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PURSUING RACIAL JUSTICE IN THE 21st CENTURY

THE SHIFTING TERRAIN

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Last Term, in *Douglas v. Independent Living Center of Southern California Incorporated*, Justice Kennedy joined with the four more liberal justices to form the majority remanding the case without addressing whether preemption provided an avenue to invalidate state laws in conflict with Medicaid.1 Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, dissented, asserted that the supremacy clause did not provide a cause of action for private suits by Medicaid beneficiaries or providers, on the basis that the Medicaid statute is a spending clause statute.2 The Independent Living Center dissent quoted Justice Kennedy’s statement in his concurring opinion in *Virginia Office for Protection and Advocacy v. Stewart* that *Ex parte Young* involved “the pre-emptive assertion in equity of a defense that would otherwise have been available in the State’s enforcement proceedings at law.”3 The dissenters and others interpreted this remark in Kennedy’s *Virginia Office for Protection and Advocacy* concurrence as demonstrating support for the dissent’s conclusion.4 They ignored Kennedy’s further reflection in *Virginia Office for Protection and Advocacy* that the Court had subsequently “expanded the *Young* exception far beyond its original office.”5

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2Independent Living Center, 132 S. Ct. at 1215 (Roberts, C.J., dissenting).

3Id. at 1213, citing Virginia Office for Protection and Advocacy v. Stewart, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring), and Ex parte Young, 209 U.S. 123 (1908).

4Id. See also Stephen I. Vladeck, Douglas and the Fate of Ex Parte Young, 122 YALE LAW JOURNAL Online 13, 16–17 (2012).

5Virginia Office for Protection and Advocacy, 131 S. Ct. at 1642.
Some lower courts have been eager to embrace the Independent Living Center dissenters’ vision. For instance, the highest court of Massachusetts found the dissent’s reasoning persuasive and, on that basis, dismissed a Medicaid preemption claim. Similarly the Seventh Circuit echoed the dissent’s interpretation of Kennedy’s Virginia Office for Protection and Advocacy dissent.

But in a recent Supreme Court case, Wos v. E.M.A., Kennedy clarified his support for Medicaid preemption claims. The decision, which Kennedy wrote, does not directly address whether the supremacy clause provides a cause of action for a private Medicaid preemption claim since the issue was never argued by the parties. Nevertheless, the Court’s reasoning squarely supports the use of preemption to invalidate state laws that conflict with federal spending clause statutes.

Justice Kennedy’s majority opinion in E.M.A. is noteworthy for its rejection of the reasoning of the Independent Living Center dissent. The Court cited and heavily relied upon business preemption cases as applicable precedent supporting a finding that the Medicaid statute preempted contrary state law. Thus the Court rejected the Independent Living Center dissenters’ suggestion that spending clause statutes should be treated differently from other preemption cases.

The Court’s holding in E.M.A. that the Medicaid statute has “preemptive force” demonstrates that a majority of the justices view Medicaid as properly enforced via preemption.

The E.M.A. opinion shows that the Independent Living Center dissent misconstrued Kennedy’s Virginia Office for Protection and Advocacy concurrence. Kennedy’s rejection of the Independent Living Center dissenters’ reasoning in E.M.A. is totally consistent with his statement in his Virginia Office for Protection and Advocacy concurrence that the Court expanded Young. Moreover, Kennedy’s support for Medicaid preemption claims is consistent with his federalism jurisprudence, which has repeatedly embraced the federal power to preempt conflicting state law. Prior to the Independent Living Center decision, all federal circuits had rejected the position adopted by the Independent Living Center dissent and upheld Medicaid preemption suits. E.M.A. repudiates the surmise that the Independent Living Center dissent is likely to garner a fifth vote in the current Court. Lower courts now have no basis for failing to uphold Medicaid preemption claims.

My colleague Simon Lazarus further elucidates the Wos v. E.M.A. decision in the following article that is being reprinted from the National Law Journal.
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