

A Legislative and Political History of ERISA Preemption, Part 3

BY JAMES A. WOOTEN

The preemption language in ERISA is exceedingly broad. The preemption language in the law ERISA replaced—the Welfare and Pension Plans Disclosure Act of 1958—was exceedingly narrow. In Part 3, we trace the evolution of ERISA preemption from the Disclosure Act to the beginning of the Ninety-Third Congress, which passed ERISA.

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As I explained in earlier articles in this series, preemption played an enormously important role in the development of ERISA. As Part 1 recounted, the desire for federal preemption induced the business community and the AFL-CIO, which had opposed comprehensive federal regulation of benefit plans, to back federal legislation as a means of avoiding regulation by the states. As discussed in Part 2, the desire for preemption allowed the liberal congressional labor committees to exercise great sway in the drafting of ERISA because they had jurisdiction over bills that would preempt state regulation of private-sector employment. As benefits lawyers well know, the legal and policy consequences of ERISA preemption have been very controversial largely because the language Congress used to implement the preemption policy is so broad. In Justice O'Connor's words, section 514 of ERISA "establishes as an area of exclusive federal concern the subject of every state law that 'relate[s] to' an employee benefit plan governed by ERISA." [*FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990)] Interestingly, this approach to state regulation is antithetical to the policy of the law ERISA replaced—the Welfare and Pension Plans Disclosure Act of 1958 (the Disclosure Act). According to the New York Court of Appeals, the Disclosure Act "[was] about as far away from Federal preemption as you can get." [*Thacher v. United Construction Workers*, 180 N.E.2d 245, 247 (N.Y. 1962)] How did Congress get from one extreme to the other?

In brief, there were four stages in Congress's journey from the Disclosure Act to ERISA, each embodying a different relationship between state and federal law. Initially, Congress ceded regulatory responsibility to the states. The Disclosure Act was an *interstitial* measure that ostensibly enhanced the regulatory capacity of the states. In the mid 1960s, federal officials concluded that Congress should go beyond disclosure and create *minimum* standards for benefit plans. In February 1967, Lyndon Johnson proposed federal fiduciary standards while Senator Jacob Javits (R, N.Y.) introduced a more ambitious bill with fiduciary, vesting, and funding standards, termination insurance, and a portability program. Because these bills proposed minimum standards, each had narrow preemption language that allowed states to supplement the federal standards. In March 1970, Richard Nixon proposed *uniform* federal fiduciary and disclosure standards along with preemption language that would displace state statutes that created overlapping rules. Senator Javits later revised his bill to foreclose state regulation of the

various matters it addressed. Nixon's and Javits's bills left states with the authority to regulate matters not addressed by federal law. During the Ninety-Third Congress, lawmakers further expanded the preemption provision to make benefit plans "an area of *exclusive* federal concern." This article traces the first three stages in the evolution of ERISA preemption. Part 4 will consider the final stage.

Stage One: Federal Law in the Service of State Regulation

The Disclosure Act nicely illustrates Hart and Wechsler's oft-cited description of the "interstitial" character of most federal law. "Federal legislation," they observed, "on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary to the special purpose." [Henry M. Hart, Jr. and Herbert Wechsler, *The Federal Courts and the Federal System* (Brooklyn: Foundation Press, 1953), 435] Before Congress passed ERISA, the principal body of law governing private pension and welfare plans was state common law. When malfeasance in benefit plans emerged as a problem in the 1950s, a few state legislatures passed statutes to police these plans. Congress followed suit with the Disclosure Act in 1958. Consistent with Congress's "limited objectives," the Disclosure Act conceded regulatory authority over benefit plans to the states. The Act and amendments to it passed in 1962 were narrowly drawn to address discrete problems in the operation of benefit plans and in the various state statutes that regulated these plans.

Before ERISA, federal oversight of private pension and welfare plans was quite limited. The federal tax and labor laws encouraged employers to establish benefit plans and policed these plans to a limited extent, but the states provided the basic legal framework. And while a variety of state statutes affected benefit plans, "[t]he main source of standards, and the main body of law presupposed by federal statutes, was state common law." [Jay Conison, "ERISA and the Language of Preemption," *Washington University Law Quarterly*, vol. 72 (1994), 644-645] In the 1950s, this permissive legal environment facilitated a benefits "boom" in which businesses and unions created tens of thousands of new plans that covered tens of millions of people. [See Senate Committee on Labor and Public Welfare, *Welfare and Pension Plans Disclosure Act*, 85th Cong., 2d sess., 1958, S. Rpt. 1440 (S. Rpt. 85-1440), 5-6.]

Unfortunately, the resources funneled into these plans also created opportunities for unscrupulous individuals to enrich themselves at the expense of employees. Through the 1950s, government investigators exposed a series of cases in which benefit plans—in particular, multiemployer welfare plans—were mismanaged or looted. In the mid 1950s, Congress and a number of state legislatures took up legislation to monitor or regulate benefit plans. Several states adopted such legislation before Congress passed the Disclosure Act in August 1958. [See Bureau of National Affairs, *Federal-State Regulation of Welfare Funds* (Washington: BNA Incorporated, 1958), 15.]

Although the Senate and the House of Representatives differed sharply over the specifics of federal disclosure legislation, lawmakers in both chambers were adamant that they did not wish to regulate the terms of the employment contract or tell unions or employers how to run employee-benefit plans. The Committee on Labor and Public Welfare, which drafted the Senate's disclosure bill, claimed that it had "no desire to get the Federal Government involved in the regulation of these plans..." [S. Rpt. 85-1440, 18] If benefit plans required regulation, lawmakers in each chamber declared that the states should do the regulating. [See generally *Malone v. White Motor Corp.*, 435 U.S. 497, 507-512 (1978); Conison, "ERISA and the Language of Preemption," 644-645.] A "uniform Federal disclosure law," then-Senator John F. Kennedy (D, Mass.) observed, would "make the facts available not only to the participants and the Federal Government but to the States, in order that any desired State regulation can be more effectively accomplished." [Congressional Record, 85th Cong., 2d sess., 1958, 104, pt. 6: 7,050] The House Labor Committee concurred, reporting that its bill would "place the primary responsibility for the policing and improved operation of these plans upon the participants and beneficiaries themselves...reserving to the States the detailed regulations relating to insurance and trusts, and other phases of their operation..." [House Committee on Education and Labor, *Welfare and Pension Plans Disclosure Act*, 85th Cong., 2d sess., 1958, H. Rpt. 2283, 10]

The limited character of the Disclosure Act and its preservation of state regulatory authority are reflected in section 10, which addressed the "Effect of Other Laws":

(a) In the case of an employee welfare or pension benefit plan providing benefits to employees employed in two

or more States, no person shall be required by reason of any law of any such State to file with any State agency (other than an agency of the State in which such plan has its principal office) any information included within a description of the plan or an annual report published and filed pursuant to the provisions of this Act if copies of such description of the plan and of such annual report are filed with the State agency, and if copies of such portion of the description of the plan and annual report, as may be required by the State agency, are distributed to participants and beneficiaries in accordance with the requirements of such State law with respect to scope of distribution. Nothing contained in this subsection shall be construed to prevent any State from obtaining such additional information relating to any such plan as it may desire, or from otherwise regulating such plan.

(b) The provisions of this Act, except subsection (a) of this section, and any action taken thereunder, shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of the United States or of any State affecting the operation or administration of employee welfare or pension benefit plans, or in any manner to authorize the operation or administration of any such plan contrary to any such law. [*Welfare and Pension Plans Disclosure Act*, Public Law 836, 85th Cong., 2d sess. (August 28, 1958), § 10]

When Congress passed the Disclosure Act, six states had passed laws directed specifically to employee-benefit plans. Each of the state laws included disclosure requirements. [*See Federal-State Regulation of Welfare Funds*, 16–17.] The disclosure requirements in the federal Act and its narrow and partial preemption of state laws addressed a problem that came into view as states began passing disclosure statutes. As the Senate Labor Committee observed, “It would be highly impractical for 48 State governments to be concerned about obtaining the facts on the same plan, for a great many of the plans involved are national or multistate in character.” [S. Rpt. 85-1440, 18] Section 10(a) reduced, but did not eliminate, the burden of duplicative reporting requirements. It also left states free to ask for “additional information” not required under the Disclosure Act. The statutes in several states went beyond disclosure by creating standards of conduct for plan administrators or authorizing a state agency to conduct periodic audits. [*See Federal-State Regulation of Welfare Funds*, 14.] The Disclosure Act preserved this authority. As a contemporaneous guide to the Act explained, “In view of the limited scope of

the Federal Act, it was felt that the states should not be preempted from adopting more stringent legislation in this field. Section 10...therefore provides that nothing in the Act should be construed as preventing any state from obtaining additional information on welfare and pension plans or from otherwise regulating such plans.” [*Id.*]

In March 1962, Congress amended the Disclosure Act by, among other things, augmenting the disclosure requirements and establishing a federal bonding requirement for benefit plans. [*Welfare and Pension Plans Disclosure Act Amendments of 1962*, Public Law 420, 87th Cong., 2d sess. (March 20, 1962) (*Disclosure Act Amendments*)] Like the federal disclosure requirements, the bonding provision could result in duplicative regulation if plan officials were covered by other federal or state bonding requirements. The Disclosure Act Amendments specified that the bonding requirement in the Disclosure Act “would supersede any other provision of Federal or State law which might otherwise overlap it.” [Senate Committee on Labor and Public Welfare, *Welfare and Pension Plans Disclosure Act Amendments of 1961*, 87th Cong., 1st sess., 1961, S. Rpt. 908 (S. Rpt. 87-908), 10. *See also Disclosure Act Amendments*, § 13(d).] The Disclosure Act Amendments also included provisions that criminalized embezzlement or theft from an employee-benefit plan or the solicitation, receipt, or payment of kickbacks in connection with the operation of such a plan. [*Disclosure Act Amendments*, § 17(a) and (e)] These new criminal penalties addressed gaps in state enforcement authority. The drafters of the Senate bill explained, for example, that state laws forbidding embezzlement “[were] of little value where the conversion occurs over a multistate area.” [S. Rpt. 87-908, 6]

To emphasize that their revisions did not make the Disclosure Act a regulatory law, lawmakers also added section 9(h), which stated that “[n]othing contained in this Act shall be so construed or applied as to authorize the Secretary [of Labor] to regulate, or interfere in the management of, any employee welfare or pension benefit plan....” [*Disclosure Act Amendments*, § 15 (adding § 9(h))] Thus, the Disclosure Act Amendments did not change the broader understanding of the relationship between the Disclosure Act and state law. Federal law would require disclosure and bonding, preempt state laws that involved unnecessary duplication of these obligations, and address dangers that were beyond the regulatory capacity of state governments, but it remained the case that “the primary responsibility for developing...‘mandatory standards’

would lie with the States.” [*Malone v. White Motor Corp.*, 435 U.S., at 512]

Stage Two: Federal Law as a Source of Minimum Standards

The second stage in the development of ERISA’s preemption provision began when officials in the executive branch and Congress drafted legislation that would establish “mandatory standards” for the design and operation of benefit plans. The promulgation of federal standards necessarily would alter the relationship between federal and state regulatory authority. Rather than defer to the states, Congress would establish rules based on its own judgments of policy for private pension and welfare plans. The drafters of these bills, however, took care to preserve a form of “dual sovereignty.” [See U.S. Advisory Commission on Intergovernmental Relations, *Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues* (September 1992), 15.] Federal legislation would set *minimum* standards for employee-benefit plans. The states, although forbidden to relieve plans or plan officials of obligations created by federal law, would be free to supplement the federal standards.

Shortly after Congress amended the Disclosure Act, President Kennedy created a cabinet-level committee to consider the role of private pension and welfare plans in promoting economic security. In January 1965, President Johnson released the group’s report. Among other reforms, the President’s Committee on Corporate Pension Funds urged Congress to establish minimum vesting and funding standards for pension plans. Later in 1965, the Senate Permanent Subcommittee on Investigations uncovered seemingly outrageous instances of fiduciary malfeasance among several welfare plans. The report of the President’s Committee and the new revelations of fiduciary malfeasance convinced officials in the executive branch and Congress that the federal government should regulate private pension plans as well as some welfare plans. In February 1967, President Johnson proposed legislation that would create federal fiduciary standards and also beef up the federal disclosure requirements. [*Welfare and Pension Plan Protection Act of 1967*, S. 1024, 90th Cong., 1st sess. (1967)] A few days later, Senator Javits introduced a much broader bill that included, in addition to fiduciary reforms, minimum vesting and funding standards, termination insurance, a portability program, and an independent federal commission to oversee employee-benefit plans.

[*Pension and Employee Benefit Act of 1967*, S. 1103, 90th Cong., 1st sess. (1967)]

Although Johnson’s and Javits’s bills would put the federal government in the business of regulating benefit plans, the states would retain concurrent regulatory authority. Section 18 of Johnson’s bill (S. 1024) addressed the regulatory role of the states. The preemption provision—subsection 18(a)—was identical to subsection 10(a) of the Disclosure Act, quoted above. Like the Disclosure Act, S. 1024 would reduce, but not eliminate, duplicative state disclosure requirements. Subsection 18(b) was a savings clause that derived from subsection 10(b) of the Disclosure Act but included several changes:

(b) The provisions of this Act, except subsection (a) of this section and section 13, shall not be held to exempt or relieve any person from compliance with any Federal or State law imposing obligations, duties, responsibilities, or other standards of conduct with respect to the operation or administration of employee welfare or pension benefit plans; nor, except as explicitly provided to the contrary, shall anything in this Act take away any right or bar any remedy to which participants or beneficiaries are entitled to [*sic*] under such other Federal or State law: *Provided, however,* That no State law shall relieve any persons of the obligations, duties, responsibilities, and standards provided in this Act. [*Welfare and Pension Plan Protection Act of 1967*, § 18(b) (italics in original)]

According to Frank Kleiler, a long-time Labor Department official who chaired the group that drafted S. 1024, the changes to section 10(b) sought “to make clear that the new fiduciary section does not preempt any other Federal or State law which imposes additional responsibilities or provides additional remedies except to the extent such other law attempts to relieve persons from obligations imposed under the [Disclosure Act].” [Report of Interagency Task Force on WPPDA Amendments, July 28, 1966, General Records of the Department of Labor, National Archives, Record Group 174, Records of Secretary of Labor W. Willard Wirtz, 1966-Committee-President’s Committee on Corporate Pension Funds and Other Private Retirement Programs, 7] Read together, the two parts of section 18 clearly establish S. 1024 as minimum standards legislation. The reporting and disclosure provisions would require plans to provide some information, but the states would be free to ask for more. And the fiduciary provisions would create minimum standards

of conduct for plan officials while allowing states to pass laws that added to but did not relieve these officials of “the obligations, duties, responsibilities, and standards provided in this Act.”

Senator Javits’s bill (S. 1103) was much more ambitious. Like Johnson, Javits proposed fiduciary rules for private pension and welfare plans. And Javits drew on the work of the President’s Committee on Corporate Pension Funds and proposed minimum vesting and funding standards. Javits also included two initiatives, termination insurance and a portability program, that the President’s Committee had recommended for further study. In Javits’s words, this slate of reforms made S. 1103 “the first concrete comprehensive scheme for establishing basic minimum pension standards and dealing with the problems which have come to light in recent years.” [*Congressional Record*, 90th Cong., 1st sess., 1967, 113, pt. 4: 4,651] When a federal statute is comprehensive, courts sometimes infer a congressional intent to occupy the “field,” which implies that the states may not regulate matters within the “field” addressed in the federal statute. [See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). See also Caleb Nelson, “Preemption,” *Virginia Law Review*, vol. 86 (2000), 225, 227.] Javits made it clear that no such intent should be inferred from the “comprehensive scheme” of regulations in his bill.

Section 508 of S. 1103 provided, in pertinent part, that “[n]othing in this Act shall be deemed to nullify any provision of State or Federal law not in direct conflict with a provision of this Act.” The reference to “direct conflict” would narrow the scope of preemption under the bill. The Supreme Court’s preemption jurisprudence distinguished among instances in which there was “direct conflict” between state and federal law, instances of more diffuse conflict in which a state statute was “an obstacle to the full effectiveness of a federal statute” [*Colorado Anti-Discrimination Comm. v. Continental Air Lines*, 372 U.S. 714, 722 (1963)], and instances in which there was “evidence of a congressional design to preempt the field.” [*Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963). See generally Robert R. Gasaway, “The Problem of Federal Preemption: Reformulating the Black Letter Rules,” *Pepperdine Law Review*, vol. 33 (2005), 25, 31–34.] Because a state statute in “direct conflict” with a federal statute would be preempted even in the absence of express preemption language, the limitation of preemption to instances of “direct conflict” expressed an intent to allow states to pass stricter regulations if

they chose to do so. [See *Federal Statutory Preemption of State and Local Authority*, 15–16.]

Stage Three: Federal Law as the Source of Uniform Standards

In the second stage of the evolution of ERISA preemption, lawmakers expanded the preemption language in their bills to accommodate a change in the nature of their regulatory initiatives. The third stage reflected not a change in regulatory initiatives but a decision that federal initiatives should be exclusive. In March 1970, Richard Nixon proposed a revised version of Lyndon Johnson’s fiduciary-standards legislation. Nixon’s bill provided for *uniform*, rather than minimum, federal standards and expressly preempted state laws that created fiduciary and disclosure rules for benefit plans. The policy rationale for the change was that it would be easier for multi-state plans to comply with a single set of national rules than with an assortment of federal and state standards. There probably were political reasons for the change as well. Business groups and the AFL-CIO opposed comprehensive pension-reform legislation, but if Congress did act, they wanted the federal rules to be exclusive. Senator Javits followed Nixon’s lead when he introduced a revised version of his own bill in January 1971.

With Richard Nixon’s inauguration, the executive branch became more attentive to the concerns of the business community. Not surprisingly, the Nixon administration approached pension reform more skeptically than its Democratic predecessor. Several months after Nixon took office, the Labor and Commerce Departments submitted a report that urged the President to move forward on fiduciary standards and disclosure reform but to defer action on more controversial measures such as vesting and funding standards, portability, and termination insurance. Fiduciary issues took on particular salience later in 1969, when union president Anthony Boyle was accused of manipulating the United Mineworkers pension fund to improve his chances of reelection. The allegations against Boyle and the murder of his opponent shortly after the election reactivated congressional interest in pensions and forced the administration to press forward on its own legislative program.

In March 1970, Nixon sent Congress legislation that elaborated and refined the disclosure and fiduciary rules Lyndon Johnson had proposed in S. 1024. Nixon’s bill did not change the substance of the standards in Johnson’s bill, but it proposed a significant change in the federal and state roles in regulating

employee-benefit plans. The “Effect of Other Laws” language read as follows:

Sect. 18. It is hereby declared to be the express intent of Congress that except for actions authorized by section 9(e)(1)(B) of this Act, the provisions of this Act shall supersede any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter relate to the fiduciary, reporting and disclosure responsibilities of persons acting on behalf of employee benefit plans provided that nothing herein shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities or to prohibit a State from requiring that there be filed with a State agency copies of reports required by this Act to be filed with the Secretary. Nothing herein shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States (other than the Welfare and Pension Plans Disclosure Act of 1958 as amended (92 Stat. 994)) or any rule or regulation issued under any such law. [*Employee Benefits Protection Act*, S. 3589, 91st Cong., 2d sess. (1970), § 14 (amending § 16 of the Disclosure Act, renumbered § 18 by another provision in Nixon’s bill)]

The explanatory statement that accompanied the bill explained the clear intent of this provision: “The Act provides for a uniform source of law for evaluating the fiduciary conduct of persons acting on behalf of employee benefit plans and a singular reporting and disclosure system in lieu of burdensome multiple reports.” [*Congressional Record*, 91st Cong., 2d sess. 1970, 116, pt. 6: 7,286] The desire for uniformity required preemption language that went considerably beyond the Disclosure Act and previous legislative proposals. The Disclosure Act only superseded state laws that imposed duplicative obligations, such as filing the same information on both state and federal disclosure forms. Johnson’s (S. 1024) and Javits’s (S. 1103) bills would also supersede state laws that negated obligations created by federal law. In contrast, the preemption language in S. 3589 “designat[e] the Act as the *exclusive* form of regulation for employee benefit plans *within the areas covered...*” [*Congressional Record*, 91st Cong., 2d sess. 1970, 116, pt. 6: 7,288 (italics added)] It also is worth noting that the clause saving insurance, banking, and securities laws from preemption (which would become ERISA section 514(b)(2)(A)) makes its first appearance in S. 3589, evidently because the broader preemption of state law necessary to establish uniform federal standards threatened to preempt too many state laws.

Officials in the Department of Labor explained the policy rationale for this shift in a memo to White House aide Peter Flanigan in February 1970. Uniform standards would benefit plan sponsors, the DOL argued, because “the operations of employee benefit plans are increasingly interstate. From the viewpoint of those who must accommodate their activities to the reporting, disclosure and fiduciary responsibility ground rules, it seems clearly preferable to have one set of rules to follow, rather than a potential 51 sets of rules.” [“Scope of Preemption under the Proposed Employee Benefits Protection Act,” White House Central Files, LA box 24, EX LA9 Welfare-Pensions-Retirement [1969–1970] folder, Nixon Presidential Papers, National Archives] Under Secretary of Labor Laurence Silberman echoed this reasoning two years later in remarks to the American Bar Association’s Section of Real Property, Probate, and Trust Law. Admitting that federal preemption was “a rather interesting proposal for a Republican Administration to make,” Silberman reported that “those of us who worked on the legislation were horrified at the idea of regulating such a large amount of money from Washington, and at the same time giving deference to the various state laws and putting fiduciaries in the position of trying to determine investment decisions with an eye to 50 state laws.” [Laurence H. Silberman, “Fiduciary Responsibilities of Pension Trustees: A Government View,” *Real Property, Probate and Trust Journal*, vol. 7 (1972), 784]

Broader federal preemption also had political advantages. When Nixon introduced his bill, the AFL-CIO remained opposed to comprehensive pension-reform legislation that would impose vesting and funding standards on multiemployer plans, but it had declared its support for federal fiduciary standards and federal preemption. In December 1967, the AFL-CIO Convention passed a resolution “favor[ing] a Federal fiduciary statute, enforceable through the Federal courts, which would pre-empt State law...” [House Committee on Education and Labor, *Proposed Welfare and Pension Plan Protection Act: Hearings on H.R. 5741*, 90th Cong., 2d sess., 1968, 184] And in testimony in March 1968, AFL-CIO lobbyist Andrew Biemiller criticized Lyndon Johnson’s fiduciary-standards bill for failing to preempt state laws that overlapped the standards it proposed. Biemiller “urge[d] that the legislation be amended so that the Federal law will preempt State trust laws with respect to health, welfare, pension, and profit-sharing plans.” [*Id.*, 185]

Business groups strongly opposed vesting or funding standards, a portability program, or a pension guaranty fund, and they initially had objected to federal fiduciary standards as well. By the time Nixon took office, however, some business leaders had moderated their position on fiduciary legislation. The shift reflected a tactical judgment that enactment of stronger disclosure requirements and federal fiduciary standards might forestall more intrusive measures. The Nixon administration received input from business groups when it revised Johnson's fiduciary-standards bill, so they may have suggested the preemption language in Nixon's bill. In any case, the business community embraced preemption after Nixon proposed it. For example, after Nixon proposed S. 3589, the National Association of Insurance Commissioners (NAIC) attempted to salvage a role for the states in regulating small, intra-state benefit plans. The NAIC sought to muster support for this proposal by creating an advisory committee, which was comprised mainly of business representatives. [See *1972 Proceedings of the National Association of Insurance Commissioners*, vol. I, 553–554.] Much to the NAIC's chagrin, the committee panned the idea. "To the extent that there are weaknesses in Federal law or in its administration," declared the advisory committee, "the insurance commissioners could render a public service by urging Congressional action." [1973 *Proceedings of the National Association of Insurance Commissioners*, vol. I, 187]

Jacob Javits also appreciated the policy and political benefits of broader federal preemption. In January 1971, Javits introduced a revised bill that borrowed language from the preemption provision in S. 3589. Javits adapted section 18 of Nixon's bill (quoted above) to his more far-reaching measure by replacing S. 3589's reference to preempting state laws that "relate to the fiduciary, reporting and disclosure responsibilities of persons acting on behalf of employee benefit plans" with a general reference to state laws that "relate to the subject matters regulated by this Act." [*Pension and Employee Benefit Act*, S. 2, 92d Cong., 1st sess. (1971), § 507] Javits explained

the change in much the same terms as the Nixon administration. "Once an across-the-board federal pension law is enacted," he said, "it seems unfair and unduly burdensome to subject private pension plans—many of which are interstate in operation—to additional state regulation." [U.S. House, Committee on Education and Labor, *Welfare and Pension Plan Legislation: Hearings on H.R. 1269*, 92d Cong., 1st sess., 1971, 60] Javits's adoption of broader preemption language probably reflected political prudence as well. Business groups and the AFL-CIO opposed Javits's bill because they rejected some or all of its major initiatives. But Javits might make his legislation less unpalatable—and perhaps mitigate the intensity of the opposition—if he made the federal regulations he proposed exclusive.

Conclusion

As the foregoing discussion shows, ideas about the proper scope of federal and state authority evolved as lawmakers revised and elaborated legislation to regulate employee-benefit plans. By the early 1970s, bills such as S. 3589 and S. 2 proposed to make federal law exclusive with respect to matters that federal law addressed but to allow the states to regulate aspects of employee-benefit plans not touched by federal law. These bills also included language that expressly saved state insurance, banking, and securities laws from preemption. Over the course of the Ninety-Third Congress, which passed ERISA, lawmakers further expanded the preemption language so that employee-benefit plans became "an area of exclusive federal concern." [*FMC Corp. v. Holliday*, 498 U.S. at 58] ERISA § 514(a) preempts state regulation of benefit plans even with respect to matters federal law does not address. Lawmakers also narrowed the ambit of the savings clause by forbidding states to apply insurance, banking, and securities laws to self-insured plans. The next installment of this article will trace the histories of the sweeping preemption language in ERISA § 514(a), the savings clause in § 514(b)(2)(A), and the deemer clause in § 514(b)(2)(B). ■