covered by public or private plans, receive the benefits that Congress intended to guarantee.