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The Centre Barely Holds: ERISA Preemption After *Gobeille v. Liberty Mutual Insurance Company*

By Stephen Rosenberg¹

INTRODUCTION

“Things fall apart, the centre cannot hold.”²

The Supreme Court’s most recent decision on ERISA preemption, *Gobeille v. Liberty Mut. Ins. Co.*,³ is a paradoxical decision. Despite the fact that it vigorously upheld preemption of a state regulatory initiative related to health care, the multiple opinions the case spawned have created numerous avenues to dispute the applicability of preemption in future cases, both in the context of health care and in other areas of state regulation. Somehow, at the same time that it seems to have strengthened and expanded the scope of ERISA preemption, it simultaneously seems to have opened up more room for dispute.

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² “The Second Coming,” by William Butler Yeats, 1919.

³ 136 S. Ct. 936 (2016).

GOBEILLE AND ITS FOUR OPINIONS

Gobeille presented a seemingly simple question: could a state government require health insurers, self-funded plans and third-party administrators to compile and turn over to state regulatory agencies data about health care use and costs related to ERISA-governed health plans? The federal district court held that it could, and the Second Circuit reversed, holding that ERISA preempted the state law in question. The Supreme Court then affirmed, but on the basis of a majority opinion, two concurring opinions and with a dissent that, taken as a whole, raise more questions than they answer about ERISA preemption and, in particular, its application to the ever evolving health care environment.

The statute and enabling regulation in question “require[d] reporting of myriad categories of claims data.”⁴ The statute required health insurers, self-insurers, administrators and similar entities to “regularly submit medical claims data, pharmacy claims data, member eligibility data, provider data, and other information relating to health care,” which would then be made “available as a resource for insurers, employers, providers, purchasers of health care, and state agencies to continuously review health care utilization, expenditures, and performance in Vermont.”⁵

In *Gobeille*, the Supreme Court unequivocally held that this statute was preempted by ERISA, using language firmly suggesting that any such data collection efforts at the state level are categorically preempted.

⁴ *Liberty Mut. Ins. Co. v. Donegan*, 746 F.3d 497, 500 (2d Cir. 2014), *aff’d*, *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936 (2016).

⁵ *Id.* at 500-01.

The multiple opinions generated by the case, however, demonstrate the ambiguity of current Supreme Court jurisprudence on ERISA preemption. Perhaps more troubling is the extent to which the differing opinions reach differing conclusions while relying on the same established standards, suggesting that the standards simply cannot provide accurate prescriptive guidance to either lower courts or practitioners.

The Problems Created by Congress's Use of the Word "Relate"

The dilemma created by *Gobeille* stems, initially, from a mere 20 words included in the thousands that make up ERISA itself, which provide that the statute "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."⁶ Given how broadly the statute defines an "employee benefit plan" and, in turn, the ubiquity of employee benefits in American commerce, the number of state laws that may "relate," to one degree or another, to an employee benefit plan is nearly infinite. Indeed, it is the very usage of the word "relate" in the Congressional grant of supremacy to ERISA that gives rise to the majority of problems inherent in determining whether preemption exists in a given situation. The word is notorious in many areas of law for the fact that, read literally, it eliminates boundaries rather than creating them: the word "relate" does not give rise to any inherent endpoint and, instead, can capture a wide range of distant, yet still logical, connections.

The recent Academy Award-nominated movie, *Bridge of Spies*, starring Tom Hanks, opens with two lawyers negotiating over whether a group of injuries caused by a single accident should be considered related even though in plain English and to a non-lawyer, they clearly are related. These fictional lawyers did not have access to one of the leading decisions on the problems generated by the term "related," because that decision would not be issued until 30 years after the depicted conversation. As the California Supreme Court explained:⁷

"Related" is a commonly used word with a broad meaning that encompasses a myriad of relationships. For example, a leading legal dictionary defines "related" to mean "standing in relation; connected; allied; akin." (Black's Law Dict. (6th ed. 1990) p. 1288, col. 1.) Similarly, a legal thesaurus lists many synonyms for "related." (Burton, Legal The-

saurus (1980) p. 925, col. 2.) . . . "related" can denote a causal connection as well as the "notion of similarity." (*O'Doan v. [Ins. Co. of N. Am.]*, . . . 243 Cal.App.2d 71, 78, 52 Cal. Rptr. 184 [1966]). [The word] "related" is broad enough to encompass both logical as well as causal relationships.

Humorously, the California Supreme Court in *Bay Cities* then engaged in a definitional study of the word in order to narrow it down from its inherent generality. However, in doing so, the court eventually concluded that the exact breadth to be attributed to the word would have to be decided on a case-by-case basis. The court determined that:⁸

. . . the term "related" as it is commonly understood and used encompasses both logical and causal connections. Restricting the word to only causal connections improperly limits the word to less than its general meaning. "Related" is a broad word . . . and is not limited only to causally related acts.

We do not suggest, however, that . . . the term "related" would encompass every conceivable logical relationship. At some point, a relationship[,] though perhaps "logical," might be so attenuated or unusual that [it cannot be deemed related].

Id., 5 Cal. 4th at 873, 855 P.2d at 1274–75 (internal insurance law centric aspects deleted).

That's clear, isn't it? More importantly, just as judicial decisions are supposed to do, it gives tremendous guidance for future cases as to when certain incidents are or are not related from a legal perspective, doesn't it? Of course, to ask these questions is to answer them. This particular analysis and effort to define the limits of the word "related" does nothing more than kick the ball down the road, leaving the question of whether a particular relationship is, or is not, too attenuated to be deemed related to be decided on the facts of the next case, and of the case after that and of the case after that.

It is, of course, relatively easy to mock the California Supreme Court's decision in *Bay Cities*. However, what is less amusing is that, in a nutshell, the decision presaged the entire modern history of ERISA preemption jurisprudence up until the time that the Supreme Court issued its most recent ruling on the issue in *Gobeille*. In that case, the majority and dissenting opinions reached opposite conclusions on the same facts simply by, in essence if not in verbiage, applying dis-

⁶ ERISA §514.

⁷ *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 5 Cal. 4th 854, 868, 855 P.2d 1263, 1271 (1993).

⁸ *Id.*, 5 Cal. 4th at 873, 855 P.2d at 1274–75 (internal insurance law centric aspects deleted).

tinct interpretations of the word “related” as used in ERISA’s preemption provision. Furthermore, a concurring Justice — Justice Thomas — suggested overturning decades of jurisprudence on ERISA preemption, in large part because of the sheer difficulty of applying a principled interpretation to the word “related.”

ERISA Preemption Jurisprudence: Giving Meaning to the Word “Related”

As a typical Boston sports fan believes that the Patriots and the Red Sox are the country’s only professional sports teams, so too, the author has a tendency to return to his home court, the First Circuit, in considering the foundations of ERISA jurisprudence. A relatively recent First Circuit decision nicely summarized the status of preemption jurisprudence prior to the Supreme Court’s decision in *Gobeille*. In *Merit Constr. Alliance v. City of Quincy*, 759 F.3d 122 (1st Cir. 2014), the court considered that “ERISA ‘supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan,’ ” and explained that the “Supreme Court has distilled the statute’s ‘relate to’ language into two independently sufficient alternatives: ‘a connection with or reference to’ an ERISA plan will result in preemption.”⁹

Those “two independently sufficient alternatives” — a connection or a reference — are understood to be, essentially, two different tests. As the Supreme Court summarized in *Gobeille*, “reference” to an ERISA plan triggers preemption if the state law “acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law’s operation.”¹⁰ In turn, a state law “has an impermissible ‘connection’ ” with an ERISA plan, triggering preemption, if the state law “governs . . . a central matter of plan administration” or “interferes with nationally uniform plan administration.”¹¹ A state law can also “have an impermissible connection . . . if ‘acute, albeit indirect, economic effects’ of the state law ‘force an ERISA plan to adopt a certain scheme of substantive coverage.’ ”¹²

Neither of these tests, however, is inherently limiting, nor establishes a clear and definitive standard for when a particular state law has such a reference or connection. They do little more to reduce the potential applicability of ERISA’s preemptive scope than did Congress’s original choice of the word “related.”

Those two tests, therefore, cannot alone prevent ERISA preemption from consuming entirely the field of benefit regulation and, instead, require further refinement in order to establish the outer limits of preemption under ERISA. As the First Circuit cautioned in *Merit Constr. Alliance* not long, relative to the glacial pace at which jurisprudence develops, before the Supreme Court’s decision in *Gobeille*, “[u]nder this two-sided rubric, ERISA’s preemptive reach may be ‘clearly expansive,’ but the two tests cannot be literally and uncritically applied in a manner that would allow an excessive range of connections to give rise to preemption.”¹³

And what demarcates the limit of preemption, so that it does not subsume, by a literal application of the connection and reference tests, every state law that relates in any manner to employee benefits? It is not something concrete, but is instead something amorphous: “the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.”¹⁴

And this is where we stood, on the precipice of *Gobeille*, with the outer limits of preemption marked by the intent of Congress, something to be decided 40 years after the statute’s enactment and in light of unprecedented regulatory actions, particularly in the realm of health care, that could not possibly have been anticipated when ERISA was enacted. From the Affordable Care Act to the Massachusetts Health Care Reform Act to state payer databases such as the Vermont statute at issue in *Gobeille*, the current environment of state regulation of benefits has as much relationship to the one confronted by Congress in 1974 as the Indy 500 does to the Kentucky Derby: similar on the surface, but worlds apart. Yet, despite this reality, and the opportunity presented by *Gobeille* to bring ERISA preemption in line with the modern reality of benefit regulation and operation; in *Gobeille*, the Supreme Court declined to update the doctrinal underpinnings of preemption, and continued to apply precedents that rely on Congress’s intent in 1974 to determine the breadth of ERISA preemption.

The Majority Opinion and Justice Breyer’s Concurrence Combine to Give Great Breadth to ERISA’s Preemptive Scope

Gobeille, and the attack on the state payer database’s application to the ERISA-governed health plan at issue, turned on the “connection” prong of the Court’s existing preemption jurisprudence. The major-

⁹ *Merit Const. Alliance*, 759 F.3d at 128.

¹⁰ *Gobeille*, 136 S. Ct. at 943.

¹¹ *Id.*

¹² *Id.*

¹³ *Merit Const. Alliance*, 759 F.3d at 128.

¹⁴ *Id.*

ity opinion explained that, under this prong, laws that “interfere with the uniformity of plan administration . . . have an impermissible ‘connection with’ ERISA plans” and are preempted.¹⁵ Of course, almost any state regulatory initiative in the area of employment will have some impact on or connection with ERISA plans, so a limiting construct or gloss must be overlaid on this principle lest every such statute or regulation be deemed preempted. As the majority emphasized, that limiting gloss consists of “the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive . . . and the nature of the effect of the state law on ERISA plans.”¹⁶

Relying on the premise that ERISA’s and Congress’s central concern was to render the regulation of employee benefit plans exclusively a federal concern, the majority concluded that the reporting requirements of Vermont’s database legislation and regulation overlapped with a detailed element of ERISA’s statutory regime: recordkeeping and reporting.¹⁷ The majority focused on certain subsidiary principles demonstrating, in their view, that preemption was required under that circumstance. These principles, culled from prior decisions, were that only ERISA could dictate the specific terms and structure of plan operations and administration, and that a plan administrator cannot be required to comply with the vagaries of multiple state directives in administering a plan.¹⁸ The majority concluded that the state database payer reporting requirements infringed directly on core obligations imposed on administrators and plans by ERISA itself, and also threatened administrators with the risk of having to comply with different state reporting obligations. The majority concluded that the state initiative was preempted under those circumstances.

Notably, the majority rejected the idea that the reporting requirements were only peripheral to the recordkeeping requirements imposed by ERISA. Vermont argued, in essence, that the reporting requirement did not truly go to a core recordkeeping requirement, or dictate a particular administrative approach in that regard, but simply added additional reporting that did not dictate or control a core ERISA requirement. Vermont argued further that the reporting required by the database did not concern the purposes of ERISA’s regulation of reporting and disclosure and, therefore, did not tread on ERISA’s areas of sole authority. The majority, however, found that the fact that

Vermont’s initiative overlaid ERISA’s reporting requirements with additional obligations was sufficient to constitute an impermissible connection between the state statute and an ERISA-governed plan. This required a finding that the Vermont state statute and regulations were preempted, regardless of the fact that the database reporting requirements could be construed as supplementing, and not altering, the reporting and disclosure obligations imposed by ERISA.

This is an important point, and one that probably received short shrift from the majority. The reporting and data collection duties imposed by the Vermont state regulatory scheme did not truly dictate core administrative activities by a plan administrator nor contradict the administrator’s duties, as detailed under ERISA. A state statutory or regulatory regime with such an effect would dictate clearly the terms of plan operations in a manner that impermissibly supplements, or contradicts, the express dictates of ERISA; such a regime would, therefore, be preempted. To borrow from the language of patent litigation, such a statute or regulation would “read” directly on the requirements of ERISA plans as expressly dictated by ERISA, and would go right to the heart of what Congress clearly intended to preempt: state efforts to dictate plan terms or structure. The majority in *Gobeille* treated the state database requirements as though they had this effect, even though they could just as equally, and probably more fairly, be described as supplementing, rather than altering or changing in any manner, the obligations already imposed on a plan and its administrator by ERISA itself.

This point should not be overlooked. It means that ERISA preemption applies even when such a regulatory effort merely supplements, but does not alter, ERISA’s requirements. Moreover, the majority opinion found preemption in that circumstance on the basis of what is most likely the strongest ground in all of ERISA preemption jurisprudence: the dictating of core ERISA terms. As a result, going forward, merely supplementing ERISA’s obligations by seeking additional reporting in areas already addressed by ERISA, but without contradicting ERISA’s obligations, falls within this core and primary area to which Congress intended preemption to apply. At heart, this expansive reading by the Supreme Court of ERISA preemption clears the field of any similar state statutory or regulatory initiative.

The majority also rejected the idea that it mattered whether an administrator was actually subjected to multiple and conflicting state obligations, finding that the mere fact that the Vermont statute posed the risk that a plan could be subject to that state’s, as well as to other states’, regulations on reporting and disclosure was sufficient to establish preemption. That alone, in the view of the majority, placed the law

¹⁵ *Gobeille*, 136 S. Ct. at 943.

¹⁶ *Id.*

¹⁷ *Id.* at 945.

¹⁸ *Id.*

within the category of state regulation that is pre-empted because it confronts an administrator with the potential costs and burdens of complying with multiple, and potentially conflicting, state regulatory regimes. Liberty Mutual argued “that Vermont’s scheme regulates a central aspect of plan administration and, if the scheme is not pre-empted, plans will face the possibility of a body of disuniform state reporting laws and, even if uniform, the necessity to accommodate multiple governmental agencies.”¹⁹ The majority agreed, stating that “[a] plan need not wait to bring a pre-emption claim until confronted with numerous inconsistent obligations and encumbered with any ensuing costs.”²⁰ In essence, the majority found that one state regulatory scheme was sufficient to require preemption because of the possibility that other states might likewise act, giving rise to the burden of complying with multiple state regulatory schemes.

It is worth pausing to take note of this discussion by the majority because, while it seems like a throw-away line in order to quickly dispense with one of Vermont’s arguments, it is anything but such. Instead, it invites plan sponsors and administrators before district courts to challenge as preempted any individual state initiative without regard to whether conflicting regulatory burdens under other state schemes exist, on the ground that the initiative raises the mere risk of having to confront contradictory regulatory regimens in different states, even if no other state scheme actually exists.

What is a district court to do when faced with such a preemption argument regarding what could be a *sui generis* state statute or regulation, in light of this brief discussion by the majority in *Gobeille*? A district court would likely find preemption if the challenged state initiative reasonably could be expected at some point, to have imitators elsewhere in the 50 states. Moreover, such a conclusion by a district court would be correct: it is the only appropriate holding by a court applying controlling authority, given the discussion in *Gobeille*. Granted, one can develop numerous arguments to the contrary as to why a district court would not be required to treat the analysis in *Gobeille* as controlling in such a circumstance, including that the discussion of this point in *Gobeille* is arguably *dicta*. However, so too was the discussion of surcharge and other equitable remedies in *CIGNA Corp. v. Amara*,²¹ and that has not prevented claims for equitable relief of that nature from being widely accepted. One suspects that here, too, lower courts will quickly adopt the premise from the majority opinion

that a state regulatory scheme is preempted as long as it is possible that other states could impose similar, but not exactly identical, regulatory schemes.

This seems particularly certain given the concurrence of Justice Breyer who emphasized this ground for preemption, and centered his discussion on the idea that the mere possibility of exposure to conflicting state regulatory structures was sufficient to invoke preemption. Justice Breyer stated that he wrote “separately to emphasize that a failure to find pre-emption here would subject self-insured health plans under the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U.S.C. §1001 et seq., to 50 or more *potentially* conflicting information reporting requirements” and also stated that “[d]oing so is *likely* to create serious administrative problems.”²² “Potentially” and “likely” are words, deliberately chosen by the Justice, that can mean only one thing: proving the actual existence of conflicting state regulatory regimes is not necessary to trigger preemption, and the mere possibility that other states could enact laws that are similar, but not identical, to a challenged state action is sufficient to trigger federal preemption.

The Dissent Persuasively Dismisses the Arguments for Preemption Using the Exact Same Standards Used by the Majority for Preemption

As the previous discussion reflects, the majority applied an extremely broad and powerful reading of preemption to the Vermont statute. But, as the dissenting opinion by Justice Ginsburg, in which Justice Sotomayor joined, makes clear, the existing jurisprudence regarding the scope of ERISA preemption applied by the majority did not logically require that outcome. The dissent rejected the two primary pillars for the majority’s finding of preemption, which were that the reporting requirements of the Vermont state regulations went to a core ERISA administrative function and that there was a sufficient risk, based on mere possibility rather than concrete evidence, of having to comply with multiple conflicting state regulatory regimes. Justice Ginsburg wrote that the information collection and reporting requirements of the Vermont regulations did not alter, or otherwise impermissibly affect, a core ERISA function but, instead, simply added additional disclosure on top of, and not in contradiction to, the reporting, disclosure and other administrative duties expressly imposed by ERISA. The dissent reasoned that “ERISA’s reporting requirements and the Vermont law elicit different information

¹⁹ *Gobeille*, 136 S. Ct. at 945.

²⁰ *Id.*

²¹ 563 U.S. 421, 131 S. Ct. 1866, 179 L. Ed. 2d 843 (2011).

²² *Gobeille*, 136 S. Ct. at 949 (emphasis added).

and serve distinct purposes,” and preemption was, therefore, not required under the Court’s existing preemption jurisprudence.²³ Justice Ginsburg emphasized that, factually, the reporting required by the Vermont statute did not implicate the actual, substantive obligations of plan administrators imposed by ERISA, nor plan terms and requirements that were dictated by ERISA.

The dissent recognized that much of existing Supreme Court jurisprudence on the scope of preemption under ERISA flows from the need to narrow the impact of the use by Congress of the word “related” in ERISA’s preemption provision. The dissenters, however, rejected the idea, accepted by the majority and the Second Circuit, that the facts of the Vermont payer database regimen placed it on the wrong side, for preemption purposes, of the line previously drawn by the Court for purposes of testing whether a state action is related to an ERISA-governed plan for purposes of preemption. The dissenters concluded that “[d]eclaring ‘reporting,’ unmodified, a central or core ERISA function, as the Second Circuit did, 746 F.3d, at 508, passes the line this Court drew in *Travelers, De Buono*, and *Dillingham* when it reined in §1144(a) so that it would no longer operate as a ‘super-preemption’ provision.”²⁴

The dissent, however, struck not only at the question of where in the shifting sands of ERISA preemption jurisprudence the line between “related” and “unrelated” should be drawn, but also at a more subtle, and potentially more important, point concerning the practicalities and significance of the required reporting. The dissent searched for evidence that would support the premise that it was excessively burdensome for an administrator to comply with the Vermont data collection requirements or with multiple, potentially conflicting similar state efforts, and noted that there was no such evidence. The dissent argued that everyone who saw preemption in the case at bar, from Liberty Mutual to the Supreme Court majority, effectively “overlooked . . . the technological capacity for efficient computer-based data storage, formatting, and submission” in considering whether the Vermont statute imposed real burdens, either standing alone or in conjunction with other states’ similar initiatives.²⁵ Criticizing the idea accepted by the majority, that preemption could exist without actual evidence of such burden, as opposed to mere supposition that such burden exists, the dissenters argued that “[w]here regulatory compliance depends upon the use of evolving technologies, it should be incumbent on the objector

to show concretely what the alleged regulatory burden in fact entails.”²⁶

The dissent noted that this was particularly important in light of the type of regulatory effort at issue, which concerned state efforts to grapple with rising health care costs by gathering the information needed to address that concern.²⁷ Taken as a whole, the dissent made the point that: (1) we are moving into a new world of health care cost, regulation and insurance that comes with new technological approaches; and (2) these new factors need to be examined closely and preemption jurisprudence must be revised as necessary in order to account for changes in both the world of healthcare and of technology. In other words, it is no longer 1974 and ERISA preemption jurisprudence cannot continue to exist as though it is 1974 by barring innovative state actions that impact, only marginally but not squarely, ERISA’s regulation of health plans. In this way, the dissent harkens back to the point, noted above, that reliance on Congress’s intent in 1974 regarding the scope of state actions preempted by ERISA is an insufficient guidepost for determining what state actions are sufficiently “related” to an ERISA-governed benefit plan to warrant preemption. There is too little correlation between the modern world of employee benefits, on the one hand, and the world of pensions and private indemnity health insurance that dominated the landscape in 1974, on the other, for that test to have continuing value.

Indeed, the majority opinion illustrates this exact point. No single modern event in health care compares to the Affordable Care Act in terms of its ground shifting impact, and the parties in *Gobeille* raised before the Supreme Court the potential impact of that statute on ERISA preemption. Liberty Mutual suggested that the Affordable Care Act created new reporting obligations for employer-sponsored health plans and incorporated those requirements into the body of ERISA, further demonstrate[ed] that ERISA pre-empts Vermont’s reporting regime.”²⁸ The majority, though, declined to address the question, or to update current ERISA preemption jurisprudence to account for the type of substantial change in the health care environment that the Affordable Care Act represents.²⁹ The majority, instead, held that Liberty Mutual’s challenge could be decided on the basis of traditional preemption theories, without addressing the impact on preemption of these new legislative developments.

²³ *Id.* at 954.

²⁴ *Id.* at 958.

²⁵ *Id.* at 956.

²⁶ *Id.*

²⁷ *Id.* at 958.

²⁸ *Id.* at 946–47.

²⁹ *Id.* at 947.

The Four Opinions of *Gobeille* Leave the Field at Least as Muddled as it Was Before the Decision

The majority and dissenting opinions reach entirely contradictory results, while applying effectively the same tests for preemption that were established to determine when a state action is sufficiently related to a plan to give rise to preemption. Somewhere in the linguistic mire stands the line demarcating “related” from “unrelated” for purposes of ERISA preemption, but as the conflicting views of the justices reflect, where exactly that line is drawn remains open to debate after *Gobeille*. Under Supreme Court jurisprudence on ERISA preemption, “[t]he path from [insufficient impact to provoke preemption] to [sufficient impact to provoke preemption] amounts to a continuum and it is not always a simple task to determine where along this continuum a particular state law falls.”³⁰ The majority in *Gobeille* places the line along this continuum that demarcates preemption very close to the point where *any* regulatory initiative imposes on the prerogatives of the administrator of an ERISA-governed plan, while the dissent moves that line much further down the field of play.

The amorphous and perpetually ambiguous nature of defining “related” for purposes of ERISA’s preemption provision is highlighted by the distance between the majority and dissenting opinions. Both would effectively reach opposite results on the same facts while applying ostensibly the same standards, namely the Court’s prior opinions seeking to establish the outer limits of ERISA preemption. As the conflicting opinions suggest, the extant approach to defining the scope of preemption has not resulted in a consistent, uniform, and accepted understanding of where the line lies between state action that is preempted and state action that is not preempted.

Moreover, even though *Gobeille* resulted in a holding that a state payer database was preempted, and clearly leads to the conclusion that all such state database laws would be preempted, the decision does not provide clear guidance as to when other types of state initiatives in the realm of health care are preempted. The majority drew the borders of preemption in *Gobeille* for state database collection statutes using the traditional rubric for determining that issue, but essentially sidestepped any question of whether those borders would apply in the same way to other state health care initiatives. The majority, confronted with the question of whether the Affordable Care Act had an impact on preemption of the Vermont state database law, elected not to address that question. By declining to take up the question, or to provide any guid-

ance as to how preemption should be addressed in the context of major changes to health care financing and regulation, the majority left for future litigation the broader question of where the border between preempted and not preempted lies in the brave new world of health care that the American economy and the legal profession now confront, one in which the creation of databases is probably the most innocuous of impositions that plan administrators and sponsors can expect to face.

This is where the paradoxical nature of *Gobeille* comes to light. There is little question that it leaves ERISA preemption at least as robust as it found it, with state database initiatives that are similar in scope, or approach, to the Vermont statute at issue off the table for the foreseeable future. Yet, at the same time, *Gobeille* provides limited guidance to plans and their lawyers regarding when they can ignore or, instead, must comply with state law in the health care realm. In addition, it opens up numerous avenues for future litigation that lower courts will have to confront.

A real world example can serve to clarify, and move this concern from the realm of the hypothetical. It is commonplace to observe that employers are struggling with the costs of providing health insurance to their employees, and are seeking different avenues to control those costs. Employers who might consider shifting to a self-funded health plan must confront the issue of which state law requirements concerning health care require compliance and which can be ignored as preempted. To what extent does *Gobeille* help with this question and with predicting how a court might rule regarding whether that self-funded plan had to comply with any particular state requirements? Certainly, *Gobeille* stands for the proposition that any state data collection statutes or regulations are preempted and can be ignored. But does it stand for something more than that? Does it mean that any state regulatory initiatives in the health care field that involve at least the minimal level of burden reflected by data base collection efforts are preempted and, thus, if a particular state initiative has at least that much impact on the plan administrator and sponsor, it can be ignored? In other words, does *Gobeille* create a formula where one simply measures the burden of a particular regulation against the burden of the Vermont database statute and, as long as the burden equals or exceeds that of the Vermont statute, the regulation is preempted?

More importantly, what about the fact that the majority opinion in *Gobeille* can be read as effectively sidestepping the need to bring ERISA preemption doctrines in line with the latest developments in health care provision and financing, or to account for the brave new world that we are entering in this regard? *Gobeille* cannot possibly stand for the proposi-

³⁰ *Merit Const. Alliance*, 759 F.3d at 129.

tion that federal law on ERISA preemption is so static that, if state data collection efforts are barred, so too are future health care reform efforts at the state level that, as with the Vermont database statute, “read” even indirectly on the dictates of ERISA. The majority’s express statement in *Gobeille* that it would decide only on the basis of current, traditional preemption doctrines suggests that the relationship of preemption to these types of “big picture” issues with regard to the provision of health care remains open.

THE BEST ROAD FORWARD?

As is often the case with Supreme Court decisions in the area of ERISA preemption, *Gobeille* raises as many questions as it answers. Legal doctrine in this area is simply too amorphous, as currently articulated, to avoid that result. A clearer, less malleable, less case-specific approach to defining where the line lies between preempted and not preempted would go far towards changing that dynamic. What such an approach would look like is beyond the scope of this article, but spend enough time in the quagmire of preemption and it is simple to come up with ideas as to what it could look like.

Justice Thomas has his own answer to this problem, presented in his concurrence in *Gobeille*, which should not be ignored. He suggests that the entire preemption contraption be jettisoned, essentially on the

premise that it is not possible to sufficiently define when a state law is or is not related to an ERISA plan so as to ensure that preemption passes constitutional muster. For now this is an open, and clearly intentional, invitation to attack preemption of a particular state law on constitutional grounds. In the same way lawyers for ERISA plan participants were quick to accept the Supreme Court’s open invitation in *Amara* to press more expansive theories of equitable relief, so too can we expect that some lawyer whose path is blocked by preemption will similarly take up this invitation in the near future.

For the present, the majority and dissenting opinions in *Gobeille* reflect a consensus that the current standards set forth in Supreme Court precedents govern the field of ERISA preemption, though without consistency as to when those standards require preemption. The centre, so to speak, thus holds: there is a doctrine that, despite disagreement over its application, is still understood to govern the issue. Justice Thomas, however, has asked a lower court, somewhere and in some case, to take the first step towards doing away entirely with the accepted structure for addressing these issues. If and when that happens, we will be able to see whether there really is a better way of handling the question than the muddled attempts to define the scope of the word “related” that currently controls the issue.