ERISA PREEMPTION AFTER *GOBEILLE V. LIBERTY MUTUAL*: COMPLETING THE RETRENCHMENT OF *SHAW*

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I. INTRODUCTION

Gobeille v. Liberty Mutual Insurance Co. is the United States Supreme Court's most recent preemption decision under the Employee Retirement Income Security Act of 1974 ("ERISA").[1] In *Gobeille*, the Court completed the process of reconciling the restrained approach to ERISA preemption announced in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co*. (*Travelers*) with the Court's literal and expansive approach adopted earlier in *Shaw v. Delta Air Lines, Inc.*[2] *Gobeille* consummated this reconciliation by confirming the *sub silentio* retrenchment of *Shaw* and its "plain language" approach in favor of *Traveler's* broader construction of ERISA preemption.[3]

Gobeille held that Vermont's "all-payer claims database" is ERISA-preempted, and reached this conclusion in a way which indicates that, going forward, *Traveler's* more restrained approach to ERISA preemption exclusively prevails.[4] This is particularly significant for state-sponsored private sector retirement plans, now immune from ERISA preemption challenge, as well as for state taxes as they apply to

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1. Gobeille v. Liberty Mut. Ins. Co., 577 U.S. _, 136 S. Ct. 936, 940 (2016). The Employee Retirement Income Security Act of 1974 [hereinafter *ERISA*] is codified at 29 U.S.C. § 1001 et. seq. *Id.* ERISA lawyers generally cite the provisions of the statute while the courts tend to cite the same provisions as codified in Title 29 of the U.S. Code. JOHN H. LANGBEIN ET AL., PENSION AND EMPLOYEE BENEFIT LAW 79 (6th ed. 2015). In the text of this article, I cite the relevant provisions as designated in ERISA and then, in appropriate footnotes, indicate the designation as codified in Title 29.

2. *Compare* N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co. (*Travelers*), 514 U.S. 645, 668 (1995) *with Gobeille*, 136 S. Ct. at 947; *see* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 108-09 (1982).

3. *Gobeille*, 136 S. Ct. at 947.

4. *See id.* at 941, 946-47 (citing *Travelers*, 514 U.S. at 658-59).

the investment trusts of ERISA-regulated retirement plans.[5]

Under the Court's earlier *Shaw*-based case law, these state-sponsored plans and taxes were vulnerable to ERISA preemption challenge on the ground that they referred to ERISA-regulated employee benefit plans.[6] *Gobeille* leaves no doubt that, under the Court's current, more restrained approach to ERISA preemption as first pronounced in *Travelers*, these plans and taxes pass ERISA muster even though they literally refer to ERISA-governed plans.[7]

A. Facts

Liberty Mutual Insurance Company ("Liberty Mutual") sells auto, home and life insurance.[8] Liberty Mutual provides self-funded health care coverage to its current and former employees and to their families.[9] It provides such coverage throughout the nation including the state of Vermont.[10] Liberty Mutual hires Blue Cross Blue Shield of Massachusetts, Inc. ("Mass. Blue Cross") to administer Liberty Mutual's self-funded health care plan.[11]

Vermont is one of eighteen states which maintains an "all-payer claims database."[12] Such state-maintained databases require most "health insurers, health care providers, health care facilities, and governmental agencies to report" to the state any "information relating to health care costs, prices, quality, utilization, or resources" used to provide medical care within the state.[13]

Liberty Mutual's self-funded health plan, standing on its own, covers too few participants in Vermont to trigger the state's requirement to report to its database.[14] However, Vermont mandated Mass. Blue Cross to report to the Vermont database about the plans which Mass. Blue Cross administers in the Green Mountain State since, in the aggregate (including the Liberty Mutual plan participants), Mass. Blue

5. *See id.* at 946-47.
6. *See Shaw*, 463 U.S. at 91.
7. *Gobeille*, 136 S. Ct at 943, 945-46.
8. *Insurance for Auto, Home, & Life*, LIBERTY MUTUAL, https://www.libertymutualgroup.com/about-lm/our-company/our-business (last visited Mar. 22, 2017).
9. *Gobeille*, 136 S. Ct. at 941.
10. *Id.*
11. *Id.* at 942.
12. *Id.* at 940-41, 950 (Ginsburg, J., dissenting).
13. *Id.* at 941 (citations omitted).
14. *See id.* at 942.

Cross oversees health care coverage for over 200 residents of Vermont.[15]

Liberty Mutual objected to Vermont's requirement that Mass. Blue Cross report information to the Vermont database about Liberty Mutual's health care plan and its participants.[16] Liberty Mutual's objections were ultimately sustained by the U.S. Supreme Court which held that ERISA preempts Vermont's data reporting statute.[17]

II. ERISA PREEMPTION: SECTION 514(A) AND THE TENSION BETWEEN *SHAW* AND *TRAVELERS*

ERISA section 514(a) provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA.[18] For roughly a decade, starting with *Shaw*, the Supreme Court applied this statutory language literally and capaciously to preempt a wide array of state statutes.[19] Under *Shaw*'s original "plain language"[20] approach to section 514(a), the Court deemed state laws to "relate to" ERISA-regulated employee benefit plans[21] if such laws have "a connection with or reference to" such plans.[22] Hence, such laws, by virtue of their "connection with or reference to" ERISA plans, were preempted by section 514(a).[23]

In this first, literalist phase of the Court's construction of ERISA section 514(a), the Court found a broad swath of state laws preempted, as such laws referred to or were connected with ERISA-governed employee benefit plans.[24] The state laws preempted under *Shaw*'s "plain language" approach included New York's Human Rights Law, prohibiting employer discrimination against pregnant employees,[25] Mississippi's tort law as applied to an employer-provided group

15. *See id.*

16. *See id.*

17. *See id.* at 943.

18. *ERISA*, 29 U.S.C. § 1144(a) (2006).

19. *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1982).

20. *Id.* at 97, 100.

21. Under ERISA, employee benefit plans include both employer-provided retirement plans such as defined benefit pensions and 401(k) arrangements, as well as employer-sponsored fringe benefit plans such as medical and death benefit arrangements. *See* ERISA, 29 U.S.C. §§ 1002(1), 1002(2)-(3) (defining "welfare plan[s]," "pension plan[s]," and "employee benefit plan[s]" as both welfare and pension plans).

22. *Shaw*, 463 U.S. at 97.

23. *Id.* at 100 (i.e., the Human Rights law and the Disability Benefits Law).

24. Edward A. Zelinsky, *Travelers, Reasoned Textualism, and the New Jurisprudence of ERISA Preemption*, 21 CARDOZO L. REV. 807, 815-827 (1999) [hereinafter Zelinsky, *Travelers*] (discussing various court holdings regarding preemption under ERISA).

25. *Shaw*, 463 U.S. at 86, 108.

disability policy,[26] Pennsylvania's anti-subrogation statute as applied to employers' self-funded medical plans for their employees,[27] Texas' tort law proscribing an employer from firing employees to reduce the employer's pension costs,[28] and a District of Columbia statute requiring employers to provide to injured workers receiving workers' compensation payments the same medical coverage such employers furnished to their other, active employees.[29] In all these cases, the challenged state law was deemed to "relate to" an ERISA-governed plan and was thus preempted under *Shaw'*s "plain language" approach to section 514(a) which proscribes state laws referring to or connected with ERISA-governed employee benefit plans.[30]

Subsequently, in *Travelers*, the Supreme Court departed from *Shaw*'s literalist and expansive approach to ERISA section 514(a).[31] *Travelers* involved an ERISA preemption challenge to surcharges New York State imposed upon the fees charged by hospitals in the Empire State.[32] In a compelling application of the Supreme Court's *Shaw*-based case law,[33] the U.S. Court of Appeals for the Second Circuit held these New York surcharges preempted insofar as they applied to employers' ERISA-governed medical plans for their employees.[34] Following *Shaw*'s literal and expansive approach to section 514(a), the appeals court held that section 514(a) protected such plans from the state hospital surcharge law which "connect[ed] with" New York employers' medical plans for their employees: "[T]he surcharges purposely interfere with the choices that ERISA plans make for health care coverage. Such interference is sufficient to constitute 'connection with' ERISA plans."[35]

In *Travelers*, the Supreme Court reversed the Second Circuit in a way which altered the Supreme Court's characterization of section

26. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987), *overruled in part by* Kentucky Ass'n of Health Plans v. Miller, 538 U.S. 329 (2003), *and* Selmon v. Metro. Life Ins. Co., 372 Ark. 420 (Ark. 2008).

27. FMC Corp. v. Holliday, 498 U.S. 52, 54, 65 (1990).

28. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 140 (1990).

29. District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125, 126-27 (1992).

30. *See, e.g.*, *Shaw*, 463 U.S. at 108-09; *Dedeaux*, 481 U.S. at 57; *Ingersoll-Rand*, 498 U.S. at 140; *FMC Corp.*, 498 U.S. at 54, 65; *Greater Washington Bd. of Trade*, 506 U.S. at 126-27.

31. Zelinsky, *Travelers*, *supra* note 24, at 834; *see also* State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 649 (1995).

32. *Travelers*, 514 U.S. at 649.

33. *See* Travelers Ins. Co. v. Cuomo, 14 F.3d 708, 718-19 (2d Cir. 1993), *rev'd*, 514 U.S. 645 (1995).

34. *Id.* at 721, 723, 725.

35. *Id.* at 719.

514(a) without acknowledging that alteration.[36] Contrary to the broad and literalist spirit of *Shaw* and its progeny, *Travelers* starts with the "presumption that Congress does not intend to supplant state law."[37] Moreover, unlike *Shaw*'s "plain language" approach to section 514(a)'s "relate to" terminology, *Travelers* warns in anti-literalist terms that, if that the phrase "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.'"[38]

Declaring the literal terminology of section 514(a) "unhelpful,"[39] *Travelers* identifies the policy animating section 514(a) as "nationally uniform administration of employee benefit plans."[40] The state laws deemed preempted during the Court's *Shaw* phase, *Travelers* retrospectively declares, "mandated employee benefit structures or their administration" or provided "alternate enforcement mechanisms"[41] and consequently impaired such "nationally uniform administration."[42] In contrast, New York's hospital surcharges, the *Travelers* Court opined, merely have an "indirect economic effect on choices made by insurance buyers, including ERISA plans."[43]

While the Supreme Court did not acknowledge the extent to which *Travelers* retracted *Shaw*'s expansive, "plain language" approach to section 514(a), the lower courts and commentators recognized the tension between *Shaw* and *Travelers* and their respective approaches to section 514(a).[44] Most recently, the Second Circuit, when it adjudicated Liberty Mutual's challenge to the Vermont database,[45] observed that the Supreme Court had initially "construe[d ERISA] preemption broadly" but subsequently "pulled back" from this expansive approach.[46]

36. *See Travelers*, 514 U.S. at 668.

37. *Id.* at 654.

38. *Id.* at 655 (internal quotations and citations omitted).

39. *Id.* at 656.

40. *Id.* at 657.

41. *Id.* at 658.

42. *Id.* at 656-57 (explaining what triggers preemption and what, in turn, permits the administration of employee benefit plans).

43. *Id.* at 646.

44. Hattem v. Schwarzenegger, 449 F.3d 423, 428, 430 (2d Cir. 2006); Liberty Mut. Ins. Co. v. Donegan, 746 F.3d 497, 503-04, 506 (2d Cir. 2014); Golden Gate Rest. Ass'n v. City & Cty. of San Francisco 546 F.3d 639, 655-56 (9th Cir. 2008).

45. *Donegan*, 746 F.3d at 499-500. Susan L. Donegan was the Commissioner of the Vermont Department of Financial Regulation. *Id.* at 497. In the U.S. Supreme Court, the named litigant representing Vermont was Alfred Gobeille, chair of the Vermont Green Mountain Care Board. Gobeille v. Liberty Mut. Ins. Co., 577 U.S. _, 136 S. Ct. 936, 936 (2016).

46. *Donegan*, 746 F.3d at 500. In this same vein, an earlier panel of the Second Circuit had noted that "the Supreme Court *greatly narrowed* preemption in *Travelers*." *Hattem*, 449 F.3d at

Travelers thus "marked something of a pivot in ERISA preemption."[47] Similarly, the U.S. Court of Appeals for the Ninth Circuit "read *Travelers* as narrowing the [Supreme] Court's interpretation of the scope of section 514(a)."[48]

Commentators made similar observations, emphasizing the extent to which *Travelers* departed from *Shaw*'s broad and literal approach ("connection with or reference to") to ERISA section 514(a).[49]

III. THE SUPREME COURT'S *GOBEILLE* OPINION: COMPLETING THE *SUB SILENTIO* RETRENCHMENT OF *SHAW*

When Liberty Mutual's challenge to the Vermont database reached the Supreme Court, the Court could have explicitly confronted the tension between *Travelers* and *Shaw*.[50] Alternatively, the Court could have ignored that tension and just decided whether or not Vermont's law requiring participation in its all-payer database interfered with the nationally uniform administration of employer-provided health care plans. Instead, the Court, in an opinion by Justice Kennedy, *sub silentio* completed the retrenchment of *Shaw* and its "plain language" approach to section 514, confirming the Court's decision to eliminate the tension between *Shaw* and *Travelers* by retrospectively reinterpreting and constricting *Shaw*.[51] In an extended passage, *Gobeille* declares that:

> [T]he Court's case law to date has described two categories of state laws that ERISA pre-empts. First, ERISA pre-empts a state law if it has a 'reference to' ERISA plans. To be more precise, '[w]here a State's law acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law's operation . . . that 'reference' will

430, 431 (emphasis in original) ("[P]ost-*Travelers*, there has been a significant change in preemption analysis that necessitates revamping our once-broad view of its scope.").

47. *Donegan*, 746 F.3d at 506.

48. *Golden Gate Rest. Ass'n*, 546 F.3d at 654.

49. Edward A. Zelinsky, *Gobeille v. Liberty Mutual: An Opportunity to Correct the Problems of ERISA Preemption*, 100 CORNELL L. REV. ONLINE 24, 27-28 (2015); LAWRENCE A. FROLIK & KATHRYN L. MOORE, LAW OF EMPLOYEE PENSION AND WELFARE BENEFITS 209-10 (3d ed. 2012); Zelinsky, *Travelers*, supra note 24, at 815, 817, 827.

50. This was the course I urged upon the Court as Amicus Curiae. *See* Brief of Professor Edward A. Zelinsky as Amicus Curiae in Support of Neither Party, at *2-3, Gobeille v. Liberty Mut. Ins. Co., 577 U.S. _, 136 S. Ct. 936 (2016) (No. 14-181).

51. *Gobeille*, 136 S. Ct. at 940, 943.

> result in pre-emption.' Second, ERISA pre-empts a state law that has an impermissible 'connection with' ERISA plans, meaning a state law that 'governs . . . a central matter of plan administration' or 'interferes with nationally uniform plan administration.' A state law also might have an impermissible connection with ERISA plans if 'acute, albeit indirect, economic effects' of the state law 'force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers.' When considered together, these formulations ensure that ERISA's express pre-emption clause receives the broad scope Congress intended while avoiding the clause's susceptibility to limitless application.[52]

This extended passage is the most important statement on ERISA preemption since *Travelers*. It confirms the reconciliation of *Shaw* with *Travelers*' narrower formulation of ERISA preemption by bringing together different post-*Travelers* observations to complete the contraction of *Shaw* and its notions of "connection with or reference to."[53]

Consider first *Gobeille*'s restatement of *Shaw*'s "reference to" test. Contra to *Shaw*'s "plain language" approach to section 514(a), *Gobeille* confirms that not all state law references to ERISA plans will trigger ERISA preemption.[54] Utilizing language from the Court's post-*Travelers* decision in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*,[55] *Gobeille* declares that a state law's reference to an ERISA plan will only cause preemption under section 514(a) if such law "acts immediately and exclusively upon ERISA plans."[56] Thus, a state law referring to an ERISA-governed

52. *Id.* at 943 (citations omitted).

53. *Id.*; Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 102 (1982); State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 653 (1995).

54. *Gobeille*, 136 S. Ct. at 943. The court in *Gobeille* stated that, "[w]hen considered together, these formulations ensure that ERISA's express pre-emption clause receives the broad scope Congress intended while avoiding the clause's susceptibility to limitless application." *Id.*

55. California Div. of Labor Standards Enf't v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 325 (1997); *see also* Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. 131, 141 (2010) [hereinafter Secunda, *Sorry*] (discussing *Dillingham*, 519 U.S. 316); Donald T. Bogan, *Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States to Regulate Managed Care?*, 74 TUL. L. REV. 951, 1014-16 (2000).

56. *Gobeille*, 136 S. Ct. at 943 (citing *Dillingham*, 519 U.S. 316, 325).

arrangement will, notwithstanding such reference, survive preemption challenge if the state law acts upon entities other than ERISA-regulated employee benefit plans or if such law has less than immediate impact upon such ERISA-governed plans.[57]

This test of immediacy will require elaboration in future cases. However, even without such elaboration, *Gobeille* confirms that, in contrast to *Shaw'*s original and unqualified articulation of the "reference to" standard, state laws referring to ERISA-regulated plans will now surmount section 514(a) if such laws' effects are less than immediate – whatever that might prove to mean—or if such laws act on entities other than ERISA-governed employee benefit plans.[58]

Gobeille also says that a state law will be deemed to refer to ERISA-regulated plans and thus trigger section 514(a)'s preemptive effect if "the existence of ERISA plans is essential to the law's operation."[59] This test, also incorporated from *Dillingham*, similarly constricts the reach of *Shaw*'s "reference to" standard. Under this narrower approach, a state law may refer to an ERISA plan without triggering preemption as long as "the existence of" such plans is not "essential to the law's operation."[60]

This test of essentiality will also require future elaboration. However, even without such elaboration, *Gobeille* confirms the retrenchment of *Shaw* since, under *Gobeille*, a state law can, consistently with section 514(a), refer to ERISA plans as long as such plans are not deemed "essential" to the operation of the state law referring to them.[61]

In short, *Gobeille* completed the repudiation of *Shaw*'s notion that the "reference to" standard literally implements the "plain language" of section 514(a)'s "relate to" clause.[62] Instead, the "reference to" label now summarizes a narrower understanding of ERISA preemption.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Dillingham*, 519 U.S. 316, 328-32 (holding that the California statute in question was not invalidated by the ERISA pre-emption because the statute focused on areas besides reporting, disclosure, and fiduciary responsibility that ERISA was expressly concerned with); State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 653, 661 (1995) (concluding that "pre-emption does not occur . . . if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability.") (quoting District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125, 130 (1992)).

61. *Gobeille*, 136 S. Ct. at 943, 948 (relying on the *Travelers* and *Dillingham* decisions in finding that "pre-emption would never run its course" if section 514(a) was to be read literally, and instead, a state law would only be pre-empted "where the existence of ERISA plans is essential to the law's operation".

62. *Id.* at 946, 948.

Under that narrower understanding, state laws which literally refer to ERISA-regulated plans are not preempted if such laws act on entities other than ERISA plans, if such laws affect ERISA plans with less than immediacy, or if the existence of ERISA-governed arrangements is not "essential" to the operation of such state laws.[63]

Gobeille's construction of *Shaw*'s "connection with" test is similarly constricting, retrospectively recasting *Shaw* in narrower terms, using language both from *Travelers* and from the Court's post-*Travelers* decision in *Egelhoff v. Egelhoff*.[64] For purposes of section 514(a) and its "relate to" clause, "connection with" an employee benefit plan now means only "connection with" an employee benefit plan's administration.[65] *Gobeille* also tells us that a state law also "might have an impermissible connection with ERISA plans if 'acute, albeit indirect, economic effects' of the state law 'force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers.'"[66]

In either case, a mere "connection" between a state law and ERISA-governed employee benefit plan will no longer cause the state law to be preempted. It will require something more precise to trigger section 514(a) and its "relate to" clause, namely, a connection with plan administration or an "acute" economic effect upon the ERISA-regulated employee benefit plan.[67]

According to the *Gobeille* Court, the Vermont database statute impacts "fundamental components of ERISA's regulation of plan administration"[68] and is thus preempted under the more constrained approach to section 514(a).[69] However, as discussed below, this more restrained approach will, in some important areas, contract the reach of ERISA preemption.

While Justice Kennedy and the Court's majority completed the *sub silentio* retrenchment of *Shaw*, Justice Thomas concurring in *Gobeille*, and Justice Ginsburg dissenting, instead explicitly confronted the tension between *Shaw*'s broad, literalist approach to ERISA Section 514(a) and *Travelers'* more constricted approach to ERISA preemption.[70] Justice

63. *Id.* at 943; *Travelers*, 514 U.S. at 661, 665, 668.

64. *See Gobeille*, 136 S. Ct. at 948; Egelhoff v. Egelhoff, 532 U.S. 141, 147 (2001); Secunda, *Sorry*, *supra* note 55, at 141-42 (discussing *Egelhoff*, 532 U.S. 141).

65. *See Gobeille*, 136 S. Ct. at 943.

66. *Id.*

67. *Id.*

68. *Id.* at 945.

69. *Id.* at 952 (Ginsburg, J., dissenting).

70. *See id.* at 949-58.

Thomas described this tension:

> This Court used to interpret [section 514(a)] according to its text. But we became uncomfortable with how much state law [section 514(a)] would pre-empt if read literally. . . . [W]e abandoned efforts to give [section 514(a)'s] text its ordinary meaning. In *Travelers*, we adopted a textual but what we thought to be 'workable' standards to construe [section 514(a)].[71]

In this same vein, Justice Ginsburg, joined by Justice Sotomayor, quoted with apparent approval the observation of the Second Circuit majority that *Travelers* "marked something of a pivot" in the Supreme Court's approach to ERISA preemption.[72]

In contrast to these explicit recognitions of the tension between *Shaw* and *Travelers*, Justice Kennedy, supported by a majority of the *Gobeille* Court, instead pursued the time-honored course of reinterpreting precedents to impose a retrospective sense of continuity upon a body of case law even as legal doctrine is changed. In his classic statement on legal reasoning, Professor Levi described the process by which courts "realign"[73] their precedents, thereby adapting legal doctrine while simultaneously executing "the duty of the American judge to view the law as a fairly consistent whole."[74] A generation later, in this same vein, Professor Eisenberg denoted as "transformation"[75] the judicial technique of "reconstruct[ing]"[76] precedents to change the law while "maintain[ing] the impression that the standard of doctrinal stability is an extremely powerful constraint on judicial decision making."[77]

Most recently, Professor Ginsburg, in her text on legal methods, describes how, by reworking precedent, some courts "move the law significantly without seeming to do violence to the doctrine of precedent."[78] Professor Ginsburg (like Professors Levi and Eisenberg)

71. *Id.* at 948.

72. *Id.* at 952 (Ginsburg, J., dissenting).

73. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 7-8 (The University of Chicago Press, 1949).

74. *Id.*

75. MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 132 (Harvard University Press, 1988).

76. *Id.*

77. *Id.* at 134.

78. JANE C. GINSBURG, LEGAL METHODS 140 (4th ed. 2014) (describing how "courts move the law while they purport to be following binding precedent.").

offers her observations in the context of the common law.[79] The Supreme Court's ERISA-preemption decisions have a common law quality, judge-made doctrine based on an open-ended statute ("relate to") which Congress has not revisited for over four decades.

Gobeille's *sub silentio* retrenchment of *Shaw* follows the venerable tradition of reinterpreting prior case law to "move" the law while honoring the force of precedent. *Gobeille* completed the retrospective reconciliation of *Shaw* with *Travelers*, codifying more restrained versions of the "connection with or reference to" tests.[80] In this fashion, *Gobeille* "realigns" the Court's ERISA preemption case law as a fairly consistent whole by jettisoning the broad and literal reach of *Shaw* and its expansive "plain meaning" approach to section 514(a).[81]

IV. HOW *GOBEILLE* MATTERS: THE STATE PRIVATE SAVINGS RETIREMENT STATUTES

The most immediate impact of the retrospective retrenchment of *Shaw* completed in *Gobeille* pertains to the ERISA status of state private sector retirement savings statutes. *Gobeille* confirms that these statutes are not ERISA-preempted.

California was the first state to create a state-sponsored private sector retirement program.[82] Several states have followed the Golden State's model.[83] These states require certain-sized[84] private sector employers to participate in state-operated individual retirement account

79. *See id*. at 5.

80. Gobeille v. Liberty Mut. Ins. Co., 577 U.S. _, 136 S. Ct. 936, 943 (2016).

81. *See id.*; Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 86 (1982).

82. The California Secure Choice Retirement Savings Trust Act, CAL. CODE ANN. § 100000(b) (2017); Edward A. Zelinsky, *Retirement in the Land of Lincoln: The Illinois Secure Choice Savings Program Act*, 2016 U. ILL. L. REV. 173, 174 (2016) [hereinafter Zelinsky, *Retirement*]; *see* Edward A. Zelinsky, *California Dreaming: The California Secure Choice Retirement Savings Trust Act*, 20 CONN. INS. L.J. 547, 548 (2014).

83. *See, e.g.*, The Illinois Secure Choice Savings Program Act, 820 ILL. COMP. STAT. § 80/ et seq. (West 2015); Zelinsky, *Retirement*, *supra* note 82, at 173, 174; *see also* MD. CODE ANN., LAB. & EMPL. § 12-101 et seq. (West 2016); CONN. GEN. STAT. ANN. 16-29, § 1 et seq. (West 2016).

84. *See* CAL. CODE ANN. §§ 100000(d), 100032(d) (West 2012). California imposes the obligation to participate in its state-operated retirement savings plan upon any "eligible employer," defined as an employer "that has five or more employees." *Id.* Connecticut similarly requires participation in its state-sponsored retirement program if the employer employs "five or more individuals in the state." CONN. GEN. STAT. ANN. 16-29 § 1(7) (West 2016). The Illinois law requires participation in the state retirement savings program if the employer has twenty-five or more Illinois employees. 820 ILL. COMP. STAT. § 80/5 (West 2015) (defining "employer"). In contrast, Maryland's law applies to all employers. MD. CODE ANN., LAB. & EMPL. §12-101(a) (West 2016).

("IRA") savings plans if such employers lack their own retirement savings programs for their employees.[85]

The Illinois statute is typical and excuses an employer from participating in the Illinois Secure Choice Savings Program if the employer has its own retirement savings arrangement for its employees:

> Employers shall retain the option at all times to set up any type of employer-sponsored retirement plan, such as a defined benefit plan or a 401(k), Simplified Employee Pension (SEP) plan, or Savings Incentive Match Plan for Employees (SIMPLE) plan, or to offer an automatic enrollment payroll deduction IRA, instead of having a payroll deposit retirement savings arrangement to allow employee participation in the Program.[86]

Under *Shaw*'s "plain meaning" approach to section 514(a), this statute (and other state laws like it) would be ERISA-preempted. The Illinois statute (and the equivalent statutes of other states) literally refers to ERISA-regulated retirement plans, most obviously, employer-sponsored defined benefit pensions and the now ubiquitous 401(k) plans.[87] An employer who maintains such[88] an ERISA-regulated retirement arrangement need not participate in the Illinois program.[89]

Under *Shaw*, this kind of statute makes "reference to" ERISA-governed employee benefit plans, in particular defined benefit and 401(k) arrangements, the maintenance of which excuses the sponsoring

85. *See* The Illinois Secure Choice Savings Program Act, 820 ILL. COMP. STAT. 80/60(b) (West 2015).

86. *Id.* § 80/60(g).

87. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 85 (1982); *see also* 820 ILL. COMP. STAT. 80/60(g) (West 2015).

88. The statute also excuses an employer from participating in the Illinois state retirement program if the employer maintains a SEP or SIMPLE plan for its employees. *See* I.R.C. § 408(k) (2012) (establishing the simplified employee pension ("SEP")); *Id.* § 408(p) (2012) (establishing the simple retirement account).

89. Recent regulations promulgated by the U.S. Department of Labor ("DOL") make it unlikely that employers will voluntarily participate in state-operated retirement programs since, as to such employers, the state program will be deemed by the DOL to be an ERISA-regulated employee benefit program. *See* Savings Arrangements Established by Qualified State Political Subdivisions for Non-Governmental Employees, 81 Fed. Reg. 92639, 92640, 92648, 92653 (proposed Dec. 20, 2016) (to be codified at 29 C.F.R. pt. 2510.3-2); *see also* Emp. Benefits Security Admin., U.S. Dep't of Labor, Savings Arrangements Established by States for Non-Governmental Employees (Aug. 24, 2016), *as reprinted in* 81 Fed. Reg. 92639 at 10, 25 ("Under ERISA'S expansive test, when an employer voluntarily chooses to provide retirement income to its employees through a particular benefit arrangement, it effectively establishes or maintains a plan.").

employer from participating in the state-operated private sector retirement savings program. For the drafters of these state statutes, *Shaw's* literal construction of section 514(a) creates a proverbial Catch-22 situation: The states adopting state-maintained IRA savings programs require participation in such programs only if an employer fails to provide its own retirement savings alternative to its employees. However, per *Shaw*, a state statute cannot refer to these alternative employer-operated arrangements since that reference triggers ERISA-preemption.[90]

Gobeille eliminates this dilemma since the Court made clear that not all references to ERISA-governed employee benefit plans trigger ERISA preemption under section 514(a).[91] Per *Gobeille* and the *sub silentio* retrenchment of *Shaw*'s "plain meaning" approach to section 514(a), a state law's reference to ERISA employee benefit plans causes ERISA preemption only if that reference "acts immediately and exclusively upon ERISA plans."[92]

For two reasons, the kind of law typified by the Illinois statute, while literally referring to ERISA plans, does not trigger this reconfigured "reference to" standard. First, the Illinois statute does not act, immediately or otherwise, upon ERISA plans. Rather, the statute acts upon employers who fail to maintain such plans, requiring such employers to participate in the state-operated private sector retirement savings program.[93]

Second, the Illinois statute's reference to ERISA-governed plans is not exclusive to such plans since the statute also refers to non-ERISA retirement arrangements.[94] In particular, an Illinois employer is not required to participate in the Illinois state program if the employer maintains for its employees an IRA payroll deposit savings arrangement.[95] Such arrangements are not ERISA-regulated though employers sponsoring such non-ERISA arrangements are released from the statutory obligation to participate in the Illinois retirement plan.[96]

The statutes of the other states maintaining private sector retirement plans are similar[97] to Illinois law and, per *Gobeille*, surmount ERISA

90. *See Shaw*, 463 U.S. at 96-97.

91. *See* Gobeille v. Liberty Mut. Ins. Co., 577 U.S. _, 136 S. Ct. 936, 943 (2016).

92. *Id.* (citing California Div. of Labor Standards Enf't v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 325 (1997)).

93. *See* 820 ILL. COMP. STAT. 80/60(g) (2015).

94. *Id.*

95. *See id.*; *see also* Zelinsky, *Retirement*, *supra* note 82, at 176-77.

96. *Id.* at 175-77.

97. CAL. CODE ANN. § 100032(b)-(d) (West 2012); CONN. GEN. STAT. ANN. 16-29, § 7(a)(4)

preemption since a mere reference to ERISA-regulated plans no longer triggers section 514(a). These state statutes do not exclusively act upon ERISA plans and thus, while they literally refer to ERISA-regulated retirement plans, these state laws do not make "reference to" such plans as *Gobeille* construes that term of art.[98]

V. HOW *GOBEILLE* MATTERS: APPLYING STATE UBIT AND ENDOWMENT TAXES TO ERISA-REGULATED PENSION PLANS

Consider the impact of *Gobeille* on existing and potential state taxes which might tax the investments held in trust for ERISA-regulated pension plans. Thirty-eight states[99] apply or copy the Internal Revenue Code's tax[100] on the unrelated business income of exempt institutions. These taxes, conventionally labeled as "UBIT" levies,[101] literally make "reference to" the universe of tax-exempt, ERISA-governed retirement savings plans.

Consider, for example, New York State's UBIT.[102] The Empire State's UBIT literally refers to the trusts which hold the assets of ERISA-regulated pension and profit-sharing plans including 401(k) plans.[103] In particular, the New York tax on unrelated business income applies to "every organization described"[104] in section 511(a)(2) of the Internal Revenue Code.[105] Code section 511(a)(2) in turn incorporates Code section 501(a)[106] which in turn incorporates Code section 401(a).[107] This daisy chain of cross-references subjects to New York's UBIT the trusts holding the investments of ERISA-regulated plans since section 401(a) lays out the detailed qualification requirements for the

(West 2016); MD. CODE ANN., LAB. & EMPL. § 12-402(c) (West 2016).

98. *See* Gobeille v. Liberty Mut. Ins. Co., 577 U.S. _, 136 S. Ct. 936, 943 (2016).

99. The states which do not tax unrelated business income of nonprofit institutions are Delaware, Kentucky, Nevada, New Jersey, Ohio, Pennsylvania, South Dakota, Texas and Wyoming. Nevada, South Dakota and Wyoming do not tax any corporate income. *See State Taxability of Unrelated Business Income*, NAT'L ASS'N OF C. AND U. BUS. OFFICERS (Jan. 28, 2012), http://www.nacubo.org/documents/eventsandprograms/2013ubit/pwcstateubichart.pdf.

100. I.R.C. § 511(a) (2012).

101. *See id*. (defining what "UBIT" is).

102. N.Y. TAX LAW § 290(b) (McKinney 2012).

103. *See id.* § 290(a); *see also* In re McKinsey Master Ret. Tr., No. 817551, 2003 WL 22110291, at *6 (N.Y. Tax Div. 2003).

104. N.Y. TAX LAW § 290(a).

105. I.R.C. § 511(a)(2).

106. *Id.* § 501(a).

107. *Id.* §401(a) (2012).

trusts holding the assets of pension and profit sharing plans including 401(k) arrangements.[108]

Looking at this string of cross-references, the New York Tax Appeals Tribunal held the New York UBIT to be ERISA-preempted insofar as such tax applies to ERISA-regulated pension and 401(k) trusts.[109] The New York UBIT statute, the Tribunal declared, "refers by definition to ERISA-covered employee benefit plans."[110] The Tribunal also held that the statute is "connected with" the ERISA-governed plans the investments of which the UBIT statute taxes.[111]

The Tribunal's opinion recognizes *Travelers* and its progeny, highlighting the "significant requirements" which the UBIT law imposes on ERISA-regulated plans "including reporting and payment requirements, involving accounting, record keeping, and other administrative burdens."[112] Moreover, the Tribunal noted, the New York "UBIT is a tax specifically directed at ERISA entities' investment income pursuant to IRC section 401(a), and thereby directly impacts the plan's investment strategy."[113] Hence, the Tribunal reasoned, despite *Travelers*' narrowing of the scope of ERISA-preemption, New York's UBIT is preempted as it applies to the assets held in trust by ERISA-regulated retirement plans.[114]

In contrast, the U.S. Court of Appeals for the Second Circuit held that California's equivalent UBIT is not ERISA-preempted.[115]

Gobeille makes clear that the Second Circuit is correct: State UBIT statutes are not ERISA-preempted though such state laws refer to (and tax the income of) the trusts of ERISA-governed retirement plans.[116] These state taxes on unrelated business income do not apply "exclusively" to ERISA-governed entities as the state UBITs (like the federal UBIT on which they are modeled) affect the entire universe of tax-exempt institutions including churches, charities and hospitals.[117] For that same reason, the existence of ERISA-regulated plans is not

108. *See id.* § 401(a) (2012).

109. In re McKinsey Master Ret. Tr., No. 817551, 2003 WL 22110291, at *1 (N.Y. Tax Div. 2003).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. Hattem v. Schwarzenegger, 449 F.3d 423, 435 (2d Cir. 2006).

116. *See* Gobeille v. Liberty Mut. Ins. Co., 577 U.S. _, 136 S. Ct. 936, 947 (2016) (affirming the judgment in the Court of Appeals of the Second Circuit and holding that state statutes imposing duties that are inconsistent with the central design of ERISA are preempted).

117. *See Hattem*, 449 F.3d at 431-35.

essential to the operation of any state's UBIT. These taxes apply to all tax-exempt entities including most tax-exempt eleemosynary institutions.[118] Hence, state UBITs do not refer to ERISA-governed arrangements, as *Gobeille* constrains the "reference to" test.

Moreover, state UBITs are not "connect[ed] with" ERISA plans as *Gobeille* restyles that alternative test under section 514(a).[119] A state UBIT neither "governs . . . a central matter of plan administration" nor "interferes with nationally uniform plan administration."[120] At the margins, a state UBIT might lead a pension trustee or 401(k) participant self-directing her account's investments[121] to avoid assets subject to UBIT taxation. In the same way, real property taxes might lead a pension trustee or plan participant to avoid real estate-related investments or sales taxes might lead trustees and self-investing participants to eschew retail stocks because such taxes discourage retail sales.

None of this impacts plan administration. ERISA draws a sharp distinction between plan administration and plan investment. ERISA distinguishes between the plan's "administrator"[122] who administers the plan and the plan "trustee"[123] who invests plan assets. Similarly, ERISA's definition of a fiduciary distinguishes among the "management" of an ERISA plan,[124] the "administration of such plan,"[125] and the "management or disposition of [the plan's] assets."[126] While the difference between managing and administering a plan is elusive, the statute is clear that such plan management/administration is different from the management of the plan's assets.[127]

Thus, any impact of the UBIT on the allocation of plan investments does not interfere with the administration of the plan itself. Hence, that

118. *See, e.g.*, ARIZ. REV. STAT. ANN. § 43-1231 (2016) ("Any organization, trust or church or a convention or association of churches which is exempt . . . from taxation . . . shall be subject to the tax imposed under [section] 43-1111 upon its 'unrelated business taxable income' as defined in [section] 512 of the [I]nternal [R]evenue [C]ode.")

119. *Gobeille*, 136 S. Ct. at 943.

120. *See id.*

121. *See* EDWARD A. ZELINSKY, THE ORIGINS OF THE OWNERSHIP SOCIETY: HOW THE DEFINED CONTRIBUTION PARADIGM CHANGED AMERICA 45-47 (2007) (explaining participant direction of retirement account investments).

122. *ERISA*, 29 U.S.C. § 3(16)(A)(i); § 1002(16)(A)(i).

123. *Id.* at § 3(14)(A) (distinguishing between the treatment of "administrator" and "trustee" in the statute).

124. *Id.* § 3(21)(A)(i).

125. *Id.* § 3(21)(A)(iii).

126. *Id.* § 3(21)(A)(i).

127. *See id.* § 3(21)(A)(i), (iii) (clarifying between a management's administration from a management of the plan's assets).

impact does not trigger preemption under *Gobeille*'s focus upon plan administration.

However, it might be retorted, a state UBIT requires a tax return, and the paperwork and accounting necessary to file such a return. Filling and filing this UBIT tax return is an act of plan administration, even if the selection of plan investments is not.[128]

The inquiry under *Gobeille* then becomes whether this burden is a "central" matter of plan administration or "interferes" with nationally uniform plan administration. It is unpersuasive to label compliance with a state UBIT as either. A retirement trust with unrelated business income must already comply with the federal UBIT on that income. Compliance with similar state levies would at most entail an incremental cost, not a matter "central" to the plan's administration.

Moreover, it presses the concept of national administrative unity too far to declare the different state UBIT returns as trampling that uniformity. By way of analogy, suppose that an ERISA plan owns office buildings in two different communities in two different states. The plan must pay real property taxes in each community and must subject itself to the real estate valuation process in two of these communities,[129] including reviews of assessments. It is unpersuasive to say that this real estate taxation is either a central burden on plan administration or interferes with nationally uniform plan administration. The plan's UBIT obligations in the two states are no different.

Suppose the two states have different minimum wage laws, applying to the plan's clerical employees. No one is prepared to declare that ERISA preempts the plan's need to comply with these divergent minimum wage statutes. By analogy, ERISA does not preempt compliance with the different states' UBITs as a "central" matter of plan administration or as impairing national uniformity in plan administration.

Finally, a state UBIT does not require "an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers."[130] A UBIT merely requires a tax payment from unrelated

128. *See* Gobeille v. Liberty Mut. Ins. Co., 577 U.S. _, 136 S. Ct. 936, 945 (2016) (explaining that a plan administration's reporting disclosure and recordkeeping are "an essential part of [] the uniform system of plan administration contemplated by ERISA").

129. *See* WALTER HELLERSTEIN, ET AL., STATE AND LOCAL TAXATION: CASES AND MATERIALS 867-1002 (10th ed. 2014) (discussing the legal issues surrounding property taxation, including assessments of taxable values).

130. *Gobeille*, 136 S. Ct. at 943 (citing N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995)).

business income. A pension trustee or participant may respond to such a tax by shifting to other investments not subject to UBIT taxation. But this shift is unrelated to the "substantive coverage" of the plan or "its choice of insurers."

In short, *Gobeille* confirms the Second Circuit's conclusion that ERISA does not preempt the states' UBITs from taxing the unrelated business incomes of ERISA-regulated retirement trusts, along with the unrelated business incomes of other tax-exempt entities. A state tax aimed only at ERISA-regulated trusts would raise different considerations, but a state adopted tax aimed "exclusively" at retirement trusts seems unlikely.

More plausible is the extension to such trusts of a possible state tax on endowment incomes. Some state legislators have raised the prospect of taxing the incomes of college and university endowments.[131] Once such taxes are on the table, it seems plausible to extend the taxes to other entities also holding investment assets such as retirement trusts.

ERISA would not preempt the extension of a state endowment tax from colleges and universities to ERISA-governed retirement trusts, for the same reasons that ERISA does not preempt state UBITs following *Gobeille*. A state endowment tax would not apply "exclusively" to retirement trusts nor would the existence of such trusts be "essential" to endowment tax laws. A state endowment tax would affect plan investments, not plan administration. Additionally, a state endowment tax would not force retirement plans to adopt particular benefit coverage schemes or to select particular insurers.

The advisability of taxes on the incomes of college and university endowments is a controversial matter of tax policy, as would be the extension of such taxes to the incomes of retirement trusts. *Gobeille* makes clear that the merits of extending a state endowment tax to retirement trusts is a question of tax policy, not ERISA preemption.

VI. CONCLUSION

There were other courses which the *Gobeille* Court could have taken. I argued, for example, that the best construction of ERISA

131. *See* Tyler S.B. Olkowski, *Study Proposes Excise Tax on Harvard's Endowment*, HARV. CRIMSON (Apr. 22, 2015), http://www.thecrimson.com/article/2015/4/22/study-harvard-excise-tax/ (discussing 2008 proposal for a 2.5% Massachusetts endowment tax); *see also* Janet Lorin, *Cash-Strapped Connecticut Wants to Tax Yale Endowments*, BLOOMBERG (Mar. 23, 2016, 1:28 PM), https://www.bloomberg.com/news/articles/2016-03-23/yale-endowment-tax-proposal-eyed-by-cash-strapped-connecticut.

Section 514(a) is to treat that section as reversing the normal presumption against preemption and instead presuming preemption when ERISA plans are affected by state law.[132]

Gobeille chose a different path, completing the *sub silentio* retrenchment of *Shaw*. *Gobeille* confirms that, going forward, *Traveler*'s more restrained approach to ERISA preemption prevails over *Shaw*'s "plain meaning" approach to section 514(a). This is important for state-sponsored private sector retirement plans, now immune from ERISA preemption challenge, as well as state taxes as they apply to the investment trusts of ERISA-regulated retirement plans.

132. Zelinsky, *Travelers, supra* note 24, at 839-41.