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THE SOUNDS OF SILENCE: THE LIBERTARIAN ETHOS OF ERISA PREEMPTION

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Hello darkness, my old friend
I've come to talk with you again.[***]

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*** Paul Simon, *The Sounds of Silence*, © 1964 (BMI).

INTRODUCTION

In the Winter of 1996, the Harvard Journal on Legislation published an article entitled in part, *The Last Article About the Language of ERISA Preemption?*[1] Absent the question mark, one might have thought it a bold (and hopefully accurate) statement. Yet, as the question mark suggests, no scholar has been able to provide the definitive answer regarding the scope of ERISA preemption. Indeed, only the Supreme Court can, and it has answered with a resounding lack of clarity. Rather than shedding light on the language of ERISA preemption, the Supreme Court in four recent decisions has thrust the issue back into a murky darkness. So jurists, academics, and practitioners alike, while perhaps not old friends, again

1. Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35 (1996).

must talk about the darkness enveloping ERISA preemption.

Since enactment in 1974, the Employee Retirement Income Security Act (ERISA)[2] has confounded both state regulators and the courts concerning the appropriate extent of its preemption of state law. Using an odd turn of phrase, Congress sought to supersede state laws that "relate to any employee benefit plan."[3] On its face, this language appears to call for a broad scope of preemption, and, for roughly two decades, the Court agreed and interpreted the "relate to" standard so as to moot a myriad of state laws touching on employee benefit plans.[4]

This expansive reading of ERISA preemption has come under increasing criticism. In what has become a familiar refrain, commentators point to ERISA's lack of substantive regulation of employee welfare benefit plans as evidence of a Congressional intent to limit federal ouster of state regulation.[5] They point out that ERISA's silence, when coupled with the preemption of state law, essentially results in a "regulatory vacuum" concerning employee welfare benefit plans.[6] Viewing this vacuum as abhorrent, they presume that Congress must have intended a greater role for state regulation. This criticism is perhaps most poignant with respect to employer-provided health care benefits, which are among the most significant and least regulated of all employee benefits.[7]

Perhaps responding to this criticism, the Supreme Court has issued four decisions since 1995 that appear to signal a growing discomfort with ERISA's broad preemptive sweep. These decisions, while raising the potential for a radically altered landscape of employee benefits law, have not been successful in crafting a new standard for testing ERISA's preemptive scope.

The presumed Congressional silence in ERISA with respect to the substantive regulation of employee benefit plans lies at the heart of this debate. Is a more limited scope of ERISA preemption the inevitable "sound" of this silence? We think not. A review of ERISA's legislative

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2. 29 U.S.C. §§ 1001-1461 (1974).

3. *Id.* § 1144(a).

4. *See infra* notes 45-58 and accompanying text.

5. *See* Fisk, *supra* note 1, at 36-37, 56; Daniel M. Fox & Daniel C. Schaffer, *Semi-Preemption in ERISA: Legislative Process and Health Policy*, 7 AM. J. TAX POLICY 47, 48 (1988); Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 31-35 (1995); *see also* Jay Conison, *ERISA and the Language of Preemption*, 72 WASH. U. L.Q. 619, 667 (1994).

6. *See, e.g.*, Fisk, *supra* note 1, at 37; Fox & Schaffer, *supra* note 5, at 48; Stabile, *supra* note 5, at 35.

7. *See, e.g.*, Corey J. Ayling, *New Developments in ERISA Preemption and Judicial Oversight of Managed Care*, 31 CREIGHTON L. REV. 403, 434 (1998); Robert N. Covington, *Amending ERISA's Preemption Scheme*, 8 KAN. J.L. & PUB. POL'Y 1 (1999); Fox & Schaffer, *supra* note 5.

history and post-enactment amendments suggests that this Congressional silence was intentional and, more importantly, consistent in purpose with the broad scope of preemption announced by the Court nearly two decades ago. Rather than abhorring this vacuum, Congress deliberately established a regulation-free zone largely devoid of both federal and state law mandates. By creating this regulatory vacuum, Congress sought to free employers from conflicting regulatory schemes and to encourage them to expand the number of voluntarily provided benefit plans for their employees. In short, Congressional silence regarding the substance of welfare benefit plans should be viewed as inviting a "libertarian ethos" to infuse the law and marketplace of employee benefits.

Thus, the shifting winds of ERISA preemption present both a curse and an opportunity: a curse of unpredictability concerning the present standard for preemption, and an opportunity to reinvestigate the appropriate balance between state and federal regulation of employee benefits. As the struggle to articulate a standard continues, the courts would be wise to recall ERISA's libertarian ethos and refrain from treating the preemption issue as a proxy for debating health care reform.

Part I of this article provides an introduction to basic federal preemption principles, while Part II provides an overview of the ERISA statute. Part III then reviews the Supreme Court's ERISA preemption jurisprudence, first in terms of the Court's traditionally broad interpretation of the "relate to" standard, and then with regard to the more limiting decisions issued since 1995. Part IV summarizes the various options flowing from these decisions for a future preemption test as well as the arguments of those commentators who recommend a more narrow scope of ERISA preemption. In Part V, we investigate various indicators of Congressional intent, such as legislative history, the structure and coverage of ERISA, and post-enactment amendments, as a means of gauging the appropriateness of a narrower preemption standard. This process, as we discuss in Part VI, reveals the libertarian ethos underlying ERISA's treatment of welfare benefit plans by which Congress sought to encourage the development of benefit plans in an environment largely free of both federal and state regulation. Given this overarching objective, we conclude that a narrower scope of ERISA preemption is inconsistent with Congressional intent and that the Court, accordingly, should fashion its new analytical framework in a manner that will retain a broad preemptive scope.

I. A PRIMER ON PREEMPTION

A federal system of government necessarily involves a tension in the division of power between state and federal governments. Under the United States Constitution, this tension is principally resolved through the

Supremacy Clause, which states, "This Constitution, and the laws of the United States . . . shall be the supreme law of the Land."[8] This language authorizes, but does not compel, federal preemption of state law. Generally speaking, federal law supersedes state law where the two laws conflict or where Congress has otherwise indicated its desire to oust state regulation.[9] Preemption analysis, therefore, is a matter of divining Congressional intent with respect to the particular federal statute at issue.[10]

The federal courts primarily bear the responsibility of determining when federal preemption of state law is appropriate. The Supreme Court first addressed the question of preemption in the landmark case of *McCulloch v. Maryland*,[11] which stated:

> [T]he sovereignty of the State . . . is subordinate to, and may be controlled by the Constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain.[12]

Not long thereafter, in *Gibbons v. Ogden*, Justice Johnson noted in a concurring opinion that certain state navigation laws, which conflicted with those of Congress, were "repugnant to the . . . Constitution, and void."[13] In the years since, the Court has engaged in an evolving jurisprudence on preemption. Since the Presidency of Franklin Delano Roosevelt and the rapid expansion of federal laws into areas of traditional state power, the issue of federal preemption has attained heightened importance.

The Supreme Court, through this evolving jurisprudence, has identified two functional categories of preemption: express and implied.[14] The court

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8. U.S. CONST. art. VI, cl. 2.

9. *See* Malone v. White Motor Corp., 435 U.S. 497, 504 (1978).

10. *See* Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption*, 13 THE LABOR LAWYER 429 (1998).

11. 17 U.S. (4 Wheat.) 316 (1819).

12. *Id.* at 427.

13. 22 U.S. (9 Wheat.) 1, 240 (1824) (Johnson, J., concurring).

14. *See, e.g.*, English v. General Elec. Co., 496 U.S. 72 (1990). These preemption categories are discussed in greater length in Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149 (1998).

uses express analysis to determine the effect of a direct statement within a federal law describing the appropriate scope of federal preemption. In other words, preemption is express when "Congress' command is explicitly stated in the statute's language. . . ."[15] Express preemption clauses sometimes have been a cause of consternation, prompting one commentator to suggest that Congress instead should leave preemption issues to the judiciary.[16] Still, because the ultimate goal of preemption analysis is to ascertain Congressional intent, an express statement serves at least to assist the courts in determining that intent.

The courts employ implied preemption analysis when a statute lacks an express provision articulating its preemptive impact. While the statute may not directly call for preemption, Congressional "intent" may impliedly suggest that state law should be preempted to further the purposes of the federal law.[17] Implied preemption is generally of two types: field preemption and conflict preemption. Field preemption arises when Congress impliedly demonstrates its intent to reserve an area of concern exclusively for federal regulation. The Supreme Court, for example, has inferred such an intent 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."[18] As Justice Stone rightfully pointed out with respect to field preemption, "[every] Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution."[19] Justice Stone's remonstrance notwithstanding, once a court has determined the boundaries of the field in question, federal law will oust state law attempting to occupy that same field. This is true even if there is no direct conflict between federal and state law, or indeed, even if federal and state law are consistent.[20]

Conflict preemption necessarily is narrower in scope than field preemption. A court will invalidate a state law on conflict preemption grounds to the extent that a state law directly conflicts with federal law. The Supreme Court has explained that conflict preemption will be found when it is either "impossible for a private party to comply with both state

15. Livadas v. Bradshaw, 512 U.S. 107 (1994).

16. *See* Stabile, *supra* note 5, at 3 (arguing that, "except in rare circumstances, Congress should refrain from including express preemption provisions in the legislation it enacts, suggesting that the courts, rather than Congress, are better able to make preemption determinations that give appropriate regard to federalism considerations").

17. *See* Befort, *supra* note 10, at 429-30; Jordan, *supra* note 14, at 1165-66.

18. *English*, 496 U.S. at 79.

19. Hines v. Davidowitz, 312 U.S. 52, 78 (1941) (Stone, J., dissenting).

20. *See* Department of Indus., Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 286 (1986); Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825, 829 (1988).

and federal requirements"[21] or where state law stands as an obstacle to the accomplishment and execution of the "full purposes and objectives of Congress."[22] Under the latter inquiry, state law will pose an impermissible obstacle if it "interferes with the methods by which the federal statute was designed to reach [its] goal."[23]

Whether preemption is express, field, or conflict in nature, the ultimate effect is the same. To the extent that federal law is found to be preemptive, a state is ousted from the power to regulate. Similarly, a plaintiff may not impose liability on a defendant under state law, "regardless of whether the defendant's conduct in fact constituted a violation of state law and regardless of whether federal law provides the plaintiff any remedy."[24]

From this brief overview, it is clear that courts must consider several policy considerations in resolving questions of preemption, such as basic notions of federalism, uniformity of laws, ease of administration, and allocation of resources.[25] The tensions underlying these policy concerns have been explored frequently in the Supreme Court's ERISA preemption jurisprudence. Nonetheless, while the Supreme Court has visited the question of preemption under ERISA at an average of almost once per year since enactment,[26] the scope of preemption still remains uncertain.

II. A BRIEF INTRODUCTION TO ERISA

Prior to ERISA's adoption, relatively little legislation, either state or federal, governed employee benefits. State law predominated in the form of insurance regulation focused principally on issues of taxation and fiduciary duties.[27]

With the enactment of ERISA in 1974, Congress crafted the first comprehensive law governing employee benefits in the United States. The findings and declaration of policy incorporated in ERISA reflect Congress' views on the importance of this step.

> The Congress finds . . . that the continued well being and security of millions of employees and their dependents are

21. *English*, 496 U.S. at 79.

22. *Id.* (quoting Maryland v. Louisiana, 451 U.S. 725, 747 (1981)).

23. International Paper Co. v. Quellette, 479 U.S. 481, 494 (1987) (addressing the preemptive effect of the Clean Water Act).

24. Stabile, *supra* note 5, at 5.

25. *See id.* at 9-12.

26. The Supreme Court has decided seventeen ERISA preemption cases since the statute was enacted in 1974. *See* Unum Life Ins. Co. v. Ward, 526 U.S. 358 (1999) (the Court's most recent ERISA preemption decision); Prudential Ins. Co. v. National Park Med. Ctr., 154 F.3d 812, 815 (8th Cir. 1998) (listing sixteen ERISA preemption cases decided through 1998).

27. *See generally* Conison, *supra* note 5, at 642-45.

> directly affected by these plans; that they are affected with a national public interest; that they have become an important factor in activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained. . . .[28]

Moreover, Congress clearly felt that the prior set of state and federal laws governing employee benefits were inadequate: "[O]wing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans. . . ."[29]

Although commonly thought of as a law regulating pensions, ERISA is a set of statutes[30] that regulates benefit programs for current employees as well as for retired employees. Thus, benefit plans subject to ERISA include both "pension" plans and "employee welfare benefit plans."[31] Generally speaking, covered "pension" plans provide retirement income to employees or their dependents.[32] ERISA defines an "employee welfare benefit plan" more expansively to encompass a multitude of services provided to current employees, including:

> any plan, fund, or program . . . established or maintained by an employer or by an employee organization . . . for the purpose of providing . . . 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,

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28. 29 U.S. § 1001 (1986).

29. *Id.*

30. Congress adopted ERISA as Pub. L. 93-406, Title I, § 2, Sept. 2, 1974, 89 Stat. 832. In common usage, ERISA has come to represent more than simply the statute itself. Instead, ERISA includes a multitude of regulatory sources concerning pensions and welfare benefits, such as the Department of Labor's rules, regulations, and letter rulings, the Internal Revenue Code and tax opinions, and the expanding body of case law interpreting the many statutes, rules, and regulations. These pieces together comprise "ERISA" for the purposes of the practicing lawyer, the human resources manager, and, of course, the participants and beneficiaries under a particular plan.

31. 29 U.S.C. § 1002(3) (1974).

32. *See id.* § 1002(2)(A) ("[T]he terms 'employee pension benefit plan' and 'pension plan' mean any plan . . . [that] (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. . . ."). The two primary types of pensions are defined benefit plans and defined contribution plans. Defined benefit plans involve an obligation to pay a certain monthly amount upon retirement. Defined contribution plans involve an obligation to pay a certain amount each month into a fund while the employee is employed. Upon retirement, the benefits in a defined contribution plan may vary based upon market conditions, interest rates and other factors.

scholarship funds, or prepaid legal services.[33]

Although subject to certain limitations and exclusions,[34] ERISA covers the vast majority of employee benefits, including the important subset of health care benefits.

Congress divided the statutory framework of ERISA into four titles. Title One, captioned "Protection of Employee Benefit Rights," is the most significant title and its regulatory provisions set out in Subtitle B consists of seven Parts. Part 1 covers the reporting and disclosure requirements applicable to all employee benefit plans.[35] Part 2 covers participation and vesting requirements for pension plans.[36] Part 3 concerns funding requirements for pension plans.[37] Part 4 outlines the fiduciary responsibilities of employee benefit plan administrators.[38] Part 5 sets out the civil liability and enforcement provisions of ERISA.[39] Part 6 addresses continuation of benefits coverage under COBRA.[40] Part 7 creates certain group health plan portability, access, and renewability requirements.[41]

As Professor Peter J. Wiedenbeck has noted, one of the striking anomalies of Title I of ERISA is that its regulatory framework can be seen as a series of "conduct" and "content" provisions. The "conduct" provisions relate to both pension and welfare plans, while the extensive set of "content" provisions govern only pension plans.[42] The distinction lies in the fact that only pension benefits receive attention with respect to the "content," or substance, of the plans themselves. ERISA directly regulates the substance of pension plans by imposing certain funding, vesting, anti-discrimination, and other content-based mandates. In contrast, at the time of ERISA's enactment, welfare benefits principally were subject only to "conduct" regulations. These regulations governed the behavior of plan

33. *Id.* § 1002(1) (1974). Even though broad, the entire class tends to share one common trait distinct from pensions: these benefits tend to be in the nature of "services" provided to employees throughout the course of employment, and perhaps through retirement, as opposed to pensions which constitute post-employment monetary transfers.

34. ERISA explicitly exempts from coverage the benefit plans of state and federal government agencies, religious organizations, workers compensation insurance plans, and non-resident alien plans. 29 U.S.C. § 1003(b). Also, certain types of employee benefits found within the private sector are either excluded as well, such as dependent care reimbursement plans, *see* IRC § 129 (1981), or subject only to a limited part of ERISA's provisions, such as unfunded excess benefit plans. *See* 29 U.S.C. § 1002(36); *id.* § 1101(a)(1).

35. *See* 29 U.S.C. §§ 1021-1031.

36. *See id.* §§ 1051-1061.

37. *See id.* §§ 1081-1086.

38. *See id.* §§ 1101-1114.

39. *See id.* §§ 1131-1147.

40. *See id.* §§ 1161-1169.

41. *See id.* §§ 1181-1191.

42. *See* Peter J. Wiedenbeck, *ERISA's Curious Coverage*, 76 WASH. U. L.Q. 311, 341 (1998).

administrators procedurally such as by imposing reporting, disclosure and fiduciary responsibilities, but they did not impose substantive requirements concerning the contents of welfare benefit plans. While this dichotomy still exists to a considerable extent, Congress, as discussed below,[43] has shown an increased willingness to regulate the substance of welfare benefits as well.

ERISA also contains an express preemption clause. Section 514(a) provides that ERISA "[supercedes] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[44] This succinct statement of Congressional intent, although seemingly simple and straightforward, continues to confound the courts.

III. ERISA PREEMPTION JURISPRUDENCE

A. *The First Two Decades*

For the first two decades following ERISA's enactment, the Supreme Court interpreted the "relate to" language of § 514(a) literally to embrace a broad scope of preemption. In various decisions, the Court described § 514(a) as having "a broad scope"[45] and "expansive sweep,"[46] and as "broadly worded,"[47] "deliberately expansive,"[48] and "conspicuous for its breadth."[49]

In its early decisions, the Supreme Court added texture to the sparse "relate to" statutory language. The Court looked to the "broad common-sense meaning" of that phrase concluding that "a state law may 'relate to' a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the effect is only indirect."[50] Similarly, the Court has made it clear that even state laws that are consistent with ERISA are preempted so long as they somehow relate to an employee benefit plan.[51] Consistent with these principles, the Court has ruled that a state law "relates to" an ERISA plan if the law either: 1) has a "connection with," or 2) has a "reference to" an ERISA plan.[52]

The lower courts have identified various factors to consider in applying

43. *See infra* notes 243-51 and accompanying text.
44. 29 U.S.C. § 1144(a).
45. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985).
46. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987).
47. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138 (1990).
48. *Pilot Life*, 481 U.S. at 46.
49. FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990).
50. *Ingersoll-Rand*, 498 U.S. at 139.
51. *See* Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 829 (1988); *Metropolitan Life*, 471 U.S. at 739.
52. *Metropolitan Life*, 471 U.S. at 739; Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983).

these two prongs of the "relates to" test. The courts typically consult four factors when determining whether a state law impermissibly "refers" to an ERISA plan. As summarized by a recent Eighth Circuit Court of Appeals decision, these factors include: 1) whether the law imposes requirements by expressly referring to ERISA plans; 2) whether the law expressly exempts ERISA plans from an otherwise generally applicable statute; 3) whether the law acts immediately or exclusively upon ERISA plans; and 4) whether the existence of an ERISA plan is essential to the law's operation.[53]

The lower courts similarly look to various factors in determining whether a given state law has an impermissible "connection with" an ERISA plan. These factors include the following: 1) whether the law regulates the types of benefits offered under an ERISA plan; 2) whether the law requires the establishment of a separate benefit plan to comply with the law; 3) whether the law imposes reporting, disclosure, funding or vesting requirements; and 4) whether the law regulates ERISA relationships, such as those between the plan and the employer, and, to the extent a plan is involved, between the employer and the employee.[54]

Up until 1995, courts applied these principles to preempt a wide-range of state laws and claims. The Supreme Court, for example, held that ERISA preempted a wrongful discharge tort action in which an employee claimed that his employer fired him to avoid making contributions to a pension fund.[55] The Supreme Court also ruled that ERISA preempted state contract and tort claims alleging improper processing of a disability benefit claim.[56] ERISA preemption has been particularly noteworthy in the health care setting, where courts have barred state law negligence claims relating to the utilization review process,[57] as well as state health insurance mandates and "pay-or-play" incentives.[58]

While recognizing a broad scope for ERISA preemption, the Supreme Court has cautioned that some state laws may impact benefit plans in "too tenuous, remote or peripheral a manner" to warrant preemption.[59] The Court also has read ERISA as tolerating state regulation of insurance

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53. *See* Prudential Ins. Co. of America v. National Park Medical Ctr., 154 F.3d 812, 822 (8th Cir. 1998).

54. *See* Operating Eng'rs Health & Welfare Trust Fund v. JWJ Contracting Co., 135 F.3d 671, 678 (9th Cir. 1998); Aloha Airlines, Inc. v. Ahue, 12 F.3d 1498, 1504 (9th Cir. 1993).

55. *See Ingersoll-Rand Co.*, 498 U.S. at 140. For a general discussion of ERISA preemption of state employment law claims, see Paul J. Zech, *Federal Preemption and State Exclusive Remedy Issues in Employment Litigation*, 72 N.D. L. REV. 325 (1996).

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

57. *See* Kuhl v. Lincoln Nat'l Health Plan, 999 F.2d 298 (8th Cir. 1993); Corcoran v. United Healthcare, Inc., 965 F.2d 1321 (5th Cir. 1992).

58. *See* Standard Oil Co. v. Agsalud, 633 F.2d 760, 765 (9th Cir. 1980).

59. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1983).

contracts purchased to provide employee benefits, but not those provided through self-insurance plans.[60] The lower courts have had a difficult time in determining the appropriate boundary of these limitations,[61] and the Supreme Court has signaled its frustration with the continual necessity of revisiting its ERISA preemption jurisprudence.[62] Meanwhile, commentators have increasingly criticized the Court's broad interpretation of the "relate to" standard as inconsistent with ERISA's regulatory silence concerning the substance of welfare benefit plans.[63]

B. *Four Recent Decisions*

Beginning in 1995, the Supreme Court signaled a retreat of sorts from its traditional broad approach to ERISA preemption. In four significant decisions,[64] the Court has cast considerable doubt on the validity of its past jurisprudence. The Court, in these decisions, has rejected a strictly literal reading of ERISA's "relate to" preemption provision,[65] and suggested the

60. ERISA contains a "savings clause" which preserves state laws that "regulate insurance, banking or securities." 29 U.S.C. § 1144(b)(2)(A). The savings clause is qualified, in turn, by what is known as the "deemer clause" which states that an employee benefit plan governed by ERISA may not itself be deemed to be an insurer subject to the savings clause exception. 29 U.S.C. § 1144(b)(2)(B). The Supreme Court has interpreted these two clauses as providing for a different scope of preemption with respect to plans that purchase insurance as opposed to self-insured plans. For example, in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 746 (1985), the Court held that ERISA did not preempt a state statute requiring that health care plans provide certain minimum mental health care benefits to the extent that it applied to insurance contracts purchased for ERISA plans. On the other hand, the Court explained that plans that are self-funded by employers are exempt from the insurance exception by virtue of the deemer clause and are, therefore, preempted by ERISA. *See id.* at 747; *see also* FMC Corp. v. Holliday, 498 U.S. 52, 65 (1990) (ruling that ERISA preempted a Pennsylvania anti-subrogation law as it applied to self-insured plans, but not as applied to plans with purchased insurance).

61. *See, e.g.*, AETNA Life Ins. Co. v. Borges, 869 F.2d 142, 145 (2d Cir. 1989) (observing that "the distinction between state laws that 'relate to' employee benefit plans and those that have only a 'tenuous, remote, or peripheral' impact is not always clear").

62. *See* DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 809 (1997) (where Justice Stevens begins his opinion by stating, "This is another Employee Retirement Income Security Act (ERISA) pre-emption case"); California Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 336 (1997) (Scalia, J., concurring) (stating "I think it would greatly assist our function of clarifying the law if we simply acknowledged that our first take on this [ERISA] statute was wrong").

63. *See infra* notes 151-61 and accompanying text.

64. The Supreme Court actually has decided five ERISA preemption cases since 1995. The most recent decision, *Unum Life Ins. Co. v. Ward*, 526 U.S. 358 (1999), concerns a narrow issue with regard to the insurance savings clause exception to preemption, *see supra* note 60 and accompanying text, and does not address the broader preemption issue that is the subject of this article.

65. *See DeBuono*, 520 U.S. at 812-13; New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654-55 (1995).

appropriateness of a somewhat narrower preemptive impact. In doing so, however, the Court has failed to fashion a new, predictable test for preemption. Indeed, these cases can be read as suggesting as many as six alternate approaches to ERISA preemption.[66] The following review of these four decisions depicts the uncertain landscape that they have created.

1. *Travelers*

The Supreme Court first signaled its desire to reshape the scope of ERISA preemption in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*[67] In that decision, the Court held that ERISA did not preempt a New York statute that required hospitals to collect surcharges from patients covered by commercial insurers or HMO's while exempting patients insured by a Blue Cross/Blue Shield plan.[68]

The Court began its analysis in *Travelers* by revisiting the meaning of ERISA's "relate to" language. The Court noted that its prior attempts to construe that phrase had provided little guidance in determining the proper boundary line of ERISA preemption.[69] The Court rejected a literal reading of the statutory language, stating:

> If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for "really, universally, relations stop nowhere." H. James, *Roderick Hudson*, xli (New York ed., World's Classics 1980). But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality.[70]

In determining whether this presumption has been overcome in applying the "connection with" prong of ERISA preemption, the Court stated that it must go beyond the "unhelpful" statutory text 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."[71]

Applying this modified test, the Court in *Travelers* held that ERISA did not preempt the health care surcharge at issue.[72] The Court found that the principal purpose of ERISA's preemption clause was to avoid a

66. *See infra* notes 149-50 and accompanying text.
67. 514 U.S. 645 (1995).
68. *See id.* at 649-51.
69. *See id.* at 655.
70. *Id.*
71. *Id.* at 656.
72. *See id.* at 668.

multiplicity of regulation in order to permit the national, uniform administration of benefit plans.[73] While this purpose supports the preemption of state laws that mandate plans to provide certain minimum benefits,[74] the Court distinguished state laws, such as the New York surcharge, which merely have an "indirect economic influence" on ERISA benefit plans.[75] The Court concluded that such "an indirect influence . . . does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself."[76]

2. *DeBuono*

Although not the next case in terms of chronological order, the Court's decision in *DeBuono v. NYSA-ILA Medical & Clinical Services Fund*,[77] is the only one of the remaining three decisions that fully adheres to the principles announced in *Travelers*. In fact, the *DeBuono* case, decided by the Court in 1997, closely resembles *Travelers* as to both facts and reasoning.

At issue in *DeBuono* was a state tax imposed on gross receipts for patient services at hospitals, residential care facilities, and diagnostic treatment centers.[78] The validity of the tax was challenged by the trustees of a self-insured, multiemployer benefit plan who argued that the tax was preempted as applied to facilities directly operated by an ERISA plan.[79] The Second Circuit Court of Appeals agreed and distinguished *Travelers* on the ground that the state tax in *DeBuono* directly reduced the plan's assets.[80] Thus, unlike the indirect economic influence of the *Travelers*' surcharge, the Second Circuit concluded that the tax imposed by this statute was preempted because of its immediate impact on an ERISA plan's operation.[81]

The Supreme Court, in reversing, admonished the court of appeals for "failing to give proper weight to *Travelers* rejection of a strictly literal

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73. *See id.* at 656-57.

74. *See id.* at 657.

75. *Id.* at 659.

76. *Id.* The Court's reasoning in this regard is questionable. The "indirect economic influence" of the New York law acted as a tax on the decision *not* to have the type of open-enrollment offered by Blue Cross & Blue Shield. Open-enrollment addresses eligibility for benefits under a plan or from a given insurer. Plan participation, however, is squarely within the purview of ERISA. The New York laws, while on their face only impacting insurance prices and plan costs, had the apparent purpose of financially coercing plans to accept open-enrollment. Therefore, state regulation via the *taxation* of plans not offering open-enrollment may arguably be preempted.

77. 520 U.S. 806 (1997).

78. *See id.* at 809-10.

79. *See id.* at 810.

80. *See id.* at 811.

81. *See* NYSA-ILA Med. & Clinical Servs. Fund v. Axelrod, 74 F.3d 28, 30 (2d Cir. 1996).

reading of § 514(a)."[82] While acknowledging that the statute's preemption language is "clearly expansive,"[83] the Court again stated that the text does not modify the usual presumption against preemption.[84] The Court then reiterated the modified test of *Travelers*:

> In order to evaluate whether the normal presumption against pre-emption has been overcome in a particular case, we concluded [in *Travelers*] that we "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."[85]

Turning to the merits, the Court characterized the state tax as "one of a 'myriad state laws' of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not 'relate to' them within the meaning of the governing statute."[86] The Court pointed out that the tax is not on ERISA plans per se, but on health care facilities, most of which are not owned and operated directly by ERISA plans.[87] The Court concluded by stating that the fact that such a tax, whether directly or indirectly imposed, has some financial impact on ERISA plans, "simply cannot mean that every state law with such an effect is preempted by the federal statute."[88]

3. The *Travelers/DeBuono* Modified Test

The *Travelers* and *DeBuono* opinions clearly illustrate the Court's desire to narrow its standard for finding ERISA preemption. These decisions retain the traditional inquiry into whether the state law in question has either a "reference to" or "connection with" an employee benefit plan,[89] but appears to adjust this analytical framework through two modifications.

First, the two decisions indicate that the preemption inquiry should be grounded in the presumption that Congress generally does not intend to preempt state law.[90] This presumption is rooted in part within the notion

82. *DeBuono*, 520 U.S. at 812-13.
83. *Id.* at 813.
84. *See id.*
85. *Id.* at 813-14.
86. *Id.* at 815.
87. *See id.* at 816.
88. *Id.*
89. *Id.* at 813; *Travelers*, 514 U.S. at 656.
90. *See DeBuono*, 520 U.S. at 813, 814; *see also Travelers*, 514 U.S. at 654 (holding "we have never assumed lightly that Congress has derogated state regulation, but instead have addressed

that "the historic police powers of the State include the regulation of matters of health and safety."[91] When a state acts within this zone of traditional activity, the party seeking preemption bears a "considerable burden" of overcoming the presumption of validity.[92]

This new[93] presumption appears simultaneously with the admonition that courts should no longer give weight to the "unhelpful" text of section 514(a).[94] Taken together with the anti-preemption presumption, this adjustment in the Court's methodology effectively reverses the Court's prior practice of presuming preemption. Under the Court's traditional practice, ERISA's "relate to" standard resulted in the preemption of any state law or claim impacting an employee benefit plan unless that impact was too remote in nature.[95] The modified test of *Travelers* and *DeBuono*, in contrast, presumes the absence of preemption unless the challenging party overcomes the considerable burden to prove otherwise. This reversed presumption appears to signal a sharp reversal of prior precedent, and brings into question the continuing validity of many of the Court's prior preemption decisions.

Second, *Travelers* and *DeBuono* instruct that courts should look to the "objectives" of ERISA as a guide to Congressional intentions on preemption.[96] This step necessarily leads to a more narrow scope of preemption. Rather than ousting all state laws and claims that relate in any manner to an employee benefit plan, the modified test apparently will tolerate state regulation that is not inconsistent with ERISA's objectives, even if that regulation relates to a covered benefit plan. While this, at first blush, may seem to be a logical, policy-oriented limitation on the expansive "relate to" standard, divining the objectives of ERISA may prove as difficult as the text of section 514(a). As an example, the direct/indirect economic influence distinction that the Court made in

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claims of pre-emption with the starting presumption that Congress does not intend to supplant state law").

91. *DeBuono*, 520 U.S. at 814; *see also Travelers*, 514 U.S. at 655 (stating that historic police powers of the state should not be superseded by a Federal Act unless that was the clear and manifest purpose of Congress).

92. *DeBuono*, 520 U.S. at 814.

93. Only one of the Court's earlier decisions had mentioned such a presumption, and did so in *dicta*. *See* Metropolitan Life Ins. Co. v. Massachusetts Travelers Ins. Co., 471 U.S. 724, 740 (1985) ("We also must presume that Congress did not intend to pre-empt areas of traditional state regulation."). Indeed, the Court in *Travelers* cited only to *non-ERISA* precedent as support for this proposition. *See* 514 U.S. at 654-55 (citing Maryland v. Louisiana, 451 U.S. 725, 746 (1981)).

94. *See DeBuono*, 520 U.S. at 813; *Travelers*, 514 U.S. at 656.

95. *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1983).

96. *DeBuono*, 520 U.S. at 813-14; *Travelers*, 514 U.S. at 656.

Travelers[97] was discarded as irrelevant in *DeBuono*.[98] The danger, of course, is that the Court may be unleashing an ad hoc approach to preemption analysis that may be even more unwieldy and unpredictable than that which it replaces.

The modified test of *Travelers* and *DeBuono*, accordingly, does not necessarily presage a smooth transition in the law of ERISA preemption. This concern is heightened further by the fact that neither of the Court's other two recent decisions fully adhere to this new standard.

4. *Dillingham*

The Court's decision in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*[99] was sandwiched between those of *Travelers* and *DeBuono*. In *Dillingham*, the Court considered whether ERISA preempted a state prevailing wage law as applied to apprenticeship programs.[100] The California law in question "require[d] a contractor on a public works project to pay its workers the prevailing wage in the project's locale."[101] The State, however, provided an exception for approved apprenticeship programs.[102] The State sought to enforce the statute against Dillingham Construction, a contractor that had been paying its apprentices below the prevailing wage scale prior to approval of its apprenticeship program.[103] Because ERISA includes apprenticeship programs within the definition of a covered welfare benefit plan,[104] the contractor argued that ERISA preempted enforcement of California's prevailing wage law.

The Court rejected this argument and ruled that the prevailing wage law had neither a reference to nor a connection with such a plan.[105] The Court found that the statute did not refer to covered benefit plans because an approved apprenticeship plan could be structured as a non-ERISA plan.[106] As such, the Court noted, the statute "functions irrespective of . . . the existence of an ERISA plan."[107] The Court also stated that since the state law only operated as an economic incentive, as opposed to a direct substantive mandate, it did not have an impermissible connection with

97. *See Travelers*, 514 U.S. at 659.
98. *See DeBuono*, 520 U.S. at 816.
99. 519 U.S. 316 (1997).
100. *See id.* at 319.
101. *Id.*
102. *See id.* at 319-20.
103. *See id.* at 321-23.
104. *See id.* at 323-24 (citing 29 U.S.C. § 1002(1)).
105. *See id.* at 324.
106. *See id.* at 325-28.
107. *Id.* at 328.

ERISA plans.[108]

Dillingham is important in several respects. First, the Court in *Dillingham* significantly restricted the "reference to" prong of ERISA preemption in concluding that the state law did not refer to benefit plans because of the theoretical possibility of its application to non-ERISA plans.[109] This conclusion is surprising since most of the apprentice programs that the State of California sought to regulate were ERISA plans,[110] including the plan at issue in the case.[111] The Court's reading of the "reference to" prong could result in a large loophole enabling state regulation of plans so long as the law is structured to encompass nonplan subjects as well.[112]

Second, the Court specifically emphasized ERISA's silence with respect to the substance of welfare benefit plans in considering whether ERISA's objectives were sufficient to overcome the presumption against preemption. In this regard, the Court stated:

> ERISA certainly contemplated the pre-emption of substantial areas of traditional state regulation. The wages to be paid on public works projects and the substantive standards to be applied to apprenticeship training programs are, however, quite remote from the areas with which ERISA is expressly concerned—"reporting, disclosure, fiduciary responsibility, and the like." . . . A reading of § 514(a) resulting in the pre-emption of traditional state-regulated substantive law *in those areas where ERISA has nothing to say would* be "unsettling."[113]

Thus, the Court, at least in this particular context, seems to agree with those commentators who urge a more limited scope of preemption in light of ERISA's regulatory silence.

Finally, and perhaps ultimately more important than the actual holding of *Dillingham*, is the concurring opinion of Justice Scalia which urges the Court to acknowledge that its "first take" on the scope of ERISA preemption was wrong.[114] Justice Scalia criticized the majority opinion for

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108. *See id.* at 330-34.

109. *See id.* at 328.

110. *See id.* at 327 n.5.

111. *See id.* at 322.

112. This approach appears to be contrary to some prior decisions which found preemption with respect to state laws of general applicability even though the law also applied to entities not covered by ERISA. *See generally* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985); EMPLOYEE BENEFITS LAW 548 (Steven J. Sacher et al., eds. (BNA 1991)).

113. *Dillingham*, 519 U.S. at 330 (emphasis added) (citation omitted).

114. *Id.* at 336 (Scalia, J., concurring).

attempting to reconcile the outcome in *Dillingham* with prior decisions of the Court "instead of acknowledging that the criteria set forth in some of them have in effect been abandoned."[115] The concurring opinion then urged the adoption of a "field" preemption standard for ERISA preemption: "we [should] acknowledge . . . that the 'relate to' clause of the pre-emption provision is meant, not to set forth a test for pre-emption, but rather to identify the field in which ordinary *field pre-emption* applies—namely, the field of laws regulating employee benefit plans [subject to ERISA]."[116] Under this suggested approach, ERISA preemption apparently would extend to the field of laws and claims regulating employee benefit plans but not more broadly to encompass those additional laws and claims that relate only indirectly to an employee benefit plan.

5. *Boggs*: An "Escape Hatch" from the *DeBuono/Travelers* Test?

Of the four cases, the Court's decision in *Boggs v. Boggs*[117] is the most difficult to reconcile with the others. Although issued on the same day as a companion opinion with *DeBuono*, *Boggs* may represent a retreat from the modified test of *Travelers* and *DeBuono*.

The *Boggs* case involved a dispute concerning a decedent's pension benefits between the surviving sons of the decedent's first wife and the decedent's second wife.[118] The benefits at issue included an annuity, an interest in an Employee Stock Ownership Plan (ESOP), and an Individual Retirement Account (IRA).[119] As permitted by Louisiana community property law, the first wife had transferred her interest in these benefits to her sons by means of a testamentary instrument.[120] The second wife challenged the validity of the testamentary transfer claiming that ERISA preempted application of the Louisiana law.[121] She relied, in part, on ERISA's requirement that a qualified joint and survivor annuity must include an annuity payable to a surviving spouse unless the spouse has consented to another arrangement.[122] ERISA, however, does not contain any provision that would govern or otherwise impact testamentary transfers of other types of pension benefits, such as an interest in an ESOP.[123] The Court held that ERISA preempted the operation of the sons' state law

115. *Id.* at 335 (Scalia, J., concurring).
116. *Id.* at 336 (Scalia, J., concurring).
117. 520 U.S. 833 (1997).
118. *See id.* at 836.
119. *See id.*
120. *See id.* at 835-36.
121. *See id.* at 837.
122. *See id.* at 842 (citing 29 U.S.C. § 1055(a), (c)(2)).
123. *See id.* at 847-48.

claims based upon the testamentary transfers.[124]

The Court began its analysis of the case by considering the state law claim concerning the annuity benefits.[125] Unlike in its other recent decisions, the Court did not begin its analysis in *Boggs* by invoking the new presumption against preemption. To the contrary, the Court stated: "Louisiana's community property laws, and the community property regimes enacted in other States, implement policies and values lying within the traditional domain of the States. These considerations *inform* our preemption analysis."[126] Markedly absent from Justice Kennedy's majority opinion is any reference to the "considerable burden" that the decedent's second wife, using the *DeBuono* standard,[127] would have to overcome in order for ERISA to preempt her step-children's state law claims to the retirement benefits.[128]

The Court in *Boggs*, instead, set out the following analytical framework for its deliberations:

> ERISA's express pre-emption clause states that the Act "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." § 1144(a) [ERISA § 514(a)]. We can begin, and in this case end, the analysis by *simply* asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects. 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 preemption claim. Nor need we consider the applicability of field pre-emption. . . .[129]

Because of a direct clash between ERISA and state law with respect to the distribution of annuity benefits, the Court held that ERISA preempted Louisiana's community property law to the extent that it permitted the testamentary transfer of the first wife's interest in the annuity.[130]

The *Boggs* Court then addressed the disposition of the ESOP and the IRA benefits. In contrast with survivor annuity property interests, ERISA does not directly designate a participant's wife as a beneficiary to these

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124. *See id.* at 854.

125. *See id.* at 839-41.

126. *Id.* at 840 (citing Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979)) (emphasis added).

127. *See DeBuono*, 520 U.S. at 814.

128. Indeed, only the dissent in *Boggs* raised the presumption issue ignored by the majority. *See Boggs*, 520 U.S. at 861-62 (Breyer, J., dissenting).

129. *Id.* at 841 (emphasis added).

130. *See id.* at 844.

types of retirement benefits.[131] Therefore, the Court engaged in an extensive overview of ERISA's other provisions governing the protection of plan participants and beneficiaries. From its analysis, the Court noted:

> The surviving spouse annuity and QDRO provisions, which acknowledge and protect specific pension plan community property interests, give rise to the strong implication that other community property claims are not consistent with the statutory scheme. ERISA's *silence* with respect to the right of a nonparticipant spouse to control pension plan benefits by testamentary transfer provides powerful support for the conclusion that the right does not exist.[132]

The Court, accordingly, also found the son's state law claims with respect to the ESOP and IRA benefits to be preempted.[133]

Interestingly, and to the converse of *Dillingham*,[134] the Court in *Boggs* relied on ERISA's regulatory silence to support a finding of preemption. Silence, of course, faces a considerable burden in attempting to overcome a presumption. Perhaps this explains the Court's reluctance to employ the *DeBuono* presumption in *Boggs*.

The *Boggs* decision is curious for its departure from the *Travelers/DeBuono* modified test. The departure may be nothing more than a convenient way to justify a finding of preemption in the context of the *Boggs* set of facts. On the other hand, the Court's opaque mode of analysis may reflect a desire by the justices to keep their options open with respect to the future direction of ERISA preemption.

C. *Lower Court Response*

Not surprisingly, the Supreme Court's lack of clarity has led to considerable confusion at the lower court level. These courts understandably are struggling to undo the "Gordian knot"[135] of ERISA preemption in the aftermath of these four decisions. The range of uncertainty is illustrated by the divergent interpretations of the Ninth and Eighth Circuits.

The Ninth Circuit Court of Appeals reads the four Supreme Court

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131. *See supra* note 123 and accompanying text.

132. *Boggs*, 520 U.S. at 847-48.

133. *See id.* at 852-53.

134. *See supra* note 112 and accompanying text.

135. Prudential Ins. Co. v. National Park Med. Ctr., 154 F.3d 812, 818 (8th Cir. 1998) (describing the appropriate standard for ERISA preemption as a mystery in the nature of the "Gordian knot").

decisions as adopting a new, "markedly narrowed"[136] approach to ERISA preemption. In *Emard v. Hughes Aircraft Co.*,[137] a Ninth Circuit panel reviewed the four decisions and offered the following interpretation of the Supreme Court's new standard: "Taken together, these recent cases demonstrate, as Justice Scalia noted in his concurrence in *Dillingham*, that the Court now applies 'ordinary field pre-emption, and, of course, ordinary conflict pre-emption' analysis to ERISA preemption questions."[138] Under the *Emard* approach, ERISA does not oust state law unless the state provision would conflict with a specific provision of ERISA,[139] frustrate ERISA's purposes,[140] or intrude into the field exclusively occupied by ERISA.[141] The *Emard* court further suggested that the field occupied by ERISA is one narrowly confined to the regulation of plan administration and the "rights of participants and beneficiaries as against the other plan entities."[142] This view of ERISA preemption clearly is quite restrictive and one that will likely undo a considerable body of prior case law.[143]

The Eighth Circuit of Appeals, in contrast, does not read the four Supreme court decisions as affecting a "sea change"[144] in the law of ERISA preemption. In *Prudential Insurance Co. v. National Park Medical Center*,[145] the Eighth Circuit noted that these cases still retain the traditional, two-prong analytical framework asking if a state law has an impermissible "connection with" or a "reference to" an ERISA benefit plan.[146] Taking a measured view of the Supreme Court's apparent adjustment of that framework, the *Prudential* court concluded that the Supreme Court only refocused the preemption inquiry in the context of the "connection with" prong, thereby leaving the "reference to" mode of analysis unchanged.[147] The Court went on to state, "To put it another way, we believe that the presumption that Congress does not intend to supplant state law is necessarily overcome when the state law has an inappropriate

136. Toumajian v. Frailey, 135 F.3d 648, 654 n.3 (9th Cir. 1998).
137. 153 F.3d 949 (9th Cir. 1998).
138. *Id.* at 953.
139. *See id.* at 957.
140. *See id.*
141. *See id.* at 960-61.
142. *Id.* at 961.
143. This likelihood was expressly mentioned in another Ninth Circuit decision, *Operating Eng'rs Health & Welfare Trust Fund v. JWJ Contracting Co.*, 135 F.3d 671, 678 (9th Cir. 1998) (stating "If the breadth of federal pre-emption described in [prior precedents] were still good law, Continental would probably prevail. However, these cases rely on expansive language from the Supreme Court demonstrating an understanding of ERISA pre-emption that has since been tailored to better fit Congress' policy intentions.").
144. Prudential Ins. Co. v. National Park Med. Ctr., 154 F.3d 812, 820 (8th Cir. 1998).
145. 154 F.3d 812 (8th Cir. 1998).
146. *Id.* at 820-21.
147. *Id.* at 822.

'reference to' ERISA or ERISA plans, as such an improper reference is defined in pre-*Travelers* precedent."[148] Thus, the Eighth Circuit views the scope of ERISA preemption as only slightly modified from the traditional, expansive approach.

IV. THE OPTIONS FOR A FUTURE ERISA PREEMPTION STANDARD

A. *Making a List*

The Supreme Court, indeed, has many options from which to choose in fashioning a future preemption standard. The following is a list of six options, each of which is arguably viable based upon a reading of the Court's four recent decisions:

1. The Modified Test of *Travelers* and *DeBuono*

The leading candidate is the new test set out in the *Travelers* and *DeBuono* cases. This more restrictive reformulation of the "relate to" standard has been expressly endorsed in two Supreme Court decisions. Nonetheless, the Court's failure fully to follow the *Travelers/DeBuono* formula in the other two recent cases suggests that the die is not yet cast.

2. Conflict Preemption

The Court in *Boggs* used a conflict preemption mode of analysis in arriving at its finding of preemption. As the most narrow preemption theory, the Court's adoption of this standard would be a radical departure from its more traditional, expansive reading of the "relate to" language. More likely, the *Boggs* majority simply used this "lowest common denominator" of preemption as a means of resolving the case in question without having to make any further pronouncements as to a future standard.

3. Field Preemption

This is the standard championed by Justice Scalia in *Dillingham* and employed by the Ninth Circuit in *Emard.* Although the Supreme Court has not overtly adopted this approach in any of its decisions, the topic of field preemption certainly was on the Court's mind in issuing *Boggs.* The *Boggs* majority stated that it need not "consider the applicability of field preemption," because of the ability to dispose of the case on a conflict

148. *Id.*

preemption basis.[149] The *Boggs* dissent, meanwhile, expressed the view that the notion of field preemption is encompassed in the "connection with" prong of ERISA preemption analysis.[150]

4. The *Prudential* Compromise

The Eighth Circuit in *Prudential* interpreted the four Supreme Court decisions as making a less radical adjustment to the traditional test. The *Prudential* court concluded that *Travelers'* presumption against preemption only modifies the "connection with" prong of the analytical framework. This, according to the Eighth Circuit, would retain the "reference to" inquiry under the traditional mode of analysis without modification.

5. The Traditional "Relate to" Test

A return to the Court's traditionally expansive preemption standard may be the least likely option given the Court's recent and repeated criticism of that approach. Yet, by keeping its options open in *Boggs*, the Court retains the possibility of returning to a test that would not put its past jurisprudence in jeopardy.

6. A Differential Test for Pension and Welfare Benefits

Three of the Court's recent cases involved state laws that arguably related to welfare benefit plans. The Court ruled that ERISA did not preempt any of these statutes. Only one case, *Boggs*, focused on the impact of state law on pension benefits. The Court found that law to be preempted. Perhaps these cases portend a differential standard in which ERISA will more broadly preempt laws relating to pensions than those relating to welfare benefits. This dichotomy, of course, mirrors ERISA's differential treatment of pension and welfare benefit plans.

B. *Critical Pressure for a More Limited Scope of Preemption*

The Supreme Court's apparent search for a less expansive test for ERISA preemption finds support in the writings of numerous commentators. These critics intone a familiar refrain—ERISA's regulatory silence with respect to welfare benefit plans necessarily is inconsistent with

149. *Boggs*, 520 U.S. at 841.
150. *Id.* at 860 (Breyer, J., dissenting).

a broad scope of preemption.[151] According to these commentators, the Supreme Court should reduce the zone of preemption so as to enable the states to fill the currently existing regulatory vacuum.

This argument is premised upon three related assertions. First, the critics maintain that the legislative history surrounding ERISA's enactment shows that Congress gave little thought to the meaning of the "relate to" test in section 514(a).[152] They point out that this language was substituted for a less expansive field preemption provision only ten days before final enactment.[153] One widely-cited article postulates that the broader amendment resulted from lobbying by a few special interest groups seeking to protect their turf and that the Congressional sponsors did not really grasp the significance of this change.[154]

Some commentators find further support for this line of argument in the fact that the bill enacting ERISA also established a Joint Pension Task Force charged with the responsibility of suggesting possible modifications to section 514(a).[155] Thus, they maintain that Congress intended the "relate to" test to be only "provisional"[156] or "experimental" in nature.[157]

As a second assertion, some commentators argue that Congress also gave little thought to the topic of welfare benefit plans in enacting ERISA. They point to the fact that while ERISA contains significant substantive regulation of pension plans, the statute is silent as to the required content of welfare benefit plans.[158] Instead, ERISA only regulates the process-oriented aspects of welfare benefit plans, such as fund reporting requirements and fiduciary obligations.

Third, the combination of a broad scope of federal preemption with a paucity of federal regulation results in a "regulatory vacuum" with respect to welfare benefit plans.[159] Viewing such a vacuum as rare and unwise, the critics contend that Congress could not have intended such a result. At

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151. *See, e.g.*, Fisk, *supra* note 1, at 36-38; Stabile, *supra* note 5, at 48.

152. *See* Conison, *supra* note 5, at 622, 646-48; Fisk, *supra* note 1, at 52-56.

153. *See, e.g.*, Fisk, *supra* note 1, at 53; Fox & Schaffer, *supra* note 5, at 49.

154. *See* Fox & Schaffer, *supra* note 5, at 48-52.

155. The creation of the Joint Pension Task Force is discussed *infra* at notes 192-97 and accompanying text.

156. Fisk, *supra* note 5, at 54-55.

157. Conison, *supra* note 5, at 650-51.

158. *See* Fisk, *supra* note 1, at 36-37; Stabile, *supra* note 5, at 31-35; Wiedenbeck *supra* note 42, at 341-42.

159. *See* Fisk, *supra* note 1, at 37; Fox & Schaffer, *supra* note 5, at 48; Stabile, *supra* note 5, at 35. Dana Muir describes this regulatory vacuum as the "black hole of ERISA." *See* Dana M. Muir, *Contemporary Social Policy Analysis and Employee Benefit Programs: Boomers, Benefits, and Bargains*, 54 WASH. & LEE L. REV. 1351, 1371 (1997). Professor Muir, however, offers a somewhat different view as to the origins of this "black hole," stating that "it is not a necessary consequence of comprehensive preemption. Instead, the federal substantive and remedial law, or more accurately, the absence of federal substantive and remedial law, creates the vacuity." *Id.*

least with respect to pension plans, ERISA's scheme of substantive regulation provides some need to protect against potentially conflicting state law. But such a need is absent in light of ERISA's regulatory silence concerning welfare benefit plans.[160] In any event, the critics conclude, the regulatory vacuum is bad policy in that it enables plans to operate at whim without either federal or state substantive oversight.[161]

V. A RESPONSE TO THE CRITICS: REVISITING EVIDENCE OF CONGRESSIONAL INTENT

This Section attempts to test the thesis summarized above by reviewing various indicators of Congressional intent concerning the contemplated scope of ERISA preemption. This task includes taking a look at legislative history, the structure of ERISA, and the history of post-enactment amendments. We believe that this review shows that the commentators have overstated their claims and that Congress consciously adopted and maintained a broad scope of federal preemption that is consistent with the central purposes of the statute.

A. *Legislative History*

To understand ERISA's preemption structure, it is helpful to understand the regulatory framework that preceded it. Aside from provisions with the Internal Revenue Code governing the tax treatment of employee benefits, Congress twice undertook measures to substantively regulate employee benefits prior to ERISA's enactment in 1974. First, the Taft-Hartley Act, adopted in 1947, began to regulate employee benefit plans of employers with a unionized workforce by imposing various trust and documentation requirements on certain benefits.[162] Second, in 1958, Congress enacted the Welfare and Pension Plans Disclosure Act (WPPDA) which included further content and conduct regulations concerning employee benefits.[163]

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160. *See* Fisk, *supra* note 1, at 56 (stating that "[b]road preemption of state law may make sense when Congress decides to regulate a field extensively, as it did with respect to pensions. But broad preemption makes little sense when Congress does not extensively regulate in an area, as is the case with nonpension benefits"); Stabile, *supra* note 5, at 35 (stating "[o]ddly, the cases do not address the appropriateness of a different preemption standard for welfare rather than pension plans, despite the fact that Congress' concern in passing ERISA was clearly with pension plans, not welfare plans, and that ERISA provides substantive regulation only of the former").

161. *See* Ayling, *supra* note 7, at 407-08 (noting the lack of accountability by HMO's for poor health care because of ERISA preemption); Fisk, *supra* note 1, at 38 (noting the "disastrous" effects of ERISA preemption).

162. *See* 29 U.S.C. § 186(c)(5) (1947).

163. *See* 29 U.S.C. §§ 301-9 (1972). The WPPDA was *repealed by* ERISA. *See* Pub. L. No. 93-406, § 111(B)(2).

These two acts took different paths in attempting to accommodate state law. The Taft-Hartley Act contained the potential to preempt some aspects of state law in relation to employee benefits.[164] The WPPDA, on the other hand, expressly reserved the right of the states to regulate matters involving employee benefit plans.[165]

ERISA arose out of efforts to revise the WPPDA.[166] The House of Representatives' first bill toward that end stated, "the provisions of this Act shall supersede any and all laws of the States . . . insofar as they may now or hereafter relate to the fiduciary, reporting, and disclosure responsibilities of persons acting on behalf of benefit plans. . . ."[167] Similarly, the Senate's first bill, denominated as the Retirement Income Security for Employees Act, provided that "the provisions of this Act or the Welfare and Pension Plans Disclosure Act shall supersede any and all laws of the states . . . insofar as they may now or hereafter relate to the Subject matters regulated by this Act or the Welfare and Pension Plans Disclosure Act. . . ."[168] Both bills included an exception for state banking, insurance, and securities laws.[169]

These early bills, accordingly, envisioned a field preemption standard.[170] As Senator Javits, another of ERISA's sponsors noted, the earlier bills "defined the perimeters of preemption in relation to the areas regulated by the bill."[171]

ERISA, as enacted, however, contained broader language than any of the earlier versions. Section 514(a), as we know, states that ERISA "supercede[s] any and all State laws insofar as they may . . . relate to any employee benefit plan."[172] This language, which came out of the conference committee, is admittedly a departure from the earlier bills.[173]

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164. *See generally* Raymond Goetz, *Regulation of Uninsured Employee Welfare Plans Under State Insurance Laws*, 1967 WIS. L. REV. 319, 330.

165. *See* 29 U.S.C. § 309(b).

166. *See generally* H.R. Rep. No. 93-533, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639 (mentioning that the purpose behind the proposed bill was to revise the WPPDA).

167. H.R. 2, 93d Cong., § 114 (1973), *reprinted in* Subcommittee on Labor of the Committee on Labor and Public Welfare, I LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 50-51 (1976) [hereinafter "LEGISLATIVE HISTORY"].

168. S. 4, 93d Cong., § 602(a), *reprinted in* I LEGISLATIVE HISTORY at 186.

169. *See* H.R. 2, 93d Cong. § 114 (1973), *reprinted in* I LEGISLATIVE HISTORY, at 51; S. 4, 93d Cong., § 602(b), *reprinted in* I LEGISLATIVE HISTORY at 187.

170. One commentator has aptly described the earlier language as having "subject-specific contours." Conison, *supra* note 5, at 619.

171. 120 CONG. REC. 29,942 (1974), *reprinted in* III LEGISLATIVE HISTORY, at 4770-71. One commentator has suggested that "[t]hese penultimate versions were designed to preempt only what was federally regulated, leaving states free to experiment in the employee benefit field where ERISA stopped short." EMPLOYEE BENEFITS LAW, *supra* note 112, at lxxxvii (introduction).

172. 29 U.S.C. § 1144(a).

173. *See* Conison, *supra* note 5, at 620.

This new language "was disclosed when the conference committee report was filed ten days before Congress took final action on ERISA."[174]

Why the departure from the earlier bills? Some clues are provided by the comments of ERISA's legislative sponsors, contemporaneous regulatory attempts by state and professional organizations, and the creation by Congress of a Joint Pension Task Force.

1. Statements by ERISA's Legislative Sponsors

All three of ERISA's principal legislative proponents spoke in favor of the expanded scope of preemption contained in the Conference Committee Report. Senator Williams, Chairman of the Committee, noted, "with the narrow exceptions specified in the bill, the substantive and enforcement provisions . . . are intended to preempt the field for Federal regulations."[175] The comments of Representative John Dent, another of ERISA's sponsors, echo and expand upon those of Senator Williams:

> Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation.[176]

While both Williams' and Dent's comments speak of "field" preemption, other comments describe the new language in more expansive terms. Representative Dent, for example, depicted ERISA preemption as "reaching any rule, regulation, practice or decision of any State," limited only by "narrow exceptions specifically enumerated."[177] Senator Javits, then ranking minority member of the Committee on Labor and Public Welfare, stated that the new language was preferable because the prior, more narrow

> formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory

174. Fox & Schaffer, *supra* note 5, at 49.
175. 120 CONG. REC. 29,933 (1974) (statement of Sen. Williams).
176. 120 CONG. REC. 29,197 (1974) (statement of Rep. Dent).
177. *Id.*

scheme.[178]

In addition, Senators Javits and Williams both stated that the "relate to" language was intended to apply in its "broadest sense."[179]

These legislative comments warrant a number of significant conclusions. First, the adoption of the "relate to" standard was neither accidental nor a decision made with little thought. Instead, the comments of these three sponsors illustrate that the new provision was an intentional departure from the prior text. Second, the clear intent of this change was to expand the scope of ERISA preemption. Although the new language is sometimes described as embodying field preemption and sometimes in yet more expansive terms, the statements of the sponsors, in either event, indicated an intent to forge a standard that extends federal preemption in its "broadest sense."[180] Finally, these comments reveal the policy considerations underlying the desired ouster of state law—Congress wanted to protect both employers and plan participants from the obvious burden of a myriad of potential state regulation.[181]

2. Contemporaneous Regulatory Initiatives

The potential for multiple layers of regulation clearly was evident to Congress in 1974. At the same time that it was considering the bill that would become ERISA, three non-federal entities were contemplating their own regulation of various types of employee benefit plans. The very real danger of multiple layers of regulation likely provided Congress with an incentive to expand the preemptive reach of section 514(a).

Near the time that the Conference Committee was meeting, both Missouri and New York were moving to regulate self-insured benefit plans.[182] A self-insured plan is a type of welfare benefit plan by which an employer, acting as the plan sponsor, provides benefits covered by its own assets, rather than by contracting with a private insurer.[183] In an important decision issued in 1974, the Missouri State Insurance Commissioner successfully had argued in state court that such plans constituted

178. 120 CONG. REC. 29,942 (1974) (statement of Sen. Javits).

179. *Id.*; 120 CONG. REC. 29,197 (1974) (statement of Sen. Williams).

180. 120 CONG. REC. 29,197 (1974).

181. The Supreme Court has recognized this Congressional intent in a number of its decisions. *See, e.g.*, Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990) (holding that the goal of 514(a) was to reduce burdens caused by conflicting state regulations); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 105 n.25 (1983) (stating that the purpose of preemption of state law was to reduce the burden caused by complying with state laws).

182. *See* Fox & Schaffer, *supra* note 5, at 50.

183. *See* Mark A. Edwards, *Protections for ERISA Self-Insured Employee Welfare Benefit Plan Participants: New Possibilities for State Action in the Event of Plan Failure*, 1997 WIS. L. REV. 351, 352.

"insurance" subject to Missouri's insurance laws.[184] One year earlier, New York had put forward a similar argument.[185]

Also at this time, the American Bar Association was taking action to limit the development of certain types of prepaid legal service plans.[186] In its 1974 annual meeting, the ABA amended the Model Code of Professional Responsibility in a manner that inhibited the formation of such plans.[187]

Congress clearly was concerned about these developments and took action to preclude regulation supplemental to ERISA. Congress blocked the possibility of the states regulating self-insured plans by the addition of ERISA's "deemer" clause[188] which provides that benefit plans, by themselves, may not be deemed to be insurance subject to state regulation.[189] Similarly, Congress amended ERISA to ensure that rules promulgated by professional associations are subject to the same preemption as state law.[190]

These contemporaneous regulatory attempts, moreover, provided strong contextual evidence of the need for broader preemption in general. While the amendments noted above took surgical aim at their specific targets, Congress may well have reacted against these events by expanding section 514(a)'s scope of preemption as a means of heading off future state regulation as a whole. Senator William's comment that ERISA's specific ban on professional association regulation is "consistent with [the] principle" of the expanded "relate to" language lends some credence to this explanation.[191]

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184. Missouri v. Monsanto Co., Case No. 259774 (St. Louis Co. Cir. Ct., Jan. 4, 1973). This unreported decision was reversed in *State v. Monsanto Co.*, 517 S.W.2d 129, 131-32 (Mo. 1974).

185. *See* Mutual Life Ins. Co. v. New York State Tax Comm'r, 298 N.E.2d 632, 636 (N.Y. 1973). Both the New York and Missouri courts of final appeal eventually went on to hold that the laws of their respective states were inapplicable to self-insured plans, despite their regulators' arguments to the contrary. *See id.*; *Monsanto Co.*, 517 S.W.2d at 131-32.

186. *See* Conison, *supra* note 5, at 649.

187. *See id.*; *see also* Roland L. Young, *House of Delegates Acts on Group Legal Services, Shield Legislation, Court Organization Standards, and Uniform Divorce*, 60 A.B.A. J. 446, 446 (1974).

188. 29 U.S.C. § 1144(b)(2)(A). The interplay between the "deemer" clause and the "insurance savings" clause is discussed *supra* at note 60.

189. *See* Conison, *supra* note 5, at 649.

190. *See* Pfennigstorf & Kimball, *Employee Legal Service Plans: Conflicts Between Federal and State Regulation*, AM. B. FOUND. RES. J. 787, 829 (1976).

191. 120 CONG. REC. 29,933 (1974) (Statement of Sen. Williams). *See also* EMPLOYEE BENEFITS LAW, *supra* note 112, at 5 ("The impact of this [*Monsanto*] decision was a key motivation of Congress to include strong preemption rules in ERISA, largely precluding states from regulating benefit plans."); Conison, *supra* note 5, at 649 ("the [*Monsanto*] decision may have further demonstrated to legislators a more general need for broad preemption").

3. Creation of the Task Force

As noted above,[192] the ERISA statute provided for the creation of a Joint Pension Task Force. Congress charged this task force with the responsibility for undertaking "a full study and review . . . of the effects and desirability of the Federal preemption of state and local law with respect to matters relating to pension and similar plans."[193] Some commentators have argued that the presence of the task force suggests that section 514(a) was designed only to be experimental and that Congress had little idea what results the experiment would yield.[194]

This argument is flawed in two salient respects. First, the resulting task force report underscored the desirability of broad preemption. The task force concluded that the "Federal interest and the need for national uniformity are so great that the enforcement of a state regulation should be precluded."[195] Indeed, the task force recommended that the exceptions to preemption set out in section 514(b) should "be narrowed still further."[196] Even more significantly, Congress has not acted to alter the expansive "relate to" text. The experiment, as such, is now a quarter of a century old.

B. *The Structure and Coverage of ERISA*

Further evidence of Congressional intent may be ascertained from the structure and coverage of ERISA itself. Advocates for a more narrow range of preemption claim support from ERISA's differential treatment of pension and welfare benefits. They contend that ERISA's silence as to the substantive content of welfare benefit plans means that Congress gave little thought to welfare plans in enacting ERISA and that the apparently broad scope of the "relate to" standard should operate only in tandem with the greater substantive regulation of pension plans.[197] While their observations concerning the distinction in substantive regulation of pension and welfare plans is accurate, we believe that the meaning to be gleaned from this fact is not.

A brief overview of ERISA's statutory provisions show that Congress devoted considerable attention to the regulation of welfare benefit plans. Title I of ERISA is divided into two subtitles: Subtitle A and Subtitle B. Subtitle A briefly contains basic introductory provisions such as declarations of policy, definitions, and descriptions of coverage. The more

192. *See supra* notes 155-57 and accompanying text.

193. 29 U.S.C. § 1222(a)(5).

194. *See* Conison, *supra* note 5, at 650-51; Fisk, *supra* note 1, at 54-55.

195. House Comm. on Educ. & Labor, Activity Report, H.R. REP. NO. 1785, 94th Cong., 2d Sess. 46-47 (1977).

196. *Id.*

197. *See supra* notes 158-61 and accompanying text.

extensive provisions of Subtitle B contain numerous regulatory provisions.

To those who believe Congress unthinkingly included welfare benefits within ERISA, the structure of Subtitle A's definitional section may come as a surprise. Rather than immediately addressing pensions, ERISA first provides an exhaustive definition of what constitutes a "welfare benefit plan."[198] This provision is followed by the crucial definition of a covered "employee benefit plan"[199] in which Congress explicitly includes both welfare and pension plans. These definitions provide the key for understanding the intricacy of ERISA's framework.

Subtitle A also contains a section detailing the coverage of Title I. That section explicitly provides that Title I in its entirety applies to "any employee benefit plan" except as modified in the scope provisions of Parts 2, 3, and 4.[200] By structuring coverage in this manner, Congress obviously intended for Title I presumptively to apply to all covered benefit plans, including welfare plans.

Subtitle B then sets out a litany of regulatory provisions divided into seven Parts. Five of these Parts contain regulations applicable to welfare benefit plans. Only Part 2, dealing with participant entitlement to pension benefits, and Part 3, concerning the funding of defined pension benefit plans, do not. This leaves welfare plans subject to a considerable breadth of regulation applicable to such matters as information disclosure,[201] fiduciary responsibilities,[202] and enforcement procedures.[203] Post-1974 amendments have added Parts 6[204] and 7[205] which contain significant substantive regulation concerning the continuation and portability of health care benefits, perhaps the most important of all welfare benefits. More recently, in the 1990s, Congress amended ERISA so as to require health plans to provide coverage related to mental health benefits[206] and breast reconstructive surgery.[207]

ERISA's extensive regulation of welfare benefit plans belies the argument that Congress was not really thinking about nonpension plans in enacting ERISA. Congress thought a great deal about welfare plans, but in a different way than it thought about pension plans. The provisions noted

198. 29 U.S.C. § 1002(1).
199. *Id.* § 1002(2)(A).
200. *Id.* § 1003.
201. *See id.* §§ 1021-1031.
202. *See id.* §§ 1101-1114.
203. *See id.* §§ 1131-1147.
204. *See* 29 U.S.C. §§ 1161-1169 (1986).
205. *See* 29 U.S.C. §§ 1181-1191 (1996).
206. *See* Mental Health Parity Act of 1996, Pub. L. No. 104-204, 110 Stat. 2944 (1996) (codified as 29 U.S.C. § 1185a (1996) and 42 U.S.C. § 300gg-5 (1996)).
207. *See* Women's Health and Cancer Rights Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified as 29 U.S.C. § 1185b).

above illustrate that Congress knew how to address those areas in which it wanted to regulate welfare plans as well as how to create a regulatory silence as to other aspects of such plans.

It is instructive to view the preemption language of section 514(a) in the same light. Congress specifically extended the broad "relate to" language to apply to both pension and welfare plans. This was hardly an accident. Instead, Congress likely adopted the broad section 514(a) language for the purpose of creating a regulatory silence in a different arena; that of state law relating to all employee benefit plans.

C. *Subsequent Amendments*

Congress has amended section 514 no less than six times since 1974. None of these amendments have had the effect of altering the general reach of ERISA preemption.

In 1983, Congress granted a specific exemption to the State of Hawaii to maintain its state health laws[208] which uniquely mandate nearly universal health insurance coverage for Hawaiian residents.[209] Significantly, Congress rejected an earlier version of this bill which would have eliminated ERISA preemption as to any state health insurance laws.[210] The Hawaii amendment was accompanied by a strong statement of negative Congressional intent: "Nothing in [this amendment] shall be construed to exempt [from preemption] any State tax law relating to employee benefit plans."[211]

The remaining five amendments generated three substantive exceptions to preemption, all of which, like the Hawaii amendment, otherwise "related to" state regulation of employee benefits. First, alongside the 1983 Hawaii exemption, Congress also enacted a limited exception for state regulation of multiple employer plans,[212] which Congress revisited in 1989 with an additional modification in language.[213] Second, in 1984, Congress

208. *See* HAWAII REV. STAT. § 393 (1983).

209. *See* Pub. L. No. 97-473, § 301(a), 96 Stat. 2605, 2611 (1983) (codified as 29 U.S.C. § 1144(b)(5) (1974)). The exemption for the Hawaii Prepaid Health Care Act was apparently in response to *Standard Oil Co. v. Agsalud*, 442 F. Supp. 695 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (1980), *aff'd*, 545 U.S. 801 (1981) (holding that ERISA preempted Hawaii's mandates with respect to self-insured plans).

210. *See* S.F. 1383, 95th Cong. 1st Sess. (1977) (introduced by Sen Inouye (HI) on Apr. 26, 1977)). For a history of the struggle to secure an exemption for Hawaii's mandated health coverage law, see Fox & Schaffer, *supra* note 5, at 54-59.

211. Pub. L. No. 97-473, § 301(b), 96 Stat. 2605, 2612 (1983) (codified as 29 U.S.C. § 1144(b)(5)(B) (1974)).

212. Pub. L. No. 97-473, § 302, 96 Stat. 2605, 2611 (1983) (codified as 29 U.S.C. § 1144(b)(6) (1974)).

213. *See* Pub. L. No. 101-239, § 7894, 103 Stat. 2441, 2451 (1989) (amending 29 U.S.C. § 1144(b)(6) (1974)).

exempted state laws governing domestic relations orders from preemption, provided that such orders were "qualified" within the meaning of ERISA.[214] In 1993, Congress further amended this provision to include certain qualified child support orders.[215] Finally, in 1986, Congress enacted an amendment granting states the power to mandate that employer-sponsored health plans not include a provision requiring employees to exhaust Medicaid benefits prior to claiming benefits under a health plan.[216]

While the Supreme Court generally has cautioned that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one,"[217] the history of these amendments depicts a succession of Congresses that have adopted a consistent view of section 514(a). Through these amendments, Congress illustrated that it knew how to change the reach of ERISA preemption, yet did so only through relatively minor adjustments that did not alter ERISA's general preemptive reach. These amendments, moreover, are consistent with the recommendation of the Task Force that the policies underlying ERISA require that "the enforcement of a state regulation should be precluded."[218] Taken together, this post-enactment history reveals that Congress has chosen to embrace and retain a broad scope of ERISA preemption.

VI. WELFARE BENEFITS AND ERISA'S LIBERTARIAN ETHOS

The above review of the pertinent evidence fails to link Congressional intent with a narrow scope of ERISA preemption. The legislative history shows that Congress deliberately sought to expand the scope of preemption beyond that described in earlier bills through the adoption of the "relate to" text. Later Congresses repeatedly ratified that decision in post-enactment amendments to section 514(a).

All that remains of the three-legged stool[219] upon which the proponents of narrow preemption base their arguments is ERISA's differential regulation with respect to the substance of pension and welfare benefit plans. According to these commentators, the lack of federal regulation concerning the content of welfare benefit plans necessarily implies a lack

214. Pub. L. No. 98-397, § 104(b), 98 Stat. 1426, 1435 (codified as 29 U.S.C. § 1144(b)(7) (1974)).

215. *See* Pub. L. No. 103-66, § 4301(c)(4)(A), 107 Stat. 371, 377 (1993) (codified as 29 U.S.C. § 1144(b)(7) (1974)).

216. *See* Pub. L. No. 99-272, § 9503(d)(1), 100 Stat. 82, 207 (1986) (codified as 29 U.S.C. § 1144(b)(8)).

217. United States v. Price, 361 U.S. 304, 313 (1960).

218. House Comm. on Educ. & Labor, Activity Report, H.R. Rep. No. 1785, 94th Cong., 2d Sess. 46-47 (1977).

219. *See supra* notes 152-61 and accompanying text.

of Congressional interest in preempting state law in this arena.[220]

We interpret the sounds of this Congressional silence differently. Given the great attention that Congress gave to welfare plans in the structure and design of the ERISA statute,[221] it is more likely that Congress meant exactly what it said in adopting the expansive "relate to" standard. By deliberately pairing the silence of federal regulation with the silence of state regulation flowing from a broad scope of ERISA preemption, Congress intentionally created a regulatory vacuum that serves the central objectives of ERISA's treatment of welfare benefit plans.

Comments by ERISA's legislative sponsors and the Supreme Court are instructive in terms of ascertaining these objectives. At its most basic level, of course ERISA preemption was designed to avoid potential conflicts between federal and state law. As Senator Williams stated, section 514(a) was drafted so as to ensure that employers would not face "conflicting or inconsistent State and local regulation of employee benefit plans."[222]

Congress, however, sought to accomplish more than simply to trump conflicting state law. Section 514(a) was intended to "reach any rule, regulation, practice or decision of any State,"[223] even where such state regulation may be consistent with ERISA's requirements.[224] This broader preemption scope was designed to create a uniform body of federal law regulating employee benefits.[225] By preserving benefit regulation as the exclusive domain of the federal government, Congress sought: "to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries."[226] Thus, Congress sought to eliminate state law from the arena of employee benefits in order to serve the interests of both employers (plan sponsors) and employees (plan beneficiaries).

The Supreme Court, in *Shaw v. Delta Air Lines, Inc.*, provided its most detailed explanation of just how supplementary state law would burden both employers and employees:

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220. *See supra* notes 158-60 and accompanying text.

221. *See supra* notes 197-207 and accompanying text.

222. 120 CONG. REC. 29,933 (1974) (statement of Sen. Williams); *see also* 120 CONG. REC. 29,942 (1974) (statement of Sen. Javits) (explaining that the broader language of section 514(a) was designed to avoid "multiple and potentially conflicting State laws" that might impinge on the federal scheme of regulation).

223. 120 CONG. REC. 29,197 (1974) (statement of Rep. Dent).

224. *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11 (1987); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 105 n.25 (1983).

225. *See Ingersoll-Rand*, 498 U.S. at 142; *Fort Halifax Packing Co.*, 482 U.S. at 11; *Shaw*, 463 U.S. at 105 n.25.

226. *Ingersoll-Rand*, 498 U.S. at 142; *see also* 120 Cong. Rec. 29,197 (1974) (statement of Rep. Dent) ("[w]ith the preemption of the field, round out the protection afforded participants").

> An employer with employees in many States might find that the most efficient way to provide benefits to those employees is through a single employee benefit plan. Obligating the employer to satisfy the varied and perhaps conflicting requirements of particular state laws, as well as the requirements of [federal law], would make administration of a uniform nationwide plan more difficult. The employer might choose to offer a number of plans, each tailored to the laws of particular States; the inefficiency of such a system presumably would be paid for by lowering benefit levels.[227]

The *Shaw* Court went on to describe the likely reaction of an employer forced to comply with a myriad of federal and state regulation:

> To offset the additional expenses, the employer presumably would reduce wages or *eliminate those benefits* not required by any State. Another means by which the employer could retain its uniform nationwide plan would be by *eliminating classes* of benefits that are subject to state requirements with which the employer is unwilling to comply. ERISA's comprehensive pre-emption of state law was meant to minimize this sort of interference with the administration of employee benefit plans.[228]

These statements reveal that Congress' desire for a uniform federal law of employee benefits is designed to serve a yet higher objective—that of encouraging employers to provide benefits to their employees. The Court identified this goal more succinctly in its more recent *FMC Corp. v. Holliday*[229] decision: "To require plan providers to design their programs in an environment of differing state regulations would complicate the administration of nationwide plans, producing the inefficiencies that employers might offset with decreased benefits."[230]

Thus, by prohibiting state mandates, ERISA enhances employer flexibility in structuring benefit plans. Large employers can structure a single multi-state, or even nationwide, benefit plan. And, within such plans, employers can experiment with innovative compensation arrangements.

The purported incompatibility of pairing broad federal preemption with little federal regulation disappears once this often overlooked objective of encouraging the voluntary creation of benefit plans is understood. At the

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227. *Shaw*, 463 U.S. at 105 n.25.
228. *Id.* (emphasis added).
229. 498 U.S. 52 (1990).
230. *Id.* at 60.

time of ERISA's enactment, most welfare-type benefits were either nonexistent or in their infancy.[231] Congress understood the need to provide broad incentives in order to create an atmosphere in which private employers would be more likely to provide benefits, such as health insurance coverage, to their employees. These incentives included a largely regulation-free environment in which employer flexibility and experimentation would be given free reign. This, then, is the heart of ERISA's libertarian ethos: to create a vacuum, largely uniform in its *lack* of either federal or state regulation, within which a multiplicity of welfare benefits could evolve.

This objective perhaps may have been overlooked by many commentators because it is not the usual goal of federal preemption. Courts generally invoke federal preemption in order to preserve the integrity of a scheme of federal regulation.[232] Such a federal scheme, in turn, usually was adopted in order to fix a perceived problem through substantive regulation. ERISA's preemption of state pension laws is representative of this typical pattern.[233] Broad preemption in the welfare benefits arena is somewhat unusual in that it takes the less well-traveled road of preserving an area largely free of both federal and state regulation.

While ERISA's use of a broad preemption standard coupled with relatively little substantive regulation may not be the norm, it is not unique. A useful comparison in this regard may be drawn to federal labor law preemption. The Supreme Court has recognized preemption under the National Labor Relations Act (NLRA)[234] in two separate circumstances. The first strand of the NLRA, known as *Garmon* preemption, is the more typical type of preemption in that it precludes state and local governments from regulating conduct that is either arguably protected or prohibited by the NLRA.[235] Under the second type of preemption, known as *Machinists* preemption, a state or local government entity may not regulate conduct, even if it is neither protected nor prohibited by the NLRA, if that conduct is within the zone of activity that Congress meant to leave to the "free play of economic forces."[236]

While ERISA's preemption of state law relating to pension plans may be similar in purpose to that of *Garmon* preemption, its preemption of state

231. *See* Conison, *supra* note 5, at 621-22; Stabile, *supra* note 5, at 36-37.

232. *See* Befort, *supra* note 10, at 430.

233. *See* Stabile, *supra* note 5, at 31 (noting that Congress, in enacting ERISA's regulation of pension plans, was seeking to rectify "abuse in the administration of pension funds and inadequate funding of pension plans").

234. For a discussion of NLRA preemption generally, see Befort, *supra* note 10, at 430-34.

235. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959).

236. International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 139-40 (1976).

law relating to welfare plans is more similar to the objectives served by the *Machinists* strand of labor law preemption. Congress, in both of the latter contexts, sought to create a regulation-free zone in which the free play of economic forces would not be disturbed.[237]

ERISA has been highly successful in its attempt to encourage the development of employee benefit plans. In 1974, such plans were few, and they played a limited economic and social role.[238] That situation has changed drastically over the past twenty-five years.[239] Today, benefit plans "are pervasive features of the business and economic landscape,"[240] with employee benefit transfers constituting approximately forty percent of total payroll costs in the United States.[241] This dramatic growth certainly is due, in part, to ERISA's libertarian ethos.

It should be noted that ERISA's preemption of state laws relating to welfare plans serves a secondary *Garmon*-type purpose as well. That is, ERISA's broad scope of preemption preserves the welfare benefit arena for future federal regulation as the need may arise.[242] In recent years, Congress increasingly has enacted substantive regulation of welfare benefit plans. Congress first added Part 6 to ERISA in the form of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).[243] This Act requires covered employers to offer continuing group health coverage to terminating employees.[244] In 1996, Congress followed with the adoption of the Health Insurance Portability and Accountability Act.[245] This Act enhances the accessibility of employees to health insurance when changing jobs by restricting limitations on coverage due to certain preexisting conditions.[246] More recently, Congress passed the first clearly "content"-based[247] provisions concerning the extent to which health plans must provide coverage for mental health care[248] and breast reconstructive surgery.[249]

Thus, ERISA preemption increasingly is serving two interests in a

237. *See Machinists*, 427 U.S. at 149-51.
238. *See* Conison, *supra* note 5, at 621-22; Stabile, *supra* note 5, at 36-37.
239. *See* Conison, *supra* note 5, at 622; Stabile, *supra* note 5, at 37.
240. Conison, *supra* note 5, at 622.
241. *See* MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 455 (4th ed. 1998).
242. *See* Stabile, *supra* note 5, at 35 n.114.
243. *See* 29 U.S.C. §§ 1161-1169 (1986).
244. *See* 29 U.S.C.A. § 1161(a).
245. Pub. L. No. 104-191, 110 Stat. 1936 (codified as 29 U.S.C. §§ 1181-1191 (1996)).
246. *See id.*
247. *See supra* notes 42-43 and accompanying text.
248. *See* Mental Health Parity Act of 1996, Pub. L. No. 104-204, 110 Stat. 2944 (1996) (codified at 29 U.S.C. § 1185a (1996) and 42 U.S.C. § 300gg-5 (1996)).
249. *See* Women's Health and Cancer Rights Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 29 U.S.C. § 1185b (1996)).

manner similar to that of preemption under the NLRA—encouraging the development of benefit plans through the free play of economic forces and protecting a growing federal scheme of regulation. This secondary objective of ERISA preemption is likely to increase in importance as Congress continues to grapple with national health care reform issues. President Clinton's 1993 health care legislative proposal, for example, would have amended ERISA broadly by imposing substantive regulation on health plans, including self-insured plans.[250] While that legislation did not pass, Congress, in 1999, has returned to the health care topic in debating the adoption of a formal patients' bill of rights.[251] At this pace, Congress likely will occupy the field of substantive welfare benefit plan regulation more fully in the years to come.

Some commentators, noting the failure of federal health care initiatives, argue for a narrower scope of ERISA preemption so as to enable health care reform to proceed at the state level.[252] This is a misguided notion. Health care policy is a matter of national concern and should be addressed by Congress, not by fifty states enacting conflicting health care mandates.

The most appropriate forum for the debate over health care and other employee benefits is Congress, our most democratic national institution. The Supreme Court should not divert this debate to the states by using ERISA preemption as a proxy for health care reform.

CONCLUSION

The Supreme Court's ERISA preemption jurisprudence is in disarray. In four decisions since 1995, the Court has retreated from its traditional broad reading of the statute's "relate to" text, but without clearly delineating a new standard. The Court, although frustrated with the vagaries of the statutory language, will have no choice but to revisit this topic in the near future.

In doing so, the Court would be wise not to lose sight of the libertarian ethos that underlies ERISA's treatment of welfare benefit plans. Congress, in enacting ERISA, deliberately carved out an expansive zone largely free of both federal and state regulation. It did so, at least in significant measure, in order to encourage employers to create benefit plans for their employees. This incentive plan has worked well and should not now be abandoned.

What should this mean for the future of ERISA preemption? At a

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250. *See* The White House Domestic Policy Council, THE PRESIDENT'S HEALTH SECURITY PLAN: THE CLINTON BLUEPRINT 79-80 (1993).

251. *See* Peter Aronson, *Congress Squares Off Over HMO Liability*, NAT'L L.J., June 21, 1999, at A-1, A-10; Covington, *supra* note 7, at 22-30.

252. *See* Edwards, *supra* note 183, at 354.

minimum, it means that the Court should not stand ERISA preemption on its head by adopting a narrow test simply because of ERISA's regulatory silence with respect to the substance of welfare benefit plans. A conflict-based standard or one that treats welfare plans substantially different from pension plans likely would unleash a torrent of state regulation and lead to a diminution in the number and variety of welfare plans. Such a result would also interfere with Congress' growing interest in establishing a uniform body of federal substantive law governing employee benefits, in general, and health care benefits, in particular.

Because of the difficulty of demarcating the outer boundary of what "relates to" an employee benefit plan, we are sympathetic with the Court's struggle to draw the line in a different manner. That line, however, should retain a broad scope of preemption and provide some additional precision to the analytical framework. The revised *Travelers/DeBuono* test appears to be suspect in terms of both of these objectives. A preferable path may lie in Justice Scalia's suggestion of a field preemption standard or in the Eighth Circuit's relatively modest reformulation in *Prudential*. But however the Court recasts its test for preemption, the new standard should reflect and embody ERISA's libertarian ethos.