

WHAT THE UNCONSTITUTIONAL CONDITIONS
DOCTRINE CAN TEACH US ABOUT ERISA
PREEMPTION: IS IT POSSIBLE TO
CONSISTENTLY IDENTIFY “COERCIVE”
PAY-OR-PLAY SCHEMES?

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With the ranks of the uninsured steadily increasing and the federal government failing to intervene, several state and local governments have considered employer pay-or-play schemes as a tool to expand coverage. But two recent circuit decisions—first Retail Industry Leaders Ass’n v. Fielder in the Fourth Circuit then Golden Gate Restaurant Ass’n v. San Francisco in the Ninth Circuit—have left far from clear the extent to which these schemes are valid in the face of an ERISA preemption challenge. Debate indeed continues as to whether the currently operative, but as yet unchallenged, pay-or-play law in Massachusetts is preempted. The Ninth Circuit reasoned in Golden Gate that the San Francisco scheme it upheld was distinguishable from the Maryland scheme the Fourth Circuit struck down because it did not coerce employers into increasing their ERISA health benefits, and therefore the decision created no circuit split.

This Note argues that a coercion-centered test is unlikely to produce a consistent doctrine. To make this point, it analogizes to the unconstitutional conditions doctrine, in which courts have also tried to measure the coercive effect of economic incentive schemes but have failed to fashion a coherent test capable of producing predictable outcomes. Instead of focusing on coercion, courts can, with equal fidelity to the law, apply a rebuttable presumption against preemption to pay-or-play schemes that are part of comprehensive health reform initiatives. This approach provides a superior basis for distinguishing the Maryland and San Francisco schemes, and also leads to the predictable outcome that the Massachusetts pay-or-play law is not preempted.

INTRODUCTION

In July 2006, the City of San Francisco enacted the San Francisco Health Care Security Ordinance (the “Ordinance”), which included an employer “pay-or-play” provision.¹ Pay-or-play provisions require employers to either “pay”—normally a tax or fee to the government—or “play”—by contributing to their employees’ health care costs.² San Francisco’s legislators hoped that their pay-or-play scheme would help reduce the number of uninsured San Franciscans and relieve strain on local hospitals from treating nonpaying patients, problems which are hardly unique to San Francisco.³

1. See *infra* Part II.A.2 (describing San Francisco Health Care Security Ordinance).

2. See *infra* Part I.A.3 (describing pay-or-play schemes).

3. See *infra* Part I.A.1 (describing problems associated with high levels of uninsurance).

Many expected that courts would strike down the Ordinance as preempted by the Employee Retirement Income Security Act of 1974 (ERISA)—a federal law which dictates that employee benefit plans are only subject to federal regulation.⁴ This expectation was reinforced by the Fourth Circuit's decision in *Retail Industry Leaders Ass'n v. Fielder*⁵ striking down the Maryland Fair Share Health Care Fund Act (the "Act"), which contained a seemingly similar pay-or-play provision. The Northern District of California agreed, and followed the Fourth Circuit's analysis in finding the Ordinance preempted.⁶ But the Ninth Circuit quickly reversed, surprising many when it allowed the scheme to go into effect in *Golden Gate Restaurant Ass'n v. San Francisco*.⁷

The Ninth Circuit did not adopt the Fourth Circuit's analysis, nor did it reject it,⁸ thereby seeking to avoid a direct circuit split.⁹ Rather, the Ninth Circuit insisted that the San Francisco Ordinance differed from the Maryland Act in important ways that made the Ordinance permissible even under the Fourth Circuit's approach. In *Fielder*, the Fourth Circuit held that ERISA preempted the Maryland Act because rational employers were left with no "meaningful alternatives"¹⁰ other than to increase health spending, a requirement that ERISA precludes states from imposing directly. Why would an employer pay a tax from which it receives no direct benefit when it can instead spend the money on its own employees? The San Francisco Ordinance on the other hand, at least according to the *Golden Gate* court, does leave employers with reasonable alternatives, as the scheme provides a "tangible benefit" to employees of employers that choose to pay the tax by allowing these employees to join the city's public insurance plan at discounted rates.¹¹ Thus the Ordinance would have passed the Fourth Circuit's test, even if the Ninth Circuit had

4. See *infra* Part I.B (discussing ERISA and ERISA preemption).

5. 475 F.3d 180 (4th Cir. 2007).

6. *Golden Gate Rest. Ass'n v. City of San Francisco (Golden Gate I)*, 535 F. Supp. 2d 968, 975–78 (N.D. Cal. 2007).

7. The district court's opinion was issued December 26, 2007. *Id.* at 968 (district court opinion). Parts of the Ordinance were scheduled to go into effect on January 1, 2008, and the Ninth Circuit held oral argument regarding the issuance of a stay on January 3, 2008 and issued the stay on January 9, 2008. *Golden Gate Rest. Ass'n v. City of San Francisco (Golden Gate II)*, 512 F.3d 1112 (9th Cir. 2008) (staying district court's opinion, allowing Ordinance to take effect pending final decision on merits). The final decision on the merits was issued September 30, 2008. *Golden Gate Rest. Ass'n v. City of San Francisco (Golden Gate III)*, 546 F.3d 639 (9th Cir. 2008). Subsequent proceedings are discussed *infra* notes 13–14 and accompanying text.

8. *Golden Gate III*, 546 F.3d at 659 ("We neither adopt nor reject the analysis of the Fourth Circuit in *Fielder*.").

9. *Id.* ("The Association contends that we will create a circuit split if we uphold the Ordinance. We disagree. We see no inconsistency between the Fourth Circuit's holding in *Fielder* and our holding in this case.").

10. *Fielder*, 475 F.3d at 196; see also *infra* Part II.A.1 (describing *Fielder* decision).

11. *Golden Gate III*, 546 F.3d at 660.

adopted it, and the court therefore argued that no circuit split was created.¹²

But the *Golden Gate* court's effort to avoid a circuit split creates anything but a secure foundation for future rulings. Eight judges on the Ninth Circuit recently filed a strong dissent from an order denying an en banc rehearing,¹³ and the Restaurant Association has petitioned the Supreme Court to review the case.¹⁴ Both argue persuasively that the *Golden Gate* ruling creates a split with the Fourth Circuit and diverges from Supreme Court precedent because the Ordinance does in fact coerce employers to increase benefits.¹⁵ In its effort to distinguish the San Francisco Ordinance from the Maryland Act based on the degree of coercion associated with each scheme, the Ninth Circuit has created unstable categories, as judges and scholars have a difficult time agreeing on what terms like "coercion" or "meaningful alternatives" actually mean. These concepts are simply too malleable to guide consistent judicial decisionmaking.¹⁶

This Note analogizes the Fourth and Ninth Circuits' approach to that taken in the unconstitutional conditions doctrine in order to demonstrate the difficulties of drawing clear lines when an inquiry into coercion is required. In unconstitutional conditions cases, courts limit governments from wrongly using their taxing and spending powers to encourage or discourage conduct that they cannot regulate directly. But the Supreme Court has failed to fashion a consistent standard governing unconstitutional conditions, even with the benefit of one hundred years of decisions and reams of scholarly commentary. The underlying problem, many observers have concluded, is that defining coercion requires normative judgments that can never be settled.¹⁷

A similarly unpredictable doctrinal framework in the context of ERISA preemption is unacceptable. As state and local governments struggle to reduce the numbers of their citizens lacking health insurance,¹⁸ they need a clear picture of the tools at their disposal. In the past few years, dozens of state governments have officially proposed pay-or-play

12. *Id.* at 659 ("For purposes of argument, . . . we assume that the panel majority in *Fielder* was correct. But even under the reasoning of the panel majority, San Francisco's Ordinance is valid.").

13. *Golden Gate Rest. Ass'n v. City of San Francisco (Golden Gate IV)*, 558 F.3d 1000, 1004–10 (9th Cir. 2009) (Smith, J., dissenting from denial of rehearing en banc).

14. Petition for Writ of Certiorari, *Golden Gate III*, No. 08-1515, (U.S. June 5, 2009), 2009 WL 1630302.

15. *Golden Gate IV*, 558 F.3d at 1004 (Smith, J., dissenting from denial of rehearing en banc); Petition for Writ of Certiorari, *supra* note 14, at 15–20.

16. See *infra* Part II.D (criticizing coercion test in ERISA preemption context).

17. See *infra* Part II.C (describing unconstitutional conditions doctrine and its common criticisms).

18. See *infra* Part I.A (describing problem of uninsurance and attractiveness of pay-or-play schemes).

schemes,¹⁹ yet none can be sure what makes such schemes permissible under ERISA. There is even speculation regarding the permissibility of the pay-or-play scheme already operating in Massachusetts²⁰—though it has not been challenged in court—and the Fourth and Ninth Circuits’ coercion-focused analysis provides little help in predicting the outcome of a potential challenge.

This Note argues that a doctrine invalidating pay-or-play schemes that are too “coercive” will produce unpredictable and inconsistent outcomes. Instead, courts should uphold pay-or-play schemes that are enacted as part of broad-based, comprehensive health reform initiatives, so long as they do not impose substantial new administrative obligations that would conflict with ERISA’s core goal of national uniformity.²¹ Doctrinally, this approach recognizes that comprehensive reforms should qualify for the presumption against preemption that has long been applied to laws of general applicability, particularly in fields traditionally regulated by the states.²² This proposed inquiry into the comprehensive nature of the scheme would be just as faithful to ERISA and Supreme Court precedent as a focus on coercion, but would be better suited to consistent and predictable judicial oversight.²³

Part I provides background on the health insurance system in America and the forces which have led many states to pursue pay-or-play schemes, then outlines ERISA and its preemption doctrine. Part II describes the approaches adopted by the Fourth and Ninth Circuits in response to the Maryland and San Francisco schemes, and analogizes the problems inherent in a coercion analysis to the indeterminacy associated with the unconstitutional conditions doctrine. Part III proposes a new approach, more conducive to consistent application, which would require courts to apply a presumption against preemption to comprehensive, broad-based reforms. This presumption would only be rebuttable if the scheme at issue imposed new administrative obligations on ERISA plan managers. This mode of analysis not only provides a superior basis for distinguishing the Maryland Act from the San Francisco Ordinance than that provided by the Ninth Circuit, but also leads to a predictable answer that the Massachusetts scheme is not preempted. Part IV briefly discusses

19. See Nat’l Conference of State Legislatures, 2006 “Pay or Play” Bills, at <http://www.ncsl.org/default.aspx?tabid=13873> (last updated Mar. 3, 2006) (on file with the *Columbia Law Review*) (listing twenty-six states’ bills); see also Julia Contreras & Orly Lobel, *Wal-Martization and the Fair Share Health Care Acts*, 19 *St. Thomas L. Rev.* 105, 136 (2006) (describing recent pay-or-play legislation).

20. See *infra* notes 223–232 and accompanying text (describing Massachusetts law and debate over preemption).

21. See *infra* Part III.A (describing new suggested approach).

22. See *infra* notes 82–84 and accompanying text (discussing presumption generally); *infra* notes 120–125, 242–252 (discussing presumption in ERISA preemption context).

23. See *infra* Part III (arguing new approach is faithful to ERISA and demonstrating ease of application).

how national health reforms being debated as this Note goes to press may affect this Note's analysis.

I. ERISA PREEMPTION AND PAY-OR-PLAY SCHEMES

Before taking up the *Felder* and *Golden Gate* decisions, it is useful to understand the forces that have led so many states and localities to consider pay-or-play schemes. Part I.A is dedicated to this task. Part I.B then gives background on ERISA in general and its preemption provision in particular.

A. *The Role of Pay-or-Play Schemes in the American Health Coverage System*

Part I.A.1 outlines some of the problems that state and local governments face due to the high number of Americans who lack health insurance. Part I.A.2 describes the current patchwork health coverage system in America. Finally, Part I.A.3 discusses the popularity of employer pay-or-play schemes as a mechanism for state and local governments to reduce the number of uninsured residents.

1. *Problems Caused by the High Number of Uninsured Americans.* — More than forty-five million Americans lack even basic health insurance coverage.²⁴ Many consider this situation unsustainable for a variety of reasons. Some point to the injustice of a system in which less privileged Americans are precluded from seeking basic health care because they lack the financial means to do so.²⁵ Researchers estimate that between 22,000 and 27,000 Americans died prematurely in 2006 because they lacked coverage and thus did not seek care in a timely fashion.²⁶ Other researchers esti-

24. U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2007*, at 19 (2008), available at www.census.gov/prod/2008pubs/p60-235.pdf (on file with the *Columbia Law Review*) [hereinafter *Census, Health Insurance*] (reporting statistics for 2007). There were also twenty-five million Americans in 2005 who could be defined as "underinsured." Cathy Schoen et al., *How Many Are Underinsured? Trends Among U.S. Adults, 2003 and 2007*, 27 *Health Aff.* w298, w300 (2008), at <http://content.healthaffairs.org/cgi/reprint/27/4/w298.pdf> (on file with the *Columbia Law Review*).

25. See, e.g., Larry R. Churchill, *Rationing Health Care in America: Perceptions and Principles of Justice* 91 (1987) (describing health problems as undeserved misfortune); President's Comm'n for the Study of Ethical Problems in Med. & Biomedical and Behavioral Research, *1 Securing Access to Health Care: A Report on the Ethical Implications of Differences in the Availability of Health Services* 109 (1983), available at http://www.bioethics.gov/reports/past_commissions/securing_access.pdf (on file with the *Columbia Law Review*) (arguing that lack of health insurance, most pronounced among the poor, creates barrier to accessing care and thus fails "ethical tests"); Einer Elhauge, *Allocating Health Care Morally*, 82 *Cal. L. Rev.* 1449, 1473-93 (1994) (outlining several justifications for redistributive policies in health care).

26. Stan Dorn, *Urban Inst., Uninsured and Dying Because of It: Updating the Institute of Medicine Analysis on the Impact of Uninsurance on Mortality*, 3 *tbls.1 & 2* (2008), available at http://www.urban.org/UploadedPDF/411588_uninsured_dying.pdf (on file with the *Columbia Law Review*) (estimating number of deaths among adults aged twenty-five to sixty-four). For the sake of comparison, in 2005: 21,623 Americans died of

mated the economic cost of the uninsured in 2006 to be as high as \$200 billion.²⁷ Living without insurance coverage also causes great financial hardship for many Americans with health care needs. More than one-third of uninsured adults report that a collection agency has contacted them about unpaid medical bills within the past five years.²⁸ In one series of studies, researchers at Harvard estimated that medical debts were a serious contributing factor to more than half of all bankruptcies in the United States in 2001, and more than sixty percent in 2007.²⁹ Even so, social injustice is just one serious criticism of a health system that leaves so many without coverage.

Apart from concerns of fairness and justice for uninsured Americans, the large number of uninsured also adversely affects the health system as a whole. One problem arises when uninsured patients seek care in emergency rooms; though hospitals are legally required to provide care to the uninsured in emergencies,³⁰ they are rarely compensated for these services.³¹ This places great financial stress on hospitals—particularly those in areas with large populations of uninsured residents—and has forced

Leukemia; 45,343 Americans died in motor vehicle accidents; and 18,124 Americans died as a result of homicide. Hsiang-Ching Kung et al., Ctrs. for Disease Control & Prevention, Deaths: Final Data for 2005, CDC Nat'l Vital Stats. Reps. 31 tbl.10 (2008), available at http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_10.pdf (on file with the *Columbia Law Review*) (listing number of American deaths in 2005 for 113 causes).

27. Sarah Axeen & Elizabeth Carpenter, New America Found., Cost of Failure: The Economic Losses of the Uninsured I (2008), available at http://www.newamerica.net/files/Cost_Of_Failure.pdf (on file with the *Columbia Law Review*).

28. Kaiser Comm'n on Medicaid and the Uninsured, Kaiser Family Found., The Uninsured: A Primer 10 (2008), available at <http://www.kff.org/uninsured/upload/7451-04.pdf> (on file with the *Columbia Law Review*) [hereinafter Kaiser, Uninsured].

29. See David U. Himmelstein et al., MarketWatch: Illness and Injury as Contributors to Bankruptcy, 24 Health Aff. W5-63, W5-66 (2005), at <http://content.healthaffairs.org/cgi/reprint/hlthaff.w5.63v1.pdf> (on file with the *Columbia Law Review*) (reporting more than half of personal bankruptcies in 2001 had medical cause); David U. Himmelstein et al., Medical Bankruptcy in the United States, 2007: Results of a National Study, 122 Am. J. of Med. (forthcoming 2009) (manuscript at 2, on file with the *Columbia Law Review*), available at http://pnhp.org/new_bankruptcy_study/Bankruptcy-2009.pdf (reporting sixty-two percent of personal bankruptcies in 2007 had medical cause). But see David Dranove & Michael L. Millenson, Medical Bankruptcy: Myth Versus Fact, 25 Health Aff. w74, w75 (2006), at <http://content.healthaffairs.org/cgi/reprint/25/2/w74.pdf> (on file with the *Columbia Law Review*) (arguing Himmelstein's data in 2005 article shows "causal" relationship between medical debt and bankruptcy in only seventeen percent of cases).

30. This requirement stems from the Emergency Medical Treatment and Active Labor Act, better known as "EMTALA." See 42 U.S.C. § 1395dd(a)–(b), (d)(1) (2006) (requiring medical screening and stabilization of all patients arriving in emergency condition, enforced by civil fines).

31. The Kaiser Family Foundation predicted that health care providers would supply \$57.4 billion in uncompensated care in 2008, of which approximately sixty percent would be provided in hospitals. Kaiser, Uninsured, supra note 28, at 11–12; see also Jack Hadley et al., Covering the Uninsured in 2008: Current Costs, Sources of Payment, and Incremental Costs, 27 Health Aff. w399, w402 (2008), at <http://content.healthaffairs.org/cgi/reprint/27/5/w399.pdf> (on file with the *Columbia Law Review*) (projecting uncompensated care costs in 2008 of \$54.3 billion).

several hospitals to close.³² For those hospitals that can bear this financial stress, the expenses of treating uncompensated care patients must be passed along to the hospitals' paying clientele.³³ This creates a perverse incentive system in which the end "payer" in the system—which is often an employer who provides coverage to its workers³⁴—ends up subsidizing the care of the uninsured—who are often employees of firms that do not offer coverage.³⁵ Even more importantly, some health experts argue that the uninsured overly rely on expensive emergency services because they have to pay out of pocket for more cost-effective preventative care.³⁶ Thus the problem of the uninsured is not just a problem *for* the uninsured; it affects the stability of the entire health care system.

32. See, e.g., Gwendolyn Roberts Majette, *Access to Health Care: What a Difference Shades of Color Make*, 12 *Annals Health L.* 121, 126–27 (2003) (describing closing of D.C. General Hospital).

33. In Maryland, for instance, this is achieved directly through the hospital rate-setting formula which allows hospitals providing more uncompensated care to charge higher rates to their paying patients. See M. William Salganik, Md. Health Cuts to Mean Higher Insurance Rates, *Balt. Sun*, Aug. 3, 2003, at 1D (quoting Robert Murray, executive director of Maryland's rate-setting commission, as saying that insured Marylanders pay \$500 million per year towards treating uncompensated care patients, and Stuart Altman, Professor of health policy at Brandeis, as saying that what happens formally in Maryland through rate setting happens informally all over the country); see also Md. Hosp. Ass'n, *Maryland Hospital Rate Regulation 1* (2006), at http://www.mdhospitals.org/mha/News_Publications/HSCRC.Md.Rate.Setting.Facts.pdf (on file with the *Columbia Law Review*) (recognizing \$738 million per year in uncompensated care "built into" rates for paying patients). Some states attempt to pay hospitals for uncompensated care through state-funded charity care pools, which may be partially or completely made up of tax dollars. But even these states have struggled to find a system in which the costs of treating the uninsured are not passed on to the insured population. See Elisabeth Benjamin & Kat Gabrieheski, *The Case for Reform: How New York State's Secret Hospital Charity Care Pool Funds Fail to Help Uninsured and Underinsured New Yorkers*, 8 *N.Y.U. J. Legis. & Pub. Pol'y* 5, 11–13 (2004) (noting lack of accountability for charity care funds and noting hospitals reported providing twice as much bad debt and charity care to patients as received from fund). Also, see generally Randall R. Bovbjerg et al., *Urban Inst., Market Competition and Uncompensated Care Pools* (2000), available at <http://www.urban.org/UploadedPDF/occa35.pdf> (on file with the *Columbia Law Review*) (describing and evaluating impact of charity care pools generally and in New York, New Jersey, and Massachusetts).

34. In 2007, fifty-nine percent of U.S. residents (177.4 million individuals) were covered by employer-sponsored health insurance. Census, *Health Insurance*, *supra* note 24, at 19; see also *infra* notes 37–43 and accompanying text (discussing employer-sponsored coverage).

35. Thirty-seven million of the forty-five million nonelderly uninsured U.S. residents (eighty-two percent) in 2007 are from working families. Kaiser, *Uninsured*, *supra* note 28, at 13, 15. Approximately eighteen percent of working 18- to 64-year-olds, 26.8 million individuals, were uninsured in 2007. Census, *Health Insurance*, *supra* note 24, at 24. But cf. Hadley et al., *supra* note 31, at w403–w407 (arguing most uncompensated care is financed by public funds).

36. See Kaiser, *Uninsured*, *supra* note 28, at 7–8 (noting that uninsured are far more likely to forego care because of cost and less likely to obtain all recommended care).

2. *Contours of the American Health Coverage System.* — Employer-sponsored coverage dominates the American health insurance system.³⁷ Fifty-nine percent of Americans—177 million individuals—are covered though some form of employer-sponsored health insurance.³⁸ Roughly half of these individuals are covered by “self-insured” plans, meaning that the employer assumes the financial risks associated with the coverage (though such plans are typically administered by third parties).³⁹ The remainder are covered by “fully insured” plans, meaning the covering employer has helped purchase private insurance from a health insurance company.⁴⁰

Employer-sponsored insurance rose to prominence due to unplanned historical circumstances, but its position has since been reinforced by government policy. The system became popular when wage controls during World War II led firms to offer fringe benefits such as health insurance to attract and retain workers.⁴¹ This inadvertent employer-based system was then solidified in 1954 when the federal government altered the tax code so that health insurance benefits could be excluded from an employee’s taxable income.⁴² The special tax treatment of health benefits survives to this day⁴³ and employer-sponsored health insurance re-

37. See Sara R. Collins et al., *The Commonwealth Fund, Whither Employer-Based Health Insurance? The Current and Future Role of U.S. Companies in the Provision and Financing of Health Insurance 1* (2007), available at http://www.commonwealthfund.org/user_doc/Collins_whitheremployer-basedhltins_1059.pdf?section=4039 (on file with the *Columbia Law Review*) (“Today, employer-based coverage forms the backbone of the U.S. system of health insurance.”).

38. Census, *Health Insurance*, supra note 24, at 19. This does not necessarily mean that the employer pays for the full cost of coverage. In 2008, covering employers paid on average \$3,983 out of \$4,704 in total premiums for covering individuals, and \$9,325 out of \$12,680 in total premiums for covering families. The remainder of the premiums would be borne by the employee, plus any additional out-of-pocket costs such as co-payments, deductibles, and co-insurance. Kaiser Family Found., *Employer Health Benefits Chart Pack, Slide 2* (2008), at <http://facts.kff.org/chart.aspx?ch=624> (on file with the *Columbia Law Review*).

39. As of 2006, fifty-five percent of covered *workers* were covered through self-funded plans. Kaiser Family Found. & Health Research and Educ. Trust, *Employer Health Benefits: 2006 Annual Survey 126–30* (2006), available at <http://www.kff.org/insurance/7527/upload/7527.pdf> (on file with the *Columbia Law Review*) [hereinafter Kaiser, *Employer Benefit Survey*] (including breakdowns by factors such as firm size, industry, and region).

40. *Id.* at 126; see also *infra* notes 88–93 and accompanying text (regarding importance of this distinction in ERISA context).

41. Laura D. Hermer, *Private Health Insurance in the United States: A Proposal for a More Functional System*, 6 *Hous. J. Health L. & Pol’y* 1, 10–13 (2005) (outlining history of link between employment and health insurance).

42. *Id.* at 10.

43. See 26 U.S.C. § 106 (2006). The elimination of this special treatment, which represents a tax break of roughly \$250 billion per year, was central to John McCain’s health reform platform in his 2008 run for president and is currently being considered by Congress. See Sara R. Collins et al., *The 2008 Presidential Candidates’ Health Reform Proposals: Choices for America 9* (2008), available at <http://www.commonwealthfund.org>.

mains the dominant component of the insurance system for nonelderly Americans.

Americans who are not insured through their employers are covered, if at all, by a patchwork of public and private systems. Forty-one million individuals—including virtually all Americans age 65 and older—are covered by Medicare, a federal government insurance program created in 1965 to cover the elderly and disabled.⁴⁴ Almost forty million Americans—roughly thirteen percent of the population—are covered by Medicaid, a joint federal-state program created in 1965 mainly to cover families receiving welfare assistance.⁴⁵ Twenty-seven million individuals—roughly nine percent of the population—purchase health insurance on the private, non-group market.⁴⁶ Of those who slip through the cracks of this patchwork system—the forty-five million Americans who have no health insurance⁴⁷—thirty-seven million are from working families.⁴⁸

3. *Attractiveness of Local Pay-or-Play Solutions.* — It is within this patchwork system that any health reform must take place. Whatever its intentions, the federal government has shown little ability over the past two decades to reduce the number of uninsured Americans. Many commentators argue that the Bush Administration adopted policies that exacerbated the problem, including the tightening of eligibility restrictions in the State Children's Health Insurance Program (SCHIP)⁴⁹ and

org/usr_doc/Collins_2008presidentialcandidateshlreformproposals_1179.pdf?section=4039 (on file with the *Columbia Law Review*) (critiquing McCain's health platform); Joint Comm. on Taxation, Senate Comm. on Fin., Tax Expenditures for Health Care 4 (2008), available at <http://finance.senate.gov/hearings/testimony/2008test/073108sektest.pdf> (on file with the *Columbia Law Review*) (estimating cost of exclusion of health benefits from taxation at \$246.1 billion for 2007); see also *infra* Part IV (regarding current Congressional deliberations).

44. Census, Health Insurance, *supra* note 24, at 21. Medicare also covers individuals with end-stage renal disease or amyotrophic lateral sclerosis (Lou Gehrig's disease). For a general background on Medicare, see Kaiser Family Found., Medicare: A Primer (2009), available at <http://www.kff.org/medicare/upload/7615-02.pdf> (on file with the *Columbia Law Review*).

45. Census, Health Insurance, *supra* note 24, at 21; see also Kaiser Comm'n on Medicaid and the Uninsured, Kaiser Family Found., Health Coverage for Low-Income Populations: A Comparison of Medicaid and SCHIP I (2006), available at <http://www.kff.org/medicaid/upload/7488.pdf> (on file with the *Columbia Law Review*) [hereinafter Kaiser, Medicaid and SCHIP] (comparing Medicaid with SCHIP, a government insurance program covering eligible children).

46. Census, Health Insurance, *supra* note 24, at 21 fig.7, 22 tbl.6.

47. See *supra* note 24 and accompanying text.

48. Kaiser, Uninsured, *supra* note 28, at 15.

49. SCHIP is a federal-state partnership program designed to cover uninsured children. See generally Kaiser, Medicaid and SCHIP, *supra* note 45. Regarding federal strategies designed to restrict enrollment, or to prevent states from increasing enrollment, in SCHIP, see Letter from Dennis G. Smith, Dir., Ctr. for Medicaid and State Operations, to State Health Officials (Aug. 17, 2007), available at <http://www.cms.hhs.gov/smdl/downloads/SHO081707.pdf> (on file with the *Columbia Law Review*) (listing new "assurances" to be given by states before approval will be granted for expansion of SCHIP).

Medicaid.⁵⁰ But the Clinton Administration also famously failed to expand insurance coverage in the health reform effort spearheaded by Hillary Clinton.⁵¹ Regardless of the administration in Washington, the number of uninsured Americans has steadily increased, with only minor exceptions, since at least 1987.⁵² While it is debatable whether this hands-off approach is desirable,⁵³ it is certain that the absence of action at the national level has left state and local governments with the burden of facing the problem of uninsurance, should they choose to, on their own.⁵⁴ This was at least true until very recently, when President Obama's election has left many states waiting, at least briefly, to see what national reform may bring.⁵⁵

States that wish to reduce their number of uninsured residents can either increase funding to public insurance programs⁵⁶—which likely requires the state to raise taxes, borrow, or cut other spending, all options which are unappealing to state legislatures—or try to encourage more

to children from families above 250% of the federal poverty level); see also Tony Pugh, *Bush Fights Against Insurance for Children Already Covered*, *Star-Ledger* (Newark, N.J.), Sept. 16, 2007, at 39 (describing Bush's attempts to block state expansion of SCHIP programs); cf. Sheryl Gay Stolberg & Carl Hulse, *Bush Vetoes Health Bill Privately, Without Fanfare*, *N.Y. Times*, Oct. 4, 2007, at A18 (describing Bush's veto of a bill which would have expanded funding for SCHIP).

50. Medicaid is a federal-state partnership program designed to cover the disabled and indigent. See generally Kaiser, *Medicaid and SCHIP*, supra note 45. Regarding federal strategies designed to restrict enrollment in Medicaid, see Robert Pear, *U.S. Curtailing Bids to Expand Medicaid Rolls*, *N.Y. Times*, Jan. 4, 2008, at A1 (describing administration plans to apply similar restrictions to Medicaid as applied to SCHIP).

51. For background on Hillary Clinton's failed health reform effort, see generally Lisa Disch, *Publicity-Stunt Participation and Sound Bite Polemics: The Health Care Debate 1993–94*, 21 *J. Health Pol. Pol'y & L.* 3 (1996) (theorizing on cause of failure of Clinton reforms).

52. See *Census, Health Insurance*, supra note 24, at 20 fig.6 (showing both absolute number and rate of uninsured Americans).

53. Many argue, for example, that a stronger influence of market forces would help America's health system, particularly with respect to reducing costs. See, e.g., Amy B. Monahan, *The Promise and Peril of Ownership Society Health Care Policy*, 80 *Tul. L. Rev.* 777, 801–03 (2006) (describing benefits of consumer driven system). Some dispute the notion that universal coverage should even be a government goal. See, e.g., Elhauge, supra note 25, at 1476 (“Health care is far less special than commonly thought . . .”).

54. See, e.g., Alan Weil, *How Far Can States Take Health Reform?*, 27 *Health Aff.* 736, 736 (2008) (“Expectations for state leadership promoting health reform have reached an all-time high.”).

55. See *infra* Part IV (describing national reform agenda under discussion in the summer of 2009).

56. For example, some states have effectively raised the maximum income or asset levels for Medicaid eligibility by disregarding certain income or assets. See Michael Birnbaum, *Expanding Coverage to Parents Through Medicaid Section 1931*, at 2 (2000), available at <http://www.statecoverage.org/files/Expanding%20Coverage%20to%20Parents%20through%20Medicaid%20Section%201931.pdf> (on file with the *Columbia Law Review*) (describing such efforts of several states).

individuals⁵⁷ or employers⁵⁸ to acquire insurance on their own. Many states facing these options have turned to “pay-or-play” schemes, which require employers to provide a minimum level of health coverage to their workers, or else pay a tax or fee which can be used to cover the uninsured.⁵⁹ These pay-or-play schemes reduce a state’s burden in covering the uninsured through two mechanisms at once: They both raise revenue and encourage employers to offer insurance.⁶⁰

Besides the virtue of approaching the problem from two angles, there are additional political and policy-based advantages to such schemes. Mainly, they have the clever effect of raising revenue to cover uninsured citizens without forcing employers that already provide coverage to pay “twice,” e.g., both for their own workers and for those who work for firms not offering health coverage.⁶¹ From a policy perspective, it is ideal to raise the revenue from parties who are linked to creating the government burden, but it is also far easier from a political perspective for a legislator to support a new tax that only affects employers who refuse to cover their workers.⁶² Such schemes also allow a government to declare officially that providing health coverage is a real responsibility for

57. Massachusetts, for instance, recently enacted an “individual mandate” requiring all state residents to purchase health insurance, so long as affordable products are available on the market. See Kaiser Comm’n on Medicaid and the Uninsured, Kaiser Family Found., Massachusetts Health Care Reform Plan: An Update I (2007), available at <http://www.kff.org/uninsured/upload/7494-02.pdf> (on file with the *Columbia Law Review*) [hereinafter Kaiser, Massachusetts] (describing individual mandate).

58. The Maryland and San Francisco employer pay-or-play schemes discussed in detail in Part II.A *infra* are examples of policies which may encourage employers to cover more of their workers.

59. Such a scheme can take many forms. Sometimes the “pay” option can be called a “tax,” “fee,” or “penalty.” Sometimes the “play” option can be described as a “mandate,” a “requirement,” or an “alternative.” But regardless of the nomenclature, the basic concept is that a new tax or fee is introduced on employers, with the purpose of directing such revenue to covering the uninsured. But employers that spend money on their employees’ health care are then either allowed a credit against the new tax or are relieved of their obligation to pay the fee. Employers are thus given the choice of either “paying”—a tax or fee to the state—or “playing”—by providing health coverage to their workers.

60. Our current voluntary system actually provides incentives for employers *not* to provide insurance since they may have to compete against other firms that also do not offer coverage, and thus have lower costs.

61. Recall that approximately eighty-two percent of the uninsured are workers or their dependants. See *supra* note 35.

62. See Jonathan Oberlander, *The Politics of Paying for Health Reform: Zombies, Payroll Taxes, and the Holy Grail*, 27 *Health Aff.* w544, w549 (2008), at <http://content.healthaffairs.org/cgi/reprint/27/6/w544> (on file with the *Columbia Law Review*) (describing political benefits of pay-or-play schemes); see also Uwe E. Reinhardt, *Breaking American Health Policy Gridlock*, *Health Aff.*, Summer 1991, at 96, 101 (describing political attractiveness of pay-or-play as form of taxation which can be “artfully referred to in words that spare one’s lips from having to trace out even the semblance of the dreaded letter *t*”).

employers, a message that resonates with many voters.⁶³ Employers who already provide coverage obviously support these schemes because they reduce the disadvantage that these employers face when competing against firms that do not provide coverage.⁶⁴ Even employers who do not offer coverage often support such proposals—which allow them to cover their workers without suffering a disadvantage against their competitors—and the opposition of others is tempered by the knowledge that these schemes leave a level playing field.⁶⁵ While support for pay-or-play is far from universal,⁶⁶ it is no surprise that such schemes, given their numerous advantages, are often an important part of state or local health reform efforts.⁶⁷

B. ERISA Preemption

1. *ERISA and Preemption: Background.* — The Employee Retirement Income Security Act of 1974 (“ERISA”) is a federal law governing “employee welfare benefit plan[s],”⁶⁸ which it defines as including, among other things, “medical, surgical, or hospital care or benefits, or benefits in

63. See, e.g., Oberlander, *supra* note 62, at w549 (describing “notions of employer responsibility”); see also The Bus. & Labor Coal. of N.Y. et al., *The Health Care Pulse of New York State Small Businesses 10* (2008), available at <http://www.balconyny.org/documents/REPORT%20SURVEY%20JUNE%204TH.pdf> (on file with the *Columbia Law Review*) (showing eighty-one percent of small business managers in New York say financing health coverage is shared responsibility of government, workers, and businesses).

64. Consider, for instance, Giant Food’s support for the Maryland Fair Share Act. See *infra* note 137.

65. See Heidi Whitmore et al., *Employers’ Views on Incremental Measures to Expand Health Coverage*, 25 *Health Aff.* 1668, 1670, 1672–73 (2006) (describing survey results where majority of employers who do not offer coverage agree that employers share responsibility to pay for coverage and support reforms which would require employers to make financial contributions for same); Miguel Bustillo & Janet Adamy, *Trade Group Challenges Wal-Mart on Health Care*, *Wall St. J.*, July 13, 2009, at A3 [hereinafter *Bustillo & Adamy, Trade Group*] (describing Wal-Mart’s support of national pay-or-play scheme which applies to its competitors as well).

66. See, e.g., Katherine Baicker & Helen Levy, *Employer Health Insurance Mandates and the Risk of Unemployment*, 11 *Risk Mgmt. & Ins. Rev.* 109, 118–19 (2008) (arguing pay-or-play puts many jobs at risk); Bustillo & Adamy, *Trade Group*, *supra* note 65 (describing opposition of National Retail Federation to national pay-or-play); Avery Johnson & Janet Adamy, *Businesses Worry About New Burdens*, *Wall St. J.*, July 16, 2009, at A6 [hereinafter *Johnson & Adamy, New Burdens*] (quoting Bruce Josten, Executive Vice President of U.S. Chamber of Commerce: “[Pay-or-play is] going to cost jobs. It’s pretty simple.”); Ken Jacobs & Jacob S. Hacker, *Univ. of Cal. Berkeley Labor Center, How to Structure a “Play-or-Pay” Requirement on Employers: Lessons from California for National Health Reform 14–16* (2009), at http://laborcenter.berkeley.edu/healthcare/pay_or_play09.pdf (on file with the *Columbia Law Review*) (describing opposition to pay-or-play in California from some employer organizations).

67. For a thorough review of arguments supporting pay-or-play, see Jacobs & Hacker, *supra* note 66, at 5–11.

68. Employee Retirement Income Security Act of 1974 (ERISA) § 3(1), 29 U.S.C. § 1002(1) (2006).

the event of sickness, accident, [or] disability.”⁶⁹ ERISA was enacted with two main goals in mind: (1) to protect employees by establishing administrative standards designed to prevent the mismanagement of funds held by ERISA plans,⁷⁰ and (2) to “ensure[] that the administrative practices of a benefit plan will be governed by only a single set of regulations.”⁷¹ Although some viewed this second goal as a tradeoff to entice business interests to support the new requirements,⁷² the “uniformity” objective was also designed to protect plan beneficiaries, even if indirectly.⁷³ By insulating employers from the burden of complying with fifty sets of state regulations, Congress expected to reduce administrative costs, allowing employers to pass these savings along to their workers through improved benefit packages.⁷⁴ However, ERISA only sets out general reporting and fiduciary requirements and does *not* mandate any set of minimum bene-

69. *Id.* Many commentators say that Congress—which was primarily concerned with pension plans—included health insurance plans in the ERISA framework at the last minute with little discussion. See *Standard Oil Co. v. Agsalud*, 442 F. Supp. 695, 711 (N.D. Cal. 1977) (“It troubles the Court . . . that Congress preempted state health insurance laws apparently without specific discussion of the need for such a step.”); Byron Done, *Health Care Reform and ERISA Preemption: Can the States Adopt Aspects of Germany’s Health Care System to Achieve Universal Access and Cost Containment?*, 18 *Hastings Int’l & Comp. L. Rev.* 745, 757–58 (1995) (describing addition of health benefits into ERISA’s scope as “after-thought”). But others have disputed whether Congress inadequately considered the preemption of state health plan regulation. See Michael S. Gordon, *Employee Benefit Research Inst., EBRI Issue Brief No. 135, The History of ERISA’s Preemption Provision and Its Bearing on the Current Debate over Health Care Reform 28-30* (1993), available at www.ebri.org/pdf/briefspdf/0393ib.pdf (on file with the *Columbia Law Review*) (recounting personal knowledge that legislators were well aware of ERISA’s effects on state health plan regulation).

70. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90–91 (1983) (discussing ERISA’s goal of promoting the interests of employees). To accomplish this goal, ERISA imposes rules regarding reporting, fiduciary duties, funding, vesting, and the like. *Id.*

71. *Port Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987).

72. During the floor debate over ERISA, Representative Dent said:

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.

120 Cong. Rec. 29,197 (1974) (statement of Rep. Dent); see also Phyllis C. Borzi, *There’s “Private” and Then There’s “Private”: ERISA, Its Impact, and Options for Reform*, 36 *J.L. Med. & Ethics* 660, 661 (2008) (calling deregulation of welfare plans “quid pro quo” for new regulation of pensions).

73. But cf. Mary Ann Chirba-Martin & Troyen A. Brennan, *The Critical Role of ERISA in State Health Reform*, 13 *Health Aff.* 142, 144 (1994) (calling ERISA preemption employer-favoring).

74. See Russell Korobkin, *The Battle Over Self-Insured Health Plans, or “One Good Loophole Deserves Another,”* 5 *Yale J. Health Pol’y L. & Ethics* 89, 93 (2005) (discussing ERISA’s supporters’ belief that employers would be more likely to offer benefits when not subjected to state regulation); Howard Shapiro et al., *ERISA Preemption: To Infinity and Beyond and Back Again? (A Historical Review of Supreme Court Jurisprudence)*, 58 *La. L. Rev.* 997, 999 (1998) (summarizing arguments favoring uniform national regulatory regime).

fits that employers must provide.⁷⁵ ERISA's goal of uniform national benefit plan administration is achieved through a preemption provision,⁷⁶ a tool commonly used by Congress to displace state or local law.

The Supreme Court and commentators speak of Congress's power to supplant state law either "expressly"—through a statutory provision—or "impliedly"—in the absence of such a provision.⁷⁷ Implied preemption supplants state laws that "conflict" with a federal law or regulation. This can affect individual state laws or an entire "field" of state law. The conflict that supplants state law may be direct, in the sense that it is "impossible" for a party to comply with both federal and state law at the same time,⁷⁸ or, more controversially, the conflict can arise when a state law presents an "obstacle" to the full purposes and objectives of a federal scheme.⁷⁹ This taxonomy, however, is not always particularly helpful as the categories are not "rigidly distinct"⁸⁰ and analytical approaches from one category may bleed into the others.⁸¹ Important for the context of

75. See *N.Y. State Confederation of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 651 (1995) ("[ERISA] does not . . . requir[e] employers to provide any given set of minimum benefits."); see also Chirba-Martin & Brennan, *supra* note 73, at 144 ("ERISA imposes virtually no substantive requirements regarding employee benefit plans.").

76. ERISA § 514(a), 29 U.S.C. § 1144(a) (2006).

77. Regarding the categorization of preemption, though each source uses slightly different taxonomy, see Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 724–29 (5th ed. 2003) (describing preemption generally); 1 Laurence H. Tribe, *American Constitutional Law* § 6-28, at 1176–77 (3d ed. 2000) (describing express, implied, and conflict preemption); Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 *Vand. L. Rev.* 1149, 1150–52 (1998) [hereinafter Jordan, *Preemption*] (introducing categories of preemption); Caleb Nelson, *Preemption*, 86 *Va. L. Rev.* 225, 226–29 (2000) (describing express, implied/field, and conflict preemption).

78. While this type of preemption is widely accepted, it is difficult to show in practice. See *Wyeth v. Levine*, 129 S. Ct. 1187, 1196–99 (2009) ("Impossibility pre-emption is a demanding defense."); see also Nelson, *supra* note 77, at 228 (calling "physical impossibility" preemption "vanishingly narrow").

79. For criticisms of "obstacle" (or "purposes and objectives") preemption, see, e.g., *Wyeth*, 129 S. Ct. at 1211 (Thomas, J., concurring) ("This Court's entire body of 'purposes and objectives' pre-emption jurisprudence is inherently flawed."); Nelson, *supra* note 77, at 265–90 (discussing "the failure of any general doctrine of 'obstacle' preemption").

80. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990) (conceding also that "field pre-emption may be understood as a species of conflict pre-emption"); see also Fallon et al., *supra* note 77, at 725–26 (explaining field preemption may be recharacterized as conflict preemption and vice versa, depending on how one defines "field" covered by federal law in question); Tribe, *supra* note 77, at 1177 (calling Court's three categories "anything but analytically airtight").

81. See Fallon et al., *supra* note 77, at 726–27 (noting express preemption provisions, (i) "do not preclude consideration of implied preemption," and (ii) "should be interpreted in light of implied preemption principles"); Jordan, *Preemption*, *supra* note 77, at 1152 ("[T]he Court as a whole agrees that an express preemption provision does not foreclose consideration of the implied preemption doctrines." (footnote omitted)); see also Tribe, *supra* note 77, at 1204 ("[L]abels like 'conflict' and 'field' preemption rarely offer much real help in the inherently difficult task that lies at the heart of preemption

this Note, the Court typically starts a preemption analysis with the presumption that federal law does not supplant state law, particularly in fields traditionally subject to state regulation, unless Congress demonstrates this intention clearly.⁸² This practice has come under some recent attacks in dissenting opinions⁸³ but still has never been directly repudiated by a majority of Justices.⁸⁴ But whatever the type of preemption being discussed, there is broad consensus that “[t]he purpose of Congress is the ultimate touchstone in every pre-emption case.”⁸⁵

ERISA’s express preemption provision,⁸⁶ § 514(a), provides that the provisions of ERISA “shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan.”⁸⁷ ERISA’s “savings clause” tempers this broad preemption provision, protecting the states’ continued power to regulate in the fields of “insurance, banking, or securities,”⁸⁸ even if such laws “relate to” employee benefit plans under § 514(a). ERISA’s “deemer clause”⁸⁹ then prevents a state from “deeming” self-insured employer health plans⁹⁰ as “insurance,” which might otherwise be subject to state regulation under the savings clause. Thus ERISA shields self-insured employer health plans—roughly half of all em-

analysis”); Nelson, *supra* note 77, at 260–64 (criticizing these distinctions on various grounds).

82. See, e.g., *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (applying presumption); see also Fallon et al., *supra* note 77, at 725 (discussing presumption against preemption). But see Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. Rev. 967, 971 (2002) (arguing that modern Court has, despite its statements otherwise, actually applied presumption *in favor of* preemption).

83. See *Altria*, 129 S. Ct. at 555–58 (Thomas, J., dissenting) (criticizing, in opinion signed by four Justices, use of presumption in context of express preemption); see also Nelson, *supra* note 77, at 290–303 (arguing against use of presumption); cf. *Wyeth*, 129 S. Ct. at 1208 n.2 (Thomas, J., concurring) (finding it “not necessary to decide whether . . . the presumption should apply in [the implied preemption context]”).

84. But cf. *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008) (finding preemption without use of presumption in analysis, but not specifically rejecting it either).

85. *Wyeth*, 129 S. Ct. at 1194, 1219 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (indicating consensus, both majority and principal dissenting opinion contain same quotation).

86. See *Tribe*, *supra* note 77, at 1211 n.34 (referring to ERISA preemption as express type).

87. ERISA § 514(a), 29 U.S.C. § 1144(a) (2006) (emphasis added). This express provision does not necessarily preclude the use of implied preemption analysis as well in the ERISA context. See *Boggs v. Boggs*, 520 U.S. 833, 844 (1997) (analyzing ERISA preemption relying on implied preemption principles instead of § 514(a)); Jordan, *Preemption*, *supra* note 77, at 1182–91 (discussing “leap” in *Boggs*); see also Fallon et al., *supra* note 77, at 727 (discussing *Boggs*); *supra* note 81 and accompanying text (discussing use of implied preemption analysis in presence of express clause).

88. 29 U.S.C. § 1144(b)(2)(A).

89. 29 U.S.C. § 1144(b)(2)(B).

90. See *supra* notes 39–40 and accompanying text (distinguishing self-insured from fully insured plans).

ployer-sponsored health insurance⁹¹—from the effects of state or local law. Since ERISA itself contains few substantive health requirements, this creates a “zone of employer autonomy” as to the structuring of self-insured plans.⁹² But by virtue of the savings clause, states may still regulate health insurance companies, including the policies that insurance companies sell to fully insured plans.⁹³

2. *ERISA Preemption: Leading Supreme Court Doctrine.* — The Court has consistently interpreted ERISA’s preemption provision—particularly its “relates to” language—as signaling a congressional intent for ERISA’s preemptive scope to be especially broad and sweeping.⁹⁴ State or local laws which affect ERISA benefit plans may be preempted, even if ERISA is entirely silent as to the subject of the law, and even if the law does not purport to regulate ERISA plans.⁹⁵ The Court’s ERISA preemption jurisprudence has remained largely insular, at least thus far, and preemption decisions from other contexts are rarely cited in ERISA cases.⁹⁶

The leading case in the Supreme Court’s current ERISA preemption line is *Shaw v. Delta Air Lines, Inc.*, in which the Court created a two-pronged test: “A law ‘relates to’ an employee benefit plan . . . if it has [1]

91. ERISA also does not cover health benefits offered by federal, state, and local government employers. 29 U.S.C. § 1003(b)(1). Experts estimate that 73 million individuals are covered by the types of self-insured plans that ERISA preemption shields from state regulation. William Pierron & Paul Fronstin, Employee Benefit Research Inst., EBRI Issue Brief No. 314, ERISA Preemption: Implications for Health Reform and Coverage 11 (2008), available at www.ebri.org/pdf/briefspdf/EBRI_IB_02a-20082.pdf (on file with the *Columbia Law Review*).

92. Edward A. Zelinsky, *Travelers*, Reasoned Textualism, and the New Jurisprudence of ERISA Preemption, 21 *Cardozo L. Rev.* 807, 840 (1999) [hereinafter Zelinsky, *Travelers*].

93. See *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985) (recognizing that self-insured plans will be immune from state regulation where private insurance sold to employers will not be, due to implications of deemer clause); see also Korobkin, *supra* note 74, at 92–98 (explaining structure of savings and deemer clauses).

94. *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 324 (1997) (noting that ERISA’s preemption is “clearly expansive,” has “broad scope,” is “deliberately expansive,” and is “conspicuous for its breadth” (citations omitted)); see also Karen A. Jordan, *Travelers Insurance: New Support for the Argument to Restrain ERISA Pre-emption*, 13 *Yale J. on Reg.* 255, 263 (1996) [hereinafter Jordan, *Travelers*] (noting that ERISA preemption extends beyond state laws aimed at subjects governed by ERISA).

95. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) (“[A] state law may ‘relate to’ a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. Pre-emption is also not precluded simply because a state law is consistent with ERISA’s substantive requirements.” (citations omitted)); see also Jordan, *Travelers*, *supra* note 94, at 263 (“ERISA may even pre-empt state laws that are consistent with ERISA’s substantive requirements.”).

96. But cf. *Boggs v. Boggs*, 520 U.S. 833, 844 (1997) (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992)) (applying “obstacle” preemption principles in ERISA context).

a connection with or [2] reference to such a plan.”⁹⁷ The *Shaw* Court stressed that “Congress used the words ‘relate to’ in § 514(a) in their broad sense,”⁹⁸ meaning that its preemptive force would be correspondingly broad. Thus, the New York law at issue in *Shaw*, which prohibited discrimination in benefit levels on the basis of pregnancy, was preempted because it “require[d] employers to pay employees specific benefits.”⁹⁹ Though the broad and literal approach of the *Shaw* Court was later tempered,¹⁰⁰ its two-pronged “connection with/reference to”¹⁰¹ test remains the starting point of modern ERISA preemption analysis.¹⁰²

The preemptive force of ERISA is broad but not universal, and the determination of whether a state law has an impermissible “connection with” ERISA plans—the first prong of the *Shaw* test¹⁰³—can be a delicate one. First, state laws that require employers to offer specific benefits, like the law at issue in *Shaw*, will be preempted as having a connection with ERISA plans.¹⁰⁴ Likewise, laws imposing new administrative burdens on benefit plans face difficult scrutiny. In *Egelhoff v. Egelhoff*, the Supreme Court struck down a law that affected the inheritance of certain ERISA

97. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96–97 (1983) (numbering added). The Court arrived at this test after looking to no higher authority than Black’s Law Dictionary. *Id.* at 98 n.16 (defining “relate” as “[t]o stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with” (quoting Black’s Law Dictionary 1158 (5th ed. 1979))).

98. *Id.* at 98.

99. *Id.* at 97.

100. See *infra* Part I.B.2 (describing later ERISA preemption cases). In fact, the *Shaw* court itself noted in a footnote that some state actions may not be preempted if their relation to ERISA plans is “too tenuous, remote, or peripheral.” *Shaw*, 463 U.S. at 100 n.21. But cf. *Jordan, Travelers*, *supra* note 94, at 268 (noting that only two Supreme Court cases prior to *Travelers* found the connection too remote to find preemption).

101. This Note focuses on the decisions of the Fourth Circuit in *Retail Indus. Leaders Ass’n v. Fielder*, 475 F.3d 180 (4th Cir. 2007), and the Ninth Circuit in *Golden Gate III*, 546 F.3d 639 (9th Cir. 2008). Since the Fourth Circuit never reached the “reference to” prong of the *Shaw* test—it found the law at issue preempted under the “connection with” prong—this Note largely disregards the “reference to” prong of the *Shaw* test. See 475 F.3d at 192 n.2 (stating that court did not reach issue of whether Maryland pay-or-play law contained a “reference to” an ERISA plan). Regarding the “reference to” prong of the *Shaw* test, see generally *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 130–31 (1992) (finding law “referred to” ERISA plans when it used ERISA plan benefit levels to define requirements for non-ERISA benefits).

102. See, e.g., *Golden Gate III*, 546 F.3d at 648 (“A law ‘relate[s] to’ a covered employee benefit plan for the purposes of § 514(a) if it [1] has a connection with or [2] reference to such a plan.” (quoting *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 324 (1997))); *Fielder*, 475 F.3d at 191 (“[A] state law ‘relates to’ an ERISA plan ‘if it has a connection with or reference to such a plan.’” (quoting *Shaw*, 463 U.S. at 97)); see also David Simon, Note, Fair Share at Health Care: Current ERISA Preemption Jurisprudence Paves the Way for Health Care Reform, 31 *Seton Hall Legis. J.* 497, 505 (2007) (referring to *Shaw* as seminal ERISA case).

103. This Note focuses only on the “connection with” prong of *Shaw*’s test. See *supra* note 101 (explaining).

104. See *supra* note 99 and accompanying text (describing result of *Shaw*).

benefits such as life insurance and retirement accounts.¹⁰⁵ The Court found that ERISA preempted the law even though it allowed an employer to opt out of its effect by simply stating such a desire on its plan documents.¹⁰⁶ Thus, both mandates on plan benefit structures and administrative requirements—even if minor—are likely to be preempted under the “connection with” prong of the *Shaw* test.

In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*¹⁰⁷ and *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*,¹⁰⁸ when faced with laws creating indirect economic influences on ERISA plans, the Court retreated from the literalist line of *Shaw*.¹⁰⁹ Discussing *Shaw*, the Court noted that “if ‘relate to’ were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for [r]eally, universally, relations stop nowhere.”¹¹⁰ The Court similarly rejected “uncritical literalism”¹¹¹ with respect to the “connection with” prong of the *Shaw* test: “For the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections.”¹¹² In place of the hard line drawn by *Shaw*, where a literal reading of the words “relate to” gave § 514(a) very strong preemptive force, *Travelers* and *Dillingham* produce a softer standard, instructing courts to “look instead to the objectives of the ERISA statute as a guide”¹¹³ to determine its preemptive scope.

Following this softened approach, laws which merely influence the decisions of plan administrators by altering the economic incentives they face—such as those at issue in *Travelers* and *Dillingham*—need not be preempted, so long as the influence is not too acute. In *Travelers*, the Court upheld a New York law that required hospitals to impose surcharges on patients covered by insurers other than Blue Cross & Blue Shield (“the

105. 532 U.S. 141 (2001). The law in question would have nullified the election of an ex-spouse to inherit certain nonprobate assets—including ERISA benefits such as employer-provided life insurance policies, annuities, and retirement accounts—in case of divorce before death. *Id.* at 144.

106. The Court held that “[t]he statute is not any less of a regulation of the terms of ERISA plans simply because there are two ways of complying with it.” *Id.* at 150.

107. 514 U.S. 645 (1995).

108. 519 U.S. 316 (1997).

109. See Tribe, *supra* note 77, at 1211 n.34 (describing *Travelers* and *Dillingham* as “constru[ing] ERISA preemption a bit more narrowly” than *Shaw*); Jordan, *Travelers*, *supra* note 94, at 261 (noting *Travelers* sends “a signal for judicial restraint when determining whether state laws are preempted by ERISA”); Zelinsky, *Travelers*, *supra* note 92, at 831 (calling it “beyond peradventure” that the *Travelers* test “cannot be found in *Shaw* or its progeny”).

110. *Travelers*, 514 U.S. at 655 (quoting Henry James, Roderick Hudson, at xli (New York ed., World’s Classics 1980) (1875)). Or, as Justice Scalia described the problem in *Dillingham*: “[A]s many a curbstone philosopher has observed, everything is related to everything else.” *Dillingham*, 519 U.S. at 335 (Scalia, J., concurring).

111. *Travelers*, 514 U.S. at 656.

112. *Id.*

113. *Id.*

Blues”).¹¹⁴ While the law “ma[d]e the Blues more attractive . . . and thus ha[d] an indirect economic effect on choices made by insurance buyers,”¹¹⁵ the Court held that such an “indirect economic influence [did] not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan.”¹¹⁶ Likewise, in *Dillingham*, the Court upheld a California law that produced an economic incentive for local apprenticeship programs to comply with state regulations in addition to ERISA.¹¹⁷ As in *Travelers*, a state law which “alter[ed] the incentives, but d[id] not dictate the choices, facing ERISA plans”¹¹⁸ was not preempted. *Travelers* and *Dillingham* therefore weakened the *Shaw* standard by saving from preemption state laws that merely influence the decisionmaking of ERISA plan managers.¹¹⁹

In *De Buono v. NYSA-ILA Medical and Clinical Services Fund*, the Court reaffirmed that its traditional presumption against preemption¹²⁰ applies

114. *Id.* at 649. The law was part of an effort to compensate the Blues for their historical position as a nonprofit open enrollment insurer, which may have made its client population less healthy than that of other insurers. *Id.* at 658. Today, though not at the time, New York has a “guaranteed issue/community rating” system which precludes health insurers from refusing to issue policies to potential clients based on their health status and sharply restricts the criteria that insurers can use in setting their prices. See N.Y. Ins. Law § 4317 (McKinney 2008).

115. *Travelers*, 514 U.S. at 659.

116. *Id.* The *Travelers* court, though, added an important caveat to this rule: “[A] state law might produce such acute, albeit indirect, economic effects [as to be] preempted under § 514 [of ERISA].” *Id.* at 668.

117. At the time of the case, California, like many states, required local prevailing wages to be paid on state-funded construction projects. *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 319 (1997). The law in question allowed an exception to this prevailing wage law for employees who were enrolled in a state-approved apprenticeship program. *Id.* In this way, the law provided “some measure of economic incentive” for apprenticeship programs, which do fall under ERISA, to comply with state regulations. *Id.* at 332.

118. *Id.* at 334.

119. Outside of the ERISA context, there has also been some limited debate over the effect of preemption on state laws that do not directly compel behavior at odds with federal legislation. See, e.g., *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 554 (2008) (Thomas, J., dissenting) (describing position of Scalia’s dissent in *Cipollone* that “[t]he test for preemption in this setting should be one of practical compulsion, i.e., whether the law practically compels . . . behavior that Congress has barred the States from prescribing directly” (quoting *Cipollone v. Liggett*, 505 U.S. 504, 555 (1992))). However, courts have widely recognized the possibility of preemption of state tort claims, which do not technically “compel” anything since a defendant may continue its behavior so long as it pays tort claims. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 886 (2000) (holding that federal motor vehicle safety standards preempted state tort claim against Honda based on lack of airbags); Marc A. Franklin et al., *Tort Law and Alternatives* 503 (8th ed. 2006) (“Virtually every court confronted with the question has read ‘requirement’ in preemption statutes to include common law tort liability.”).

120. See *supra* notes 82–84 and accompanying text (discussing presumption against preemption).

“unequivocally”¹²¹ to ERISA preemption jurisprudence as well. In that case, the Court saved from preemption a new tax on hospitals, which happened to affect a hospital operated by an ERISA plan,¹²² stressing that where a regulation “operates in a field that ‘has been traditionally occupied by the States’ . . . [those challenging the statute] bear the considerable burden of overcoming ‘the starting presumption that Congress does not intend to supplant state law.’”¹²³ This tax on hospitals, the Court went on to conclude, was “one of ‘myriad state laws’ of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not ‘relate to’ them within the meaning of the governing statute.”¹²⁴ This presumption rationale asks courts to err on the side of allowing a state law to stand when its “relation to” ERISA plans is ambiguous.¹²⁵

II. ERISA PREEMPTION AS APPLIED TO PAY-OR-PLAY SCHEMES: BACKGROUND AND CRITICISM

Are employer pay-or-play schemes preempted by ERISA? Are they mandates which dictate requirements for employer-sponsored health plans?¹²⁶ Or do they merely alter the economic incentives facing such plans?¹²⁷ If they merely alter incentives, then is this influence too acute to survive preemption? Do these schemes occupy an area of traditional state regulation, thus giving rise to a presumption against preemption?¹²⁸ Part II.A summarizes the approaches taken by the Fourth and Ninth Circuits in evaluating pay-or-play schemes in Maryland and San Francisco, respectively. Part II.B highlights the sum total of these approaches: that the critical test is the extent to which the scheme leaves employers with a

121. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 (1997) (interpreting *Travelers*); see also *Travelers*, 514 U.S. at 654–55 (discussing “starting presumption that Congress does not intend to supplant state law . . . in fields of traditional state regulation”).

122. The challenger in this case was a self-insured, multiemployer benefit plan composed primarily of longshoremen, which operated medical centers for its members and their dependants. *De Buono*, 520 U.S. at 810.

123. *Id.* at 814 (quoting *Travelers*, 514 U.S. at 654; *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985)).

124. *Id.* at 815 (quoting *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr. N.A., Inc.*, 519 U.S. 316, 333–34 (1997); *Travelers*, 514 U.S. at 668).

125. The battle over the applicability of the presumption against preemption, see *supra* note 83 and accompanying text, is a relatively recent phenomenon. See *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 555–58 (2008) (Thomas, J., dissenting) (pointing out that *Lohr*, decided in 1996, “predates the Court’s recent jurisprudence on the topic,” and relying heavily on *Reigel*, decided in 2008, in arguing against use of presumption). It will be interesting to see if this battle finds its way into the Court’s next ERISA preemption case. But in any case, this is a battle that the presumption has survived so far.

126. See *supra* notes 104–106 and accompanying text (describing *Shaw* and *Egelhoff*).

127. See *supra* notes 114–119 and accompanying text (describing *Travelers* and *Dillingham*).

128. See *supra* notes 120–125 and accompanying text (describing *De Buono*).

“meaningful alternative”¹²⁹ other than increasing its health benefits. Part II.C introduces the unconstitutional conditions doctrine as an example of another doctrine that relies on a similar analytic framework and also discusses some common criticisms of this type of approach. Finally, Part II.D argues that the coercion inquiry in the ERISA preemption context is susceptible to the same criticisms.

A. *Two Recent Decisions: Fielder and Golden Gate*

Maryland and San Francisco each recently enacted pay-or-play schemes that were challenged as preempted by ERISA and resulted in appellate court decisions.¹³⁰ This section examines these statutes and the resulting judicial opinions.

1. *Maryland “Fair Share Act” and Fielder.* — In an attempt to deal with Maryland’s health insurance coverage problems,¹³¹ the Maryland legislature passed the Fair Share Health Care Fund Act (“Fair Share Act” or “Act”) on January 12, 2006. This pay-or-play scheme would require covered employers to spend at least “8% of the total wages paid to employees in the State on health costs,” or else pay a tax of “an amount equal to the difference between what the employer spends for health insurance costs and an amount equal to 8%” of the covered employer’s in-state payroll.¹³² “Health insurance costs” for the purposes of the Act are defined as any expenditures deductible under § 213(d) of the Internal

129. *Golden Gate III*, 546 F.3d 639, 659–60 (9th Cir. 2008).

130. The only other pay-or-play scheme to attract an ERISA challenge was that of Suffolk County, New York. The Eastern District of New York found it preempted just six months following the Fourth Circuit’s decision on the Maryland law, and the county did not appeal. The court’s reasoning there followed that of the Fourth Circuit very closely. See *Retail Indus. Leaders Ass’n v. Suffolk County*, 497 F. Supp. 2d 403, 415–18 (E.D.N.Y. 2007) (describing legal standard of Fourth Circuit then applying it).

131. Health coverage statistics in Maryland resemble those in America as a whole. Approximately fourteen percent of Maryland’s population—just under 800,000 individuals, including over 150,000 children—is uninsured, and sixty-one percent of Maryland’s population—just under 3,400,000 individuals—is covered through employer-sponsored insurance. See Kaiser Family Found., *State Health Facts, Maryland: Health Insurance Coverage of the Total Population (2007)*, available at <http://www.statehealthfacts.org/profileind.jsp?ind=125&cat=3&rgn=22> (on file with the *Columbia Law Review*) (regarding total uninsured population); Kaiser Family Found., *State Health Facts, Maryland: Health Insurance Coverage of Children 0–18 (2007)*, available at <http://www.statehealthfacts.org/profileind.jsp?ind=127&cat=3&rgn=22> (on file with the *Columbia Law Review*) (regarding uninsured children). Regarding national statistics, see *supra* Part I.A.2.

132. Md. Code Ann., Lab. & Empl. § 8.5-104(b) (LexisNexis 2008). Payments were to be dedicated for the sole purpose of supporting Maryland’s Medical Assistance Program, which includes both Medicaid and its children’s health insurance programs. Md. Code Ann., Health-Gen § 15-142 (LexisNexis 2008); *Retail Indus. Leaders Ass’n v. Fielder*, 475 F.3d 180, 185 (4th Cir. 2007).

Revenue Code,¹³³ which includes expenditures on both ERISA¹³⁴ and non-ERISA items.¹³⁵ “Covered employers” are defined by the Act as those with 10,000 or more employees in the state.¹³⁶ Only four employers fit this description at the time, but loopholes in the law meant that only one of the companies, Wal-Mart, would have to change its current practices to comply with the Act.¹³⁷

The Retail Industry Leaders Association, a trade group of retailers of which Wal-Mart is a member, challenged the Fair Share Act as being preempted by ERISA. Upholding the District Court’s decision, the Fourth Circuit held¹³⁸ that the Fair Share Act “effectively require[d]” covered employers to increase their contributions to ERISA plans.¹³⁹ While the Act technically may have left employers compliance options other than increasing ERISA plan spending, these options were dismissed as “not meaningful alternatives.”¹⁴⁰ The employers’ option of paying a tax in lieu of increasing health spending was dismissed based on the court’s conclusion that “the only rational choice”¹⁴¹ for employers presented with these alternatives would be to increase ERISA spending. It reasoned that increased ERISA spending would bring advantages such as “improved retention and performance of present employees and the ability to attract more and better new employees,”¹⁴² while companies electing

133. Md. Code Ann., Lab. & Empl. § 8.5-101 (LexisNexis 2008).

134. Health insurance costs would include, for instance, direct reimbursements of employees’ medical costs from an employer’s self-insured fund, which is clearly governed by ERISA.

135. Health insurance costs would also include, for example, the maintenance of on-site medical clinics for employees and their families, as well as contributions to health employees’ health savings accounts, neither of which is governed by ERISA.

136. Md. Code Ann., Lab. & Empl. § 8.5-102 (LexisNexis 2008); *Felder*, 475 F.3d at 184.

137. *Felder*, 475 F.3d at 185 (noting only four employers had at least 10,000 employees). The four employers with more than 10,000 employees in Maryland were Wal-Mart, Giant Food, Northrop Grumman, and Johns Hopkins University. As a nonprofit, Johns Hopkins was subject to a reduced minimum health expenditure rate of six percent of payroll, which it already met at the time. Giant Food, a long-unionized supermarket, already met the eight percent health spending requirement, and in fact lobbied for the Act’s passage. Northrop Grumman, which has many higher-paid employees, was saved by an amendment to the Act which excluded all salary paid above the median income in Maryland from the base of calculation of the eight percent minimum expenditure amount. So only one employer, Wal-Mart, which had roughly 16,000 employees in Maryland and spent less than eight percent of wages on health care, was left immediately affected by the Act’s passage. *Id.*

138. The three-judge circuit panel was split 2–1. A dissenting opinion, with largely opposite conclusions as to ERISA preemption, was authored by Judge Michael. *Id.* at 198 (Michael, J., dissenting).

139. *Id.* at 183 (majority opinion).

140. *Id.* at 196. The court based this largely on its conclusion that “the vast majority of any employer’s healthcare spending occurs through ERISA plans.” *Id.*

141. *Id.* at 193.

142. *Id.*

to pay the tax “would gain nothing.”¹⁴³ The Act’s narrow scope of applicability allowed the court to reject the notion that it was subject to the presumption against preemption available to laws of “general applicability” of the type at issue in *De Buono*.¹⁴⁴ Since the Act left no “reasonable” or “rational” alternatives other than increasing ERISA spending, the court viewed it as a requirement—analogueous to *Shaw* and *Egelhoff*¹⁴⁵—rather than a mere incentive-altering rule—comparable to *Travelers* and *Dillingham*.¹⁴⁶ As such, the Act was preempted by ERISA as having an impermissible “relat[ion] to”¹⁴⁷ ERISA plans under the “connection with” prong of the *Shaw* test.¹⁴⁸

2. *San Francisco Health Care Security Ordinance and Golden Gate*. — With its passage of the San Francisco Health Care Security Ordinance (the “Ordinance”) in July of 2006,¹⁴⁹ the City of San Francisco took a slightly different approach than Maryland had taken with its Fair Share Act. The Ordinance creates Healthy San Francisco (HSF),¹⁵⁰ a city-administered health care program available to uninsured residents of San Francisco.¹⁵¹ It also establishes medical reimbursement accounts to serve those who work in San Francisco but live elsewhere and those who are already insured.¹⁵² The Ordinance also includes an “Employer Spending Requirement,” which mandates that covered employers spend a fixed minimum amount on health care for every hour of their covered employees’ work.¹⁵³ Like the Fair Share Act, the Ordinance outlines several

143. *Id.*

144. *Id.* at 194. Regarding *De Buono*, see *supra* notes 120–124 and accompanying text.

145. *Fielder*, 475 F.3d at 195–96 (“The tighter causal link between the regulation and employers’ ERISA plans makes the Fair Share Act much more analogueous to the regulations at issue in *Shaw* and *Egelhoff* . . .”).

146. *Id.* (“[T]he laws involved in *Travelers* and *Dillingham* are inapposite . . .”).

147. ERISA § 514(a), 29 U.S.C. § 1144(a) (2006).

148. *Fielder*, 475 F.3d at 197; see also *supra* Part I.B.2 (regarding *Shaw* test).

149. *Golden Gate III*, 546 F.3d 639, 642 (9th Cir 2008).

150. Healthy San Francisco used to be known as the Health Access Plan (or HAP) and is referred to as such in the judicial opinions cited. *Id.* at 642 n.1.

151. HSF is not exactly an insurance product. Its members are entitled to treatment at San Francisco General Hospital and twenty-seven participating clinics. HSF does not, for instance, reimburse its members for medical costs incurred outside of San Francisco, even for emergency treatment. For a general description of Healthy San Francisco, see Healthy San Francisco, *Healthy San Francisco: Program In-Depth* (2008), available at http://www.healthysanfrancisco.org/files/PDF/HSF_Program_In-Depth.pdf (on file with the *Columbia Law Review*) [hereinafter, HSF In-Depth]; Kaiser Comm’n on Medicaid and the Uninsured, Kaiser Family Found., *Healthy San Francisco* (2008), available at <http://www.kff.org/uninsured/upload/7760-02.pdf> (on file with the *Columbia Law Review*).

152. *Golden Gate III*, 546 F.3d at 645. The medical reimbursement accounts hold money deposited on behalf of the employee and reimburse that employee on submission of qualifying receipts for medical expenses. See Healthy San Francisco, *Medical Reimbursement Accounts*, at http://www.healthysanfrancisco.org/employees/Medical_Reimbursement_Accounts.aspx (last visited Sept. 9, 2009) (on file with the *Columbia Law Review*).

153. “Covered employees” are defined as persons who are entitled to receive minimum wage, have been employed for at least ninety days, S.F., Cal., Admin. Code

types of qualifying health-related expenses, including ERISA and non-ERISA options.¹⁵⁴ Any employer not spending sufficient funds on the other options is forced to make up the difference by increasing its payments to the City, which are used to fund HSF and medical reimbursement accounts.¹⁵⁵ Covered employees of employers that choose to pay the City may enroll in HSF at reduced rates, so long as they are eligible uninsured San Francisco residents;¹⁵⁶ otherwise they are eligible for medical reimbursement accounts with the City. This feature of providing a benefit to employers that chose to “pay” (to the City) rather than “play” (by increasing health spending) has led one commentator to describe it as a “pay-plus-or-play” model.¹⁵⁷ These requirements are supported by an annual obligation for covered employers to report information on the

§ 14.1(b)(2) (2007), and work for a San Francisco employer for at least eight hours per week. S.F., Cal., Admin. Code § 14.1(b)(2)(c) (reducing minimum working hours in covered employee definition from ten hours in 2008 to eight hours in 2009). Through December 2009, employers with between twenty and ninety-nine covered employees are required to spend at least \$1.23 per man-hour of these employees on health-related expenses, while employers with 100 or more covered employees are required to spend at least \$1.85 per hour. *Id.* § 14.1(b)(8)(b). Nonprofits with fewer than fifty employees are exempt from the requirement. *Id.* § 14.1(b)(3). As of January 1, 2010 the minimum expenditure amounts will increase to \$1.31 and \$1.96 per hour. See Healthy San Francisco, Employers: Health Care Security Ordinance (HCSO) Compliance, at http://www.healthysanfrancisco.org/employers/HCSO_Compliance.aspx (last visited Sept. 9, 2009) (on file with the *Columbia Law Review*).

154. S.F., Cal., Admin. Code § 14.1(b)(7); see also *Golden Gate III*, 546 F.3d at 644 (summarizing qualifying health expenditures under Ordinance).

155. See City & County of S.F., Office of Labor Standards Enforcement, Regulations Implementing the Employer Spending Requirement of the San Francisco Health Care Security Ordinance (HCSO), Reg. 4.2(A) (2007), available at http://www.sfgov.org/site/uploadedfiles/olse/hcso/HCSO_Final_Regulations.pdf (on file with the *Columbia Law Review*) (listing qualified employer health expenditures including payments to City to fund programs).

156. The fee schedule for membership in Healthy San Francisco in 2008 was as follows:

Quarterly Participation Fees to Healthy San Francisco						
	Income as Percent of Federal Poverty Level					
	0– 100%	101– 200%	201– 300%	301– 400%	401– 500%	501+%
Quarterly Participant Fee	\$0	\$60	\$150	\$300	\$450	\$675
Fee as Percent of Income	0%	2.30%	2.90%	3.90%	4.40%	5.20%
Discounted Employee Fee*	\$0	\$0	\$0	\$75	\$113	\$169

*Amount paid by an eligible HSF participant working for an employer electing to fulfill its spending requirements through payments to HSF. HSF In-Depth, *supra* note 151, at 9–10 tbl.1.

157. Brian P. Goldman, Note, The San Francisco Health Care Security Ordinance: Universal Health Care Beyond ERISA’s Reach?, 19 *Stan. L. & Pol’y Rev.* 361, 375 (2008).

hours worked by covered employees and health care expenditures for those employees.¹⁵⁸

The Ninth Circuit surprised many when it overturned the Northern District of California's decision and allowed the Ordinance to go into effect.¹⁵⁹ A unanimous Ninth Circuit panel found that, unlike the Maryland Fair Share Act, the San Francisco Ordinance merely alters the incentives of ERISA plan managers and is therefore permissible under *Travelers* and *Dillingham*.¹⁶⁰ In reaching this conclusion, the court emphasized that health care—particularly for the poor—“has long been the province of state and local governments.”¹⁶¹ Consequently, the court held that the Ordinance enjoyed a presumption against preemption like the law at issue in *De Buono*.¹⁶² The court then proceeded to focus on the voluntary nature of any employer's decision to increase health benefit spending following the enactment of the Ordinance:

The Ordinance does not require any employer to adopt an ERISA plan or other health plan. Nor does it require any employer to provide specific benefits through an existing ERISA plan or other health plan. Any employer covered by the Ordinance may fully discharge its expenditure obligations by making the required level of employee health care expenditures,

158. See City & County of S.F., Office of Labor Standards Enforcement, Regulations Implementing the Employer Spending Requirement of the San Francisco Health Care Security Ordinance (HCSO), Reg. 7.3 (2007), available at http://www.sfgov.org/site/uploadedfiles/olse/hcso/HCSO_Final_Regulations.pdf (on file with the *Columbia Law Review*) (“Covered employers shall provide information to the City regarding its health care expenditures on an annual basis [using] the HSCO Mandatory Annual Reporting Form”); see also City & County of S.F., Office of Labor Standards Enforcement, Health Care Security Ordinance (HCSO)—Mandatory Annual Reporting for 2008, available at <http://www.sfgov.org/site/uploadedfiles/olse/hcso/REVISED,%20city%20sf%20labor%20hcso%202008%20fillable.pdf> (on file with the *Columbia Law Review*) (providing one-page required annual reporting form); City & County of S.F., Office of Labor Standards Enforcement, Instructions for the HSCO Annual Reporting Form, available at <http://www.sfgov.org/site/uploadedfiles/olse/hcso/Annual%20Reporting%20Form%20Instructions.pdf> (on file with the *Columbia Law Review*) (providing general and line-by-line instructions for completing required annual form).

159. See, e.g., Jesse McKinley, Judges Say San Francisco Can Charge Employers for its Health Plan, *N.Y. Times*, Oct. 1, 2008, at A27 (reporting various reactions to ruling). The Northern District's decision was issued December 26, 2007. *Golden Gate I*, 535 F.Supp.2d 968 (N.D. Cal. 2007). Parts of the Ordinance were scheduled to go into effect on January 1, 2008; the Ninth Circuit held oral argument regarding the issuance of a stay on January 3, 2008 and issued the stay on January 9, 2008. *Golden Gate II*, 512 F.3d 1112 (9th Cir. 2008) (ordering stay of district court decision). The final decision on the merits, largely mirroring the reasoning of the stay, was issued September 30, 2008. *Golden Gate III*, 546 F.3d 639. A rehearing en banc was denied on March 9, 2009. *Golden Gate IV*, 558 F.3d 1000 (9th Cir. 2009). The Restaurant Association petitioned for certiorari on June 5, 2009. Petition for Writ of Certiorari, *supra* note 14.

160. *Golden Gate III*, 546 F.3d at 656 (“In this case, the influence exerted by the Ordinance is even less direct than the influence in *Travelers*.”).

161. *Id.* at 648.

162. *Id.* at 647 (“We begin by noting that state and local laws enjoy a presumption against preemption when they ‘clearly operate[] in a field that has been traditionally occupied by the States.’” (quoting *De Buono v. NYSA-ISA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997))).

whether those expenditures are made in whole or in part to an ERISA plan, or in whole or in part to the City.¹⁶³

The decision also held that the Ordinance imposed no significant administrative burdens on ERISA plans, as employers were equally affected by its administrative requirements whether or not they had an ERISA plan.¹⁶⁴ Since the Ordinance does not *require* employers to alter their ERISA plan benefits or administration, the Ninth Circuit reasoned, it does not “relate to” ERISA plans under the “connection with” prong of the *Shaw* test.¹⁶⁵

B. Reading *Golden Gate* and *Fielder* Together: The Focus on “Meaningful Choice”

Although the Fourth Circuit and Ninth Circuit seem to have reached opposite conclusions on very similar fact patterns, the Ninth Circuit clearly states that it disagrees with any contention that it created a circuit split.¹⁶⁶ The *Golden Gate* court avoided direct contradiction with the Fourth Circuit by emphasizing a factual difference between the Maryland Act and the San Francisco Ordinance. While “‘the choices given in the [Maryland Act] . . . are not meaningful alternatives’”¹⁶⁷ to increasing ERISA spending, the court said that “[i]n contrast to the Maryland [Act], the San Francisco Ordinance provides tangible benefits to employees [by allowing them to join HSF at reduced rates] when their employers choose to pay the City rather than to establish or alter ERISA plans.”¹⁶⁸ The Ordinance thus presents a meaningful alternative and does not compel employers to alter their ERISA spending. This is not to say that the two

163. *Id.* at 655–56.

164. *Id.* at 657 (arguing that Ordinance’s administrative burdens operate “on the employer rather than on an ERISA plan”).

165. Of course, in order to avoid preemption, the Ordinance also could not have an impermissible “reference to” ERISA plans under the second prong of the *Shaw* test. See *id.* at 657–59 (discussing “reference to” prong of *Shaw* test). Somewhat peculiar to this set of facts, in order to find against preemption the court also had to defeat the argument that the Ordinance created an ERISA plan through the city payment option or through its creation of HSF. *Id.* at 648–54 (discussing whether Ordinance created ERISA plan through city payment option or HSF). This Note only discusses the *Golden Gate* court’s analysis of the “connection with” prong of the *Shaw* test since other issues create no potential conflict with the *Fielder* decision.

166. *Id.* at 659 (“The Association contends that we will create a circuit split if we uphold the Ordinance. We disagree.”). Many contend otherwise. See, e.g., *Golden Gate IV*, 558 F.3d 1000, 1004–10 (9th Cir. 2009) (Smith, J., dissenting from denial of rehearing en banc) (“[T]he panel’s decision [to allow the Ordinance to stand] conflicts with [*Fielder*].”); Petition for Writ of Certiorari, *supra* note 14, at 15–20 (arguing same); cf. Edward A. Zelinsky, Employer Mandates and ERISA Preemption in the Ninth Circuit, 47 *St. Tax Notes* 603, 609–15 (2008) (comparing Fourth Circuit’s preemption analysis to that of Ninth Circuit’s stay opinion).

167. *Golden Gate III*, 546 F.3d at 660 (quoting *Retail Indus. Leaders Ass’n v. Fielder*, 475 F.3d 180, 196 (4th Cir. 2007)).

168. *Id.* Regarding the HSF membership discounts for workers whose employers are paying the City tax, see *supra* note 156.

circuits' analyses do not differ in other ways.¹⁶⁹ But the *Golden Gate* court took special pains to address the *Fielder* decision directly in a separate section of its opinion that focused solely on its conclusion that the benefit offered to employers electing to pay the tax—the “plus” part of the Ordinance’s “pay-plus-or-play” model¹⁷⁰—left employers with a “meaningful alternative” to increasing ERISA benefits, while the Fair Share Act did not.¹⁷¹ Though the *Golden Gate* court specifically declined to adopt the *Fielder* “meaningful alternative” framework,¹⁷² the court preserved the framework’s importance by singling this out as the distinguishing dimension of the Ordinance which would have saved it even under the *Fielder* court’s test.

Thus a court which wants to follow both the *Golden Gate* and *Fielder* analyses is left with a seemingly simple inquiry to determine whether or not a local pay-or-play law has an impermissible “connection with” ERISA plans: Laws like the San Francisco Ordinance that leave covered employers with “legitimate alternative[s] to establishing or altering ERISA plans”¹⁷³ are permitted, while laws akin to the Maryland Fair Share Act that coerce employers by “leav[ing] ERISA plan purchasers ‘with a Hobson’s choice’ . . . amounting to an impermissible substantive mandate”¹⁷⁴ are preempted.

C. Doctrine of Unconstitutional Conditions: Background and Criticism

The *Fielder* and *Golden Gate* courts’ impulse to look into the coercive nature of a pay-or-play scheme should look familiar, as courts often look into the coercive nature of parties’ behavior.¹⁷⁵ Part II.C.1 develops the background of the “unconstitutional conditions” doctrine, in which courts determine whether a government may use its power and resources—through conditional financial incentives or disincentives—to influence people, companies, or states in ways that may undermine their

169. For instance, they took different approaches as to the administrative burdens imposed by the laws in question. Compare *Golden Gate III*, 546 F.3d at 657 (finding that Ordinance did not impose impermissible administrative burdens on ERISA plans), with *Fielder*, 475 F.3d at 197 (finding Act would “deny Wal-Mart the uniform nationwide administration of its healthcare plans”).

170. As to the term “pay-plus-or-play,” see *supra* note 157 and accompanying text.

171. *Golden Gate III*, 546 F.3d at 659–61 (addressing *Fielder* decision directly).

172. *Id.* at 659 (“We neither adopt nor reject the analysis of the Fourth Circuit in *Fielder*.”).

173. *Id.* at 660 (citing *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 664 (1995)).

174. *Id.* (quoting *Travelers*, 514 U.S. at 664).

175. Besides the “unconstitutional conditions” doctrine discussed in this Part, two other doctrines that use the concept of coercion readily come to mind. First, the doctrine of duress from contract law makes contracts voidable when assent is “induced by an improper threat . . . that leaves the victim no reasonable alternative.” Restatement (Second) of Contracts § 175 (1981). Second, the doctrine of duress from criminal law excuses a perpetrator’s act when compelled under the use (or threat of use) of unlawful force. See, e.g., Model Penal Code § 2.09(1) (1985).

constitutional rights. Part II.C.2 describes the strong and common criticism that identifying coercion in this context has led to an arbitrary doctrine, ill-designed for consistent judicial application, with little predictive power when new sets of facts are presented.

1. *The Doctrine of Unconstitutional Conditions.* — Unconstitutional conditions questions arise when the government ties taxes or subsidies to conditions which implicate constitutional rights.¹⁷⁶ For instance, it may be that federal and state governments cannot ban abortion,¹⁷⁷ but can they encourage pregnant women to carry pregnancies to term by funding childbirth benefits through Medicaid but refusing to fund abortions?¹⁷⁸ It may also be that the federal government cannot set a national minimum drinking age,¹⁷⁹ but can it encourage states to raise their drinking ages to twenty-one by threatening to withhold federal highway subsidies from states that refuse to comply?¹⁸⁰ These are classic unconstitutional conditions problems.

The Supreme Court initially took an extremely deferential approach to this type of government action, arguing that the “greater power” to withhold a benefit in its entirety—and the government is constitutionally compelled to provide very few benefits—surely includes the “lesser power” to withhold a benefit conditionally.¹⁸¹ Eventually, though, the Court recognized that this could not be entirely true.¹⁸² Clearly the gov-

176. Kathleen Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev 1413, 1421–28 (1989) (outlining components of unconstitutional conditions problem). As Sullivan stresses, it is important that both elements—the conditional benefit *and* the implicated constitutional right—be present to raise this type of case. “Many conditions are attached to government offers of benefits, and many aspects of government benefit offers are unconstitutional, but not every instance of either presents an unconstitutional conditions problem.” *Id.* at 1421; see also Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Colum. L. Rev. 321, 325 (1935) (describing principle concerns of doctrine of unconstitutional conditions).

177. See, e.g., *Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (outlining conditions under which state is precluded from interfering with woman’s right to have abortion).

178. See *Maher v. Roe*, 432 U.S. 464, 474 (1977) (holding that government may subsidize childbirth and refuse to subsidize nontherapeutic abortion); see also *Harris v. McRae*, 448 U.S. 297, 316–17 (1980) (extending *Maher* holding to context of refusal to subsidize certain medically necessary abortions).

179. U.S. Const. amend. XXI; cf. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980) (“The Twenty-first Amendment grants the States virtually complete control over . . . how to structure the liquor distribution system.”).

180. See *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (holding that federal government may encourage states to increase drinking age through conditional funding, even assuming Twenty-First Amendment bars Congress from doing so directly).

181. This now-discredited argument can be traced to Justice Holmes, who famously ruled that a policeman could be fired for violating rules restricting his political speech: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

182. See Geoffrey R. Stone et al., *Constitutional Law* 1642 (5th ed. 2005) (describing doctrine of “greater power” including “lesser power,” and noting that “[e]ventually the Court concluded that this position was too broad”); Seth F. Kreimer, *Allocational*

ernment could not, for instance, limit access to federally funded highways to persons with certain political views.¹⁸³ The doctrine of unconstitutional conditions attempts to draw the line between permissible and impermissible conditional government grants which implicate constitutional rights.¹⁸⁴

A few cases regarding abortion and political speech provide a good illustration of the modern shape of the doctrine. The Supreme Court has repeatedly said that conditional spending only becomes constitutionally problematic when it is sufficiently coercive.¹⁸⁵ For the most part, this has led to a test under which “penalizing” the exercise of constitutional rights is barred, while merely “refusing to subsidize” constitutionally protected behavior is acceptable.¹⁸⁶ Thus, in striking down a California statute which required veterans to sign an oath of allegiance to the United States in order to qualify for a property tax exemption,¹⁸⁷ the majority in *Speiser v. Randall* pointed out that “[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to *penalize* them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.”¹⁸⁸ Likewise, in upholding the government policy of granting Medicaid benefits for childbirth but denying them for nontherapeutic abortions, the majority in *Maher v. Roe* dismissed the argument “that the State ‘*penalizes*’ the woman’s decision to have an abortion by refusing to pay for it,” and highlighted the “basic difference between direct state interference with a protected activity and state encouragement of an alternative activity.”¹⁸⁹ In unconstitutional conditions cases, distinguishing between penalties and refusals to subsidize¹⁹⁰ is the critical first

Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293, 1310–11 (1984) (calling doctrine of greater includes the lesser “deeply flawed”); William W. Van Astyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439, 1458–63 (1968) (criticizing and describing weakening of Holmes’s doctrine).

183. See Stone et al., *supra* note 182, at 1642 (describing similar hypothetical as unacceptable).

184. See *supra* note 176 and accompanying text.

185. Sullivan, *supra* note 176, at 1428.

186. See, e.g., *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983) (“[A] legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.”); *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980) (“A refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.”); see also Stone et al., *supra* note 182, at 1643–44 (stating government has no obligation to subsidize protected activities); cf. *Maher v. Roe*, 432 U.S. 464, 475 (1977) (“There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.”).

187. 357 U.S. 513, 514–15 (1958).

188. *Id.* at 518 (emphasis added). Similarly, in *Shapiro v. Thompson*, 394 U.S. 618, 627–33 (1969), the Court held that welfare rules restricting benefits for new arrivals in a state acted as a penalty against those who had exercised their right to travel interstate.

189. *Maher*, 432 U.S. at 475 & n.8 (emphasis added).

190. Some have referred to this as the “benefit/burden distinction.” Stone et al., *supra* note 182, at 1638. Others have referred to this as distinguishing “threats” from

step toward determining whether a conditional spending policy is sufficiently coercive to be unconstitutional.¹⁹¹

2. *Criticisms of the Unconstitutional Conditions Doctrine.* — The unconstitutional conditions doctrine has been widely criticized because of the difficulty of consistently distinguishing between penalties and refusals to subsidize, stemming from the need to first establish a baseline of government neutrality from which to judge.¹⁹² For instance, the dissent in *Speiser* disagreed with the majority's classification of withholding a tax exemption as a "penalty."¹⁹³ If the status quo is a world with property taxes, then a tax exemption looks like a subsidy.¹⁹⁴ Indeed, in other contexts, Supreme Court majorities have deemed the withholding of tax exemp-

"offers." Kreimer, *supra* note 182, at 1352–59. Still others have referred to this as distinguishing "subsidies from penalties." Cass Sunstein, *The Partial Constitution* 299 (1993) [hereinafter Sunstein, *Partial Constitution*].

191. Sunstein, *Partial Constitution*, *supra* note 190, at 298 (calling this distinction the "constitutional mainstream"); Sullivan, *supra* note 176, at 1439–42 (noting that "penalty/nonsubsidy distinction has increasingly determined the outcomes of unconstitutional conditions challenges"). This is a bit of an oversimplification, as other factors may influence the Court's determination as well, especially in isolated types of cases. For example, the Court often looks to the germaneness of a condition, or the extent to which the condition supports the same interests which gave rise to the power to withhold a benefit in its entirety. See, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836–37 (1987) (holding conditional grant of building permit only valid if conditions support interests which gave rise to power to withhold permit completely). Also, for cases where conditional grants affect the speech rights of organizations, the Court is concerned with whether the scheme allows those organizations to segregate their subsidized from nonsubsidized activities and continue with both. For a review of other factors of potential interest to the Court, see Stone et al., *supra* note 182, at 1642–48.

192. See, e.g., Sunstein, *Partial Constitution*, *supra* note 190, at 301–05 (arguing that unconstitutional conditions doctrine is an anachronism because baseline of government neutrality is outdated concept); Sullivan, *supra* note 176, at 1489 (arguing that difficulty of baseline drawing plagues unconstitutional conditions doctrine); Cass Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. Rev. 593, 601–04 (1990) [hereinafter Sunstein, *Anachronism*] (same).

193. *Speiser*, 357 U.S. at 541 (classifying tax exemption as instance of "legislative largesse") (Clark, J., dissenting). The dissenting opinion also declared that "California's action here, declining to extend the grace of the State to appellants, can in no proper sense be regarded as a 'penalty.'" *Id.*

194. The notion that granting relief from tax obligation is a form of government spending is well established. See, e.g., *Stanley S. Surrey & Paul R. McDaniel, Tax Expenditures* 3 (1985) ("Whatever their form, these [exclusions, deductions, deferrals, credits, and special rates] represent government spending for favored activities or groups, effected through the tax system rather than through direct grants, loans, or other forms of government assistance."). Professor Sullivan considers the special case of conditional tax exemptions as falling into a "twilight zone," but concludes that she agrees with the Court-acknowledged principle that exemptions normally have the same economic effects as subsidies, and thus may be treated alike. Sullivan, *supra* note 176, at 1424–25. But cf. Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 *Stan. L. Rev.* 1103, 1123 (1987) (recognizing that many tax benefits are indistinguishable from grants, but noting that the two have often been treated as politically and constitutionally different).

tions to be noncoercive refusals to subsidize.¹⁹⁵ The dissent in *Maher* also disagreed with the majority's classification of selectively funding childbirth but not abortion as a mere refusal to subsidize.¹⁹⁶ If the baseline is a world with government benefit programs like Medicaid to subsidize medical expenses, then withholding funding for an abortion seems like penalizing that choice.¹⁹⁷ And indeed, in other contexts, Supreme Court majorities have deemed selective refusals to provide government benefits as coercive "penalties."¹⁹⁸

While some commentators have suggested tools to improve the Court's ability to distinguish coercive from noncoercive conditions,¹⁹⁹ others have suggested that the endeavor is doomed. Professor Kathleen Sullivan has argued that the focus on coercion is "unsustainable . . . [because] any useful conception of coercion is irreducibly normative. Without a theory of autonomy, utility, fairness, or desert, one cannot tell when choice has been wrongfully constrained."²⁰⁰ Professor Cass Sunstein has

195. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983) ("Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system.").

196. The dissenters first noted that "[the majority's] conclusion is based on the perceived distinction, on the one hand, between the imposition of criminal penalties for the procurement of an abortion . . . and, on the other, the assertedly lesser inhibition imposed by the Connecticut scheme [at issue here]," *Maher v. Roe*, 432 U.S. 464, 485 (1977) (Brennan, J., dissenting), and then went on to argue that "[f]or a doctor who cannot afford to work for nothing, and a woman who cannot afford to pay him, the State's refusal to fund an abortion is as effective an 'interdiction' of it as would ever be necessary." *Id.* (internal quotation marks omitted) (quoting *Singleton v. Wulff*, 428 U.S. 106, 118–19 n.7 (1976) (Blackmun, J., plurality opinion)).

197. Sunstein, *Partial Constitution*, *supra* note 190, at 299 (making same point with respect to *Harris*).

198. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (holding that denying unemployment benefits to Saturday Sabbath worshipers "pressure[d]" them, in the same manner as a "fine," not to practice religion).

199. Professor Seth Kreimer has suggested that impermissible "threats" may be distinguished from permissible "offers" in that threats decrease the range of choices available to the target, while offers increase the choices available. He has proposed three approaches—using "history," "equality," or "prediction"—to determine the necessary baseline. Kreimer, *supra* note 182, at 1353–74. Professor Mitchell Berman has proposed a "three-dimensional" analysis of the effects, purpose, and conduct associated with a conditional subsidy in order to determine its constitutionality. Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 *Geo. L.J.* 1, 15–19 (2001) (arguing Constitution can supply norms necessary to identify wrongful coercion).

200. Sullivan, *supra* note 176, at 1428. Later, she asserts that "coercion depends on a normative baseline from which to measure an increase or decrease in one's options, but in the world of gratuitous government benefits, such baselines elude definition." *Id.* at 1489. To support her conclusions, she draws on numerous philosophical accounts of coercion, including a classic account by Robert Nozick. *Id.* at 1448–49 & n.142. See generally Robert Nozick, *Coercion*, in *Philosophy, Science, and Method* 440 (Sidney Morgenbesser et al. eds., 1969).

Other doctrines discussed in note 175 *supra*, which also seek to identify coercive behavior, avoid this problem of normative debate by focusing only on *unlawful* threats as

argued that identifying coercive conditions by distinguishing penalties from refusals to subsidize is an “anachronism” in a modern welfare state in which government support is a widely accepted baseline under many circumstances.²⁰¹ Professors Sullivan and Sunstein are only two of the more prominent voices among a chorus of commentators that criticize the Court’s unconstitutional conditions doctrine. The coercion test, they argue, has proven arbitrary and ill designed for judicial management, rarely producing a clear or predictable result when applied to a new set of facts.²⁰²

D. *The Focus on Coercion in the ERISA and Pay-or-Play Context is Subject to the Same Criticisms as the Unconstitutional Conditions Doctrine*

Part II.D.1 expressly draws the analogy between the unconstitutional conditions doctrine and the approach to “meaningful alternatives” espoused by the *Fielder* and *Golden Gate* courts. Part II.D.2 argues that the coercion standard, if followed by others, will produce an unpredictable doctrine, subject to many of the same criticisms that have been leveled against the unconstitutional conditions doctrine.

1. *Unconstitutional Conditions and the Fielder/Golden Gate Standard: Drawing the Analogy.* — In both the unconstitutional conditions and pay-or-play contexts, courts are asked whether governments are circumventing limits on their power and regulating in fields beyond their reach, using conditional financial incentives as a tool to achieve objectives that affect the exercise of rights. In the unconstitutional conditions context,

potentially coercive. See Model Penal Code § 2.09(1) (1985) (limiting duress defense to cases where actor was “coerced . . . by the use of, or a threat to use, unlawful force”); Restatement (Second) of Contracts § 176 (1981) (defining “improper” threat as crime or tort, in addition to other limited special circumstances). This approach is not available in the unconstitutional conditions context since courts are evaluating acts of Congress, which can only be unlawful if unconstitutional. To say that only unlawful (i.e., unconstitutional) laws are coercive, and that only coercive laws are unconstitutional (i.e., unlawful), is obviously no help.

201. Sunstein, *Partial Constitution*, supra note 190, at 301; Sunstein, *Anachronism*, supra note 192, at 601–04. Sunstein is also a co-author of the *Stone Constitutional Law* textbook, which argues that it is “hard to know” when we have a “mere failure to subsidize” as opposed to an “impermissible penalty.” Stone et al., supra note 182, at 1644.

202. See, e.g., Sunstein, *Partial Constitution*, supra note 190, at 291 (“The various puzzles in the [unconstitutional conditions] doctrine have produced considerable confusion and a wide range of commentary.”); Berman, supra note 199, at 3 (“Regrettably, more than a century of judicial and scholarly attention to the [unconstitutional conditions] problem has produced few settled understandings.”); Kreimer, supra note 182, at 1396 (calling past approaches “flawed”); Rosenthal, supra note 194, at 1120 (“Th[e] topic [of unconstitutional conditions] has had a long and convoluted history, and the general principles that have evolved from that history are seldom useful in solving specific cases.”); Sullivan, supra note 176, at 1416 (“As applied . . . the doctrine of unconstitutional conditions is riven with inconsistencies.”).

the limits on federal government power arise from the Constitution,²⁰³ and the financial incentives are often conditional subsidies or tax exemptions.²⁰⁴ The rights affected in the unconstitutional conditions context may be, for instance, individuals' rights to abortion²⁰⁵ or political speech.²⁰⁶ In the ERISA preemption context, the limits on state government power are rooted in the preemption provision of ERISA—a federal, and thus superior, law—which prevents state regulation of ERISA plans.²⁰⁷ The financial incentives take the form of a tax credit provided to firms that spend sufficiently on their employees' health care.²⁰⁸ The right implicated in the ERISA context is the employer's right, granted to it by ERISA, to be immune from the effects of state or local regulations that relate to their benefit plans.²⁰⁹ Critically, both the unconstitutional conditions and ERISA preemption doctrines concentrate on the coercive effect of a conditional incentive on a rightholder in order to determine the permissibility of the condition.²¹⁰

This is not to say that the analogy between the two doctrines is perfect, for they clearly serve different underlying purposes. The unconstitutional conditions doctrine prevents the federal government from wrongly circumventing constitutional limits on its power, and such constitutional limits are in place to protect interests such as individual liberty, equality, political self-determination, etc.²¹¹ The ERISA preemption doctrine, in contrast, prevents state governments from wrongly circumventing limits on their power that arise from a federal law, and these limits are designed

203. See Sullivan, *supra* note 176, at 1421–22 (describing unconstitutional conditions problems as implicating activities protected from government interference by constitutional rights).

204. See *supra* Part II.C.1 (summarizing financial incentives used in several unconstitutional conditions cases).

205. See, e.g., *Maher v. Roe*, 432 U.S. 464, 465–66 (1977) (regarding selective funding of childbirth but not nontherapeutic abortion); *supra* notes 189, 196 and accompanying text; see also *Harris v. McRae*, 448 U.S. 297, 301–03 (1980) (regarding refusal to fund certain medically necessary abortions).

206. See, e.g., *Speiser v. Randall*, 357 U.S. 513, 518 (1958) (regarding right to refuse to sign oath of allegiance); *supra* notes 187, 193, and accompanying text; see also *Rust v. Sullivan*, 500 U.S. 173, 192 (1991) (regarding right of family planning counselors to discuss abortion with clients).

207. ERISA § 514(a), 29 U.S.C. § 1144(a) (2006).

208. See *supra* note 59 and accompanying text (describing pay-or-play schemes).

209. Cf. Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 *Colum. L. Rev.* 233, 239–40 (1991) (describing preemption, including ERISA preemption, as federally-created right to immunity from state regulation).

210. While the *Golden Gate* court did not use the word “coercion” explicitly in its decision, it is clearly more than hinting at the concept as it repeatedly contrasts concepts such as “meaningful alternatives,” “legitimate alternative[s],” “realistic alternatives,” and “choice[s],” with “irresistible incentive[s],” “effective[] mandate[s],” “Hobson’s choice[s],” and “comp[ulsion].” *Golden Gate III*, 546 F.3d 639, 659–60 (9th Cir. 2008) (citations omitted).

211. See Sunstein, *Partial Constitution*, *supra* note 190, at 291 (“The purpose of the [unconstitutional conditions] doctrine is to limit the power of government to affect constitutional rights by using its resources to pressure people to do what it wants.”).

to protect interests associated with the efficient management of multistate businesses.²¹² Admittedly, this difference in purpose may lead courts to draw the line for coercion at different places in these different contexts.²¹³ The need to draw a line somewhere, though, remains. This Note argues that drawing the line for coercion consistently and predictably in the ERISA preemption context will be difficult for the same reasons that it has been difficult in the unconstitutional conditions context.²¹⁴ For this purpose, the imperfect analogy suffices.

2. *Identifying “Coercive” Schemes Will Be as Problematic in ERISA Preemption Context as It Has Been in Unconstitutional Conditions Context.* — Just as government economic coercion has been difficult to define and identify in the unconstitutional conditions context, so too will it be in the ERISA preemption context. Recall that the *Golden Gate* and *Fielder* decisions, read together, seek to invalidate as preempted those pay-or-play schemes that coerce employers by leaving them with no “legitimate alternative[s]”²¹⁵ other than increasing ERISA spending.²¹⁶

An ERISA analysis which borrows from unconstitutional conditions jurisprudence—by invalidating those schemes which penalize employers who do not provide health coverage and permitting those schemes which merely refuse to subsidize those employers²¹⁷—would be unsuccessful. Practically any pay-or-play scheme can be characterized either way. If one imagines a baseline world in which the state is providing little health care to its citizens, and is thus not taxing employers for this purpose, then a new tax on firms not offering coverage certainly seems like a coercive penalty.²¹⁸ An alternative baseline world, however, can be envisioned in which the state has committed to providing health coverage to the uninsured, and thus needs to finance this commitment. A payroll tax²¹⁹ is

212. See *supra* notes 71–74 and accompanying text (discussing goals of ERISA).

213. Though beyond the scope of this Note, one could conceivably argue that the bar for coercion should be set lower with regard to fundamental constitutional liberties, to the extent that one could argue that these rights are deserving of more vigilant judicial protection than are economically-oriented rights such as those granted employers under ERISA preemption.

214. For criticisms of the application of the unconstitutional conditions doctrine, see *supra* note 202. Both doctrines also share the weakness that attempting to single out *unlawful* threats as those which may be wrongfully coercive, as adopted in the doctrines of duress from criminal law and contract law, will be fruitlessly circular. See *supra* notes 175, 200 (explaining why focus on unlawful threats has been helpful in some contexts but will not be in others).

215. *Golden Gate III*, 546 F.3d at 660 (citing N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 664 (1995)).

216. See *supra* Part II.B (describing holding of *Golden Gate* in light of *Fielder*).

217. See *supra* Part II.C (describing unconstitutional conditions doctrine).

218. Of Professor Kreimer’s three approaches to defining baselines, see *supra* note 199, this probably fits best with the “historical” approach: If there was no payroll tax last year, and also no obligation to provide health care to employees, then a new pay-or-play scheme seems more threat-like in that an employer’s options will have been reduced.

219. As opposed to other methods such as, for example, income or sales taxes.

certainly within its discretion as the preferred method to raise funds.²²⁰ In this baseline world, the government's provision of health care to all citizens, whether or not their employers offer coverage, certainly looks like a subsidy to noncovering employers. Thus any attempt to make noncovering employers bear their burden can easily be classified as a refusal to subsidize their decision not to offer coverage.²²¹ Because the proper baseline cannot always be drawn clearly, an approach to ERISA preemption that looks to distinguish coercive penalties from noncoercive refusals to subsidize is unlikely to help.²²²

The ambiguity surrounding the permissibility of Massachusetts's pay-or-play scheme under a coerciveness inquiry further reveals the deficiencies of this type of doctrinal framework. The Massachusetts Act Providing Access to Affordable, Quality, Accountable Health Care (the "Massachusetts Health Reform Law" or the "Law"), enacted in 2006, includes a pay-or-play component which requires employers with eleven or more employees to make a "fair and reasonable" contribution to their employees' health coverage costs, or else pay a "Fair Share Contribution"²²³ to the state not to exceed \$295 per employee per

220. The payroll tax standing on its own, of course, is not the problem. Different states have different payroll taxes. See, e.g., Comm. on Ways & Means, U.S. House of Representatives, 2004 Green Book: Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means 4-28-4-32 (2004), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_green_book&docid=f:wm006_04.pdf (on file with the *Columbia Law Review*) (describing differing state taxes on payroll to support unemployment insurance). The potential problem with a payroll tax in the pay-or-play context is the *conditional* credit which may coerce employers into increasing health benefit spending, an action which a state cannot mandate directly because of ERISA's preemptive force.

221. Again referring back to Kreimer's three approaches, see *supra* notes 199, 218, this probably best fits the "predictive" approach: If an expensive expansion of public health coverage is a real government interest, then a payroll tax is a plausible way to raise the money, and it can be argued that some sort of new payroll tax would be in the works whether or not the government had the power to impose the condition. Under that conception, the conditional credit is a choice-enhancing "offer."

222. This is not to say that the *Golden Gate* or *Fielder* courts adopted an approach based on distinguishing penalties from refusals to subsidize, for they did not. Though the *Fielder* court did use the language of "fee[s]" and "penalt[ies]," *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 194 (4th Cir. 2007), the *Golden Gate* court instead focused on saving "pay-plus-or-play" schemes which offer "tangible benefits" to employers electing to pay the tax. *Golden Gate III*, 546 F.3d 639, 660 (9th Cir. 2008); see also *supra* note 157 and accompanying text (regarding "pay-plus-or-play"). This is different than distinguishing penalties from refusals to subsidize.

223. Mass. Gen. Laws ch. 149, § 188 (2008). Effective January 1, 2009, an employer with fifty or fewer employees is deemed to have made a "fair and reasonable" contribution if either: (i) twenty-five percent or more of the firm's Massachusetts employees are enrolled in the employer's health plan, or (ii) the firm offers to pay at least thirty-three percent of the cost of premiums of a group health plan offered to full time employees. Employers with more than fifty employees must meet both tests, unless at least seventy-five percent of its full time employees are enrolled in the firm's health plan. 114.5 Mass. Code Regs. 16.03 (2008), available at http://www.mass.gov/Elwd/docs/dua/114_5_16.doc (on file with the *Columbia Law Review*).

year.²²⁴ Though the scheme has not yet been challenged in court,²²⁵ commentators have argued persuasively on both sides of the debate as to whether or not it is preempted by ERISA.²²⁶ Those arguing that the scheme's pay-or-play element is preempted have typically focused on the penalty-like nature of the Fair Share Contribution.²²⁷ In contrast, those arguing against preemption have focused on the relatively minor \$295 annual per employee penalty, an option which some "reasonable employer[s]"²²⁸ may rationally elect in lieu of providing coverage that could be far more costly.²²⁹ The heart of this debate thus pits those who con-

224. See 114.5 Mass. Code Regs. 16.04, available at http://www.mass.gov/Elwd/docs/dua/114_5_16.doc (on file with the *Columbia Law Review*) (regarding calculation of Fair Share Contribution). The Massachusetts health reform that included the pay-or-play scheme also altered the state's health system in several other significant ways. For instance, it enacted an "individual mandate" which requires all individuals to buy insurance if affordable coverage is available; established a "Connector" to help match individual insurance buyers with companies offering credible coverage; enacted a "cafeteria plan requirement" which mandates that employers offer so-called cafeteria plans which allow employees to buy coverage with pre-tax dollars, or else face the possibility of paying a "Free Rider Surcharge"; funded new subsidies allowing residents earning less than 300% of the federal poverty level to purchase affordable insurance based on a sliding price scale. For general information on the reform package as a whole, see Kaiser, Massachusetts, *supra* note 57; Marcia S. Wagner & Barry M. Newman, Will ERISA Preemption Derail Massachusetts Health Care Reform?, 23 *Tax Mgmt. Fin. Plan. J.* 143, 144-45 (2007); Edward A. Zelinsky, The New Massachusetts Health Law: Preemption and Experimentation, 49 *Wm. & Mary L. Rev.* 229, 235-45 (2007) [hereinafter Zelinsky, Massachusetts].

225. The reasons why no court challenge has materialized is a mystery to many, but a few commentators have offered their theories. See Joan Indiana Rigdon, Universal Health Care?, *Wash. Law.*, Aug. 2008, available at http://www.dcbbar.org/for_lawyers/resources/publications/washington_lawyer/august_2008/universal_health.cfm (on file with the *Columbia Law Review*) (advancing theories for lack of challenge, including: manner in which employers were involved in initial negotiation of the reform; employers' fear that challenge would provoke federal reform; small size of \$295 penalty; or pro-business groups' reluctance to stain Mitt Romney's résumé); Brian Rossman, When You Got Nothing, You Got Nothing to Lose: Fair Share and ERISA, Health Care for All, A Healthy Blog, Sept. 9, 2008, at <http://blog.hcfama.org/?p=1842> (on file with the *Columbia Law Review*) (advancing other theories, including employers' fear of creating adverse precedent with unfavorable test case).

226. For a concise summary of the arguments on both sides of the debate, see Jon O. Shimabukuro & Jennifer Staman, Cong. Research Serv., Legal Issues Relating to State Health Care Regulation: ERISA Preemption and Fair Share Laws 11-15 (2008), available at http://assets.opencrs.com/rpts/RL34637_20080826.pdf (on file with the *Columbia Law Review*).

227. See, e.g., Wagner & Newman, *supra* note 224, at 147-49 (arguing Massachusetts pay-or-play scheme would fail ERISA preemption challenge); Zelinsky, Massachusetts, *supra* note 224, at 253-67 (same).

228. *Golden Gate III*, 546 F.3d 639, 659-60 (9th Cir. 2008) (quoting *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 193 (4th Cir. 2007)).

229. See, e.g., Amy B. Monahan, Pay or Play Laws, ERISA Preemption, and Potential Lessons from Massachusetts, 55 *U. Kan. L. Rev.* 1203, 1213-20 (2007) (arguing Massachusetts' "weak" pay-or-play provision not preempted); Anthony Ten Haagen, Note, Surviving Preemption: The Importance of Chapter 58 in the Context of America's Health Care Crisis, 33 *Am. J.L. & Med.* 663, 670-81 (2007) (arguing against preemption on several

tend that *all* penalties are coercive against those who contend that *some* penalties, if small enough, need not be. The problem is that neither the definition of a coercive scheme provided by *Golden Gate* and *Fielder*,²³⁰ nor the definition of overly “acute” economic influence from *Travelers* and *Dillingham*,²³¹ dictate a clear outcome to this debate. The public is left wondering what a court might say should the Massachusetts scheme ever be challenged, and policymakers are left wondering whether they should use it as a model.²³²

This Note criticizes an approach to ERISA preemption which focuses on the coercive nature of pay-or-play schemes not because it is unfaithful to ERISA,²³³ but *only* because such an approach is ill-suited for consistent and predictable judicial application. In this context, the need for a clear rule is apparent. Dozens of states and localities have proposed or adopted pay-or-play schemes in the past several years,²³⁴ and countless more are considering their health reform options. These legislators need a clear rule with *predictive* power so that they can know what is permissible *before* the conclusion of drawn-out litigation.²³⁵ As Justice Cardozo once observed in the unconstitutional conditions context:

grounds, including “legitimate choices” offered by scheme). In striking down the Maryland Fair Share Act, the District Court of Maryland made a point to express “no opinion” as to whether the Massachusetts scheme would be preempted. *Retail Indus. Leaders Ass’n v. Fielder*, 435 F. Supp. 2d 481, 496 n.15 (D. Md. 2006).

230. See *supra* Part II.B (regarding *Golden Gate* and *Fielder*).

231. See *supra* notes 107–118 (regarding *Travelers* and *Dillingham*).

232. The potential for inconsistent outcomes is further evidenced by the dissent from denial of an en banc rehearing in the *Golden Gate* case, where eight Ninth Circuit judges were able to argue persuasively that the San Francisco Ordinance was in fact coercive, and scholars have persuasively argued the same as well. *Golden Gate IV*, 558 F.3d 1000, 1006–07 (9th Cir. 2009) (Smith, J., dissenting from denial of rehearing en banc) (“A currently non-complying employer in San Francisco has the same choice as a non-complying employer in Maryland . . .”); see also Edward Zelinsky, *Golden Gate III: San Francisco’s Health Care Security Ordinance*, 52 St. Tax Notes 559, 568–69 (2009) (discussing dissent from denial of rehearing and agreeing that *Golden Gate* conflicts with *Fielder* with regard to coercion). The dissenter in *Fielder* also disagreed with the majority’s conclusion that the Maryland Act was coercive. *Fielder*, 475 F.3d at 201–04 (Michael, J., dissenting) (“Under the Act employers have the option of either paying an assessment or increasing ERISA plan health insurance. This choice is real.”). While close cases will appear in all legal doctrines, it is disconcerting that the coercion approach seems to have made close cases out of the only two that have been considered at the appellate level, in addition to the so-far unchallenged Massachusetts scheme.

233. In fact, this approach seems to be drawn directly from the reasoning of *Travelers* and *Dillingham*. See *supra* Part I.B (regarding ERISA preemption). This reasoning is also not far from the “practical compulsion” standard advocated by Scalia with respect to the preemption of state tort claims. See *supra* note 119 (discussing effect of preemption on state tort claims).

234. See *supra* note 19 and accompanying text.

235. See, e.g., Borzi, *supra* note 72, at 665–66 (noting that after *Golden Gate*, states are left “unsure what, if anything, they are permitted to do without violating ERISA, yet under enormous pressure to act”); Peter D. Jacobson, *The Role of ERISA Preemption in Health Reform: Opportunities and Limits* 10 (O’Neill Inst. For Nat’l and Global Health Law Scholarship, Paper 27 2009), available at <http://scholarship.law.georgetown.edu/>

[E]very rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible.²³⁶

To the extent that a new rule can be fashioned which avoids these “endless difficulties,” while remaining at least *as* faithful to the letter and spirit of ERISA, it will be superior to an unpredictable inquiry into coercion.

III. A NEW APPROACH TO PAY-OR-PAY ERISA PREEMPTION ANALYSIS: FOCUS ON SAVING SCHEMES WHICH BUTTRESS COMPREHENSIVE HEALTH REFORM INITIATIVES

Future courts should eschew the *Fielder* and *Golden Gate* coercion analysis for assessing the permissibility of pay-or-play schemes and adopt a doctrinal framework that applies a presumption against preemption of pay-or-play schemes which are imbedded in broad-based, comprehensive health reform legislation. Such an approach will produce an outcome at least as faithful to ERISA and better suited for consistent application than a judicial inquiry into coercion. In order to protect ERISA’s uniform regulatory regime, this presumption should be rebuttable if a state law can be shown to impose new administrative burdens or substantive mandates on ERISA plans. Part III.A outlines statutory, doctrinal, and policy rationales in support of this approach. Next, Part III.B describes how courts can identify such nonpreempted schemes. Finally, Part III.C applies this approach to the Maryland Fair Share Act, the San Francisco Health Care Security Ordinance, and the Massachusetts Health Reform Law, demonstrating the predictable nature of the inquiry.

A. *Pay-or-Play Schemes Designed to Finance Comprehensive Health Reform Should Not Be Preempted by ERISA*

The text and spirit of ERISA, Supreme Court precedent, and numerous policy considerations all support a doctrine requiring courts to apply a presumption against preemption when evaluating pay-or-play schemes which are embedded in comprehensive, broad-based health reforms. This presumption should be rebutted if a scheme imposes significant ad-

ois_papers/27 (on file with the *Columbia Law Review*) (noting that, after *Golden Gate*, lower courts are likely to struggle with ERISA preemption analysis, and that in the meantime “state and local health reform efforts will remain in ERISA limbo (otherwise known as purgatory)”; Rossman, *supra* note 225 (discussing reluctance to reform in face of uncertainty as to ERISA challenge).

236. *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 589–90 (1937). In *Steward Machine*, the Court examined a federal scheme that imposed a new federal tax on firms but allowed them a credit for all taxes paid to federally-approved state unemployment funds. While this clearly created incentives for states to establish unemployment insurance systems that met federal standards, Cardozo’s majority decided that an inquiry into the strengths of these incentives would be fruitless. *Id.*

ministrative burdens or substantive mandates on plan managers and thereby conflicts with ERISA's core goal of national uniformity.

Though § 514(a)—ERISA's preemption provision—clearly creates a “zone of employer autonomy,”²³⁷ in structuring health plans, the statute gives no indication that it was ever intended to preclude states from enacting a wide range of comprehensive health reforms aimed at covering the uninsured. After all, ERISA itself has little if anything to say about the provision of health care and health insurance to Americans.²³⁸ It thus seems unlikely that Congress intended to block states from pursuing the goal of covering uninsured citizens, leaving behind a regulatory vacuum.²³⁹ Since pay-or-play schemes can be an important part of comprehensive reform,²⁴⁰ an interpretation of ERISA that preempts *all* pay-or-play schemes—even those with little effect on ERISA plan administration—extends the scope of ERISA preemption far beyond the scope of ERISA itself.²⁴¹

A presumption against preemption for comprehensive health reforms is also well grounded in Supreme Court precedent.²⁴² The Court

237. Zelinsky, *Travelers*, supra note 92, at 840; see also supra Part I.B.1 (regarding ERISA goal of uniform regulation and ERISA preemption framework).

238. See supra note 75 and accompanying text (regarding limited scope of ERISA to administrative issues).

239. In *Travelers*, the Supreme Court relied on similar logic when concluding in dicta that numerous hospital quality and employment standards must not be preempted by ERISA, even though they affect plans. ERISA itself does not include such regulation, the Court reasoned, so Congress could not have intended to displace these state laws, leaving a regulatory void in its wake. See *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 660–62 (1995) (regarding assumed nonpreemption of many hospital regulations which would affect ERISA plan pricing); cf. *Associated Builders & Contractors v. Mich. Dep't of Labor & Econ. Growth*, 543 F.3d 275, 282–83 (6th Cir. 2008) (arguing presumption against ERISA's intention to create regulatory vacuums helps save state regulations of apprenticeship programs from preemption).

240. See Part I.A.3 supra (regarding attractive features of pay-or-play schemes).

241. See Borzi, supra note 72, at 663 (arguing that broad ERISA preemption makes any state level health reform with broad-based financing affecting employers “very difficult, if not practically impossible”). But consider the history of Hawaii's admittedly comprehensive Prepaid Health Care Act, passed in the same year as ERISA. It was initially struck down as preempted, see *Standard Oil Co. v. Agsalud*, 633 F.2d 760, 763 (9th Cir. 1980), *aff'd*, 454 U.S. 801 (1981), but Congress eventually amended ERISA to specifically exempt Hawaii's reform. ERISA preempted Hawaii's health reform, and that reform was certainly comprehensive. But Hawaii's plan was substantially different from the pay-or-play schemes discussed in this Note. It imposed substantive mandates directly on employer health plans, requiring them, for instance, to cover treatment for drug and alcohol abuse. For general background on Hawaii's health system and ERISA waiver, see generally Sylvia A. Law, *Health Care in Hawaii: An Agenda for Research and Reform*, 26 *Am. J.L. & Med.* 205 (2000).

242. See supra notes 82–83 and accompanying text (regarding presumption against preemption). This is not to say that an inquiry into coercion is not also based in Supreme Court precedent. Such an inquiry seems to follow from the *Travelers* and *Dillingham Courts'* focus on how directly or acutely a questioned regulation affects ERISA plan management. See *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 332–34 (1997) (regarding strength of economic incentives in question);

has stated repeatedly—and reaffirmed recently²⁴³—that laws of “general applicability”²⁴⁴ in fields traditionally subject to state regulation are presumed to withstand a preemption challenge unless Congress has clearly stated its intention to displace them.²⁴⁵ In the ERISA preemption context, the applicability of this doctrine is discussed in both *Travelers*²⁴⁶ and *Dillingham*,²⁴⁷ and then confirmed “unequivocally”²⁴⁸ in *De Buono*. Furthermore, numerous judicial opinions have recognized that the provision of health care and insurance, particularly to the poor, is a traditional state province.²⁴⁹ While § 514(a) clearly calls for broad preemption²⁵⁰—one observer has suggested that it even creates a presumption *in favor of* preemption²⁵¹—the need to resolve close cases at the margin does not disappear: It is at this point that the Court’s traditional presumption becomes useful. The *Golden Gate* and *Felder* courts both recognized this line of judicial precedent, though the *Golden Gate* court instead chose to distinguish the Maryland scheme solely on the basis of its coerciveness.²⁵² Had the *Golden Gate* court distinguished the two laws on the basis of whether they are laws of “general applicability” subject to a presumption against preemption, it would have been on equally firm doctrinal ground.

Travelers, 514 U.S. at 668 (same). It also does not stray far from Scalia’s “practical compulsion” standard. See *supra* note 119 and accompanying text (regarding same).

243. *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (applying presumption explicitly in face of dissent).

244. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 815 (1997) (citing *Dillingham*, 519 U.S. at 333–34; *Travelers*, 514 U.S. at 668).

245. See, e.g., *Rice*, 331 U.S. at 230 (describing “assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”); see also *supra* notes 82–83 and accompanying text (discussing presumption against preemption).

246. *Travelers*, 514 U.S. at 668 (discussing “myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate”).

247. *Dillingham*, 519 U.S. at 334 (“We could not hold pre-empted a state law in an area of traditional state regulation based on so tenuous a relation without doing grave violence to our presumption that Congress intended nothing of the sort.”).

248. *De Buono*, 520 U.S. at 813.

249. See, e.g., *id.* at 814 (“[T]he historic police powers of the State include the regulation of matters of health and safety.”); *Travelers*, 514 U.S. at 661 (“[N]othing in the language of [ERISA] or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern.” (citing *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985))); *Golden Gate III*, 546 F.3d 639, 648 (9th Cir. 2008) (“The Ordinance . . . operates in a field [, the provision of health care services,] which has long been the province of state and local governments . . .”).

250. See *supra* note 94 and accompanying text (describing broad scope of ERISA preemption).

251. *Zelinsky*, *Travelers*, *supra* note 92, at 839–40 (arguing persuasively that presumption against preemption would render ERISA’s “savings clause” meaningless).

252. See *supra* Part II.B (regarding *Golden Gate*’s treatment of *Felder*); see also *supra* note 169 (comparing *Golden Gate* and *Felder* courts’ discussions of availability of presumption against preemption for laws of general applicability).

Finally, numerous policy considerations support the view that ERISA should not be read to displace too much state authority over health reform. Each state faces a unique health care problem and has a unique capacity to cope with it,²⁵³ and even similarly situated states can decide how (or whether) to reduce levels of uninsurance based on differing moral and philosophical judgments.²⁵⁴ State flexibility in health reform is also supported by the oft-heard argument that states should serve as “laboratories,” experimenting with various options to see which proves most successful.²⁵⁵ Indeed, Massachusetts’s experience with its Health Reform Law has become a focal point in the health reform debates of other states and the nation as a whole.²⁵⁶ Had the statute been struck down as preempted by ERISA, the nation would have been denied the benefits of this experiment.

The presumption against preemption should be rebutted when a scheme obstructs Congress’s core ERISA purpose of “provid[ing] a uniform regulatory regime over employee benefit plans.”²⁵⁷ ERISA itself sets up a comprehensive framework for plan administration, including obligations for disclosure, reporting, fiduciary responsibility, and the like.²⁵⁸ Any state regulations, which create new administrative burdens conflicting with these core ERISA purposes should be preempted.²⁵⁹

253. See, e.g., Jeffrey Krasner, *Calif.’s healthcare plan looks familiar: But revamp faces taller hurdles than in Massachusetts because problem is so much bigger there*, *Boston Globe*, Jan. 11, 2007, at 1D (describing differing levels of uninsurance in Massachusetts and California and effect on viability of reform).

254. See, e.g., Elhauge, *supra* note 25, at 1454–57 (describing various moral judgments underlying different health policy priorities).

255. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This argument has repeatedly been invoked in the ERISA context to support the value of state experimentation in health reform. See, e.g., Zelinsky, *Massachusetts*, *supra* note 224, at 276–87 (making case for experimentation); see also Catherine L. Fisk & Michael M. Oswald, *Preemption and Civic Democracy in the Battle over Wal-Mart*, 92 *Minn. L. Rev.* 1502, 1523–38 (2008) (arguing narrow preemption protects local civic democratic attempts to shape community development). Even the District Court of Maryland, in striking down the Fair Share Act, noted that “it is strongly in the public interest to permit states to perform their traditional roles of serving as laboratories.” *Retail Indus. Leaders Ass’n v. Fielder*, 435 F. Supp. 2d 481, 496 n.15 (D. Md. 2006).

256. See, e.g., Mark V. Pauly, *Massachusetts Avoids Employer Mandates: Lessons for Other States?*, 11 *Risk Mgmt. & Ins. Rev.* 65, 65 (2008) (discussing implications of Massachusetts pay-or-play for other states); Kevin Sack, *Health Care Reform’s Moment Arrives (Again)*, *N.Y. Times*, June 19, 2009, at A17 (citing Massachusetts model as factor encouraging national reform).

257. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004).

258. See *supra* note 70 and accompanying text (regarding goals of ERISA’s drafters).

259. This is the core holding of *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) and *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). See *supra* notes 103–106 and accompanying text (regarding *Egelhoff* and *Shaw*). In some respects, this type of test may not be far off from Scalia’s concurrence in *Dillingham* calling for the application of ordinary field and conflict preemption to ERISA, with the “field” defined as the structuring and administration of benefit plans. See *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 334–36 (1997) (Scalia, J. concurring); see also Fallon et al., *supra* note

B. *Identifying Comprehensive Pay-or-Play Schemes*

This Note argues that pay-or-play schemes that are a component of broad-based, comprehensive health reforms should be insulated from preemption as laws of “general applicability.”²⁶⁰ But how can courts distinguish such permissible pay-or-play schemes from those that do not serve this role? While there are many possible indicators of broad-based reform, an inquiry limited to just two factors should suffice. First, courts should consider whether the pay-or-play scheme applies to a broad group of covered employers. To the extent that a scheme applies to only a handful of employers, it is less likely that the scheme is part of an effort to spearhead expanded coverage initiatives or reform a state’s health care system in any substantial way.²⁶¹ Second, courts should determine whether the state takes on an expanded role in providing health care to its citizenry at the same time as it implements the pay-or-play scheme.²⁶² If these criteria are not met, then it is unlikely that the scheme in question is the type of state law of “general applicability” which the Supreme

77, at 725–26 (highlighting “important question [of] how broadly the field should be defined”). But cf. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995) (“[W]e do not hold today that ERISA pre-empts only direct regulation of ERISA plans, nor could we do that with fidelity to the views expressed in our prior opinions.”). Professor Zelinsky has argued that the use of implied field preemption analysis in the ERISA context is inappropriate because it renders § 514(a) meaningless. Even without that section, the argument goes, Congress knew that laws which conflicted with ERISA’s operation would be preempted. Zelinsky, *Travelers*, supra note 92, at 840. The approach suggested herein, though, does not preclude preemption for laws that violate the “zone of employer autonomy” that ERISA creates even for matters it does not regulate directly. For example, a state mandate that employers offering health coverage must also include dental coverage may not conflict with ERISA under an implied preemption analysis in the absence of § 514(a), but with § 514(a) in place it should be preempted. This Note does not address the issue of substantive benefit mandates, though, because the focus here is on pay-or-play schemes themselves, which do not necessarily or normally include such mandates.

260. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 815–16 (citing *Travelers*, 514 U.S. at 668; *Dillingham*, 519 U.S. at 333–34).

261. See Haagen, supra note 229, at 680–81 (calling Massachusetts scheme more “comprehensive” than Maryland scheme in that it applies to more than “just one company”); cf. *Retail Indus. Leaders Ass’n v. Fielder*, 475 F.3d 180, 194 (4th Cir. 2007) (resisting argument that Maryland Act is law of “general application” on basis that it applies to at most four employers). This conclusion is supported by two observations. Firstly, taxes which apply to fewer employers will be less likely to raise the significant amounts of money that comprehensive reform requires. Secondly, even if the covered employers chose to increase coverage in lieu of paying the tax, a scheme which only applies to a small number of employers will only result in increased coverage for a relatively small number of workers. It may also be possible to instead focus on the number of employees covered by the law, as opposed to the number of employers. The difference in terms of ease of objective line-drawing should be negligible.

262. See Haagen, supra note 229, at 680–81 & n.163 (identifying Massachusetts scheme as more “comprehensive” because of its numerous state measures aimed at increasing coverage); cf. *Fielder*, 475 F.3d at 185 (describing fact that funds raised by Maryland scheme would only support already-existing health insurance programs).

Court is reluctant to displace, or the type of comprehensive reform aimed at covering the uninsured that ERISA's drafters may have been reluctant to preempt.²⁶³ This standard is more susceptible to objective definition than coercion, making this approach easier for courts to administer predictably.²⁶⁴

C. *Approach Applied to Maryland Fair Share Act, San Francisco Ordinance, and Massachusetts Health Reform Law*

1. *Maryland Fair Share Health Care Fund Act.* — The Maryland Fair Share Act does not meet either of the two criteria described above for identifying pay-or-play schemes that are part of comprehensive health reforms, and is thus the type of law that Congress intended for ERISA to supplant. The scheme does not apply to a broad group of employers. At most it applied to four employers in the state, and at the time of its enactment it only would have affected current practices at Wal-Mart.²⁶⁵ As such, the statute could have affected only 16,000 workers²⁶⁶ in a state with 5.6 million inhabitants.²⁶⁷ Furthermore, although Maryland estimated Wal-Mart's total health spending obligation under the Act to be \$21.6

263. See *supra* notes 242–256 and accompanying text (describing Supreme Court deference to state laws of general applicability, and policy considerations that may have made ERISA's drafters wary to preempt too broad a swath of state-level reform efforts).

264. The two characteristics proposed herein to identify “comprehensive” reforms are similar to those used by courts to distinguish “taxes” from “fees,” for example in the context of the applicability of the Tax Injunction Act (TIA). See, e.g., *San Juan Cellular Tel. Co. v. Public Serv. Comm'n*, 967 F.2d 683, 685 (1st Cir. 1992) (Breyer, C.J.) (distinguishing “classic ‘tax,’” which burdens most of the population and funds public purposes, from “classic ‘regulatory fee’” in TIA context). This similarity suggests that courts have experience making these types of judgments. It also connects to the ERISA preemption context in that numerous courts and commentators have suggested that pay-or-play schemes that use “taxes” and “credits” are less susceptible to preemption than schemes that use “fees” or “penalties.” See, e.g., *Felder*, 475 F.3d at 194 (arguing in support of preemption that “the amount that the Act prescribes for payment to the State is actually a fee or a penalty”); *Golden Gate I*, 535 F. Supp. 2d 968, 980 (N.D. Cal. 2007) (striking down San Francisco Ordinance at district court level, suggesting in conclusion that tax and credit system may not be preempted); Darren Abernethy, Note, *Of State Laboratories and Legislative Alloys: How “Fair Share” Laws Can Be Written to Avoid ERISA Preemption and Influence Private Sector Health Care Reform in America*, 49 *Wm. & Mary L. Rev.* 1859, 1883–89 (2008) (suggesting that future states design scheme with “taxes” to avoid preemption); cf. Jason Burge, Note, *Rethinking Fees and Taxes in Light of the New York City Health Care Security Act*, 61 *N.Y.U. Ann. Surv. Am. L.* 679, 719–20 (2006) (arguing New York City pay-or-play scheme at higher preemption risk by imposing civil fine instead of tax).

265. See *supra* notes 136–137 and accompanying text (describing definition of “covered employer” in Fair Share Act).

266. See *supra* note 137 (discussing number of Wal-Mart employees at time). This is of course a maximum number of affected employees, since Wal-Mart could have met its commitment by increasing benefits for only some workers.

267. Estimated as of 2006. See U.S. Census Bureau, *Maryland QuickFacts* from the U.S. Census Bureau, at <http://quickfacts.census.gov/qfd/states/24000.html> (last visited Sept. 9, 2009) (on file with the *Columbia Law Review*).

million,²⁶⁸ at the time Wal-Mart already spent at least seven percent of its Maryland payroll on health.²⁶⁹ Consequently, even if Wal-Mart chose to pay the tax, its total obligation would have been less than three million dollars,²⁷⁰ an insignificant amount in a state that was projecting annual Medicaid and children's health spending of \$4.7 billion²⁷¹ and hospital uncompensated care costs of \$738 million.²⁷² But just as importantly, the Act could not be described as comprehensive because it did not include any new obligations of the state towards its citizens.²⁷³

2. *San Francisco Health Care Security Ordinance.* — In contrast to the Fair Share Act, the pay-or-play component of the San Francisco Ordinance clearly passes this Note's test and is part of a comprehensive health reform that ERISA should be presumed not to preempt. First, it applies to a very broad group of employers: all for-profit employers with twenty or more employees and all nonprofit employers with fifty or more employees.²⁷⁴ Second, San Francisco clearly took on an expanded role in the delivery of health care to its residents with passage of the Ordinance. It created Healthy San Francisco, which every uninsured resident (not eligible for other public programs) may join, in many cases at little or no cost.²⁷⁵ It also created a medical reimbursement account system to serve nonresidents employed in the City. It is easy to see how these new government obligations are supported by a pay-or-play scheme's power to raise revenue and encourage employers to contribute more to their employees' health care.²⁷⁶

268. Dep't of Legislative Servs. of Md. Gen. Assembly, Fiscal and Policy Note: Senate Bill 790, Fair Share Health Care Fund Act 3 (2005), available at http://mlis.state.md.us/2005rs/fnotes/bil_0000/sb0790.pdf (on file with the *Columbia Law Review*) [hereinafter, Maryland Fiscal Note] (reporting also Wal-Mart's in-state total wages at \$270,333,508).

269. *Felder*, 475 F.3d at 185 ("Wal-Mart representatives testified that it spends about 7 to 8% of its total payroll on healthcare, falling short of the Act's 8% threshold.").

270. One-eighth of Wal-Mart's total estimated health spending obligation of \$21.6 million equals \$2.7 million. The report of the Department of Legislative Services itself concluded that there was "insufficient data to reliably estimate any revenue increase" from the Act. Maryland Fiscal Note, supra note 268, at 4.

271. Budget for 2007. *Felder*, 475 F.3d at 199 (Michael, J., dissenting).

272. Projection for 2006. See Md. Hosp. Ass'n, supra note 33, at 1.

273. The only expense mentioned in the Fiscal and Policy Note attached to the bill was \$25,749 per year to employ an accountant to monitor the fund. Maryland Fiscal Note, supra note 268, at 3.

274. See supra note 153 and accompanying text (describing Ordinance's definition of "covered employer").

275. See supra note 156 (detailing HSF fee schedule).

276. San Francisco expected employer contributions to cover roughly six percent of the costs of running HSF in its first year. See HSF In-Depth, supra note 151, at 16–17, 22. The fact that the scheme may have been expected to affect employers' coverage decisions as much as to raise revenue should not be damning. The fact remains that the City took on significant obligations as part of a reform that Congress would not have wanted ERISA to preempt, and the City could not have taken on such obligations without the pay-or-play scheme in place. So long as the scheme does not violate ERISA's goals by imposing administrative burdens, this should suffice.

In terms of rebutting the presumption against preemption, the *Golden Gate* court found that the Ordinance did not impose significant administrative burdens on ERISA plans themselves, because the administrative requirements applied to all covered employers, whether or not they managed ERISA plans.²⁷⁷ ERISA's preemption was designed to create a uniform administrative framework for ERISA plans, not to shield companies from general bureaucratic obligations that local governments may impose.²⁷⁸ San Francisco, for instance, requires annual payroll tax filings,²⁷⁹ and California requires employers to maintain detailed records on items such as employees' hours, pay, and overtime worked.²⁸⁰ The presumption against preemption is not rebutted if the new administrative requirements of the Ordinance are akin to the general obligations of all businesses, even if these new obligations include requirements to report health spending.²⁸¹ Thus, this case was also rightly decided under the approach advanced by this Note; the San Francisco Health Care Security Ordinance, including its pay-or-play component, is not preempted by ERISA.

While a debate over the coercive nature of the Ordinance in relation to the Fair Share Act may never be resolved,²⁸² the approach suggested

277. *Golden Gate III*, 546 F.3d 639, 657 (9th Cir. 2009) (arguing that Ordinance imposed administrative burdens on employers but not on plans); see also City & County of S.F., Office of Labor Standards Enforcement, Regulations Implementing the Employer Spending Requirement of the San Francisco Health Care Security Ordinance, Reg. 7.2–7.3 (2007), at http://www.sfgov.org/site/uploadedfiles/olse/hcso/HCSO_Final_Regulations.pdf (on file with the *Columbia Law Review*) (requiring covered employers to keep certain records and to report health expenditures to City on annual basis).

278. See *supra* Part I.B.1 (describing ERISA preemption).

279. See City & County of S.F., Office of the Treasurer & Tax Collector, 2009–2010 Business Registration Renewal & 2008 Payroll Tax Statement: General Information and Instructions 1 (2008), available at http://www.sfgov.org/site/uploadedfiles/tax/business_zone/PYRGINStruct.pdf (on file with the *Columbia Law Review*) (describing filing requirements).

280. See, e.g., Cal. Lab. Code § 226 (West 2008) (describing requirements for reporting to employees and maintaining records).

281. Some may disagree with this line of reasoning. See, e.g., Brief for the American Benefits Council and HR Policy Ass'n as Amici Curiae in Support of Petition for Certiorari at 14–15, *Golden Gate III*, No. 08-1515 (U.S. July 10, 2009), 2009 WL 2040454 (arguing Ordinance creates administrative obligations as burdensome as those struck down as preempted in *Egelhoff*); Brief for the Retail Industry Leaders Ass'n and the Chamber of Commerce of the U.S. as Amici Curiae in Support of Petition for Certiorari at 15, *Golden Gate III*, (2009) (No. 08-1515), 2009 WL 2009350 (arguing Ordinance creates onerous administrative requirements for multijurisdiction employers); Brief for the Washington Legal Foundation as Amicus Curiae in Support of Petition for Certiorari at 6–11, *Golden Gate III*, (2009) (No. 08-1515), 2009 WL 2040455 (detailing troublesome administrative requirements of Ordinance). To provide an example of how this Note's inquiry would function, however, the conclusions of the *Golden Gate* court will, in this respect, be accepted. The beauty of the use of presumptions is, of course, that they help resolve close cases predictably.

282. See *supra* note 232 (describing ongoing debate as to whether Ordinance was coercive). The fact that Ninth Circuit "resolved" the debate by issuing a final opinion and

here produces a far clearer basis for distinguishing the two schemes. As such, it should provide more predictable results in cases that present similar questions.

3. *Massachusetts Health Reform Law*. — Assessed under this Note's approach, it is easy to see why the Massachusetts Health Reform Law deserves a strong presumption against preemption. Its pay-or-play provision covers all employers with eleven or more employees,²⁸³ making it even broader than the San Francisco Ordinance in this respect. The scheme also passes the second part of the proposed test, as it includes numerous new state obligations towards its citizens, including the creation of a state-sponsored insurance "Connector" to help match insurance buyers and sellers efficiently²⁸⁴ and new state subsidies which allow residents earning less than 300% of the federal poverty level to buy insurance based on a sliding price scale.²⁸⁵ The administrative obligations imposed by the Law are similar to those imposed by the Ordinance, the central requirement being reports by all covered employers on their number of fulltime employees, their hours worked, and a summary of covered health spending.²⁸⁶ Also, like the Ordinance, these requirements apply to all employers, whether or not they operate an ERISA plan.²⁸⁷ As such, the presumption against preemption is not rebutted.²⁸⁸

denying a rehearing is beside the point. If its resolution is still debated by academics and potential future parties, then it will provide little guidance to future courts examining slightly different schemes.

283. See *supra* note 224 and accompanying text (describing the Massachusetts pay-or-play scheme).

284. For a description of the "Connector," see Kaiser, Massachusetts, *supra* note 57; Zelinsky, Massachusetts, *supra* note 224, at 235–39.

285. For a description of the sliding price scale, see Kaiser, Massachusetts, *supra* note 57; Zelinsky, Massachusetts, *supra* note 224, at 244–45.

286. See 114.5 Mass. Code Regs. 18.03 (2009), available at http://www.mass.gov/Eeo_hhs2/docs/dhcfp/g/regs/114_5_18.pdf (on file with the *Columbia Law Review*) (describing employer Health Insurance Responsibility Disclosure requirements). Massachusetts requires quarterly filings for some employers, depending on how often the employer must file with the Department of Unemployment Assistance. *Id.* at 18.03(2). Regarding the reporting requirement in general, see also Mass. Dep't of Workforce Dev., Filing Instructions for Filing Period: 2009 Q3, at <https://fsc.detma.org> (follow "Fair Share Filing Instructions for the current filing period" hyperlink) (last visited Sept. 9, 2009) (on file with the *Columbia Law Review*). For a side by side comparison of the San Francisco and Massachusetts reporting requirements, see Am. Benefits Council, Employer "Pay or Play" Requirements: Key State and Local Health Care Reform Initiatives 2–5, 7–9 (2008), available at http://www.americanbenefitscouncil.com/documents/abc_statechart_0408.pdf (on file with the *Columbia Law Review*).

287. 114.5 Mass. Code Regs. 18.03(1) (2008), available at http://www.mass.gov/Eeo_hhs2/docs/dhcfp/g/regs/114_5_18.pdf (on file with the *Columbia Law Review*) ("Each Massachusetts Employer with eleven or more Full Time Equivalent Employees shall report the following information . . .").

288. A judicial record would be helpful towards a more thorough analysis of the administrative obligations of the Law, which is admittedly not the focus of this Note. Interestingly, though, the scholarly record on this issue is surprisingly barren as well. In the leading pieces setting out the arguments in favor of preemption, there is no discussion

The clarity of this result is important. Under the coercion analysis adopted by the *Golden Gate* and *Fielder* courts, it is impossible to predict in advance whether a court would consider a fine of \$295 per employee per year coercive.²⁸⁹ But under the framework suggested in this Note, it is very difficult to contend that the Massachusetts reform would be preempted, at least absent some finding that it imposes new administrative burdens of the type covered by ERISA. Thus the strength of this approach lies in its *predictive* power.²⁹⁰

IV. POSTSCRIPT: THE NATIONAL HEALTH REFORM DEBATE OF THE SUMMER OF 2009

As this Note goes into production in the summer of 2009, Congress is feverishly debating national health reform, though what will emerge is far from certain.²⁹¹ Many of the proposals being discussed clearly affect state and local pay-or-play schemes, both in terms of their attractiveness and legality. Prime among these, the current House proposal calls for a national pay-or-play plan requiring all companies with payrolls exceeding \$400,000 per year to spend eight percent of payroll on employee health care or else make up the difference with a tax.²⁹² The current proposal from the Senate's Health, Education, Labor, and Pensions Committee calls for a more Massachusetts style pay-or-play, which would require firms with twenty-five or more employees to pay an annual fine of \$750 per employee if they cover less than sixty percent of employee premiums.²⁹³ A national pay-or-play scheme leaves states less room to impose their own.

at all of the administrative and reporting obligations imposed by the law. See Shimabukuro & Staman, *supra* note 226, at 11–15 (summarizing arguments for and against preemption); Wagner & Newman, *supra* note 224, at 147–49 (2007) (arguing for preemption); Zelinsky, *Massachusetts*, *supra* note 224, at 253–67 (same). This shift in academic focus away from the core ERISA goal of uniform national administration and regulation should be unsettling.

289. Scholars indeed persuasively argue both possibilities. See *supra* notes 226–229 and accompanying text (describing debate over coercive nature of Massachusetts scheme).

290. This is not to say that this approach will not meet “hard” cases that fall into a grey area, for such cases will certainly arise. This Note only argues that far fewer cases will look “hard” using its approach than using the approach of the *Fielder* and *Golden Gate* courts.

291. As of mid-July 2009, several committees in the Senate and House are working on proposals that do not agree with each other in various important respects. See Lara Meckler, *Democrats Turn Up the Heat on Insurance Industry*, *Wall St. J.*, July 16, 2009, at A6 (including chart comparing key elements of three proposals advanced by House; Senate Health, Education, Labor, and Pensions Committee; and Senate Finance Committee, as of mid-July); Drew Altman, *Pulling it Together, Last Week's Health Reform “Shocker,”* June 25, 2009, at http://www.kff.org/pullingittogether/062509_altman.cfm (on file with the *Columbia Law Review*) (noting five different congressional committees involved in various proposals in late June).

292. Johnson & Adamy, *New Burdens*, *supra* note 66, at A6.

293. *Id.*; see also Bustillo & Adamy, *Trade Group*, *supra* note 65, at A3 (noting national pay-or-play “has gained political currency thanks to the backing of [Wal-Mart]”); Pay or Play?, *Economist* (London), July 11–17, 2009, at 32 (declaring “momentum is growing” among liberals to impose pay-or-play on employers).

Indeed any national reform, with or without pay-or-play, which succeeds at covering a large portion of the uninsured is likely to reduce the pressure for state level reform. An amendment to ERISA allowing states to enact their own pay-or-play schemes is also a possibility, though such an idea has not yet featured in the debate.²⁹⁴

On the other hand, it is also possible that national reform will fail to increase coverage substantially, leaving many states in essentially the same position they are in today.²⁹⁵ Another possibility, for better or worse, is that the reform agenda could completely melt down.²⁹⁶ One can speculate that the reform outcome may also influence the Supreme Court's decision on whether to grant certiorari in the *Golden Gate* case.²⁹⁷ A more thorough analysis is difficult amidst the uncertainty; this Note's reader will know more in the fall than its author knows in the summer.²⁹⁸

CONCLUSION

The question of how ERISA preemption affects the legality of state and local pay-or-play schemes demands a clear answer allowing for consistent application. Dozens of states, counties, or municipalities have proposed pay-or-play schemes in the past several years, and these governments and others need to know what they are allowed to do. Unfortunately, the doctrine left behind by the *Fielder* and *Golden Gate* decisions, which looks to the coercive nature of the scheme in question, is unlikely to produce predictable outcomes, as the unconstitutional conditions doctrine has shown. This has the deleterious effect of leaving local governments that wish to address their uninsurance problems wondering what tools are actually at their disposal. A doctrine which focuses on the

294. But cf. Review & Outlook, Repealing Erisa—II, Wall St. J., July 31, 2009, at A16 (asserting national reform undermines ERISA because of new levels of national regulation of employer health plans, rather than any loosening of ERISA preemption to allow state level regulation).

295. See, e.g., Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Edward M. Kennedy, Chairman, Senate Comm. on Health, Educ., Labor, and Pensions (June 15, 2009), available at <http://www.cbo.gov/ftpdocs/103xx/doc10310/06-15-HealthChoicesAct.pdf> (on file with the *Columbia Law Review*) (estimating that then-current committee proposal would only decrease number of uninsured by sixteen million). This analysis covered a preliminary proposal which is still being negotiated and amended.

296. See, e.g., Editorial, Financing Health Care Reform, N.Y. Times, July 7, 2009, at A22 (discussing possibility of "health reform fall[ing] apart again in Congress"); Robert Pear & David M. Herszenhorn, Democrats Grow Wary as Health Bill Advances, N.Y. Times, July 18, 2009, at A1 (describing difficulties and uncertainty in reform debate, even within Democratic majority in Congress).

297. See *supra* note 14 and accompanying text (describing petition for certiorari). Even if national reform does not make the case moot, it may diminish its national importance.

298. See, e.g., What Now for Obamacare?, Economist (London), Aug. 1–7, 2009, at 23–24 ("[A]fter months of building up momentum, Obamacare has hit serious snags Whether this merely delays reforms until the autumn or scuppers them altogether remains to be seen.").

comprehensive nature of the reforms accompanying a pay-or-play scheme will produce more consistent and predictable results than an approach centered on coercion. Furthermore, such a rebuttable presumption will be at least as faithful to the letter and spirit of ERISA as is the coercion approach. As such, this approach should be adopted by future courts considering the issue.