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Medicaid Preemption Remedy SURVIVES SUPREME COURT CHALLENGE

By Rochelle Bobroff

Rochelle Bobroff
Directing Attorney

Herbert Semmel Federal Rights Project
National Senior Citizens Law Center
1444 I St. NW Suite 1100
Washington, DC 20005
202.683.1997
202.289.6976 ext. 214
rbobroff@nsclc.org

In *Douglas v. Independent Living Center of Southern California Incorporated* court access to enforce the Medicaid statute was at risk.[1] The U.S. Supreme Court accepted certiorari to decide whether providers and beneficiaries may utilize the preemption remedy to enjoin a state law which conflicts with the federal Medicaid statute. California's challenge to the preemption claim drew amicus support from the U.S. solicitor general and twenty-two other states but was embraced by only four dissenting Justices. A five-Justice majority ducked the question presented and remanded the case to the Ninth Circuit for consideration of the availability of a statutory claim following a federal agency's final decision. The case sustains the preemption remedy, particularly for cases in which the federal government has not taken action.

Here I begin by briefly explaining the importance of Medicaid preemption claims to remedy state action which conflicts with federal law. Next I outline the facts and lower-court opinions in the initial case that spawned the decision. Then I analyze in detail the Supreme Court's majority and dissenting opinions. I show that the majority opinion comports with continuing reliance on the preemption remedy in future Medicaid litigation. Because the majority did not respond to the dissent, I counter the dissent's rationale for dismissing the case.

Medicaid preemption claims against states are vital because the Supreme Court has constricted the availability of other remedies.[2] Medicaid law does not have an express right of action. The Court has restricted implied rights of action by requiring evidence that Congress intended to create a right of action, even though Congress did not enact an express right to sue. Under this nearly insurmountable standard, Medicaid has been held not to contain an implied private right of action.[3]

Since 1980, the express right of action in 42 U.S.C. § 1983 has been utilized to enforce safety-net statutes against states that violate federal rights.[4] However, enforcement under Section 1983 was narrowed by the Supreme Court's 2002 decision, *Gonzaga v.*

[1] *Douglas v. Independent Living Center of Southern California Incorporated*, 132 S. Ct. 1204 (2012). The case was originally titled *Independent Living Center of Southern California v. Shewry,* then versus Maxwell-Jolly, and now versus Douglas. The change in name reflects the change in the director of the California agency. The *Independent Living Center* case was consolidated by the U.S. Supreme Court with several other cases addressing the validity of a Medicaid preemption claim.

[2] See my *You Have a Federal Right, But Do You Have a Remedy?*, 44 Clearinghouse Review 428 (Jan.–Feb. 2011).

[3] *Stewart v. Bernstein*, 769 F.2d 1088, 1092–94 (5th Cir. 1985).

[4] *You Have a Federal Right*, *supra* note 2, at 429–30.

Doe, which held that the applicable statutory provision must contain "rights-creating" language "phrased in terms of the persons benefited."[5] Numerous Medicaid provisions which had been enforced by federal courts prior to *Gonzaga* were held to be no longer actionable under Section 1983 after *Gonzaga*; among such provisions is the one at issue in the *Independent Living Center* case.[6] Provisions that are phrased in broad language may not be enforceable at all unless preemption opens the courthouse doors.

I. Facts and Lower-Court Opinions

Independent Living Center began as a challenge to California's Assembly Bill X3 5, enacted in a special fiscal emergency budget session, which cut by 10 percent Medicaid reimbursement rates to physicians, dentists, pharmacists, adult day health centers, and other providers. Two beneficiaries, three pharmacies, and an independent living center sued the state; they alleged that Assembly Bill 5 conflicted with the Medicaid statute requirement, 42 U.S.C. § 1396a(a)(30)(A), for "methods and procedures … to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." The plaintiffs alleged that the failure of the state legislature to consider the impact of the cuts on beneficiaries violated the directive in 42 U.S.C. § 1396a(a)(30)(A) to utilize procedures that ensure quality of care and sufficient providers. Assembly Bill 5 expired in February 2009 and was replaced with a 5 percent rate cut. A second suit by Independent Living Center of Southern California challenged the 5 percent cut.

The district court denied a preliminary injunction on the basis that the claim could not be brought under the supremacy clause, but the Ninth Circuit reversed the district court's decision.[7] The district court relied heavily on *Sanchez v. Johnson*, a Ninth Circuit opinion which held that 42 U.S.C. § 1396a(a)(30)(A) is not enforceable under Section 1983, post-*Gonzaga*, because that Medicaid statute requirement is not phrased in terms of the persons benefited.[8] But the *Independent Living Center* panel concluded that *Sanchez* did not preclude a preemption claim. The Ninth Circuit explained that the "Supreme Court has repeatedly entertained claims for injunctive relief based on federal preemption, without requiring that the standards for bringing suit under § 1983 be met."[9] The Ninth Circuit cited numerous Supreme Court cases, including the post-*Gonzaga* decision of *Pharmaceutical Research and Manufacturers of America v. Walsh*, in which the Court reached the merits of the Medicaid claim, even though the concurrences of Justices Scalia and Thomas advocated dismissal.[10] The Ninth Circuit reasoned that, "[f]or more than a century," the Supreme Court "has consistently assumed—without comment—that the Supremacy Clause provides a cause of action to enjoin implementation of allegedly unlawful state legislation."[11] The Supreme Court declined to review the Ninth Circuit's reversal of the denial of the preliminary injunction.[12]

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[5]*Gonzaga v. Doe,* 536 U.S. 273, 284 (2002); see also Jane Perkins, *Using Section 1983 to Enforce Federal Laws*, 38 Clearinghouse Review 720 (March–April 2005); Robert Capistrano, *Using Section 1983 to Raise Constitutional Claims in Garden-Variety Cases*, *id.* at 734.

[6]See my *Section 1983 and Preemption: Alternative Means of Court Access for Safety Net Statutes*, 10 Loyola Journal of Public Interest Law 27, 63–65 (2009).

[7]*Independent Living Center v. Shewry*, 543 F.3d 1050 (9th Cir. 2008).

[8]*Independent Living Center of Southern California v. Shewry*, 2008 WL 4298223, at *4–6 (C.D. Cal. 2008), citing *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005).

[9]*Independent Living Center*, 543 F.3d at 1054–55.

[10]*Id.* at 1060–61, citing *Pharmaceutical Research and Manufacturers of America v. Walsh*, 538 U.S. 644 (2003).

[11]*Id.* at 1056, 1061–62.

[12]*Independent Living Center of Southern California v. Shewry*, 129 S. Ct. 2828 (2009).

On remand, the district court issued a preliminary injunction enjoining enforcement of Assembly Bill 5, and the Ninth Circuit affirmed shortly after the denial of certiorari on its 2008 opinion.[13] Although California continued to challenge the availability of a preemption claim, the Ninth Circuit's 2009 *Independent Living Center* decision stated that the issue was resolved by the 2008 *Independent Living Center* decision and refused to consider the issue further.[14] On the merits question of whether the procedures utilized by California conflicted with federal law, the Ninth Circuit relied upon its prior decision in *Orthopaedic Hospital v. Belshe*, which held that the procedures for setting rates must include an analysis of providers' costs or an explanation of why such information had not been analyzed.[15] The Ninth Circuit acknowledged that the solicitor general had filed a certiorari-stage brief in *Belshe* that disagreed with the circuit court's holding in *Belshe*, but the *Independent Living Center* panel stated that the solicitor general's view, as expressed in a brief, was owed "no deference in this case."[16]

California again petitioned for certiorari. The petition raised two questions: (1) whether the supremacy clause supplies a cause of action and (2) whether Assembly Bill 5 conflicts with and is therefore preempted by 42 U.S.C. § 1396a(a)(30)(A).

The Supreme Court requested the solicitor general's view. Six months later the Centers for Medicare and Medicaid Services (CMS) disapproved California's State Plan Amendments that proposed the rate cuts.[17] The disapproval letter stated that California had not demonstrated compliance with 42 U.S.C. § 1396a(a)(30)(A)'s requirement to assure that payments are adequate to enlist sufficient providers. California appealed the decision, but providers and beneficiaries were not parties in that administrative hearing process.[18] A few weeks after CMS disapproved the cuts, the solicitor general filed a brief recommending denial of certiorari in *Independent Living Center*. The solicitor general stated that review was "not warranted at this time" because CMS was rulemaking on 42 U.S.C. § 1396a(a)(30)(A).[19] The brief also indicated that the federal government disagreed with the Ninth's Circuit interpretation of 42 U.S.C. § 1396a(a)(30)(A) in *Belshe*.[20]

The Supreme Court denied certiorari on the question of whether the rate cut conflicts with the federal statute but granted certiorari to address the threshold issue of the propriety of a Medicaid preemption claim.[21] The Court consolidated five cases raising this issue: (1) the *Independent Living Center* case concerning the initial 10 percent rate cut; (2) the *Independent Living Center* case challenging the subsequent 5 percent rate cut; (3) a suit by the California Hospital Association on hospital reimbursement rate cuts; (4) a challenge to hospital reimbursement rate cuts by Santa Rosa Memorial Hospital; and (5) a case involving cuts in wages for home health care workers.

The solicitor general filed a merits-stage brief in support of California, arguing that the Supreme Court should not permit a preemption claim under 42 U.S.C. § 1396a(a)(30)(A).[22] About a month after oral argument, CMS approved some

[13]*Independent Living Center v. Shewry*, 2008 WL 3891211 (C.D. Cal. 2008), aff'd, *Independent Living Center v. Maxwell-Jolly*, 572 F.3d 644 (9th Cir. 2009).

[14]*Independent Living Center,* 572 F.3d at 651 n.7.

[15]*Orthopaedic Hospital v. Belshe*, 103 F.3d 1491 (9th Cir. 1997).

[16]*Independent Living Center*, 572 F.3d at 654.

[17]U.S. Amicus Brief on *Independent Living Center* Petition at 7, *Independent Living Center*, 132 S. Ct. 1204.

[18]*Id*.

[19]*Id*. at 19–20.

[20]*Id*. at 9–10.

[21]*Maxwell-Jolly v. Independent Living Center of Southern California Incorporated*, 131 S. Ct. 992 (2011).

[22]U.S. Amicus Brief Supporting Petitioner at 25–32, *Independent Living Center*, 132 S. Ct. 1204.

of the proposed rate cuts and California withdrew its request for the remainder. In accordance with the Court's solicitation, the parties filed letter briefs on the impact of CMS' action.

II. Supreme Court Opinion

Justice Breyer—joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan—wrote the opinion for the Supreme Court.[23] The decision focuses on CMS' approval of the rate cuts and remands the case to the Ninth Circuit for consideration of the impact of the availability of a claim against CMS under the Administrative Procedure Act, 5 U.S.C. §§ 701–706. Chief Justice Roberts—joined by Justices Scalia, Thomas, and Alito—dissented.[24] The dissenters conclude that, regardless of the availability of an Administrative Procedure Act claim, the supremacy clause does not provide a cause of action to enforce 42 U.S.C. § 1396a(a)(30)(A).

A. The Majority Opinion

The Supreme Court vacated seven 2009 and 2010 Ninth Circuit opinions in the five consolidated cases that had affirmed preliminary injunctions; the Court instructed the Ninth Circuit to consider the impact of CMS' approval.[25] None of the seven vacated decisions addressed whether a preemption claim was permissible, instead relying upon the resolution of the threshold question in the 2008 *Independent Living Center* opinion. But the Court did not list the 2008 *Independent Living Center* opinion among those vacated, and its reasoning did not disturb the Ninth Circuit's 2008 holding that a preemption claim may be brought to obtain injunctive relief prior to CMS approval.

The Supreme Court explicitly declined to take up the question for which certiorari had been granted. The Court stated: "In the present posture of these cases, we do not address whether the Ninth Circuit properly recognized a Supremacy Clause action to enforce this federal statute before the agency took final action."[26] The majority did not even consider the lower court's reasons for permitting a preemption claim prior to CMS approval.

Instead the Supreme Court focused on the availability of a claim under the Administrative Procedure Act. While California was challenging the disapproval of the rate cuts, CMS' decision was not final.[27] After the federal and state government reached agreement, providers and beneficiaries were able to bring against CMS an Administrative Procedure Act claim, alleging that CMS' approval of the rate cuts was arbitrary and capricious. The Court stated that CMS' approval of the rate cuts "may require respondents now to proceed by seeking review of the agency determination under the [Administrative Procedure Act], rather than in an action against California under the Supremacy Clause."[28] The Court gave no explanation of why providers and beneficiaries would be *required* to proceed under the Administrative Procedure Act instead of making a preemption claim. The Court suggested that if Administrative Procedure Act and preemption claims "reach the same result, the Supremacy Clause challenge is at best redundant."[29] The Court indicated that "continuation" of the preemption claims "would seem to be inefficient" since the federal government was not a party in the preemption suit brought solely against the state.[30]

The opinion highlights that, following agency action, the federal government needs to be involved in the litigation. The court would have to evaluate the va-

[23]*Independent Living Center*, 132 S. Ct. at 1207.

[24]*Id.* at 1211 (Roberts, C.J., dissenting).

[25]*Id.* at 1209.

[26]*Id.* at 1211.

[27]The Administrative Procedure Act permits review only after the agency decision is final (5 U.S.C. § 704).

[28]*Independent Living Center*, 132 S. Ct. at 1210.

[29]*Id.* at 1211.

[30]*Id.*

lidity of the agency's decision in order to determine whether there is a conflict between federal and state law. The federal government, rather than the state defendants, would be the best party to defend its own decision. The Administrative Procedure Act, not preemption, supplies a basis for getting the federal agency involved in the litigation. While the federal government is not required to defend a state law, it does justify its approval of state action. Plaintiffs could be required to bring an Administrative Procedure Act claim in order to include all the relevant parties who have a stake in the outcome as well as expertise on the issues.

Moreover, the statutory Administrative Procedure Act claim raises the specter of the possible application of the avoidance doctrine, which counsels that courts have the "responsibility to avoid unnecessary constitutional adjudication."[31] Although the *Independent Living Center* decision does not mention the avoidance doctrine, the Supreme Court repeatedly characterizes the matter as a claim arising under the supremacy clause of the Constitution. In qualified immunity cases, Justice Breyer has fervently advocated resolution of nonconstitutional claims before reaching constitutional questions.[32] If the avoidance doctrine is applied in *Independent Living Center*, the statutory Administrative Procedure Act claim might eliminate the need to address the supremacy clause claim.

Two circuits recently disagreed on whether to invoke the avoidance doctrine when presented with preemption and state-law claims. The Fourth Circuit held that the avoidance doctrine prevented a federal court from reviewing a preemption claim prior to deciding dispositive questions of state law.[33] The Third Circuit explicitly rejected the Fourth Circuit's conclusion and reached the federal question of preemption.[34] But then-Judge Alito, concurring, agreed with the Fourth Circuit and would have reached the same result under state law and avoided addressing federal law. He stated that "preemption is a constitutional doctrine," and the court should apply "prudential rules" to "avoid[] constitutional questions except as a last resort."[35] The *Independent Living Center* opinion is consistent with the approach of avoiding the constitutional preemption question if there is a purely statutory basis for resolving the dispute.

The Supreme Court further indicated that, after final agency action, the result should be the same, whether the claim is brought under the Supremacy Clause or the Administrative Procedure Act. The majority explained that "to permit a difference in result here would subject the States to conflicting interpretations of federal law…, thereby threatening to defeat the uniformity that Congress intended by centralizing administration of the federal agency and to make superfluous or to undermine traditional [Administrative Procedure Act] review."[36] The decision then gives a "cf." or "compare" citation to *Astra USA Incorporated v. Santa Clara County*, which rejected a third-party beneficiary claim to enforce federal law, on the grounds that plaintiffs could not "dress their claims" in different clothing in order to access the courts.[37] While the Court's citation of *Astra* could be viewed as discouraging the use of the alternative remedy of preemption, the majority's discussion of possible limitations on the availability of preemption is clearly limited to instances in which "the agency has taken final action."[38]

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[31] *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering Professional Corporation*, 467 U.S. 138, 157 (1984).

[32] See, e.g., *Scott v. Harris,* 550 U.S. 372, 388 (2007) (Breyer, J., concurring).

[33] *Bell Atlantic Maryland Incorporated v. Prince George's County*, 212 F.3d 863 (4th Cir. 2000).

[34] *New Jersey Payphone Association v. Town of West New York*, 299 F.3d 235, 239 n.2 (3d Cir. 2002).

[35] *Id.* at 248–49 (Alito, J., concurring)

[36] *Independent Living Center*, 132 S. Ct. at 1211.

[37] *Id.*, citing *Astra USA Incorporated v. Santa Clara County*, 131 S. Ct. 1342 (2011).

[38] *Independent Living Center*, 132 S. Ct. at 1210.

The majority observed that, in assessing the merits question of whether there is a conflict between state and federal law, the Ninth Circuit "declined to give weight to the Federal Government's interpretation of the federal statutory language."[39] The Supreme Court highlighted the Ninth Circuit's refusal to give deference to the certiorari-stage brief of the solicitor general in *Belshe*. The Court stated that "ordinary standards of deference" would require giving weight to "agency decisionmaking."[40] The Court cited *National Cable and Telecommunications Association v. Brand X Internet Services*, in which the Court reversed the Ninth Circuit for following circuit precedent rather than deferring to agency interpretation.[41] Although *Independent Living Center* did not explicitly hold that the agency's interpretation of 42 U.S.C. § 1396a(a)(30)(A) should trump *Belshe*, the Court's analysis suggests that the lower court should reconsider the question of deference.

On remand, the federal government is likely to be brought into the case, probably through an Administrative Procedure Act claim. The central issue on the merits will be the degree of deference accorded to CMS' interpretation of 42 U.S.C. § 1396a(a)(30)(A), and the lower court could decline to reach the preemption claim if it finds the Administrative Procedure Act claim to be dispositive. While California may hope to get back to the Supreme Court for a renewal of its challenge to the preemption remedy, if the Ninth Circuit abandons *Belshe* and defers to CMS, the state might win the case but lose its battle against preemption.

B. The Dissent

Following the playbook of California, its twenty-two state supporters, and the solicitor general, the dissent contends that the supremacy clause does not provide a cause of action to enforce spending clause statutes lacking an express right of action.[42] According to the dissent, if Congress does not put a cause of action in a statute, then the supremacy clause does not permit private parties to ensure the supremacy of federal law.

The past century of Supreme Court preemption cases is of no moment to the dissent, which does not concern itself with distinguishing scores of prior cases permitting private parties to bring preemption claims whether or not the federal statute contains an express cause of action. For example, in a 2006 decision involving a suit by a Medicaid beneficiary, the Court unanimously held that a state law which conflicted with Medicaid was "unenforceable."[43]

The dissent proposes a drastic narrowing of *Ex parte Young*, which for over a century has authorized claims for injunctive relief against state officials who violate federal law.[44] Chief Justice Roberts suggests that suits invoking the courts' equitable powers be limited to instances when plaintiffs are "subject to or threatened with any enforcement proceeding."[45] The state law at issue in *Ex parte Young* included not only fines but also criminal penalties, and business executives had been sued in state court to force their compliance with an allegedly preempted state law. Yet the remedy of enjoining state laws that conflict with federal laws has never been limited to cases in which the state has threatened criminal penalties or initiated an enforcement proceeding.[46]

The only citation that the dissent proffers to support its drastic narrowing of *Ex parte Young* is the concurrence of Justice Kennedy (who did not join the *Independent Living Center* dissent) in *Virginia Of-*

[39] *Id.*

[40] *Id.*

[41] *Id.*, citing *National Cable and Telecommunication Association v. Brand X Internet Services,* 545 U.S. 967 (2005).

[42] *Independent Living Center*, 132 S. Ct. at 1213.

[43] *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268, 292 (2006).

[44] *Ex parte Young,* 209 U.S. 123 (1908).

[45] *Independent Living Center*, 132 S. Ct. at 1213.

[46] See my *Ex Parte Young as a Tool to Enforce Safety Net and Civil Rights Statutes*, 40 University of Toledo Law Review 819 (2009).

fice for Protection and Advocacy v. Stewart.[47] But this concurrence shows that Kennedy did not advocate such a constricted interpretation. Kennedy's *Virginia Office for Protection and Advocacy* concurrence states that the Supreme Court "has expanded the *Young* exception far beyond its original office in order 'to vindicate the federal interest in assuring the supremacy of [federal] law.'"[48] Thus Kennedy's concurrence does not support the dissent's proposed limitations on *Ex parte Young* suits.

Moreover, Kennedy's concurrence emphasizes that the case of *Verizon Maryland Incorporated v. Public Services Commission of Maryland* "involved the same kind of preenforcement assertion of a defense that was at issue in [*Ex parte] Young*."[49] *Verizon* involved a dispute between two telecommunications companies regarding the rates paid by one company to carry the other company's telephone calls. The state commission's decision on the rate dispute applied state contract law, and the losing company, alleging preemption, sued in federal court. The telephone company was not facing an enforcement action by the state but rather was subject to a state determination of the applicable rate in its contract dispute with another company. Similarly, in *Independent Living Center*, there had been no enforcement proceeding to lower the rates, but rather the state determined the amount to which providers were entitled. *Independent Living Center* is factually equivalent to *Verizon*, involving the state's resolution of a monetary claim pursuant to state law. Justice Kennedy's embrace of the preemption claim in *Verizon* is equally applicable to *Independent Living Center*.

The dissenters worry that preemption claims for spending clause statutes would raise federalism concerns because states are entitled to notice of the terms of their acceptance of federal funds.[50] However, as the Supreme Court stated in *Virginia Office for Protection and Advocacy*, a state does "not have to *know* that" its conduct will "allow suit in federal court. Know or not know, *Ex parte Young* produces that result."[51] The states are well aware of the supremacy clause and cannot evade judicial review by claiming surprise when they are sued for ignoring federal law.

The dissent asserts that permitting a supremacy clause claim "would effect a complete end-run around this Court's implied right of action and … § 1983 jurisprudence."[52] Yet there has never been any Supreme Court case applying that line of jurisprudence to a supremacy clause claim. The dissent notes that the reasoning of the *Astra* case, which rejected a remedy in third-party beneficiary contract law, reached a result similar to that advocated by the dissent.[53] However, there is no basis for applying any of these doctrines—implied rights of action, Section 1983, or contract law—to a preemption claim.

Justice Roberts ridicules the majority for permitting a supremacy clause "cause of action that fades away once a federal agency has acted."[54] However, the dissent notes the need for the federal government to be a party in an Administrative Procedure Act case, as well as different standards and remedies for an Administrative Procedure Act claim, and concludes that "it is difficult to see what would be left of the original Supremacy Clause suit."[55] This reasoning supports

[47]*Independent Living Center*, 132 S. Ct. 1213, citing *Virginia Office for Protection and Advocacy v. Stewart*, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring).

[48]*Id*., quoting *Green v. Mansour*, 474 U.S. 64 (1985).

[49]*Id*. at 1643, citing *Verizon Maryland Incorporated v. Public Services Commission of Maryland*, 535 U.S. 635 (2002).

[50]*Independent Living Center*, 132 S. Ct. at 1213.

[51]*Virginia Office for Protection and Advocacy*, 131 S. Ct. at 1640 n.5.

[52]*Independent Living Center*, 132 S. Ct. at 1213.

[53]*Astra USA Incorporated*, 131 S. Ct. at 1348.

[54]*Independent Living Center*, 132 S. Ct. at 1215.

[55]*Id*.

the majority's suggestion that an Administrative Procedure Act claim is likely to be determinative of a preemption claim following agency action.

With an eye toward influencing the lower court, the dissent contends that the reasoning of the majority opinion supports a future holding that there is no cause of action to bring a preemption claim. According to the dissent, the majority "provides a compelling list of reasons" for the Ninth Circuit, on remand, to determine that there is no cause of action under the supremacy clause; the reasons include agency expertise, the broad language of 42 U.S.C. § 1396a(a)(30)(A), centralized administration of federal programs, and potential problems with redundancy and inefficiency.[56] However, many of these concerns will be alleviated by the addition of an Administrative Procedure Act claim, especially if the avoidance doctrine is applied to prevent the court from reaching the supremacy clause claim.

While the dissenters appear to be hoping for a future chance to destroy the preemption remedy for spending clause statutes, California's dreams of demolishing Medicaid preemption claims via this case have been dashed. The Medicaid preemption remedy lives on.

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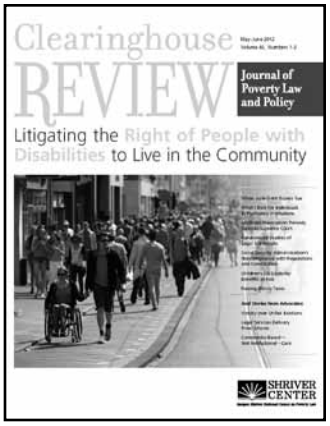
[56] *Id.*



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