Both the Sword and the Purse:

State Governments and Statutory Rights in the Rehnquist Court

R. Shep Melnick

Thomas P. O'Neill, Jr. Professor
Political Science Department
Boston College

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Federalism lies at the heart of the jurisprudence of the Rehnquist Court. For the first time since the 1930s the Court has limited Congress's power under the Commerce Clause and section 5 of the Fourteenth Amendment.[1] The Supreme Court has significantly curtailed the federal judiciary's supervision of criminal proceedings in state court and the treatment of those confined to state prisons.[2] It has limited the federal government's authority to "commandeer" states' administrative apparatus.[3] In a series of decisions announced between 1996 and 2002 the Court has brought state sovereign immunity under the Eleventh Amendment back from the dead.[4] And in a variety of contexts it has refused to impose federal mandates on state governments unless Congress has provided a "clear statement" of its intent.[5] The vote on most of these decisions was 5-4, leading admirers and critics alike to describe Rehnquist, O'Connor, Kennedy, Scalia, and Thomas as the "Federalist Five."

How significant these new doctrines will prove in practice is the subject of considerable debate. Academic opinion ranges from dire warnings of the return of antebellum states' rights and nullification to fatalistic assertions about the Court's inability to halt the inevitable nationalization of American politics. Even the Justices admit to uncertainty about the practical significance of their rulings. Near the end of a 2002 opinion explaining why the Eleventh Amendment prevents private parties from "hauling" a state agency before the Federal Maritime Commission (FMC), Justice Thomas agreed with the Solicitor General that the Court's ruling would have "little practical effect on the FMC's enforcement of the Shipping Act." This did not satisfy

Justice Breyer, who remained uncertain of whether "the consequences of the Court's approach [will] prove anodyne, as I hope, rather than randomly destructive, as I fear."[6]

It is reasonable to suspect that not all the Court's federalism will turn out to have equally practical significance. For example, it is likely that the decisions that have received most public and scholarly attention—those limiting Congress's authority under the Commerce Clause—will not have much long-term effect on public policy. The federal government never made much of an effort to keep guns out of "school zones" or to nationalize domestic violence and rape law. Moreover, the Court's definition of interstate commerce remains very broad, and the difficulties associated with constructing judicially manageable and politically acceptable limitations on congressional powers are probably insurmountable, especially for a coalition with a bare majority.[7] The Court may exert more influence by adopting narrow interpretations of federal laws that approach the outer limits of congressional authority.[8] This strategy of requiring Congress to take a "sober second look" at some extensions of federal power not only avoids open conflict between coequal branches of government, but allows liberals and conservatives on the bench to find common ground.[9]

The Court's effort to reduce federal supervision of state courts and prisons by curtailing the use of habeas corpus petitions, in contrast, seem to have been largely successful.[10] Not only is this a matter peculiarly within the bailiwick of the judicial branch, but the 104th Congress passed two pieces of legislation—the Prison Litigation Reform Act and the oddly named Anti-Terrorism and Effective Death Penalty Act—that reinforced the position of the Federalist Five. So far Democrats in Congress have made no effort to revise these products of the Gingrich years.

The central argument of this paper is that if the Federalist Five is able to retain its hold on the Court, one of its most important accomplishments will be to reduce substantially the extent to which federal judges can use suits brought by private parties to impose statute-based mandates on state and local governments. I recognize that the immediate response to this assertion is likely to be either "So what?" or "Who cares?" Consequently, a major task of this paper will be to why private suits to impose statutory mandates on subnational governments are so important to Supreme Court justices, state and local officials, advocacy lawyers—and the daily operation of federalism. The paper will do so by examining two sets of cases in detail: those dealing with federal welfare laws and those interpreting Title VI of the Civil Rights Act of 1964. In each instance the paper will show how such suits have shaped public policy over the past 35 years and how decisions of the Rehnquist Court have limited the opportunities for private parties to file these suits in the federal courts.[11]

National Rules and Subnational Governments

In order to understand the importance of statutory cases brought by private citizens against state and local governments, it is necessary to think about how the federal government induces subnational governments to comply with national rules and the conditions of federal grants. Since 1960 the number and complexity of such federal laws and regulations has grown enormously. From health care to environmental protection, civil rights to welfare, education to Social Security, transportation to disability policy, federal money and rules touch our lives on a daily basis. Yet over these decades the number of civilians employed by the federal government has actually

declined. Meanwhile, the workforce of state and local governments has grown by leaps and bounds. State and local governments provide almost all the "street-level bureaucrats" who carry out programs established—and partially funded—by the national government. Public school teachers, police, welfare administrators, highway engineers, health and safety inspectors, public health officials—all are employed by subnational governments but subject to a wide variety of federal rules.

How do federal officials ensure that their state and local counterparts follow these rules and spend federal funds properly? An important feature of American government is that federal officials cannot issue direct commands to state and local administrators. They cannot hire, fire, or reassign the thousands of "street-level bureaucrats" on whom they rely so heavily. Of course, the federal government can use money to encourage programs it likes and to starve those it would like to scale back. Federal administrators can try to develop close ties with like-thinking professionals in state and local governments. As useful as all these tools can be for establishing the general direction of policy, they are not designed to ensure that each and every federal rule is followed or, more importantly, that each potential beneficiary receives the treatment promised by federal law.

In many instances federal officials have the authority to cut off funding to state and local programs that fail to comply with federal law. This strategy underlies both grant-in-aid programs (such as AFDC/TANF, Medicaid, highway and mass transit programs, and various programs established by the Elementary and Secondary Education Act) as well as the so-called "cross-cutting" regulations that apply to all recipients of federal financial assistance (most notably Title VI of the Civil Rights Act of

1964, Title IX of the Education Amendments of 1972, and section 504 of the Rehabilitation Act of 1973). But we know that federal administrators are reluctant to impose such sanctions. Not only do funding cut-offs invite intense political opposition, but they create friction between federal and state administrators and endanger the programs these administrators are trying to promote. Moreover, most conditional spending laws require “substantial” non-compliance before funds can be terminated. In the early years of a program federal administrators might be able to use the threat of fiscal sanctions to achieve major policy change; but over time the effectiveness of such threats fades. Similar problems frequently plague federal regulatory programs administered by the states: the penalty for failure to follow federal rules is usually a federal take-over of enforcement; but the federal government seldom has the resources, expertise, or political will to displace state regulators. Cross-cutting regulations present an additional problem: the federal officials charged with enforcing the cross-cutting rules are not the ones charged with supervising the programs in question. Administrators in, say, the Department of Transportation will be reluctant to reduce transportation funding to enforce rules announced by the Department of Justice.

Another potential enforcement tool—one that is both more focused and more credible—is a lawsuit brought by the United States against state and local governments. Federal administrators may not be able to issue direct orders to state and local officials, but federal judges most definitely can. And frequently do. As city councilors in Yonkers, New York learned a few years ago, public officials who ignore federal court injunctions can be held in contempt of court, fined, and even imprisoned. Hamilton’s famous claim that the judiciary “has no influence over the sword or the purse”[12] ignores

a key feature of American federalism: federal judges can use their injunctive sword—backed by an army of federal administrators and, ultimately, the guns of US Marshals—to control the purse strings of state and local governments. As state and local officials know (but political science professors are for some reason loathe to admit), federal judges routinely issue such orders, and state and local officials routinely obey.

The federal courts have long recognized the authority of the United States to file suit against either private parties or subnational governments to enforce the terms of federal laws. Private parties may need statutory authority to file federal court suits, but the government does not.[13] Nor does the Eleventh Amendment's limitation on suits against state governments apply to the US. Federal judges have power to issue commands to state officials; federal administrators have both the authority to initiate litigation and the capacity to monitor compliance: the combination would thus appear to constitute a highly effective compliance mechanism.

Yet outside school desegregation and voting rights the United States government does not often go to court to insist that subnational governments comply with federal mandates. Perhaps this is because such litigation normally must go through the Department of Justice, which is both risk-averse and perpetually short-handed. Perhaps federal administrators worry about disrupting relations with their state counterparts. Perhaps political executives worry about the political fallout of such a visible and adversarial stance. Or perhaps it is simply easier to let private parties take the initiative--and the political heat.

Thus we arrive at the enforcement mechanism that is the focus of this paper: private suits against subnational governments for failure to comply with federal rules.

Private rights of action, whether against subnational governments or private parties, add significantly to the enforcement resources available to the federal government. Private rights of action offer those with the greatest stake in government decisions and the most knowledge of the circumstances—for example, welfare recipients denied benefits, students subjected to sexual harassment, or employees who were the victims of racial discrimination—the opportunity to lodge a complaint, demand compliance, and receive financial compensation. Whether a homeless schizophrenic or an university professor, the plaintiff can have his day in court, fight city hall, and vindicate his rights.

Private rights of action, though, are not without their drawbacks. Enforcement mechanisms inevitably alter the balance of power between levels of government. Congress might want to preserve a significant amount of state and local discretion, and thus may limit federal sanctions to instances of "substantial" non-compliance. Moreover, since complete enforcement is seldom either possible or desirable, private rights of action give private parties the power to set public priorities. In criminal law we rely entirely on public prosecutors to decide which cases are worth pursuing. We do not want the enforcement of criminal law to depend on the litigiousness or vindictiveness of private parties. Public prosecutors are politically accountable in the way that private parties are not.

Private rights of action also make enforcement of federal requirements highly decentralized and unpredictable. The extent of compliance will vary from state to state and even from city to city, depending on the inclination of judges and the resources and litigiousness of interest groups. Such variation can at times become extreme, creating

serious problems for federal officials charged with administering federal law in a uniform manner.[14]

Finally, and probably most importantly, enforcing a law or regulation is inextricably linked with interpreting that law or regulation. This means that private rights of action give federal judges the opportunity to determine the content of federal mandates. Many federal requirements are inherently ambiguous: What does it mean to "discriminate" on the basis of race, gender, or disability? What constitutes "available" income, "reasonable and adequate" reimbursement, or an "appropriate" education? Some judges will defer to federal administrators' interpretation of these terms. Some will defer to the interpretation offered by state officials. Some will do neither. Some judges will look only at the text of the federal statute, others at its legislative history or general purpose. Some will favor broad interpretations of statutory entitlements; others will be hesitant to increase financial burdens on subnational governments. Most of the time this discretion will be exercised not by the Supreme Court but by district and circuit court judges.

In a recent dissent in an Eleventh Amendment case, Justice Stevens wrote, "This case is about power—the power of the Congress of the United States to create a private federal cause of action against a state, or its Governor, for the violation of a federal right."[15] That case involved the question of whether a private right of action explicitly created by Congress was compatible with the sovereign immunity of state governments the Court has found implicit in the Eleventh Amendment. Many other cases involve the power of the courts to recognize "implied" private rights of action, i.e. those not specifically created by a federal statute. Recognizing a private right of action

extends significantly the power of the national government over the states. Refusal to recognize a private right of action, in contrast, reduces the power of groups claiming benefits under the federal law. Whenever a court does recognize a private right of action against a subnational government, it must decide how much interpretive authority to cede to the federal agency charged with administering the program and how much to retain for itself. In short, all these cases raise important questions about the distribution of power within our complex constitutional system.

Judges confronting these issues almost always claim to base their decisions on the language, structure, and history of the particular federal statute before them. But behind their investigation of each statute usually lie strongly held presumptions about the nature of federalism and the role of the courts. As Richard Fallon has shown in his convincing analysis of federal court law, a key premise of the "Nationalist" position is that "Absent clear evidence of contrary legislative intent, there should be a presumption in the construction of jurisdictional statutes that Congress generally legislates sympathetically to federal rights by authorizing easy access, as of right, to the lower federal courts."[16] Federalists, in contrast, tend to view laws governing federal-state relations, especially those creating grant-in-aid programs, as "in the nature of a contract."[17] This means that states are bound only by requirements clearly announced in the text of federal statutes, and that states can be subjected to private suits only when Congress has made this an explicit part of the deal. Whether the overt legal debate focuses on waiver of sovereign immunity under the Eleventh Amendment, the relationship between two sections of the Ku Klux Klan Act of 1871, or whether Title IX incorporated judicial practices current in 1972, the underlying issue is the proper

distribution of constitutional authority. One thing both sides can agree upon is that in making these decisions federal judges are strategically well positioned to affect the distribution of power between the national government and the states.

Rising Actions

Private suits against state and local governments claiming violations of federal statutes were extremely rare before 1960 but commonplace by 1970. We do not have adequate statistics for this class of cases. But we do know that before 1960 there were only a handful of federal cases involving grant-in-aid programs.[18] Cross-cutting regulations, cross-over sanctions, and partial pre-emption statutes—the source of much of the intergovernmental litigation since the mid-1960s—were virtually unknown. Most private suits against subnational governments today are brought under 42 USC § 1983, which authorizes federal courts to issue injunctive relief and assess damages against any person "who, under color of any statute, ordinance, regulation, custom or usage, of any State" deprives another of "any rights, privileges, or immunities secured by the Constitution or the laws" of the United States In 1960 fewer than 300 such cases were filed in district court, almost all of them claiming deprivation of constitutional rights. Excluding cases filed by prisoners, the number of §1983 cases rose to 13,000 in 1977, almost 25,000 in 1992, and over 32,000 in 1994.[19] From 1935 to 1967 AFDC beneficiaries had not won a single case in federal court. But over the next eight years the Supreme Court alone decided 18 AFDC cases, most of which were won by welfare recipients. The lower courts heard hundreds of AFDC cases, and required states to

adjust virtually every aspect of the program.[20] The same thing happened in many other programs.

Why the sudden shift? One contributing factor, obviously, was the surge of legislative activity that began in 1964 and continued throughout the 1970s. The number of grant-in-aid programs, the amount of money involved, and the number of "strings" attached to them all grew enormously. Title VI of the Civil Rights Act, the first of the "cross-cutting" rules, prohibited racial discrimination in any program or activity receiving federal funds. It was soon "cloned" (to use Hugh Davis Graham's apt term[21]) to prohibit gender discrimination in federally financed education programs (Title IX) and discrimination against the disabled (§504). The "social regulation" of the 1970s both delegated massive regulatory duties to the states, and placed obligations and restrictions on state and local governments in their roles as polluters and land managers. Federal laws that had previously protected only private employees were extended to state, county, and municipal employees, e.g. Title VII of the Civil Rights Act in 1972 and the Federal Labor Standards Act in 1974. The new agencies created to administer these programs generated reams of detailed federal regulations.

A second factor was that many of the beneficiaries of these programs could now find lawyers to represent them. By the mid-1960s civil rights lawyers, Legal Services attorneys, and other "cause" lawyers were actively looking for clients. These lawyers soon realized, though, that getting cases against state and local governments heard in federal court would not be easy. In the words of a frequently cited law review article, "A major goal of this movement has been to secure federal judicial review of federally supported, state welfare programs. The path to the federal courts is, however,

strewn with a number of potential obstructions."[22] This new breed of lawyers did a remarkable job convincing judges to change rules on jurisdiction and relief. In 1990 the former research director for the Legal Services Corporation wrote,

> Today, advocates take for granted that individuals can assert rights under federal statutes and regulations that were designed to protect or assist them. But when *King v. Smith* was decided [in 1968], this was novel. *King* radically changed poverty law by providing remedies in federal and state courts for decisions by administrators of AFDC, public housing, and other public benefits programs.[23]

Over the past decade Legal Services attorneys have been fighting—often unsuccessfully—to preserve the victories they won in the 1960s and 1970s.

A third and crucial factor was the Warren Court receptivity to these innovative arguments about the role of the federal courts. The Supreme Court began to relax jurisdictional barriers a few years before the events described in the preceding paragraphs. Three cases decided between 1961 and 1964 demonstrate the Court's readiness to entertain new claims and to monitor state and local officials: *Monroe v. Pape*, *J.I. Case Co. v. Borak*, and *Parden v. Terminal Railway of the Alabama State Dock Department*. None of these cases were part of an organized litigational campaign. Indeed it is unlikely that anyone saw much of a connection among them: one was a tort suit brought against rogue Chicago cops; another a stockholder suit against a company engaged in a corporate take-over; the third a wrongful death claim against a railroad owned by Alabama. Taken together they illustrate how impatient the Warren Court was with jurisdictional barriers and states' claims of immunity from federal suit.

Before examining these cases in detail, it is important to emphasize a major difference between state courts and federal courts: the former are courts of general

jurisdiction while the latter are courts of limited jurisdiction. In his hornbook on Law of Federal Courts, Charles Alan Wright explains the significance of this difference:

> Most state courts are courts of general jurisdiction, and the presumption is that they have jurisdiction over a particular controversy unless a showing is made to the contrary. The federal courts, on the other hand, cannot be courts of general jurisdiction. They are empowered to hear only such cases as are within the judicial power of the United States, as defined in the Constitution, and have been entrusted to them by a jurisdictional grant by Congress.
>
> Because of this unusual nature of the federal courts, and because it would be not simply wrong but indeed an unconstitutional invasion of the powers reserved to the states if those courts were to entertain cases not within their jurisdiction, the rule is well settled that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the competence of such a court. The presumption is that the court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists.[24]

The jurisdiction established by federal statutes has always been more circumscribed than the maximum allowed under the Constitution. Although it seems remarkable today, Congress did not pass legislation giving federal courts subject-matter jurisdiction over cases involving federal law until 1875. Congress has also established amount-in-controversy minimums: in the 1960s and 1970s the federal courts ordinarily could not hear cases involving less than $10,000, which excluded most claims for welfare benefits.[25] Many grant-in-aid statutes provided for administrative hearings to determine whether a state had complied with federal requirements, and allowed states to seek judicial review of federal administrative decisions to terminate funding. But they seldom explicitly authorized suits—or any other form of participation—by recipients. This made it difficult to argue that Congress had intended to allow beneficiary to challenge state laws or regulations in federal court.

The first and best known of the three cases listed above was *Monroe v. Pape*.[26] An African-American family sought damages under 42 USC §1983 after Chicago

policemen had illegally entered their house without a warrant, abused them, and incarcerated the father. This now-famous section of the Ku Klux Klan Act of 1871 had seldom been invoked since the end of Reconstruction. After a review of the Act's legislative history Justice Douglas concluded that the phrase "under color of any statute, ordinance, regulation, or usage, of any State" is broad enough to include actions taken by state officers invoking their official authority even if these actions are unauthorized or forbidden by state law. This opened the federal courthouse door to thousands of constitutional tort actions against state officials. The Supreme Court further held that plaintiffs need not exhaust state remedies, but can proceed directly to a federal forum.

Justice Frankfurter was the sole dissenter. He criticized Douglas for treating the case as a "mine-run statutory question" and for understating the extent to which the case involved "a basic problem of American federalism: the relation of the Nation to the states in the critically important sphere of municipal law administration." State courts can deal adequately with tort claims such as this, Frankfurter maintained, and federal judges should be wary of altering the balance between state and federal power without a clear mandate from Congress:

> [R]espect for principles which this Court has long regarded as critical to the most effective functioning of our federalism should avoid extension of a statute beyond its manifest area of operation into applications which invite conflict with the administration of local policies. Such an extension makes the extreme limits of federal constitutional power a law to regulate the quotidian business of every traffic policeman, every registrar of election, every city inspector or investigator, every clerk in every municipal licensing bureau in the country.[27]

The statistics on §1983 suits cited above suggest that this was no idle concern.

Monroe v. Pape indicates the willingness of almost all members of the Warren Court to use ambiguous legislation to extend the jurisdiction of the federal courts to

novel causes of action against state officials—especially in cases with racial overtones. But the decision was limited in two important ways. First, Douglas's opinion explicitly exempted municipalities from the reach of §1983. It wasn't until seventeen years later that the Supreme Court extended §1983 to cities, school districts, and other local bodies.[28] Second, *Monroe v. Pape* involved a constitutional claim, not a violation of a federal statute. Not until *Maine v. Thiboutot* in 1980 did the Court apply §1983 to rights secured by all federal laws.[29] Both extensions of *Monroe v. Pape* were written by Justice Brennan, who for thirty years was the Court's most fervent advocate of federal supervision of state and local officials.

The second decision, *J.I. Case Co. v. Borak*, was short and unanimous. The Securities and Exchange Act of 1934 established rules relating to corporate proxy statements. It authorized the federal government to file suit against violators, but was silent on the right of stockholders to sue for damages. Justice Clark did not spend much time examining legislative history or ruminating about the proper role of the federal courts. He simply asserted that the purpose of the statutory provision in question was to prevent the use of deceptive proxy statements and that "private enforcement of the proxy rule provides a necessary supplement to the [Security and Exchange] Commission's action." The SEC is not able to review all proxy statements in a timely manner. Moreover, "the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of proxy requirements." If the federal courts were to close the door to implied private rights of action and rely on the SEC and state courts to enforce the law, "the whole purpose of the section might be frustrated."[30]

Three assumptions underlay the court's perfunctory opinion. First, the more enforcement the better. Second, federal courts should assume that Congress has authorized a private right of action unless the statute clearly indicates otherwise. This reversed the usual assumption about the limited jurisdiction of federal courts. Third, the federal courts should strive not simply to follow the letter of the law, but to achieve the overriding "purpose" of the legislative provision. Although *Borak* involved a suit against a private corporation, the same logic would seem to apply to suits against state and local officials. The Supreme Court said precious little about implied private rights of action over the next decade. But the lower courts routinely invoked *J.I. Case v. Borak* to hear private suits to enforce federal laws.

Finally we come to the most obscure of the three cases*, Parden v. Terminal Railway of the Alabama State Docks Department*. An employee of the state-owned railroad sustained injuries on the job, and brought suit for damages under the Federal Employers' Liability Act (FELA). FELA applies to "every common carrier by railroad" engaged in interstate commerce. If Terminal Railway had been a private corporation, it would clearly have been subject to FELA. But does the Eleventh Amendment allow federal courts to entertain suits for damages against state governments? All members of the Supreme Court agreed that the Eleventh Amendment bars such suits—unless the state has consented to be sued. Writing for a five member majority, Justice Brennan argued that by operating a railroad after passage of FELA, Alabama had in effect waived its sovereign immunity:

> Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by the Act. By adopting and ratifying the Commerce Clause, the States empowered Congress to

> create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.[31]

The minority (which included Justice Douglas) found this to be a rather slender reed to support a waiver of sovereign immunity, especially since "Congress did not even consider the possible impact of its legislation upon state immunity from suit." Justice White's dissent enunciated an argument which late became a centerpiece of the Rehnquist Court's Eleventh Amendment jurisprudence: "A decent respect for the normally preferred position of constitutional rights dictates that if Congress decided to exercise its power to condition privileges within its control on the forfeiture of constitutional rights <u>its intention to do so should appear with unmistakable clarity</u>."[32]

Justice Brennan seemed to limit the scope of *Parden* by pointing out that in this case the state had chosen to engage in commercial activity which "if carried on by a private party or corporation, would be subject to federal regulation." "When a State leaves the sphere that is exclusively its own," Brennan argued, it subjects itself to regulation "as fully as if it was a private person or corporation." Whether *Parden*'s waiver of sovereign immunity would apply only to proprietary activities such as running a railroad or would extend to inherently governmental actions such as the provision of welfare benefits was left unclear. Brennan later argued that a state waived its Eleventh Amendment immunity merely by participating in a joint program with the federal government, regardless of whether federal law made waiver an explicit condition of participation. Try as he might, though, Brennan could never convince a majority of Justices to accept this position.

Parden and *J.I. Case v. Borak* were announced in the spring of 1964, just as LBJ was announcing his plans for the Great Society and Congress was debating the Civil Right Act of 1964. Together the courts, Congress, and the President were creating an explosive combination: new judicial remedies for a broad array of new statutory rights. No doubt behind the Court's innovative rulings lay the same distrust of and impatience with state and local governments that was evident in the congressional debate over civil rights. Yet it is also clear that the Court had not given much thought to the manifold implications of its new receptivity to suits against state and local officials. Over the next decade the federal courts would frequently accept novel cases without explaining why. Not until the mid-1970s did the Supreme Court try to clarify its position on §1983, implied private rights of action, and sovereign immunity. But by then it was too internally divided to produce any consistent themes.

The significance of the Court's new receptivity to private suits against state and local governments was particularly clear in Supreme Court rulings interpreting two important statutes, the Aid to Dependent Children (AFDC) title of the Social Security Act of 1935 and Title VI of the Civil Rights Act of 1964. In the following sections I will focus on two key cases: *King v. Smith*[33] and *Lau v. Nichols*.[34] In both instances the Supreme Court allowed private parties to file suit against state and local governments to vindicate statutory rights without explicitly addressing the jurisdictional issues. The Court simply assumed that enforcing federal mandates was a proper role for the federal judiciary. In both cases the Court found in federal law substantive requirements that, to put it charitably, were not evident on the face of the statute. In both cases the Court made it easier for federal agencies to impose additional demands on subnational governments.

And both decisions were repudiated by the Rehnquist Court a quarter of a century later. Consequently, these two cases provide a useful prism for examining the competing federalism doctrines of the Warren and Rehnquist courts.

The New Condition of Federal Grants: The Legacy of King v. Smith

King v. Smith was the first and most important of the Supreme Court's many decisions involving AFDC. It led to significant expansion of eligibility in each of the 51 AFDC programs run by the states and the District of Columbia. From 1935 to 1968 the states had nearly complete control over AFDC eligibility requirements and benefit levels, subject to the handful of restrictions listed in Title IV of the Social Security Act. But in 1968 the Supreme Court suddenly stood the central presumption of the program on its head. As the Court explained in a later case, "*King v. Smith* establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under the federal AFDC standard violates the Social Security Act and is therefore invalid under the Supremacy Clause."[35] The statute's silence on most eligibility issues—which was clearly based on Congress's insistence on state control—was suddenly converted into a federal barrier to state-created restrictions. This proved to be a remarkably effective method for moving toward the "sophisticated and enlightened" welfare policy favored by the Court.[36]

The precedent *King v. Smith* set on jurisdictional matters was just as important as its novel reading of the substantive requirements of Title IV of the Social Security Act. With barely a word of explanation the Court swept away almost all the barriers that

had so worried Legal Services attorneys. Chief Justice Warren's opinion contained no discussion of whether the Social Security Act had created a private right of action to supplement the administrative enforcement mechanism explicitly established by the Act. Jurisdictional issues were relegated to a brief footnote which included the delphic statement, "we intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are incompatible with the federal statute may be brought in federal court."[37] The Court did not require the plaintiff to exhaust state or federal administrative remedies. It assumed—again without explanation—that the proper remedy was to enjoin enforcement of the state's invalid rule, rather than to enjoin federal spending until the state came into compliance. In a subsequent Second Circuit opinion Judge Henry Friendly, one of the federal judiciary's leading experts on jurisdictional matters, described the Court's assumption of jurisdiction in *King v. Smith* as "inexplicable."[38] Yet in case after case the Supreme Court and the lower courts proceeded directly to the merits without explaining why they had authority to hear suits by private parties to enforce conditions on federal grants.[39]

The Court was able to sidestep the sticky jurisdictional issues in *King v. Smith* because the case had initially taken the form of an Equal Protection challenge to Alabama's notorious "substitute parent" rule. Poverty lawyers representing one of the thousands of African-American families denied benefits as a result of policies instituted by Governor George Wallace filed a §1983 suite claiming that the "substitute parent" rule was racially discriminatory in both its intent and its administration. They had plenty of evidence, and the three-judge court that heard the case readily agreed. But as *King v. Smith* made its way to the Supreme Court, those lawyers realized that the case would

have a greater impact if it were based on an expansive interpretation of the Social Security Act. A constitutional ruling would only affect the peculiar state of Alabama; a new interpretation of Title IV would change policy throughout the nation. The Supreme Court held that the initial Equal Protection challenge—which it never discussed—provided it with "pendant" jurisdiction over the statutory issue.

The Court continued to hear AFDC cases on this basis despite the fact that its decisions in *Dandridge v. Williams* and *Jefferson v. Hackney*[40] cut the heart out of Legal Service's constitutional arguments. In 1974 the Court acknowledged that

> Several past decisions of this Court concerning challenges by federal categorical assistance recipients to state welfare regulations have either assumed that jurisdiction existed under section 1343 or so stated without analysis. . . . In none of these cases was the jurisdictional issue squarely raised as a contention in the petitions for certiorari, jurisdictional statements, or briefs filed in this Court.[41]

This was not something that three of President Nixon's recent appointees, Justices Rehnquist, Powell, and Burger, were willing to accept. They argued that there was no basis for the federal courts' acceptance of this "massive influx of cases challenging state welfare regulations."[42] The three dissenters argued that the plaintiffs could not meet the $10,000 minimum established by the general federal-question jurisdictional statute, nor could they use §1983 since the Social Security Act is not a law "providing for equal rights." Since the Supreme Court had "largely discredited [constitutional] attacks on legislative decisions about the apportionment of limited state welfare funds," the Court's invocation of "pendant" jurisdiction was little more than a hoax—"a classic case of the statutory tail wagging the constitutional dog."[43]

The majority, though, was willing neither to give up jurisdiction or to provide a clearer jurisdictional basis for the statutory claims. Federal courts could retain pendant

jurisdiction over statutory claims, Justice White argued, as long as the constitutional arguments presented by plaintiff's lawyers were not "obviously frivolous," "absolutely devoid of merit," or "no longer open to discussion."[44] A court should deny jurisdiction only when the legislative provision in question is "so patently rational as to require no meaningful consideration. [45] This peculiar formulation—what would it mean for a law to be patently rational?--indicates just how frayed the Court's bootstrap argument had become.

The longer the Court went without finding an Equal Protection violation, the more embarrassing the assertion of pendant jurisdiction became. Two subsequent AFDC decisions, *Chapman v. Houston Welfare Rights Organization* and *Maine v. Thiboutot*[46] revealed the deepening divisions in the Court on the question of jurisdiction. In *Chapman* the Court ruled by a vote of 6-3 that AFDC cases based solely on statutory claims could not be brought under §1983 since §1983 is limited to protecting federal "rights, privileges, or immunities" secured by laws "relating to equal rights." Justice Powell's lengthy concurring opinion warned that if the Supreme Court were to apply §1983 to rights created by <u>all</u> federal laws, "then virtually every such [cooperative grant-in-aid] program, together with the state officials who administer it, become subject to judicial oversight at the behest of a single citizen, even if such a drastic expansion of federal-court jurisdiction never would have been countenanced when these programs were adopted."[47] The dissenting opinion of Justices Stewart, Brennan, and Marshall, in contrast, argued that after 11 years of deciding statutory AFDC claims "it is far too late in the day . . . to argue that the plaintiffs in these cases did not state causes of action cognizable in the federal courts."[48] Although it would usually be possible to use

Hagan's pendant jurisdiction rationale to slip into court, the dissenters believed that "to sacrifice even one lawsuit to the Court's cramped reading" of §1983 "is to deprive a plaintiff of a federal forum without justification in the language or history of the law."[49]

The very next year the Court reversed its position on the scope of §1983, again by a vote of 6-3. In *Maine v. Thiboutot* Justice Brennan finally convinced a majority to accept the position that §1983 applies to all rights secured by federal statutes. In his brief opinion Brennan argued that this expansion of the authority of the federal courts was consistent with both the plain language of the statute and Supreme Court practices since *King v. Smith*.[50] Justice Powell's dissenting opinion complained that the Court "almost casually" had conferred upon the federal judiciary "unprecedented authority to oversee state actions that have little or nothing to do with the individual rights" protected by Reconstruction legislation. He provided a long list of programs that would become subject to judicial scrutiny as a result of the Court's broad interpretation of §1983.[51]

These AFDC cases provide a useful cook's tour of the evolution of judicial doctrine on private rights of action in grant-in-aid programs. First came a scarcely acknowledged expansion of jurisdiction to deal with problems of racial discrimination. Once the initial crisis receded, judges were reluctant to return to the *status quo ante*, which would have left state officials unsupervised by federal judges. A counterattack by the federalism faction (in the late 1970s this meant Justices Rehnquist, Powell, and Burger) was repulsed as Justice Brennan put together a Supreme Court majority to provide a permanent basis for the expansion of federal judicial authority.

Nearly as important as the way private rights of action changed the role of the federal courts was the way they altered the incentives and the perspective of federal administrators. Before the courts stepped in, the U.S. Department of Health, Education, and Welfare issued numerous "state letters" to guide and goad state administrators. Since state administrators knew that the feds were unlikely to cut funding, federal enforcement of grant requirements involved lengthy negotiations between officials at the federal, state, and local levels.[52]

All this changed after *King v. Smith*. The Court's reinterpretation of the Social Security Act in *King* had relied in part on HEW regulations. HEW officials soon realized that they could issue extensive regulations and rely on <u>the courts</u> to enforce them. Freed from its reliance on the politically treacherous and usually ineffective funding sanction, HEW quickly became more aggressive and more legalistic.

The Supreme Court endorsed this new role for federal administrators in its first post-*King* AFDC decision. In *Lewis v. Martin* the Court relied exclusively on HEW rules specifying when states could count the income of "men assuming the role of spouse." It announced that HEW was free to add conditions consistent with the act's "basic purpose of providing aid to 'needy' children."[53] This is not to say that federal judges always agreed with HEW. In a variety of cases the Supreme Court and the lower courts read the Social Security Act to encompass an entitlement broader than that recognized by HEW. In effect HEW rules established a new floor, one on which the courts were free to build.

The shift in the politics of intergovernmental grants was captured in an article written by HEW's deputy general counsel in 1970. He noted that after *King v. Smith*

“instead of the legislative and executive branches providing the initiative for the creative development of new rules, it has been the courts that have supplied the initiative, and, in some measure, the creativity.” Intervention by the courts “permitted a sort of four-sided game of leapfrog,” in which each set of federal actors could impose new restrictions on the states. “If for some reason the federal administrators were inhibited in the development of new rules—perhaps because of the disapproving views of members of an appropriations committee—the courts could assume the lead in developing new legal requirements.” At the same time, federal administrators could embed a judicially developed policy in their rule book "perhaps even embellishing it a bit." Reform “could thus proceed in an ever-ascending spiral with no single participant in the process having the capacity to block progressive development.”[54]

Far from merely insuring that states comply with federal statutory commands, private rights of action gave judges and administrators considerable power to impose their own interpretations of federal welfare laws on the states. Liberals applauded the courts’ effort to institute welfare reforms that had never been able to survive the “obstacle course on Capitol Hill.” Conservatives in Congress, the Nixon Administration, and the office of California Governor Ronald Reagan were also well aware of the role the federal courts had played in expanding welfare eligibility and reducing the authority of the states. For years they vowed to end the courts meddling with AFDC. Not until 1996 did they finally succeeded.

Lau v. Nichols and the Politics of Cross-Cutting Regulations

In 1974 the Supreme Court issued a brief, unanimous decision requiring school districts throughout the nation to provide bilingual education to children who do not speak English. *Lau v. Nichols*[55] not only played an important role in the development of bilingual education, but also established the federal courts' role as enforcer of agency rules issued under Title VI of the Civil Rights Act and, later, Title IX of the Education Amendments of 1972 and §504 of the Rehabilitation Act of 1973. Once again the expansion of the authority of the federal courts was barely mentioned in the Supreme Court's opinion. In this instance all the Court's Nixon appointees—including Rehnquist, Powell, and Burger—joined the majority. The amicus brief for the United States urging the Court to adopt an expansive reading of Title VI was signed by Solicitor General Robert Bork. Republicans in the White House and HEW's Office of Civil Rights were eager to court Hispanic voters; judicial conservatives had yet to grasp the significance of private rights of action under "cross-cutting" statutory provisions such as Title VI.

Title VI was the sleeper section of the Civil Rights Act of 1964. The first part of Title VI provides that "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." (§601) The second part requires federal departments and agencies to write regulations to carry out this prohibition, and authorizes them to terminate funds to recipients who fail to comply. (§602) The Kennedy Administration presented these provisions as an administrative alternative to the painfully slow process of achieving desegregation through litigation.[56] Although a subcommittee of the House Judiciary

Committee recommended adding a private right of action to Title VI, this proposal was dropped by the full committee, never to reappear. The House bill, which was later accepted by the Senate with only a few changes, provided that administrative regulations could be enforced "by any other means authorized by law." The legislative history indicates that the handful of members of Congress who paid attention to the details of Title VI took this to mean that the United States could file suit to enforce Title VI regulations.[57] At the time this seemed rather minor since Title II of the Act gave the Attorney General authority to file desegregation suits, and private citizens already had the right under §1983 and the Fourteenth Amendment to challenge racial discrimination by those using federal funds. The White House and civil rights groups favored Title VI—and Southerners feared it—because it seemed to offer a quick and effective <u>administrative</u> enforcement mechanism.

Over the next five years HEW guidelines under Title VI played a major role in the rapid desegregation of southern schools.[58] Central to the success of desegregation was the alliance that developed between HEW and the Fifth Circuit, the appeals court with jurisdiction over most of the deep South. In a series of important desegregation cases the Fifth Circuit relied heavily on HEW's rules to establish appropriate remedies for constitutional violations. Acting alone, Judge Wisdom noted, the courts had failed to end segregation. But now Title VI and executive branch expertise provided a means "to rescue school desegregation from the bog in which it has been trapped for years." The "HEW Guidelines offer, for the first time, the prospect that the transition from a *de jure* segregated dual system to a unitary integrated system may be carried out effectively, promptly, and in an orderly manner."[59] Formally HEW was not a party to these cases,

which were brought by the Department of Justice and private parties to correct school practices that violated the Constitution. But the court announced that it would give “great weight” to the guidelines in future litigation, and it borrowed heavily from the guidelines in constructing a model decree which it expected to be used by district court judges within the circuit. With the federal courts relying so heavily on its rules and with the Department of Justice pursuing an aggressive litigational effort to uproot segregation, HEW did not need to rely exclusively or even primarily on the threat of a funding cutoff to enforce its standards.

In 1970 the Office of Civil Rights in HEW decided to tackle another educational issue, announcing extensive bilingual education guidelines for all public schools with a significant number of non-English speaking students. According to OCR, failure to provide bilingual education constitutes discrimination because “inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district.” Consequently, districts with more than 5% non-English speakers “must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.”[60] Schools could not assign non-English speakers to special education classes without the consent of new advisory committees mandated by the federal regulations. HEW Secretary Elliot Richardson told Congress that the OCR regulations would require ”total institutional reposturing (including culturally sensitizing teachers, instructional materials and educational approaches) in order to incorporate, affirmatively recognize and value the cultural environment of ethnic minority children so that the development of positive self-concept can be accelerated.”[61] Despite the fact that

bilingual education had never been discussed in the lengthy debate over the Civil Rights Act, federal administrators intended to use Title VI to require major changes in urban school systems. Yet by itself OCR had neither the manpower nor the political will to ensure that these school districts would comply.[62] Nor was it clear that private litigants could get into federal court by claiming that failure to provide bilingual education constituted a violation of the Constitution.

In *Lau v. Nichols* Chinese-American students aided by Legal Services attorneys sued the San Francisco school system to force it to comply with OCR's guidelines. The lower courts ruled that neither the Constitution nor Title VI impose such affirmative duties on local schools. But the Supreme Court disagreed. Justice Douglas's brief majority opinion upheld the OCR guidelines with scarcely any discussion of the language of Title VI or the implications of the decision for federalism. His opinion included the later controversial assertion that "discrimination is barred which has that <u>effect</u> even though no purposeful design is present."[63] Justice Stewart's concurring opinion (which Justices Burger and Blackmun joined) noted that the San Francisco school district had not "affirmatively or intentionally contributed to this [language] inadequacy," but had "failed to act in the face of changing social and linguistic patterns." "It is not entirely clear," Stewart wrote, that the prohibition on discrimination contained in §601 requires the school system to add new programs. "The crucial question is, therefore, whether the regulations and guidelines promulgated by HEW go beyond the authority of §601." Steward found that these regulations were "reasonably related to the purpose of the enabling legislation." Department rules, the Supreme Court had held in many previous cases, are "entitled to great weight."[64] Stewart in effect argued that

federal agencies have authority to add a disparate-impact test to the ban on intentional discrimination announced in Title VI. Douglas, in contrast, implied that Title VI itself incorporated a disparate-impact test. Neither considered whether these two understandings of discrimination might be incompatible, and neither explicitly addressed the question of whether Title VI contained a private right of action.

Lau v. Nichols both gave HEW broad authority to interpret "discrimination" and committed the federal judiciary to enforcing HEW's rules. This had implications that went well beyond bilingual education: HEW could now establish affirmative action requirements for school assignment, college admission, and employment. Private citizens, civil rights groups, and Legal Services attorneys could then seek injunctions and damages against recipients of federal funds who failed to comply. This meant that Title VI had been transformed from an administrative enforcement mechanism for guaranteeing equal protection of the law into a judicial mechanism for enforcing administrative rules defining a wide variety of forms of discrimination.

One of the ironies of Title VI litigation is that some of the justices who were most vigorous in opposing implied private rights of action under other statutes had reasons for recognizing a private right of action under Title VI. This became clear in the *Board of Regents v. Bakke*[65], in which four members of the Court (Burger, Rehnquist, Stewart and Stevens) based their opposition to the University of California's affirmative action program entirely on Title VI. With the liberals using Title VI to justify affirmative action and two conservatives using Title VI to limit affirmative action, only Justice White refused to recognize a private right of action.[66] Having taken this stand in *Bakke*,

Rehnquist and Burger, two of the court's most reliable defenders of federalism, later provided the votes necessary to recognize a private right of action under Title IX.[67]

During the 1970s and 1980s lower court judges routinely required state and local governments to follow federal administrative rules defining discrimination based on race, gender, language, and disability. Once again judicial doctrine had developed incrementally: first the lower courts deferred to HEW's Title VI guidelines to attack behavior by state and local officials that was clearly unconstitutional (*de jure* school segregation); then the Supreme Court used private rights of action under Title VI to address state and local policies that might be unconstitutional under a broad reading of the equal protection clause *(Lau v. Nichols*); and eventually judges recognized private rights of action to enforce administrative rules that had no constitutional basis whatever (for example, requiring accessible transportation for the disabled). Together federal judges and administrators were creating an elaborate common law governing the behavior of subnational governments with virtually no direction from Congress.

Confusion Reigns: The Supreme Court in the '80s

These developments provoked a concerted effort by Justice Powell to reverse the steady erosion of state and local authority. In a famous dissent in a 1979 Title IX case, he argued that "the time has come to reappraise our standard for the judicial implication of private causes of action."[68] That same year Powell, writing for a unanimous Court, refused to defer to HEW regulations issued under §504 of the Rehabilitation Act: "Here, neither the language, purpose nor history of §504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds."[69]

Two years later a divided Court ruled in the first *Pennhurst* case that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[70] The Court seemed to be backing away from the course it had set in *King v. Smith* and *Lau v. Nichols.*

But reality was more complex—and Supreme Court doctrine less coherent—than this might suggest. When Justice O'Connor replaced Justice Stewart in 1981, federalism picked up a fourth reliable vote. This "Federalism Four" (Powell, Rehnquist, Burger, and O'Connor) could often pick up at least one swing vote (usually White or Stevens). For example,

- In a number of cases the court refused to find a private right of action when the statute in question seemed to create a comprehensive enforcement scheme[71] or did not promise "especial benefits" to a clearly defined set of recipients.[72]
- In its second major decision involving the Pennhurst State School and Hospital, the Court invoked the Eleventh Amendment to prevent federal courts from relying on state law to order the restructuring of state institutions.[73]
- In an another frequently cited case, *Atascadero State Hospital v. Scanlon* the Court invoked the Eleventh Amendment and the "clear statement" rule to deny damages to a plaintiff who had won a §504 suit against the state of California. [74]

- In several cases the Court refused to allow §1983 suits against state and local governments, arguing that the extensive remedial measures created by Congress precluded the use of the more generic remedy.[75]

Yet the "Federalist Four" lost at least as many battles as they won. In 1985 the Court issued is decision in *Garcia*, which claimed to leave protection of federalism to the political branches.[76] After authorizing §1983 suits against municipalities in 1978, the Court stripped municipality of their "good faith" immunity in 1980 and two years late ruled that §1983 does not require exhaustion of administrative remedies.[77] The Court's 1989 decision in *Pennsylvania v. Union Gas Co*. seemed to put a quick end to the revival of the Eleventh Amendment: by a 5-4 vote the Supreme Court ruled that Congress could use its authority under the Commerce Clause to abrogate the states' sovereign immunity.[78] That meant that Congress—and, by implication, the judges who interpret congressional intent—can ignore the Eleventh Amendment whenever they see fit. The Court also allowed Congress to impose specific duties on long-established state regulatory commissions.[79]

Ironically, one reason the Court swung back and forth on federalism issues during the 1980s was that the federalist and nationalist blocs had become more cohesive in their voting and more coherent in their doctrine. When Burger and Powell retired they were replaced by Scalia and Kennedy, who were at least as committed to a revival of federalism as their predecessors. Meanwhile Justice Brennan was picking up converts (Justices Blackmun and Stevens) in his long-standing effort to eliminate sovereign immunity and to extend the reach of §1983. That meant that the vote of a single justice—often Justice White—would determine the outcome of the case before

the Court. Meanwhile Congress was increasing the number of unfunded mandates and conditions on federal grants. The huge budget deficits of the 1980s made cost-shifting an increasingly popular political strategy in Washington. As a result, a badly divided Supreme Court faced increasingly difficult federalism issues.

The End of the Alliance: Alexander v. Sandoval

In 1991 Clarence Thomas replaced Justice Thurgood Marshall and the "Federalism Four" became the "Federalism Five." During the 1990s the Supreme Court developed a number of doctrines that made it more difficult for the federal government to impose mandates on the states.[80] Rather than try to review all these developments, this paper will examine two Supreme Court cases that exemplify these trends and illustrate their significance. These two decisions, *Alexander v. Sandoval*[81] and *Blessing v. Freestone*[82] provide vivid contrasts with *King v. Smith* and *Lau v. Nichols*.

The Court's 2001 decision in *Alexander v. Sandoval* not only revoked the authority granted to federal administrators in *Lau v. Nichols*, but featured a heated debate between Justices Scalia and Stevens on federalism and the role of the courts. Like *Lau v. Nichols, Sandoval* involved administrative regulations on language-based discrimination under Title VI. Soon after Alabama amended its Constitution to declare English its official language, the state required drivers exams to be conducted only in English. Non-English speakers challenged the practice as contrary to regulations issued by the Department of Justice. As Justice Stevens pointed out, "when this Court faced an identical case 27 years ago, all the Justices believed that private parties could bring

lawsuits under Title VI and its implementing regulations to enjoin the provision of services in a manner that discriminates against non-English speakers."[83]

But not this time. In a majority opinion that was simultaneously queer and clever, Justice Scalia stated that the long-established private right of action under Title VI extended only to the prohibition of discrimination in §601, not to the administrative regulations issued under §602. Scalia did not say that the Department of Justice's language discrimination rules were invalid because they were based on a disparate-impact understanding of Title VI that had been rejected by a majority of the Court—even though this conclusion seem to animate his entire opinion. Rather he drew a sharp (and novel) line between a private right of action to enforce a statute and a private right of action to enforce a regulation issued under that statute. The federal judiciary, Scalia maintained, would no longer take on the job of enforcing against subnational governments agency regulations that were only loosely connected to congressional statutes. Scalia's opinion managed pull off a triple play by (1) following a long line of precedents on the availability of private rights of action under Title VI, (2) retaining Title VI as a weapon for assaulting affirmative action programs, and (3) substantially reducing the power of federal agencies to regulate subnational governments.

The difficulty with Scalia's argument is that, as he pointed out, the Court had long held that "a Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of that statute to be so enforced as well." It is "therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute."[84] If there is no private right of action to enforce agency rules, then these rules must not be authoritative interpretations of the statute.

But how can that be? Doesn't the "well established principle" of deference to administrative expertise announced in *Chevron v. NRDC*[85] require the court to accept , and thus enforce, the DOJ rules? Justice Scalia's opinion is uncharacteristically opaque on this central issue.

The reason, I would suggest, is that Scalia and other members of the "Federalist Five" see a major difference between regulating private parties and regulating subnational governments, and are not willing to apply "*Chevron* deference" to rules that apply to state and local governments. The logic goes like this: the courts will only impose mandates on subnational governments when Congress has made a "clear statement" to that effect. This "clear statement" must be readily apparent on the face of the statute, clear enough for both state officials and federal judges to see it without the help of elaborate administrative rules. Under what Scalia described as the "ancien regime" of *J.I. Case Co. v. Borak*, the federal courts would frequently go well beyond the clear commands of the law in order to "make effective the congressional purpose." But no longer: "Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondent's invitation to have one last drink."[86] Agencies cannot create or expand rights enforceable against the states. This is a job for Congress alone: "Agencies may play the sorcerer's apprentice, but not the sorcerer himself."[87] In short, federal judges should not enforce agency regulations against subnational governments unless there is a <u>very</u> clear link between the regulations and the text of the statute.

The Court's failure to invalidate the DOJ guidelines leaves open the possibility that the Department remains free to attempt to enforce its rules administratively, i.e. through negotiations and the threat of a funding cut-off. Of course a state denied

federal funds on these grounds could seek judicial review of the Department's decision, and it is hard to imagine that the DOJ's disparate-impact rules would survive Supreme Court review. But there could well be many valid agency rules in the vast gray area between what a statute clearly requires and what it does not permit. *Sandoval* presents the possibility of a two-tiered enforcement structure: rights the Court decides are clear on the face of the statute are enforceable in federal court; agency rules in the gray area can be enforced only through administrative means. Whether the Court will explicitly endorse this approach is unclear.

The dissent written by Justice Sevens and jointed by Justices Souter, Breyer, and Ginsburg did not hesitate to point out that the majority's effort to "carve out an important exception to the right of private action long recognized under Title VI" was "unfounded in any precedent" and "hostile to decades of settled expectations." Stevens offered a spirited defense of what Scalia had derided as the "ancien regime." Over the past 35 years, Stevens wrote, "we have developed a body of law giving content" to the "antidiscrimination ideals laid out in §601." The "deceptively simple" structure of Title VI created an "integrated remedial scheme" that "reflects a reasonable—indeed inspired—model for attacking the often-intractable problem of racial and ethnic discrimination." Title VI has "delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems" to justify "altering the practices of the federal grantees that have produced those impacts."[88] §602 grants the responsible federal agencies "the power to issue prophylactic rules aimed at realizing the vision laid out in §601, even if the conduct captured by these rules is at times broader than that which would otherwise be

prohibited." The federal courts must join this effort in order to "provide individual citizens effective protection" against practices that violate these "antidiscrimination norms." Such court-agency cooperation, Stevens argued, has produced a dynamic form of regulation of subnational governments:

> On its own terms, the statute supports an action challenging policies of federal grantees that explicitly or unambiguously violate antidiscrimination norms (such as policies that on their face limit benefits or services to certain races). With regard to more subtle forms of discrimination (such as schemes that limit benefits or services on ostensibly race-neutral grounds but have the predictable and perhaps intended consequences of materially benefiting some races at the expense of others), the statute does not establish a static approach but instead empowers the relevant agencies to evaluate social circumstances to determine whether three is a need for stronger measures. Such an approach builds into the law flexibility, an ability to make nuanced assessments of complex social realities, and an admirable willingness to credit the possibility of progress.[89]

Noticeably absent from Stevens discussion of Title VI is any acknowledgement of the principle that restrictions on state and local governments must come from Congress. Indeed, in Stevens' lengthy dissent there is virtually no discussion of federalism at all. For him the authority of a federal agency to regulate state and local governments under Title VI is no different from an the Environmental Protection Agency's authority under the Clean Air Act to regulate a refinery owned by the Chevron Corporation.

One could, of course, view *Sandoval* as "merely" another round in the long judicial battle over competing understandings of race- and gender-based discrimination. But the case shows that it is virtually impossible to separate this "policy" dispute from the broader institutional debate over the proper role of agencies and courts and the constitutional authority of the federal government. Unlike many political scientists who study the courts, Supreme Court justices understand that the most effective way to change public policy is to issue broad rules altering institutional relations.

A *Blessing* or a Curse? Toward the *Mothers* of All Welfare Cases[90]

As we saw above, *King v. Smith* marked the beginning of the federal court's extensive effort both to expand and to enforce federal conditions on grant-in-aid programs. In 1980 the Supreme Court resolved the ticklish jurisdictional issue by holding that §1983 could be invoked to protect rights "secured" by the Social Security Act and other health, education, and welfare statutes. AFDC litigation tapered off a bit in the 1980s as federal judges became more willing to defer to the judgement of state officials and the recommendations of Reagan and Bush appointees at HHS.[91] It then came to a crashing halt when Congress enacted welfare reform in 1996. That law made crystal clear Congress's intent to end the court-created federal welfare "entitlement" and to remove federal judges from welfare policymaking. One section announced literally in capital letters, "NO INDIVIDUAL ENTITLEMENTS.—This part shall not be interpreted to entitle any individual or family to assistance under any State program funded by this part." Another section stated that federal restrictions on eligibility "shall not be interpreted to require any state to provide assistance to any individual for any period of time under State programs under this part."[92] Enforcement of federal requirements was left completely in the hands of the administrators who controlled the distribution of federal funds.

Most grant-in-aid programs that distribute federal health, education, and welfare funds, though, do not include signs that so bluntly tell federal courts "Keep Out!" How have the "Federalist Five" treated private rights of action under these statutes? Although the Court has not explicitly overturned *Maine v. Thiboutot*, in recent years it

has issued several decisions severely limiting the extent to which §1983 can be used to enforce conditions on federal grants. This section of the paper will look closely at one such case, *Blessing v. Freestone*[93], which involves a program similar in structure to the original AFDC. It will then examine a highly controversial lower court decision on Medicaid to explore the possible consequences of the Court's new doctrines.

Title IV-D of the Social Security Act provides federal funding for state child support services programs, provided that these programs comply with federal requirements. Among other things, Title IV-D specifies the services all states must provide and establishes deadlines for passing through to needy families the child support payments collected by the state from absent parents. Like the original Title IV that established AFDC, Title IV-D allows federal administrators to reduce funding to states that fail to meet federal standards, but does not explicitly authorize private suits against the states.

In *Blessing v. Freestone* several families sued the state of Arizona, claiming they had been denied services and child support payments mandated by Title IV-D. Everyone (including HHS) agreed that Arizona had done a miserable job complying with federal requirements. The Ninth Circuit ruled that beneficiaries could sue the state under §1983 in order to bring the state into "substantial compliance" with federal law. But the Supreme Court disagreed.

Writing for a unanimous court in 1977, Justice O' Connor explained that "in order to seek redress through §1983" a plaintiff "must assert the violation of a federal right, not merely the violation of a federal law."[94] The plaintiff not only must identify the "particular statutory provision" that "gives rise to a federal right," but must also convince

the court that Congress had intended to single out for assistance particular beneficiaries rather than to provide collective benefits to a broad sector of the population. Moreover, the plaintiff must demonstrate that the statutory right "is not so 'vague and amorphous' that its enforcement would strain judicial competence." The statute "must unambiguously impose a binding obligation on the States" by couching the right "in mandatory, rather than precatory, terms." All this produces "only a rebuttable presumption that the right is enforceable under §1983." A judicial remedy is foreclosed if Congress had expressedly forbidden recourse to §1983 or, more importantly, if Congress had created "a comprehensive enforcement scheme that is incompatible with individual entitlements under §1983."[95]

The plaintiffs in *Blessing* could not surmount these numerous hurdles. According to the Court,

> [T]he requirement that a state operate its child support program in 'substantial compliance' with title IV-D was not intended to benefit individual children and custodial parents, and therefore it does not constitute a federal right. Far from crafting an individual entitlement to services, the standard is simply a yardstick for the Secretary to measure the systemwide performance of a State's Title IV-D program. Thus, the Secretary must look to the aggregate services provided the State, not to whether the needs of any particular persons have been satisfied.[96]

The Court did not foreclose the possibility that some parts of Title IV-D might create rights enforceable through 1983—which probably explains why this was a unanimous opinion. But *Blessing* shows how reluctant the Court has become to discover individual entitlements in grant-in-aid programs.

Blessing was just one of several post-1991 cases to narrow the scope of statutory rights protected by §1983. For example, in *Suter v. Artist M*[97] the Court refused to enforce a provision of the Adoption Assistance Act that required participating

states to make “reasonable efforts . . . to prevent or eliminate the need for removal of the child from his home and to make it possible for the child to return to his home.” This language, Chief Justice Rehnquist claimed,

> Does not unambiguously confer an enforceable right upon the Act’s beneficiaries. The term ‘reasonable efforts’ in this context is at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary in the manner previously discussed.[98]

Justice Blackmun objected that the Court had in effect “inverted its established presumption that a private remedy is available under §1983 unless Congress has affirmatively withdraw [it].”[99] According to Blackmun, the Court had “contravened 22 years of precedent” under *Maine v. Thiboutot*, “changing the rules of the game without offering even minimal justification.”[100]

In its most recent term the Court held that despite its name the Family Educational Rights and Privacy Act of 1974 creates “no personal right to enforcement under 42 USC §1983.”[101] According to the Court, plaintiffs not only carry the heavy burden of demonstrating that Congress intended to create an individual right (and “not the broader or vaguer ‘benefits’ or ‘interests’”), but must also of demonstrating that Congress intended the right to be enforceable through a private right of action. No longer did §1983 create a presumption in favor of judicial enforcement of individual rights created by federal laws: “if Congress wishes to create new rights enforceable under §1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action.”[102] Justice Stevens’ dissenting opinion correctly noted that by placing the “burden of showing an intent to create a private remedy on §1983 plaintiffs,” the

Court had "eroded—if not eviscerated—the long-established principle of presumptive enforceability of rights under §1983."[103] Behind this implicit overruling *of Maine v. Thiboutot* lay the central mantra of the Rehnquist Court's federalism jurisprudence: "If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute."[104]

Blessing v. Freestone is notable not only for its stark contrast with *King v. Smith*, but also for a concurrence written by Justice Scalia and joined by Justice Kennedy. Scalia briefly raised "the question of whether §1983 ever authorizes the beneficiary of a federal-state funding and spending agreement . . . to bring suit." Scalia strongly hinted that his answer to this question was "no." According to the Court's opinion in the first *Pennhurst* case, grant-in-aid programs are "in the nature of a contract." The states and the federal government are the primary parties to the contract; potential recipients are "third party beneficiaries." According to Scalia, "until relatively recent times, the third party beneficiary was generally a stranger to the contract, and could not sue under it." This might not be the law in most states today, "but it appears to have been the law at the time §1983 was enacted."[105] To Scalia and Kennedy this seemed to mean that §1983 did not authorize suit by beneficiaries no matter how clear the individual right established by federal law.

Rehnquist's majority opinion in *Gonzaga* and Scalia's concurrence in *Blessing* both point in the same direction: before enforcing the "strings" on federal grants, judges must find unambiguous evidence that the Congress that enacted the program meant to created both an individual right and a judicial remedy. Since few grant

statutes do both, consistent application of these new doctrines could substantially reduce the opportunities to pursue judicial enforcement of conditions on federal grants.

One federal district court judge has taken the Court's argument one step further, claiming that the combination of the Court's "contract" understanding of grant programs and its recent Eleventh Amendment decisions prohibits Congress from authorizing private suits to enforce the conditions on grants to state governments. Judge Robert Cleland of the Eastern District of Michigan issued this controversial view in *Westside Mothers v. Haveman*, a lengthy Medicaid opinion subsequently overturned by the Seventh Circuit. [106] To make an extremely long story mercifully short, Judge Cleland argued that the Rehnquist Court's reading of the Eleventh Amendment prohibits all private suits against states—with but two exceptions. The first is suits to protect Fourteenth Amendment rights, which are not implicated in run-of-the-mill entitlement cases. The second exception is suits against state officers, authorized by the Court nearly a century ago in *Ex Parte Young*.[107] For years the *Ex parte Young* loophole has allowed almost all suits against states to survive Eleventh Amendment challenge, save those involving compensation for past misdeeds by the state, i.e. back pay, compensatory damages, or repayment of benefits previously denied. According to Judge Cleland, *Ex Parte Young* applies only when a state officer has violated a federal rule that is "the supreme law of the land." But, he argued, a provision in a conditional spending program is not "the supreme law of the land" but merely a term in a contract between two government: "Because congressional enactments pursuant to the spending power that set forth the terms of federal-state cooperative agreements depend on the voluntary agreement of participating States and are not within the ambit of the

Supremacy Clause, they are not the supreme law of the land, and suits cannot be brought against state officials under *Ex Parte Young* to enforce those requirements."[108]

Given the fact that the Supreme Court has been expanding its reading of Eleventh Amendment sovereign immunity on an annual basis, it is not entirely out of the question that five members of the Court might eventually accept Judge Cleland's analysis. This possibility has certainly alarmed Legal Services attorneys, who file scores of §1983 suits under Medicaid and other grant programs each year: "With Judge Cleland's argument cropping up in litigation around the country, the prospect of that issue finding its way to the Supreme Court looms menacingly on the horizon."[109] This spring the Sixth Circuit issued a brief opinion overturning Judge Cleland, stating that "Binding precedent has put the issue to rest."[110] What the circuit court failed to mention was that many of these "binding" precedents are routinely being questioned, limited, and overturned by the current Supreme Court. Although it remains unlikely that the Supreme Court will establish the constitutional ban on private rights of action under spending clause laws recommended by Judge Cleland, it is almost certain that the Court will continue to use statutory arguments to limit judicial enforcement of conditions on federal grants.

Conclusions

Since this is already a long paper, I will conclude by briefly summarizing four findings of the preceding analysis.

First, recent decisions of the Rehnquist Court have had a significant effect on a variety of programs run jointly by state and national governments by substantially

reducing opportunities for private suits against subnational to enforce federal rules. The importance of these decisions flows from the federal courts' unique capacity to issue orders to state and local officials. Over the past 35 years such private suits have been the primary mechanism for enforcing the multitude of federal mandates announced by Congress, federal administrative agencies, and federal judges. The Rehnquist Court has been particularly determined to prevent the federal courts from forcing subnational governments to comply with rules enunciated by federal administrators or federal judges on the basis of their understanding of the "purposes" or "ideals" of congressional enactments. Michael Greve has aptly described the stance of the "Federalist Five" as one of "judicial non-cooperation"[111]: they will not allow the judicial power to be used to reduce state governments to "mere prefectures or corporations."[112]

Second, Justices Stevens and Blackmun were correct in their claims that the current majority on the Court is overturning precedents that go back 22 years (*Maine v. Thiboutot*), 28 years (*Lau v. Nichols*), and 38 years (*J. I. Case Co. v. Borak*). By the same token, those jurisdiction-expanding decisions represented sharp departures both from long-standing assumptions about the limited jurisdiction of the federal courts and from the rejection of federal common law in the pivotal New Deal decision of *Erie v. Tompkins*.[113] The Supreme Court paid surprisingly little attention to the institutional consequences of its decisions of the 1960s and early 1970s, and by 1980 was already having second thoughts about some of them. Rarely could the state of the law on implied private rights of action or §1983 be described as "settled." The best way to describe the current shift is to say that the Rehnquist Court is putting strict limits on the judicial experiment begun in the 1960s.

Third, so far at least, the Supreme Court has put relatively few limits on the conditions Congress can attach to federal grants or the extent to which the United States government can go to court to demand that subnational governments comply with statutory rules. It has focused primarily on the authority of agencies and courts to build upon (and on occasions distort) vague congressional mandates and the ability of private parties to initiate judicial action. As members of the "Federalist Five" have frequently pointed out, the so-called "political safeguards of federalism" cannot protect state and local governments if courts and agencies are able to go well beyond the clear commands of laws enacted by Congress.[114] The Court has indicated that it is much more willing to enforce mandates that come directly from Congress than those that come from administrators; and that it is more willing to entertain suits against subnational governments when the executive branch is willing to take responsibility for initiating them. The long-term consequences of the Rehnquist Court's doctrines thus will depend in large part on how willing and able Congress and the executive are to take direct responsibility for the expansion of federal authority.

Finally, judicial rulings on such matters as implied private rights of action, §1983, and judicial deference to administrative regulations are not usually regarded as "constitutional" decisions. Yet they have enormous implications for the balance of power between federal and state governments and for the day-to-day operation of separation of powers. Indeed, one could argue that the most important change in federalism over the past 40 years has been way the federal courts have played a central role in imposing on subnational governments a *de facto* common law developed by federal judges and administrators. Whether this judge- and administrator-made law

is essential to the protection of discrete and insular minorities and to the supremacy of federal law (as Justice Brennan and his allies have argued) or whether it has distorted our constitutional system (as the "Federalist Five" maintain), its significance is hard to deny. Understanding this form of constitutional law requires understanding both how a wide variety of federal programs work and how an even larger number of complex court rulings have shaped their development. Our constitution lies is such details.

ENDNOTES

[1] US v. Lopez, 514 US 549 (1995); City of Boerne v. Flores, 521 US 507 (1997); US v. Morrison, 529 US 598 (2002).
[2] For example, Teague v. Lane, 489 US 288 (1989); Coleman v. Thompson, 501 US 72 (1991); McKleskey v. Zant, 499 US 467 (1991); Felker v. Turpin, 518 US 651 (1996); Calderon v. Thompson, 523 US 538 (1998); and Miller v. French, 530 US 327 (2000).
[3] New York v. US, 488 US 1041 (1992); and Printz v. US, 521 US 898 (1997).
[4] Seminole Tribe of Florida v. Florida, 517 US 44 (1996); Idaho v. Coeur d'Alene Tribe, 512 US 261 (1997); Florida Prepaid Postsecondary Education Expenses Board v. College Savings Bank, 527 US 627(1999); College Savings Bank v. Florida Prepaid 527 US 666 (1999); Alden v. Maine, 527 US 706 (1999); Kimel v. Florida Board of Regents, 528 US 62 (2000); Board of Regents v. Garrett, 531 US 356(2001); Federal Maritime Commission v. South Carolina State Ports Authority, 535 US — (2002).
[5] For example, Gregory v. Ashcroft, 501 US 452 (1991); Dellmuth v. Muth, 491 US 223 (1989); and Welch v. Texas Highways and Public Transportation Department, 483 US 468 (1987).
[6] FMC v. South Carolina State Ports Authority, slip opinion at 23 (Thomas) and 17 (Breyer).
[7] For a convincing argument on this score, see Timothy Conlan and Francois Vergniolle De Chantal, "The Rehnquist Court and Contemporary American Federalism, Political Science Quarterly, vol. 116 (Summer, 2001), pp. 265-73.
[8] E.g., Solid Waste Agency v. US Army Corps of Engineers, 531 US 159 (2001).
[9] E.g., .Jones v. US, 529 US 848 (2000). Justice Ginsburg's opinion for a unanimous Court adopted a very narrow interpretation of a federal arson statute.
[10] See, for example, Jordon Streiker, "Did the Oklahoma City Bombers Succeed?" The Supreme Court's Federalism: Real or Imagined? (Sage, 2001), and Katy Harriger, "The Federalism Debate in the Transformation of Federal Habeas Corpus Law," 27 Publius 3 (1997)
[11] This category of lawsuits—*private* suits brought in *federal* court to force *subnational governments* to comply with *statutory* mandates and conditions—have received virtually no attention in the political science literature. The major exception is Michael Greve, who has called attention to the importance of these cases in Real Federalism: Why It Matters, How it Could Happen (AEI, 1999), ch. 4; and in "Federalism, Yes. Activism, No." Federalism Outlook #7, AEI, July, 2001. It was Greve's work that first alerted me to the importance of the *Sandoval* and *Westside Mothers* cases discussed in the second half of this paper. The importance of Rehnquist Court opinions for this category of cases is also a continuing theme of articles in the Legal Services Corporation's Clearinghouse Review, especially its annual review of Supreme Court decisions, which since the early 1990s has been called "Decisions Concerning Access to the Federal Courts." The enormous law review literature is helpful for understanding various components of the legal doctrines affecting these cases, i.e. implied private rights of action, §1983, and Eleventh Amendment sovereign immunity. I have found three law review articles particularly helpful: Richard H. Fallon, Jr., "The Ideologies of Federal Courts Law," 74 Virginia Law Review 1141 (1988), George Brown, "Of Activism and Erie: The Implication Doctrines Implications for the Nature and Role of the Federal Courts," 69 Iowa Law Review 617 (1984) ; and Ann Althouse, "The Alden Trilogy: Still Searching for a Way to Enforce Federalism," 31 Rutgers Law Journal 631 (2000).
[12] Federalist #78
[13] Charles Alan Wright, Law of Federal Courts, fifth edition (West, 1994), p. 126.
[14] For a graphic example, see Martha Derthick, Agency Under Stress (Brookings, 1990) ch. 7.
[15] Seminole Tribe v. Florida, 517 US at 76.
[16] Fallon, "The Ideology of Federal Courts Law," p. 1161.
[17] Pennhurst State School and Hospital v. Halderman 451 US 1 (1981) at 18.
[18] Richard B. Coppalli, Rights and Remedies Under Federal Grants (BNA, 1979), pp. 1-11.

[19] Wright, Law of Federal Courts, p. 132; Theodore Eisenberg, Civil Rights Legislation: Cases and Materials (Michie, 1981), p. 74.
[20] Melnick, Between the Lines: Interpreting Welfare Rights (Brookings, 1994), pp. 42-51 and 83-102.
[21] "After 1964," in Morton Keller and R. Shep Melnick, eds., Taking Stock: American Governance in the Twentieth Century (Cambridge University Press and Woodrow Wilson Center Press, 1999), pp. 197-99.
[22] Note, "Federal Judicial Review of State Welfare Practices," 67 Columbia Law Review 84 (1967) at 84.
[23] Alan Houseman, "A Short Review of past Poverty Law Advocacy," Clearinghouse Review, vol. 23 (April, 1990), at 1516.
[24] Law of Federal Courts, p. 27
[25] Rules on class actions did not allow for the aggregation of such benefits to meet the amount-in-controversy minimum. "Federal Judicial Review of State Welfare Practices," at 111. Civil rights cases, though, were not subject to the $10,000 minimum.
[26] 365 US 167 (1961)
[27] At 241-42
[28] Monnell v. New York City Department of Social Services, 436 US 658 (1978)
[29] 448 US 1 (1980)
[30] 377 US 426 (1964) at 429.
[31] 377 US 184 (1964) at 192.
[32] At 199.
[33] 392 US 309 (1968)
[34] 414 US 563 (1974)
[35] Townsend v. Swank, 404 US 282 (1971) at 286.
[36] For an extended discussion of how King v. Smith and subsequent decisions affected welfare policy, see Melnick, Between the Lines, ch. 5.
[37] At 312, note 3
[38] Almenares v. Wyman, 453 F.2d 1075 (2nd Cir., 1971) at 1082.
[39] See Between the Lines, pp. 88-108.
[40] Dandridge v. Williams, 397 US 471 (1970), and Jefferson v. Hackney, 406 US 535 (1972).
[41] Hagans v. Levine 415 US 528 (1974) at 534, note 5.
[42] At 552.
[43] At 563-64.
[44] At 537
[45] At 541.
[46] 441 US 600 (1979) and 448 US 1 (1980).
[47] At 646.
[48] At 674.
[49] At 675-76.
[50] At 5-7.
[51] At 12, 26, and 35-38. The three justices who changed their votes between 1979 and 1980—Blackmun, White, and Stevens (the author of the Chapman decision)—never explained their switch. One possibility is that a new federal law removing the $10,000 minimum in cases such as this made §1983 independent of 42 USC §1343(3) and (4), the sections of the Ku Klux Klan Act that refer to laws securing "equal rights" and "civil rights." See Stevens' discussion of these sections in Chapman, at 608-620. Although this argument is not without force, it is remarkable that the three swing votes would allow such an important federalism matter to rest on such a convoluted statutory argument. Perhaps the three justices had decided that explicit expansion of §1983 was preferable to perpetuation of the pendant jurisdiction charade; perhaps they believed that Congress's recent action indicated that the public supported a wider role for the federal courts. Later cases indicate that Stevens and Blackmun were slowly moving into Justice Brennan's camp on most federalism issues.
[52] Martha Derthick, The Influence of Federal Grants (Harvard, 1970).
[53] 397 US 552 (1970) at 559.

[54] St. John Barrett, "The New Role of the Courts in Developing Welfare Law,: 1970 Duke Law Journal 1, at 23.
[55] 414 US 563 (1974).
[56] Stephen C. Halpern, On the Limits of the Law: The Ironic Legacy of Title VI of the Civil Rights Act (Johns Hopkins, 1995), pp. 5 and 26.
[57] Halpern, 28-33.
[58] Orfield, The Reconstruction of Southern Education (Wiley, 1969); and Halpern, ch. 3.
[59] United States v. Jefferson County Board of Education 372 F.2d 836 (5th Cir., 1966) at 852 and 856. The other important cases were US v. Jefferson County Board of Education 380 385 (1967 (en banc), Singleton v. Jackson Municipal Separate School District 348 F.2d 869 (5th Cir., 1966). Halpern provides an excellent discussion of these cases, pp. 50-80.
[60] Memo from J. Stanley Pottinger, Director of OCR, quoted in Gareth Davies, "The Great Society after Johnson: The Case of Bilingual education," The Journal of American History vol. 88, pp. 1419-20 (2002). Davies provides an excellent summary of the political and administrative origins of the guidelines.
[61] Quoted in Davies, p. 1421.
[62] Davies, pp. 1424-25.
[63] At 568, emphasis in the original. It is not clear whether Douglas is referring to the guidelines or to Title VI itself. The underlying assumption of his opinion is that Title VI authorizes OCR to do whatever it deems necessary to uproot unfairness in education.
[64] At 570-71.
[65] 438 US 265 (1978).
[66] According to White, "It is extremely unlikely that Congress, without a word indicating that it intended to do so, contemplated creating an independent, private statutory cause of action against all private as well as public agencies that might be in violation of the section. . . . Whenever a discriminatory program was a public undertaking, such as a public school, private remedies were already available under other statutes, and a private remedy under Title VI was unnecessary. Congress was well aware of this fact. . . .[I]t is difficult to believe that Congress *silently* created a *private* remedy to terminate conduct that previously had been entirely beyond the reach of federal law ."
[67] Cannon v. University of Chicago, 441US 677 (1979). The vote was 6-3, with Powell, White, and Blackmun dissenting.
[68] Cannon, at 732.
[69] Southeast Community College v. Davis, 442 US 397 (1979) at 412.
[70] Pennhurst State School and Hospital v. Halderman, 451 US 1 (1981) at 18.
[71] E.g. Middlesex Co. Sewage Authority v. National Seaclammers Association, 453 US 1 (1981)
[72] E.g. California v. Sierra Club, 451 US 287 (1981).
[73] Pennhurst State School and Hospital v. Halderman, 465 US 89 (1984).
[74] 473 US 234 (1985).
[75] Smith v. Robinson, 468 US 992 (1984); and Dellmuth v. Muth, 491 US 223 (1985).
[76] Garcia v. San Antonio Metropolitan Transit Authority, 469 US 528 (1985).
[77] Owen v. City of Independence, 445 US 622 (1980); Patsy v. Board of Regents, 457 US 496 (1982). Also see Wright v. Roanoke Redevelopment and Housing Authority, 479 US 418 (1987); and Wilder v. Virginia Hospital Association, 496 US 498 (1990).
[78] 491 US 1 (1989).
[79] FERC v. Mississippi, 456 US 742 (1982).
[80] See cases cited in notes 3-5 above.
[81] 532 US 275 (2001).
[82] 520 US 329 (1997).
[83] Slip opinion, at 3.
[84] Slip opinion, at 7-8.
[85] Chevron USA v. NRDC, 467 US 837 (1984).
[86] Slip opinion at 11.
[87] Slip opinion at 15.

[88] Slip opinion at 13, quoting from a previous opinion by Justice Thurgood Marshall.
[89] Slip opinion at 14.
[90] I can take credit for the first pun in this heading, but not the second, which I first saw in the Clearinghouse Review article cited in note 110.
[91] The cases are described in Melnick, Between the Lines, pp. 104-8.
[92] Section 401 (b) and 408 (a)(2)(D).
[93] 520 US 329 (1997).
[94] At 340, emphasis in the original.
[95] At 341.
[96] At 343, emphasis in the original.
[97] 503 US 347 (1992)
[98] At 363.
[99] At 376, internal quotation marks omitted.
[100] At 377.
[101] Gonzaga University v. Doe, 536 US – (2002), slip opinion at 1.
[102] Slip opinion at 16.
[103] Slip opinion at 11 (Stevens, dissenting), internal quotation marks omitted.
[104] Slip opinion at 11 (majority opinion), quoting Atascadero and Pennhurst II, internal quotation marks omitted.
[105] 520 US 329 at 349-50.
[106] Westside Mothers v. Haveman 133 F. Supp. 2d 549 (2001); and Westside Mothers v. Haveman, #01-1494 (6th Cir, May, 2002).
[107] 209 US 123 (1908)
[108] 133 F. Supp. 2d 549 at 562.
[109] "The Mother of All Section 1983 Cases May Be Coming Soon to a Supreme Court Near You," Clearinghouse Review (Nov-Dec, 2001), p. 393.
[110] Lexis-Nexis version at 5.
[111] Real Federalism, pp. 62-65.
[112] Justice Kennedy in Alden v. Maine, 527 US 706 (1999).
[113] Erie v. Tompkins, 304 US 64 (1938). For an excellent analysis of the connection between implied private rights of action, federal common law, and *Erie*, see George Brown, "Of Activism and *Erie*—the Implication Doctrine's Implications for the Nature and Role of the Federal Courts," 69 Iowa Law Review 617 (1984).
[114] This is the underlying argument in *Sandoval*. For another example, Justice O'Connor's majority opinion in Gregory v. Ashcroft, 501 US 452 (1991).