Chicago-Kent College of Law
Scholarly Commons @ IIT Chicago-Kent College of Law

All Faculty Scholarship | Faculty Scholarship

March 2001

Domestic Partnership and ERISA Preemption

Jeffrey G. Sherman
IIT Chicago-Kent College of Law, jsherman@kentlaw.iit.edu

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/fac_schol

 Part of the Family Law Commons, and the Retirement Security Law Commons

Recommended Citation

Jeffrey G. Sherman, *Domestic Partnership and ERISA Preemption*, 76 Tul. L. Rev. 373 (2001).
Available at: https://scholarship.kentlaw.iit.edu/fac_schol/553

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

Domestic Partnership and ERISA Preemption

Jeffrey G. Sherman*

State and local governments have begun to expand their fair employment laws to include prohibitions against sexual orientation discrimination and marital status discrimination. To the extent, however, that they require private employers to offer domestic partner benefits to their employees, these laws have been held to be preempted by the Employee Retirement Income Security Act of 1974 (ERISA). This Article criticizes this interpretation of ERISA and argues that these domestic partner benefit laws should withstand ERISA preemption. Neither the express language of ERISA nor the general principles of federal preemption doctrine require the suppression of such state laws.

* Professor of Law and Senior Advisor to the Graduate Program in Taxation, Chicago-Kent College of Law, Illinois Institute of Technology. B.A., J.D. Harvard University. In writing this Article, I have benefited enormously from the shrewd advice and sternly critical observations of Kathy Baker, Jacob Corne, Jesse Dukeminier, John Langbein, Christopher Leslie, Dale Nance, Daniel Ortiz, and Lawrence Waggoner, and I am grateful to them for the interest and assistance. I must also thank my diligent and skillful research assistant, Christopher Collins. And I should like to thank the Marshall D. Ewell Research Fund for providing support for the writing of this Article.

HeinOnline -- 76 Tul. L. Rev. 373 2001-2002

"What is virtue but the Trade Unionism of the married?"
George Bernard Shaw, *Man and Superman*

"Equal pay for equal work."[1] Who can argue with that rhythmic rallying cry, which emerged during the last century as a call for gender justice in the workplace?[2] Though other canons of distributive justice undoubtedly exist—the Marxian slogan "to each according to need"[3] comes readily to mind[4]—the idea that two employees performing the same job should receive equal compensation has an appeal so unquestionable that departures from that model excite suspicion and resentment. Yet this canon of justice is violated routinely in the American workplace today: violated in a way that is seldom acknowledged.

Suppose an employer has two male employees of equal skill, seniority, responsibility, and productivity: Smith and Jones. The employer pays each employee a $50,000 salary, but there is a difference in their fringe benefits. The employer provides health insurance coverage with a market value of $6000 for Smith and Smith's consort. But the employer provides Jones with health insurance only for himself with a market value of only $3000. Smith, in other words, is receiving $3000 more compensation than Jones, even though the two are equally skilled and equally productive. This particular violation of the "equal pay for equal work" maxim is almost

---

1. *See* Janice R. Bellace, *Comparable Worth: Proving Sex-Based Wage Discrimination*, 69 IOWA L. REV. 655, 658-59 (1984). "Government support for the concept of equal pay [for women] can be traced back to World War I, when the National War Labor Board applied the principle of equal pay for equal work in its awards." *Id.* (citing REP. OF THE SECRETARY NAT'L WAR LAB. BD. TO SECRETARY OF LAB., FOR THE TWELVE MONTHS ENDING MAY 31, 1919, at 69-71 (1920)).

2. *Id.*

3. *See* BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW 59-60 (1994). Although the Marxian phrase "to each according to need" is often cited as a particular canon of distributive justice, Marx himself did not regard it as such. As Professor Thomas Grey states:

> [Marx] was not primarily concerned with questions of distribution. Marx often and forcefully argued that the case for socialist revolution was not founded on the injustice of capitalism; that justice was a specifically bourgeois conception; and that the aim of socialism was not a more equal pattern of distribution, but rather democratic control by workers over the means of production.

Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 877 n.1 (1976).

4. Distribution according to need and distribution per capita are by no means the only possible canons of distributive justice. Distribution as reward for past achievements or distribution according to effort expended are also "[a]mong the many candidates." DALE A. NANCE, LAW AND JUSTICE 352 (2d ed. 1999) (enumerating these and other canons of distributive justice).

HeinOnline -- 76 Tul. L. Rev. 374 2001-2002

routine in workplace environments where Smith has a female consort designated a "wife," and Jones has a male or female consort designated a "domestic partner."[5] One might defend this disparate treatment by relying on the generalization that Smith, having a wife, is more likely to be the couple's principal breadwinner than Jones, having a domestic partner (especially a male domestic partner), and therefore needs greater earnings than Jones.[6] While Karl Marx might nod his

5. *See, e.g.*, Rovira v. AT&T, 817 F. Supp. 1062, 1068-72 (S.D.N.Y. 1993); Hinman v. Dep't of Pers. Admin., 213 Cal. Rptr. 410, 412-20 (Ct. App. 1985); Ross v. Denver Dep't of Health & Hosps., 883 P.2d 516, 518-22 (Colo. Ct. App. 1994); Rutgers Council of AAUP Chapters v. Rutgers, 689 A.2d 828, 833-38 (N.J. Super. Ct. App. Div. 1997); Phillips v. Wis. Pers. Comm'n, 482 N.W.2d 121, 123-30 (Wis. Ct. App. 1992).

6. This is as good a place as any to confront the myth of gay and lesbian affluence, an oft-repeated canard especially popular with the right wing. *E.g.*, DIDI HERMAN, THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT 114-19 (1997) ("The primary theme of the [Christian Right] pragmatists is that, while rights may be due to the 'truly disadvantaged,' the gay movement does not fit this description. Their arguments contain two fused limbs: first, gays are immensely wealthy . . . ."); Bill Ghent, *Hatch, Both Open and Closed*, ADVOCATE, Sept. 28, 1999, at 16 ("[G]ays and lesbians, by and large, are . . . highly educated, high-earning people, who support mainly Democrats." (quoting Senator Orrin Hatch)); Will Perkins [the Executive Chairman of the Board of Colorado for Family Values], *Views on Gay Rights Conflict*, DENVER POST, Oct. 11, 1992, at 1D ("[G]ays are one of the most privileged groups in the country, sporting average annual household incomes over $55,000."). This canard is usually deployed in the hope of disentitling gays and lesbians to the protection of antidiscrimination laws. The old philistine gibe, "If you're so smart, how come you ain't rich?" has been replaced by "If you're so oppressed, how come you ain't poor?" Didi Herman quotes a member of the Christian Right (a term she scrupulously defines) as saying, "[E]nough money makes anyone a 'majority.'" HERMAN, *supra*, at 119. Will Perkins, quoted above, averred that civil rights protections for gay people would lead to the creation of "a whole new protected class of affluent, well-educated, sexually deviant political power brokers." Perkins, *supra*, at 1D. Asian-Americans, too, have found that popular misimpressions of their wealth—the so-called "model minority" label—can be used to undermine their claims of entitlement to nondiscrimination protection. *See* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1259-64 (1993); Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 246, 245-46 (1995).

The notion that material success necessarily wards off discrimination cannot withstand historical examination. For example, in a dialogue between the two authors in MICHAEL LERNER & CORNEL WEST, JEWS AND BLACKS: LET THE HEALING BEGIN (1995), Rabbi Michael Lerner criticizes the assumption that the only oppression that matters is the oppression with immediate economic consequences, stating:

> The Marxists were unable to pick up on Jewish oppression, hence we were totally unprepared for the rise of fascism, which focused on anti-Semitism. Why? Because for the Marxists, the fundamental reality was economic oppression. Well, Jews seemed to be doing alright economically in 1920s' Germany, so Marxists didn't see them as a group whose interests needed to be protected. That's because Jewish oppression does not take the form of economic oppression. So does that mean they're not really oppressed? Or does it mean that Marxism's theory of what constitutes oppression is inadequate?

HeinOnline -- 76 Tul. L. Rev. 375 2001-2002

shaggy head approvingly, such a resolution is uncomfortably reminiscent of one of the classic excuses for lower pay scales for women: the belief that women were less likely to be a family's principal breadwinner and therefore merited less compensation than men.[7] Certainly, the Equal Pay Act of 1963 constitutes both a confirmation of the "equal pay for equal work" principle[8] and a

---

Id. at 124. Nonetheless, opponents of gay rights continue to insist that the supposed wealth of gays and lesbians disentitles them to equal protection. Justice Antonin Scalia, arguing that a state may constitutionally place special impediments in the way of gays and lesbians who seek antidiscrimination protection, thought it relevant to assert that "those who engage in homosexual conduct tend to . . . have high disposable income . . . ." Romer v. Evans, 517 U.S. 620, 645 (1996) (Scalia, J., dissenting). It is curious that Justice Scalia chose the phrase "those who engage in homosexual conduct" rather than the more obvious "gay people" or "homosexuals": curious because the class of "persons who engage in homosexual conduct" (as distinguished from those who self-identify as gay) undoubtedly includes many prison inmates whose disposable incomes presumably depress considerably the average income figures on which Justice Scalia rests his argument.

This myth of gay wealth may have gained "currency" because poor gays and lesbians tend to be less visible than nonpoor ones. *See* Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 69-71 (1999) ("Due to the economic consequences of heterosexist employment and housing discrimination, those individuals 'who are in a position of relative comfort and security' will face fewer barriers than the poor in living openly gay and lesbian lives. Thus, surveys of 'out' gays and lesbians tend to under-represent the poor." (footnote omitted) (quoting Samuel A. Marcosson, *The "Special Rights" Canard in the Debate Over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137, 160 n.69 (1995))).

For a summary of the findings of several statistical studies debunking this canard about gay wealth, see M.V. Lee Badgett, *The Myth of Gay & Lesbian Affluence*, GAY & LESBIAN REV., Spring 2000, at 22, 22-25 ("GLBT people [gay, lesbian, bisexual, and transgendered persons] do not earn more as individuals than heterosexual people do, and they do not live in more affluent households. Two studies suggest that gay men earn less than similarly qualified heterosexual men.").

Even those who do not assume that individual gay people are wealthier than individual heterosexual people may nonetheless believe that same-sex households are more affluent than opposite-sex (married or unmarried) households. This belief usually derives from an assumption that same-sex households are either less likely than opposite-sex households to be burdened with dependant children or more likely than opposite-sex households to be headed by a two-earner couple. While it is true that opposite-sex households are more likely than same-sex couples to have dependant children, *see infra* note 11 and accompanying text, it is not true that same-sex households are more affluent. *See* Badgett, *supra*, at 25.

7. *See, e.g.*, M. Neil Browne & Michael D. Meuti, *Individualism and the Market Determination of Women's Wages in the United States, Canada, and Hong Kong*, 21 LOY. L.A. INT'L & COMP. L.J. 355, 361 (1999).

8. Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified as amended at 29 U.S.C. § 206(d) (1994)); *see* H.R. REP. No. 309 (1963), *reprinted in* 1963 U.S.C.C.A.N. 687, 688 (defining "equal work" as "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions"). At least some legislators supported the Equal Pay Act not because they believed that nonbreadwinners deserve as much pay as breadwinners, but rather because they believed that women are sometimes principal breadwinners, too. "There perhaps was a time in the country's history

HeinOnline -- 76 Tul. L. Rev. 376 2001-2002

warning to employers that compensation budgets should not be allocated among employees on the dubious strength of category-based conjectures about family needs.[9]

Conscious of the inequality engendered by the denial of domestic partner benefits[10] and of the number of persons adversely affected by such denial,[11] some state and city governments have begun to offer

---

when a man, because of his commanding position as the head of the family and breadwinner, was *entitled* to more compensation than the single woman." 109 CONG. REC. 8914 (1963) (statement of Sen. McNamara) (emphasis added).

9. *See* Robyn Blumner, *Childless Workers Rebel*, PLAIN DEALER (Cleveland), Feb. 8, 1998, at 1E. A similar objection could be made where an employer provides insurance coverage for her employees' children: An employee with three children would receive more compensation than an employee with none. And the provision of spousal or partners' benefits effectively awards more compensation to the coupled than to the single. One can defend higher salaries for parents or couples than for the childless or single by making the familiar needs-based argument, but that argument cannot sustain higher salaries for an individual who is half of a married couple as opposed to an individual who is half of an unmarried couple.

10. The employee benefits most commonly at issue in the domestic partner debate are medical benefits: physicians' and surgeons' fees, hospital expenses, pharmaceutical costs, vision-related costs (e.g., eyeglasses), mechanical aids (e.g., wheelchairs and orthotic braces), and dental expenses. These (together with retirement benefits, long-term care benefits, and long-term disability benefits) are sometimes referred to as "hard benefits." (Retirement benefits and disability benefits are designed to make payments only to the employee while the employee is alive, not to a domestic partner while the employee is alive. But retirement plans frequently provide for payments to a "beneficiary" after the employee has died.) Many employers also offer "soft benefits" that could be offered on a domestic partner basis: prepaid legal services, adoption assistance, bereavement leave (i.e., leave for the employee because of the death of a domestic partner or member of the domestic partner's family), sick leave, employee discounts (e.g., authorization for the employee's domestic partner to fly free on the airline for which the employee works), and fitness programs. This list is by no means exhaustive.

11. The 2000 United States Census revealed that a total of 5.5 million households are headed by unmarried partners (as opposed to spouses, "roommates," or unpartnered individuals); about 11% of those households are headed by same-sex couples, while 89% are headed by opposite-sex couples. UNITED STATES CENSUS BUREAU, HOUSEHOLD AND FAMILIES: 2000-CENSUS 2000 BRIEF 7 (2001). A 1994 study indicated that "[a] significant minority of same-sex couples (between 8 and 9%) and an even greater percentage of opposite-sex couples (35%) have children under the age of fifteen living with them." Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 3 (1998).

Because of the risks still inherent in disclosing one's homosexuality, public surveys tend to undercount gay people; indeed, certain survey methods are almost guaranteed to undercount them:

> In one effort to survey Americans in every state by phone, it took 1650 calls to Kansas—55 hours of random dialing—before the pollers found the first person willing to admit being lesbian or gay. It is possible, of course, that fewer than one-tenth of one percent of Kansans are lesbian or gay, but I doubt it.

David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 449 n.3 (1996) (citing Larry Hartfield, *Methods of Polling*, S.F. EXAMINER, June 5, 1989, at A20).

HeinOnline -- 76 Tul. L. Rev. 377 2001-2002

domestic partner benefits to their own employees.[12] In 1996, however, the city and county of San Francisco (the two are coextensive) tried to go one step further and require private employers to offer domestic partner benefits as well;[13] and in trying to compel private employers to offer such benefits, San Francisco ran up against ERISA preemption.[14] While ERISA does not prevent a state or local government from offering domestic partner benefits to its own employees,[15] the statute is implicated whenever a state or local government seeks to impose such a requirement on private employers.

The San Francisco Administrative Code, as of June 1, 1997, purported to bar the city from contracting with companies that did not

---

12. *See, e.g.*, CAL. GOV'T CODE §§ 22,867-77 (Deering Supp. 2001) (as amended by 1999 Cal. Stat. 588) (establishing a domestic partnership for same-sex and opposite-sex couples meeting "specified criteria"); HAW. REV. STAT. ANN. § 572C (Michie 1999); Crawford v. City of Chicago, 710 N.E.2d 91, 93, (Ill. App. Ct. 1999) (upholding Chicago's extension of domestic partner benefits to its employees); Nicole Itano, *State's Gay Employees Gain in Benefits Ruling*, N.Y. TIMES, Mar. 19, 2000, § 14CN, at 3 (reporting an arbitration award granting domestic partner benefits to the same-sex partners of employees in Connecticut); Eric Seigel, *Baltimore Grants Benefits to Gays*, BALT. SUN, Dec. 16, 1993, at 1A (reporting on policy to grant health benefits to domestic partners of Baltimore municipal workers); *Vermont Is First State to Pay Benefits for Domestic Partners*, S.F. CHRON., June 13, 1994, at A3 (reporting that Vermont is the first state to grant health and dental coverage to domestic partners). For a list of those states and municipalities that offer their employees domestic partner benefits, see JOSEPH S. ADAMS & TODD A. SOLOMON, DOMESTIC PARTNER BENEFITS: AN EMPLOYER'S GUIDE 55-56 (2000).

13. The cities of Los Angeles and Seattle have recently tried this approach as well. *See* J. Martin McComber, *City Council OKs Benefits for Gay Couples*, SEATTLE TIMES, Nov. 23, 1999, at B3; Rick Orlov, *Domestic Partner Benefits at Issue*, L.A. DAILY NEWS, Aug. 17, 1999, at N3.

14. ERISA is the standard acronym for the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (1994 & Supp. V 1999).

Municipal employee domestic partner benefit programs have occasionally been invalidated on the *state* law ground that the municipality exceeded its authority by going beyond the limits of the applicable "home rule" statute or by intruding on matters of exclusively statewide concern. *See, e.g.*, City of Atlanta v. Morgan, 492 S.E.2d 193, 194-96 (Ga. 1997); City of Atlanta v. McKinney, 454 S.E.2d 517, 521-22 (Ga. 1995) (affirming, however, that the city did have the authority to enact limited ordinances prohibiting employment discrimination); Connors v. City of Boston, 714 N.E.2d 335, 342 (Mass. 1999); Lilly v. City of Minneapolis, 527 N.W.2d 107, 108-13 (Minn. Ct. App. 1995); Arlington County v. White, 528 S.E.2d 706, 709 (Va. 2000); *cf. Crawford*, 710 N.E.2d at 93-100 (holding that Chicago's extension of domestic partner benefits to its employees was a valid exercise of the city's home rule powers); *see generally* Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1198-1203 (1992) (exploring the limits of municipal authority to regulate domestic relations). This kind of state law "preemption" lies beyond the scope of this article.

15. ERISA § 4(b)(1), 29 U.S.C. § 1003(b)(1).

HeinOnline -- 76 Tul. L. Rev. 378 2001-2002

furnish their employees with domestic partner benefits equal to the companies' spousal benefits:

> No contracting agency of the City [shall enter into any contract] with any contractor that discriminates in the provision of [benefits] between employees with domestic partners [same-sex or opposite-sex] and employees with spouses, and/or between the domestic partners and spouses of such employees .... In addition, in the event a contractor is unable to provide a certain benefit, despite taking reasonable measures to do so, the contractor shall not be deemed to discriminate in the provision of benefits if the contractor provides the employee with a cash equivalent.[16]

The City's stated intent in enacting this ordinance (the Ordinance) was "'to equalize to the maximum extent legally permitted' the total compensation provided to similarly-situated employees with spouses and employees with domestic partners"[17]—"Equal pay for equal work," in other words.[18]

The Ordinance was challenged by the Air Transport Association (ATA),[19] many of whose member airlines, users of San Francisco International Airport, were obliged to contract with the San Francisco Airport Commission. The ATA's challenge was largely successful; the District Court for the Northern District of California held that the Ordinance was preempted by ERISA.[20]

---

16. S.F., CAL. ADMIN. CODE ch. 12B, § 12B.1(b) (1999), *available at* http://www.amlegal.com/sanfranadmin/lpext.dll?f=templates&fn=main-j.htm&2.0 (last visited Dec. 6, 2001).

17. Air Transp. Ass'n of Am. v. City & County of San Francisco, 992 F. Supp. 1149, 1157 (N.D. Cal. 1998), *aff'd on other grounds*, 266 F.3d 1064 (9th Cir. 2001) [hereinafter *ATA*] (quoting S.F., CAL. ADMIN. CODE ch. 12B, § 12B.2(b)). Thus, the Ordinance also prohibited the City from contracting with employers who grant domestic partner benefits but deny spousal benefits. I doubt, however, that such discrimination against the married was in the minds of the members of Board of Supervisors when they adopted the Ordinance.

18. *See* S.F. HUMAN RIGHTS COMMISSION, TWO YEAR REPORT ON THE S.F. EQUAL BENEFITS ORDINANCE, *available at* http://www.ci.sf.ca.us/sfhumanrights/eb_2yr.htm (Aug. 12, 1999) (stating that the "main premise of the ... Ordinance is equal treatment").

19. *See ATA*, 992 F. Supp. at 1155, 1159-61. The district court's decision was appealed on other grounds to the Court of Appeals for the Ninth Circuit. *See infra* note 20 and accompanying text.

20. *Id.* at 1180. I say "largely successful" rather than "entirely successful" because the court did uphold the Ordinance insofar as it applied to the provision of certain non-ERISA benefits, such as moving expenses, membership discounts, and travel benefits, and to the provision of family medical leave benefits and bereavement leave benefits paid out of the general assets of the employer. *Id.* I shall discuss the source of these exceptions later, *see infra* notes 70-72 and accompanying text, but these excepted benefits are negligible compared with "hard" benefits like health insurance. The *ATA* case was appealed, but the City of San Francisco was not the appellant. No one appealed the district court's holding that ERISA preempts the Ordinance as to ERISA-covered benefits. But the ATA *did* appeal the

HeinOnline -- 76 Tul. L. Rev. 379 2001-2002

This holding was not an aberration; it was quite in keeping with classic ERISA precedent.[21] But the ATA's victory represented a defeat for lesbians and gay men, who had found, and continue to find, state and local governments far more receptive than the federal government to their claims for fair employment coverage.[22] These groups were

---

district court's holding that San Francisco is entitled to require the airlines to provide non-ERISA benefits like bereavement leave, and that holding was affirmed. Air Transp. Ass'n of Am. v. City & County of San Francisco, 266 F.3d 1064 (9th Cir. 2001) [hereinafter *ATA*].

The Ordinance also ran afoul of the so-called Dormant Commerce Clause: the principle that the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, impliedly bars state and local governments from adopting laws that affect commerce wholly outside the boundaries of the state or locality. *See ATA*, 992 F. Supp. at 1163; *see also* Healy v. Beer Inst., 491 U.S. 324, 336 (1989); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578-79 (1986); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). The Ordinance's nondiscrimination requirements purported to apply not simply to a contractor's operations within the city and county of San Francisco, but also to all of the contractor's operations anywhere else in the United States. *See ATA*, 992 F. Supp. at 1157. Applying the Dormant Commerce Clause, the court invalidated the Ordinance "to the extent the Ordinance is applied to out-of-State conduct that is not related to the purposes of the City contract." *Id.* at 1165. But it is ERISA that will be the focus of this Article, rather than the Dormant Commerce Clause, inasmuch as the constitutional issue can be avoided as long as the state does not presume to regulate extraterritorial conduct.

The ATA also argued on appeal that the Ordinance was preempted by a state statute signed into law after the trial court had ruled on the plaintiff's federal preemption claims. *See ATA*, 266 F.3d at 1079. Rather than disposing of this state issue on the merits, the Court of Appeals remanded the case to permit the district court to decide it. *Id.* The state statute in question creates a state-sanctioned registry of domestic partners. *See* CAL. FAM. CODE §§ 297-299.6 (Deering Supp. 2001).

21. *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 108-09 (1983); Champion Int'l Corp. v. Brown, 731 F.2d 1406, 1408-09 (9th Cir. 1984); Rovira v. AT&T, 817 F. Supp. 1062, 1072 (S.D.N.Y. 1993).

22. A number of states and the District of Columbia have enacted laws that prohibit private employers from discriminating on the basis of sexual orientation. *See* CAL. GOV'T CODE §§ 12920-21 (Supp. 2001); CONN. GEN. STAT. §§ 46a-81c (1997); D.C. CODE ANN. § 1-2512 (1999); HAW. REV. STAT. ANN. §§ 368-1 to 378-2 (Michie 1999); MASS. ANN. LAWS ch. 272, § 98 (1996); MINN. STAT. ANN. §§ 363.03, 363.12 (West Supp. 2001); N.J. STAT. ANN. § 10:5-4 (West 1993); R.I. GEN. LAWS § 28-5-7 (2000); VT. STAT. ANN. tit. 3, § 495 (1996); WIS. STAT. ANN. §§ 111.321, 111.36(1)(d)(1) (West 1997). Yet no federal law exists that would extend such job protection on the national level. The Employment Nondiscrimination Act (ENDA), which would have extended such job protection, was first introduced in 1994. S. 2238, 103d Cong. (1994); H.R. 4636, 103d Cong. (1994). It was finally voted on in 1996 and defeated, but by only one vote in the Senate. 142 CONG. REC. S10,129-39 (daily ed. Sept. 10, 1996).

In 1992, the City Council of Washington, D.C., passed an ordinance providing domestic partner benefits to D.C. employees. Health Care Benefits Expansion Act, 1992 D.C. Stat. 9-114. The United States Congress, which exercises budgetary control over the District of Columbia, barred the use of any federal funds to implement or enforce the Act and renewed that prohibition from year to year. *See* Pub. L. No. 106-113, § 131, 113 Stat. 1501, 1517-18 (1999); *cf.* David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221, 221 (1988) ("State supreme courts have recently interpreted states' constitutions to confer more rights than their federal counterpart in well over 400 cases.").

HeinOnline -- 76 Tul. L. Rev. 380 2001-2002

accordingly distressed at the court's holding that state and local governments were all but powerless to act on their behalf in the employee benefits arena.

In this Article, I shall argue that the *ATA* case and cases like it[23] are wrong: ERISA should not be interpreted to preempt state and local attempts to require domestic partner benefits in the private workplace. The Ordinance did not require employers to provide domestic partner benefits; it merely barred the City from doing business with employers who failed to provide them. The Board of Supervisors of San Francisco presumably used this indirect approach in an unsuccessful attempt to avail themselves of the so-called "market participation" doctrine.[24] In this Article, however, rather than dispute the proper application of this doctrine, I shall confront the preemption issue more boldly and shall argue that even if a state or local government explicitly requires private employers to provide domestic partner benefits matching their spousal benefits, such a requirement should survive ERISA preemption.[25]

---

23. When the Human Rights Department of the City of Seattle ruled that the city had to extend health insurance benefits to the domestic partners of municipal employees, "Seattle city attorney Doug Jewett initially announced that the ruling would apply to all private employers in the city as well. But he quickly reversed field, saying [that] provisions of [ERISA] would exempt private employers from the scope of the ruling." Kevin Gudridge, *Seattle Suspends Live-In Health Benefit Rule*, NAT'L UNDERWRITER, LIFE & HEALTH/FIN. SERVS. ED., June 5, 1989, at 5.

24. The "market participant" doctrine is an exception to the Dormant Commerce Clause. *See supra* note 20 and accompanying text. This exception may apply when a state's action is merely a manifestation of its purchasing choices, rather than an attempted regulation of the market. *See* White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204, 214-15 (1983); Dan T. Coenen, *The Impact of the* Garcia *Decision on the Market-Participant Exception to the Dormant Commerce Clause*, 1995 U. ILL. L. REV. 727, 728. The court in the *ATA* case rejected the city's claim that the market participant doctrine shielded the Ordinance from Dormant Commerce Clause objections. *See* 992 F. Supp. at 1163.

The Board of Supervisors of San Francisco may also have hoped that the market participant doctrine would be applied, by extension, to ERISA preemption issues, so that the Ordinance would be upheld on the ground that it only applied to the city's purchasing decisions. This extended use of the market participant doctrine is unwarranted. *See* Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282, 289 (1986) ("[T]he 'market participant' doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted."). In any event, the court in the *ATA* case also rejected this application of the doctrine. 992 F. Supp. at 1180.

25. To accomplish this result, a state legislature may need to refer specifically to employee benefits in its fair employment statute. Such specificity may be necessary because a number of courts have held—unpersuasively, in my opinion—that the denial of domestic partner benefits does not constitute discrimination on the basis of sexual orientation. For example, in *Phillips v. Wisconsin Personnel Commission*, 482 N.W.2d 121, 123-24 (Wis. Ct. App. 1992), a female employee was denied employer-provided health insurance coverage for her female partner even though the employer provided such coverage for employees' spouses.

HeinOnline -- 76 Tul. L. Rev. 381 2001-2002

In Part I, I shall discuss the emerging understanding of the term "domestic partner." In Part II, I shall discuss the structure and meaning of ERISA's express preemption provision. And in Part III, I shall argue that neither ERISA's express preemptive reach nor its implied preemptive reach should touch state or local government laws requiring private employers to provide equal domestic partner benefits.

I. DEFINING "DOMESTIC PARTNER"

The designation "domestic partner" is a relative newcomer in family law discourse. The *New York Times*, for example, did not use the term in this sense until 1982,[26] and federal appeals courts waited

---

The female employee brought suit, claiming that the employer's policy, which denied her this domestic partner benefit, violated the Wisconsin Fair Employment Act. This act, *inter alia*, prohibits employment discrimination on the basis of sexual orientation. WIS. STAT. ANN. §§ 111.321, 111.36(1)(d)(1). The court held that the employer's policy did not constitute discrimination on the basis of sexual orientation, inasmuch as even a heterosexual employee would have been denied such a benefit for his or her unmarried partner. *See Phillips*, 482 N.W.2d at 127.

Because lesbians and gay men are currently unable to marry their partners, such an analysis is uncomfortably reminiscent of the Supreme Court's reasoning in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). In that case, the Court held that an employer's denial of pregnancy benefits did not amount to sex discrimination because the denial applied equally to pregnant men as well as to pregnant women, *id.* at 138, a judgment that Congress emphatically repudiated when it enacted the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (1994)). The *Gilbert* dissenters had argued that the employer's denial of pregnancy benefits did constitute sex discrimination because the employer was protecting female employees against only some of the categories of risks that females face, while it protected male employees against all the categories of risks that males face. 429 U.S. at 155 (Brennan, J., dissenting). Congress, in adopting the Pregnancy Discrimination Act of 1978, explicitly endorsed the *Gilbert* dissenters' reasoning. H.R. REP. NO. 95-948, at 2 (1978), *reprinted in* LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, at 148 (1979). This congressionally approved reasoning, applied to a denial of domestic partner benefits by an employer who does offer spousal benefits, leads to the conclusion that such a denial constitutes discrimination on the basis of sexual orientation. Such an employer would be failing to protect gay employees against the risk that they would one day have mates who needed expensive medical care, while it was protecting heterosexual employees against the risk that they would one day have mates who needed expensive medical care (though the heterosexuals would have to marry to get those benefits).

26. A LEXIS search performed on Sept. 20, 2000, found that the *Times*'s earliest use of the term as a family law designation occurred in 1982. *See Death Benefit Voted for Homosexual's Lover*, N.Y. TIMES, Nov. 11, 1982, at A26. Earlier uses of the term were confined to other contexts, such as a reference to an international accounting firm's "domestic partners" as distinguished from its "worldwide partners." *See* Deborah Rankin, *Biggest Accounting Merger Joins Touche Ross with J.K. Lasser*, N.Y. TIMES, Aug. 23, 1977, at 49. The LEXIS database of *New York Times* articles does not extend earlier than 1969, so my search does not exclude the possibility that a pre-1969 article in the *Times* used the term "domestic partner" as a family law term.

HeinOnline -- 76 Tul. L. Rev. 382 2001-2002

until 1991.[27] But unlike the term "widow," which has a meaning on which presumably all states agree, the term "domestic partner" remains definitionally an empty vessel that legislatures or employers may fill as they wish.

In deciding to offer "domestic partner" benefits, an employer undertakes to treat married and unmarried couples similarly for employee benefit purposes. Consequently, such employers generally view domestic partnership as a "simulacrum of marriage"[28] and, accordingly, require such partnerships to have most of the characteristics that are thought to accompany or constitute marriage.[29]

Courts, too, when called upon to determine whether a particular relationship qualifies as a spousal or family equivalent for some statutory purpose, examine the characteristics of the particular relationship and explicitly, or more often implicitly, compare them with those associated with marriage. In *Braschi v. Stahl Associates Co.*, for example, the Court of Appeals of New York was called upon to interpret the word "family" under a New York City rent control regulation.[30] This regulation provided that upon the death of a tenant protected by rent control, the decedent's landlord might not dispossess "either the surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the

---

27. *See* United States v. Horn, 946 F.2d 738, 742 n.3 (10th Cir. 1991). As of Sept. 20, 2000, the Supreme Court still has not used the term in this sense.

28. This elegant phrase is Judge Posner's:

> [S]ince the public hostility to homosexuals in this country is too widespread to make homosexual marriage a feasible proposal even if it is on balance cost-justified, maybe the focus should be shifted to an intermediate solution that would give homosexuals most of what they want . . . .
>
> . . . [A] registered partnership . . . is in effect a form contract that homosexuals can use to create a simulacrum of marriage.

RICHARD A. POSNER, SEX AND REASON 313 (1992).

29. Professor Lawrence Waggoner, in a working draft (revised as of Jan. 20, 1995) of a proposed amendment to the Uniform Probate Code that would allow an unmarried decedent's "committed partner" a share of the decedent's intestate estate, coined the phrase "marriage-like relationship" to identify one of the conditions that must be met in order for such intestate rights to arise. LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 107-08 (2d ed. 1997). "[A] 'marriage-like relationship' is a relationship that corresponds to the relationship between marital partners, in which two individuals have chosen to share one another's lives in a long-term, intimate, and committed relationship of mutual caring." *Id.* at 107. Professor Waggoner also has advocated a self-identification approach, whereby an appropriate couple can attain "committed" couple status simply by registering as such with the designated authority. *See* E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1087 n.125 (1999).

30. 543 N.E.2d 49, 52-61 (N.Y. 1989).

HeinOnline -- 76 Tul. L. Rev. 383 2001-2002

tenant."[31] The Court of Appeals held that in determining whether Miguel Braschi, the surviving male domestic partner of a male decedent, was "family" and therefore entitled to the rent control law's protection against eviction and unregulated rent increases, a court should consider several factors. These include "the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services."[32] The court considered the following factors, among others: (1) Braschi and the decedent "shared all obligations including a household budget"; (2) "they maintained joint checking and savings accounts, and joint credit cards"; (3) the decedent had executed a power of attorney in Braschi's favor authorizing him to make financial and medical decisions for him; and (4) Braschi was the named beneficiary of the decedent's life insurance policy as well as his primary legatee and coexecutor of his estate.[33] The court regarded Braschi's likelihood of success (on the issue of whether he was "family") to be sufficiently great that it upheld the trial court's preliminary injunction against the landlord seeking Braschi's eviction.[34]

---

31. *Id.* at 50 (emphasis omitted) (quoting the New York City Rent and Eviction Regulations, 9 NYCRR § 2204.6(d)).

32. *Id.* at 55.

33. *Id.*

34. *Id.* The city's rent control regulations were subsequently amended to reflect the *Braschi* holding. Specifically, the regulations expanded the definition of "family member" to include "[a] person residing with the tenant ... as a primary residen[t], who can prove emotional and financial commitment, and interdependence between such person and the tenant." 9 NYCRR § 2204.6(d)(3)(i) (1995). Eight factors are to be considered in making this determination, with no single factor as determinative:

> (a) longevity of the relationship;
> (b) sharing of or relying upon each other for payment of household or family expenses, and/or other common necessities of life;
> (c) intermingling of finances as evidenced by, among other things, joint ownership of bank accounts, personal and real property, credit cards, loan obligations, sharing a household budget for purposes of receiving government benefits, etc.;
> (d) engaging in family-type activities by jointly attending family functions, holidays and celebrations, social and recreational activities, etc.;
> (e) formalizing of legal obligations, intentions, and responsibilities to each other by such means as executing wills naming each other as executor and/or beneficiary, conferring upon each other a power of attorney and/or authority to make health care decisions each for the other, entering into a personal relationship contract, making a domestic partnership declaration, or serving as a representative payee for purposes of public benefits, etc.;

HeinOnline -- 76 Tul. L. Rev. 384 2001-2002

An employer proposing to offer domestic partner benefits, however, needs to know unequivocally who is or is not an employee's domestic partner. No benefit plan can operate efficiently if the plan administrator is continually required to undertake subjective evaluations (e.g., "the level of emotional ... commitment"[35]) to determine who is an eligible designated beneficiary. A job applicant also needs to know whether she and her family qualify for an employer's domestic partner benefit program in order to evaluate a compensation package before accepting a position. The plan's governing instrument therefore must define the term "domestic partner" in such a way as to enable eligibility determinations to be made with certitude.[36] Perhaps to preclude complaints from married employees that those with domestic partners have an easier time than they qualifying for benefits,[37] employers generally try to incorporate many of the distinctive, restrictive characteristics of marriage into their definitions of "domestic partner."

(f) holding themselves out as family members to other family members, friends, members of the community or religious institutions, or society in general, through their words or actions;

(g) regularly performing family functions, such as caring for each other or each other's extended family members, and/or relying upon each other for daily family services; [and]

(h) engaging in any other ... action which evidences the intention of creating a long-term, emotionally committed relationship.

Id.; *see also The Courts*, N.Y. L.J., Mar 2, 1992, at 25 (reporting that the *Braschi* "indicia of 'family'" were "codified in amendments to the family member succession regulations").

35. *See Braschi*, 543 N.E.2d at 55.

36. Interestingly, no such certitude is possible in the case of common law marriages, because the usual definition depends on ill-defined factors, or at least on considerations not easily verified. *See, e.g.*, Mattison v. Kirk, 497 So. 2d 120, 122 (Ala. 1986) ("The requisites of common law marriage are: capacity [to enter into a marriage]; present agreement or consent to be husband and wife; and public recognition of the existence of the marriage and cohabitation or mutual assumption openly of marital duties and obligations [i.e., consummation]."); Waller v. Waller, 567 So. 2d 869, 869-70 (Ala. Civ. App. 1990) (citing the *Mattison* definition and adding that "no specific words of assent are necessary"); Driscoll v. Driscoll, 552 P.2d 629, 632 (Kan. 1976) ("The essential elements of a common law marriage are: (1) Capacity of the parties to marry; (2) a present marriage agreement between the parties; and (3) a holding out of each other as husband and wife to the public.").

37. Shortly after the state of Vermont enacted its groundbreaking "civil union" law in 2000, *see infra* note 51 and accompanying text, the University of Vermont, which had been granting benefits to both married couples and same-sex domestic partners, announced that henceforth same-sex partners would qualify for university benefits only if they formally established a civil union and obtained a civil union license pursuant to the Vermont statute. Richard Higgins, *UVM Revises Domestic-Partner Policy*, BOSTON GLOBE, Sept. 28, 2000, at B3. ("A university spokesman said that not instituting the policy could be seen as discriminatory against heterosexual couples in long-term relationships who must be married to obtain spousal benefits.").

HeinOnline -- 76 Tul. L. Rev. 385 2001-2002

A typical definition is the eight-part test used by Arlington County, Virginia, when it expanded coverage under its health plan to include its employees' domestic partners.[38] The county's plan defined an employee's domestic partner as a person who:

> [1.] has resided with the employee for a 1 year period;
> [2.] shares with the employee the common necessities of life and basic living expenses;
> [3.] is financially interdependent with the employee;
> [4.] is involved with the employee in a mutually exclusive relationship of support and commitment;
> [5.] is not related by blood to the employee;
> [6.] is not married to anyone;
> [7.] was mentally competent at time of consent to relationship; [and]
> [8.] is 18 years of age or older.[39]

Some of these requirements undoubtedly correspond to those of marriage: (4), (6),[40] (7), and (8), for example. Other requirements, however, are more problematical.

The first requirement—that the employee have resided with his domestic partner for one year before being entitled to provide the partner with benefits—is not imposed on married couples. Indeed, married couples are not required to cohabit at all,[41] and they need not wait a year after the solemnization of their marriage to obtain the

---

38. The Supreme Court of Virginia subsequently held that the county's extension of domestic partner benefits exceeded the county's authority under state law. Arlington County v. White, 528 S.E.2d 706, 709 (Va. 2000); *see supra* note 14 and accompanying text.

39. *Id.* at 711; *cf.* Priv. Ltr. Rul. 98-500-11 (Sept. 10, 1998), in which the Internal Revenue Service was asked to rule upon certain tax consequences in the case of an employer who granted domestic partner benefits. The employer's definition of domestic partners required that they

> (1) have an intimate, committed relationship of mutual caring; (2) have shared the same principal place of residence for at least six months; (3) agree to be responsible for each other's basic living expenses; (4) are both 18 or older; (5) are the same sex and neither is married; (6) are not related by blood or certain other relationships.

Id.

40. This sixth requirement is designed to correspond roughly to prohibitions against polygamy. The notion here is that one cannot simultaneously have *A* as one's spouse and *B* as one's domestic partner. The Arlington County phrasing is somewhat artless in that it imposes the requirement of singleness only on the employee and not on the employee's domestic partner. Furthermore, the Arlington County definition does not explicitly preclude an employee from having two domestic partners at the same time, although the use of the word "exclusive" in the fourth requirement may serve to impose such a restriction.

41. In *Turner v. Safley*, 482 U.S. 78, 95-96 (1987), for instance, the Supreme Court held that prison inmates have a constitutional right to marry, even though it is understood that they will not be able to cohabit with their spouses or even consummate the marriage.

HeinOnline -- 76 Tul. L. Rev. 386 2001-2002

privileges conferred by marital status; the privileges begin immediately.[42] The second and third requirements, though commonly thought to accompany marriage, are by no means *sine quibus non* of the institution.[43] Nor does the fifth requirement, dealing with relation by blood, wholly correspond to a requirement of marriage: First cousins may marry in some states,[44] and second cousins may marry in all states. This fifth requirement is probably an inartful attempt to preclude domestic partnership for persons whose consanguinity would bar them from marriage.[45]

Many employers offering domestic partner benefits require the employee (and often the partner as well) to sign an affidavit to be eligible for such benefits. This affidavit attests to the various status requirements imposed by the employer (cohabitation, mutual caring, etc.).[46] Inasmuch as employers seldom require married employees to furnish a copy of their marriage licenses as a condition of receiving spousal coverage, this affidavit requirement might be regarded as discriminatory, or at least as a failure to achieve true parity between domestic partner benefits and spousal benefits.[47] Moreover, some

---

42. For example, if *A* and *B* marry each other on December 31 of a given year, they are regarded, for certain tax purposes, as having been married to each other for that entire year. *See* I.R.C. § 7703(a) (1994).

43. *Sine quibus non* is the plural of *sine qua non.* The preposition "sine" takes the ablative. "Qua," a feminine singular pronoun, is the phrase's only word susceptible of pluralization, and "quibus" is the feminine ablative plural. I hope you're satisfied.

44. *See, e.g.*, ALA. CODE § 13A-13-3 (1994); GA. CODE ANN. § 19-3-3 (1999). In Indiana, first cousins may marry only if the marriage is solemnized after September 1, 1977, and both parties are over the age of 65 at the time of the solemnization. *See* IND. CODE ANN. § 31-11-8-3 (Michie 1997).

45. Lotus Development Corporation, which offers same-sex domestic partner benefits, phrases the requirement as "not related by blood to a degree of closeness . . . which would prohibit legal marriage in the state in which we legally reside." Lotus Development Corporation, Affidavit of Spousal Equivalency (on file with author).

46. *See, e.g., U.S. WEST to Extend Health Benefits to Same-Sex Partners Beginning Next Year*, 24 Pens. & Ben. Rep. (BNA) 2050 (Sept. 8, 1997); *California Bar Covers Domestic Partners*, 22 Pens. & Ben. Rep. (BNA) 1669 (July 17, 1995).

47. An employer might defend its affidavit requirement on the ground that the affidavit protects the employer against fraudulent claims of partnership: that it is easier to misrepresent a domestic partnership than a marriage, perhaps because it is easier to change domestic partners than to change spouses. *But see* VT. STAT. ANN. tit. 15, § 1206 (Supp. 2000) ("The dissolution of [same-sex] civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage . . . ."). This concern about fraud seems misplaced, however. *See* Robert L. Eblin, Note, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)*, 51 OHIO ST. L.J. 1067, 1082-83 (1990). If the employer has reason to suspect fraud, regarding either a spouse or a domestic partner, the employer can always demand evidence of entitlement at that time. True, a married couple generally will have the evidence close at hand (the marriage certificate), but so would domestic partners in

HeinOnline -- 76 Tul. L. Rev. 387 2001-2002

employers' affidavits may burden domestic partners with financial obligations beyond those imposed on spouses. Frequently, the partners must certify that they "are jointly responsible for each other's common welfare and financial obligations."[48] Many domestic partners might be loath to make such a certification, fearing that it would be taken by third-party creditors and by courts as a commitment to be liable for each other's debts. (Spouses ordinarily are not responsible for each other's separate debts.[49]) On the other hand, the milder certification that domestic partners are jointly responsible for each other's common welfare, an obligation that *is* imposed on spouses, might offer solace to married employees who fear that domestic partners are given an

---

states with domestic partnership registries. Domestic partners in nonregistry states might have greater difficulty showing such evidence, but so would couples in a common law marriage. *See supra* note 36 and accompanying text.

In fact, the insistence on a domestic partnership affidavit is more likely to be prompted by a belief that domestic partnerships are somehow less consequential and enduring than marriages. For example, in 1989, when Dianne Feinstein, then the acting mayor of San Francisco, vetoed an early attempt to extend rather modest benefits to domestic partners, she explained her veto in these terms (in a letter to a member of the San Francisco Board of Supervisors): "'That San Francisco should be called upon to voyage into the unknown in terms of setting precedent for the entire nation for partnerships that may be *fleeting and totally vacant of any mutual sense of responsibility or caring* is, I believe, putting too much strain on our social fabric.'" Cynthia Gorney, *Making It Official: The Law & Live-Ins*, WASH. POST, July 5, 1989, at C1 (emphasis added). As to whether Mayor Feinstein's characterization—"fleeting"—is more applicable to domestic partnership than to marriage, it is worth noting that at the time she made her assertion, approximately one-half of all American marriages ended in divorce, see Teresa Castro Martin & Larry L. Bumpass, *Recent Trends in Marital Disruption*, 26 DEMOGRAPHY 37, 37 (1989), and the average duration of an American marriage was 9.6 years. Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 20 (1991).

It is also worth noting that in states that criminalize private homosexual acts, same-sex couples might be fearful of signing such an affidavit; and in those few states that still criminalize "cohabitation," even opposite-sex couples might be fearful.

48. Lotus Development Corporation, Affidavit of Spousal Equivalency, *supra* note 45; *see* University of Denver, Affidavit of Domestic Partnership (on file with author) ("[W]e have promised to each other that our financial resources and obligations will be jointly shared . . . ."). Rutgers University, in providing employees with same-sex domestic partner benefits, requires such employees to "have agreed in writing to be jointly responsible for each other's common welfare, living expenses and financial obligations." Cathleen Lewis, *Partner Benefits Still Face Doubts*, DAILY TARGUM (N.J.), Sept. 15, 1999, at 1. The University of Denver's program of providing benefits to employees' same-sex domestic partners requires the couple to confirm that "significant financial commitments have been made to each other." *University Offers Domestic Partner Benefits*, 22 Pens. & Ben. Rep. (BNA) 2339 (Oct. 23, 1995).

49. *See, e.g.*, N.J. STAT. ANN. §§ 37:2-10 to 2-15 (West 1968); UTAH CODE ANN. § 30-2-5(1)(b) (1998); *see also* N.Y. DOM. REL. LAW § 50 (McKinney 1999) ("Property . . . now owned by a married woman . . . shall not be . . . liable for [her husband's] debts.")

HeinOnline -- 76 Tul. L. Rev. 388 2001-2002

advantage, inasmuch as without such express contractual commitment, domestic partners are not responsible for each other's support.[50]

Some employers grant domestic partner benefits only to same-sex couples, "on the theory that [committed] opposite-sex [couples] have the option of marrying . . . while [committed] same-sex [couples] do not."[51] The legality of this employer practice was challenged in *Foray v. Bell Atlantic*,[52] where Paul Foray, an unmarried male Bell Atlantic employee who was denied benefits for his female domestic partner Jeanine Muntzner, claimed that such denial constituted sex discrimination prohibited by federal fair employment statutes.[53] Because Bell Atlantic *did* offer such benefits to same-sex domestic partners, Foray argued that had he been female, Bell Atlantic would

---

50. "In general, states have refused to recognize any support obligations [between] unmarried cohabitants; they have only divided property [upon termination of the cohabitation]." *See* Bowman & Cornish, *supra* note 14, at 1182.

51. Alice Rickel, *Extending Employee Benefits to Domestic Partners: Avoiding Legal Hurdles While Staying in Tune with the Changing Definition of the Family*, 16 WHITTIER L. REV. 737, 743 (1995) (quoting Robert J. Durst, II, Health Care Benefits: Why and How They Are Affected by Marital Status and/or Sexual Preference, KRM INFORMATION SERVICES, June 28, 1994); *see also, e.g.*, *UAW, Automakers Agree on Extending Health Benefits*, 27 Pens. & Ben. Rep. (BNA) 1433 (2000) (stating that the "Big Three" automakers will offer health care benefits to same-sex domestic partners of their employees); Itano, *supra* note 12, at 3 (reporting that Connecticut will offer domestic partner benefits to the same-sex domestic partners of state employees but not to opposite-sex domestic partners); *Washington Extends Health Care Benefits to State Workers' Same-Sex Partners*, 27 Pens. & Ben. Rep. (BNA) 1390 (2000) (same for Washington State). Responding to *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999), which held "that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law," the Vermont legislature created the institution of "civil union," available only to persons of the same sex. *See* VT. STAT. ANN. tit. 15, § 1201(2) (Supp. 2000). Parties to a Vermont civil union enjoy all the benefits and protections granted to married couples under Vermont law.

The phrase "opposite sex" is a genuine puzzler if one considers it afresh. How can one sex be the antithesis of another? "[Women] are 'the opposite sex'—(though why 'opposite' I do not know; what is the 'neighbouring sex'?). But the fundamental thing is that women are more like men than anything else in the world." Dorothy L. Sayers, *The Human-Not-Quite Human*, *in* ARE WOMEN HUMAN? 37, 37 (1971). Finding a good substitute for the term "opposite-sex couple," however, is not easy. "Heterosexual couple" does not quite work; because lesbians and gay men are permitted to marry (as long as their spouses are not of the same sex), the phrase might strike some readers as a reference to the sexual orientations of the respective spouses rather than to the heterogeneity of their genders. "Mixed-sex couple" is so very analogous to the gauche term "mixed-race couple" that I do not care to use it. And "different-sex couple" might strike readers as a comment on the couple's sexual practices. So I shall stick with "opposite-sex couple," though I should welcome suggestions for a substitute.

52. 56 F. Supp. 2d 327, 328-29 (S.D.N.Y. 1999).

53. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1994 & Supp. V 1999); Equal Pay Act, 29 U.S.C. §§ 206(d), 215a(1)-(2) (1994).

HeinOnline -- 76 Tul. L. Rev. 389 2001-2002

have provided benefits for his partner, and that, accordingly, he was denied a fringe benefit solely because of his sex.[54]

The court rejected this "but for" argument,[55] noting that the proper inquiry was whether Bell Atlantic's policy treated Paul Foray differently from a "similarly situated" woman.[56] And who was this hypothetical "similarly situated" woman?

> Plaintiff's claim that he was treated differently from similarly situated persons of the opposite sex depends on the assumption that a similarly situated woman is one who has a female domestic partner. However, a woman with a female domestic partner is *differently* situated from plaintiff in material respects because . . . she, unlike plaintiff, is unable to marry her partner.[57]

This observation sufficiently disposed of Foray's particular sex discrimination argument,[58] but had the court said nothing further, its

---

54. *Foray*, 56 F. Supp. 2d at 327-29.

55. *Id.* at 329-30. Interestingly, this "but for" argument was successful in *Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993), one of gay people's signal court victories. In that case, the Supreme Court of Hawaii held that the state's denial of marriage licenses to same-sex couples constituted discrimination "because of . . . sex" in violation of the state Constitution's Equal Protection Clause. *Id.* at 60-61. The court reached this conclusion because the state marriage policy conditioned the granting of marriage licenses on the sex of the applicant. *See id.* at 49-50.

56. *Foray*, 56 F. Supp. 2d at 329 (citing Shumway v. United Parcel Serv. Inc., 118 F.3d 60, 64 (2d Cir. 1997); DeCintio v. Westchester County Med. Ctr., 807 F.2d 304, 306 (2d Cir. 1986)).

57. *Foray*, 56 F. Supp. 2d at 330 (emphasis added).

58. Andrew Koppelman, in an elegant and compelling article, argues that discrimination against lesbians and gay men is a form of sex discrimination, not because antigay discrimination punishes conduct in a man that it permits in a woman, but rather because such discrimination is an instrument in the maintenance of a male-dominated gender hierarchy. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 216-19 (1994). Professor Koppelman states:

> The central outrage of [male-male sex] is that a man is reduced to the status of a woman, which is understood to be degrading. Just as miscegenation was threatening because it called into question the distinctive and superior status of being white, homosexuality is threatening because it calls into question the distinctive and superior status of being male.

Id. at 235-36. One study concluded:

> [T]he best single predictor of homophobia is a belief in the traditional family ideology, i.e., dominant father, submissive mother, and obedient children. The second best predictor of homophobia was found to be agreement with traditional beliefs about women, e.g., that it is worse for a woman to tell dirty jokes than it is for a man.

Stephen F. Morin & Ellen M. Garfinkle, *Male Homophobia*, 34 J. SOC. ISSUES 29, 31 (1978).

A good illustration of the correlation between homophobia and a preoccupation with gender roles is found in an Internet posting by one Norman Liebmann, who identifies himself as "a former television writer [for, among others,] Johnny Carson [and] Dean Martin," and who has posted an article on the Web entitled *Mincing Down the Aisle in - The New Vermont*,

HeinOnline -- 76 Tul. L. Rev. 390 2001-2002

holding easily could have been turned on its head; it could have been used to permit an employer to offer domestic partner benefits only to opposite-sex couples and not to same-sex couples. That is, if an employer gave a benefit to employee Paul's female domestic partner but not to employee Mary's female domestic partner, and if Mary complained that she was not being treated like the similarly situated Paul, the employer could defend itself by saying, "Paul is not similarly situated; unlike you, Mary, he *is* able to marry his domestic partner." Fortunately, the *Foray* court elaborated on its holding in such a way as to emphasize that Bell Atlantic's policy served in fact to remedy invidious discrimination.[59]

> A woman and her same-sex domestic partner, unlike plaintiff and Ms. Muntzner, will never be eligible for a host of benefits available to opposite-sex couples who are able to marry. Among such benefits, of course, are those extended to married couples under defendant's employee benefits plan. This difference in the ability to marry . . . is material in the context of a compensation plan which grants benefits to employees' chosen partners. [Bell Atlantic]'s policy of distinguishing between unmarried opposite-sex couples and unmarried same-sex couples reflects and *remedies differences between these persons* which are material in this particular context, and does not discriminate between similarly situated men and women.[60]

In other words, said the court, Bell Atlantic's policy produced a result similar to that which "fair employment" legislation might require.[61] The significance of this "fair employment" characterization will become clear shortly.

---

http://dadi.org/nl_vermt.htm (Dec. 31, 1999). The article is an attack on Vermont's then-proposed legislation recognizing same-sex civil unions. *See supra* note 51 and accompanying text. At the top of the article is a drawing showing a woman in warrior clothing, standing triumphantly with an upraised spear (get it?) over the supine body of a man. *See* Liebmann, *supra*. After lamenting the banishment of the word "fag" from cultured discourse, Mr. Liebmann goes on to make some sarcastic predictions of Vermont's future: predictions displaying considerable gender-nervousness. *See id.* For example, he predicts that the state will adopt "I Enjoy Being a Girl" as its state song. "[T]omcats [the feline kind] will prowl around wearing ballet slippers." "The most popular sexual position will be with both participants on the bottom." "Instead of adding flouride to Vermont's water they will lace it with estrogen." *Id.* I am not making this up.

59. That lesbians and gay men have been and continue to be the target of discriminatory laws and conduct is too obvious a point to require extensive substantiation here. *See* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000).

60. *Foray*, 56 F. Supp. 2d at 330 (emphasis added).

61. *See also* James M. Donovan, *An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Couples*, 8 L. & SEXUALITY 649 (1998) (recognizing that

HeinOnline -- 76 Tul. L. Rev. 391 2001-2002

II. THE BASIC ELEMENTS OF ERISA PREEMPTION[62]

A. *"Employee Benefit Plan": The Touchstone of ERISA Coverage*

When people refer to ERISA, generally they have in mind Title I of ERISA: a body of federal substantive law regulating most employee benefit plans in interstate commerce.[63] Employee benefit plans come in two flavors: pension plans and welfare plans. In the simplest terms, a pension plan provides retirement benefits,[64] and a

---

"fairness" does not always require that opposite-sex domestic partnerships be given the same benefits as same-sex domestic partnerships).

Recently, the United States Court of Appeals for the Seventh Circuit upheld, against a federal constitutional challenge, a Chicago city ordinance granting certain domestic partner benefits to the same-sex partners of city employees and not to opposite-sex domestic partners. *See* Irizarry v. Bd. of Educ., 251 F.3d 604, 610-11 (7th Cir. 2001). Applying a "rational basis" analysis, since "[h]eterosexuals cohabiting outside of marriage are not a [suspect] class," *id.* at 610, the court held that the public policy favoring marriage over cohabitation justified, as a constitutional matter, the city's refusal to grant domestic partner benefits to cohabitants who had the option of marrying, even where it granted such benefits to cohabitants who did not have the option of marrying. *Id.* at 607-09.

62. Oddly enough, the word "preemption" does not appear in the statute; ERISA speaks of "supersed[ing]" state laws, not preempting them. ERISA § 514(a), 29 U.S.C. § 1144(a) (1994). Indeed, Justice Stevens, dissenting in *District of Columbia v. Greater Washington Board of Trade*, argued that Congress's preference for "supersede" reveals much about the intended scope of ERISA section 514(a), but his suggestion has not been adopted, 506 U.S. 125, 136-37 (1992) (Stevens, J., dissenting). Courts and commentators speak routinely of ERISA "preemption."

63. Section 4(a) of ERISA provides:

> Except as provided in subsection (b) of this section, and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—
>
> (1) by any employer engaged in commerce [between a state and any place outside of that state] or in any industry or activity affecting [such] commerce; or
>
> (2) by any employee organization or organizations representing employees engaged in [such] commerce or in any industry or activity affecting [such] commerce; or
>
> (3) by both.

29 U.S.C. § 1003(a).

Section 4(b) of ERISA enumerates five categories of plans that are exempt from Title I coverage; the two most important categories are government-sponsored plans and church-sponsored plans. *Id.* § 1003(b)(1), (2). In addition, sections 201, 301, 401 of ERISA exempt other types of plans from some, but not all, of the requirements of Title I. *Id.* §§ 1051, 1081, 1101.

64. The term "pension plan" means

> any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond . . . .

ERISA § 3(2)(a), 29 U.S.C. § 1002(2)(A).

HeinOnline -- 76 Tul. L. Rev. 392 2001-2002

welfare plan provides other major fringe benefits, such as medical insurance.[65] An "employee benefit plan" is defined as a plan that is either a pension plan, a welfare plan, or both.[66]

The definition of employee benefit plan is the threshold question in any ERISA preemption matter, for ERISA preempts state laws only insofar as they relate to "employee benefit plan[s] described in section 4(a) ... and not exempt under section 4(b) ...."[67] If an employer provides a benefit through some program that is not an employee benefit plan, ERISA preemption will not apply; the program will be subject to state law, not ERISA. For example, "church plans,"—that is, plans maintained by tax-exempt religious establishments for the benefit of their employees and clergy—generally are exempt from ERISA coverage under section 4(b).[68] Consequently, church plans *are* subject to state laws, including state laws mandating domestic partner benefits, and will not be shielded by ERISA's preemption provision: a

---

65. The term "welfare plan" means

> any plan, fund, or program ... established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Id. § 3(1), 29 U.S.C. § 1002(1).

The reference to 29 U.S.C. § 186(c), which codified section 302(c) of the Taft-Hartley Act, is a reference more particularly to 29 U.S.C. § 186(c)(5), or § 302(c)(5) of the Taft-Hartley Act. Section 302(c)(5) "permits employers and unions to create employer-financed trust funds for the benefit of employees, [as] long as employees and employers are equally represented by the trustees of the funds," NLRB v. Amax Coal Co., 453 U.S. 322, 325 (1981) (quoting Section 302(c)(5) of the Act), and as long as the trust funds are used exclusively for the benefit of participating employees and their beneficiaries. *See generally*, Raymond Goetz, *Developing Federal Labor Law of Welfare and Pension Plans*, 55 CORNELL L. REV. 911, 929-30 (1969-70) (explaining that Congress's purpose was to prevent possible diversion of funds to labor unions or their leaders).

66. ERISA § 3(3), 29 U.S.C. § 1002(3).

67. *Id.* § 514(a), 29 U.S.C. § 1144(a).

68. *Id.* 4(b)(2), 29 U.S.C. § 1003(b)(2); *see also* I.R.C. § 414(e) (1994). I say "generally" because if the church plan is a pension plan, the plan administrator may elect, pursuant to I.R.C. § 410(d), to have the plan covered by certain provisions of the Internal Revenue Code governing qualified retirement plans, *see infra* note 226 and accompanying text, such as the provisions relating to plan termination insurance. *See* ERISA § 4021(b)(3), 29 U.S.C. § 1321(b)(3). And if the plan administrator makes that election, the plan *is* covered by Title I of ERISA. *Id.* § 4(b)(2), 29 U.S.C. § 1003(b)(2).

HeinOnline -- 76 Tul. L. Rev. 393 2001-2002

somewhat ironic result, inasmuch as some religious institutions are among the most conspicuous opponents of domestic partner benefits.[69]

Which employer-provided benefits do not give rise to or entail an employee benefit plan? The most common instances are benefits not enumerated in ERISA's definitions of welfare plan or pension plan. For example, current salary and wages are not among the benefits enumerated in the two definitions; accordingly, an employer's program of providing its employees with current salary and wages is not an employee benefit plan.[70] "Soft" benefits, such as bereavement leave and travel discounts, likewise fall outside ERISA's enumeration and therefore do not constitute employee benefit plans.[71] For this reason, the court in the *ATA* case held that San Francisco could, consistently with ERISA, require employers who contracted with the city to offer such soft benefits with respect to domestic partners.[72]

---

69. For example, Hiram Crawford, pastor of the Israel Methodist Community Church in Chicago, shouted as Chicago aldermen walked to their seats at a hearing on an ordinance to extend same-sex domestic partner benefits to the city's employees, "Anyone who takes the blood of holy communion and votes for this thing, I'm saying, the word of God says, 'They drink damnation to their soul.'" Robert Becker, *Suit Tests City's Same-Sex Partner Benefits*, CHI. TRIB., Apr. 19, 1997, at 1-5 (quotations omitted). Crawford later challenged Chicago's extension of domestic partner benefits to the city's employees in court; his challenge failed. Crawford v. City of Chicago, 710 N.E.2d 91, 93, 100 (Ill. App. Ct. 1999); *see also Baptist Group Calls for Boycott of Disney*, N.Y. TIMES, Nov. 17, 1995, at A18 (reporting that the Florida Baptist State Convention "has asked its one million members to boycott the Walt Disney Co.'s parks and products, saying Disney showed a lack of moral leadership by extending health insurance to the partners of homosexual workers"); Dana Milbank, *Bush Drops Rule on Hiring of Gays*, WASH. POST, July 11, 2001, at A1 (stating that the Salvation Army, a religious charitable organization, requested that the Administration issue a regulation exempting "government-funded religious charities from state and local laws barring workplace discrimination" against lesbians and gay men); Fran Spielman, *Archbishop to Meet Alderman*, CHI. SUN-TIMES, May 13, 1997, at 12 (discussing the opposition of the Chicago Roman Catholic Archdiocese to the extension of domestic partner benefits to city employees). As to whether the First Amendment requires religious institutions, in their role as employers, to be exempt from state-imposed requirements regarding same-sex domestic partner benefits, *see* Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189 (1999); David B. Cruz, Note, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. REV. 1176 (1994).

70. *See* Massachusetts v. Morash, 490 U.S. 107, 115 (1989); Murphy v. Inexco Oil Co., 611 F.2d 570, 575-76 (5th Cir. 1980).

71. For a brief explanation of the terms "hard" and "soft" benefits, *see supra* note 10 and accompanying text.

72. *See* 992 F. Supp. 1149, 1180 (N.D. Cal. 1998), *aff'd on other grounds*, 266 F.3d 1064 (9th Cir. 2001).

The court in the 1998 *ATA* case regarded bereavement leave benefits as non-ERISA benefits only if they were paid out of the employer's general assets, the implication being that bereavement leave benefits *would* be ERISA-covered benefits if they were paid by means of a specially administered "plan." *Id.* at 1174-75. This view of bereavement leave seems incorrect, inasmuch as bereavement leave is not one of the benefits enumerated in ERISA

HeinOnline -- 76 Tul. L. Rev. 394 2001-2002

The most troublesome element of the definition of employee benefit plan—certainly the most frequently litigated—is the requirement that the entity be a "plan." A brief account of courts' struggle to define "plan" will help to pinpoint the source of much ERISA preemption difficulty.[73] The United States Supreme Court has addressed this definitional issue on occasion, and addressed it skillfully,[74] but a United States Court of Appeals for the Eleventh Circuit opinion, *Donovan v. Dillingham*,[75] has proved more influential.

Dillingham defines "plan" in terms of four characteristics: "[A] 'plan, fund or program' under ERISA implies the existence of intended benefits, intended beneficiaries, a source of financing, and a procedure to apply for and collect benefits."[76] Although the *Dillingham* standard has been cited with approval in every circuit,[77] the case's "checklist" approach to defining the term is ultimately unsatisfactory.[78] While it may be true that every well-crafted plan possesses all four characteristics, it does not follow that all four are necessary to achieve

---

sections 3(1) and (2), 29 U.S.C. § 1002(1)-(2). That is, bereavement leave should be regarded as a non-ERISA benefit no matter how the benefit is furnished, and, indeed, in a later related case, the same district court characterized bereavement leave unqualifiedly as a "non-ERISA benefit." Air Transp. Ass'n of Am. v. City and County of San Francisco, No. C97-01763CW, 1999 U.S. Dist. LEXIS 8747, at *9 (N.D. Cal. May 27, 1999). Nonetheless, Department of Labor regulations provide some support for the court's 1998 holding that bereavement leave benefits are non-ERISA benefits only if paid from the employer's general assets. Specifically, the regulations exclude from the definition of "welfare plan" an employer's "[p]ayment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons . . . performs no duties . . . ." 29 C.F.R. § 2510.3-1(b)(3) (2000). This exclusionary language may faintly suggest, by negative implication, that such payments *would* constitute a welfare plan if they were paid from some source other than the employer's general assets. As a practical matter, though, it is unlikely that an employer who continues an employee's salary payments while the employee is on bereavement leave would make those payments from some fund other than the employer's general assets.

73. The statute itself is of no help here; its references to "plan" are "ultimately circular." Pegram v. Herdrich, 530 U.S. 211, 223 (2000). For example, ERISA defines "welfare plan" as "any *plan*, fund, or program . . . to the extent that such *plan*, fund, or program was established . . . for the purpose of . . . ." ERISA § 3(1), 29 U.S.C. § 1002(1) (emphasis added). And it defines "pension plan" as "any *plan*, fund, or program . . . to the extent that . . . such *plan*, fund, or program . . . provides . . . ." *Id.* § 3(2)(A), 29 U.S.C. § 1002(2)(A) (emphasis added).

74. *See, e.g.*, *Morash*, 490 U.S. at 114-21; Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 6-9 (1987).

75. 688 F.2d 1367 (11th Cir. 1982).

76. *Id.* at 1372.

77. Williams v. WCI Steel Co., 170 F.3d 598, 602 n.1 (6th Cir. 1999).

78. Indeed, one court remarked that "[t]here is no authoritative checklist that can be consulted to determine whether an employer's actions establish an ERISA plan." Demars v. CIGNA Corp., 173 F.3d 443, 446 (1st Cir. 1999) (quotations omitted) (quoting Belanger v. Wyman-Gordon Co., 71 F.3d 451, 455 (1st Cir. 1995)).

HeinOnline -- 76 Tul. L. Rev. 395 2001-2002

plan status. If a program is not a plan, it is not regulated by ERISA. Holding that a program must have all four *Dillingham* characteristics in order to constitute a "plan" would enable an employer to avoid ERISA regulation simply by designing its program haphazardly or vaguely: by failing to specify a benefit claims procedure, for example. Congress could not have intended that result.[79]

The Supreme Court's approach to defining "plan," though curiously less influential than *Dillingham*'s, is considerably sounder, in that the Court has defined the term with a view toward furthering ERISA's purposes, rather than toward fashioning an abstract dictionary definition. *Fort Halifax Packing Co. v. Coyne* held that an employer's practice of paying one-time severance benefits from the employer's general assets was not a "plan" and, therefore, that a Maine statute mandating such severance benefits was not preempted by ERISA.[80] The *Fort Halifax* Court observed, in a passage worth quoting at length:

> Congress intended pre-emption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however, with respect to *benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation.* It is for this reason that Congress pre-empted state laws relating to *plans*, rather than simply to *benefits.* Only a plan embodies a set of administrative practices vulnerable to the burden that would be imposed by a patchwork scheme of regulation.

---

79. Dean Jay Conison states:

> The question to be answered is that of what employer activities ERISA regulates. But why should it be thought to follow, from the mere informality or sloppiness of an employer's activities, that they are not ones ERISA seeks to regulate? If a source of financing cannot be identified for an employer program relating to payment of benefits, then *either* the program is not a plan *or* it is a plan in violation of ERISA. The *Dillingham* test, without any attempt at justification, simply assumes the former. [Whereas in fact,] . . . the failure of a practice to satisfy one or more of the *Dillingham* criteria may simply mean that it *is* a plan, but one that fails to comply with ERISA.
>
> . . . .
>
> Curiously, the *Dillingham* court itself recognized that ERISA must be construed so as to apply to informal unwritten plans. As the court explained: "[B]ecause the policy of ERISA is to safeguard the well-being and security of working men and women and to apprise them of their rights and obligations under any employee benefit plan . . . it would be incongruous for persons establishing or maintaining informal or unwritten employee benefit plans . . . to circumvent the Act merely because an administrator or other fiduciary failed to satisfy reporting or fiduciary standards.["]

Jay Conison, *Foundations of the Common Law of Plans*, 41 DEPAUL L. REV. 575, 648 & n.293 (1992) (quoting *Dillingham*, 688 F.2d at 1367).

80. 482 U.S. 1 (1987).

HeinOnline -- 76 Tul. L. Rev. 396 2001-2002

> The Maine statute neither establishes, nor requires an employer to maintain, an employee benefit *plan*. The requirement of a one-time, lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation. The employer assumes no responsibility to pay benefits on a regular basis, and thus faces no periodic demands on its assets that create a need for financial coordination and control.[81]

Observe that the Court in *Fort Halifax* focused merely on whether there was a *need* for an ongoing administrative scheme, unlike the court in *Dillingham*, which focused unsatisfactorily on whether an ongoing administrative scheme existed in fact.[82]

The Supreme Court continued its purposive approach to the definitional task two years later in *Massachusetts v. Morash*, which involved a Massachusetts statute requiring employers to pay a discharged employee her unused vacation pay on the date of discharge.[83] Like the Maine statute in *Fort Halifax*, the Massachusetts statute in *Morash* imposed a "requirement of a one-time, lump-sum payment triggered by a single event."[84] And like the *Fort Halifax* Court, the *Morash* Court held that the benefit in question was not a "plan" and, therefore, that the state statute requiring such a benefit was not preempted by ERISA.[85] But while the Maine statute mandated a type of benefit not enumerated in ERISA's definition of welfare plan (severance benefits), the Massachusetts statute mandated a type of benefit that *is* enumerated in ERISA (vacation benefits).[86] Consequently, the *Morash* approach to the definitional issue had to differ from the *Fort Halifax* approach. While *Fort Halifax* looked to the purpose of the preemption provision ("to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations"[87]), *Morash* looked to the purpose of ERISA: "to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits."[88] With that purpose in mind, the *Morash* Court held that although vacation benefits *can* be provided through a welfare plan, the arrangement at which the Massachusetts statute was directed was *not* a

---

81. *Id.* at 11-12 (first emphasis added).
82. *Id.*; *Dillingham*, 688 F.2d at 1373-76.
83. 490 U.S. 107 (1989).
84. *Fort Halifax*, 482 U.S. at 12.
85. *Morash*, 490 U.S. at 120-21.
86. *See supra* note 65 and accompanying text.
87. 482 U.S. at 11.
88. 490 U.S. at 112.

HeinOnline -- 76 Tul. L. Rev. 397 2001-2002

plan, inasmuch as the arrangement created no risk of the kind of abuse that ERISA was designed to prevent.[89]

The *Morash* Court states that

> [i]n enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds. To that end, it established extensive reporting, disclosure, and fiduciary duty requirements to insure against the possibility that the employee's expectation of the benefit would be defeated through poor management by the plan administrator. Because ordinary vacation payments are typically fixed, due at known times, and do not depend on contingencies outside the employee's control, they present none of the risks that ERISA is intended to address. If there is a danger of defeated expectations, it is no different from the danger of defeated expectations of wages for services performed—a danger Congress chose not to regulate in ERISA . . . .
>
> [When Congress included a reference to vacation plans in its definition of "welfare plan," it had in mind only] those vacation benefit funds . . . in which either the employee's right to a benefit is contingent upon some future occurrence or the employee bears a risk different from his ordinary employment risk.[90]

This pair of Supreme Court cases highlights the fundamental anomaly underlying the ERISA preemption problem: a troubling inconsistency within ERISA itself. The Court in *Morash* was quite correct in noting that ERISA as a whole was enacted to protect employees,[91] but the *Fort Halifax* Court was also correct in noting that the ERISA preemption provision was enacted to protect employers.[92] A search through all the ERISA preemption cases reveals not one case where it was an employee who was relying on ERISA preemption to shield him from an employer-friendly state law. The cases are legion, however, in which an employer relied on ERISA preemption to shield it from an employee-friendly state law. In *Fort Halifax*, for example, an employer sought (albeit unsuccessfully) to use ERISA preemption to avoid paying state-mandated severance benefits,[93] and in *Ingersoll-Rand Co. v. McClendon*, an employer successfully used ERISA preemption to block an employee's state-law wrongful discharge

89. *Id.* at 120-21.

90. *Id.* at 115-16 (footnote and internal citations omitted).

91. *See supra* note 90 and accompanying text.

92. *See supra* notes 81, 87 and accompanying text. The preemption provision also benefited organized labor. *See infra* note 186 and accompanying text.

93. 482 U.S. at 1.

HeinOnline -- 76 Tul. L. Rev. 398 2001-2002

claim.[94] Congress's insertion of a pro-employer provision in the midst of this otherwise pro-employee statutory regime has often had the unintended consequence of defeating the expectations of employees who had looked upon ERISA as a shield against employer arrogations.

B. The Statutory Preemption Language

ERISA's employer-friendly preemption provision begins with a deceptively simple declaration in section 514(a): "Except as provided in subsection (b) of this section, the provisions of this [Title] . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) . . . and not exempt under section 4(b) . . . ."[95]

The obvious source of trouble in section 514(a) is that elastic phrase "relate to." Because "everything is related to everything else,"[96] there is potentially no limit to ERISA's preemptive reach. Indeed that reach has been characterized by the Supreme Court at various times as "expansive,"[97] "broad,"[98] and even "conspicuous for its breadth."[99]

Section 514 does contain a number of important exceptions to the preemptive rule of subsection (a). For example, a state's "generally applicable criminal law[s]" are not preempted.[100] Could a state avoid ERISA preemption with respect to its antidiscrimination legislation by

---

94. 498 U.S. 133, 138-42 (1990); *see also* Shaw v. Delta Air Lines, 463 U.S. 85, 100-09 (1983) (holding that an employer could use ERISA preemption to avoid paying some state-mandated pregnancy benefits); Simas v. Quaker Fabric Corp. of Fall River, 6 F.3d 849, 856 (1st Cir. 1993) (holding that an employer could use ERISA preemption to avoid a state statute mandating "tin parachute" benefits). *But see* Lettes v. Kinam Gold Inc., No. 00-1057, 2001 U.S. App. LEXIS 949, at *14 (10th Cir. Jan. 23, 2001), *cert. denied*, 121 S. Ct. 2551 (2001) (holding that an employer could use ERISA preemption to avoid a state statute mandating "golden parachute" benefits). And even where ERISA creates a cause of action analogous to the preempted state cause of action, the ERISA remedies may be far narrower than state remedies; punitive damages, for instance, are unlikely to be available under ERISA. *See, e.g.*, Nero v. Indus. Molding Corp., 167 F.3d 921, 931-32 (5th Cir. 1999); Zimmerman v. Sloss Equip., Inc., 72 F.3d 822, 828 (10th Cir. 1995).

95. ERISA § 514(a), 29 U.S.C. § 1144(a) (1994). For a brief discussion of which plans are described in section 4(a) and which are exempt under section 4(b), see *supra* note 63 and accompanying text. For the purpose of this title, "[t]he term 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either," ERISA § 514(c)(2), 29 U.S.C. § 1144(c)(2), and the term "State law" refers not only to statutes, but also to all "decisions, rules, regulations, or other State action having the effect of law." *Id.* § 514(c)(1), 29 U.S.C. § 1144(c)(1).

96. Cal. Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A., 519 U.S. 316, 335 (1997) (Scalia, J., concurring).

97. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987).

98. Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985).

99. FMC Corp. v. Holliday, 498 U.S. 52, 59 (1990).

100. ERISA § 514(b)(4), 29 U.S.C. § 1144(b)(4).

HeinOnline -- 76 Tul. L. Rev. 399 2001-2002

framing the legislation as a criminal statute: criminalizing an employer's denial of domestic partner benefits if the employer grants spousal benefits? The ERISA exception applies only to "generally applicable" criminal laws, a phrase suggesting laws against larceny or embezzlement, rather than laws prohibiting acts peculiarly associated with employee benefit plans.[101] At least one court, however, has held that even a state criminal law directed specifically at employee benefit plans would satisfy the "generally applicable" requirement (and therefore survive preemption) if the law applied to all employers.[102] But this exception for criminal statutes does not provide a satisfactory means of protecting state fair employment laws from ERISA preemption, because the criminalization of employment discrimination would have far-reaching, and probably undesirable, consequences.[103]

The statutory exception for state laws "regulat[ing] insurance,"[104] often referred to as the Saving Clause, has commanded more attention. Insurance companies and policies have traditionally been subject to state, rather than federal, regulation. This ERISA exception preserves Congress's policy of leaving such regulation in state hands.[105] But the existence and popularity of so-called "self-insured" plans clouds the concept of insurance considerably.

A self-insured plan is an employee benefit plan providing medical or similar benefits, where the employer, rather than a health maintenance organization (HMO) or health insurance company, bears the risk of high claims.[106] An employer maintaining a self-insured plan

---

101. *See* Aloha Airlines, Inc. v. Ahue, 12 F.3d 1498, 1506 (9th Cir. 1993); Sforza v. Kenco Constr. Contracting, Inc., 674 F. Supp. 1493, 1494 (D. Conn. 1986).

102. *See* Goldstein v. Mangano, 417 N.Y.S.2d 368, 375 (N.Y. Civ. Ct. 1978). A federal district court has also declared that an Illinois statute that criminalized an employer's failure to contribute to an employee benefit plan was not preempted by ERISA. Upholsterer's Int'l Union Health & Welfare Fund Trs. v. Pontiac Furniture, Inc., 647 F. Supp. 1053, 1056 (C.D. Ill. 1986). *But cf.*, *Sforza*, 674 F. Supp. at 1494.

103. For a discussion of the inadequacies of France's criminalization of racial discrimination, see Donna M. Gitter, Comment, *French Criminalization of Racial Employment Discrimination Compared to the Imposition of Civil Penalties in the United States*, 15 COMP. LAB. L.J. 488, 505-20 (1993). Ms. Gitter discusses the inadequacies of criminal penalties from the point of view of a victim seeking redress, rather than the question whether intentional discrimination involves what U.S. law generally regards as criminal intent. *See id.*

104. "Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A).

105. *See* Daniel M. Fox & Daniel C. Schaffer, *Semi-Preemption in ERISA: Legislative Process and Health Policy*, 7 AM. J. TAX POL'Y, 47, 50 (1988).

106. A 1997 study of more than 8000 employers in seven states (Colorado, Florida, Minnesota, New York, Oregon, Vermont, and Washington) found that 13% of the surveyed

HeinOnline -- 76 Tul. L. Rev. 400 2001-2002

may engage an insurance company to review and process claims for benefits, but the dollars used to pay those claims will come out of the employer's pocket, not the insurer's.[107] Does a self-insured employee benefit plan constitute "insurance," in which case it is subject to state law; or is it a plan, in which case state law is preempted by ERISA, and the plan is subject to federal law (or no law at all)?[108]

In the years before ERISA's enactment, states rarely attempted to subject self-insured plans to their insurance laws, although such plans, as risk-spreaders, do arguably act as insurers.[109] In the early 1970s, a Missouri circuit court held self-funded medical benefit plans to be insurance companies for purposes of state regulation; the court accordingly imposed a $185 million penalty on Monsanto Corporation

---

employers had self-insured plans. M. Susan Marquis & Stephen H. Long, *Recent Trends in Self-Insured Employer Health Plans*, HEALTH AFF., May/June 1999, at 161, 161-63. Of those employers with at least 500 employees, 56% were self-insured. *Id.* at 163. "The likelihood of being in a self-insured plan rises strongly as firm size increases." *Id.* Troy Paredes, citing earlier studies, quotes higher figures for self-insured coverage. Troy Paredes, Note, *Stop-Loss Insurance, State Regulation, and ERISA: Defining the Scope of Federal Preemption*, 34 HARV. J. ON LEGIS. 233, 234 (1997).

107. Some employers maintaining self-insured health plans purchase so-called stop-loss insurance policies as protection against unexpectedly high levels of claims. Whenever the employer becomes obligated under its plan to pay benefit claims in excess of a designated "attachment point," the stop-loss insurer covers the excess. Sometimes the stop-loss policy expresses the attachment point as an aggregate sum (e.g., claims totaling more than $2,000,000 in any calendar year) and sometimes as a per-employee sum (e.g., claims for any employee amounting to more than $20,000 in any calendar year). "[O]ver 70% of otherwise self-[insured] plans are covered by some form of stop-loss insurance." Paredes, *supra* note 106, at 235 (citing A. FOSTER HIGGINS & CO., FOSTER HIGGINS HEALTH CARE BENEFITS SURVEY 19 (1992)).

108. If ERISA contains a substantive rule corresponding to the preempted state rule, then the plan will be governed by that federal rule. Frequently, however, there is no corresponding federal rule, in which case ERISA's preemption of state law begets a "regulatory vacuum." *See, e.g.*, Fox & Schaffer, *supra* note 105, at 48. When confronting such a vacuum, courts may endeavor to fill it by fashioning a federal common law rule, sometimes using the preempted state rule as a model. *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987) (referring to the "expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop"); Branch v. G. Bernd Co., 955 F.2d 1574, 1580 (11th Cir. 1992) ("While ERISA ... preempt[s] state law, Congress has authorized federal courts to create federal common law ...."); *see generally* Jeffrey G. Sherman, *Spendthrift Trusts and Employee Pensions: The Problem of Creditors' Rights*, 55 IND. L.J. 247, 257 (1980) (suggesting that it was Congress's intent to have federal courts create common law in this area). Often, however, courts decline to fill the vacuum, on the ground that such action is Congress's responsibility. *See, e.g.*, Corp. Health Ins., Inc. v. Tex. Dep't of Ins., 12 F. Supp. 2d 597, 616 n.7 (S.D. Tex. 1998) ("If Congress wants the American citizens to have access to adequate health care, then Congress must accept its responsibility to define the scope of ERISA preemption and to enact legislation that will ensure every patient has access to that care.").

109. Jay Conison, *ERISA and the Language of Preemption*, 72 WASH. U. L.Q. 619, 648 (1994).

HeinOnline -- 76 Tul. L. Rev. 401 2001-2002

under state law for "operating an insurance company without a license."[110] This decision moved Congress to act to protect the federal regulatory scheme that was to become ERISA.[111] The protection is found in the so-called Deemer Clause, which declares that for purposes of the provision saving state insurance laws from preemption, "Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company . . . or to be engaged in the business of insurance . . . ."[112]

The case of *Metropolitan Life Insurance Co. v. Massachusetts* presents a classic application of the Deemer Clause.[113] The Commonwealth of Massachusetts had enacted a statute mandating certain minimum mental health benefits for Massachusetts residents insured under general insurance policies, accident or sickness insurance policies, or employee health care plans covering hospital and surgical expenses.[114] In a suit brought by Metropolitan Life to have the Massachusetts statute invalidated on ERISA preemption grounds, the Supreme Court distinguished between self-insured employee benefit plans and insurance contracts purchased for employee benefit plans.[115] With regard to the latter, the Court held that the Massachusetts statute was *not* preempted, inasmuch as the statute "regulate[d] insurance" within the meaning of the ERISA Section 514(b)(2)(A) Saving Clause.[116] But with regard to the former, the Court held (by implication) that the statute was preempted, inasmuch as the Deemer Clause prevented the state from availing itself of the insurance exception.[117]

Thus, a state may do indirectly what it may not do directly. The state may require insurance companies to offer mental health benefits in the insurance products that they sell to insured employee benefit plans; but the state may not require self-insured plans to offer such benefits themselves.[118] "We are aware," said the Court in *Metropolitan Life*,

---

110. *Id.*

111. In fact, the Missouri circuit court's judgment was reversed three months after ERISA's enactment. *See* State *ex rel.* Farmer v. Monsanto Co., 517 S.W.2d 129, 133 (Mo. 1974).

112. ERISA § 514(b)(2)(B); 29 U.S.C. § 1144(b)(2)(B) (1994).

113. 471 U.S. 724 (1985).

114. MASS. ANN. LAWS ch. 175, § 47B (Law Co-op 1997).

115. *Metro. Life Ins.*, 471 U.S. at 758.

116. *Id.*

117. *Id.* at 740-41; *see also* FMC Corp. v. Holliday, 498 U.S. 52 (1990).

118. Stop-loss insurance, *see supra* note 107 and accompanying text, has the potential for enabling an employer to enjoy simultaneously the protection of insurance coverage and

HeinOnline -- 76 Tul. L. Rev. 402 2001-2002

> that our decision results in a distinction between insured and uninsured [*i.e.*, self-insured] plans, leaving the former open to indirect [state] regulation while the latter are not. By so doing we merely give life to a distinction created by Congress in the 'deemer clause,' a distinction Congress is aware of and one it has chosen not to alter.[119]

In other words, thanks to the Saving Clause, a state could require health insurance policies to provide domestic partner coverage to the same extent they provide spousal coverage, and any employee benefit plan that purchased such policies would perforce offer its participants these domestic partner benefits. But if an employer chose to self-insure, ERISA would, because of the Deemer Clause, preempt any state requirement regarding the granting of domestic partner benefits. Accordingly, an argument that ERISA does not preempt state laws mandating domestic partner benefits cannot rely on the statutory exceptions noted so far, but must instead confront the basic rule of ERISA section 514(a): that all state laws that "relate to" employee benefit plans are preempted.

III. WHY ERISA DOES NOT PREEMPT STATE DOMESTIC PARTNERSHIP LAWS

Suppose an employer has only eight employees—seven men and one woman—and adopts a pension plan covering only the males. The excluded female employee has no remedy under Title VII of the Federal Civil Rights Act because the Act applies only to employers

---

the benefit of ERISA preemption for its self-insured health plan. If the attachment point under a stop-loss policy is sufficiently low, the employer in reality bears little risk; the main risk is borne by the insurer. Is a plan considered self-insured for purposes of ERISA preemption (i.e., is the plan exempt from state insurance regulation) if the employer is covered by a stop-loss policy with a low attachment point? The United States Court of Appeals for the Fourth Circuit answered this question in the negative. Am. Med. Sec., Inc. v. Bartlett, 111 F.3d 358, 360 (4th Cir. 1997). The Maryland legislature was concerned that the proliferation of stop-loss policies with low attachment points was allowing employers to evade state regulation by insisting that their plans were self-insured, even though in reality the stop-loss insurance that they purchased transferred the principal risks to insurance companies. To prevent what it regarded as a subterfuge, Maryland amended its laws to require stop-loss policies issued to employee benefit plans to provide certain mandated health benefits if the policy's attachment point was below $10,000 (i.e., $10,000 of benefits paid to any single beneficiary annually). Because the purpose and effect of the Maryland statute was "to force state-mandated health benefits on self-funded ERISA plans when they purchase . . . stop-loss insurance," the court held that ERISA preempted the Maryland statute. *Id.* at 360. Most courts that have addressed this issue agree with the *Bartlett* holding that self-insured plans entailing stop-loss insurance are nonetheless insulated by ERISA preemption from the reach of state law, but a few courts disagree. *See* Paredes, *supra* note 106, at 256-59.

119. *Metro. Life Ins.*, 471 U.S. at 747.

HeinOnline -- 76 Tul. L. Rev. 403 2001-2002

with fifteen or more employees.[120] But suppose the employer's male-only program violates the state's civil rights law. Is it conceivable that a court would hold that ERISA preempts the state's civil rights law and that the female employee is therefore without a remedy? Those happy souls who have not studied ERISA must find it unthinkable that courts would deny such a plaintiff her state remedies for employment discrimination, yet courts have held ERISA preemption to be so broad as to require that very result.[121] I submit that any statutory interpretation leading to such an unpalatable result ought to be reexamined closely.

A. "Relate to": ERISA's Sweeping Command

The starting point for any discussion of ERISA's effect on state fair employment laws must be *Shaw v. Delta Air Lines, Inc.*: the 1983 Supreme Court case that calls for that unpalatable, discriminatory result.[122] The case arose at a time when federal law did not prohibit employment discrimination on the basis of pregnancy.[123] But New York State's Human Rights Law *did*, and it required employers with disability plans to provide the same benefits for pregnancy as for any other nonoccupational disability.[124] Delta Air Lines, seeking to avoid offering the pregnancy benefit in its welfare plans, claimed that ERISA preempted the state Human Rights Law.[125]

---

120. 42 U.S.C. § 2000e(b) (1994); *see, e.g.*, Yerdon v. Henry, 91 F.3d 370, 375-77 (2d Cir. 1996); Burke v. Friedman, 556 F.2d 867, 870 (7th Cir. 1977).

121. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 108-09 (1983).

122. *Id.* at 85. Justice Blackmun wrote the opinion. Some seven years later, in a case involving federal nuclear regulation, rather than employee benefits, Justice Blackmun opined that when a federal statute, such as ERISA, contains an express preemption clause, "the courts' task [in determining the extent to which Congress intended to preempt state law] is an easy one." English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990). In view of the huge volume of litigation generated by ERISA § 514(a), Justice Blackmun's characterization of the task as "easy" seems wildly inaccurate. Perhaps he was lulled into complacency by the Court's unanimity in each of the first five ERISA preemption cases to reach it. *See* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 67 (1987); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987); *Metro. Life Ins.*, 471 U.S. at 758; *Shaw*, 463 U.S. at 108-09; Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 526 (1981). Not until June 1, 1997, did an ERISA preemption matter divide the Court. *See* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) (5-4 decision).

123. *See Shaw*, 463 U.S. at 88-89. The Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (1994)), which makes employment discrimination based on pregnancy unlawful under Title VII of the Civil Rights Act of 1964, was enacted after *Shaw* arose. 463 U.S. at 85.

124. Brooklyn Union Gas. Co. v. N.Y. State Human Rights Appeal Bd., 359 N.E.2d 393, 395 (N.Y. 1976) (interpreting N.Y. EXEC. LAW §§ 290-301 (McKinney 2001).

125. *Shaw*, 463 U.S. at 92. The case also involved another New York State statute, N.Y. WORK. COMP. LAW §§ 200-242 (McKinney 1994), but because the statute implicated a

HeinOnline -- 76 Tul. L. Rev. 404 2001-2002

Assuming that Congress is constitutionally authorized to preempt state law with respect to a given subject area,[126] the question whether and to what extent Congress has in fact exercised that authority in a particular case is fundamentally one of congressional intent.[127] The Court in *Shaw* began its analysis, as so many subsequent courts have done, with the judgment that Congress's intent in enacting ERISA's express preemption clause in section 514(a) was entirely captured by its choice of the phrase "relate to,"[128] and that the phrase had a plain, acontextual meaning.[129] That is, the Court saw the preemption problem as purely definitional; if New York's Human Rights Law "relate[d] to" employers' disability plans, then the law was preempted—end of discussion (unless a specific statutory exception could be found).[130] And, perhaps less defensibly, the Court assumed that the way to resolve the definitional problem was simply by consulting a dictionary rather than by considering Congress's legislative purposes.[131]

Relying simply on Black's Law Dictionary, the *Shaw* Court held that a state law "relates to" an employee benefit plan "if it has a connection with or reference to such a plan."[132] From the point of view

---

narrow exception to ERISA's definition of employee benefit plan, *Shaw*'s discussion of this other statute is not relevant to our inquiry. 463 U.S. at 106-07.

126. *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 767 (1994).

127. *See* Retail Clerks Int'l Ass'n. v. Schermerhorn, 375 U.S. 96, 103 (1963) (holding that congressional intent is the "ultimate touchstone" of any federal preemption inquiry); Aetna Life Ins. Co. v. Borges, 869 F.2d 142, 144 (2d Cir. 1989).

128. *See supra* notes 95-98 and accompanying text.

129. For an elaborate criticism of this acontextual interpretation of "relate to," see Conison, *supra* note 109, at 624-28.

130. *Shaw*, 463 U.S. at 96.

131. *See id.* at 97 n.16 (relying on BLACK'S LAW DICTIONARY 1158 (5th ed. 1979)). A later decision hardly clarified matters when the Court observed that the phrase "relate to" was to be given its "broad, common-sense meaning." Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985). In a more recent ERISA preemption case, the Court once again relied exclusively on Black's Law Dictionary for its construction of the phrase "relate to." *See* District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125, 129 (1992). Happily, when the Court was required to define "plan" for ERISA preemption purposes, it considered the purposes of ERISA, rather than simply the dictionary definition. *See* Massachusetts v. Morash, 490 U.S. 107, 114-15 (1989); Fort Halifax Packing Co. v. Coyne 482 U.S. 1, 8 (1987). These cases are discussed earlier in the text. *See supra* notes 80-90 and accompanying text. A comprehensive and endlessly fascinating study and criticism of the Court's reliance on dictionaries as sources of dispositive authority can be found in Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227 (1999); *see also* David Mellinkoff, *The Myth of Precision and the Law Dictionary*, 31 UCLA L. REV. 423 (1983) ("[T]he language of the law is more peculiar than precise, and it is important not to confuse the epithets.") (quotations omitted)).

132. *Shaw*, 463 U.S. at 96-97.

HeinOnline -- 76 Tul. L. Rev. 405 2001-2002

of clarity and helpfulness, "connection with or reference to" is hardly an advance on "relate to"; it still offers no limiting principle whereby one can distinguish a state law permitting a plan administrator's office landlord to sue in state court for back rent owed by the plan (presumably not preempted by ERISA)[133] from a state law capping the fees that a plan administrator may charge for his services (presumably preempted). Indeed, the Court subsequently concluded that "a state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect."[134]

In view of *Shaw*'s reliance on the dictionary, it should come as no surprise that the Court concluded—indeed, had "no difficulty in concluding"—that New York State's Human Rights Law "related to" employee benefit plans (i.e., Delta Air Lines' welfare plans providing disability benefits) within the meaning of ERISA § 514(a),[135] and was therefore preempted unless some other provision of ERISA saved it. In fact, another provision of ERISA, section 514(d), *did* save it, but only to a very limited extent.

B. *The Effect of ERISA Preemption on State Fair Employment Laws*

Section 514(d) of ERISA provides that the general preemption rule of section 514(a) shall not "be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States."[136] *Shaw* held that inasmuch as Title VII of the Civil Rights Act of 1964 expressly envisions joint state and federal enforcement of the federal fair employment standards, Title VII would be "impaired" (within the meaning of ERISA section 514(d)) if state fair employment laws were

133. In a footnote, the *Shaw* Court remarked that a state law affecting employee benefit plans only in a "tenuous, remote, or peripheral" manner does not "relate to" such plans and therefore is not preempted by ERISA. *Id.* at 100 n.21. But this "tenuous, remote, or peripheral" formula is merely another way of stating the conclusion that the state law is not preempted; the formula hardly serves as a tool for distinguishing preempted laws from those that are not preempted. Indeed, the example that the Court cites of a state law whose effect is too remote to "relate to" a plan—"state garnishment of a spouse's pension income to enforce alimony and support orders"—seems very clearly to "relate to" the plan, if this determination is to be based on the dictionary definition of "relate." *Id.* In order to conclude that the garnishment law is not preempted, one must consider ERISA's purposes, not merely its literal language; but *Shaw* focused only on the language.

134. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139 (1990) (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987)).

135. *Shaw*, 463 U.S. at 96. Later in that case, the Court observed that the case "plainly does not present [even] a borderline question." *Id.* at 100 n.21.

136. 29 U.S.C. § 1144(d) (1994).

HeinOnline -- 76 Tul. L. Rev. 406 2001-2002

held to be preempted by ERISA.[137] But—and here was the crucial point—*Shaw* declared that the joint state and federal enforcement scheme of Title VII was envisioned only with respect to discriminatory practices prohibited by Title VII.[138] *Shaw* stated that if a state's fair employment law prohibited an action permitted by Title VII, then no joint state and federal enforcement scheme was contemplated by Congress with respect to that discriminatory action, and therefore the preemption of that state prohibition by ERISA would not "impair" Title VII. Put another way, if a state law purports to prohibit a discriminatory employee benefit plan practice that is also prohibited by Title VII of the Civil Rights Act of 1964, then that state law is not preempted by ERISA. But if a state law purports to prohibit a discriminatory employee benefit plan practice *not* prohibited by Title VII, then that state law *is* preempted by ERISA.[139] Thus, because New York State law prohibited an act that Title VII allowed (pregnancy discrimination), the Court held that the New York law was preempted insofar as the state law applied to employee benefit plans. Specifically, the state law was preempted insofar as it required employers to treat pregnancy like any other nonoccupational disability under their

---

137. 463 U.S. at 100-02. The *Shaw* Court stated:

> When an employment practice prohibited by Title VII is alleged to have occurred in a State or locality which prohibits the practice and has established an agency to enforce that prohibition, the Equal Employment Opportunity Commission (EEOC) refers the charges to the state agency. The EEOC may not actively process the charges "before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated."
>
> Given the importance of state fair employment laws to the federal enforcement scheme, pre-emption of the [New York State] Human Rights Law would impair Title VII to the extent that the Human Rights Law provides a means of enforcing Title VII's commands. Before the enactment of ERISA, an employee claiming discrimination in connection with a benefit plan would have had his complaint referred to the New York State Division of Human Rights. If ERISA were interpreted to pre-empt the Human Rights Law entirely with respect to covered benefit plans, the State no longer could prohibit the challenged employment practice and the state agency no longer would be authorized to grant relief. The EEOC thus would be unable to refer the claim to the state agency. This would frustrate the goal of encouraging joint state/federal enforcement of Title VII; an employee's only remedies for discrimination prohibited by Title VII in ERISA plans would be federal ones. Such a disruption of the enforcement scheme contemplated by Title VII would, in the words of [ERISA] § 514(d), "modify" and "impair" federal law.

Id. at 101-02 (citations omitted).

138. *Id.* at 103.

139. *See id.*

HeinOnline -- 76 Tul. L. Rev. 407 2001-2002

welfare plans prior to the effective date of the Federal Pregnancy Discrimination Act.[140]

Because Title VII does not prohibit employers with fewer than fifteen employees from discriminating on the basis of sex,[141] *Shaw*'s precedential authority would leave the female employee in the hypothetical that began Part III of this Article without a remedy as a result of ERISA preemption. That *Shaw* would lead to such an unthinkable result strongly suggests that *Shaw* was incorrectly decided (this point will be discussed later in this Article). More directly relevant to our purposes here, *Shaw* would also hold that because Title VII does not prohibit employment discrimination based on sexual orientation,[142] any state attempt to ban such discrimination with respect to employee benefit plans is likewise preempted by ERISA.

Can the gender case be distinguished from the sexual orientation case? That is, because Title VII does prohibit larger employers from discriminating on the basis of gender, but does not prohibit anyone from discriminating on the basis of sexual orientation, can one soundly argue that *Shaw* would preempt a state's plan-directed ban on sexual orientation discrimination but would not preempt a state's plan-directed ban on gender discrimination by employers with fewer than fifteen employees? In a word, no; the two bans are indistinguishable under *Shaw*. In order to distinguish the two bans, one would have to read *Shaw* as holding that state laws prohibiting discrimination *of a type prohibited by Title VII* (e.g., gender discrimination or race discrimination) are not preempted and that accordingly the state statute in our eight-employee hypothetical would not be preempted inasmuch as Title VII likewise prohibits gender discrimination. But this is not what *Shaw* holds. *Shaw* holds that the only type of plan-directed state discrimination prohibition that would survive ERISA preemption is a state prohibition of acts that likewise violate Title VII. Under *Shaw*, it is only when an act simultaneously violates both state and federal law that the contemplated joint state and federal jurisdiction, which

140. "Of course, § 514(a) pre-empts state laws only insofar as they relate to plans covered by ERISA. The Human Rights Law, for example, would be unaffected insofar as it prohibits [pregnancy] discrimination in hiring, promotion, salary, and the like." *Id.* at 97 n.17. After the effective date of the Pregnancy Discrimination Act, ERISA would no longer preempt New York's Human Rights Law.

141. *See supra* note 120 and accompanying text.

142. Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979); Blum v. Gulf Oil Corp., 597 F.2d 936, 937-38 (5th Cir. 1979); Bibby v. Phila. Coca Cola Bottling Co., 85 F. Supp. 2d 509, 514-17 (E.D. Pa. 2000).

HeinOnline -- 76 Tul. L. Rev. 408 2001-2002

underlies the *Shaw* result, comes into play.[143] Inasmuch as gender discrimination by a small employer does not violate Title VII, i.e., is "lawful under Title VII," any state attempt to bar small employers from thus discriminating is preempted by ERISA as interpreted by *Shaw*.[144]

This result seems almost counterintuitive. One would think that Congress, while designing ERISA, intended to use federal power to *expand* upon employee rights already granted under state law, not contract them.[145] But the *Shaw* Court framed the preemption issue as one merely of definition. Because the dictionary definition of "relate" is so broad, *Shaw* and its progeny led to a statutory regime of virtually "automatic" preemption[146] if any connection at all existed between the state rule and ERISA-covered plans.[147] Although *Shaw* acknowledged in a footnote that a state law's connection with plans might be so "tenuous, remote, or peripheral" as to avoid preemption,[148] never has the Court in subsequent ERISA preemption cases actually found such

---

143. *See supra* notes 136-139 and accompanying text.

144. 463 U.S. at 103; *accord* Le v. Applied Biosystems, 886 F. Supp. 717, 721 (N.D. Cal. 1995).

145. In this context, one court referred to "the remarkable legerdemain that has turned a statute designed to protect employees' pension rights into a law that strips them of most of the protection they previously enjoyed under state law." Concha v. London, 62 F.3d 1493, 1505 (9th Cir. 1995); *accord* Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1333 (5th Cir. 1992) ("[W]e are not unmindful of the fact that our interpretation of the pre-emption clause leaves a gap in remedies within a statute intended to protect participants in employee benefit plans . . . ."). For other examples of cases where this broad reading of ERISA § 514(a) deprived employees of rights they might otherwise have had under state law, *see supra* note 94.

146. Edward A. Zelinsky, Travelers, *Reasoned Textualism, and the New Jurisprudence of ERISA Preemption*, 21 CARDOZO L. REV. 807, 808 (1999). Some critics of post-*Shaw* ERISA preemption doctrine lay the blame at Congress's feet, saying that it was Congress's choice of the broad phrase "relate to," rather than judicial interpretation of Congress's language, that has given rise to this undesirable state of automatic preemption. *See* Leon E. Irish & Harrison J. Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. MICH. J.L. REFORM 109 (1985). Mr. Irish and Mr. Cohen argue that

> [t]he language of ERISA section 514(a) has made it impossible to develop a sound or internally consistent jurisprudence of ERISA preemption. Some positions that are fully justified, indeed required, by faithful adherence to the literal language of section 514 simply constitute bad policy, and would not, absent the rigid language of the statute, be adopted by the courts.

Id. at 163. I do not share these views that the phrase "relate to" compels the *Shaw* result. But it is undoubtedly true that *Shaw* can be "blamed" for excluding from the preemption calculus any attempt at balancing competing interests. *See id.* at 119-20.

147. *Shaw*'s progeny—that is, the cases that follow *Shaw*'s analysis leading to automatic preemption—include such cases as *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125 (1992); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990); and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987).

148. *See supra* note 133 and accompanying text.

HeinOnline -- 76 Tul. L. Rev. 409 2001-2002

"tenuousness" to exist.[149] Indeed, until 1995,[150] the Supreme Court never upheld a state law against an ERISA-based preemption challenge unless the state law was saved by ERISA's narrow insurance "Saving Clause,"[151] or the arrangement to which the state law related was not a "plan."[152]

If *Shaw* was correct in holding that ERISA preemption questions should be decided by considering only the dictionary definition of "relate to" and applying that definition literally and remorselessly, then *Shaw* likewise was correct in holding that a state fair employment law that goes beyond Title VII is preempted by ERISA insofar as the state law purports to impose requirements on employee benefit plans. An example of such a preempted statute would be a state law prohibiting employment discrimination on the basis of sexual orientation and requiring domestic partner benefits for same-sex couples.[153] But the *Shaw* Court erred by combining with its overbroad interpretation of "relate to" in ERISA § 514(a) an overly narrow interpretation of "impair" in ERISA § 514(d).

Shaw held that ERISA's preemption of a state law forbidding a discriminatory action also prohibited by Title VII would "impair" the operation of Title VII, but that the preemption of a state law forbidding a discriminatory action *not* prohibited by Title VII would not "impair" the operation of Title VII.[154] This holding displays too restricted a view of the role Congress envisioned for state law in the field of fair

149. Some appellate courts have occasionally found a state statute's connection with employee benefit plans to be too "tenuous or remote" to be preempted by ERISA. *See, e.g.*, Aetna Life Ins. Co. v. Borges, 869 F.2d 142, 147 (2d Cir. 1989); Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc., 793 F.2d 1456, 1470 (5th Cir. 1986).

150. *See* N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656-62 (1995).

151. *See* Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 758 (1985). That case held that the state statute was not preempted insofar as it affected the insurance policies purchased by employee benefit plans. But the statute *was* preempted insofar as it applied to self-insured plans. *See supra* notes 113-117 and accompanying text.

152. *See* Massachusetts v. Morash, 490 U.S. 107, 119-21 (1989); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 23 (1987).

153. In *Foray v. Bell Atlantic*, 56 F. Supp. 2d 327, 327-30 (S.D.N.Y. 1999), an employee brought suit in state court claiming that his employer's policy of offering benefits to same-sex domestic partners but not to his female domestic partner violated New York State and New York City law. Bell Atlantic successfully removed the case to federal district court, pursuant to 28 U.S.C. § 1441 (1994), on the ground "that Foray's claims related to . . . an employee benefit plan and [therefore] were preempted by [ERISA]." *Foray*, 56 F. Supp. 2d at 329. The preemption issue, however, was not actually litigated. After removal, Foray's motion for voluntary dismissal was granted. Foray then brought a suit in federal district court, claiming that Bell Atlantic's policy violated federal fair employment laws, rather than state ones. *Id.* His suit was unsuccessful. *See supra* notes 52-57 and accompanying text.

154. *See supra* notes 137-140 and accompanying text.

HeinOnline -- 76 Tul. L. Rev. 410 2001-2002

employment regulation. *Shaw* saw this role as merely the joint state and federal enforcement of prohibitions against actions that violate Title VII,[155] but Congress saw the state law's role also as a supplement to federal law.

Each of the three major federal statutes prohibiting employment discrimination "expressly disclaims any intent to occupy the field of employment discrimination law or to oust state regulation,"[156] except where state law purports to permit conduct that federal law prohibits. Title VII of the Civil Rights Act of 1964 provides:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.[157]

The Age Discrimination in Employment Act provides: "Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age . . . ."[158] And the Americans With Disabilities Act provides:

> Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.[159]

Thus, Congress was intent on preserving not only state laws that prohibit discriminatory acts likewise prohibited by federal law, but also state laws that expand upon the antidiscrimination protections conferred by federal law. *Shaw*'s limited view of what constitutes impairment of Title VII overlooks the great "importance Congress attached to state antidiscrimination laws in achieving [this] goal of equal employment opportunity."[160] ERISA preemption of state efforts to extend antidiscrimination protections to gay people and their partners, far from furthering Congress's purposes as *Shaw* held, would

---

155. *See supra* note 138 and accompanying text.

156. Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption*, 13 LAB. LAW. 429, 441 (1998).

157. 42 U.S.C. § 2000e-7 (1994).

158. 29 U.S.C. § 633(a) (1994).

159. 42 U.S.C. § 12,201(b).

160. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 283 (1987).

HeinOnline -- 76 Tul. L. Rev. 411 2001-2002

interfere with those purposes. ERISA should not be read to preempt state fair employment laws, except in those instances where "compliance with both federal and state regulations is a physical impossibility,"[161] or where the state rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[162] These two exceptions derive from "implied preemption" doctrine.

C. *Implied Preemption: "Conflict" and "Field"*

If a state statute actually conflicts with a federal statute, the state statute is preempted, not by virtue of any express preemption provision in the federal statute, but rather by application of the supremacy doctrine.[163] This so-called conflict preemption differs from express preemption in that it arises by implication, rather than by express congressional command.[164] Thus, even if the phrase "relate to" in ERISA section 514(a) were interpreted more narrowly than in *Shaw*, ERISA still could, by implication, preempt any state laws that actually conflicted with it. State law also is preempted by implication when the state law

> regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[165]

This second kind of implied preemption is known as "field preemption."[166]

The United States Supreme Court once suggested that Congress's inclusion of an express preemption provision in a federal statute

---

161. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

162. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

163. U.S. CONST. art. VI, cl. 2; Gardbaum, *supra* note 126, at 809; *see* Maryland v. Louisiana, 451 U.S. 725, 747 (1981) ("[A] state statute is void to the extent it conflicts with a federal statute.").

164. *See supra* note 161 and accompanying text.

165. English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (alterations in original) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

166. For an extraordinarily helpful discussion of the distinction between implied preemption and express preemption (such as that effected by ERISA § 514), and of the differences between the two kinds of implied preemption ("conflict" preemption and "field" preemption), see Stephen F. Befort & Christopher J. Kopka, *The Sounds of Silence: The Libertarian Ethos of ERISA Preemption*, 52 FLA. L. REV. 1, 4-7 (2000).

HeinOnline -- 76 Tul. L. Rev. 412 2001-2002

signaled its intention to exclude both kinds of "implied" preemption analysis from the calculus: "Congress' enactment of a provision [expressly] defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted."[167] But three years later, the Court retreated somewhat from this position and declared that an express preemption clause in a federal statute merely "supports a reasonable inference" that there is to be no implied preemption.[168] Somewhat later still, the Court created more confusion by citing what was arguably an implied preemption case in support of its finding that ERISA's express preemption provision applied.[169] Fortunately, for purposes of the topic under discussion, we need not definitively tease apart the categories of express preemption and implied preemption, inasmuch as the two doctrines coalesce in ERISA's peculiar preemption environment.[170]

We have seen that (1) ERISA section 514(d) spares state statutes from preemption if such preemption would "impair" the operation of some other federal statute;[171] (2) in enacting Title VII of the Civil Rights Act of 1964, Congress intended to preserve state fair employment statutes;[172] (3) ERISA's preemption of state fair employment statutes therefore would impair the operation of Title VII; and (4) accordingly, ERISA does not preempt state fair employment statutes. Thus, the application of ERISA turns in part on Congress's intent at the time it enacted Title VII. While Congress undeniably intended that Title VII preserve state fair employment laws, it is hardly conceivable that Congress intended to preserve even those state fair employment laws that actually conflict with some other federal statute (i.e., conflict preemption) or that intrude upon a field that Congress intended to be regulated solely by federal law (i.e., field preemption). Therefore, in our discussion of whether ERISA preempts state laws

167. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992).

168. Freightliner Corp. v. Myrick, 514 U.S. 280, 288 (1995).

169. *See* Boggs v. Boggs, 520 U.S. 833, 844 (1997) (citing Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992)).

170. Indeed, Justice Scalia, on a number of occasions, has expressed the view that the enactment of ERISA § 514(a) did nothing more than codify preexisting implied preemption doctrine (both conflict and field). *See* Egelhoff v. Egelhoff, 121 S. Ct. 1322, 1330-31 (2001) (Scalia, J., concurring); Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., 519 U.S. 316, 336 (1997) (Scalia, J., concurring). Curiously, Justice Breyer, dissenting in *Egelhoff*, agreed with Justice Scalia that the proper ERISA preemption analysis in the later case was to "apply normal conflict pre-emption and field pre-emption principles," 121 S. Ct. at 1331 (Breyer, J., dissenting), yet he reached the opposite conclusion on the merits.

171. *See supra* note 136 and accompanying text.

172. *See supra* note 157 and accompanying text.

HeinOnline -- 76 Tul. L. Rev. 413 2001-2002

that mandate domestic partner benefits, our work is not yet done. We must ask whether such a state mandate would actually conflict with ERISA or would intrude upon a field that Congress intended to be free of state regulation.

1. Conflict with ERISA's Substantive Provisions

Would a state fair employment statute mandating equal benefits for domestic partners actually conflict with the contents of ERISA?[173] The answer is no. Suppose a state law required any employer who

---

173. Inasmuch as a state statute banning employment discrimination on the basis of sexual orientation might not be construed to require the provision of domestic partner benefits equal to the spousal benefits that the employer provides, *see supra* note 25 and accompanying text, a special state statute dealing explicitly with employee benefits might be required.

Earlier in this Article, I have argued that an employer's policy of granting domestic partner benefits to same-sex couples, but denying them to unmarried opposite-sex couples, constitutes a "fair employment" practice designed to remedy antigay discrimination. *See supra* notes 52-61 and accompanying text. This is not to say, however, that for a domestic partner statute to constitute a "fair employment law," the statute must deal only with same-sex benefits. On the contrary, law and custom grant benefits to married couples that are denied to unmarried couples. *See* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 66-67 (1996). Consequently, a statute mandating both opposite-sex domestic partner benefits and same-sex domestic partner benefits would likewise fit within the rubric of "fair employment law," because such a statute would be calculated to remedy discrimination on the basis of marital status. At least one court, however, has held that an employer's policy of providing spousal benefits, but not domestic partner benefits, did not constitute marital status discrimination. Phillips v. Wis. Pers. Comm'n, 482 N.W.2d 121, 125-28 (Wis. Ct. App. 1992). The court acknowledged that the employer's policy gave married employees a greater benefit than single employees, but noted that "not all disparate treatment is discriminatory. It is only where similarly situated persons are treated differently that discrimination is an issue." *Id.* at 126. Unmarried couples, said the court, are differently situated from married couples because unmarried couples are not legally bound to support and provide medical care for each other. Thus, the unmarried plaintiff's status was not similar to that of a married employee because the plaintiff was not responsible for her partner's support. *Id.* at 126-27. This is a bootstrap argument, because the reason the plaintiff was not responsible for her partner's support was that they were not married to each other. This bootstrap argument is particularly suspect in this case. The court also held, in an ecstasy of circularity, that the employer's policy did not discriminate on the basis of sexual orientation, inasmuch as the policy distinguished between the married and the unmarried rather than between the straight and the gay. *See supra* note 25 and accompanying text.

The Alaska Supreme Court, in a similar case, held that an employer's denial of insurance benefits to an employee's domestic partner, when such benefits were granted to employees' spouses, did indeed violate the state's prohibition against employment discrimination based on marital status. Univ. of Alaska v. Tumeo, 933 P.2d 1147, 1153, 1156 (Alaska 1997) (applying ALASKA STAT. § 18.80.220(a) (2000)). After the case arose, however, the Alaska legislature amended the statute, expressly to allow employers to "provide greater health and retirement benefits to employees who have a spouse ... than are provided to other employees." ALASKA STAT. § 18.80.220(c)(1) (2000) (as amended by 1996 ALASKA SESS. LAWS ch. 16, §§ 1,2).

HeinOnline -- 76 Tul. L. Rev. 414 2001-2002

provided medical insurance coverage for her employees' spouses to provide equal medical insurance coverage for her employees' domestic partners. Such a law would not be inconsistent with any provision of ERISA, because ERISA does not speak to the question of who, besides the employee himself, may or must receive benefits under a welfare plan.[174] The question of conflicts in the case of pension plans is more complicated, for although ERISA imposes no requirements with respect to the substantive provisions of welfare plans, the statute does impose substantive requirements on pension plans.[175]

Let us go directly to the most difficult case. ERISA requires certain pension plans to provide that when a married participating employee retires, her retirement benefit is paid in a form that gives her spouse certain payments if he survives her and that he cannot be deprived of this survivor's benefit without his written consent.[176] ERISA does not require a survivor's benefit for any other beneficiary of an employee—only for a spouse. Would a state law requiring that an employee's surviving domestic partner be given the same survivor's benefit as a spouse conflict with ERISA? Again, the answer is no. While ERISA mandates this kind of survivor's benefit only in the case of spouses, the statute does not—even by the most strained application of the *expressio unius* principle[177]—forbid a plan to offer such a benefit to domestic partners. Indeed, if an employer's plan expressly provided for domestic partner benefits, "voluntarily" or under compulsion from state law, ERISA would grant plan participants and beneficiaries a

---

174. ERISA simply refers to "providing [benefits] for [the plan's participating employees] or their beneficiaries." ERISA § 3(1), 29 U.S.C. § 1002(1) (1994). The term "beneficiary" is defined, somewhat tautologically, as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." *Id.* § 3(7), 29 U.S.C. § 1002(8).

175. Thus, much can depend on whether a plan is classified as a welfare plan or as a pension plan. For example, in *Rombach v. Nestle USA, Inc.*, 211 F.3d 190, 191-92 (2d Cir. 2000), an employee challenged some reductions that her employer had made in its disability income plan. She claimed that the benefit reductions were barred by ERISA. *See* ERISA § 204(g), 29 U.S.C. § 1054(g). The court held that the benefit reductions were permissible because the plan in question was a welfare plan, and section 204(g) applies only to pension plans. *Rombach*, 211 F.3d at 192-94.

176. ERISA § 205, 29 U.S.C. § 1055; *see generally* JEFFREY G. SHERMAN, PENSION PLANNING AND DEFERRED COMPENSATION § 9.05 (2d ed. 1990) (discussing the assignment and alienation of accrued benefits).

177. *Expressio unius est exclusio alterius*: the expression of one thing is the exclusion of the others. For example, if a contract specifies that Smith is to deliver an automobile and a tractor to Jones on July 1, the recital of "automobile and tractor" in the contract implies that Smith is not bound by that contract to deliver additional items to Smith on July 1. For a critique of *expressio unius* as a tool of statutory construction, see 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47.25 (5th rev. ed. 1992).

HeinOnline -- 76 Tul. L. Rev. 415 2001-2002

right to sue under federal law if those benefits were improperly denied in a particular case.[178]

The Defense of Marriage Act (DOMA) does not interfere with this result.[179] DOMA provides that for purposes of interpreting federal statutes and regulations, the word "spouse" means only an opposite-sex spouse.[180] Thus, as a consequence of DOMA, when ERISA requires pension plans to offer certain spousal benefits, the requirement extends only to opposite-sex spouses, even if the state also recognizes same-sex marriages.[181] But DOMA does not *forbid* plans to recognize either same-sex spouses or domestic partners.[182]

2. Intrusion upon a Federal Field

Although a state law mandating domestic partner benefits would not conflict with any of ERISA's statutory provisions, would it conflict with the intent behind the preemption clause itself? The legislative history indicates that Congress intended ERISA preemption to be broad. By ultimately adopting the "relate to" standard of ERISA § 514(a), Congress implicitly rejected earlier, narrower versions of the preemption clause that would have preempted state laws only "insofar as they ... relate[d] to the fiduciary, reporting, and disclosure responsibilities of persons acting on behalf of employee benefit

178. "A civil action may be brought ... by a participant or beneficiary ... to recover benefits due to him *under the terms of his plan* ...." ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (emphasis added); Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 108 (1989). State and federal courts have concurrent jurisdiction over actions brought under section 502(a)(1)(B). ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

179. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7, 28 U.S.C. § 1738C (Supp. V 1999)).

180. DOMA states:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7.

181. For example, ERISA § 205 requires pension plans to provide certain death benefits to the "spouse" of an employee who dies before retirement. Because of DOMA, the requirement of section 205 does not extend to same-sex spouses, even if the same-sex partner is a legal spouse under applicable state domestic relations law. Thus, pension plans are not required to furnish same-sex spouses with this death benefit.

182. Under federal tax law, however, domestic partners' benefits are treated less favorably than spouses' benefits. Because of DOMA, even a state's recognition of same-sex marriage would not grant such couples the federal tax advantages of marriage. *See, e.g.*, Priv. Ltr. Rul. 98-500-11 (Sept. 10, 1998).

HeinOnline -- 76 Tul. L. Rev. 416 2001-2002

plans;"[183] or "insofar as they ... relate[d] to the subject matters regulated by this Act."[184] These rejected standards linked preemption to the specific subjects covered by ERISA and clearly would have allowed state fair employment laws to survive ERISA (particularly under the language of the first standard). The published legislative history sheds little light on the reasons for this last-minute broadening of the preemption clause,[185] but Professors Daniel Fox and Daniel Schaffer have discovered through conversations with the participants that the more sweeping preemption language "was inserted during the final negotiations in the conference committee, in response to strong opinions voiced by House conferees speaking for powerful interest groups [, notably organized labor]."[186] The official history is limited to more general, but nonetheless accurate, floor statements such as those by Senator Harrison Williams, floor manager of the bill and Chairman of the Committee on Labor and Public Welfare. Williams stated that the broad preemption clause was intended to "eliminat[e] the threat of conflicting or inconsistent State and local regulation of employee benefit plans."[187] Likewise, Representative John Dent, Chairman of the Subcommittee on Labor of the House Labor and Education Committee, stated that the preemption clause effectively reserved "to Federal authority the sole power to regulate the field of employee benefit plans."[188] Accordingly, this question of implied preemption can be framed as follows: Would a state law requiring domestic partner benefits be inconsistent with (1) Congress's intent to protect plans from nonuniform state regulation, or (2) Congress's intent to make

183. H.R. 2, 93d Cong., § 114 (1st Sess. 1973), *reprinted in* I SENATE COMM. ON LABOR & PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 50-51 (1976) [hereinafter LEGISLATIVE HISTORY]. *See* Conison, *supra* note 109, at 619 n.1; *see also* Sherman, *supra* note 108, at 255-56 (discussing the legislative history of ERISA).

184. S. 4, 93d Cong., § 609(a) (1st Sess. 1973), *reprinted in* I LEGISLATIVE HISTORY, *supra* note 183, at 186; *see* Conison, *supra* note 109, at 619 n.2.

185. Senator Jacob Javitz, the ranking minority member of the Senate Committee on Labor and Public Welfare, suggested that the narrow preemption standard was rejected out of a concern that it might lead to "endless litigation" over whether the subject of a particular state law was or was not one of the subjects dealt with by ERISA. 120 CONG. REC. 29,942 (1974). If that was Congress's concern, they chose a singularly unsuccessful way of addressing it, inasmuch as the broader "relate to" standard has led to an immense quantity of litigation aimed at determining the reach of the preemption clause. *See* Conison, *supra* note 109, at 620 n.8.

186. Fox & Schaffer, *supra* note 105, at 48-49.

187. 120 CONG. REC. 29,933 (1974).

188. *Id.* at 29,197.

HeinOnline -- 76 Tul. L. Rev. 417 2001-2002

federal authority the sole power regulating the field of employee benefit plans?

As to the first question, the *Shaw* Court saw Congress's intent as one to "minimize[] the need for interstate employers to administer their plans differently in each State in which they have employees."[189] For example, imagine a legal environment where some states required employers' pension plans to cover all employees over the age of twenty-five regardless of their years of service, but other states required employers to cover all employees with at least two years of service regardless of their age, and still other states required employers to cover all employees with either three years of service or thirty years of age. In such an environment, a multistate employer's task of compliance, absent ERISA preemption, would be considerably complicated by this multiplicity of state standards.[190]

On the other hand, if some states imposed a forty-mile-per-hour speed limit and others imposed a thirty-mile-per-hour limit, the trustees of a multistate plan might have to drive at different rates of speed in each state, but this disparity would not complicate the trustees' task of administering the plan. For preemption purposes, would a state law regarding domestic partner benefits (e.g., a state law requiring pension plans to provide employees' domestic partners with the same kind of survivors' benefits that ERISA requires plans to provide spouses) be closer in kind to a law regulating pension plan coverage or to a law regulating driving speed? Such a domestic partner law would be closer to the speed limit law in this sense: state-to-state variations in domestic partner laws do not complicate the task of plan administrators any more than state-to-state variations in marriage laws. Allowing a state to require plans to provide survivors' pension benefits to same-sex partners is no different from allowing a

189. Shaw v. Delta Air Lines, 463 U.S. 85, 105 (1983); *accord* Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 11 (1987) ("Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.")

190. ERISA provides (with some exceptions not relevant here) that if a pension plan has an eligibility requirement relating to minimum age or minimum number of years of service, such a requirement may not exclude an employee from participation in the plan "beyond the later of . . . (i) the date on which he attains the age of 21; or (ii) the date on which he completes 1 year of service." ERISA § 202(a)(1)(A), 29 U.S.C. § 1052(a)(1)(A) (1994). Thus, although the three hypothetical eligibility requirements set forth in the text vary considerably from one another, none of the three would be inconsistent with ERISA. For example, the first hypothetical requirement would require a pension plan to cover a twenty-five-year-old employee as soon as he was hired. While such immediate coverage would be faster than ERISA requires—ERISA would allow the plan to wait a year—it would not violate ERISA. Therefore, but for broader ERISA preemption principles, the multistate employer would be subject to all three.

HeinOnline -- 76 Tul. L. Rev. 418 2001-2002

state to prescribe the requisites of opposite-sex marriage: e.g., permitting first cousins to marry or recognizing common law marriage. If an employer maintains plants in New York (which does not recognize common law marriage)[191] and Pennsylvania (which does),[192] then the plan administrator may have to seek a different kind of documentation from a New York employee than from a Pennsylvania employee before arranging for an employee's survivor's benefits. Variations among state domestic partnership policies would have merely that same effect.

Consider the following illustration. Under present law, an employee benefit plan administrator typically requires eligible employees to execute some sort of enrollment form as a condition of participating in the plan. Such forms usually provide a space for the employee to designate his "beneficiary" by name and to identify the relation, if any, that the designee bears to the employee (spouse, child, sibling, friend, etc.). If an employee indicates on the form that his designated beneficiary is his "spouse," the employer can, of course, investigate to see if the designee does indeed satisfy the applicable state definition of "spouse": for example, whether the marriage is in fact bigamous or incestuous under applicable state law or whether, in the case of a common law marriage in a state recognizing them, it has been consummated.[193] In fact, however, employers generally accept such declarations at face value. Each employee is presumed to be truthful on this point and to know whether his designee does indeed qualify as a "spouse" under applicable state law. The employer seldom wishes to expend any effort in probing into an employee's connubial history in search of disqualifying particulars. The same system doubtless would obtain under a regime requiring domestic partner benefits.[194] Indeed, the administrator of a multistate plan could still use

191. *See* N.Y. DOM. REL. LAW § 11 (McKinney 1999); Merritt v. Chevrolet Tonawanda Div., 377 N.Y.S.2d 663, 664-65 (App. Div. 1975).

192. 23 PA. CONS. STAT. ANN. § 1103 (West 1991); DeMedio v. DeMedio, 257 A.2d 290, 302-04 (Pa. Super. Ct. 1969).

193. *See supra* note 36 and accompanying text.

194. Such a system would presumably satisfy the Internal Revenue Service (IRS). If an employer provides medical insurance coverage for an employee's domestic partner, the employee must pay income tax on the value of the partner's coverage, and the employer must withhold the resulting applicable employment taxes, unless the partner is the employee's "dependent" within the meaning of section 152 of the Internal Revenue Code. *See, e.g.*, Priv. Ltr. Rul. 98-50-011 (Sept. 10, 1998). In order for the partner to qualify as the employee's dependent, three statutory requirements must be met: (1) the employee and the partner must reside in the same household throughout the taxable year; (2) the employee must provide more than half of the partner's support; and (3) the employee/partner relationship must be consistent with local law. I.R.C. § 152 (1994). Thus, if an employer provides such medical

HeinOnline -- 76 Tul. L. Rev. 419 2001-2002

the same enrollment form in every state. In states that did not mandate domestic partner benefits, the administrator could disregard a domestic partner designation (or treat it as the designation of a nonrelative), just as an administrator is currently free to disregard a designation by an employee who, with immoderate candor, writes "common law spouse" on the enrollment form in a state that does not recognize common law marriage.[195]

Turning to the second point: Would a state law requiring pension plans to provide employees' domestic partners with the same kind of survivors' benefits that ERISA mandates for spouses be inconsistent with Congress's intent to make "federal authority the sole power to regulate the field of employee benefit plans?"[196] Again, the answer is no. What is this "*field* of employee benefit plans" that Congress sought to insulate from state control? Presumably the field does not include domestic relations law. "[D]omestic relations ... has long been regarded as a virtually exclusive province of the States."[197] "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."[198] A state's decision to require domestic partner benefits is scarcely different from a state's decision henceforth to

---

insurance coverage for a domestic partner but fails to withhold the applicable employment taxes, the employer will have violated the tax law unless the employee and partner satisfy the three-part test of section 152. The IRS has ruled that in determining whether to withhold such employment taxes, the employer is entitled to rely on a simple written "certification" executed by the employee to the effect that the employee and partner satisfy the three-part test. Priv. Ltr. Rul. 2001-08-010 (Nov. 17, 2000).

195. One might argue: "But a common law spouse is still a 'spouse.' Disregarding for the moment the possibility of 'immoderate candor,' even the geographically spotty institution of common law marriage requires the administrator to be on the lookout for only one word: 'spouse.' An employee in a state like Pennsylvania that recognizes common law marriage is going to use the same word—spouse—on the plan enrollment form, whether his marriage is a common law marriage or a solemnized marriage." The difficulty with this argument is that it assumes incorrectly that an ERISA plan's legal obligation to honor common law marriages in certain states depends on the fortuity of the state's using the same, traditional label of "spouse" for persons in a common law marriage. If Pennsylvania changed its common law marriage statute to specify that henceforth the word "fribble," rather than "spouse," would be used to refer to either party to a common law marriage, a plan administrator would be required to take due note of, and treat as spouses, those fribbles designated as beneficiaries by participating employees.

196. *See supra* note 188 and accompanying text.

197. Sosna v. Iowa, 419 U.S. 393, 404 (1975).

198. *In re* Burrus, 136 U.S. 586, 593-94 (1890); *accord* Pennoyer v. Neff, 95 U.S. 714, 734-35 (1877) ("[Each] State ... has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.").

HeinOnline -- 76 Tul. L. Rev. 420 2001-2002

recognize common law marriages, and the latter clearly is a state matter under our federal system.

A recent Supreme Court case may cast some doubt on the conclusion that state laws regulating domestic relations fall outside the field of employee benefit plans that Congress sought to insulate from state influence. This much-criticized case, *Boggs v. Boggs*, arose in Louisiana, a community property state.[199] During the time that Isaac and Dorothy Boggs were married to each other, Isaac was covered by certain employer-provided retirement plans.[200] Dorothy died in 1979, leaving a will that bequeathed to her children her community interest in Isaac's accrued retirement benefits.[201] Isaac married Sandra shortly after Dorothy's death; he retired in 1985 and died in 1989.[202] A dispute then arose between Sandra and the children Dorothy had had with Isaac.[203] The children stood to inherit a share of Isaac's retirement benefits under Dorothy's will if state community property law attached to those benefits. The Court held that state community property law was preempted on this point because it conflicted with certain provisions of ERISA, which conferred Isaac's benefits entirely on Sandra.[204] One can argue whether *Boggs* was right or wrong in finding that an actual conflict existed between ERISA and state law, but the case clearly should be regarded as a straightforward "conflict" preemption case, rather than one of "field" preemption.[205] *Boggs* is clearly distinguishable from a "field" preemption case because state laws prohibiting sexual orientation discrimination in the provision of employee benefits do not conflict with any provision of ERISA; an employer may comply with ERISA and still provide domestic partners with benefits equivalent to spousal benefits. *Boggs* involved a state

---

199. 520 U.S. 833 (1997). For examples of criticisms of the case, see Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1187-88 (1998); Heather J. Rose, Comment, Boggs v. Boggs: *Creating Real-Life Cinderellas*, 33 J. MARSHALL L. REV. 271, 287-89 (1999).

200. *Boggs*, 520 U.S. at 836-37.

201. *Id.*

202. *Id.*

203. *Id.*

204. The most important ERISA provision with which *Boggs* found state property law to conflict was ERISA § 205, 29 U.S.C. § 1055 (1994). Section 205 (and this is a bit of an oversimplification) forbids a plan to award a deceased employee's accrued pension benefits to anyone other than the employee's surviving spouse, unless the surviving spouse consents in writing. *See Boggs*, 520 U.S. at 843-44; SHERMAN, *supra* note 176, at § 9.05.

205. *See Boggs*, 520 U.S. at 841, 843-44 ("We hold that there is a conflict, which suffices to resolve the case. We need not inquire whether the statutory phrase 'relate to' provides further and additional support for the pre-emption claim.").

HeinOnline -- 76 Tul. L. Rev. 421 2001-2002

law purporting to divest surviving spouses of spousal rights guaranteed by ERISA. Domestic partner laws do not divest spouses of anything.

D. A Recent Liberalizing Decision

The Supreme Court recently indicated its dissatisfaction with *Shaw* and the seemingly automatic preemption regime that *Shaw* engendered. *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co.*,[206] while not explicitly overruling *Shaw*, nonetheless "throws some cold water on" it.[207] The case involved a challenge to a New York State statute requiring hospitals to collect a 24% surcharge (to be remitted to the state) from patients covered by commercial insurance companies and from self-pay patients, a 13% surcharge from patients covered by self-insured employer plans, but no surcharge at all from patients covered by noncommercial insurers like Blue Cross/Blue Shield and HMOs.[208]

As Professor Edward Zelinsky explains:

> The obvious impact of these surcharges is to encourage employers to switch from commercial insurance and self-funding to Blue Cross/Blue Shield coverage: a hospital bill of $200 for a Blue Cross/Blue Shield patient is, by virtue of the surcharge scheme, $226 for a patient participating in his employer's self-funded plan and $248 for a patient serviced by commercial insurance.[209]

New York State wanted to encourage the use of Blue Cross/Blue Shield and HMOs to ensure their continued financial viability, inasmuch as their more relaxed underwriting practices enable higher risk individuals to obtain affordable health care.[210] Because the statute affected plans' decisions about purchasing insurance, however, commercial insurers urged the Court to find that ERISA preempted the New York statute.[211]

Under the *Shaw* line of cases, this would have been an easy case for preemption. For example, the Court in *Metropolitan Life*

---

206. 514 U.S. 645, 668 (1995); *accord* De Buono v. NYSA-ILA Med. and Clinical Servs. Fund, 520 U.S. 806, 816 (1997) (interestingly, a companion case to *Boggs*).

207. Pegram v. Herdrich, 530 U.S. 211, 235 (2000); *see also* Edward A. Zelinksy, Pegram *and Preemption: Patients' Rights and the Case for Doing Nothing*, 88 TAX NOTES 1053, 1055-56 (2000).

208. *Travelers*, 514 U.S. at 649-50.

209. Zelinsky, *supra* note 146, at 828.

210. Karen A. Jordan, Travelers Insurance*: New Support for the Argument to Restrain ERISA Pre-Emption*, 13 YALE J. ON REG. 255, 274 (1996). For a more detailed description of this rate-setting scheme, see *id.* at 273-76.

211. *Travelers*, 514 U.S. at 658-59.

HeinOnline -- 76 Tul. L. Rev. 422 2001-2002

Insurance Co. v. Massachusetts held that Massachusetts's statutory requirement that health insurance programs provide mental health benefits bore "indirectly but substantially" on employee benefit plans in that it "require[d] them to purchase the mental-health benefits ... when they purchase a certain kind of common insurance policy."[212] Thus, the Court found that the state requirement "related to" employee benefit plans within the meaning of ERISA § 514(a).[213] That is, *Metropolitan Life* held that a state law affecting the insurance-purchasing choices of an employee benefit plan administrator (like the New York law involved in *Travelers*) was preempted by ERISA.[214] And in *Travelers* itself, the United States Court of Appeals for the Second Circuit, following *Shaw* and its progeny, found the New York statute to be an unmistakable case for preemption.[215]

But the Supreme Court in *Travelers*, loath to bar states from their traditional role as regulators of hospital rates, but recognizing the inexorable logic of *Shaw*, finally realized that *Shaw* went too far. In *Travelers*, the Court made two very important departures from the *Shaw* analysis. First, the Court acknowledged that the phrase "relate to" was "not a reliable indicium of congressional intent"[216] and that consideration of the purposes of ERISA was essential. Unanimously rejecting the "uncritical literalism" that characterized *Shaw*, the *Travelers* Court said: "We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive."[217]

Second, rejecting *Shaw*'s apparent view that ERISA § 514(a) created a presumption in favor of preemption, the *Travelers* Court held that, at least as to matters that traditionally have been left to state regulation, the presumption is *against* preemption.[218] Those claiming

212. 471 U.S. 724, 739 (1985).

213. The statute was partially saved from preemption only because of ERISA's Saving Clause respecting state statutes regulating insurance. *See supra* notes 114-116 and accompanying text.

214. *See Metro. Life*, 471 U.S. at 758.

215. Travelers Ins. Co. v. Cuomo, 14 F.3d 708, 718, 724 (2d Cir. 1993), *rev'd sub nom.* N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995).

216. Jordan, *supra* note 210, at 283 n.162.

217. 514 U.S. at 656.

218. *Id.* at 654.

HeinOnline -- 76 Tul. L. Rev. 423 2001-2002

preemption "bear a considerable burden [in] overcoming this presumption."[219]

The Court concluded that Congress's purpose in inserting the preemption clause into ERISA "was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans."[220] Thus, the type of state laws that Congress intended to preempt were laws calculated to interfere with such uniformity: (1) laws that mandate the structure or administration of employee benefits, and (2) laws that provide enforcement mechanisms that parallel ERISA's enforcement mechanisms.[221] New York State's surcharge scheme did neither, said the Court. True, the scheme had an

---

219. De Buono v. NYSA-ILA Med. and Clinical Servs. Fund, 520 U.S. 806, 814 (1997). In a more recent case, the Court reasserted *Travelers*'s new premise that a presumption against preemption exists, at least "in areas of traditional state regulation." Egelhoff v. Egelhoff, 121 S. Ct. 1322, 1330 (2001), *rev'g* 989 P.2d 80 (Wash. 1999). In that case, however, the Court found the presumption to have been overcome. *Id.* *Egelhoff* involved a Washington State statute that purported to revoke any nonprobate beneficiary designation made by an individual in favor of her spouse if the individual and spouse were divorced after the designation was made. *Id.* at 1326 (citing WASH. REV CODE ANN § 11.07.010) (West 1998). The Court held that ERISA preempted the statute. *Id.* Although Justice Clarence Thomas's opinion was wholly inadequate, the outcome of the case was unsurprising, because *Egelhoff*, like *Boggs*, involved an actual conflict between the content of ERISA and the content of the Washington statute. ERISA contemplates that a person, in order to be a deceased employee's "beneficiary" under a plan, must have been designated as such either by the employee herself in a document filed with the plan administrator or by the terms of the plan's governing instrument. *See* ERISA § 3(7), 29 U.S.C. § 1002(8) (1994). Fatally, however, the Washington statute required plan administrators to look further—to look to a state statute—to "determine whether the named beneficiary's status has been 'revoked' by operation of law." *Egelhoff*, 121 S. Ct. at 1328. A state statute mandating equal domestic partner benefits, on the other hand, merely requires the plan administrator to make an inquiry no different in quality from the inquiry ERISA already allows him to make: whether a claimed "spouse" is in fact a lawful spouse under applicable State law.

It is hoped that the Supreme Court of Washington, on remand in *Egelhoff*, will hold that although ERISA preempted the Washington revocation-on-divorce statute, the void left by such preemption is to be filled by federal common law. *See supra* note 108 and accompanying text. Because succession law is, or should be, designed to execute the presumed intentions of the deceased property owner, the court should adopt as the federal common law rule of decision a revocation-on-divorce rule, such as that found in the Uniform Probate Code. *See* UNIF. PROBATE CODE § 2-804 (1993).

220. *Travelers*, 514 U.S. at 657. Of course, this was hardly a novel observation. *See supra* note 187 and accompanying text.

221. *Id.* at 657-58. The Court was somewhat oblique here. It did not actually *hold* that only laws falling into one of those two categories were preempted by ERISA. Rather, in supporting its holding that the New York surcharges were not preempted, it simply noted that all the laws that the Court had found preempted in previous decisions did in fact fall into one of those two categories. Still, because the Court offered as evidence of nonpreemption the fact that the surcharges did not fall within one of those categories, there is at least a faint implication that the preemption of a statute not within those categories would be the exception rather than the rule, particularly when the state statute addressed an area of traditional state regulation.

HeinOnline -- 76 Tul. L. Rev. 424 2001-2002

indirect economic influence on plans, but this influence was no different from that of a state's minimum wage law, which would raise the dollar amount of pensions that a plan must provide if the plan's benefit formula ties the amount of an employee's pension to the amount of her average compensation. The *Travelers* court found that "[a]n indirect economic influence ... does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself.... *Nor does the indirect influence of the surcharges preclude ... the provision of a uniform interstate benefit package if a plan wishes to provide one.*"[222]

We have seen that even under the *Shaw* regime, a state fair employment law mandating domestic partner benefits should survive ERISA preemption.[223] How much safer, then, would such state laws be under the *Travelers* regime, inasmuch as state laws address a traditional area of state regulation,[224] do not require plans to provide specific benefits,[225] and do not interfere with employer choice, except insofar as the employer would otherwise have chosen to discriminate. Under the *Shaw* regime, the argument for saving state fair employment laws from preemption was not that ERISA § 514(a) did not reach them, but rather that they were saved by the ERISA § 514(d) exception for state laws whose preemption would "impair" federal law. The *Travelers* view suggests that they would not be reached by section 514(a) in the first place.[226] Such state fair employment laws merely require the plan to treat domestic partners like spouses, just as if a state, by adopting common law marriage, thereupon required plans to treat paramours like spouses.

---

222. *Id.* at 659-60 (emphasis added).

223. *See supra* notes 170-172 and accompanying text.

224. *See id.*

225. A state law mandating a specific dollar benefit for domestic partners *would* be preempted by ERISA. *See* De Buono v. NYSA-ILA Med. and Clinical Servs. Fund, 520 U.S. 806, 815 (1997) (noting, in support of its decision that a state statute was not preempted by ERISA, that the statute did not "require[] employers to provide certain benefits"). But a law providing simply, "Whatever you give to spouses you must also give to domestic partners," would not be preempted.

226. The Court in *Travelers* "indicated that it is not appropriate to pre-empt state laws with an effect analogous to that of 'common' state laws, especially if such laws have been encouraged by the federal government." Jordan, *supra* note 210, at 289; *see Travelers*, 514 U.S. at 665-67. And the federal government has indeed encouraged state fair employment laws. *See supra* notes 156-160 and accompanying text.

HeinOnline -- 76 Tul. L. Rev. 425 2001-2002

E. The Effect of Federal Tax Law

Federal tax law may limit the practical effect of state statutes that require employers to provide domestic partners with the same benefits as those provided to spouses. For example, section 415(b) of the Internal Revenue Code imposes a limitation on the amount of retirement benefits that a pension plan may pay if the plan is to remain qualified.[227] That limitation is more generous when the employee has designated her spouse as her beneficiary (that is, designated her spouse as the person to receive pension payments after the retired employee's death) than when she has designated someone else as her beneficiary.[228]

For example, suppose Smith and Jones have worked for the same employer for the same number of years at the same $200,000 annual salary and accordingly have accrued equal retirement benefits under the employer's plan's benefit formula. Smith designates her husband as her beneficiary, while Jones designates her domestic partner as her beneficiary. The plan could, consistently with the section 415(b) limits, pay Smith a pension in the form of a joint and survivor annuity of $160,000 per year for as long as Smith lives and then, after her death, $160,000 per year to Smith's husband for as long as he lives.[229] But if the plan paid that $160,000/$160,000 joint and survivor annuity to Jones and her domestic partner, the plan would violate section 415(b) and would cease to be entitled to the tax benefits of qualification. Depending on the applicable interest rate and the partner's age at the time of Jones's retirement, the plan would have to limit Jones's joint and survivor annuity to only $130,000/$130,000 in order to remain within the section 415(b) limits and maintain its qualified status.[230]

The kind of state statute under discussion—a statute requiring an employer to provide domestic partners with the same benefits it

---

227. I.R.C. § 415(b) (1994).

228. *See* JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 350 (3d ed. 2000).

229. I.R.C. § 415(b)(1)(A), as amended by the Economic Growth and Tax Relief Reconciliation Act of 2001, § 611(a), Pub. L. 107-16, 115 Stat. 38.

230. The special exception in section 415(b)(2) authorizing the larger annuity benefits applies only when the payments are made in the form of a "qualified joint and survivor annuity," a term defined in section 417(b) of the Internal Revenue Code to require that the recipient of the survivor benefits be the "spouse" of the employee. And as a result of the Defense of Marriage Act, the word "spouse" in the Internal Revenue Code refers only to a person of the opposite sex who is the employee's husband or wife. *See supra* notes 179-182 and accompanying text.

HeinOnline -- 76 Tul. L. Rev. 426 2001-2002

provides to spouses—would presumably require the employer's plan to pay Jones and her partner the same $160,000/$160,000 joint and survivor benefit that it pays to Smith and her husband. Would the statute therefore be preempted by federal law?

Strictly speaking, the statute would not conflict with section 415(b) of the Internal Revenue Code, inasmuch as section 415(b) does not prohibit the plan from paying Jones and her partner the $160,000/$160,000 benefit; it merely ordains some adverse income tax consequences if the plan in fact pays such a benefit. But consideration of congressional intent leads to a more nuanced conclusion. When it enacted the various rules with which pension plans must comply to obtain the tax advantages of qualification, Congress must have contemplated that employers would be capable of complying. A state statute that effectively required a plan to violate one of the conditions of qualification would therefore be inconsistent with Congress's intent and, to that extent, preempted. Thus, a state statute could, without falling to ERISA preemption, require an employer to give domestic partners the same right to demand survivors' benefits as spouses have;[231] but the state could not require, if the plan was qualified, that the dollar amount of those benefits exceed the limits imposed on qualified plans by the Internal Revenue Code.[232]

---

231. *See supra* notes 179-182 and accompanying text.

232. Would such a "partial preemption" result—allowing a state to mandate domestic partner benefits, but not allowing it to mandate benefits in excess of the I.R.C. § 415(b) limits—so complicate the task of pension plan administration as to be inconsistent with Congress's intention in ERISA of "minimiz[ing] the need for interstate employers to administer their plans differently in each State?" *See supra* note 189 and accompanying text. The answer is no. Even without a state domestic partner law, a plan administrator's determinations of the amount and form of benefit payments must be made on an employee-by-employee basis because employees have differing compensation and employment histories and may retire at different ages (i.e., have different remaining life expectancies at the time of retirement).

Partial preemption is not an unfamiliar resolution. In *Air Transport Ass'n of America v. City and County of San Francisco*, 992 F. Supp. 1149, 1180 (N.D. Cal. 1998), *aff'd on other grounds*, 266 F.3d 1064 (9th Cir. 2001), for example, the court held that ERISA preempted a city ordinance to the extent the ordinance required certain benefits but did not preempt it to the extent it required certain other benefits. *See supra* note 20 and accompanying text; *see also* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 234-38 (1947) (holding that the United States Warehouse Act, 7 U.S.C. §§ 241-256 (2000), preempted Illinois law insofar as it purported to require warehouse operators to obtain the consent of the Illinois Commerce Commission before abandoning warehousing service, but did not preempt it insofar as it required warehouse operators to obtain state approval for certain other purposes relating to warehouse construction).

HeinOnline -- 76 Tul. L. Rev. 427 2001-2002

IV. NOT QUITE A CONCLUSION

Despite the sweeping language in ERISA purporting to preempt all state laws that "relate to" employee benefit plans, state laws mandating domestic partners' benefits should be held safe from preemption by the federal statute. Reaching this judgment required three steps:

1. a conclusion that state domestic partner laws, designed to prevent discrimination in the workplace based on sexual orientation or marital status, are saved from express preemption by ERISA § 514(d);
2. a conclusion that state domestic partner laws do not actually conflict with the provisions of any federal statute; and
3. a conclusion that state domestic partner laws do not intrude upon a field that Congress intended to be fully occupied by federal law.

These three steps correspond roughly to the doctrinal domains of express preemption, conflict preemption, and field preemption.

In exploring these three domains, I have confined myself to the matter of domestic partner benefits, but broader issues cloud the horizon. What about state statutes prohibiting sexual orientation discrimination or marital status discrimination beyond the domestic partner benefits sphere, or more generally, state statutes prohibiting employment discrimination as to categories outside the purview of the three principal federal employment discrimination statutes, e.g., discrimination on the basis of parental status, source of income, and marital status and sexual orientation? Would ERISA preemption allow employers to ignore these state protections in crafting and administering employee benefit plans? And would ERISA preemption allow employers with fewer than fifteen employees to discriminate on the basis of categories protected by Title VII?

From the point of view of express preemption and conflict preemption analysis, the answer clearly is no. For the reasons set forth earlier, such state fair employment statutes would survive. But field preemption analysis presents a more challenging question: Would the enforcement of such state fair employment statutes be inconsistent with Congress's intent to "minimize[] the need for interstate employers to administer their plans differently in each State in which they have employees"?[233]

233. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 105 (1983).

HeinOnline -- 76 Tul. L. Rev. 428 2001-2002

Consider an employer with two plants, one in State *A*, which prohibits employment discrimination on the basis of marital status, and one in State *B*, which does not. The employer wishes to maintain a single medical plan covering employees at both plants. At first glance, it appears that the enforceability of State *A*'s fair employment statute would require the employer to "administer [the] plan[] differently in each State." That is, the plan's eligibility criteria for the State *A* employees would have to allow divorced employees to be covered, while the criteria for the state *B* employees would not. But in fact, uniform administration is easily possible. Suppose the employer disliked divorced persons and preferred not to employ them. In that case, the employer would have hired no divorced State *B* employees, so even if the plan instrument purported to make *all* employees in both states eligible for coverage, no divorced State *B* persons would in fact be covered.

Of course, this is an imperfect resolution. One could imagine an employer who was willing to hire divorced employees in State *B*, yet unwilling to insure their health.[234] In that case, a bolder nonpreemption claim would have to be made. Recent Supreme Court analysis suggests that the burden of persuasion would lie with the party arguing for preemption,[235] the employer in this example, and I think the employer would be hard pressed to maintain that Congress intended to relieve multistate employers of the burden of complying with divergent local standards of tolerance.[236]

This broader argument, however, requires considerably more analysis and elaboration than can be offered in this Article. Such analysis and elaboration will have to wait: if not for another author, then at least for another occasion.

---

234. Evidence suggests that married persons live longer than unmarried, widowed, or divorced persons. *See* E.J. GRAFF, WHAT IS MARRIAGE FOR? 45-47 (1999).

235. *See supra* note 219 and accompanying text.

236. The preemption result would depend very much on the specifics of the particular statute. Suppose a state, in an effort to prevent employment discrimination in favor of the coupled as against the single, *see supra* note 9 and accompanying text, enacted a statute prohibiting an employer from paying for any fringe benefits except those directly benefiting employees. That is, if an employee wanted medical coverage for her spouse as well as for herself, the employer's plan could provide the spousal coverage but the employee would have to bear the additional cost; the employer could not pay for it. Such a statute, despite its "fair employment" function and inspiration, would presumably be preempted by ERISA.

HeinOnline -- 76 Tul. L. Rev. 429 2001-2002

***

HeinOnline -- 76 Tul. L. Rev. 430 2001-2002