

**GOBEILLE V. LIBERTY MUTUAL: AN OPPORTUNITY  
TO CORRECT THE PROBLEMS OF ERISA  
PREEMPTION**

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I. THE STATUTE, <i>SHAW</i> , AND <i>TRAVELERS</i> .....	26
II. DESCRIBING <i>GOBEILLE</i> .....	28
III. DECIDING <i>GOBEILLE</i> .....	30
A. The Court Should Confront the Tension Between <i>Shaw</i> and <i>Travelers</i> .....	31
B. ERISA Section 514(a) Should be Construed as Establishing a Presumption for Preemption .....	32
C. ERISA Sections 514(b)(2)(A) and 514(b)(4) Exclusively Define “Matter[s] of Local Concern” .....	34
IV. THE CASE FOR DEFERRING TO CONGRESS.....	34
CONCLUSION.....	37

Having granted certiorari in *Gobeille v. Liberty Mutual Insurance Co.*,<sup>1</sup> the U.S. Supreme Court confronts an important choice regarding the future of ERISA<sup>2</sup> preemption. *Gobeille* can be decided incrementally, as an elaboration at the margins of the Court’s current ERISA preemption case law. However, *Gobeille* is also an opportunity for the Court to correct the three fundamental problems of its current ERISA preemption jurisprudence. While incrementalism has its virtues, on balance it would be better for the Court to use *Gobeille* to correct the basics of ERISA preemption.

The Court’s current ERISA preemption case law suffers from three fundamental shortcomings. First, unlike lower courts and commentators, the Supreme Court has not acknowledged the tension between the Court’s

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<sup>1</sup> In the U.S. Court of Appeals for the Second Circuit, the case was known as *Liberty Mut. Ins. Co. v. Donegan*, 746 U.S. 497 (2d Cir. 2014), *cert. granted sub nom.*, *Gobeille v. Lib. Mut. Ins. Co.*, 2015 U.S. LEXIS 4417 (June 29, 2015).

<sup>2</sup> The Employee Retirement Income Security Act of 1974 (ERISA) is codified at 29 U.S.C. § 1001 (2013). ERISA lawyers generally cite the provisions of the statute while courts tend to cite the same provisions codified in Title 29. JOHN H. LANGBEIN ET AL., PENSION AND EMPLOYEE BENEFIT LAW 98 (5th ed. 2010). In this Essay, I cite the relevant provisions as designated in ERISA and in corresponding footnotes indicate the provision as codified in Title 29.

seminal ERISA preemption decision in *Shaw v. Delta Air Lines, Inc.*<sup>3</sup> and its subsequent decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*<sup>4</sup> Second, per *Travelers*, the Court has read ERISA’s preemption clause, section 514(a),<sup>5</sup> as nothing more than a codification of traditional, deferential preemption standards. This reading of section 514(a) is textually unpersuasive and renders sections 514(b)(2)(A)<sup>6</sup> and 514(b)(4)<sup>7</sup> redundant. Section 514(a) is better read as establishing a presumption for preemption. Third, *Travelers* asserts that the presumption against ERISA preemption applies with particular force to state regulation of an area like health care “which historically has been a matter of local concern.”<sup>8</sup> This judge-made rule also runs afoul of sections 514(b)(2)(A) and 514(b)(4), which specifically exempt state banking, securities, insurance, and criminal laws, but no other state laws from ERISA preemption.<sup>9</sup>

The mischief caused by these three shortcomings manifests itself in *Gobeille*. Thus, *Gobeille* both presents a problem and represents an opportunity. *Gobeille* can be decided as an incremental application of the Court’s existing ERISA preemption case law. Under this approach, the controlling issue for the high court to review will be the scope of “reporting” for ERISA preemption purposes. Notwithstanding the virtues of modest decision making, such judicial modesty in *Gobeille* will merely defer the Court’s confrontation with the fundamental problems of its ERISA preemption case law into the future.

On balance, it would be better for the Court to now recognize and correct the underlying problems in *Gobeille*. Specifically, the Court should acknowledge the tension between *Shaw* and *Travelers* by reconsidering the statute afresh. As part of such reconsideration, the Court should construe section 514(a) as creating a presumption for ERISA preemption. Such a construction of section 514(a) respects the text of the statute without yielding to the potential indeterminacy of the statute’s broad language. Finally, the Court should jettison the notion that traditional areas of state law—as defined by the Court—are immune from ERISA’s more expansive than usual preemption language and should instead acknowledge what the statute says: per sections 514(b)(2)(A) and 514(b)(4), the areas immunized from ERISA’s more stringent preemption are—and are only—state banking, securities, insurance, and criminal laws.<sup>10</sup>

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<sup>3</sup> 463 U.S. 85 (1983).

<sup>4</sup> 514 U.S. 645 (1995).

<sup>5</sup> 29 U.S.C. § 1144(a).

<sup>6</sup> *Id.* § 1144(b)(2)(A).

<sup>7</sup> *Id.* § 1144(b)(4).

<sup>8</sup> *Travelers*, 514 U.S. at 661.

<sup>9</sup> 29 U.S.C. §§ 1144(b)(2)(A), 1144(b)(4).

<sup>10</sup> *Id.*

## I

THE STATUTE, *SHAW*, AND *TRAVELERS*

Section 514(a) states that ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any” employee benefit plan.<sup>11</sup> Section 514(b)(2)(A)<sup>12</sup> removes state banking, securities, and insurance laws from this broad rule of preemption. Section 514(b)(4) also removes “generally applicable criminal law[s]” from the scope of ERISA preemption.<sup>13</sup>

Under section 514(b)(2)(B), employee benefit plans and trusts holding their assets may not “be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.”<sup>14</sup> This provision, often identified as ERISA’s “deemer clause,”<sup>15</sup> prevents a state from declaring employers’ benefit plans and trusts to be insurance companies or banks and thus subject to the state regulation applicable to such insurers and banks.

The sponsors of ERISA proclaimed section 514 one of ERISA’s most important features.<sup>16</sup> Few understood that section 514 would bedevil the courts as it has for the last three decades.

The Supreme Court initially outlined an expansive understanding of ERISA preemption in *Shaw*.<sup>17</sup> In that seminal decision, the Court struck New York’s statute mandating pregnancy-based disability payments for employees in the Empire State. The Court decided the state law “relate[d] to” employee benefit plans and was thus preempted by section 514(a).<sup>18</sup>

For the *Shaw* Court, this result flowed from the “plain language” of ERISA’s broad preemption provision: “A law ‘relates to’ an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.”<sup>19</sup>

For over a decade, this expansive test—“connection with or reference to”<sup>20</sup>—controlled the Court’s ERISA preemption case law. This test led the Court to strike many forms of state law as connected with or referring to

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<sup>11</sup> *Id.* § 1144(a).

<sup>12</sup> *Id.* § 1144(b)(2)(A).

<sup>13</sup> *Id.* § 1144(b)(4).

<sup>14</sup> *Id.* § 1144(b)(2)(B).

<sup>15</sup> See *Ky. Ass’n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 336 n.1 (2003) (discussing “ERISA’s ‘deemer clause’”); LAWRENCE A. FROLIK & KATHRYN L. MOORE, *LAW OF EMPLOYEE PENSION AND WELFARE BENEFITS* 228–29 (3d ed. 2012).

<sup>16</sup> See Edward A. Zelinsky, “Travelers, Reasoned Textualism and The New Jurisprudence of ERISA Preemption,” 21 *CARDOZO L. REV.* 807, 813 (1999) (quoting remarks of Rep. Dent).

<sup>17</sup> *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

<sup>18</sup> *Id.* at 96.

<sup>19</sup> *Id.* at 96–97.

<sup>20</sup> *Id.* at 97.

ERISA-regulated employee benefit plans.<sup>21</sup>

Twelve years later, in *Travelers*,<sup>22</sup> the Court made an abrupt turn in its approach to section 514 without acknowledging that turn. Like *Shaw*, *Travelers* involved New York State law. In *Travelers*, the Empire State imposed surcharges on hospitalizations financed by commercial insurance or by self-insured medical plans. These surcharges pressured employers to obtain Blue Cross/Blue Shield coverage for their employees. Under that coverage, hospitalizations did not trigger the New York-imposed surcharges.<sup>23</sup>

In a compelling application of *Shaw*, the Second Circuit held the New York surcharges were preempted by section 514 because “the surcharges purposely interfere with the choices that ERISA plans make for health care coverage. Such interference is sufficient to constitute ‘connection with’ ERISA plans.”<sup>24</sup>

In an abrupt but unacknowledged shift in its construction of section 514, the Supreme Court reversed the Second Circuit and upheld the New York hospital surcharges.<sup>25</sup> As part of this change, *Travelers* introduced a number of new themes that restricted the scope of such preemption: section 514’s “relate to” language, the Court stated, is “unhelpful.”<sup>26</sup> Indeed, if this phrase “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.’”<sup>27</sup>

Moreover, the *Travelers* Court declared preemption analysis should start with the “presumption that Congress does not intend to supplant state law.”<sup>28</sup> Accordingly, it is unlikely that Congress meant for ERISA “to displace general health care regulation, which historically has been a matter of local concern.”<sup>29</sup> *Travelers* states that the core congressional motivation for section 514(a) was the desirability of “nationally uniform administration of employee benefit plans.”<sup>30</sup> Thus, state laws are ERISA-preempted if they “mandate[] employee benefit structures or their administration”<sup>31</sup> or if such state laws provide “alternative enforcement mechanisms”<sup>32</sup> in addition to those established in ERISA.

In contrast, *Travelers* observes that laws (like the New York hospital

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<sup>21</sup> Zelinsky, *supra* note 16, at 815–25.

<sup>22</sup> N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995).

<sup>23</sup> *Id.*

<sup>24</sup> Travelers Ins. Co. v. Cuomo, 14 F.3d 708, 719 (2d Cir. 1993)..

<sup>25</sup> *Travelers*, 514 U.S. at 645.

<sup>26</sup> *Id.* at 656.

<sup>27</sup> *Id.* at 655 (citation omitted).

<sup>28</sup> *Id.* at 654.

<sup>29</sup> *Id.* at 661.

<sup>30</sup> *Id.* at 657.

<sup>31</sup> *Id.* at 658.

<sup>32</sup> *Id.*

surcharges) are not ERISA preempted if they merely impose “an indirect economic effect on choices made by insurance buyers, including ERISA plans.”<sup>33</sup>

The *Travelers* Court did not explain how to reconcile this new, more restrictive approach to ERISA preemption with *Shaw*’s expansive, “plain language” reading of section 514(a), i.e., “connection with or reference to.”<sup>34</sup> Indeed, the Supreme Court has not acknowledged the tension between *Shaw* and *Travelers*. The tension, however, has been widely noted by the lower courts<sup>35</sup> and by commentators<sup>36</sup> and it forms an important background to *Gobeille*.

## II

### DESCRIBING *GOBEILLE*

Liberty Mutual Insurance Co. (Liberty Mutual) maintains for its Vermont employees a self-insured health plan that is an ERISA-regulated employee benefit plan.<sup>37</sup> Liberty Mutual hired Blue Cross Blue Shield of Massachusetts, Inc. (Blue Cross) to administer this self-insured health plan on Liberty Mutual’s behalf. By statute and regulation, Vermont requires Blue Cross, as administrator of Liberty Mutual’s health plan, to report extensive medical-claims data to the Green Mountain State. Liberty Mutual asserted that section 514(a) preempts this state-imposed reporting requirement. The U.S. District Court for the District of Vermont rejected this assertion.<sup>38</sup>

However, a Second Circuit panel led by Chief Judge Dennis Jacobs endorsed Liberty Mutual’s assertion that the Vermont law and regulation are ERISA preempted.<sup>39</sup> Noting the tension between *Shaw* and *Travelers*,<sup>40</sup> the Second Circuit panel observed that even under *Travelers* and its progeny, a state law is preempted if it intrudes upon ERISA’s reporting requirements:

[S]tate statutes that mandate[] employee benefit structures *or their administration* have a connection with ERISA plans and are therefore

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<sup>33</sup> *Id.* at 659.

<sup>34</sup> *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983).

<sup>35</sup> *See, e.g.*, *Golden Gate Rest. Ass’n v. City & Cty. of San Francisco*, 546 F.3d 639, 654 (9th Cir. 2008) (“We read *Travelers* as narrowing the Court’s interpretation of the scope of § 514(a).”).

<sup>36</sup> *See, e.g.*, Zelinsky, *supra* note 16; Edward A. Zelinsky, Egelhoff, *ERISA Preemption, and the Conundrum of the ‘Relate To’ Clause*, 91 TAX NOTES 1917 (2001); LANGBEIN ET AL., *supra* note 2, at 842 (“*Travelers* abandoned the *Shaw* analysis, which resulted in nearly automatic preemption of state law.”); FROLIK & MOORE, *supra* note 15, at 209–10 (stating that “[t]he broad holdings of *Alessi* and *Shaw* were later cut back” by *Travelers*).

<sup>37</sup> *See Liberty Mut. Ins. Co. v. Donegan*, 746 F.3d 497, 499–500 (2d Cir. 2014), *cert. granted sub nom. Gobeille v. Lib. Mut. Ins. Co.*, 2015 U.S. LEXIS 4417 (June 29, 2015).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 506 (*Travelers* “marked something of a pivot in ERISA preemption.”).

preempted. Like *Travelers* itself, later cases reiterate that ERISA is expressly concerned with reporting, disclosure, fiduciary responsibility, and the like.

....

“[R]eporting” is a core ERISA function shielded from potentially inconsistent and burdensome state regulation.

....

ERISA preempts state laws dealing with the subject matters covered by ERISA—*reporting, disclosure, fiduciary responsibility, and the like*.<sup>41</sup>

For the Second Circuit majority in *Gobeille*, Vermont’s statutory and regulatory mandate constituted a preempted “reporting” obligation. In this context, Chief Judge Jacobs observed, “disclosure” and “reporting” are distinct activities:

“[R]eporting” is necessarily a function distinct from the disclosure that administrators provide beneficiaries; otherwise “reporting” would be subsumed by “disclosure” and rendered superfluous. Rather, “reporting” entails what Vermont requires be done: plan record-keeping, and filing with a third-party.

....

A hodge-podge of state reporting laws, each *more* onerous than ERISA’s uniform federal reporting regime, and seeking different and additional data, is exactly the threat that motivates ERISA preemption.<sup>42</sup>

While a state may, consistent with ERISA, lay “a slight reporting burden”<sup>43</sup> on an employee benefit plan, “the reporting mandated by the Vermont statute and regulation is burdensome, time-consuming, and risky.”<sup>44</sup> Consequently, “the Vermont scheme triggers preemption . . . .”<sup>45</sup>

While *Travelers* initiated a “trend toward narrowing ERISA preemption,” section 514(a) “does not allow one of ERISA’s core functions—reporting—to be laden with burdens, subjected to incompatible, multiple and variable demands, and freighted with risk of fines, breach of duty, and legal expense.”<sup>46</sup>

Senior Circuit Judge Chester J. Straub dissented, starting from the *Travelers* presumption against preemption.<sup>47</sup> That presumption is not surmounted since “the Vermont statute differs in kind from the ‘reporting’ that is required by ERISA and therefore was not the kind of state law Congress intended to preempt.”<sup>48</sup> Moreover, Judge Straub argued, “Liberty

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<sup>41</sup> *Id.* at 507–08 (alteration in original) (citations and internal quotation marks omitted).

<sup>42</sup> *Id.* at 508 & n.11 (alteration in original).

<sup>43</sup> *Id.* at 509.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 510.

<sup>47</sup> *Id.* at 511–12 (Straub, J., dissenting).

<sup>48</sup> *Id.* at 511.

Mutual has failed to show any actual burden, much less a burden that triggers ERISA preemption.”<sup>49</sup>

According to Senior Judge Straub, “the ‘reporting’ required by ERISA is wholly distinct from the reporting sought by Vermont.”<sup>50</sup> Vermont seeks information such as “medical claims data . . . and demographic information about those receiving the coverage.”<sup>51</sup> In contrast, “Vermont does not seek information on plan assets, and does not review the allocation or denial of benefits, . . . the topics on which ERISA requires reports.”<sup>52</sup> The difference between the information an ERISA-regulated plan submits to the Department of Labor (DOL) and the data required by Vermont “suggests that the Vermont statute is not of the type that Congress intended to preempt.”<sup>53</sup>

Moreover, in quantitative terms the cost of complying with the Vermont statute would be de minimis. Vermont’s law is preempted as an impermissible reporting requirement only if there is “evidence of a burden on the system for processing claims”<sup>54</sup> for ERISA-regulated benefits. Since “[n]o such evidence has been provided,”<sup>55</sup> the Vermont statute at most imposes “potential incidental costs”<sup>56</sup> on employee benefit plans. Consequently, the dissent concluded, “the Vermont statute does not hinder the national administration of employment benefit plans in any way”<sup>57</sup> and is thus not preempted.

In its amicus brief submitted to the Second Circuit,<sup>58</sup> the DOL took a similar tack. Starting with *Travelers*’s presumption against preemption, “the Vermont law does not relate to ERISA plans in any way that dictates benefit choices or interferes with plan administration or structure.”<sup>59</sup> Moreover, the DOL asserted, Vermont’s law “does not conflict with, or frustrate the purposes of, ERISA’s reporting requirements.”<sup>60</sup>

### III

#### DECIDING *GOBEILLE*

The Court can decide *Gobeille* incrementally along the contours of the

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 514.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 517.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Brief for Acting Secretary of the United States Department of Labor as Amici Curiae Supporting Defendant-Appellee, *Liberty Mut. Ins. Co. v. Donegan*, 746 F.3d 497 (2014) (No. 12-4881), 2013 WL 3482674.

<sup>59</sup> *Id.* at \*5.

<sup>60</sup> *Id.*

majority and dissent in the Second Circuit. Such a *Gobeille* opinion by the high court would elaborate at the margins of the Court's current ERISA preemption case law. Under this approach, the controlling issue for the Supreme Court will be the scope of "reporting" for ERISA preemption purposes: Is the Second Circuit majority correct that Vermont's law impermissibly intrudes upon ERISA's reporting requirements or are the *Gobeille* dissent and the DOL correct that *Travelers'* presumption against preemption protects Vermont's statute and regulation?

Such a modest approach will merely defer the Supreme Court's confrontation with the fundamental problems of its ERISA preemption case law into the future. While incrementalism has its virtues, it would be better on balance for the Court to confront those underlying problems now in *Gobeille*.

A. The Court Should Confront the Tension Between *Shaw* and *Travelers*

It is understandable that the Supreme Court prefers to treat its case law as a single unified body of decisions. However, that view is no longer sustainable in the context of ERISA preemption. The Court should accordingly acknowledge and confront the tension between *Shaw* and *Travelers*.

The split in the Second Circuit reflects this tension, which has been widely observed by lower courts<sup>61</sup> and commentators.<sup>62</sup> The expansive construction of section 514(a) advanced by *Shaw* and its progeny buttresses the conclusion of the Second Circuit's majority holding the Vermont law and regulation is ERISA preempted. In contrast, *Travelers* and the cases following its more restrictive approach to ERISA preemption sustain the dissenting position of Senior Judge Straub and the DOL against such preemption.

Given the prevalence of employer-provided medical care, the Vermont reporting statute, per *Shaw*, has a "connection with" the ERISA-regulated plans by which employers provide such care. Much, perhaps most, of the information Vermont seeks to acquire will come from such employer-sponsored health plans. Under *Shaw's* expansive, "plain language" construction of section 514(a) and its "relate to" test, that fact leads to the preemption of the Vermont law because of the law's "connection with" employer health plans.

On the other hand, starting with *Travelers'* presumption against preemption, the requirements of the Vermont reporting scheme can be reconciled with the reporting mandated by ERISA. The former compels plans to provide different data than the information required by the latter. If preemption per *Travelers* is to be disfavored, that difference controls and

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<sup>61</sup> See *supra* note 35.

<sup>62</sup> See *supra* note 36.

saves the Vermont statute and regulation from ERISA preemption.

The tensions reflected in Chief Judge Jacobs's opinion in *Gobeille* and Senior Judge Straub's dissent<sup>63</sup> will recur until the Supreme Court confronts and resolves the tension between these two disparate approaches to section 514(a) and its preemptive effect.

B. ERISA Section 514(a) Should be Construed as Establishing a Presumption for Preemption

Central to the tension between *Shaw* and *Travelers* is *Travelers's* reading of section 514(a) as a codification of traditional, deferential preemption standards. This reading of section 514(a) is unpersuasive and renders sections 514(b)(2)(A) and 514(b)(4) redundant. Section 514(a) is better read as establishing a presumption for preemption.

The problems with construing section 514(a) as embodying traditional preemption standards start with the text of section 514(a) itself. While the conventional judicial approach is a presumption against preemption, section 514(a) says nothing of the sort. Section 514(a) says that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ."<sup>64</sup> This statutory language says nothing about a presumption against preemption or about preserving state law.

The expansive language of section 514(a) contrasts with other federal preemption statutes that carefully affirm the prerogatives of the states. Consider, for example, the preemption clause of the Real Estate Settlement Procedures Act of 1974 (RESPA), adopted in the same year as ERISA. RESPA provides in pertinent part:

This chapter does not annul, alter, or affect, or exempt any person subject to the provisions of this chapter from complying with, the laws of any State with respect to settlement practices, except to the extent that those laws are [inconsistent] with any provision of this chapter, and then only to the extent of the inconsistency.<sup>65</sup>

Or consider the basic preemption clauses of the Federal Insecticide, Fungicide, and Rodenticide Act:

(a) In general. A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity. Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.<sup>66</sup>

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<sup>63</sup> *Liberty Mut. Ins. Co. v. Donegan*, 746 F.3d 497 (2d Cir. 2014).

<sup>64</sup> 29 U.S.C. § 1144(a) (2013).

<sup>65</sup> 12 U.S.C. § 2616 (2013).

<sup>66</sup> 7 U.S.C. § 136v (2012).

There are other examples of federal preemption statutes that, on their face, preserve important areas of state law.<sup>67</sup> These contrast with section 514(a)'s blanket assertion that ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any" employee benefit plan.<sup>68</sup> As a textual matter, it is not persuasive to read the sweeping language of section 514(a) as creating a presumption for the preservation of state law. Congress knows how to write a statute preserving state law when it wants one.

Sections 514(b)(2)(A) and 514(b)(4) compound the textual difficulty of reading section 514(a) as a presumption against preemption. Sections 514(b)(2)(A) and 514(b)(4) protect state insurance, banking, securities, and criminal laws against the scope of section 514(a).<sup>69</sup> If section 514(a) simply embodies the traditional presumption against preemption, from what are sections 514(b)(2)(A) and 514(b)(4) protecting? Construing section 514(a) as creating the traditional presumption against preemption renders sections 514(b)(2)(A) and 514(b)(4) redundant because, under that construction, there is nothing from which state banking, securities, insurance, and criminal laws need relief.

As the Court observed in *Travelers*, an unqualified phrase like "relate to" can be "taken to extend to the furthest stretch of its indeterminacy."<sup>70</sup> However, there is an alternative reading of section 514(a) that gives content to that provision without reaching such indeterminacy: construe section 514(a) as a presumption for preemption.<sup>71</sup>

Such an interpretation of section 514(a) also gives substance to the exceptions created in sections 514(b)(2)(A) and 514(b)(4). If section 514(a) is understood as replacing the traditional presumption against

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<sup>67</sup> For example, the preemption clause of the Federal Employees' Group Life Insurance Act provides that the provisions of any insurance contract issued pursuant to that statute "which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State or political subdivision thereof, or any regulation issued thereunder, which relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual provisions." 5 U.S.C. § 8709(d)(1) (2012). On its face, this preemption clause preserves state insurance law to the extent such law addresses topics other than "the nature or extent of coverage or benefits." It also preserves state insurance law pertaining to such coverage and benefits to the extent such law "is []consistent with the contractual provisions" of any contract issued pursuant to the federal act.

In a similar vein, 15 U.S.C. § 1334(c) (2014) provides that "a State or locality may enact statutes and promulgate regulations, based on smoking and health, that take effect after the effective date of the Family Smoking Prevention and Tobacco Control Act, imposing specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes." Thus, federal law preempts any state effort to regulate the content of cigarette advertising but states may regulate "the time, place, and manner" of such advertising.

<sup>68</sup> 29 U.S.C. § 1144(a).

<sup>69</sup> 29 U.S.C. §§ 1144(b)(2)(A), 1144(b)(4).

<sup>70</sup> *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)..

<sup>71</sup> Zelinsky, *supra* note 16; Zelinsky, Egelhoff, *ERISA Preemption, and the Conundrum of the 'Relate To' Clause*, *supra* note 36.

preemption with a statutorily mandated presumption for such preemption, sections 514(b)(2)(A) and 514(b)(4) then relieve from this presumption state insurance, banking, securities, and criminal laws. That relief restores these four categories of state law back to the traditional presumption against preemption.

There is, in short, a way to respect the text of section 514 without yielding to either the problematic *Shaw*-based alternative of preemption without limit or the equally problematic approach under *Travelers* that deprives section 514(a) of any meaningful content: construe section 514(a) as establishing a presumption for preemption, a presumption from which state banking, securities, insurance, and criminal laws are saved by sections 514(b)(2)(A) and 514(b)(4).

C. ERISA Sections 514(b)(2)(A) and 514(b)(4) Exclusively Define  
“Matter[s] of Local Concern”

A central theme of *Travelers* is that ERISA preemption is inappropriate for state regulation of health care, “which historically has been a matter of local [concern].”<sup>72</sup> However, sections 514(b)(2)(A) and 514(b)(4) outline the areas of state law to be protected from section 514(a)’s preemptive effect. Health care is not among these areas.

Postulating a judicially determined sphere for historic matters of local concern renders sections 514(b)(A) and 514(b)(4) redundant. Nothing in these provisions indicates that the statutory list—state banking, securities, insurance, and criminal laws—is merely illustrative and may be augmented by other, judicially recognized areas to be immunized from section 514(a)’s preemptive effect.<sup>73</sup>

We are in the midst of a great national debate about health care and are likely to be engaged in such debate for the indefinite future.<sup>74</sup> As a matter of policy, there is a strong argument for favoring state regulation and experimentation in this area.<sup>75</sup> There is, accordingly, a compelling case as a matter of policy for Congress to add health care to the areas protected from section 514(a)’s preemptive effect. There is, however, no warrant under section 514 as it now reads for the courts to reach that result in the teeth of the statute.

#### IV

#### THE CASE FOR DEFERRING TO CONGRESS

A critic might respond that, whatever the defects of *Shaw* and

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<sup>72</sup> *Travelers*, 514 U.S. at 661.

<sup>73</sup> 29 U.S.C. §§ 1144(b)(A), 1144(b)(4).

<sup>74</sup> Edward A. Zelinsky, *Reforming Health Care: The Paradoxes of Cost*, 31 J. LEGAL MED. 203, 204 (2010).

<sup>75</sup> Edward A. Zelinsky, *National Health Care Shouldn’t Be National*, OXFORD UNIV. PRESS BLOG (Dec. 10, 2007), [blog.oup.com/2007/12/ownership\\_society/](http://blog.oup.com/2007/12/ownership_society/).

*Travelers*, it is now too late for the Supreme Court to reconsider its approach to ERISA preemption. Under the banner of stare decisis,<sup>76</sup> this critic would assign responsibility for amending the statute to overturn *Shaw* and *Travelers* to Congress.

One of the outstanding legal scholars of the twentieth century, Edward H. Levi, classically articulated the case that democratic values require politically accountable legislators to correct erroneous judicial statutory interpretations:

If legislation which is disfavored can be interpreted away from time to time, then it is not to be expected, particularly if controversy is high, that the legislature will ever act. It will always be possible to say that new legislation is not needed because the court in the future will make a more appropriate interpretation. If the court is to have freedom to reinterpret legislation, the result will be to relieve the legislature from pressure. . . . Therefore it seems better to say that once a decisive interpretation of legislative intent has been made, and in that sense direction has been fixed within the gap of ambiguity, the court should take that direction as given.

. . . [T]he democratic process seems to require that controversial changes should be made by the legislative body. . . . [T]here is a mechanism for holding legislators responsible.<sup>77</sup>

The vintage example<sup>78</sup> of the U.S. Supreme Court adhering to this approach is *Flood v. Kuhn*.<sup>79</sup> *Flood* affirmed baseball's antitrust exemption under the Sherman Antitrust Act even though all other professional sports are subject to the Act. Central to the Court's decision in *Flood* is the baseball industry's reliance on its unique legal status as exempt under the Act.<sup>80</sup> While that exemption is aberrational,

[i]t is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of stare decisis, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs.

. . . .

If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court.<sup>81</sup>

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<sup>76</sup> Jamie Darin Prekert, *Bizarro Statutory Stare Decisis*, 28 BERKELEY J. EMP. & LAB. L. 217, 235 (2007).

<sup>77</sup> EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 32–33 (2013)..

<sup>78</sup> See WILLIAM N. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION 277–81 (2000) (discussing *Flood*); Prekert, *supra* note 76 at 235, n.114; Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 319–20 (2005).

<sup>79</sup> 407 U.S. 258 (1972).

<sup>80</sup> *Id.* at 275.

<sup>81</sup> *Id.* at 282, 284.

The Court subsequently revisited the arguments for (and against) stare decisis in *Payne v. Tennessee*.<sup>82</sup> The *Payne* Court observed:

*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Adhering to precedent is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.<sup>83</sup>

While this perspective is powerful in particular cases, it should not carry the day in the context of *Shaw*, *Travelers*, and ERISA section 514(a). The Court in *Payne* ultimately chose to reverse an earlier decision, explaining that

when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent. *Stare decisis* is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision.<sup>84</sup>

Similarly, the Supreme Court should itself correct its approach to section 514(a) and ERISA preemption rather than defer to Congress to make that correction legislatively. In light of the tension between *Shaw* and *Travelers*, there is no “decisive interpretation”<sup>85</sup> for the Court to follow. *Shaw* and *Travelers* “fixed”<sup>86</sup> nothing. They are in significant tension with each other. Neither decision is as venerable as the half-century old antitrust exemption for baseball upheld in *Flood*. Reliance interests are not strong when the Court’s case law is too uncertain for such interests to be formed. As a unit, *Shaw* and *Travelers* are together “unworkable.”<sup>87</sup>

In coming to this conclusion, it is important to recognize a factor the Court has been unwilling to acknowledge: the Court’s influence is often critical in the legislative process. Whichever side loses in the Supreme Court has the more difficult task of securing legislation to reverse the Court’s decision. Whichever side wins in the Court has the less onerous task of maintaining the status quo by blocking congressional action.

The course I propose—acknowledging the tension between *Shaw* and *Travelers*, resolving that tension by declaring section 514(a) to establish a presumption for preemption, and reading sections 514(b)(2) and 514(b)(4) as they were written to identify the only areas of state law protected from that presumption—will allocate to certain parties the burden of securing

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<sup>82</sup> 501 U.S. 808 (1991).

<sup>83</sup> *Id.* at 827 (internal citations and quotation marks omitted).

<sup>84</sup> *Id.* at 827–28 (internal citations and quotation marks deleted).

<sup>85</sup> Levi, *supra* note 77, at 32.

<sup>86</sup> *Id.*

<sup>87</sup> *Payne*, 501 U.S. at 827.

relief from Congress for their interests and policies. Most obviously, the states and those favoring decentralized decision making about health care will face the task of getting Congress to add health care to section 514(b)(2) as another category of state law protected from ERISA preemption.<sup>88</sup>

This is as it should be. If the decisions Congress made forty years ago are no longer compelling (and I think they are not),<sup>89</sup> the political burden to amend ERISA should be placed on those who now contend for revision of those four decades-old policies.

#### CONCLUSION

*Gobeille* presents the U.S. Supreme Court with the opportunity to confront the fundamental problems of its ERISA preemption case law. The Court should use *Gobeille* to acknowledge the tension between *Shaw* and *Travelers*. Moreover, the Court should read section 514(a) as establishing a presumption for preemption. Finally, the Court should acknowledge that sections 514(b)(2)(A) and 514(b)(4) exempt state banking, securities, insurance, and criminal laws, but no other state laws from ERISA preemption.

Such a *Gobeille* decision will not be the last word since the last word in matters of statutory law belongs to Congress. Such a *Gobeille* decision would respect the statute as Congress enacted it in 1974. In the final analysis, a system of statutory law requires courts to take statutes seriously.

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<sup>88</sup> Alternatively, the correct legislative response may well be the repeal of ERISA section 514(a) altogether. Zelinsky, *supra* note 16, at 863–70.

<sup>89</sup> *Id.*