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CATHERINE M. SHARKEY

## Preemption as a Judicial End-Run Around the Administrative Process?

Federal agencies play a dominant role in administering federal statutory schemes. At the front lines, they are tasked with interpreting statutes, enacting regulations to implement federal programs, and enforcing federal directives. During the course of adjudication or rulemaking, federal agencies are sometimes called upon to determine whether state law conflicts with federal law. That conflict inquiry is at the heart of preemption disputes before state and federal courts. Private parties wield preemption—typically as a defense—to stave off the effects of a state law allegedly trumped by federal law under the Supremacy Clause. Courts are then called upon to decide the extent to which state law is inconsistent with federal law. Judicial review of agency action under the Administrative Procedure Act (APA) and preemption challenges thus provide parallel proceedings to resolve disputes over whether state and federal law are *simpatico* or at war.

*Douglas v. Independent Living Center of Southern California, Inc.*<sup>1</sup> provides an opportunity to reflect upon the relationship between these parallel tracks for adjudicating federal-state conflicts. Who is, and who should be, the ultimate arbiter of the existence of federal-state conflicts and how to resolve them—agencies or courts? In this Essay, I use *Douglas* to explore two questions: first, whether courts can act as “prompters,” pushing federal agencies to discharge their duty to weigh in on potential conflicts between federal and state law; and second, whether a synergistic relationship can exist between courts and agencies in making such conflict determinations.

The Medicaid providers (doctors, hospitals, and pharmacists) in *Douglas* sued to enjoin provisions of California law that reduced the amount of

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1. No. 09-958 (U.S. Feb. 22, 2012), <http://www.supremecourt.gov/opinions/11pdf/09-958.pdf> (to be reported at 132 S. Ct. 1204).

Medicaid reimbursements to providers, alleging that the law violated the federal Medicaid Act's directive that reimbursements must be "sufficient to enlist enough providers."<sup>2</sup> Medicaid is a "cooperative federalism" scheme to assist the needy, whereby states act as coregulators with the federal agency, the Department of Health and Human Services (HHS).<sup>3</sup> States must submit a comprehensive state Medicaid plan—and any amendments thereto—to the Centers for Medicare and Medicaid Services (CMS), a subagency of HHS, for approval. CMS must decide whether a state plan conflicts with the federal Medicaid scheme. CMS approval or rejection of a plan is considered final agency action,<sup>4</sup> which can be challenged by private parties (as well as the state) under the APA.

In *Douglas*, California imposed payment-rate restrictions before seeking CMS approval. It subsequently incorporated the restrictions into a state-plan amendment that it submitted to CMS. At the time the Medicaid providers commenced legal action, CMS had not yet ruled on the plan. Because the providers would have had to wait (months or, most likely, years) until final agency action by CMS to bring an APA challenge, they instead framed their case as an affirmative preemption claim, invoking the Supremacy Clause to argue that the federal Medicaid Act trumped the conflicting provisions of the state Medicaid plan.

The question before the Court in *Douglas* was whether or not private parties, such as the providers, could bring a cause of action for preemption directly under the Supremacy Clause to enforce provisions of the federal Medicaid Act. In a five-to-four decision, however, the majority skirted the issue. Justice Breyer, writing for the majority, was not ready to close the door altogether to such private suits; instead, a final decision was put off (and the case remanded to the Ninth Circuit Court of Appeals) on account of "changed circumstances"—namely, CMS's approval of the rate restrictions in the state

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2. 42 U.S.C. § 1396a(a)(30)(A) (2006) (requiring that states have 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").
  3. As part of the Social Security Act of 1965, Congress delegated broad discretionary authority to HHS to administer the Medicaid program. Under the Spending Clause, U.S. CONST. art. I, § 8, cl. 1, Congress set up a program whereby, in exchange for federal money, states voluntarily undertake to abide by the directives of the federal program. *See* Social Security Act of 1965, Pub. L. No. 89-97, 79 Stat. 286.
  4. If CMS rejects a plan (or amendments thereto), the state may call for a full administrative hearing, although there is no similar process for objectors in the case of agency approval of a plan. *See* 42 U.S.C. § 1396c (2006).

plan amendment by the time of the Court’s decision.<sup>5</sup> The dissent, by Chief Justice Roberts,<sup>6</sup> addressed the question head-on. The dissent was prepared to shut the judicial door to such private causes of action under the Supremacy Clause, at least where Congress has not granted a private right of action under the relevant statute. The dissent construed such a cause of action as an “end-run” around the Court’s sharp constriction of federal statutory causes of action under either Section 1983 or implied rights of action.<sup>7</sup>

The specter of a different sort of end-run haunted the majority: that private parties would forgo the administrative-challenge route in favor of preemption challenges in court, thus “undermin[ing] traditional APA review.”<sup>8</sup> According to the majority, private parties can expect “an authoritative judicial determination of the merits of their legal claim” in actions against CMS under the APA.<sup>9</sup> Furthermore, the majority suggested that an APA suit against the agency is preferable to a suit against the state under the Supremacy Clause for two reasons. First, it ensures the primacy of the agency—which is “comparatively expert in the statute’s subject matter”<sup>10</sup>—in the interpretive task necessary to discerning federal-state conflicts. Second, it ensures uniformity in approach, with one centralized federal agency charged with conflict determinations, thereby guarding against the prospect of “subject[ing] the States to conflicting interpretations of federal law by several different courts (and the agency).”<sup>11</sup>

The foremost concern of the *Douglas* Medicaid providers was not which actor—courts or the federal agency—would ultimately determine the existence of any federal-state conflict regarding Medicaid reimbursement rates.<sup>12</sup> Nor did the dissent think that the existence of the parallel administrative process was

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5. *Douglas*, slip op. at 2 (majority opinion).

6. The dissent was joined by Justices Scalia, Thomas, and Alito.

7. *Douglas*, slip. op. at 4 (Roberts, C.J., dissenting) (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002)).

8. *Id.* at 8 (majority opinion).

9. *Id.* at 6.

10. *Id.* at 7.

11. *Id.* at 7-8.

12. During oral argument, counsel for the Medicaid providers seemed agnostic on that question, emphasizing that “from our perspective, the important element is to maintain the status quo ante until a resolution of the legality of California’s statute can be made, *either by the agency or by the courts.*” Transcript of Oral Argument at 60, *Douglas*, 132 S. Ct. 1204 (No. 09-958) (emphasis added), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/09-958.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-958.pdf) (argument of Carter G. Phillips, Counsel for Respondents).

relevant to the question before the Court.<sup>13</sup> But, for the majority, this question emerged as the key issue. Viewing the majority's handling of the case in this light brings two unresolved questions to the fore: (1) Why permit a preemption cause of action at all in situations in which there is a viable administrative action? And (2) where parallel proceedings persist, should agency determinations receive varying degrees of deference in each?

## I. COURTS AS AGENCY PROMPTERS

One reason for courts to entertain direct preemption challenges under the Supremacy Clause (and the one most likely animating the majority's reluctance to foreclose such suits altogether) is to enable courts to enjoin the states from acting until the administrative process concludes.<sup>14</sup> On that view, APA review remains the preferred route, but private parties need an additional, limited court option to hold the states at bay until the agency makes a final determination. The issue was of particular concern to the *Douglas* Medicaid providers, given that nothing in the Medicaid Act prevented California from implementing its rate reductions before CMS approved them.

This interim period, moreover, could be significant, as there could be years of delay between when the state acts and when the federal agency completes its

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13. *Douglas*, slip op. at 6 (Roberts, C.J., dissenting) (“[T]he CMS approvals have no impact on the question before this Court.”).

14. In a similar vein, the Court could wield the doctrine of primary jurisdiction to withhold adjudication until the agency acts and could enter an injunction in the interim. Justice Breyer advocated this approach in *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644, 673 (2003) (Breyer, J., concurring)—a recent Medicaid preemption case curiously not cited in *Douglas*. The doctrine of primary jurisdiction “permits a court itself to ‘refer’ a question to the Secretary. . . . A court may then stay its proceedings—for a limited time, if appropriate—to allow a party to initiate agency review. Lower courts have sometimes accompanied a stay with an injunction designed to preserve the status quo.” *Id.* at 673-74. The primary-jurisdiction route was discussed during oral argument, but not mentioned in the *Douglas* opinion. See Transcript of Oral Argument, *supra* note 12, at 13 (question of Justice Kennedy) (“[T]he courts, I take it, have the prerogative, perhaps even the obligation, under the primary jurisdiction rationale to simply withhold adjudication until the agency acts.”); *id.* at 38 (question of Justice Breyer) (“I want your view on . . . [the] possibility that we try primary jurisdiction, and . . . then the curlicue on that is what do you do pending? And you know, that’s your injunction.”); *id.* at 41 (question of Justice Sotomayor) (“[I]f it’s a primary jurisdiction question, what’s wrong with just saying that the court’s power is limited under equity to issuing an injunction that gives the matter over to the administrative agency that puts in the status quo . . . ?”).

review. *Douglas* itself is instructive on this point. Final agency action took place more than three years after California first enacted the payment cuts.<sup>15</sup>

To push the point further, what if the agency process is not merely delayed, but altogether stymied owing to agency inaction? According to former HHS officials, the agency lacks sufficient resources to comprehensively oversee states' compliance with federal Medicaid provisions,<sup>16</sup> and limited agency resources can lead to inaction. Neither private parties nor courts can directly force agencies to act, but a court-ordered injunction that preserves the status quo should galvanize states (and other interested parties) to pressure the agency to act.<sup>17</sup>

More expansive agency-forcing measures on the part of courts might be contemplated in contexts outside of Medicaid (and other Spending Clause legislation). Consider, for example, the arena of health and safety, where direct APA challenges to preemptive rules promulgated by the Food and Drug Administration or the National Highway Traffic and Safety Administration are few and far between. In these contexts, standing and ripeness barriers at the time of agency rulemaking loom large (in marked contrast to the Medicaid context, where the approval process contemplates final agency action as a matter of course with immediate repercussions for affected parties). Perhaps where direct APA challenges are not viable, preemption challenges could provide an alternate, albeit more indirect, route to challenge an agency's conflict determination embedded in an adjudication or rulemaking process.<sup>18</sup>

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15. The timeline is set forth in Notice of Hearing: Reconsideration of Disapproval of California State Plan Amendments (SPAs) 08-009A; 08-009B1; 08-009B2; 08-009D; and 08-019, 75 Fed. Reg. 80,058 (Dec. 21, 2010). California did not submit its plan amendment to HHS until three months after it initiated cuts to Medicaid reimbursement funds. Two months later, HHS requested that California submit additional information, and only twenty months after California failed to respond did the Secretary reject the plan. The state called for an administrative hearing for reconsideration, which took place three months later. CMS then approved the plans eight months after that.
  16. Brief of Former HHS Officials as Amici Curiae in Support of Respondents at 19, *Douglas*, 132 S. Ct. 1204 (No. 09-958) (“[F]ewer than 500 federal employees are today tasked with supervising 56 different Medicaid programs administering nearly \$400 billion in federal funds every year.”).
  17. Where the pending state legislation under agency review would mean a reduction in outlaid funds (e.g., as in *Douglas*, lower reimbursement amounts to Medicaid providers), the injunction could entail an escrowing of any monies that exceed rates contemplated under the proposed state law. The state would be enjoined from cutting provider rates pending agency approval, but the escrowed funds would be paid over to the providers only if the agency rejected the state plan. Otherwise, the money would be returned to the state.
  18. See Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125, 2178-80, 2185-91 (2009); *infra* text accompanying notes 34-40.

Courts can play an agency-forcing role here, encouraging agencies to act in adjudication and rulemaking proceedings with the “force of law” necessary to receive heightened deference in both APA and preemption challenges.<sup>19</sup>

It is one thing (as the Supreme Court has done) to leave the door partially open to some form of agency-prompting court actions. It is quite another to define precisely which private parties should be able to initiate such actions. When preemption arises as a federal defense, it is necessarily limited in scope. Where it is brought as an affirmative action under the Supremacy Clause, however, there is concern about launching a “roving commission” to find all situations where state law violates federal law.<sup>20</sup> The majority offers no guidance here, but I have two preliminary thoughts.

First, consistent with numerous Supreme Court precedents, a private party should be able to bring an action for injunctive relief as an anticipatory preemption defense.<sup>21</sup> Second, and more controversially, with respect to

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19. See *infra* note 40 and text accompanying notes 41-43; see also *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (calling for *Chevron* deference “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority”).

20. Transcript of Oral Argument, *supra* note 12, at 49 (argument of Carter G. Phillips, Counsel for Respondents).

21. According to the government, the majority of Supreme Court precedents are cases in which the plaintiff in the suit in equity is bringing an action “anticipating an action at law.” *Id.* at 20-21. *Douglas* presents a borderline case. At the time the Medicaid providers filed suit, they faced no enforcement action to which they could respond by arguing preemption. However, the providers could readily have claimed that they were going to violate state law by charging more, in which case they would have faced penalties and an imminent state enforcement action and could raise preemption as a defense. California counsel conceded—as did the government—that, if plaintiffs here were facing an imminent state enforcement action, it would be a different story. See *id.* at 15-17, 21. This concession prompted Justice Scalia to exclaim: “Well, gee, we’re not deciding a whole lot here, then. . . . [I]t’s just a matter of pleading that we’re deciding, right?” *Id.* at 22.

The issue may be more complex. My colleague Rick Hills agrees that, “[i]n principle, *Ex Parte Young* states that private persons can raise a federal law as a defense against state actions that are preempted by that law.” Rick Hills, *Douglas v. Independent Living Center: The Most Important Healthca[r]e Federalism Case You’ve Never Heard Of?*, PRAWFSBLAWG (Feb. 28, 2012, 10:22 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/02/douglas-v-independent-living-center-the-most-important-federalism-case-youve-never-heard-of.html>. But what if the state, instead of imposing penalties and/or an enforcement action for violations of state law, simply cuts off reimbursement to the providers? In that case, is a private party’s assertion of federal preemption of the state’s denial of funds different in kind from federal preemption of a state’s imposition of penalties and/or enforcement action? Professor Hills suggests that it is. See *id.* (“Public money is different from private property or liberty—even public money to which a private person is allegedly entitled. Both the

implied rights of action under the Medicaid Act, I would alter the analytic framework to make room for the agency's view of whether implied rights of action would be consistent with the federal regulatory scheme. In *Alexander v. Sandoval*,<sup>22</sup> the Supreme Court rejected the claim that there was a private right of action to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964.<sup>23</sup> The majority did not take heed of the federal agencies' contrary view that "private enforcement is consistent with, and in many instances necessary to ensuring that individuals have effective protection against discriminatory practices by recipients of federal funds."<sup>24</sup> Should the agency itself believe that federal regulatory purposes would be best served by the enhanced enforcement provided by private actions, why not give some deference to this position?<sup>25</sup>

## II. COURTS AS ARBITERS OF FEDERAL-STATE CONFLICTS

If a court does review an agency's determination of a conflict between federal and state law in a direct action against the state under the Supremacy Clause, should the court's level of deference to that agency's determination be the same as the level of deference a court would give to the agency in a suit against the agency under the APA?

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[Obama] Administration's and [Supreme] Court's intuitive sense is that private parties just cannot have the same access to the courts for claims on a state's fisc as for claims to be left alone by the state.").

22. 532 U.S. 275 (2001).

23. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, 78 Stat. 241, 252-53 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-7 (2006)).

24. Brief for the United States at 11, *Sandoval*, 532 U.S. 275 (No. 99-1908), 2000 WL 1846063, at \*11. In *Sandoval*, Justice Scalia, writing for the majority, famously pronounced that "[a]gencies may play the sorcerer's apprentice but not the sorcerer himself." 532 U.S. at 291.

25. See Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 248 (2007) (raising a "troublesome asymmetry . . . [whereby] agencies are given significant discretion to interpret or declare the preemptive scope of the regulations they promulgate, but when it comes to conferring private rights of action under those same regulations, courts tie their hands"). I would have courts apply *Skidmore* deference to an agency's interpretive views. See *infra* text accompanying notes 36-40; cf. Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 159 (2005) (arguing for *Chevron* deference to an agency's determination of the existence of a private right of action). As in preemption challenges, the agency would not be a party in the statutory implied right of action. Thus, a mechanism for soliciting input from the agency would need to be developed.

APA review of final agency determinations is highly deferential.<sup>26</sup> In practice, court review of CMS approval or rejection of state Medicaid plans and amendments is particularly deferential, given that the federal Medicaid statute is the prototypical “complex and highly technical regulatory program.”<sup>27</sup>

In *Douglas*, Justice Breyer suggests that CMS’s approval of the plan should be accorded the same heightened deference in a preemption challenge.<sup>28</sup> Counsel for the Medicaid providers agreed.<sup>29</sup> He elaborated: “[U]ltimately, you have to demonstrate . . . by clear and convincing evidence, a conflict between Federal and State law. And the agency that . . . evaluates the standards of Federal law will have said in a very authoritative way that there is not a violation under those circumstances.”<sup>30</sup>

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26. Under the Administrative Procedure Act (APA), courts may set aside agency action, findings, and conclusions only when they are found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A) (2006). Under *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, courts consider whether “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” 463 U.S. 29, 43 (1983). This “hard look” review, however, is notoriously light. See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009) (refusing to subject an agency’s decisions to any more “searching” review so long as it has some reasonable justification for its policy changes). Moreover, to the extent that the agency’s action depends upon construction of an ambiguous statute, the agency’s reasonable interpretation is subject to mandatory *Chevron* deference. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
  27. This language, from *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994), is relied upon by numerous federal courts to justify particularly broad deference to CMS. See, e.g., *Md. Dep’t of Health & Mental Hygiene v. Ctrs. for Medicare & Medicaid Servs.*, 542 F.3d 424, 428 (4th Cir. 2008) (“[W]e take care not lightly to disrupt the informed judgments of those who must labor daily in the minefield of often arcane policy, especially given the substantive complexities of the Medicaid statute.” (quoting *West Virginia v. Thompson*, 475 F.3d 204, 212 (4th Cir. 2007))).
  28. See *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, No. 09-958, slip op. at 7 (U.S. Feb. 22, 2012) (majority opinion), <http://www.supremecourt.gov/opinions/11pdf/09-958.pdf> (to be reported at 132 S. Ct. 1204) (“Nor have the parties suggested reasons why, once the agency has taken final action, a court should reach a different result in a case like this one, depending upon whether the case proceeds in a Supremacy Clause action rather than under the APA for review of an agency decision.”).
  29. See Transcript of Oral Argument, *supra* note 12, at 51 (argument of Carter G. Phillips, Counsel for Respondents) (indicating that, had the agency approved the rate plans, his clients would not have pursued the preemption challenge).
  30. *Id.* at 53.

But the Supreme Court has sent mixed signals about the level of deference owed to an agency's determination of the existence of a conflict between federal and state law in preemption suits.<sup>31</sup> To the extent that courts accord lesser deference to agency determinations in preemption challenges than would be the case in an APA challenge, the *Douglas* majority's fear that preemption could too easily serve as an end-run around the administrative process seems well-founded.

Moreover, court determinations of federal-state conflicts unmoored from the agency's position undercut the majority's desire for uniformity in approach. Indeed, CMS has complained that "court decisions [in preemption suits against the states] have not offered consistent approaches to compliance with the [Medicaid provider] access requirement."<sup>32</sup> These preemption decisions have wreaked havoc on the states, leaving them "without clear and consistent guidelines and . . . subject[ing] them to considerable uncertainty as they move forward in designing service delivery systems and payment methodologies."<sup>33</sup>

In my view, harmonizing the standards of judicial deference to agencies across preemption and administrative challenges need not result in courts giving agencies carte blanche in either realm. Particularly in "cooperative federalism" regimes such as Medicaid, in which the federal agency's incentives may be closely aligned with those of the states, courts may need to step up in their role as guardians and enforcers of the supremacy of federal law.<sup>34</sup> Judges

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31. Two cases from the previous Term illustrate that divide. In *Williamson v. Mazda Motor Co.*, 131 S. Ct. 1131 (2011), Justice Breyer, for a nearly unanimous Court, relied principally on the regulatory agency's view that the federal motor safety regulation at issue was not in conflict with additional state law requirements imposed on the defendant in a tort lawsuit. But, in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011), the majority took a position at odds with that of the underlying agency in determining that state-level failure-to-warn claims against generic-drug manufacturers were preempted by federal drug-labeling regulations. Writing for the sharply divided Court, Justice Thomas—who incidentally was the lone critic of Justice Breyer's agency-centric approach in *Williamson*—made clear that, "[a]lthough we defer to the agency's interpretation of its regulations, we do not defer to an agency's ultimate conclusion about whether state law should be pre-empted." *Id.* at 2575 n.3.

32. Methods for Assuring Access to Covered Medicaid Services, 76 Fed. Reg. 26,342, 26,343 (proposed May 6, 2011) (to be codified at 42 C.F.R. pt. 447).

33. *Id.*

34. Cf. Nicole Huberfeld, *Bizarre Love Triangle: The Spending Clause, Section 1983, and Medicaid Entitlements*, 42 U.C. DAVIS L. REV. 413, 462 (2008) ("CMS . . . is notoriously uninterested in enforcing the terms of State plans against the states; instead it seeks cooperation, when it makes demands at all."); Abigail R. Moncrieff, *The Supreme Court's Assault on Litigation: Why (and How) It Might Be Good for Health Law*, 90 B.U. L. REV. 2323, 2328 (2010) ("CMS

should therefore apply a veritable “hard look” in APA challenges and require substantial evidence in the record to back the agency’s conflict determination.<sup>35</sup> For preemption challenges, in an approach I have developed elsewhere called the “agency reference” model,<sup>36</sup> courts should apply a “*State Farm* with teeth”<sup>37</sup> standard in reviewing the evidence in the agency’s regulatory record supporting the conflict between state and federal law. Courts should accord *Skidmore* “power to persuade” deference<sup>38</sup> (rather than mandatory *Chevron* deference<sup>39</sup>) to an agency’s interpretative views on preemption based upon the consistency, care, formality, and relative expertise of the agency.<sup>40</sup>

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hardly ever withdraws funding from or refuses approval to state Medicaid plans that violate federal standards . . .”).

35. In the Medicaid context, a reviewing court will likely have a sufficient administrative record to review in the case of CMS rejection of a state plan, given the state’s ability to call for a full administrative hearing in that case. *See supra* note 4. In the case of private parties appealing CMS approval of a state plan (in which case there is no right to a full hearing), the court may have a scant administrative record to review. But, in that case, it would be appropriate for the court to withhold deference to the agency’s determination, precisely because it is not based on sufficient evidence of lack of conflict. *See, e.g., Cal. Med. Ass’n v. Douglas*, No. CV 11-9688 CAS (MANx), 2012 WL 273768, at \*6 (C.D. Cal. Jan. 31, 2012) (denying *Chevron* deference to CMS’s conflict interpretation on the ground that its approval process involved “no hearing, no record, no opportunity for interested parties to present evidence, and no formal decision in which the Secretary set forth her reasoning,” and thus “did not involve a formal adjudication accompanied by the procedural safeguards justifying *Chevron* deference”).
36. *See* Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 477-502 (2008). The “foundational premise” of the agency reference theory of preemption is that “courts should take advantage of what federal agencies, which are uniquely positioned to evaluate the impact of state regulation and common law liability upon federal regulatory schemes, have to offer.” Sharkey, *supra* note 18, at 2125. Courts must, however, in their exercise of searching judicial review, look for substantial evidence in the agency record to support statements that state law conflicts with, or frustrates the purposes of, a federal regulatory scheme.
37. Catherine M. Sharkey, *What Riegel Portends for FDA Preemption of State Law Products Liability Claims*, 103 NW. U. L. REV. 437, 449 n.60 (2009). By “*State Farm* with teeth,” I mean a more searching standard than the ordinary, highly deferential one that lets agencies off the hook so long as they provide reasonable assertions. *See supra* note 26. “*State Farm* with teeth” would, by contrast, ask judges to probe the evidentiary backing for these agency assertions.
38. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).
39. *See supra* note 26.
40. In *Douglas*, Justice Breyer alludes to the fact that, in the cases below, the Ninth Circuit “declined to give weight to the Federal Government’s interpretation of the federal statutory language.” *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, No. 09-958, slip op. at 7 (U.S. Feb. 22, 2012) (majority opinion), <http://www.supremecourt.gov/opinions/11pdf/09-958.pdf> (to be reported at 132 S. Ct. 1204). The agency’s view was expressed in an amicus curiae brief

This framework should have the salutary effect of nudging agencies toward more thorough determinations of federal-state conflicts based on substantial evidence in the administrative record. An agency, anticipating more searching judicial review, will have an incentive to make its conflict determinations based upon record evidence from either a more robust adjudicative process or notice-and-comment rulemaking. Consider, in this regard, CMS’s recent proposed rule—prompted by APA challenges and preemption lawsuits—that aims to “create a standardized, transparent process for States to follow” to ensure compliance with the Medicaid Act’s equal access provision.<sup>41</sup> CMS concedes that, to date, it has “generally relied upon State assurances” that state-plan amendments were consistent with federal law.<sup>42</sup> The proposed rule provides “a more consistent and transparent way to gather and analyze the necessary information to support such reviews.”<sup>43</sup> CMS conflict determinations, embedded in decisions to approve or to reject state plans, would then be based upon empirical data of the effect of payment-rate changes on access to care for Medicaid beneficiaries, not simply “State assurances” of compatibility.

#### **CONCLUSION: PREEMPTION AS AGENCY-FORCING**

The *Douglas* majority sides with expert agencies over generalist courts to resolve a potential federal-state conflict. Because there is a concern that courts adjudicating preemption disputes will fail to accord appropriate deference to agency conflict determinations, the majority strongly hints in its remand to the Ninth Circuit that it would close the door to such preemption actions once the agency has approved the state statutes. Nevertheless, the majority leaves the door open to preemption challenges in the future—either where the agency has yet to take, or has decided against taking, any action.

Instead of thinking of preemption challenges as an end-run around APA review, one could conceptualize them as agency-forcing measures.<sup>44</sup> The

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(submitted in prior litigation), not as part of an adjudication or rulemaking proceeding—i.e., arguably not with the “force of law” necessary to trigger *Chevron* deference under *Mead*.

41. Methods for Assuring Access to Covered Medicaid Services, 76 Fed. Reg. 26,342, 26,342 (proposed May 6, 2011) (to be codified at 42 C.F.R. pt. 447).
42. *Id.* at 26,349. Moreover, whereas CMS rejection of a state plan (or amendment) can trigger the state’s call for a full administrative hearing, there is no similar administrative process for those who object to CMS’s approval of a plan.
43. *Id.* at 26,344.
44. The dynamic between courts and agencies here would also be affected by the Court’s decision in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005). *Brand X* suggests that, should a court make a conflict-preemption

agency reference theory of preemption harnesses the federal administrative process—including *State Farm’s* “hard look” review of an agency’s factual determinations, and *Skidmore’s* “power of persuasion” deference—into judicial review. *Douglas* only skims the surface of the potentially rich interface between the administrative process and preemption challenges.

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determination in a private Supremacy Clause action, the court may not have the last word on the matter. The federal agency could make its own contrary determination within an adjudicatory or rulemaking process—to which subsequent courts would ordinarily defer. See *Douglas*, slip op. at 7 (majority opinion) (citing *Brand X*). Here, a court’s role is limited to prodding the agency into action (reviewable under the APA), but the agency may trump the court in terms of the ultimate resolution of whether a federal-state conflict exists in a preemption challenge.