ERISA Preemption of State Automatic Enrollment IRAs: The Case for Maintaining Federal Uniformity

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Introduction

The Employee Retirement Income Security Act of 1974 (ERISA) is a comprehensive federal statute that provides exclusive and uniform federal oversight of employee benefit plans and promotes the interests of employees and their beneficiaries in such plans.[1] ERISA replaced and superseded piecemeal labor and wage-and-hour laws, which were ineffective at regulating employee benefit plans and which led to mismanagement of plans and overly restrictive eligibility requirements.[2] Prior to the enactment of ERISA, employee benefit plans were governed by a hodgepodge of state and federal laws. At the federal level, prior to ERISA, employee benefits were delegated to two areas of law: first, federal tax laws, and second, federal labor laws. Federal income tax law created incentives to encourage the creation of "qualified" pension plans by ensuring favorable income-tax treatment of those plans.[3] Tax law, however, did not impose much substantive regulation of qualified plans. Rather, federal tax law governance was limited to the tax

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[1] Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461 (2018).

[2] Mark F. Sommer, Mark A. Loyd & Jennifer Y. Barber, *O Preemption, Where Art Thou?: ERISA's Lost State and Local Tax Preemption*, 64 Tax Law. 783, 783 (2011).

[3] *See* 1921 Revenue Act, Pub. L. No. 67-98 § 219(f), 42 Stat. 227, 247 (1921) (providing a tax deduction for employers who contributed to employee pension plans); 1926 Revenue Act, Pub. L. No. 69-20 § 219(f), 44 Stat. 9, 33 (1926), and 1928 Revenue Act, Pub. L. No. 70-562 §165, 45 Stat. 791, 839 (1928) (extending income tax incentives by permitting tax-free accumulation of participants on trust contributions until such contributions are distributed to the participants); Revenue Act of 1938, Pub. L. No. 75-554 §23(p)(3), 52 Stat. 447, 463–64 (1938) (conditioning preferential tax treatment on the distinction that trust contributions be made into an "irrevocable" trust and for the exclusive benefit of employees); and 1942 Revenue Act, Pub. L. No. 753 §162, 56 Stat. 798, 862 (1942) (requiring that plans not discriminate in favor of highly compensated employees and imposing limits on tax deductions for contributions to fund pension plans).

incentives to encourage pension plan participation. In addition to federal tax laws, employee benefit plans also were governed by multiple federal labor laws that regulated collective bargaining,[4] imposed operational requirements on pension and welfare plans[5] as well as fiduciary duties on plan officers,[6] and required certain plan disclosures.[7]

Similarly, a litany of state laws governing employee benefit plans exacerbated the lack of uniformity. While federal tax and labor laws encouraged employers to establish benefit plans and policed these plans to a limited extent, the states were left to provide the basic legal framework.[8] And, while a variety of state statutes affected employee benefit plans, "[t]he main source of standards, and the main body of law presupposed by federal statutes, was state common law."[9] The discrepancies and loopholes in the overlap of state and federal law exposed opportunities for taking advantage of employees' retirement assets. That is, the lack of uniformity "created opportunities for unscrupulous individuals to enrich themselves at the expense of employees."[10] ERISA enacted a uniform system for regulating employee benefit plans, consolidating and codifying the federal laws discussed above into a comprehensive federal oversight, which was structured to govern all things relating to employee benefit plans.[11] Further, "Congress adopted the view that employee benefit plans would be better regulated by the federal government without undue state interference."[12] ERISA, therefore, includes broad provisions that serve to make the regulation of employee benefit plans an "exclusively . . . federal concern."[13] Significantly, ERISA section 514(a) broadly preempts state law, declaring that, with only a few specific exceptions, ERISA "shall supersede any

[4] *See* William J. Kilberg & Paul D. Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 Tex. L. Rev. 1313, 1313 (1984) (citing National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2018))).

[5] Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–188 (2018)).

[6] Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 401–531 (1982)).

[7] Welfare and Pension Plan Disclosure Act, Pub L. No. 85-836, 72 Stat. 997 (1958), *repealed by* Employee Retirement Security Act of 1974, Pub. L. No. 93-406 §111, 88 Stat. 829, 851 (codified at 29 U.S.C. § 1031(a)(1) (2018)).

[8] James A. Wooten, *A Legislative and Political History of ERISA Preemption, Part 3*, 15 J. Pension Benefits 15, 16 (2008).

[9] Jay Conison, *ERISA and the Language of Preemption*, 72 Wash. U. L.Q. 619, 644–45 (1994).

[10] Wooten, *supra* note 8, at 16.

[11] Sommer, Loyd & Barber, *supra* note 2, at 785 (citing 29 U.S.C. § 1001 (2010); Edward A. Zelinsky, *Travelers, Reasoned Textualism, and the New Jurisprudence of ERISA Preemption*, 21 Cardozo L. Rev. 807, 811–12 (1999)).

[12] *Id.* (citing Kilberg & Inman, *supra* note 4, at 1313–14).

[13] *Id.* (citing Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981)).

and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[14]

Because ERISA does not mandate, but instead only incentivizes private employers to offer retirement programs, an estimated fifty-five million Americans are still facing a retirement-savings crisis. Instead of creating a federal response to this looming crisis, states have re-attempted to take a piecemeal approach to rectifying these deficiencies, passing and implementing laws establishing automatic enrollment Individual Retirement Account (IRA) plans. The purpose of these automatic enrollment IRA laws is to require private employers that do not offer any other retirement vehicle(s) to provide a mandated savings vehicle for those employees without access to an employer-sponsored, ERISA-governed pension plan. However, in so doing, the states' laws fail to consider that the persisting retirement shortage problem is inherently federal, and not just local, to their individual state populations.

This article argues that the passage and implementation of state automatic enrollment IRAs are contrary to ERISA's fundamental purpose of uniform employee pension governance at the federal level and thus should be preempted by ERISA's broad and uniform preemptive scope. Part I of this article outlines the historical evolution of ERISA's express preemption provision. Part II assesses the states' interests in automatic enrollment plans, including the states that have both passed and that have implemented automatic enrollment IRA laws. Part III analyzes the chronological evolution of regulations and interpretations that guide and govern IRAs and ERISA's preemption of state laws relating to employee benefit plans. These regulations will include the 1975 regulations by the Department of Labor (DOL), the DOL's 2016 regulations, Congress's 2017 invocation of the Congressional Review Act (CRA) to undo the 2016 DOL regulations, and a Guidance Letter from the DOL under the Trump administration outlining its interpretation of ERISA preemption. Part IV of this article summarizes *Howard Jarvis Taxpayer's Ass'n v. California Secure Choice Retirement Savings Program*, the lone case thus far adjudicated on the issue of whether state automatic enrollment IRA laws should be preempted by ERISA. This section then assesses how the absence of the uniformity argument in the court's decision led the California District Court to the wrong conclusion in holding that California's state automatic enrollment IRA law is not preempted by ERISA. Finally, the conclusion summarizes the key arguments of this article.

[14] *Id.* at 786 (citing 29 U.S.C. § 1144(a) (2006)).

I. ERISA Preemption

ERISA applies a three-step inquiry in determining whether a state law is preempted."[15] First, a court must decide if a "state law" has been enacted.[16] Next, the court must then determine (2) whether the state law "relates to" (3) an "ERISA-covered plan" within the meaning of section 514(a).[17] Section 514 of ERISA does not, however, define the term *employee benefit plan* for ERISA preemption. Instead, under section 3(3) of ERISA, within the statute's definitions, the term is defined as "an employee welfare plan or an employee pension benefit plan or a plan which is both a welfare plan and pension plan."[18] Section 4 of ERISA then proceeds to exempt five types of plans from ERISA's coverage.[19] Section 514(a) of ERISA, subject to limited exceptions, states that Title I of ERISA preempts state laws insofar as they "relate to" any ERISA-covered employee benefit plan.[20] The U.S. Supreme Court has said that a state law has a prohibited relation to an ERISA plan if it makes reference to, or has a connection with, employee benefit plans.[21] Under the Supreme Court's test, a state law relates to an employee benefit plan if it (1) makes a reference to or (2) has a connection with an employee benefit plan.[22] Section 3(2)(A) of ERISA defines an "employee pension benefit plan," in relevant part, as:

> [a]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program (1) provides retirement income to employees, or (2) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating benefits under the plan or the method of distributing benefits from the plan.[23]

[15] *Id.* at 788.

[16] 29 U.S.C. §1144(c) (2018). The Supreme Court has even held "state law" to encompass common-law causes for which the existence of an ERISA-covered plan forms an integral part of the basis for liability. *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137–40 (1990); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47–48 (1987); Sommer, Loyd & Barber, *supra* note 2, at 788.

[17] Sommer, Loyd & Barber, *supra* note 2, at 788 (citing 29 U.S.C. §1144(a) (1988)).

[18] 29 U.S.C. § 1002(3).

[19] *Id.* § 1003(b) (exempting (1) government plans; (2) church plans; (3) plans solely for the purpose of workmen's compensation, unemployment compensation, or disability insurance laws; (4) plans maintained outside the United States primarily for the benefit of nonresident aliens; and (5) excess benefit plans that is/are unfunded).

[20] *Id.* § 1144(a).

[21] *See, e.g.*, Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983); Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., N.A., 519 U.S. 316 (1997); Egelhoff v. Egelhoff, 532 U.S. 141 (2001).

[22] N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995).

[23] 29 U.S.C. § 1002 (2)(A); *see also* Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir. 1982) (establishing a four-prong test for determining whether there is a "plan"

The Supreme Court has said that a state law "makes reference to" an ERISA benefit plan if the law acts "immediately and exclusively" upon ERISA plans, or if the existence of an ERISA plan is essential to the law's operation.[24] The Court has identified at least three instances in which a state law can be said to have a prohibited "connection with" employee benefit plans: when it (1) mandates employee benefit structures or their administration; (2) binds employers or plan administrators to particular choices or precludes uniform administrative practice, thereby functioning as a regulation of an ERISA plan itself; and (3) provides an alternative enforcement mechanism to ERISA.[25]

Further, courts have interpreted the words "relate to" as having a broad and commonsense meaning.[26] Thus, ERISA does not preempt only state laws specifically designed to affect employee benefit plans or dealing with the specific subject matters covered by ERISA.[27] Rather, ERISA broadly preempts state laws having any connection with or reference to any employee benefit plans covered by ERISA, whether or not the law is designed to affect ERISA plans or if the effect is indirect.[28] Moreover, the legislative history for ERISA's preemption provisions indicates that Congress intended for retirement plans to be exclusively within the jurisdiction of the federal government.[29] And this view has

for purposes of ERISA). Under *Donovan*'s four-prong test, there must be (1) intended benefits, (2) intended beneficiaries, (3) a source of financing, and (4) a procedure to apply for and collect benefits. *Id*. The state automatic enrollment IRA programs appear to satisfy this test. The harder question, discussed in the text, is whether any such plan is "established or maintained by an employer or an employee organization." *See* Kathryn L. Moore, *State Automatic Enrollment IRAs After the Trump Election: Are They Preempted by ERISA?*, 27 Elder L.J. 51, 83 (2019).

[24] *Dillingham Constr.*, 519 U.S. at 324–25.

[25] *Travelers Ins. Co.*, 514 U.S. at 658–60.

[26] *Delta Air Lines, Inc.*, 463 U.S. at 103; Metro. Life Ins. Co. v. Pressley, 82 F.3d 126, 129 (6th Cir. 1996); *see also* Salameh v. Provident Life & Acc. Ins. Co., 23 F. Supp. 2d 704, 717 (S.D. Tex. 1998) (finding that the phrase "relate to" should be construed in the broadest sense.); Or. Teamster Emps. Tr. v. Hillsboro Garbage Disposal, Inc., 800 F.3d 1151, 1155–56 (9th Cir. 2015) (stating that a claim "relates to" a plan within the meaning of the ERISA section providing that ERISA supersedes state laws insofar as they relate to an employee benefit plan when the claim bears on an ERISA-regulated relationship).

[27] *Delta Air Lines, Inc.*, 463 U.S. at 85, 103.

[28] 29 U.S.C. § 1144(a); Nat'l Sec. Sys., Inc. v. Iola, 700 F.3d 65, 83 (3d Cir. 2012); Trs. of Plumbers & Pipefitters Nat'l Pension Fund v. Mar-Len, Inc., 864 F. Supp. 599, 607 (E.D. Tex. 1994); *see also* FMC Corp. v. Holliday, 498 U.S. 52, 64 (1990) ("[T]he preemption clause is conspicuous for its breadth.").

[29] *See* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522–23 (1981) (noting that 29 U.S.C. § 1144(a) aids the courts as an "explicit congressional statement about the pre-emptive effect of its action"); James A. Wooten, *A Legislative and Political History of ERISA Preemption, Part 1*, 14 J. Pension Benefits 31, 31 (2006) [hereinafter Wooten, *Part 1*] (noting that "[the desire for federal preemption was a key factor-perhaps, the key factor in creating the coalition that pushed ERISA through Congress"); James A. Wooten, *A Legislative and Political History of ERISA Preemption, Part 2*, 14 J. Pension Benefits 5, 10 (2007) [hereinafter Wooten, *Part 2*] ("[T]he politics of preemption led Congress to pass a more ambitious slate of reforms than it might otherwise have done."); Wooten, *supra* note 8, at 15.

been apparent to the Supreme Court as well. Notably, in *FMC Corp. v. Holliday*, the U.S. Supreme Court stated that "Congress intended by ERISA to establish pension plan regulation as exclusively a federal concern."[30] The Court also described Congress's desire to avoid "endless litigation over the validity of State action."[31]

The U.S. Supreme Court in *Shaw v. Delta Air Lines, Inc.* held that Congress used the words "relate to" in section 514(a) in their broadest sense.[32] The Court concluded that the bill that became ERISA originally contained a limited preemption clause, applicable only to state laws relating to the specific subjects covered by ERISA.[33] Ultimately, however, the Court noted that Congress instead opted for a broader preemption clause.[34] Indeed, one of the sponsors of ERISA referred to the preemption provision as the "crowning achievement," stating: "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."[35] Further, Congress intended to curb widespread abuse and mismanagement by employee benefit plan administrators that placed participants' benefits at risk through the enactment of ERISA.[36] The preemption text is arguably one of the broadest in the federal statutes; section 514(a) is so broad that it has been described as a "virtually unique preemption provision."[37] Congress deliberately chose expansive language in section 514(a). Both the House and Senate bills that, after debate and amendment, became ERISA, contained a preemption clause that targeted only those state laws whose subject matter was the same as ERISA's."[38] However, the Conference

[30] 498 U.S. at 64 (citing *Alessi*, 451 U.S. at 523).

[31] *Id.* at 65 (citing 120 CONG. REC. 29, 942 (1974) (remarks of Sen. Javits)).

[32] *Delta Air Lines, Inc.*, 463 U.S. at 96–97.

[33] *Id.* at 98.

[34] *Id.*

[35] 120 CONG. REC. 29,197 (daily ed. Aug. 20, 1974) (statement of Rep. Dent) (emphasis added).

[36] *See* 29 U.S.C. § 1001(a) (2018) ("[O]wing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits."); Kevin Matz, Note, *ERISA's Preemption of State Tax Laws*, 61 FORDHAM L. REV. 401, 401 n.6 (1992) ("The closing of the Studebaker automobile plant in South Bend, Indiana in December 1963, and the resulting loss of pension benefits by employees who had been with the company for as many as forty years is often cited as the impetus for the ERISA legislation.") (citing JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 53, 58 (1990)).

[37] Kilberg & Inman, *supra* note 4, at 1313 (citing Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 24 n.26 (1983)).

[38] Yonatan Gelblum, Hattem v. Schwarzenegger*: Terminating Preemption Challenges to State Taxation of ERISA Plans' Unrelated Business Taxable Income*, 60 TAX LAW. 215, 217 (2006) (citing H.R. 2, 93d Cong. § 514(a) (1974), *reprinted in* 3 SUBCOMM. ON LAB. OF THE S. COMM. ON LAB. & PUB. WELFARE, 94TH CONG., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 3898, 4057–58 (1976) (limiting preemption to those state laws "[relating] to the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting on behalf of any employee benefit plan to which part 1 applies"); S. 4, 93d Cong., § 699(a) (1974), *reprinted in* 3 SUBCOMM.

Committee substituted preemption language from targeting state laws whose subject matter was the same as ERISA's to its current language, thereby broadening the reach of preemption to laws that do not regulate the same subject matter as ERISA does, "but which nonetheless 'relate to' ERISA plans."[39]

Sponsors of the bill were clear in their goal for the scope of the preemptive provisions. Statements by ERISA's sponsors such as Representative Charles Dent of Pennsylvania indicated that they intended for ERISA's preemption provisions to be broad.[40] Similarly, Senator Harrison Williams also expressed his view that ERISA's preemption provisions were intended to apply broadly.[41] This commentary signifies the scope of ERISA's intended wholesale preemptive reach. Another principal intention of Congress was to "protect against conflicting and inconsistent state and local regulation of employee benefit plans," which surely would undermine the goal of uniformity.[42] As such, ERISA's express preemption language exceeds the breadth of traditional Supremacy Clause federal preemption, reflecting Congress's intent to provide a uniform federal standard for governing employee benefit plans.[43] Accordingly, "ERISA's expansive preemption provisions . . . are intended to ensure that employee benefit plan regulation would be exclusively a federal concern."[44]

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on Lab. of the S. Comm. on Lab. & Pub. Welfare, 94th Cong., Legislative History of the Employee Retirement Income Security Act of 1974, at 3599, 3820)).

[39] *See id.*; *see also* H.R. Rep. No. 93-1280, at 383 (1974); H.R. Rep. No. 93-1280, at 383 (1974) (Conf. Rep.); S. Rep. No. 93-1090, at 383 (1974); S. Rep. No. 93-1090, at 383 (1974).

[40] Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98–99 (1983). Representative Dent stated:

> Finally, I wish to make note of what is, to many, the crowning achievement of this legislation, the reservation to Federal authority 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.

Id. at 99 (citing 120 Cong. Rec. 29,197 (daily ed. Aug. 20, 1974)).

[41] *Id.* at 98–99. Senator Williams stated:

> It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.

Id. at 99 (citing 120 Cong. Rec. 29,933 (daily ed. Aug. 22, 1974)).

[42] *Id.*

[43] Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004) (finding that "[t]he purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans").

[44] *Id.*

Congress expressly preempted state laws through the text of ERISA in order to provide uniform federal regulations of employee benefit plans. ERISA section 514(a) is an example of such an express preemption provision. Express preemption—such as that accomplished by section 514(a)—differs from implied preemption.[45] To strike down a state law in an implied preemption case, a court must find a specific conflict between the involved federal and state laws.[46] Implied preemption seeks to "accommodate the federal interest involved with the least possible displacement of state law," whereas express preemption seeks to "prevent subtle or incremental state encroachment into a field that Congress has chosen expressly to reserve for federal law."[47]

ERISA preemption jurisprudence can best be placed in one of two historical categories: pre-*Travelers*, or post-*Travelers*, referring to the Supreme Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*[48]

*Pre-*Travelers

Initially after ERISA's passage, the Court applied a broad and sweeping breadth of preemption in ERISA cases. Initially, the Supreme Court interpreted the "relate to" language of section 514(a) literally to embrace a broad scope of preemption. In various decisions, the Court described ERISA section 514(a) as having a broad scope,[49] an expansive sweep,[50] "deliberately expansive,[51] and "conspicuous for its breadth."[52] To navigate, the Court employed the "broad common-sense meaning" of the phrase *relate to*, 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."[53] During this period, the Court made it clear that even state laws that are consistent with ERISA are preempted if they somehow "relate to" an employee benefit plan.[54] Thus, the controlling test coming out of this

[45] Sommer, Loyd & Barber, *supra* note 2, at 788.

[46] *Id.* (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-23 to 6-27 (1978) (discussing the preemption doctrine and its application within and outside the scope of the commerce clause); Brown v. Hosp. & Rest. Emps. & Bartenders Int'l Union Local 54, 468 U.S. 491, 501 (1984); Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 152–53 (1982); Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)).

[47] *Id.* at 789 (citing Kilberg & Inman*, supra* note 4, at 1316 (citing Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978))).

[48] 514 U.S. 645 (1995).

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

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

[51] *Id.* at 46.

[52] FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990).

[53] Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139 (1990).

[54] *See* Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 829 (1988); *Metro. Life*, 471 U.S. at 739.

period is that a state law "relates to" an ERISA plan if the law either has a "connection with, or reference to" an ERISA plan.[55]

Travelers *and Post-*Travelers

Travelers began what is known as the modern era of preemption jurisprudence. Rather than invalidate the original standards under the Court's early jurisprudence, it is commonly accepted that *Travelers* supplemented, rather than replaced, the earlier jurisprudence. Under the "*Travelers* Doctrine," the Court established a presumption against preemption for matters traditionally reserved to states under their police powers.[56] In *Travelers*, the Court held that an "indirect economic influence" does not bind administrators and therefore does not regulate ERISA plans.[57] The Court, however, was careful not to foreclose the possibility of economic impact that could have a sufficiently significant economic impact to encroach upon ERISA plans and areas of traditional governance.[58] Thus, under ERISA jurisprudence, state laws that relate to or have a connection with ERISA-sponsored plans are preempted unless the state law is a traditional police power regulation, or unless the state law does not have a considerable impact upon economic regulations of ERISA plans.

The Supreme Court has said that a state law "makes reference to" an ERISA benefit plan if the law acts "immediately and exclusively" upon ERISA plans, or if the existence of an ERISA plan is essential to the law's operation.[59] The Court has identified at least three instances in which a state law can be said to have a prohibited "connection with" employee benefit plans—when it (1) mandates employee benefit structures or their administration; (2) binds employers or plan administrators to particular choices or precludes uniform administrative practice, thereby functioning as a regulation of an ERISA plan itself; and (3) provides an alternative enforcement mechanism to ERISA.[60]

II. State Automatic Enrollment IRA Laws

The focus of this article is on state automatic enrollment IRAs, which, under state laws, require employers to establish an automatic enrollment IRA with an opt-out option for employers not already providing ERISA-governed retirement savings vehicles to its employees.

[55] *Metro. Life*, 471 U.S. at 739; Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983).

[56] Colleen E. Medill, Introduction to Employee Benefits Law Policy and Practice 748 (5th ed. 2018).

[57] N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 659 (1995).

[58] *Id.* at 668.

[59] Cal. Div. of Lab. Standards Enf't v. Dillingham Constr. N.A., Inc., 519 U.S. 316, 324–25 (1997).

[60] *Travelers Ins. Co.*, 514 U.S. at 658–60.

This state retirement strategy is a piecemeal effort, attempting to rectify the pending federal retirement crisis through the establishment of state automatic enrollment IRA plans. While the idea of automatic enrollment IRAs is not itself new, the imposition of a state mandate on employers to create these IRAs or else a plan that falls under ERISA is a newly implemented phenomenon.[61] In an effort to combat their constituents' retirement shortfalls, states have taken it upon themselves to risk ERISA preemption in establishing these automatic enrollment IRA plans for private-sector employees who are not otherwise offered an ERISA-covered savings vehicle. Each of the states to pass automatic enrollment laws thus far is using IRAs as the respective savings vehicle.[62] These IRA accounts are typically set up with a financial institution, such as a bank or a mutual fund company.[63]

The tax-favorable treatment that IRAs receive is similar to that of qualified plans under the Internal Revenue Code. Specifically, the tax treatment is analogous in a handful of ways: first, like in qualified plans, individuals who meet income requirements may deduct contributions to traditional IRAs from their gross income when the contributions are made.[64] Further, individuals also may make after-tax contributions to traditional IRAs.[65] Second, so long as contributions to an IRA are held by such IRA, no tax is imposed on its earnings.[66] Third, distributions from IRAs generally are subject to taxation when made.[67] Fourth, like Roth contributions to 401(k) plans, contributions to Roth IRAs are taxable when made.[68] However, neither the earnings on nor the distributions from Roth IRAs are susceptible to income taxation.[69] Thus, traditional IRAs closely mirror qualified plans in the taxability of distributions, whereas Roth IRAs obscure the timing of the tax liability. This variance in states' choice for its IRA plan further undermines the federal uniformity that ERISA promotes.

[61] Kathryn L. Moore, *A Closer Look at the IRAs in State Automatic Enrollment IRA Programs*, 23 Conn. Ins. L.J. 217, 218 n.6 (2016) (noting that while automatic enrollment plans were originally intended to be required at the federal level, numerous legislative attempts to pass and implement such a federal scheme failed).

[62] As opposed to a more traditional retirement plan, such as a 401(k) plan.

[63] *Traditional and Roth IRAs*, IRS, https://www.irs.gov/retirement-plans/traditional-and-roth-iras (last visited July 25, 2020); *Definitions*, IRS, https://www.irs.gov/retirement-plans/plan-participant-employee/definitions (last visited July 25, 2020) (defining *"Individual Retirement Account (IRA)* as "An individual account or annuity set up with a financial institution, such as a bank or a mutual fund company. Under federal law, individuals may set aside personal savings up to a certain amount, and the investments grow, tax deferred. In addition, participants can transfer money from an employer retirement plan to an IRA when leaving an employer. IRAs also can be part of an employer plan").

[64] I.R.C. § 219(a) (2018).

[65] *Id.* § 408(o).

[66] *Id.* § 408(e).

[67] *Id.* § 408(d).

[68] *Id.* § 408A(c)(1).

[69] *Id.* §§ 408A(a), 408(d), 408(e).

State-sponsored IRA plans are for the private individual and are designed to supplement ERISA. To avoid ERISA's breadth, an employer's role must be minimal. Under the 1975 DOL regulations, a safe harbor exists in which an IRA program funded by employee-pay deductions is not deemed an employee benefits plan and, thus, is not subject to ERISA if four conditions are met: (1) the employer does not make any contributions; (2) employee participation is "completely voluntary"; (3) the employer's involvement is minimal and amounts to providing information, but not to endorsing the program; and (4) the employer is not paid for endorsing the program.[70] Currently, the only other alternative action for states to avoid ERISA is to "work within the voluntary employer-based system."[71] Under this approach, the state serves as a facilitator and educator to "encourage—but not require—businesses to adopt ERISA-covered retirement plans."[72] Thus, under this approach, the state serves a critical role of a liaison to businesses and an educator to employees, who generally and traditionally do not have a high degree of financial literacy.[73]

Section 408(a) of the Internal Revenue Code defines the term *individual retirement account* as a "trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries but only if the written instrument creating the trust meets the following requirements": (1) except in the case of a rollover contribution, no contribution will be accepted unless it is in cash, and the contribution does not exceed the Internal Revenue Code section 219(b)(1)(A) limit; (2) the trustee is a bank or other person who demonstrates that the trust will be administered in accordance with the requirements of section 408; (3) no part of the trust funds will be invested in life insurance contracts; (4) the individual's interest in his account balance is nonforfeitable; (5) the trust assets will not be commingled with other property except in a common trust fund or common investment fund; and (6) minimum distribution and incidental-death benefit requirements are satisfied.[74] Further, section 408(c) of the Internal Revenue Code provides that an employer may establish an IRA so long as the six requirements of section 408(a) are satisfied, and there is a separate accounting for the interest of each employee.[75]

[70] 29 C.F.R. 2510.3-2(d) (2019).

[71] Pew Charitable Trusts, How States are Working to Address the Retirement Savings Challenge 10 (2016), https://www.pewtrusts.org/-/media/assets/2016/06/howstatesareworkingtoaddresstheretirementsavingschallenge_final.pdf [https://perma.cc/L62L-CXPK].

[72] *Id.* at 11.

[73] *See id.*

[74] I.R.C. § 408(a).

[75] 80 Fed. Reg. 59,464 (2016). Under the now repealed 2016 Department of Labor (DOL) Regulations, "Such programs encourage employees to establish tax-favored IRAs funded by payroll deductions. . . . These initiatives generally require specified employers that do not offer workplace savings arrangements to automatically deduct a specified

Midway through 2019, six states—California,[76] Connecticut,[77] Illinois,[78] Maryland,[79] New Jersey,[80] and Oregon[81]—have enacted legislation creating state automatic enrollment IRA programs.[82] Additionally, the state of Washington has enacted legislation to establish a marketplace for retirement programs.[83] Finally, other states are looking to follow suit in establishing automatic enrollment IRAs, albeit with variances in their respective specifics.[84] To prevent double taxation issues, the states are making efforts to ensure their respective programs meet the requirements Internal Revenue Service (IRS) under the Internal Revenue Code. For example, the California Act provides that the California Program may not be implemented if the IRA arrangements offered under the California Program fail to qualify for the favorable income tax treatment under the Internal Revenue Code.[85] The Illinois Act,[86] the Maryland Act,[87] and the New Jersey Act contain similar prohibiting provisions.[88] The Connecticut Act does not include an express prohibition on implementation but defines the term *IRA* for purposes of the Act in terms of the Internal Revenue Code's definition of *IRA*, and provides that the Program's assets will be held in trust or custodial

amount of wages from their employees' paychecks" in order that those amounts may be remitted to state-administered IRAs for the employees. Typically, with automatic enrollment, the states would require that the employer deduct specified amounts on behalf of the employee, unless the employee affirmatively elects not to participate. As a rule, employees can stop the payroll deductions at any time. The programs, as currently designed, do not require, provide for or permit employers to make matching or other contributions of their own into the employees' accounts. In addition, the state initiatives typically require that employers act as a conduit for information regarding the program, including disclosure of employees' rights and various program features, often based on state-prepared materials." *Id.* at 59,464–65.

[76] CAL. GOV'T CODE §§ 100000–100044 (West 2019).

[77] CONN. GEN. STAT. § 16-29 (2016).

[78] 820 ILL. COMP. STAT. 80/1-95 (2016).

[79] MD. CODE ANN., LAB. & EMPL. §§ 12-201 to 12-502 (West 2019).

[80] New Jersey Secure Choice Savings Program, Assemb. 4134, 218th Leg., Reg. Sess. (N.J. 2019).

[81] OR. REV. STAT. § 178.2015 (2019).

[82] Moore, *supra* note 23, at 52.

[83] N.J. STAT. ANN. § 43:23-2; WASH. REV. CODE § 43.330.730-50 (2019).

[84] *See, e.g.*, Missouri Secure Choice Savings Program Act, H.B. 1672, 99th Gen. Assemb., 2d Reg. Sess. (Mo. 2018). New York Governor Andrew Cuomo signed a bill in Spring 2018 that created a voluntary state IRA program for private-sector employees. *See* James T. Madore, *NY Private-Sector Employees to Receive Retirement Savings Plans*, NEWSDAY (Apr. 2, 2018), https://www.newsday.com/business/private-retirement-savings-new-york-1.17828511 [https://perma.cc/V7DB-SPMS]. Because it is voluntary, New York's program differs fundamentally from the other state programs, all of which provided for automatic enrollment IRAs. *Moore*, *supra* note 23, at 54 n.17.

[85] Moore, *supra* note 61, at 225–26 (citing CAL. GOV'T CODE § 100043 (West 2012)).

[86] *Id.* at 226 (citing 820 ILL. COMP. STAT. § 80/95 (2015)).

[87] *Id.* (citing 2016 Md. Laws, ch. 323 § 3).

[88] *Id.* at 226. As enacted, New Jersey's program did not require the board to request such a ruling or limit the program for favorable tax treatment. *Bill Text: NJ A4314 | 2018-2019 | Regular Session | Chaptered*, LEGISCAN, https://legiscan.com/NJ/text/A4134/id/1988246 (last visited July 26, 2020); *see* N.J. STAT. ANN. § 43:23-33(a) (2019).

accounts that satisfy the requirements of the Internal Revenue Code provisions governing IRAs.[89] The Oregon Act makes no specific mention of IRAs. However, the Oregon Act requires the Oregon Board to obtain a legal opinion regarding the applicability of the Internal Revenue Code prior to the Act's implementation.[90]

While the intention of these state automatic enrollment IRAs are to expand access to savings vehicles, states that have enacted laws establishing automatic enrollment IRAs have been cognizant of the broad scope of ERISA's preemptive power.[91] The Illinois Secure Choice Act, for example, initially directed the Illinois Board to request, in writing, an opinion or ruling from the DOL regarding the applicability of ERISA to the Illinois program,[92] and this Act prohibits the Board from implementing the Illinois Program "if . . . determined that the Program is an employee benefit plan and State or employer liability is established under the Employee Retirement Income Security Act."[93] This provision was ultimately amended, prior to implementation, with this obligation removed from the enacted version.[94]

Despite being cognizant of the possibilities for being preempted by ERISA, the states that have established these automatic enrollment IRA programs have continued to implement their respective programs.[95] Thus, the question remains: Do these state automatic enrollment IRAs undermine ERISA's goal of uniform federal governance of employee benefits plans, and, if so, should they be preempted by ERISA?

III. The Regulatory Progression and the Congressional Review Act

The historical evolution of DOL regulations impacting ERISA's preemptive scope date back to 1975. In 1975, the DOL issued a regulatory "safe harbor" (1975 Safe Harbor), which exempted certain IRA account plans.[96] The DOL's 1975 Safe Harbor expressly exempts six types of arrangements from the definition of employee benefit plans under ERISA: (1) severance-pay plans; (2) bonus programs; (3) individual retirement accounts; (4) gratuitous payments to pre-ERISA retirees; (5) tax-sheltered annuities; and (6) supplemental payment plans.[97] Of the six regulatory exemptions, the state automatic enrollment IRAs

[89] Moore, *supra* note 61, at 226 (citing 2016 Conn. Acts No. 16-29 §§ 1(9), 5(a)).

[90] *Id.* (citing H.B. 2960 § 7(b), 78th Leg. Assemb., Reg. Sess. (Or. 2005)).

[91] For a detailed analysis on how each state's respective plan operates and the intricacies of each, *see id.* at 219–25.

[92] 820 Ill. Comp. Stat. § 80/95 (2018).

[93] Moore, *supra* note 23, at 61 (citing 820 Ill. Comp. Stat. § 80/95).

[94] 820 Ill. Comp. Stat. § 80/95.

[95] Moore, *supra* note 23, at 62 (citing Hazel Bradford, *States to Persist with Secure Choice*, Pension & Inv. (May 15, 2017), http://www.pionline.com/article/20170515/PRINT/305159977/states-to-persist-with-secure-choice [https://perma.cc/3DGL-2K9V]).

[96] 29 C.F.R. § 2510.3-2(d) (2019).

[97] *Id.* § 2510.3-2.

"clearly do not fall within" five categories: severance plans; bonus programs; gratuitous payments; tax-sheltered annuities; and supplemental payment plans.[98] Whether state automatic enrollment IRA programs fall within the regulatory safe harbor for individual retirement accounts, however, is debatable.[99]

The 1975 Safe Harbor specifies that individual retirement accounts or individual retirement annuities will not constitute a "pension plan" for purposes of ERISA if four requirements are met:

> (1) no contributions are made by the employer or employee association; (2) participation is completely voluntary for employees or members; (3) the sole involvement of the employer or employee organization is without endorsement to permit the sponsor to publicize the program to employees or members, to collect contributions through payroll deductions or dues checkoffs, and to remit them to the sponsor; and (4) the employer or employee organization receives no consideration in the form of cash or otherwise, other than reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs.[100]

The state automatic enrollment IRAs, as structured, clearly satisfy three of the four regulatory safe harbor requirements.[101] First, the programs prohibit employer contributions; second, the programs limit the employers' involvement to educating employees about enrolling in the program, collecting employees' contributions through payroll deductions, and remitting contributions to the fund;[102] and third, the programs do not permit employers to recoup the cost of participating

[98] Moore, *supra* note 23, at 69.

[99] *Id.* at 71.

[100] 29 C.F.R. § 2510.3-2(d) (2019).

[101] Moore, *supra* note 23, at 70.

[102] *Id.* at 71 n.139. While I generally agree with Professor Moore's assessment of this factor, it is subject to some debate. *See* Letter from Vanessa A. Scott, Carol T. McClarnon & Allison E. Wielobob, Eversheds Sutherland LLP, to Randy Johnson, U.S. Chamber of Comm. (Nov. 14, 2017), https://www.uschamber.com/sites/default/files/state_ira_letter_final_11-14-17.pdf [https://perma.cc/78B2-GJ9U] (arguing that the state automatic enrollment IRA programs are preempted by ERISA) [hereinafter Eversheds Sutherland Opinion Letter]. Eversheds Sutherland contends that employer involvement in the automatic enrollment IRA programs exceeds that permitted by the safe harbor because the state programs require employers to (1) calculate contribution percentages and auto-escalation amounts, (2) determine employee eligibility, (3) verify social security numbers and other employee information, and report this information to the state, and (4) conduct and provide open enrollment periods. *Id.* at 5. Eversheds Sutherland contends that in States where employers face fines for failing to comply with program requirements, employers may be expected to encourage participation in the program to avoid penalties, paperwork, etc. associated with an opt-out. It is easy to envision a small employer automatically enrolling new employees and thus inadvertently establishing an ERISA plan. This level of involvement is clearly beyond the scope contemplated by the safe harbor.

Moore, *supra* note 23, at 71 n.139 (citing Eversheds Sutherland Opinion Letter, *supra* at 5).

in the program.[103] Accordingly, under the regulatory safe harbor, it is only the "completely voluntary" requirement that seems in question.[104]

The 1975 Safe Harbor provided little clarity around the definition of "completely voluntary." In 2016, the DOL under the Obama administration, facing concerns that automatic enrollment retirement programs that mandated employees opt-out—as opposed to opt-in—may not satisfy the definition of "completely voluntary," issued regulatory guidance to clear the confusion.[105] The 2016 Safe Harbor's Preamble explained:

> With regard to the 1975 IRA Payroll Deduction Safe Harbor's condition requiring that an employee's participation be "completely voluntary," the Department intended this term to mean that the employee's enrollment in the program must be self-initiated. In other words, under the safe harbor, the decision to enroll in the program must be made by the employee, not the employer. If the employer automatically enrolls employees in a benefit program, the employees' participation would not be "completely voluntary" and the employer's actions would constitute the "establishment" of a pension plan, within the meaning of ERISA . . . . This is true even if the employee can affirmatively opt out of the program.[106]

In support of this position, the DOL noted that courts have held that, in other contexts, opt-out arrangements are not consistent with a completely voluntary requirement.[107] In support of this proposition, the DOL cited three reported decisions,[108] three unreported decisions,[109]

[103] Moore, *supra* note 23, at 74.

[104] *Id.* at 71–72. Because this area is subject to significant debate without a clear answer, and because the focus of this paper is on the uniformity standards of ERISA preemption, this paper does not go into considerable examination of this topic. For more information on the specifics of the debate on both sides, see *id.* at 75–79.

[105] *See* Saving Arrangements Established by States for Non-Governmental Employers, 81 Fed. Reg. 59,464, 59,471 (Aug. 30, 2016) (codified at 29 C.F.R. § 2510.3-2(h) (2017), removed 82 Fed. Reg. 29236 (June 28, 2017)).

[106] *Id.* at 59,464, 59,465.

[107] Moore, *supra* note 23, at 79.

[108] *Id.* at 80 n.181 (citing Doe v. Wood Cty. Bd. of Educ., 888 F. Supp. 2d 771, 773, 776 (S.D.W. Va. 2012) (holding that option to opt out of single-sex education program does not satisfy Department of Education regulation that single-sex programs be "completely voluntary"; noting that discussion leading up to regulations state that recipient is strongly encouraged to "receive authorization from parents or guardians to enroll their children in a single-sex class"); Schear v. Food Scope Am., Inc., 297 F.R.D. 114, 125 (S.D.N.Y. 2014) (citing N.Y. Department of Labor Opinion, which provides that "[f]or a voluntary 'tip pooling' arrangement to exist, it must be 'undertaken by employees on a completely voluntary basis and may not be mandated or initiated by employers' and an employer can take 'no part in the organization or the conduct of [the] tip-pool" and finding that "Defendants' documents indicate that they had a heavy hand in facilitating the tip sharing arrangement"); Meadows v. Emps. Health Ins., 826 F. Supp. 1225, 1228–29 (D. Ariz. 1993) (finding that participation in group health insurance plan was not completely voluntary when employer agreed in contract to 100% participation of all employees for life and accidental and death and dismemberment insurance and 75% participation of all eligible employees for medical coverage)).

[109] *Id.* at 80 n.182 (citing Carter v. Guardian Life Ins. Co., No. 11-3-ART, 2011 WL 1885625 *1 (E.D. Ky. May 18, 2011) (noting that courts have held Department of Labor

Field Assistance Bulletins (FABs) regarding Health Savings Accounts (HSAs),[110] and the Advisory Council's Report on the Code's section 403(b) plans.[111]

To clarify the issue, the 2016 Safe Harbor created a "voluntary" participation standard for "state required and administered programs," such that "automatic enrollment arrangements with employee opt-out features" would be expressly exempt from ERISA's purview.[112] The 2016 Safe Harbor, however, was short-lived. To address the concerns about insufficient protections under automatic enrollment IRAs and their perceived conflict with ERISA's uniformity standards, Congress invoked the rarely invoked Congressional Review Act (CRA).[113] The CRA establishes special congressional "fast track" procedures for disapproving a broad range of regulatory rules issued by federal agencies. The Act mandates that before any rule covered by the Act can take effect, the federal agency that promulgates the rule must submit it to both houses of Congress and the Comptroller General of the Government Accountability Office (GAO).[114] Congress then has sixty legislative days[115] after the date that the agency submits its report of the rule to pass a joint resolution of disapproval and present such resolution to the President.[116] If Congress passes a joint resolution disapproving the

regulatory safe harbor for certain group or group-type insurance programs' requirement that participation be "completely voluntary" (29 C.F.R. 2510-3.1(j)) not satisfied if enrollment in plan is automatic and holding that participation in this case was automatic and thus did not satisfy completely voluntary requirement); Thompson v. UNUM Life Ins. Co., No. Civ.A.3:03-CV-0277-B, 2005 WL 722717 at *6 (N.D. Tex. Mar. 29, 2005) (finding plan participant's participation in group health plan was not completely voluntary because participation was automatic rather than voluntary); Davis v. Liberty Mut. Ins. Co., Civ. A. No. 87-2851, 1987 WL 16837 at *2 (D.D.C. Aug. 31, 1987) (participation in group health plan not completely voluntary where employer paid premiums for employees and employee would not receive alternative form of compensation if employee chose to withdraw from plan)).

[110] *Id.* at 80 n.183 (citing Memorandum from Robert J. Doyle, Director of Regulations and Interpretations, to Virginia C. Smith, Director of Enforcement Regional Directors (Oct. 27, 2006) (on file with the United States Department of Labor); Memorandum from Robert J. Doyle, Director of Regulations and Interpretations, to Virginia C. Smith, Director of Enforcement Regional Directors (Apr. 7, 2004) (on file with the United States Department of Labor), which Professor Zelinsky cited in support of his argument that state automatic enrollment IRA programs fall within the IRA regulatory safe harbor, Edward A. Zelinsky, *Retirement in the Land of Lincoln: The Illinois Secure Choice Savings Program*, 2016 U. ILL. L. REV. 173, 181).

[111] *Id.* at 80.

[112] 80 Fed. Reg. 72,006, 72,009 (Nov. 18, 2015).

[113] Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, tit. II(E), 110 Stat. 871 (1996) (codified at 5 U.S.C. §§ 801–808). The congressional disapproval procedure is contained in § 802. *See also* RICHARD S. BETH, CONG. RES. SERV., RL 31160, DISAPPROVAL OF REGULATIONS BY CONGRESS: PROCEDURE UNDER THE CONGRESSIONAL REVIEW ACT, at i (2001).

[114] The report must include any available cost-benefit analysis. 5 U.S.C. § 801(a)(1) (2018).

[115] *Id.* § 801(d).

[116] Moore, *supra* note 23, at 64 (citing Michael J. Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review Narrowly Construe*

rule and the resolution becomes law, and the rule cannot take effect or continue in effect.[117] Further, the agency may not reissue either that rule or any substantially similar one, except under authority of a subsequently enacted law.[118]

Shortly after President Trump assumed office, Representative Tim Walberg (R-MI) introduced a resolution of disapproval, House Joint Resolution 66.[119] Representative Francis Rooney (R-FL) introduced House Joint Resolution 67 blocking the companion rule extending the safe harbor to qualified state political subdivisions.[120] Together, Representatives Walberg and Rooney argued that the regulations would "discourage small businesses from offering private-sector plans and leave working families with less retirement security, inadequate safeguards, and limited control over their retirement savings."[121] The Joint Resolution was ultimately passed by both the House and the Senate and was signed by the President on May 17, 2017.[122] As a result, the 2016 DOL safe harbor was invalidated and removed.[123]

The invalidation of the 2016 Safe Harbor has muddied the guidance on the status of state automatic enrollment IRAs even further.[124] Because the 2016 Safe Harbor has been invalidated, states cannot rely on it to support the promulgation of the automatic enrollment IRA programs.[125] Further, the DOL may not reissue the regulation in substantially the same form[126] unless the rule is specifically (re)authorized by

"Substantially the Same," and Decline to Defer to Agencies Under Chevron, 70 Admin. L. Rev. 101, 107–10 (2018) (providing overview of CRA and its procedure); Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 Harv. J. L. & Pub. Pol'y 187, 197–204 (2018) (same)).

[117] 5 U.S.C. § 801(b)(1).

[118] *Id.* § 801(f).

[119] *Protecting Retirement Savers, Taxpayers, and Small Businesses*, H. Comm. on Educ. & Lab. Republicans (Feb. 15, 2017), https://republicans-edlabor.house.gov/news/documentsingle.aspx?DocumentID=401321.

[120] *Id.* To address these concerns, H. J. Res 66 was passed to roll back the regulatory "safe harbor" created by the Obama administration that automatically enrolled private workers not enrolled in an ERISA pension plan in a government-run IRAs managed by states. H. J. Res. 67 blocked a second regulation that extended the "safe harbor" to include cities and counties from going into effect.

[121] *See* Individual Retirement Plans Guide Letter No. 424, Indiv. Ret. Plans Guide (CCH) 1081378 (Mar. 23, 2017).

[122] H.J. Res. 66, 115th Cong. (2017) ("Congress disapproves the rule submitted by the Department of Labor relating to 'Savings Arrangements Established by States for Non-Governmental Employees' and such rule shall have no force or effect.").

[123] Definition of Employee Pension Benefit Plan Under ERISA, 82 Fed. Reg. 29,236, 29,236 (June 28, 2017).

[124] Moore, *supra* note 23, at 66 ("It is not entirely clear what Congress's disapproval of the 2016 Safe Harbor means for state automatic enrollment IRAs.").

[125] *Id.*

[126] *Id.* at 66 (citing Michael J. Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe "Substantially the Same," and Decline to Defer to Agencies Under* Chevron, 70 Admin. L. Rev. 101, 107–10 (2018) (providing overview of CRA and its procedure), and Maeve P. Carey et al., Cong.

a law enacted by Congress.[127] In the meantime, however, it is not clear whether state automatic enrollment IRAs are preempted by ERISA in the absence of the 2016 Safe Harbor.[128] One could reasonably take the position that the invalidation of the 2016 Safe Harbor does not foreclose the possibility that state automatic enrollment IRAs still do not qualify as employee benefit plans.[129] One could just as reasonably maintain the position that, with the invalidation of the 2016 Safe Harbor, the triggering standard for qualifying as an employee benefits plan under ERISA should be *status quo ante*, and thus, revert back to the 1975 Safe Harbor's standard of automatic enrollment usurping voluntariness. Thus, DOL regulations and standards, while in flux, have paved the way for expanded use of state automatic enrollment IRA plans.

Furthering the murkiness surrounding ERISA's preemptive scope is a 2018 DOL Guidance Letter (2018 DOL Letter) from the Chief Division of Fiduciary Interpretations in the Office of Regulations and Interpretations, indicating that "[a] state law . . . would be preempted by Section 514(a) of ERISA to the extent the law is interpreted to limit, prohibit, or regulate an employer's adoption of automatic enrollment arrangements . . . covered under Title I of ERISA . . . ."[130] The 2018 DOL Letter is not directly on point, as it is in response to a request to clarify whether automatic enrollment of a wage deduction arrangement payable into a disability benefit plan unless the employee affirmatively opts out would run afoul of ERISA section 514.[131] However, the letter reflects the DOL's continued opinion that state laws that incorporate automatic enrollment engagements run afoul of ERISA.[132] To render the DOL's opinion on automatic enrollment pay deductions for disability benefit plans, the DOL relied, in part, on two previously provided Advisory Opinions relating to ERISA's preemptive scope.[133] The DOL

RES. SERV., R43992, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS 6–17 & n.83 (2020) (describing "substantially the same" as inherently ambiguous)).

[127] *Id.* at 64–65.

[128] *Id.* at 64, 66.

[129] *See id.* at 61–67; *see also* Susan C. Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. DAVIS L. REV. 1385, 1391 (2016) ("A safe harbor guarantees compliance for described behavior, without foreclosing the possibility that activities outside the safe harbor are also compliant.").

[130] *See* U.S. Dep't of Labor, Emp. Benefits Sec. Admin., Information Letter 12-04-2018 (Dec. 4, 2018), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/information-letters/12-4-2018.pdf.

[131] *Id.*

[132] *Id.*

[133] *Id.* (citing U.S. Dep't of Labor, Emp. Benefits Sec. Admin., Advisory Opinion 2008-02A (Feb. 8, 2008), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/advisory-opinions/2008-02a.pdf, which concluded that automatic enrollment contributions to a welfare plan directly interfered with ERISA and, thus, had an impermissible connection with ERISA; and U.S. Dep't of Labor, Emp. Benefits Sec. Admin., Advisory Opinion 94-27A (July 14, 1994), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/advisory-opinions/1994-27a.pdf, which advised that a New York wage withholding law was preempted by ERISA because

also relied on Supreme Court precedent, relying on both the *Shaw* and *Travelers* standards of ERISA preemption to further solidify its opinion that automatic wage deduction plans impermissibly intrude upon ERISA's uniform coverage scheme and thus should be preempted.[134] Therefore, the DOL, as well as Congress, continues to expressly favor ERISA's broad preemption of state automatic enrollment IRAs.

IV. *Howard Jarvis Taxpayers Ass'n v. California Secure Choice Retirement Savings Program*

Thus far, the ambiguity arising from the invalidation of the 2016 Safe Harbor has led to one federal court ruling on the question of whether state automatic enrollment plans are preempted by ERISA. In *Howard Jarvis Taxpayers Ass'n v. California Secure Choice Retirement Savings Program*,[135] the Eastern District of California held that California's state automatic enrollment IRA law is not preempted by ERISA. The dispute in *Howard Jarvis* arose from California's continued implementation of the "CalSavers" program—the California state automatic enrollment IRA law—despite the repeal of the 2016 Safe Harbor.[136] In 2012, California passed the California Secure Choice Retirement Savings Trust Act, which created the CalSavers program to address the lack of retirement savings for the state's citizens.[137] CalSavers creates a state-sponsored retirement savings plan for California employees who do not have access to an employer-provided retirement plan.[138] The program requires an "eligible employer"[139] to allow employee participation in the CalSavers program via payroll deductions if that employer does not offer a retirement savings program of its own.[140] Under the program, eligible employers must automatically enroll their employees and remit payroll deductions to the program "unless the employee elects not to participate."[141] Thus, under the

it was specifically designed to affect employee benefit plans and sought to restrict choices and administration of the plans' funding policies).

[134] *Id.* For more on the *Shaw* and *Travelers* standards, see Section V, *infra*.

[135] No. 2:18-cv-01584-MCE-KJN, 2019 WL 1430113 at *8 (E.D. Cal. Mar. 28, 2019).

[136] *Id.* at *3.

[137] Cal. Gov't Code §§ 100000–100050 (West 2019).

[138] *Id.* § 100000(a), (c)–(d).

[139] *Eligible employer* is statutorily defined as "a person or entity engaged in a business, industry, profession, trade, or other enterprise in the state, whether for profit or not for profit, excluding the federal government, the state, any county, any municipal corporation, or any of the state's units or instrumentalities, that has five or more employees and that satisfies the requirements to establish or participate in a payroll deposit retirement savings arrangement." *Id.* § 100000(d)(1).

[140] *Id.* § 100032(b)–(d).

[141] *Id.* § 100032(f)(1).

program, employees of eligible employers are automatically enrolled, but can opt out of CalSavers if they want to.[142]

The court in *Howard Jarvis* first assessed whether the CalSavers program was entitled to the exemptions set forth in the 1975 Safe Harbor. The court determined that the 1975 Safe Harbor did not apply to the CalSavers program.[143] In reaching its conclusion, the court relied upon the DOL's interpretation of the meaning of "completely voluntary" under the 1975 Safe Harbor, as interpreted in the preamble of the 2016 Safe Harbor, despite the 2016 Safe Harbor having been rescinded.[144] In so holding, the court noted that "[a]n agency's interpretation of its own regulation is given significant deference."[145] Thus, taking the court's argument, the 1975 Safe Harbor did not sufficiently satisfy the exemption from ERISA's purview. The court next assessed whether, despite the 1975 Safe Harbor not applying to the CalSavers program, the program was preempted by ERISA. The court held that "[f]inding that ERISA preempts CalSavers would be out of step with the underlying purposes of ERISA . . . [as] CalSavers does not govern a central matter of ERISA's plan administration, nor does it interfere nationally with uniform plan administration."[146] Thus, the district court found that the CalSavers program is not preempted by ERISA because there was no interference with ERISA's preemptive scope by the CalSavers program.

In *Howard Jarvis*, the court held that "under the [Ninth Circuit's] adaptation of the modern approach [to ERISA preemption] a state law is not preempted merely because it has a literal 'connection with' an ERISA plan . . . . Instead, the law actually must 'govern[] . . . a central matter of plan administration or interfere with nationally uniform plan administration.'"[147] California's program, the court found, "only applies to employers without existing retirement plans," and, thus, "no ERISA plans are 'governed' or 'interfered' with because of the statute."[148] The district court in *Howard Jarvis*, therefore, seems to apply its own unique standard, independent of the Supreme Court's *Shaw* and *Travelers* jurisprudence. This decision, however, fails to consider that the term "interferes with" could be construed require preemption because the program could reasonably deter employers

[142] Howard Jarvis Taxpayers Ass'n v. Cal. Secure Choice Ret. Savings Program, No. 2:18-cv-01584-MCE-KJN, 2019 WL 1430113, at *2 (E.D. Cal. Mar. 28, 2019).

[143] *Id.* at *7.

[144] *Id.*

[145] *Id.* (citing Udall v. Tallman, 380 U.S. 1, 16 (1965) ("When the construction of an administrative regulation rather than a statute is in issue, deference [to the agency charged with its administration] is even more in order.")).

[146] *Id.* at *8.

[147] *Id.* at *7 (citing Bd. of Trs. v. Chambers, 903 F.3d 829 (9th Cir. 2018) (citing Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936, 943 (2016))).

[148] *Id.* (referencing Cal. Gov't Code § 100032(g)(1)).

from establishing ERISA governed plans. An employer, rather than dealing with the administrative and fiduciary hassles of ERISA governance, could reasonably opt to, instead, default to the state's automatic enrollment program and simply provide the payroll deductions into the employee's IRA. While the state automatic enrollment IRA plans do not provide the tax incentives that ERISA does for eligible employers, the IRAs nonetheless considerably lessen the burden of plan design, administration, and governance.

V. Analysis: State Automatic Enrollment IRA Plans Should Be Preempted

Section 514(a) of ERISA, subject to certain exceptions, states that Title I of ERISA preempts state laws insofar as they "relate to" any ERISA-covered employee benefit plan. The U.S. Supreme Court has said that a state law has a prohibited relation to an ERISA plan if it makes reference to, or has a connection with, employee benefit plans.[149] Thus, under the Supreme Court's two prong test, a state law "relates to" an employee-benefit plan if it has (1) a reference to or (2) a connection with an employee benefit plan.[150] Section 3(2)(A) of ERISA, however, defines an employee pension benefit plan, in relevant part, as any plan, fund, or program which is established or maintained by an employer or by an employee organization, or by both, which provides retirement income to employees.[151] Therefore, under the *Howard Jarvis* court's interpretation of the 1975 Safe Harbor, it is foreseeable that the CalSavers program and the other state automatic enrollment IRA programs can reasonably be construed as establishing ERISA plans.[152]

Further, courts have interpreted the words "relate to" to be given a broad and commonsense meaning.[153] Thus, ERISA does not preempt

[149] *See, e.g.*, Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96–98 (1983); Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., N.A., 519 U.S. 316, 324 (1997); Egelhoff v. Egelhoff, 532 U.S. 141 (2001).

[150] N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995).

[151] 29 U.S.C. § 1002(2)(A) (2018); *see also* Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir. 1982) (establishing a four-prong test for determining whether there is a "plan" for purposes of ERISA. Under this four-prong test, there must be (1) intended benefits, (2) intended beneficiaries, (3) a source of financing, and (4) a procedure to apply for and collect benefits); Moore, *supra* note 23, at 89 n.220 (showing the state automatic enrollment IRA programs appear to satisfy this test; the harder question, discussed in the text, is whether any such plan is "established or maintained by an employer or an employee organization").

[152] Moore, *supra* note 23, at 110–13 (finding substantial similarities between the various states' automatic enrollment plans, including, but not limited to, all plans requiring employers to create an automatic enrollment IRA).

[153] *Delta Air Lines, Inc.*, 463 U.S. at 98; Metro. Life Ins. Co. v. Pressley, 82 F.3d 126, 129 (6th Cir. 1996); *see also* Salameh v. Provident Life & Acc. Ins. Co., 23 F. Supp. 2d 704, 717 (S.D. Tex. 1998) (finding "relate to" should be construed in the broadest sense.); Or. Teamster Emps. Tr. v. Hillsboro Garbage Disposal, Inc., 800 F.3d 1151, 1156 (9th Cir. 2015) ("In evaluating whether a claim has a 'connection with' an ERISA plan,"

only state laws specifically designed to affect employee benefit plans or dealing with the specific subject matters covered by ERISA.[154] Rather, ERISA broadly preempts state laws having any connection with or reference to any employee benefit plans covered by ERISA, whether or not the law is designed to affect ERISA plans, or if the effect is indirect.[155] Here again, state automatic enrollment could have a direct and/or an indirect effect on ERISA plans. In states that have passed and implemented automatic enrollment IRAs, employers are now disincentivized from establishing and maintaining ERISA plans. Further, the implementation of such laws may cause employers with existing ERISA governed plans to terminate or phase out those plans and, instead, choose to participate in the state's automatic enrollment IRA program. Because of the simplified role for an employer under such programs, employers can reasonably escape the time-consuming, expensive, and administratively burdensome requirements, which many argue that ERISA imposes.

Further still, the court in *Howard Jarvis* held that "if a State [law] creates no prospect of conflict with a federal statute, there is no warrant for disabling it from attempting to address uniquely local and social and economic problems."[156] But this argument fails for at least three reasons. First, a uniform federal standard is necessary because the retirement shortage crisis is national, not local, in interest. That is, a piecemeal policy directed only towards the citizens of one state and not towards rectifying the problem as a whole, nationally, is unlikely to have a profound effect on the greater retirement shortage crisis. Second, pension and retirement savings and, thus, employee benefit plans, are inherently based on *interstate commerce*.[157] Because it is foreseeable how the inherent nature of interstate commerce transactions could pose federal problems,[158] ERISA's fiduciary standard, as embodied in the federal legislation, is desirable because it guarantees a measure of uniformity in an area where decisions may differ from state to state. Further, it is evident that operations of employee benefit

such that it "relates to" the plan within the meaning of the ERISA section providing that ERISA supersedes state laws insofar as they relate to an employee benefit plan, courts "use a 'relationship test' that focuses on whether the 'claim bears on an ERISA-regulated relationship.'").

[154] *Delta Air Lines, Inc.*, 463 U.S. at 103.

[155] 29 U.S.C. § 1144(a) (2018); Nat'l Sec. Sys., Inc. v. Iola, 700 F.3d 65, 83 (3d Cir. 2012); Trs. of Plumbers & Pipefitters Nat'l Pension Fund v. Mar-Len, Inc., 864 F. Supp. 599, 607 (E.D. Tex. 1994); *see also* FMC Corp. v. Holliday, 498 U.S. 52, 58 ("[T]he pre-emption clause is conspicuous for its breadth.").

[156] Howard Jarvis Taxpayers Ass'n v. Cal. Secure Choice Ret. Savs. Program, No. 2:18-cv-01584-MCE-KHN, 2019 WL 1430113, at *8 (E.D. Cal. Mar. 28, 2019) (citing Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 19 (1987)).

[157] *See* 29 U.S.C. § 1003(a) (2018).

[158] *See generally* Stephen F. Befort & Christopher J. Kopka, *The Sounds of Silence: The Libertarian Ethos of ERISA Preemption*, 52 FLA. L. REV. 1 (2000), http://scholarship.law.umn.edu/faculty_articles/387.

plans are increasingly interstate. "The uniformity of decision which [ERISA] is designed to foster" helps "administrators, fiduciaries, and participants to predict the legality of proposed actions without the necessity of reference to varying state laws."[159]

One foreseeable disruption to this standard arises, maybe not in California, but in any bi-state area of commerce. Take, for example, the city of St. Louis, Missouri. It is not uncommon for small businesses to have multiple locations on the east side of the Mississippi River, in the state of Illinois, as well as on the Missouri side. Illinois currently has an automatic enrollment IRA law; Missouri does not. In this case, it is foreseeable that one business's employees would be unequally treated based on their "home" employment location. Moreover, a foreseeable conflicts-of-law issue arises to determine which state's law prevails. Presumably, under general legal theory, it would be the state's principal place of business. But this again creates unequal savings opportunities for groups of employees who may not be geographically isolated by more than a mere few miles. And while the focus here highlights Illinois and Missouri, the quagmire is not unique. Currently, New Jersey (tri-state area) and Maryland (D.C. metro area) have Secured Choice programs that pose the same jurisdictional quagmires as well.

The Illinois Secure Choice program addresses this jurisdictional quagmire in an incomplete manner. Under the Illinois program, employees who live in another state are eligible for Illinois's program, so long as the employee's employer is located in Illinois.[160] This, at best, blurs the lines between the discrepancy highlighted above. There is no formal definition of an "Illinois employer" within the program's statute. Thus, it is foreseeable that a Missouri business, with locations in Illinois, may not be required to or even be eligible to comply with the Illinois program because it may not be an "Illinois employer."[161] Further, current guidance on Illinois's program only provides that "currently, employees not eligible for their workplace employer-sponsored retirement plan are not eligible for Illinois Secure Choice."[162] This wording seems to imply that in the posed jurisdictional split hypothetical, Missouri employees or employees of a business deemed to a Missouri employer are ineligible for the Illinois program. Similarly, the question remains what if an employee transfers from one location of his or her respective employer that is located in a state with an automatic enrollment IRA program to another state which does not have such program? Do the employee's payroll deductions continue to be deducted, despite the transfer to the new location, or is the program no longer applicable

[159] H.R. Rep. No. 95-533, at 12 (1973).

[160] *FAQ*, Ill. Secure Choice, https://www.ilsecurechoice.com/home/faq.html [https://perma.cc/NLA8-N3AJ] (last visited June 3, 2019).

[161] *Id.*

[162] *Id.*

because the employee is now working in a state that does not offer such program? Based on Illinois's program, the latter would be a foreseeable result. This is why ERISA's express purpose was to provide broad, uniform, federal coverage of employee benefit plans.

Further, the handful of state automatic-enrollment IRA laws are not uniform. In choosing their default IRA plans, California and Maryland opted for establishing a traditional IRA program; Illinois, Connecticut, and New Jersey opted for establishing a Roth IRA; and Oregon did not specify the default IRA type.[163] Roth IRAs add even more complexity by requiring a determination of employees eligible for Roth status on a federal tax basis.[164] This reliance on federal tax laws demonstrates that the state laws are inherently dependent on federal guidance and qualification because of the inherent interstate commerce nature of pensions.[165] Thus, because of the inextricable intertwining of commerce and the distinct overlap between state and federal laws relating to taxation and commerce, the state automatic-enrollment plans cannot reasonably be construed to not "relate to" or have a "connection with" ERISA governed plans.

Third and finally, is clear Congressional intent for ERISA to broadly, expressly, and uniformly govern the field of employee benefit retirement plans. That intent was evident with the original sponsors of ERISA[166] and still exists today. Indeed, in *Howard Jarvis*, the district court placed heavy emphasis on the invalidation of the invalidation of the 2016 DOL Regulations, without incorporating the underlying purpose for such invalidation. Congress clearly invoked the CRA to prevent piecemeal state legislation that would undermine ERISA's uniform fiduciary protections.[167] And this current concern falls in line with the underlying purpose of ERISA. That is, because the state laws do not impose fiduciary obligations for the automatic enrollment IRAs, the states are skirting ERISA's broad and uniform fiduciary protections. Because Congress, in invalidating the 2016 DOL Regulations, reaffirmed its commitment to ERISA's express field preemption of retirement benefit plans, the state automatic enrollment IRA laws should be preempted.

Conclusion

Whether applying the Supreme Court's "relate to" or "connection with" test, or California's unique "more modern test," the state

[163] Moore*, supra* note 61, at 234.

[164] *Id.* at 255.

[165] *See* 29 U.S.C. § 1003(a) (2018) (generally noting that Title I of ERISA applies to any employee benefit plan maintained by an employer or an employee organization whose activities affect interstate commerce).

[166] *See supra* note 12.

[167] *See supra* note 31; *see also supra* notes 121–22.

automatic-enrollment IRA plans intrude upon ERISA's goal of uniform standards for pensions by returning to a hodgepodge of state and federal laws. As such, state automatic-enrollment IRAs should be expressly preempted by ERISA. In addition to conflicting with Supreme Court interpretation of ERISA's "relates to" preemptive coverage, the state automatic-enrollment IRA plans clearly contravene the original and ongoing congressional intent for ERISA's exclusive coverage of employee pension benefits. Further, because the most recent DOL interpretation indicates that it is the agency's interpretation that such state automatic-enrollment IRA plans should be preempted by ERISA, the agency's interpretation, in conjunction with the aforementioned judicial interpretation and congressional intent, should control. Finally, pension and retirement plans are not traditional matters for which governance is deferred to the states under their respective police powers. That is, pension and retirement savings are inextricably intertwined with interstate commerce, further demonstrating the need for federal involvement. States attempting to create a piecemeal solution to an inherently federal problem contravenes the intent, the plain language of the statute, and the Supreme Court jurisprudence of ERISA.

While retirement savings shortages are still a bleak reality for U.S. workers, the impetus for these modern shortcomings has shifted, largely due to ERISA's uniform stronghold on private employee pensions since the 1970s. Undoubtedly, the United States needs to overhaul its traditional retirement-planning norms to adapt to a modern economy with fewer union jobs, more gig work, longer life spans, and, in many instances, lower or more stagnant wages. The urgent need to rectify the current shortcomings, however, should not be enforced through piecemeal state legislation. Such legislation returns the economy back to the pre-ERISA hodgepodge of laws that are both untenable and ineffective. Instead, a uniform federal standard that works in harmony with ERISA is the best fit approach.