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Journal

UCLA Women's Law Journal, 8(2)

Author

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Publication Date

1998

DOI

10.5070/L382017692

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ERISA PREEMPTION OF STATE AND LOCAL LAWS ON DOMESTIC PARTNERSHIP AND SEXUAL ORIENTATION DISCRIMINATION IN EMPLOYMENT

Catherine L. Fisk*

ABSTRACT

A pervasive form of sexual orientation discrimination in employment is the refusal of employers to provide fringe benefits to same-sex domestic partners on the same terms as benefits are provided to spouses. Some state and local governments have prohibited sexual orientation discrimination in employment, and many have provided domestic partner benefits to state and city employees. However, most have not attempted to enforce these laws against private sector employee benefit plans because it is widely assumed that the federal Employee Retirement Income Security Act ("ERISA") would preempt such an application of the law. In this Article, Professor Fisk argues that ERISA does not preempt state and local laws requiring employers to provide domestic partner benefits on the same terms as spousal benefits. She reaches this conclusion because ERISA does not preempt state and local law to the extent that preemption would "modify" or "impair" any federal law. ERISA preemption of laws that regulate domestic partner benefits would impair the Defense of Marriage Act ("DOMA"). In DOMA, Congress determined that the legal regulation of same-sex relationships shall be decided by each state and locality for itself, free from the unifying effects of federal law. ERISA preemption of state and local efforts to grant same-sex partners the same benefits as spouses would

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undermine DOMA's determination that federal law leave the states free to decide what legal benefits to grant to same-sex relationships.

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People of different states and regions have differed and continue to differ in their views about the morality of homosexuality and the desirability of prohibiting discrimination on the basis of sexual orientation. Unless and until Congress and the Supreme Court grant to gay people everywhere statutory and constitutional protection against discrimination, states and cities must be free to do so. In a federal system, democratically elected majorities in state and city governments who believe discrimination on the basis of sexual orientation is unfair ought to be able to prohibit it.¹ Indeed, many states and political

1. One of the most common arguments in favor of federalism is that it allows for local variation in the law to reflect local variation in the voting majority's values. This was the argument made in defense of Jim Crow and rejected in the enactment of the Civil Rights Act of 1964. Another argument defends federalism not because it allows differences on moral issues, but rather because it allows different approaches to the solution of technical problems. This is the famous Brandeis view of states as laboratories:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). On these and other values underlying federalism, see Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 527-29 (1995). Either of these arguments in favor of federalism support the proposition that majorities in localities ought to be able to grant legal recognition to same-sex unions.

By invoking federalism as a basis for defending against preemption, one need not necessarily endorse it; my own preference would be for a federal law that prohibits discrimination on the basis of sexual orientation. If such a law were on the

subdivisions have done so and these laws are the only legal protection against discrimination that exist for gay, lesbian, bisexual, and transgendered persons.²

Discrimination in employment on the basis of sexual orientation takes many forms, but surely the most common form is an employer's practice of paying gay and lesbian employees less than is paid to their heterosexual coworkers.³ Although the amount of cash paid to employees may be the same, the benefits included in the wage package will invariably be less valuable for gay or lesbian employees than for their straight colleagues because only the straight employees will receive benefits for their committed partners (spouses) and for their partners' dependents. Although many employers have voluntarily ceased this form of discrimination by providing benefits for employees' domestic partners, legal compulsion is necessary to fully eradicate it. State and local laws should recognize the failure to provide domestic partnership benefits on the same terms as spousal benefits as a form of illegal employment discrimination.

A principal legal obstacle to construing state and local nondiscrimination laws to require the provision of benefits to same-sex committed partners is the Employee Retirement Income Security Act of 1974 ("ERISA").⁴ ERISA preempts state and local laws "insofar as they . . . relate to any employee benefits plan" covered by ERISA.⁵ Most state and local governments that have prohibited sexual orientation

books, I would argue that it should preempt state laws permitting or requiring such discrimination. Federalism is invoked here for instrumental purposes, not because of its intrinsic worth. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

2. Since at least 1974, Congress has considered but failed to enact bills prohibiting employment discrimination on the basis of sexual orientation. See WILLIAM B. RUBENSTEIN, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 432 (2d ed. 1997).

3. Among those arguing that failure to provide domestic partner benefits discriminates on the basis of sexual orientation and analyzing state and local responses to this discrimination are: Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1372-80 (1997); Alice Rickel, *Extending Employee Benefits to Domestic Partners: Avoiding Legal Hurdles While Staying in Tune with the Changing Definition of the Family*, 16 WHITTIER L. REV. 737 (1995); Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164 (1992); Robert L. Eblin, Note, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)*, 51 OHIO ST. L.J. 1067 (1990).

4. 29 U.S.C. § 1001 (1994).

5. 29 U.S.C. § 1144(a) (1994).

discrimination in employment have not attempted to apply these laws to discrimination by private employers' benefits plans. Most have gone no further than enacting ordinances requiring that municipal employees' domestic partners be treated the same as spouses for the purposes of benefits. While these cities provide equal pay for gay and lesbian municipal employees, they leave private sector employees without protection against discrimination.

San Francisco, however, has gone one step further. It has long prohibited sexual orientation discrimination in employment, and has required city contractors to refrain from such discrimination.⁶ In November 1996, the City and County of San Francisco enacted an ordinance extending the nondiscrimination requirement to employee benefit plans by requiring city contractors to provide the same benefits to employees' domestic partners as are provided to employees' spouses.⁷ In some respects, San Francisco's ordinance is an extension of the tradition by which government entities impose nondiscrimination requirements on government contractors by refusing to contract with businesses that discriminate.⁸ The ordinance applies to all of a city contractor's operations, not just to its San Francisco-based employees.⁹

6. See SAN FRANCISCO, CAL., ADMIN. CODE § 12B.2 (1997).

7. See SAN FRANCISCO, CAL., ADMIN. CODE §§ 12B and 12C (1997).

Like many other cities, San Francisco has a domestic partnership registration program that allows city residents to register their same-sex partner as a domestic partner. See SAN FRANCISCO, CAL. ADMIN. CODE § 62 (1997).

8. See, e.g., 41 C.F.R. § 60-1.4 (1997) (prohibiting employment discrimination by federal government contractors); CAL. GOVT. CODE §§ 11135-11139.5 (Deering 1997) (requiring state contractors not to discriminate in employment).

Local government efforts to refrain from contracting with businesses that pursued policies which the city officials considered odious have in the past raised analogous questions of the power of city government. Cf. Patrick J. Borchers & Paul F. Dauer, *Taming the New Breed of Nuclear Free Zone Ordinances: Statutory and Constitutional Infirmities in Local Procurement Ordinances Blacklisting the Producers of Nuclear Weapons Components*, 40 HASTINGS L.J. 87 (1988); Kevin P. Lewis, *Dealing With South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469 (1987).

9. Like San Francisco, New York City prohibits employment discrimination by city contractors. Unlike San Francisco, however, the New York City Council refused to include sexual orientation among the protected traits in the human rights ordinance. Then-Mayor Koch's Executive Order extending the law to cover sexual orientation was held invalid as a violation of the separation of powers demanded by the New York City Charter. See *Under 21, Catholic Home Bureau for Dependent Children v. City of New York*, 482 N.E.2d 1, 10 (N.Y. 1985).

San Francisco International Airport, like the airports in other major cities, is city owned, which means that the airlines that serve the airport constitute city contractors within the meaning of the San Francisco ordinance. When United Airlines resisted providing domestic partner benefits to its employees, the Air Transport Association, the trade association for the principal U.S. airlines, sued the City to invalidate the ordinance.¹⁰ The United States District Court for the Northern District of California held that ERISA preempts substantial parts of the San Francisco ordinance.¹¹

The State of Hawaii also enacted legislation requiring private sector employers to provide benefits to same-sex partners, and, like San Francisco, promptly encountered litigation arguing that ERISA preempted the law. Effective July 1997, Hawaii allowed an unmarried adult to designate another unmarried adult as a "reciprocal beneficiary" ("RB"), and the law required public and private employers to provide legally designated RBs a variety of benefits on the same terms as spouses.¹² Employers immediately assailed the law as being preempted by ERISA, and a federal district court agreed.¹³

It is unclear whether ERISA, by its terms, should be held to preempt these and other state and local laws requiring employers to provide benefits to same-sex domestic partners on the same terms as they provide benefits to spouses. Preemption of state

10. See *Air Transp. Ass'n of Am. v. City and County of San Francisco*, No. 97-1763 CW, 1998 U.S. Dist. LEXIS 4837 (N.D. Cal. Apr. 10, 1998).

11. See *id.* at *93-94. The court also determined that the Dormant Commerce Clause of the U.S. Constitution prohibits the City from requiring airlines to provide domestic partner benefits to employees outside San Francisco. The validity of the extraterritorial application of the ordinance is not discussed here because the problem could be avoided if cities and states applied their laws only to employees within their territory. ERISA preemption, by contrast, invalidates state and local laws irrespective of their extraterritorial effects.

On the other preemption issues raised by state and local ordinances addressing social problems not addressed at the national level, see Christi R. Martin, Note, *Preemption in the Age of Local Regulatory Innovation: Fitting the Formula to a Different Kind of Conflict*, 70 TEX. L. REV. 1831 (1992).

12. See HAW. REV. STAT. ANN. § 572C (Michie 1997).

13. The court's decision is not officially reported, but was reported by the news media. See Linda Hosek, *Draft Bill Will Try to Extend Health Benefits*, HONOLULU STAR-BULLETIN, Sept. 27, 1997, at A1 (reporting that U.S. District Judge David Ezra concluded that ERISA preempted application of state law to private sector benefit plans covered by ERISA). The court did not enjoin enforcement of all provisions of the law, but the parts that remain in effect have had a less dramatic effect than had been anticipated. See Susan Essoyan, *Hawaii's Domestic-Partner Law a Bust; Ambiguity Blamed*, L.A. TIMES, Dec. 23, 1997, at A5.

law is a matter of congressional intent,¹⁴ but congressional intent on this precise issue is inscrutable and ambiguous. At the time it enacted ERISA in 1974, Congress could not have envisioned the importance that state and local law would have in prohibiting employment discrimination on the basis of sexual orientation and the effect ERISA might have on such laws. Nor did Congress think about the effect that state gay-rights laws redefining family relationships would have on ERISA plans. However, while Congress did not intend that ERISA deprive states of the power to define and proscribe employment discrimination on the basis of status or to define legally cognizable family relationships, Congress clearly did intend to relieve ERISA plans of the duty to comply with various state laws regulating employee benefits.

For twenty years, the Supreme Court has struggled to make sense of ERISA preemption. The Court's extensive preemption case law provides conflicting signals as to whether domestic partnership laws or sexual orientation discrimination laws are preempted. The Court's decisions from the early 1980s established that ERISA preempts state laws that require employers to offer particular benefits¹⁵ as well as state laws that prohibit plans from discriminating in ways that federal antidiscrimination law permits.¹⁶ These decisions suggest that ERISA preempts San Francisco's and Hawaii's laws. However, in its recent cases, the Court has backed away from the broad scope of preemption articulated in some of its earlier decisions and now seems unwilling to hold that ERISA preempts state and local laws that affect ERISA plans so long as the laws are both consistent with ERISA's substantive provisions and removed from ERISA's core concerns.¹⁷

The issue whether ERISA, standing alone, preempts domestic partnership or sexual orientation discrimination laws need not be resolved. ERISA expressly does not preempt state law where preemption would "impair" another federal law.¹⁸ ERISA preemption of state and local laws relating to domestic partner benefits and same-sex relationships would impair a

14. See, e.g., *Gade v. National Solid Waste Management*, 505 U.S. 88, 96 (1992).

15. See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

16. See *Shaw*, 463 U.S. at 108.

17. See *infra* text accompanying notes 54-58.

18. See 29 U.S.C. § 1144(d) (1994).

federal law — the Defense of Marriage Act (“DOMA”).¹⁹ DOMA indicates that, except for purposes of federal law, Congress expected the question of the entitlements of same-sex couples would be resolved at the state and local level. DOMA thereby recognizes that each state has the power to grant legal protection to same-sex partnerships, just as states grant legal recognition to marriage and other familial and dependency relationships. ERISA preemption would undermine DOMA’s resolve that each state decide for itself the legal recognition to be given to same-sex unions. Although ERISA indicates a somewhat vague congressional desire that nationwide benefit plans not be subject to conflicting state regulation, DOMA clearly articulates a more specific congressional intent that states be allowed to adopt their own varied legal treatments for same-sex relationships. In DOMA, Congress chose local control and local variation at the expense of national uniformity, knowing that this choice would cause administrative problems when one state declined to recognize the legal effect of a legal relationship formed in another state.

Readers familiar with the background of DOMA might question whether a law that was intended to restrict recognition of same-sex relationships can be the basis for saving from preemption state and local laws protecting such relationships.²⁰ In other words, can a homophobic law like DOMA really be used to advance the cause of gay rights? It can. Irrespective of the homophobia associated with its enactment, DOMA, both in text and in intent, is about preserving local control over the legal definition of same-sex and other family relationships. DOMA was written and justified not in terms of prohibiting legal recognition of same-sex relationships but instead in terms of federalism — protecting the right of each state or locality to decide. Federalism works both ways — to protect gay rights laws and to protect “traditional” marriage laws. DOMA’s language

19. Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (1996) (codified as amended at 28 U.S.C.A. § 1738C (West Supp. 1997)).

20. As is explained more fully below, *infra* Part III, Congress enacted DOMA at the time it thought the State of Hawaii was on the verge of granting legal recognition to same-sex marriages. Concerned that gay and lesbian couples would go to Hawaii, marry, and then return to their home state expecting it (and the federal government) to grant full faith and credit to the Hawaii marriage, a conservative majority of the Congress voted to enact DOMA so that neither the federal government nor any state would be forced, under the Constitution’s Full Faith and Credit Clause, to recognize a same-sex marriage performed in another state.

and legislative history establish that Congress sought to ensure that each state could decide for itself what legal recognition to accord same-sex unions. ERISA preemption plainly impairs DOMA's commitment to federalism in this area.

In Part I, I describe state and local efforts to prohibit sexual orientation discrimination and to require that some employers provide spousal benefits to same-sex couples. In Part II, I describe recent developments in ERISA preemption doctrine that indicate a new willingness on the part of the Supreme Court and lower federal courts to narrow the scope of ERISA preemption. In Part III, I explain how DOMA can be construed to save state and local laws relating to domestic partnership from the scope of ERISA preemption. I conclude by suggesting why gay and lesbian advocates may rely on DOMA to save state and local laws from preemption, notwithstanding the homophobia associated with DOMA's enactment. Although saving state laws from ERISA preemption is only a small step, it is a necessary step on the road to eliminating sexual orientation discrimination in the workplace.

I. STATE AND LOCAL LAWS PROTECTING SAME-SEX COUPLES' RIGHTS TO EQUAL BENEFITS

The only sources of law prohibiting private sector employment discrimination on the basis of sexual orientation are state and local law. Courts have uniformly rejected contentions that federal law prohibits private sector employment discrimination on the basis of sexual orientation.²¹ Federal law does not prevent

21. All courts that considered the issue have concluded that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994), does not prohibit discrimination on the basis of sexual orientation. *See, e.g.*, *Dillon v. Frank*, 952 F.2d 403 (6th Cir. 1992); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989) (per curiam); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978). These decisions are criticized in Samuel A. Marcossan, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 3-9 (1992).

The Supreme Court recently decided that sexual harassment when the harasser and the victim are the same sex constitutes sex discrimination within the meaning of Title VII. *See Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998). But, the Court is unlikely to conclude that Title VII prohibits harassment where the victim is a target because of his or her sexual orientation, as opposed to his or her sex or gender.

It is possible that the Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996) might offer limited protection against public sector decisions motivated by homophobia. *Romer* found unconstitutional a ballot initiative enacted to invalidate local laws prohibiting sexual orientation discrimination and to prevent gay men and

private sector employers from limiting benefits to the spouses and children of the employee.²² Thus, in their effort to achieve workplace equity, gay rights advocates have focused their efforts on state and local law.²³

Many employers have decided voluntarily to offer domestic partner benefits to same-sex couples and, sometimes, to unmarried opposite-sex couples.²⁴ These employers concluded for one reason or another that equality of benefits between gay and straight employees is a good business practice that costs rela-

lesbians from seeking the enactment of any other antidiscrimination laws. The Court determined that the initiative was not rationally related to a legitimate governmental purpose because, as the Court put it, "animosity toward the class of persons affected" is not a legitimate governmental purpose. *Id.* at 634. It is unclear what kinds of employment discrimination against gay men and lesbians might be found to serve a legitimate governmental purpose.

22. In the one reported case in which the plaintiff argued that an employer's nondiscrimination policy compelled it to interpret its pension plan to provide benefits to same-sex partners on the same terms as to spouses, the court rejected the claim. In *Rovira v. AT&T*, 817 F. Supp. 1062 (S.D.N.Y. 1993), the long-time lesbian partner of an AT&T employee sued for death benefits under AT&T's pension plan. The plaintiff argued that AT&T's limitation of the death benefits to spouses and children violated AT&T's promise not to discriminate on the basis of sexual orientation and violated New York state laws that defined family to include same-sex partners. The court held that AT&T's nondiscrimination policy did not control the eligibility for benefits under the ERISA plan, but rather that the plan's own definition of spouse did, and that ERISA preempted the New York housing and rent-control laws that had recognized same-sex partners as a legally cognizable family. *See id.* at 1070-72.

Although one commentator has suggested that an employer's nondiscrimination policy could affect eligibility for benefits under an ERISA plan, the commentator cited no cases or other authority. *See Rickel, supra* note 3, at 753-56.

23. Bills have been introduced in Congress repeatedly over the past 20 years seeking to extend federal antidiscrimination laws to prohibit discrimination on the basis of sexual orientation. *See, e.g.,* Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong., 1st Sess. (1995). None has been enacted.

24. For the purposes of the following analysis, it does not matter whether the law requires employers to provide benefits just to same-sex domestic partners or also to unmarried opposite-sex domestic partners. However, controversy remains about whether employers who voluntarily provide domestic partner benefits, but limit eligibility to same-sex partners, unlawfully discriminate on the basis of sexual orientation against heterosexual unmarried employees.

Some California employers have limited their domestic partner benefits to same-sex couples. The State Labor Commissioner has recently taken the position that a public employer (whose plan is not covered by ERISA) violates California Labor Code § 1102.1, which prohibits sexual orientation discrimination in employment, by limiting domestic partner benefits to same-sex partners. *See Pamela Burdman, Oakland Faces Legal Fight Over Partners Benefits*, S.F. CHRON., Dec. 3, 1997, at A17.

tively little.²⁵ Some employers, however, have balked at providing domestic partner benefits only to gay couples (even though the costs are low), and have argued that to extend the benefits to all unmarried couples would be unduly expensive. In jurisdictions that prohibit sexual orientation discrimination in employment, an employer policy that limits domestic partner benefits to same-sex couples might be considered illegal discrimination against unmarried heterosexual employees. But the more compelling view is that it is not illegal discrimination. The exclusion of opposite-sex domestic partners from a benefits plan is not discrimination on the basis of sexual orientation because gay and straight employees are not similarly situated; heterosexual employees are free to obtain benefits for their partners by marrying, gay employees are not. Whatever the merits of the arguments on this issue, this Article focuses on legal efforts to compel those employers who have resisted.

States do not need to legalize same-sex marriage or to recognize as valid a same-sex marriage performed in another state, in order to require employee benefit plans to provide domestic partner benefits.²⁶ Indeed, there are six alternative approaches to this problem of equality of employment for gay and lesbian employees. Although not all of them guarantee equality in fringe benefits, to the extent that they do, ERISA preemption poses various problems.

Under one approach, cities have enacted ordinances providing benefits for domestic partners of city employees. Although

25. Indeed, employers who offer domestic partner benefits to gay couples incur relatively minor costs in doing so. Studies by actuaries have concluded that the cost of providing health benefits to domestic partners is no greater than insuring spouses because adverse selection has not been a problem. See KMPG Peat Marwick, *Health Benefits in 1997* (1997) and Hewitt Associates, *Domestic Partners and Employee Benefits* (1994) cited in Brief for City and County of San Francisco at 5, *Air Transp. Ass'n*, 1998 U.S. Dist. LEXIS 4837 (No. 97-1763 CW). Indeed, a representative of Sun Microsystems stated in a declaration filed in the San Francisco litigation that domestic partner benefits cost less because domestic partners as a group had lower utilization rates than traditional families. See Bradshaw Decl. ¶ 7, cited in *id.* See also BARBARA FRIED ET AL., *Domestic Partner Benefits: A Case Study* (1994) (a publication of the College and University Personnel Association analyzing the costs and benefits of Stanford University extending benefits to university employees' and students' domestic partners).

26. In the wake of Hawaii's anticipated decision to legalize same-sex marriages, a large number of states have enacted laws to ensure that such marriages are not recognized in their jurisdictions and have amended their own marriage laws to make clear that same-sex marriages are not legal under their law. About half the states have such laws; they are listed in RUBENSTEIN, *supra* note 2, 1996-97 Update at 35.

some of these ordinances have been subject to legal challenge, they appear to be valid under federal law.²⁷ State and local government employee benefit plans are not covered by ERISA and, therefore, ERISA does not preempt state or local law regulating the content of such plans.²⁸ Federal preemption is a problem only when states or municipalities require private sector employers to offer domestic partner benefits.

Second, some states and municipalities have enacted laws generally prohibiting sexual orientation discrimination in employment.²⁹ Because such plans are terms of employment, discrimination by them would appear to violate such state and local laws, just as sex or race discrimination by employee benefit plans violates federal employment discrimination law.³⁰ To date, no

27. The Georgia Supreme Court recently upheld Atlanta's ordinance against a challenge that it was invalid under Georgia's constitution and Municipal Home Rule Act. See *City of Atlanta v. Morgan*, 492 S.E.2d 193 (Ga. 1997). The Atlanta ordinance provides health insurance benefits for dependents of city employees who are registered as domestic partners under the Atlanta domestic partnership registration ordinance. The ordinance defined a dependent as "one who relies on another for financial support." An earlier version of the domestic partnership ordinance had been held unconstitutional in *McKinney v. City of Atlanta*, 454 S.E.2d 517 (Ga. 1995). A Minnesota appeals court invalidated the City of Minneapolis' grant of health benefits to domestic partners of city employees on the ground that the city lacked authority to grant employee health benefits to persons not named in the state statute. See *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 108 (Minn. Ct. App. 1995), review denied (Mar. 29, 1995).

In May, 1994, the voters of Austin, Texas repealed by ballot proposition the city's decision to extend benefits to the domestic partners of city employees. See Chuck Lindell, *Gay Couples Sue City Over Loss of Benefit; ACLU Also Likely to File Suit to Recover Insurance Canceled by Proposition 22*, AUSTIN AM.-STATESMAN, June 15, 1994, at B1; Chuck Lindell, *Lawsuit Planned Over City's Domestic Partners Policy*, AUSTIN AM.-STATESMAN, June 14, 1994, at A1.

28. Plans covered by ERISA do not include state and local government plans. See 29 U.S.C. § 1003(b)(1) (1994).

29. The states prohibiting some forms of sexual orientation discrimination in employment include California, CAL. LAB. CODE § 1102.1 (Deering Supp. 1998), Connecticut, CONN. GEN. STAT. ANN. § 46a-81c (West 1995); Hawaii, HAW. REV. STAT. ANN. § 378-2 (Michie 1988), Massachusetts, MASS. ANN. LAWS, ch. 151B, § 4 (Law. Co-op. 1989), Minnesota, MINN. STAT. § 363.03 (West 1991), New Jersey, N.J. STAT. ANN. § 10:5-12 (West 1993), Rhode Island, R.I. GEN. LAWS § 28-5-7 (1995), Vermont, VT. STAT. ANN. tit. 21, § 495 (1987), and Wisconsin, WIS. STAT. § 111.36(1)(b)-(d) (West 1997). The District of Columbia also has this statutory provision. See D.C. CODE ANN. § 1-2512 (1998).

Over 100 municipalities have ordinances prohibiting sexual orientation discrimination. They are listed in NAN D. HUNTER ET AL., *THE RIGHTS OF LESBIANS AND GAY MEN: THE BASIC ACLU GUIDE TO A GAY PERSON'S RIGHTS* 204-08 (3d ed. 1992).

30. For example, California law prohibits "discrimination or different treatment in any aspect of employment or opportunity for employment based on actual or perceived sexual orientation." CAL. LAB. CODE § 1102.1.

state or city has attempted to enforce a general nondiscrimination law against a private sector employer's benefit plan that provides benefits only to spouses or dependents, perhaps because they have concluded that ERISA would be likely to preempt such an application of state or local law.³¹ Arguably, in California municipal ordinances prohibiting sexual orientation discrimination are unenforceable as they are preempted by the state Fair Employment and Housing Act.³² Thus, California cities may be powerless to use their general sexual orientation discrimination ordinances to require private sector employers to provide domestic partner benefits.³³

A number of cases have considered whether an employer's failure to provide benefits to gay or lesbian partners on the same

31. For example, the Massachusetts gay rights law says in its notes that "Nothing in this act shall be construed so as to legitimize or validate a 'homosexual marriage,' so-called, or to provide health insurance or related employee benefits to a 'homosexual spouse,' so-called." MASS. ANN. LAWS. ch. 151B, § 4 (notes).

32. A California court of appeal has held that the state Fair Employment and Housing Act ("FEHA") preempts municipal ordinances prohibiting sexual orientation discrimination. See *Delaney v. Superior Fast Freight*, 14 Cal. App. 4th 590, 596-98 (1993). See also Todd R. Dickey, *Reorienting the Workplace: Examining California's New Labor Code Section 1102.1 and Other Legal Protections Against Employment Discrimination Based on Sexual Orientation*, 66 S. CAL. L. REV. 2297 (1993). The *Delaney* court's conclusion was based on the provision of the Fair Employment and Housing Act which provides that:

it is the intention of the Legislature to occupy the field of regulation of discrimination in employment and housing encompassed by the provisions of this part, exclusive of all other laws banning discrimination in employment and housing by any city, city and county, county, or other political subdivision of the state

CAL. GOV. CODE § 12993(c) (Deering 1997). The court concluded that FEHA preempted a municipal ordinance even though FEHA does not prohibit sexual orientation discrimination.

The court overlooked two important things. First, FEHA occupies only the field of discrimination "encompassed by the provisions of this part" and sexual orientation is not within that field. Rather, sexual orientation discrimination in employment is covered by § 1102.1 of the California Labor Code. Second, the court did not consider the relevant provision of the Labor Code, § 98.7, which establishes the procedure for enforcing Labor Code prohibitions and which expressly states that "the rights and remedies provided by this section do not preclude any employee from pursuing any other rights and remedies under any other provisions of law." CAL. LAB. CODE § 98.7(f) (Deering 1991). The Labor Code thus, makes clear that the state law prohibiting sexual orientation discrimination does *not* preempt local laws.

33. Even if cities have power to enact ordinances generally prohibiting sexual orientation discrimination in employment, there is doubt as to whether the ordinances can provide the sort of damages and remedies typically available under state or federal employment discrimination law. See EUGENE MCQUILLIN, 6 THE LAW OF MUNICIPAL CORPORATIONS § 22.01 (3d ed. 1988).

terms as they are provided to spouses and dependents violates state equal protection clauses or sexual orientation discrimination laws.³⁴ Thus far, most courts have concluded that the failure to provide equal benefits to gay and lesbian partners does not constitute discrimination.³⁵ However, if courts were to conclude otherwise, this Article explains why such interpretations of state or local law would not be preempted by ERISA.

Third, several municipalities as well as the State of Hawaii have created a domestic partner registration process. Hawaii and San Francisco appear to be unique in attempting to require private employers to extend benefits to partners registered under the law, and San Francisco has attempted to do so only with respect to city contractors. Both laws have been determined to be preempted by ERISA. But if San Francisco's ordinance is upheld on appeal, one would expect other cities that have established such registration systems to enact nondiscrimination ordinances requiring businesses within the city's jurisdiction to treat registered domestic partners as the equivalent of spouses for all purposes, including benefits.

Fourth, some states and municipalities have laws prohibiting employment discrimination on the basis of marital status. Employees with same-sex partners have argued, so far unsuccessfully, that failure to provide benefits to committed same-sex partners constitutes discrimination on the basis of marital status.³⁶ However, if a court were to conclude that failure to pro-

34. See, e.g., *Beaty v. Truck Ins. Exch.*, 8 Cal. Rptr. 2d 593, 597-98 (Ct. App. 1992); *Hinman v. Dep't of Personnel Admin.*, 213 Cal. Rptr. 410, 415-16 (Ct. App. 1985); *Ross v. Denver Dep't Health & Hosps.*, 883 P.2d 516, 521 (Colo. Ct. App. 1994); *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 112 (Minn. Ct. App. 1995); *Rutgers Council of AAUP Chapters v. Rutgers, the State University*, 689 A.2d 828 (N.J. Super. Ct. App. 1997); *Phillips v. Wisconsin Personnel Comm'n*, 482 N.W.2d 121, 127 (Wis. Ct. App. 1992). These and other cases are collected and critiqued in *Developments in the Law: Employment Discrimination, Statutory Protection for Gays and Lesbians in Private Employment*, 109 HARV. L. REV. 1625, 1634-38 (1996).

35. All the cases cited *supra* note 34 rejected the discrimination argument. The only court to accept it is *Tanner v. Oregon Health Sciences Univ.*, 68 Empl. Prac. Dec. para. 44,211 (Or. Cir. Ct. 1996) (denial of benefits to same-sex partners violates state law and constitution; orders state agency to provide benefits).

36. In *Univ. of Alaska v. Tumeo*, 933 P.2d 1147 (Alaska 1997), the court held that the University's failure to provide domestic partner benefits to same-sex partners constituted discrimination on the basis of marital status. However, the court decided that a recent amendment to the relevant state law mooted the availability of prospective relief. The amendment to the Alaska Human Rights law provides that "Notwithstanding the prohibition against employment discrimination on the basis of marital status or parenthood under (a) of this section, an employer may, without violating this chapter, provide greater health and retirement benefits to employees

vide domestic partner benefits did constitute marital status discrimination, employers would be expected to argue that that application of the state law to a private employee benefit plan is preempted by ERISA.

Fifth, although no such laws have been enacted, a state might use its insurance law to require domestic partner coverage for same-sex partners. A state could, through legislation or otherwise (as by a decision of the insurance commissioner) change the state's insurance code to prohibit the writing of insurance policies that discriminate on the basis of sexual orientation, and to define failure to provide same-sex partners the same benefits as spouses as prohibited discrimination.³⁷ This would in ef-

who have a spouse or dependent children than are provided to other employees." ALASKA STAT. § 18.80.220(c)(1) (Michie 1996). The court concluded that under the amended law, an employer does not discriminate on the basis of marital status if it refuses to provide domestic partner benefits. The ERISA preemption argument was not raised because the University of Alaska, as a public employer, is not covered by ERISA.

California's provision prohibiting sexual orientation discrimination explicitly states that it does not affect "otherwise valid" marital status requirements. CAL. LAB. CODE § 1102.1(2).

37. In California, for example, statutes prohibit insurers from declining insurance coverage on the basis of sex, marital status, or sexual orientation. See CAL. INS. CODE § 679.71 (Deering 1992) (prohibiting insurers from discriminating in issuing coverage on the basis of marital status); CAL. HEALTH & SAFETY CODE § 1365.5 (Deering Supp. 1998) (prohibiting health care service plans, which include employer-provided health benefits, from declining coverage on the basis of sex, marital status, or sexual orientation). Statutes also authorize the Insurance Commissioner, who regulates property and casualty insurance, and the Commissioner of Corporations, who regulates "health care service plans," to issue regulations to enforce the statutory prohibitions. See CAL. INS. CODE § 790.10 (Deering 1992) (Insurance Commissioner's authority to implement regulations); CAL. HEALTH & SAFETY CODE §§ 1341, 1342.5 (Deering 1990) (Commissioner of Corporations' authority to promulgate regulations). A "health care service plan" is an entity that "undertakes to arrange for the provision of health care services to subscribers of enrollees, or to pay for or reimburse any part of the cost for such services, in return for a prepaid or periodic charge paid by or on behalf of such subscribers or enrollees." CAL. HEALTH & SAFETY CODE § 1345(f) (Deering 1990). Thus, health care service plans include insured employee benefit plans.

Pursuant to this statutory authority, the Insurance Commissioner has promulgated a regulation prohibiting discriminatory denials of coverage on the basis of sex, marital status, or sexual orientation. See 10 CAL. CODE REGS tit. 10 § 2560.4 (1990). The Commissioner of Corporations has not issued a similar regulation, although the provision of the Health and Safety Code prohibiting discrimination in the coverage in Health Care Service Plans on the bases of sex, marital status, or sexual orientation appears to prohibit the same things as the regulation prohibiting discrimination in other types of insurance coverage.

Neither these regulations nor the statutes specifically indicate whether they could be interpreted to require insurers that issue health or other policies to employers for employee coverage to cover domestic partners on the same terms as spouses.

fect require non-self-insured plans that provide spousal benefits to also provide domestic partner benefits as a condition of purchasing insurance. Such a state insurance law would avoid ERISA preemption under the insurance savings clause.³⁸

This approach has been tried in reverse in Georgia. The Georgia Insurance Commissioner announced that insurers in that state are prohibited from writing policies to provide domestic partner coverage to same-sex partners. In a 1995 directive, the Insurance Commissioner wrote that "for an insurer to offer insurance coverage to domestic partners, the relationship between the individuals to which coverage is offered must meet the requirements of a ceremonial or common law marriage" under Georgia law. "To allow otherwise would be contrary to the public policy of the state of Georgia."³⁹ If one state can prohibit the writing of policies for domestic partners, others could prohibit the sale of any policy that covers spouses but not domestic partners, free from the threat of ERISA preemption.

The sixth approach to the problem of benefits equality focuses on the definition of spouse. Many employee benefit plans that provide benefits for the spouse of an employee do not define the term spouse. Or, if the term is defined, the plan relies on state law for a determination of who is legally married. A state that redefined marriage so as to allow same-sex marriages would allow same-sex partners to become spouses. A same-sex spouse

Insofar as failure to offer domestic partner coverage on the same terms as spousal coverage constitutes discrimination on the basis of sexual orientation and marital status, the lack of domestic partner coverage in private sector benefit plans that are insured in California is already illegal under California law.

38. See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 733 (1985). Plans that are fully self-insured can avoid state insurance regulation because, under ERISA's insurance savings clause, state insurance regulation cannot be applied to ERISA plans. States can regulate only insurance that plans purchase.

39. Dave Lenckus, *State Bans Coverage of Gay Partners; Groups Accuse Georgia of Bias*, *BUS. INS.*, Feb. 19, 1996, at 2. It is unclear whether, in light of the Georgia Supreme Court's recent decision upholding the Atlanta domestic partners benefits ordinance, the Georgia Insurance Commissioner correctly articulated the public policy of the state. Cf. *City of Atlanta v. Morgan*, 492 S.E.2d 193 (Ga. 1997) (holding that city's domestic partnership benefit ordinances usage of the term "dependent" was consistent with the ordinary meaning of the term and such did not violate either state constitution or Municipal Home Rule Act).

That the policy was adopted by the Georgia Insurance Commissioner, rather than the state legislature, suggests that legislative action might be unnecessary in any state in which the insurance commissioner has the power to adopt such policies. California might be such a state, and political pressure on the elected insurance commissioner might be a sensible strategy for gay rights advocates. See *supra* note 37.

would be entitled to benefits under any plan that did not itself define spouse to include only opposite-sex spouses.⁴⁰

In short, there are many laws on the books in states and cities around the country that could be interpreted to require private sector employers to provide domestic partner benefits, and other untested legal strategies for ensuring equal coverage of private sector benefit plans are possible. Under any of these theories, a private sector employer's failure to provide benefits to same-sex domestic partners on the same terms as opposite-sex spouses might violate state or local law. But as soon as gay rights advocates succeed in their claims on these theories, they would likely confront the argument that enforcement of state or local law against the plan would be preempted by ERISA.

II. ERISA PREEMPTION OF DOMESTIC PARTNER BENEFITS

A. *ERISA Preemption Generally*

Enacted in 1974 to prevent abuses in the administration of private pension plans, ERISA⁴¹ regulates all private sector employee benefit plans by imposing disclosure and reporting requirements,⁴² fiduciary obligations,⁴³ and for pension plans only, participation, vesting, and minimum funding requirements.⁴⁴ Although ERISA extensively regulates the content of pension plans, it imposes few requirements on the content of health and

40. An employee benefit plan could avoid the application of a state law allowing same-sex marriages by defining for itself which persons count as spouses under the terms of the plan. A plan could state that only some legal marriages — those between a man and a woman — would be recognized under the plan. Alternatively, the plan could adopt the definition of marriage contained in federal law — the DOMA definition. *See* 1 U.S.C.A. § 7 (1997) (for purposes of federal law, “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife”). Unless such a plan term were deemed unlawful under a state law prohibiting sexual orientation discrimination, or under some other state or federal law, the plan could avoid providing benefits to same-sex spouses. *See infra* text accompanying notes 116-17.

41. 29 U.S.C. § 1001 (1994). ERISA covers all employee benefits — pensions, health insurance, disability insurance, etc. — that are offered in the form of plans. ERISA identifies two general categories of covered employee benefit plans: “pension plans” (which provide retirement benefits) and “welfare benefit plans” (which provide any benefit other than pensions, and thus include health, disability, and other fringe benefit plans).

42. *See* 29 U.S.C. §§ 1021-1030 (1994).

43. *See* 29 U.S.C. §§ 1101-1114 (1994).

44. *See* 29 U.S.C. §§ 1051-1086 (1994).

other welfare benefit plans.⁴⁵ ERISA leaves both the decision whether to offer any benefits, as well as most of the terms and coverage of health and other welfare benefit plans, to the determination of the employer.⁴⁶

One of the most controversial and frequently litigated provisions of ERISA is its preemption clause, which provides that ERISA “supersede[s] any and all state laws insofar as they . . . relate to any employee benefit plan” covered by ERISA.⁴⁷ ERISA preemption has been controversial in part because, although ERISA broadly preempts state regulation of health benefit plans, ERISA provides very little substantive regulation itself to fill the void created by the displacement of state law. As a result, preemption of state law has become a favorite argument of employers and plan administrators seeking to evade state legislation designed to protect employees.⁴⁸

Congress did not define and gave little thought to the “relates to” language of section 514(a) or to the precise scope of ERISA preemption. It apparently did not foresee that preemption of state laws relating to nonpension benefits would create a substantial regulatory void.⁴⁹ Yet, many in Congress probably were aware that broad preemption of state law would invalidate the state laws enacted to protect employees that were consistent with ERISA’s letter and spirit. The consensus view among scholars and courts is that preemption was meant to ensure that em-

45. Apart from the fiduciary and disclosure requirements and dispute resolution system requirements imposed on all plans, the only substantive regulation of the terms of health plans that ERISA imposes are nondiscrimination and portability requirements and limits on pre-existing condition exclusions. See 29 U.S.C. §§ 1181-1183 (1994). These provisions were added by the Health Ins. Portability and Accessibility Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

46. On the myriad issues that arise because of ERISA’s differential regulation of pension as compared to other benefits, see generally Catherine L. Fisk, *Lochner Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO ST. L.J. 153 (1995) [hereinafter *Lochner Redux*].

47. 29 U.S.C. § 1144(a) (1994). On ERISA preemption, see generally Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. LEGIS. 35 (1996) [hereinafter *The Last Article*].

48. See *id.* at 38.

49. See *id.* at 52-55. I and others have argued that the different degrees of substantive ERISA regulation of pensions as opposed to welfare benefits warrants courts in being free to create federal common law to fill the regulatory void in the welfare benefits area. See *Lochner Redux*, *supra* note 46, at 167-70; Samuel A. Marcossou, *Who Is “Us” and Who Is “Them” — Common Threads and the Discriminatory Cut-Off of Health Care Benefits for AIDS Under ERISA and the Americans With Disabilities Act*, 44 AM. U. L. REV. 361, 400-02 (1994).

ployers operating multistate benefit plans would not be subject to "conflicting or inconsistent State and local regulation" of their plans.⁵⁰ Congress did not fully realize the extent to which the primary purpose of ERISA — to protect employees — would conflict with its secondary purpose — to facilitate uniform administration of nationwide plans by preempting state law. The vexing problem in ERISA preemption litigation has been to reconcile these competing statutory policies and purposes.

The difficulty of reconciling these inconsistent aims was exacerbated by the Supreme Court's approach to the problem. The Court's early ERISA preemption decisions stated that the "relates to" language meant the scope of ERISA's preemptive effect was "broad,"⁵¹ and that state laws that simply had "a connection with" ERISA plans would be preempted unless they fell within exceptions to preemption enumerated in the statute or unless the connection was too "tenuous" or "remote."⁵² As preemption challenges to myriad state laws far afield from ERISA's core concerns multiplied, individual Justices, lower courts, and commentators began to question the usefulness of parsing the meaning of the words "relates to" to determine the limits of preemption.⁵³ They also doubted whether extremely broad preemption was compelled by the statute or sensible policy. In its four most recent decisions on the subject, the Court abandoned its earlier focus on the breadth of the "relates to" language. These decisions both signal a possible narrowing of the scope of ERISA preemption⁵⁴ and profess to adopt a more common-sense approach to preemption focusing on whether preemption of a particular state law is consistent with the purposes of ERISA preemption generally.⁵⁵

50. 120 CONG. REC. 29933 (1974) (statements of Sen. Williams), *quoted in* *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 105 (1983).

51. *Shaw*, 463 U.S. at 98.

52. *Id.* at 100 n.21.

53. *See, e.g.*, *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 138 (1992) (Stevens, J., dissenting); *The Last Article*, *supra* note 47, at 65.

54. *See* *California Div. of Labor Standards Enforcement v. Dillingham Constr. Co., N.A., Inc.*, 117 S. Ct. 832 (1997); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Indeed, the Court took care to note that principles of federalism compel that, in ERISA cases as elsewhere, there be a "presumption against preemption" of state law.

55. As Justice Souter wrote for a unanimous Court in *Travelers*, "[w]e simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." 514 U.S. at 656.

The Court's recent approach to ERISA preemption begins by deciding whether the state law operates in an area traditionally within the police powers of the states.⁵⁶ If so, the party asserting preemption "bear[s] the considerable burden of overcoming 'the starting presumption that Congress does not intend to supplant state law.'"⁵⁷ To overcome that presumption, the Court looks to whether the state law requires an employer to provide certain benefits, or forbids a method of calculating benefits that federal law permits, or whether the existence of an ERISA plan is a critical element of a state law cause of action.⁵⁸ If the state law does any of those things, it is preempted by ERISA unless it falls within one of the express statutory exceptions to preemption.

The Court's current ERISA preemption analysis is almost indistinguishable from ordinary preemption analysis.⁵⁹ Interpretation of the scope of the "relates to" language of the ERISA preemption provision now resembles the preemption analysis the courts use when a statute contains no preemption provision but the courts have concluded that the federal statute occupies the field in which it regulates. Subject to the express statutory limits on the scope of ERISA preemption, ERISA occupies the field of employee benefit regulation, displacing even harmonious state laws.⁶⁰ ERISA also obviously preempts state laws that directly or indirectly conflict with ERISA's provisions.

B. *State Laws Regulating the Terms of Employee Benefit Plans*

At first glance, the arguments in favor of ERISA preemption of state and local domestic partner ordinances applying to

56. See *Boggs v. Boggs*, 117 S. Ct. 1754, 1760 (1997); *De Buono v. NYSA-ILA Med. and Clinical Servs. Fund*, 117 S. Ct. 1747, 1751 (1997); *Dillingham*, 117 S. Ct. at 838. Given the breadth of the traditional police powers, however, one wonders whether this step adds anything at all to the analysis. As the Supreme Court declared in *Berman v. Parker*, 348 U.S. 26, 32 (1954): "Public safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it." On the enormous breadth of the police powers of the state as including anything that the constitution does not forbid to them, see ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 538 (1997).

57. *De Buono*, 117 S. Ct. at 1752.

58. *See id.*

59. Justice Scalia, joined by Justice Ginsburg, recently remarked on this in *Dillingham*, 117 S. Ct. at 843 (Scalia, J., concurring), and I argued some years ago that this is what the Court should have done. *See The Last Article, supra* note 47, at 45.

60. *See, e.g., Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981).

ERISA-covered plans seem quite strong. A number of arguments against ERISA preemption could, however, be based on the scope and purposes of ERISA itself. Absent DOMA, it is a close question whether ERISA preempts these state laws.

The arguments in favor of ERISA preemption rest both on the text and on the purpose of section 514. The starting point of the ERISA preemption analysis is to determine whether the state law is a subject of traditional state regulation and part of the state's historic police powers.⁶¹ The regulation of the terms of employment for the protection of employees are traditional exercises of police powers,⁶² as are the definition of marriage and of other family relationships.⁶³ So, too, are laws attempting to provide for adequate health, disability, and other insurance, for they are within the states' traditional authority to regulate both insurance and matters relating to health.⁶⁴ Thus, it would seem that the court would begin with a presumption against preemption of state laws relevant to same-sex partner benefits.

However, employers might overcome this presumption. Though it may be difficult in some cases to define the field of benefit plan regulation that ERISA exclusively occupies, state and local efforts to compel employers to offer — at least in their ERISA plans — benefits to domestic partners lie in that field. Whether in the form of a general antidiscrimination law or a targeted effort to require domestic partner benefits, these state laws regulate eligibility criteria for benefits and expand the class of people who would be eligible for coverage under any ERISA plan that provides spousal benefits. They therefore arguably “relate to” ERISA plans.

61. See *De Buono*, 117 S. Ct. at 1751-52 (citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)).

62. See *DeCanas v. Bica*, 424 U.S. 351, 356 (1976). Between the end of Reconstruction and the enactment of the Civil Rights Act in 1964, state law was the only source of employment discrimination law. In many states, including California, local governments have authority to prohibit unfair employment practices either generally, or by city contractors in particular. See, e.g., *Alioto's Fish Co., v. Human Rights Comm'n*, 120 Cal. App. 3d 594, 605 (1981).

63. As the Supreme Court said in a case determining that there is no federal court jurisdiction over domestic relations cases: “The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.” *In re Burrus*, 136 U.S. 586, 593-94 (1890). See also *Ankenbrandt v. Richards*, 112 S. Ct. 2206 (1992), *vacated* 973 F.2d 923 (5th Cir. 1992).

64. See *Travelers*, 514 U.S. at 668; *De Buono*, 117 S. Ct. at 1751-52.

Domestic partnership laws like San Francisco's and the application of general antidiscrimination laws to the terms of benefits plans implicate the concerns that ERISA's preemption provision was enacted to address. These laws have more than incidental effect on ERISA plans. They require plans to redefine who is eligible for benefits and to provide benefits to same-sex partners if benefits are provided to spouses of plan participants. The Supreme Court held that state laws mandating the provision of particular benefits are preempted, unless they fall within some other exception to preemption. Thus, in *Metropolitan Life Insurance Co. v. Massachusetts*,⁶⁵ the Court held that a state law mandating that every health policy include minimum mental health benefits was preempted to the extent it applied to ERISA plans. Similarly, *District of Columbia v. Greater Washington Board of Trade*⁶⁶ held that ERISA preempted a Washington, D.C. law that required employers to provide health benefits to workers eligible to receive workers' compensation benefits. In *Shaw v. Delta Air Lines, Inc.*,⁶⁷ the Court determined that a state law prohibiting pregnancy discrimination and another state law requiring employer disability benefit plans to cover pregnancy were preempted as applied to ERISA plans. And in *Alessi v. Raybestos-Manhattan*,⁶⁸ the Court held that ERISA preempted a state law determining how ERISA plan benefits must be calculated. Although the reasoning the Court used in reaching its conclusions in these cases was, in part, the textualist literalism that the Court has since disavowed, the Court has nevertheless approvingly cited these holdings in its recent preemption decisions, and the district court that struck down substantial parts of the San Francisco ordinance relied on some of them.⁶⁹

Compliance with San Francisco's ordinance would interfere with the administration of a nationwide ERISA benefits plan to

65. 471 U.S. 724 (1985). The Court held that the mandated benefits law was not preempted as applied to insurance policies sold in the state because it determined that the provision was a law regulating insurance and thus, saved from preemption by ERISA's insurance savings clause. The law was preempted only as applied directly to self-insured plans because the savings clause allows states to regulate only the insurance policies sold to plans, not the contents of plans that do not purchase insurance.

66. 506 U.S. 125, 127 (1992).

67. 463 U.S. 85, 97 (1983).

68. 451 U.S. 504 (1981).

69. See *De Buono*, 117 S. Ct. at 1752 n.15; *Air Transp. Ass'n of Am. v. City and County of San Francisco*, No. 97-1763 CW, 1998 U.S. Dist. LEXIS 4837, at *51-80 (N.D. Cal. Apr. 10, 1998).

the extent it would require an employer's ERISA plan to provide spousal benefits to whichever employees are within the scope of San Francisco's authority. Because the Dormant Commerce Clause arguably denies San Francisco the authority to require a major international airline such as United to change its practices with respect to employees worldwide,⁷⁰ enforcement of the ordinance would require airlines to provide benefits to San Francisco-based employees that they do not provide to employees elsewhere. If another city were to enact an ordinance that is the mirror image of San Francisco's, and refuse to permit airlines to use the airport if they *do* provide domestic partner benefits, the airline would have to have one set of benefits eligibility rules for San Francisco and another for the other city.⁷¹ Likewise, a nationwide employer doing business in Hawaii would have to provide coverage for reciprocal beneficiaries under that state's law.

Realistically, however, complying with San Francisco's or Hawaii's domestic partnership laws does not substantially affect the administration of a nationwide plan because neither law requires an employer or plan administrator to change its plan administration; the employer or plan administrator simply has to consider whether additional people qualify for benefits under the provisions for spouses or dependents.⁷² The ERISA preemption goal of facilitating nationwide uniformity for multistate plans is not significantly compromised. Complying with different state definitions of domestic partnership is no greater administrative burden than what plans already have to decide which persons are spouses or dependents. The employer and/or plan administrator still must make a determination for every covered employee whether each person he or she claims as a spouse and dependent is in fact a spouse or dependent. The burden of complying with state laws does not affect how benefits are calculated or which

70. See *Air Transp. Ass'n.*, 1998 U.S. Dist. LEXIS 4837, at *29-36.

71. Although this is speculative, such an action by another city might not be *that* unlikely, as is suggested by the decision of the Georgia Insurance Commissioner that to provide domestic partner benefits is contrary to the public policy of the State of Georgia. In 1993, the Williamson, Texas, County Commissioners voted against offering tax incentives to encourage Apple Computer to build a large facility in the county because of Apple's practice of providing domestic partner benefits. A week later, the Commission changed its decision after one commissioner changed his mind. See *Apple Computer Abandons Plans for Austin-area Facility*, DALLAS MORNING NEWS, July 27, 1997, at 12A.

72. *But cf.* *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 130-31 (1992) (local law mandating ERISA plan coverage for certain persons is preempted).

benefits are provided, it only affects who may participate in the plan. Employers and plans already make such individualized determinations for every employee on an annual basis.

Given the relatively slight harm to the goal of uniformity and ease of administration, and the relatively great harm to the states' interests in protecting employees against discrimination, there is a strong argument against finding that domestic partnership laws "relate to" plans. As the Court made clear recently in *DeBuono* and *Travelers*, state laws in areas of core state concern are not preempted simply because they affect plan administration in slight or indirect ways.⁷³ The district court therefore erred in concluding that San Francisco's ordinance relates to ERISA plans.⁷⁴

Even if a state attempted to address discrimination in benefit plans through a general antidiscrimination law rather than a law directed at benefit plans in particular, ERISA preemption would be a problem. The Supreme Court's 1983 decision in *Shaw v. Delta Air Lines, Inc.*⁷⁵ held that state antidiscrimination laws cannot be applied to benefits plans to the extent they prohibit discrimination that is permitted by federal laws such as Title VII. In *Shaw*, the Court addressed the question whether New York's Human Rights Law,⁷⁶ which prohibited pregnancy discrimination at a time when Title VII did not,⁷⁷ could be applied to employee benefit plans that discriminated against pregnant women by providing lesser benefits for pregnancy than for other nonoccupational disabilities. Applying a very broad reading of the words "relate to" — an emphasis on the plain language and interpretation of the language that the Court has since questioned — the Court decided that the state laws "related to" ERISA plans because they affected the terms of eligibility and benefits.⁷⁸ The Court held that ERISA preempted the state antidiscrimination law to the extent state law prohibited what was

73. See *De Buono*, 117 S. Ct. at 1752-53; *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995).

74. See *Air Transp. Ass'n.*, 1998 U.S. Dist. LEXIS 4837, at *80.

75. 463 U.S. 85, 103-06 (1983).

76. N.Y. EXEC. LAW §§ 290-301 (McKinney 1993 and McKinney Supp. 1997-1998).

77. In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Supreme Court held that pregnancy discrimination was not prohibited by Title VII because it did not constitute discrimination on the basis of "sex." In 1978, Congress enacted the Pregnancy Discrimination Act to overrule *Gilbert* and to establish that Title VII prohibits discrimination on the basis of pregnancy. See 42 U.S.C. § 2000e(k) (1994).

78. See *Shaw*, 463 U.S. at 103-06.

permissible under Title VII, but that ERISA did not preempt state laws that prohibit what Title VII prohibits.⁷⁹

The holding rested on section 514(d) of ERISA, which provides that ERISA's preemption provision shall not be "construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States."⁸⁰ The Court decided that preemption of state antidiscrimination law by ERISA would "impair" or "modify" Title VII because enforcement of Title VII relies on state agencies as part of the administrative enforcement machinery in states where employment discrimination laws create state fair employment practice agencies.⁸¹ Title VII requires victims of discrimination to exhaust administrative remedies by filing a charge with the EEOC.⁸² A victim of discrimination in states with state agencies can file a charge with either the state agency or the federal EEOC. If the state law were preempted, state agencies would not be able to handle the Title VII claims. To preempt state laws would, the Court decided, "'modify' and 'impair'" Title VII because it would interfere with the joint state/federal enforcement scheme that Title VII envisions.⁸³

79. *See id.* at 103-04. Thus, states can prohibit discrimination in the terms of benefit plans if the discrimination would also be illegal under Title VII. Regrettably, plans still discriminate. As Professor Sylvia Law argues, many plans discriminate on the basis of sex by excluding coverage for contraceptives from otherwise comprehensive coverage for prescription drugs and medical services. Although this form of pregnancy discrimination is arguably illegal under Title VII and under the law of some states, it remains a widespread problem. *See* Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363 (1998).

80. 29 U.S.C. § 1144(d) (1994); *see also* *Shaw*, 463 U.S. at 100-01.

81. *See Shaw*, 463 U.S. at 102.

82. Title VII requires that anyone seeking to sue for employment discrimination must first file a charge with the EEOC, or, in states with fair employment agencies, the state agency. *See* 42 U.S.C. § 2000e-5 (1994). The EEOC is supposed to conduct an investigation and attempt to get the parties to resolve the claim through conciliation. *See* 42 U.S.C. § 2000e-5(b). After investigation and conciliation, the EEOC can then either sue itself or can issue the complaining employee a "right to sue" letter that allows the employee to institute a suit herself. *See* 42 U.S.C. § 2000e-5(f)(1). Exhaustion of the administrative procedure is a prerequisite to suit. Many state fair employment statutes have similar administrative exhaustion requirements and establish their own fair employment agencies along the lines of the EEOC. In states with such agencies, the state agency and the EEOC have developed work-sharing arrangements so that both agencies do not duplicate their efforts on the same cases. Thus, an employee with both a state law and Title VII claim can file a charge with the state agency, which will investigate and attempt to conciliate the dispute, and exhaustion of the state administrative procedure is deemed to satisfy the exhaustion requirement for any Title VII claims the employee may assert. It is in this respect that the *Shaw* Court referred to the importance to Title VII enforcement of state agencies and state law.

83. *See Shaw*, 463 U.S. at 102.

The Court decided, however, that Title VII would not be impaired by preemption of state antidiscrimination laws that prohibit what Title VII permits, because in such situations there would be no federal claim to file at the agency.⁸⁴ The Court said: “Quite simply, Title VII is neutral on the subject of all employment practices it does not prohibit. We fail to see how federal law would be impaired by pre-emption of a state law prohibiting conduct that federal law permitted.”⁸⁵ The Court in *Shaw* did not have occasion to consider whether any federal law other than Title VII would be “modified” or “impaired” by preemption of state law and thus, under section 514(d), ought not be subject to preemption. As will be explained in Part III, DOMA is such a federal law.

Before examining the effect of DOMA, it is worth considering whether the holding and reasoning of *Shaw* survive the Court’s recent decisions scaling back ERISA preemption, and whether the Court today would reach the same conclusion about sexual orientation discrimination laws that it reached in *Shaw* about pregnancy discrimination. The Court no longer emphasizes the “plain meaning” of “relates to,” as it did in *Shaw*. The question today would be whether the state laws at issue, although clearly within the scope of traditional state police powers, so directly and substantially regulate the content of employee benefit plans as to run afoul of ERISA’s goals of national uniformity. The answer is probably yes, on the facts of *Shaw*. New York clearly was trying to force employers to cover a certain condition — pregnancy — in their health plans. Compliance with state law would require employers to redesign the benefits package.

Even if *Shaw* would be decided the same way today, there is a fundamental difference between the pregnancy laws at issue in *Shaw* and the sexual orientation discrimination that state and local domestic partnership laws address today. The pregnancy provisions at issue in *Shaw* had a more significant effect on plans than the domestic partnership schemes of most cities and states. To cover pregnancy would require rewriting the plan documents and summary plan descriptions and devising a set of rules about which pregnancy-related conditions would be covered, including fertility treatments, extraordinary expenses associated with high-risk pregnancies, and the like. By contrast, covering domestic

84. *See id.* at 103-04.

85. *Id.*

partners requires only rewriting any plan provisions defining who constitutes a spouse or dependent. In the many plans that do not define those terms, compliance with the state or local law would require only treating some people as spouses who have not previously been treated as spouses. This is no more onerous than complying with different state laws that regulate the validity of common law marriage or that determine whether adopted children or step-children constitute the dependents of the covered employee. Therefore, *Shaw*, while still good law on its facts, is distinguishable.

There are, as well, other arguments against ERISA preemption of state laws entitling same-sex partners to be treated as spouses for purposes of benefit eligibility. The key to avoiding preemption is for a law to fall within a statutory exception. There are a number of relevant exceptions to the scope of ERISA preemption besides section 514(d), the provision considered in *Shaw*.

First, ERISA preempts state laws relating only to benefit "plans," not to programs that do not meet the ERISA definition of a "plan."⁸⁶ Many employer-provided benefits that might be valuable to gay, lesbian and bisexual employees are not usually offered through an ERISA-covered plan. For example, family and bereavement leave, travel programs, moving expenses, credit union memberships, and discount programs are typically paid for as normal operating expenses, not from funds in a special plan

86. ERISA supersedes state laws as they "relate to any employee benefit plan described in § 1003(a) of this title and not exempt under § 1003(b) of this title." The "plans" that are covered in § 1003(a) are defined in § 1002 as a "plan, fund or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that" the plan provides various benefits specified in the statute. 29 U.S.C. §§ 1002(1), (2) (1994). The benefits that such a plan may offer include, in the case of welfare benefit plans, "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care center, scholarship funds, or prepaid legal services," 29 U.S.C. § 1002(1) (1994), and in the case of pension plans, "retirement income to employees" or "a deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. § 1002(2)(A) (1994).

In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) and in *Massachusetts v. Morash*, 490 U.S. 107 (1990), the Court held that ERISA does not preempt state laws requiring the payment of severance pay and unused vacation pay to employees because these laws affected "payroll practices" not benefit plans. The Court reasoned that although these benefits might be offered in programs that constitute ERISA plans, they need not be because such programs are usually paid out of general operating revenues and do not require substantial reserves to be calculated based on complex actuarial assumptions.

maintained according to ERISA. As long as these programs and benefits constitute "terms of employment," discrimination on the basis of sexual orientation in defining eligibility would be prohibited under any statute, such as California's Labor Code section 1102.1, which prohibits sexual orientation discrimination in terms or conditions of employment.⁸⁷ Indeed, the district court held that ERISA does not preempt enforcement of the San Francisco ordinance to benefits such as moving expenses that are not administered through ERISA-covered plans.⁸⁸

A state law requiring domestic partner benefits to be offered in a separate non-ERISA plan might escape ERISA preemption. In defending its city contractors ordinance against the airlines' legal challenge, San Francisco has argued that employers could comply with the ordinance without any effect on their ERISA plans by establishing a stand-alone plan for domestic partner benefits that would not be administered as an ERISA plan. In its recent decision in *Dillingham*,⁸⁹ the Court upheld a state law that required employers to pay prevailing wage rates to apprentices unless they participated in state-approved apprenticeship programs. Because most state-approved programs, including the one at issue in *Dillingham* were ERISA plans, the law effectively required employers to participate in an ERISA plan. Nevertheless, because it was possible for a state-approved program to be financed from the employer's general assets rather than through an ERISA plan, the Court decided that the state law functioned "irrespective of . . . the existence of an ERISA plan" and was therefore not preempted under ERISA. Relying in part on the Court's reasoning, San Francisco argued that employers could comply with the San Francisco ordinance by establishing separate plans to pay domestic partner benefits and that such programs

87. ERISA exempts from its coverage (and thus from preemption) plans maintained "solely" to comply with state workers' compensation or disability insurance laws. See 29 U.S.C. § 1003(b)(3) (1994). Any state that requires employers to comply with workers' compensation or disability laws by maintaining a separate plan could provide for same-sex partners to receive spousal benefits under such plans, although such plans do not provide benefits to spouses (except survivor's benefits for employees who die), thus the actual benefit to same-sex couples of such an extension of the law is minimal.

88. See *Air Transp. Ass'n of America v. City and County of San Francisco*, No. 97-1763 CW, 1998 U.S. Dist. LEXIS 4837, at *53-54 (N.D. Cal. Apr. 10, 1998).

89. See *California Div. Of Labor Standards Enforcement v. Dillingham Constr. Co., N.A., Inc.*, 117 S. Ct. 832, 839 (1997).

would not be ERISA plans.⁹⁰ The district court rejected the city's contention, determining that a system of paying domestic partner benefits would be a "plan" and that it would fit the statutory definition of an employee welfare benefit plan even though no employees (only their domestic partners) would receive benefits from the "plan."⁹¹

A second argument against ERISA preemption of laws like San Francisco's is that ERISA does not preempt municipal ordinances by which the city acts as a market participant rather than as a regulator of the labor market. Under this so-called market participant doctrine, a city or state can decline to contract with businesses who engage in practices that the local government finds objectionable, just as a private participant in the market can select its business partners on the same basis.⁹² San Francisco and its amici argued that, under the market participant doctrine, ERISA does not preempt the city's ordinance requiring all city contractors to avoid sexual orientation discrimination by providing domestic partner benefits because the city is simply choosing business partners that do not discriminate rather than attempting to regulate the employment practices of all private employers.⁹³

The Supreme Court has accepted a market participant exception to the preemptive effect that would otherwise be given to the Commerce Clause of the U.S. Constitution as well as to the National Labor Relations Act.⁹⁴ It has not ruled on whether the

90. In particular, San Francisco contended that such plans would not be ERISA plans because no employees — only their domestic partners — would be participants and thus the plans would not be ERISA plans as they are defined in the Department of Labor regulations. See 29 C.F.R. § 2510.3-3(b) (1997). *But cf.* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) (holding that employer-sponsored medical plan that provided lower pregnancy-related coverage for the wives of male employees than for female employees discriminated against male employees by providing fewer benefits for their dependents than for the dependents of female employees).

91. *Air Transp. Ass'n*, 1998 U.S. Dist. LEXIS 4837, at *51-68.

92. See *Building and Constr. Trades Council v. Associated Builders and Contractors*, 507 U.S. 218, 227 (1993) (holding that the market participant doctrine provides that the federal National Labor Relations Act does not preempt a city from requiring all contractors on a city construction project to adhere to specific labor conditions).

93. See Amici Curiae Brief by ACLU of Northern California and Lambda Legal Defense and Education Fund et al., *Air Transp. Ass'n of America v. City and County of San Francisco*, No. 97-1763 CW, 1998 U.S. Dist. LEXIS 4837 (N.D. Cal. Apr. 10, 1998).

94. See, e.g., *Building and Constr. Trades Council*, 507 U.S. 218 (1993) (finding a market participant exception to the preemptive scope of the National Labor Relations Act); *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204

market participant doctrine applies to ERISA preemption as well. Some district courts have held that the market participant doctrine applies to ERISA preemption, and no court of appeals has yet ruled on the issue.⁹⁵ The district court rejected San Francisco's contention that a market participant exception to ERISA preemption, even if one were recognized, would shield the ordinance. The court thought the ordinance was predominantly an exercise of regulatory power, not market power. The city's proprietary interest in ensuring that its contractors will attract a high-quality workforce did not, in the court's view, justify the ordinance because it applies to contractors (like United) who do not provide services for the city. Moreover, the court concluded that the city's monopoly in running the airport gave it far more power than an ordinary market participant and thus made the market participant exception inappropriate.⁹⁶

Even if a market participant exception to ERISA preemption is recognized, the protection it would afford to state and local laws prohibiting private sector benefit plan discrimination is limited because it would allow the state or local government to require only government contractors to provide domestic partner benefits. Laws like Hawaii's, which require *all* private sector employers to provide domestic partner benefits, would still face the threat of ERISA preemption. Moreover, state or local antidiscrimination laws would likewise not be saved from ERISA preemption because a broad antidiscrimination law is obviously regulatory, not simply an exercise of governmental discretion as a market participant.

In sum, there are strong arguments both for and against the position that ERISA preempts state and local antidiscrimination and domestic partnership benefits laws as applied to health and other ERISA plans. The difficult ERISA questions raised here, however, need not be resolved. A more straightforward and

(1983) (market participant doctrine applies to city requirement that Boston residents be hired to work on city contract projects); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (finding a market participant exception to the scope of the Commerce Clause). On the market participant doctrine generally, see Karl Manheim, *New Age Federalism and the Market Participant Doctrine*, 22 ARIZ. ST. L.J. 559 (1990).

95. See *Colfax Corp. v. Illinois State Toll Highway Authority*, No. 93-5636, 1994 U.S. Dist. LEXIS 11503 (N.D. Ill. Aug. 12, 1994); *Lott Constructors, Inc. v. Camden County Board of Chosen Freeholders*, No. 95-2118, 1994 U.S. Dist. LEXIS 2767 (D. N.J. Jan. 31, 1994); *Minnesota Chapter of Associated Builders and Contractors v. St. Louis*, 825 F. Supp. 238, 243 (D. Minn. 1993).

96. See *Air Transp. Ass'n*, 1998 U.S. Dist. LEXIS 4837, at *28-34.

compelling argument against ERISA preemption exists. Under section 514(d) of ERISA, the laws are not preempted if preemption would impair or modify another federal law. Because ERISA preemption would impair the efficacy and policy of DOMA, ERISA does not preempt these laws.

III. THE DEFENSE OF MARRIAGE ACT AND ERISA PREEMPTION

Although DOMA was intended as a legal restriction on the power of one state to use the Constitution's Full Faith and Credit Clause to force another state to recognize a same-sex marriage, DOMA can be read more broadly as a reaffirmation of the federalism principle that is the foundation of American family law: each state gets to decide for itself what is a marriage, what is a family, and what legal effect to give same-sex relationships. DOMA is not simply a congressional effort to limit the effect of the Full Faith and Credit Clause; rather, it is a recognition by Congress that in our federal system each state has the power to declare same-sex marriages valid or invalid. While DOMA defines for federal law whether same-sex relationships should be given the legal effect of marriage, DOMA simultaneously recognizes that states have power to determine whether same-sex partners can claim the legal benefits of spouses for any purpose other than federal law. If ERISA were held to preempt a state law determining that same-sex partners were entitled to spousal benefits under the terms of employee benefit plans, it would "modify" or "impair" DOMA's determination that each state may decide for itself the legal rights and duties of same-sex partners.

The background of DOMA is well known. As the Supreme Court of Hawaii was poised to determine that Hawaii's law would allow persons of the same sex to marry one another,⁹⁷ Congress enacted DOMA⁹⁸ to prevent states from having to recognize as legally valid same-sex marriages performed in other states. Although the immediate purpose of DOMA was, as its preamble states, "to define and protect the institution of marriage"⁹⁹ from the so-called threat posed by the prospect of legal same-sex marriages, it can be read more broadly. The language and the legislative history both support the idea that DOMA was

97. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

98. Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (1996) (codified as amended at 28 U.S.C.A. § 1738C (West Supp. 1997)).

99. *Id.*

intended to leave to each state the question of what legal treatment to accord same-sex relationships.

Section 2 of DOMA provides that no state “shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.”¹⁰⁰ Thus, by its terms, DOMA leaves to each state not only the power to define marriage to include same-sex unions (or not), but also the power to create other legal relationships that shall be “treated as a marriage.” Most importantly, DOMA confirms what federalism would require in our system of family law even without DOMA: each state has the power to enact laws respecting “a right or claim arising from” “a relationship between persons of the same sex.”¹⁰¹

Laws like Hawaii’s and San Francisco’s are laws “respecting . . . a right or claim” “arising from” “a relationship between persons of the same sex.” They entitle same-sex domestic partners to the same rights as spouses enjoy under the terms of employee benefit plans. Thus, under the plain language of DOMA, Congress envisions that San Francisco and Hawaii are entitled to enact this legislation.¹⁰² Federal law thus recognizes the primacy of state law in this area of family law.

Concededly, one can read the language of section 2 more narrowly to state simply that neither the states nor the federal government must recognize same-sex marriages performed in other states. In this narrow reading, section 2 of DOMA simply modifies the requirement imposed by the Constitution’s Full Faith and Credit Clause by relieving states of the obligation to give legal effect to marriages solemnized in other states. Why

100. 28 U.S.C.A. § 1738C.

101. *Id.*

102. DOMA speaks only of the laws of the “public act, record, or judicial proceeding” of a state and does not mention political subdivisions of states. The question arises, therefore, whether a city ordinance is entitled to the same respect under DOMA as a state law. The only sensible construction of DOMA is that the acts and records of political subdivisions of states are to be regarded as the acts and records of the states. Marriage licenses, after all, are issued by counties, and the records are maintained by counties, not states. The judicial proceedings at the trial level are likewise maintained by counties. Congress was aiming DOMA at marriage licenses as well as state laws defining marriages or judicial interpretations of the meaning and validity of state marriage laws or marriage licenses. Thus, San Francisco’s law would be entitled to the same enforceability as Hawaii’s law. *See infra* text accompanying notes 118-23.

prefer the broader reading to the narrower? There are two answers to this. First, if a state decided, instead of changing its marriage law, to create a statewide same-sex domestic partnership registration scheme and then stated that all such duly registered relationships would be treated as marriages, the language of section 2 would suggest that DOMA prevents any other state from having to treat the domestic partnership as a marriage. For example, the language does more than simply prevent Georgia from having to recognize as valid a same-sex marriage performed in Hawaii — it prevents Georgia from having to give legal effect to any same-sex relationship that another state would treat like a marital or family bond, whether or not it was actually labeled a marriage. In other words, DOMA allows each state to decide whether to recognize such relationships.

Second, the legislative history strongly confirms the broader reading of the language in section 2. The only committee report on the bill was the House Report, which begins as follows:

H.R. 3396, the Defense of Marriage Act, has two primary purposes. The first is to defend the institution of traditional heterosexual marriage. The second is *to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions*, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.¹⁰³

The House Report identifies governmental interests advanced by DOMA, one of which is “protecting state sovereignty and democratic self-governance.”¹⁰⁴ In discussing this interest, the Report states: “The Defense of Marriage Act is motivated in part by a desire to protect the ability of elected officials to decide matters related to homosexuality.”¹⁰⁵ The Report continues, “[b]y taking the Full Faith and Credit Clause out of the legal equation surrounding the Hawaiian situation, Congress will to that extent protect the ability of elected officials in each State to deliberate on this important policy issue free from the threat of federal constitutional compulsion.”¹⁰⁶ While some of the legislative history

103. H.R. No. 664, 104th Cong. (1996) (emphasis added).

104. *Id.* at 12.

105. *Id.* at 16.

106. *Id.* at 17.

Later, in the section-by-section analysis, the Report “emphasize[s] the narrowness of this provision.” Referring to § 2, it states:

It will not forestall or in any way affect developments in Hawaii, or, for that matter, in any other State. Indeed, nothing in this (or any

from the House of Representatives obviously focused on the specific issue of marriage, there was plenty of discussion of the need to allow each state to resolve more generally the legal recognition to be given same-sex relationships.

The Senate's legislative history paints a similar picture. Although there was no Report, each individual Senator who supported the bill emphasized a purpose similar to that articulated in the House: federalism requires each state to decide for itself how to treat what they called "same-sex unions."¹⁰⁷ The Senate Majority Leader began the Senate debate on the bill by making clear that the bill allowed each state to resolve how to treat same-sex relationships — whether to "recognize as a legal union, equivalent or identical to marriage, a living arrangement of two persons of the same sex."¹⁰⁸ He repeatedly referred not just to marriage, but to "same-sex marriages *or* unions."¹⁰⁹ He emphasized that the bill protects "States rights": "DOMA actually reinforces States rights. It prevents one State from imposing upon all the others its own particular interpretation of the law. The Defense of Marriage Act will ensure that each State can reach its own decision about this extremely controversial matter: The legal status of same-sex unions."¹¹⁰ Senator Abraham, another supporter, thought the bill was justified by "[t]he virtues of a federalist system — permitting experimentation among the States, and recognizing differing values and standards in different communities"¹¹¹ Also, Senator Dorgan said, in explaining his vote in favor of DOMA:

Those of the same sex who have a long-term relationship and who wish to provide a legal framework for that relationship should aspire to enact legislation in the States that creates such a legal framework. But that should not include changing the definition of marriage to allow same-sex marriages, and it

other) section of the Act would either prevent a State on its own from recognizing same-sex marriages, or from choosing to give binding legal effect to same-sex marriage licenses issued by another State.

Id. at 24. Finally, the Report states: "The Committee believes that Section 2 of the Defense of Marriage Act strongly supports a proper understanding of federalism and state sovereignty. Section 2 is an effort to protect the right of the various States to retain democratic control over the issue of how to define marriage." *Id.* at 27.

107. *See, e.g.*, 142 CONG. REC. § 10100-10101 (Sept. 10, 1996) (statement of Sen. Lott).

108. *Id.*

109. *Id.*

110. *Id.*

111. 142 CONG. REC. S12016 (Sept. 30, 1996) (statement of Sen. Abraham).

should not require all States to recognize that legal relationship.¹¹²

Furthermore, the context in which DOMA was enacted suggests that its purpose was broader than to address just marriage. While it most immediately sought to address the specter of Hawaii legalizing same-sex marriages, those in Congress who supported the bill saw more risks to so-called traditional family values than just gay *marriages*. Any homosexual family relationship was perceived as a problem. DOMA's purpose was to allow the people of each state to resolve for themselves what legal recognition, if any, to grant same-sex unions. Its aim was to prevent institutions in a state with a government or a majority hostile to same-sex relationships from being required, as a matter of the Constitution's Full Faith and Credit Clause, to recognize as legally valid any same-sex relationship recognized as legally-sanctioned in another state. Even if Hawaii legalized same-sex relationships as something other than a "marriage," the purpose of DOMA appears to be to prevent any gay or lesbian partner legally recognized in Hawaii from demanding in Mississippi to receive the legal benefits that spouses receive under Mississippi law.

Skeptics of this reading of DOMA likely would have two responses to this argument. First, skeptics would focus on the dominant homophobic purpose of DOMA and claim that DOMA was enacted to protect traditional heterosexual marriage and should not be read more broadly as an affirmative grant of authority to states like Hawaii and California to adopt laws providing for domestic partnership. The primary purpose of DOMA was obviously to protect heterosexual marriage. Section 3 of DOMA supports this when it defines "marriage" and "spouse" for the purposes of federal law. It says that "in determining the meaning of any" law or regulation of the United States, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."¹¹³ The proponents of the bill might be surprised to realize that, when read in conjunction with ERISA's section 514(d), their bill would be construed to force private sector employers to

112. 142 CONG. REC. S10552 (Sept. 13, 1996) (statement of Sen. Dorgan).

113. Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C.A. § 7 (West Supp. 1997)).

provide benefits to employees in relationships that these employers and conservative legislators regarded as immoral.

The problem with the skeptics' position is that DOMA was written and justified in terms of federalism and states' rights. Having made the decision to write section 2 of DOMA as a states' rights bill and to justify it that way in the legislative history, the legislators are bound by their choice. DOMA protects the right of Georgia to deny gays equal rights and it protects the right of Hawaii to grant them. Congress knowingly removed federal law from the role it might otherwise play in restricting states' abilities to choose for themselves how to treat same-sex relationships.

The unintended gay-rights consequence of DOMA's interaction with ERISA preemption is similar to the unintended consequences of the inclusion of sex among the protected statuses in Title VII of the Civil Rights Act of 1964.¹¹⁴ Sex was added to the list of protected traits by opponents of civil rights who thought that supporters of a civil rights bill for racial and religious minorities could not possibly support a bill prohibiting sex discrimination. The strategy backfired, the bill passed, and courts have not had the slightest difficulty construing the statute as it was written to protect women's rights, notwithstanding the sexism of those who voted for the amendment.

The skeptics' second argument would be that DOMA was not entirely a "states' rights" bill. In particular, although federalism is the dominant focus of section 2, section 3 of DOMA, which provides a definition of marriage to be used for the purposes of all federal laws, is distinctly "anti-federalist." Section 3 breaks, for the first time in history, the tradition of federal reliance on state law to define what constitutes a valid marriage. Section 3 instead provides that, when it comes to federal law, a marriage is a bond between a man and a woman.¹¹⁵ Thus, the skeptics might argue, DOMA does not really leave to each state to define whether same-sex relationships may be solemnized or treated as marriages.

The problem with the skeptics' second argument is that section 3 defines a marriage *only for the purpose of federal law*. Except in limited circumstances, neither ERISA nor any other federal law regulates which employees are eligible for benefits,

114. 42 U.S.C. § 2000e-2(a).

115. See 1 U.S.C.A. § 7.

who is married, or who is a beneficiary of a covered employee under the terms of ERISA plans.¹¹⁶ Rather, plans themselves define who is eligible for benefits and plans rely on state family law to determine who is a spouse, a child, or some other form of eligible dependent of a covered employee. The most that the skeptics' position establishes is that if a plan chose to define a covered "spouse" by reference to DOMA's definition of marriage rather than by reference to a state law definition of marriage, ERISA itself would not provide the basis for arguing that the plan term was invalid.

Even if a plan adopted the DOMA definition of marriage, however, the plan would not necessarily survive a challenge based on state antidiscrimination law. If state law were interpreted to make it unlawful sexual orientation discrimination to provide benefits to opposite-sex spouses and not same-sex spouses, that state law would be enforceable unless it is preempted by ERISA. The federal definition of marriage in section 3 would provide no expansion of the scope of ERISA preemption. ERISA preemption in this instance would still "impair" section 2 of DOMA, because it is section 2 that authorizes each state to decide for itself how to define what legal treatment to give same-sex relationships. Because, with a few small exceptions,¹¹⁷ ERISA does not define who constitutes a dependent or family member eligible for benefits under a plan, federal law plays no role in defining eligibility for plan benefits. Rather, Congress left to plan sponsors and employees to set the terms of the plan and envisioned no role for federal law in dictating those terms. Except where ERISA preempts state law, Congress must have recognized that plan sponsors would rely on the backdrop of state law to aid in plan design. Section 3 is relevant to defining who is a spouse only where ERISA (or other federal law) itself accords benefits to spouses. Otherwise, section 2 protects the rights of states to legislate in the area of family law.

In sum, all the conventional tools of statutory interpretation — language, legislative history, and purpose — point to the same

116. The federal definition of marriage would be relevant under ERISA only to whether same-sex spouses would be entitled to the protections accorded surviving spouses to receive continuing health coverage upon the death of the covered employee (so-called COBRA benefits), see 29 U.S.C. §§ 1163, 1167 (1994), and to a joint and survivor's annuity upon the death of an employee covered by a pension plan, or to rights in a plan upon dissolution of a marriage, as required by the Retirement Equity Act, 29 U.S.C. §§ 1055, 1056 (1994).

117. See *supra* note 116.

conclusion. DOMA protects the power of each state to decide for itself what legal recognition to give same-sex relationships and what legal rights members in such relationships may claim by virtue of their status.

Thus far, the argument has established that *states* may, under DOMA, allow same-sex partners to claim the benefits of spouses. States can do so by allowing same-sex marriage, by creating some other legal relationship for same-sex couples that would be the equivalent, for some or all purposes, of a legal marriage, or by declaring illegal any practices that treat same-sex domestic partners differently than spouses. This does not, however, establish the power of cities or counties to do so. To uphold ordinances such as San Francisco's against an ERISA preemption challenge, it must be established that when DOMA speaks of "States," the actions of political subdivisions of states are included as well.

The authority of the governments of cities, counties, and other political subdivisions of states is a question of state law.¹¹⁸ Whether an individual city's domestic partnership registration ordinance could declare that registered same-sex partners shall be treated as legally married for some or any purposes is a question of the law of the state of which the city is a political subdivision.¹¹⁹ For the purposes of ERISA preemption analysis, all that

118. See *Commissioners of Laramie County v. Commissioners of Albany County*, 92 U.S. 307 (1875); AUSTIN F. MACDONALD, *AMERICAN CITY GOVERNMENT AND ADMINISTRATION* 62 (1947).

119. Generally, municipalities can exercise power over municipal affairs, and may not regulate matters which are governed by the state and affect the people at large. See EUGENE MCQUILLIN, 5 *THE LAW OF MUNICIPAL CORPORATIONS* § 15.18 (3d ed. 1996). In California, the state constitution's "home rule" provisions give cities and counties power over "municipal affairs." CAL. CONST. art. XI, § 3-7. A city may make and enforce all ordinances and regulations with respect to its municipal affairs, but cannot regulate matters of statewide concern where the state legislature intends that state laws occupy the field to the exclusion of municipal regulation. See *Smith v. City of Riverside*, 110 Cal. Rptr. 67 (Ct. App. 1973).

Many states have confronted the question whether city and county governments have authority to prohibit sexual orientation discrimination, and most have concluded that they do. See, e.g., Fla. Op. Att'y Gen. 93-5 (1993) (charter county has authority to adopt ordinance prohibiting discrimination, including discrimination on the basis of sexual orientation); 45 Iowa Op. Att'y Gen. 88 (1984) (A city is within its authority to enact a local civil right ordinance which expands protections granted its citizens under the state statute); 69 Md. Op. Att'y Gen. 207 (1984) (state law does not preclude the enactment of a local ordinance prohibiting sexual orientation discrimination); N.Y. Op. Att'y Gen. 111 (1987) (city may enact ordinance prohibiting sexual orientation discrimination); *Federated Rural Elec. Ins. Corp. v. Madison Equal Opportunities Comm'n*, 308 N.W.2d 419 (Wis. Ct. App. 1981) (unpublished

matters is whether a law of a city can be treated as the law of a state in analyzing the effect of ERISA and DOMA.

ERISA's preemption provision clearly encompasses municipal ordinances and administrative decisions. Section 514(c) of ERISA defines state law broadly to include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State."¹²⁰ "State" is defined to include "a State, any political subdivision thereof, or any agency or instrumentality of either."¹²¹ Thus, a city official's determination that a same-sex couple should be treated as "spouses" under the terms of a domestic partnership registration ordinance would constitute a state law for the purposes of ERISA preemption because it would be the "decision" of an "agency or instrumentality" of a political subdivision of a state.

The harder question is whether such a decision should be treated as the law of a state for purposes of DOMA. The answer would seem to be yes. In many if not all states, marriage licenses are issued by city or county officials.¹²² Such licenses are considered to have the effect of state law because the state law authorizes the city clerk to issue them. Other states recognize such

opinion) (holding that city ordinance that enlarged group of persons protected by state's antidiscrimination law was valid because it furthered state statute's purpose of preventing employment discrimination).

In California, however, one court has held that cities may not prohibit sexual orientation discrimination because the state fair employment law, which does not prohibit sexual orientation discrimination, occupies the field of fair employment law. *See Delaney v. Superior Fast Freight*, 14 Cal. App. 4th 590, 600 (1993).

On the specific issue of whether cities may legislate on employee benefits and domestic partnership, state courts have split. In Minnesota, a city is without power to define "dependents" eligible for benefits to include domestic partners. *See Lilly v. City of Minneapolis*, 527 N.W.2d 107 (Minn. Ct. App. 1995). But the Georgia Supreme Court *recently* upheld a city ordinance defining dependents in such a way as to include domestic partners. *See City of Atlanta v. Morgan*, 492 S.E.2d 193 (Ga. 1997) (upholding as within city's authority an ordinance extending domestic partner benefits to persons who are financially dependent on employee); *see also McKinney v. City of Atlanta*, 454 S.E.2d 517 (Ga. 1995) (holding that city ordinance providing for domestic partner benefits for city employees exceeded city's authority because city could not extend benefits to those who were not dependents).

120. 29 U.S.C. § 1144(c)(1) (1994).

121. 29 U.S.C. § 1144(c)(2) (1994).

122. The California Family Code says that parties to a marriage must obtain a marriage license from a county clerk. *See CAL. FAM. CODE* § 350 (Deering 1994). The parties also pick up a certificate of registry from the county clerk. *See CAL. FAM. CODE* § 359 (Deering 1994). The person solemnizing the marriage completes the certificate, gets the witness' signature and returns it to the county recorder. *See id.* If the certificate of registry is not completed and returned to the county recorder, the license expires.

licenses as a valid exercise of state authority because the city clerk exercises authority granted by the state. DOMA clearly contemplates that if a city clerk decided to issue a marriage license to a same-sex couple, that decision would be treated as a state law for the purposes of full faith and credit unless it could be attacked as invalid under the law of the state where the city clerk works. Thus, unless a city's domestic partnership registration system can be attacked as *ultra vires* as a matter of state local government law, DOMA recognizes such municipal decisions as an exercise of state power that implicates DOMA's concerns.

If a state or local government agency validly (under state and municipal law) determined that a same-sex partner was entitled to claim the benefits that "spouses" are entitled to claim under a private employee benefit plan covered by ERISA, the ERISA preemption question would be presented. As explained above, such a decision would be a "state law" that "relates to" an ERISA plan because it would purport to regulate the plan's content or eligibility rules.¹²³ The city official's determination would be unenforceable against the plan under section 514(a) unless so to conclude would "impair" or "modify" some aspect of DOMA within the meaning of section 514(d).

The only Supreme Court guidance on what it means for ERISA preemption to "impair" or "modify" another federal law within the meaning of section 514(d) is the opinion in *Shaw v. Delta Air Lines*.¹²⁴ As discussed above, in *Shaw* the Court found that preemption of state fair employment laws would impair or modify Title VII because it would divest state administrative agencies of the authority to enforce state law, and in the states that have such agencies, they share enforcement authority with the EEOC.¹²⁵ As anyone who knows about the operation of state fair employment agencies and the EEOC understands, that

123. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

124. The few post-*Shaw* lower court cases have followed the reasoning of *Shaw* in determining that ERISA does not preempt state discrimination laws because preemption would impair some other federal law. In *Barber-Colman Co. v. Barbosa*, 940 F. Supp. 1269 (N.D. Ill. 1996), the court concluded that ERISA preemption of state age discrimination law would impair the federal Age Discrimination in Employment Act, which like Title VII relies on state agency enforcement. In *Le v. Applied Biosystems*, 886 F. Supp. 717 (N.D. Cal. 1995), the court concluded that ERISA does not preempt a state disability discrimination law because the federal Americans With Disabilities Act relies on state agency enforcement.

125. See *supra* text accompanying notes 75-85.

is not much of an impairment. The lesson of *Shaw*, therefore, is that the smallest and most theoretical of impairments of federal law is enough to save the state law from preemption.

As a practical matter, the state agency involvement in Title VII enforcement is in many cases relatively minor. First of all, although section 706 of Title VII requires that, before a charge may be filed with the EEOC, it must first be filed with a state or local fair employment practice agency,¹²⁶ it is the rare case that actually receives *any* genuine investigation or conciliation effort by any state agency. Most state agencies, like the EEOC, are so desperately short of resources that they do not even try to investigate or conciliate a large number of charges that are filed. The state agency simply takes a written statement of the charge and later issues a right-to-sue letter, without ever actually investigating the charge. Indeed, many states have "work-sharing agreements" with the EEOC, pursuant to which the state agency *waives* any processing of federal charges.¹²⁷ The administrative exhaustion requirement in most cases is at best a formality; in many states, an employee does not need to actually resort to the state agency at all because the EEOC will issue a right-to-sue letter on behalf of the state agency for the state claims as a matter of course and will investigate only the federal claims.¹²⁸ ERISA preemption of the jurisdiction of such state agencies for the discrimination claims that involve plans would probably not substantially change the burden on or operations of the EEOC in any state. The EEOC in that state would simply add a few extra charges to the hundreds that they already do not have the resources to investigate, so they would simply issue a right-to-sue letter as a matter of course in a few more cases each year. It is difficult to see what Title VII interest would be impaired.¹²⁹

Furthermore, in *Shaw*, as in lower court cases holding that ERISA does not preempt state discrimination claims, none of the

126. See BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1221 (3d ed. 1996).

127. See *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107 (1988); MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 1106 (4th ed. 1997).

128. See ZIMMER ET AL., *supra* note 127, at 1106.

129. Furthermore, in *Shaw* the Court did not address whether § 514(d) saves from preemption state law claims brought in suits alleging violations of 42 U.S.C. § 1981, which prohibits private sector employment discrimination on the basis of race. There is no administrative exhaustion requirement for § 1981 claims, thus preemption of state law in such suits would not impair any federal interest.

employees asserted a federal claim.¹³⁰ Thus, in none of those cases would the impairment of the federal law have actually occurred because the federal antidiscrimination laws were not invoked. The point is, in order to defeat ERISA preemption on the *Shaw* rationale, the impairment of federal law by preemption of state law need be only slight, and almost as symbolic as real.

The real rationale underlying the *Shaw* decision is not the impairment of federal enforcement powers by the preemption of state law, but the undesirability of preempting state antidiscrimination law that provided the same guarantees as federal laws and that clearly are not affected by ERISA.¹³¹ The effect of ERISA preemption of state antidiscrimination law would not affect the substantive obligations of plans, but rather cause victims of race, sex, national origin, and religious discrimination by plans to litigate their claims under federal law only. The implicit rationale of *Shaw* more closely resembles a general conflict preemption decision — it makes no sense for ERISA to preempt state antidiscrimination laws to the extent they prohibit the same conduct that federal law prohibits — rather than the fictional effect that state preemption will have on federal agency enforcement.

The effect of ERISA preemption on DOMA would be far more substantial than in *Shaw* and its progeny. Unlike Title VII's reliance on state agency enforcement in those states that have agencies and for those few cases in which the plaintiff asserts both a state and a federal claim (and the truly minute number in which there actually *is* any state agency enforcement), the central purpose of DOMA is to protect state autonomy in the question of the legal status and effects of same-sex relationships. If ERISA preemption were to prevent those states that care about gay rights from advancing that policy through requiring equal pay for equal work, ERISA would deprive states of the power to do exactly what DOMA was supposed to allow.

One important difference between the result in *Shaw* and the result under DOMA is the consequences for nationwide administration of benefit plans, which is an undisputed concern behind ERISA preemption. The enforcement of the state law

130. See *Barber-Colman Co. v. Barbosa*, 940 F. Supp. 1269, 1270-01 (N.D. Ill. 1996); *Le v. Applied Biosystems*, 886 F. Supp. 717, 719 (N.D. Cal. 1995).

131. Title VII does not preempt state laws except to the extent they permit or require what Title VII prohibits. See 42 U.S.C. §§ 2000e-7 and 2000h-4; *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

upheld in *Shaw* generated no significant national variations in the antidiscrimination standards because the Court said that state laws were saved only if their prohibitions were coextensive with Title VII's. Nevertheless, *Shaw* allows for significant local variations in damages (punitive damages are available in California;¹³² but are capped under Title VII¹³³) and sometimes local variations in the governing legal standards (to the extent that state antidiscrimination law might employ different burdens of proof rule for vicarious liability, or other rules that might affect liability). To extend the rationale to DOMA would, by contrast, result in variations in the law between states; Hawaii might prohibit such discrimination and Georgia might all but require it. But *local variation is a deliberate choice Congress made in DOMA*. On the issue of same-sex relationships, Congress chose local control at the expense of national uniformity, and ERISA's savings provision for federal laws other than ERISA means that DOMA's policy of local variation trumps ERISA's concern with the uniformity of nationwide benefit plans.

An employer determined to avoid compliance with a change in state marriage law could define for itself who counts as a spouse rather than relying on the state law definition. Or it could incorporate the DOMA definition of marriage, which is a marriage between a woman and a man. If an employer did so, the only way to compel the employer to provide benefits to opposite-sex spouses would be to argue that the plan's definition of spouse violates a state or local law. If the state law were a general sexual orientation discrimination law or a law like Hawaii's reciprocal beneficiary law, the plan's definition of its eligibility criteria might be trumped by the state's requirement that the plan not discriminate against same-sex partners.

Where an employer adopted the federal law (DOMA section 3) definition of marriage as involving only a man and a woman, the argument against ERISA preemption would concededly be the weakest. This case presents the starkest conflict between reading DOMA as *only* a protection of "traditional marriage," as opposed to both that *and* a reaffirmation of the power of states to recognize same-sex unions free from interference of federal law. It is hard to base an argument against

132. See *Commodore Home Sys. Inc. v. Superior Court*, 649 P.2d 912 (Cal. 1982).

133. See 42 U.S.C. § 1981A(b)(3). And at the time *Shaw* was decided, punitive damages were not available under Title VII at all. See ZIMMER ET AL., *supra* note 127, at 1206.

ERISA preemption of a state law invalidating a plan term defining marriage on a federal law that defines marriage exactly the same way the plan does. But even here the argument against ERISA preemption can be made. Both the Congress that enacted ERISA and the Congress that enacted DOMA did not intend to deprive states of the power to prohibit sexual orientation discrimination in employment. Fringe benefits are an extremely valuable part of an employee's wage package. ERISA is no barrier to the state's authority to require equal pay for equal work.

Although avoiding ERISA preemption is the first step toward wage equality for gay, lesbian, and bisexual employees, it will not bring them into total equality because of the federal tax law. Domestic partner benefits are taxable as income to the employee, whereas benefits for spouses and the employee's dependents are not.¹³⁴ Thus, gay and lesbian employees will still be paid less than their straight coworkers, because only they must pay income taxes on the fair market value of the health coverage the employer provides to their same-sex partner.

IV. CONCLUSION

Although one can argue based just on ERISA that state and local sexual orientation discrimination and domestic partnership laws are not preempted, the argument is strengthened by relying on DOMA. The availability of DOMA to bolster such an argu-

134. Section 106 of the Internal Revenue Code provides that "gross income of an employee does not include employer-provided coverage under an accident or health plan" and § 105(b) provides that benefits paid under such a plan are not taxable as income to the employee. However, under § 152, the exclusions under §§ 105 and 106 are available only to benefits provided to the employee, his or her spouse, and the employee's dependents. I.R.C. §§ 105, 106, 152 (1994). Until DOMA was enacted, the I.R.S. relied on state law to determine marital status. *See* Rev. Rul. 58-66, 1958-1 C.B. 60. But, because DOMA defines a marriage as being only between a man and a woman for purposes of federal law, the I.R.S. has now concluded that same-sex partners are not "spouses" within the meaning of § 152 even if they are legally married under state law. Accordingly, the I.R.S. has concluded in a private letter ruling that domestic partner benefits are taxable as income to the employee. *See Employee Taxed on Domestic Partner's Health Benefits*, TAX NOTES TODAY, Apr. 28, 1997, available in LEXIS, TNT File.

In an earlier letter ruling issued a few months before the enactment of DOMA, the IRS had determined that domestic partner benefits were taxable as income to the employee if the domestic partner was not a spouse as defined under state law and that same-sex domestic partners also do not fit the definition of dependent in § 152, and so the benefits could not be excludable from the employee's income as being paid to an employee's dependent. *See Domestic Partner Benefits Ruling Reflects IRS Reliance on State Law*, TAX NOTES TODAY, Feb. 9, 1996, available in LEXIS, TNT File.

ment raises both tactical and philosophical issues for gay rights advocates. The tactical issues are whether gay-rights activists can rely on DOMA in domestic partner benefit cases without weakening the argument that DOMA is unconstitutional which they will make when and if some state legalizes same-sex marriage. As a legal matter, of course it is possible; arguing in the alternative is an accepted part of practice. One need not concede the constitutionality of DOMA in order to argue that, if it is constitutional, it prevents ERISA preemption. Lawyers in any domestic partner benefit suit relying on DOMA can simply note that the argument holds only if DOMA is constitutional. Of course, if DOMA is declared unconstitutional, the legal strategy advocated here is partially foreclosed. But then same-sex couples could obtain benefits through marriage.

The harder question is whether it is philosophically palatable to embrace DOMA for any purpose at all. In my view, it is. As long as the law is on the books and is considered constitutional, it will be used against gay rights. It will not "strengthen" the law to use it when it can be used for the cause of gay rights.

There is one possible respect in which this reliance on DOMA might undermine arguments about DOMA's unconstitutionality. Emphasizing the states' rights aspect of DOMA as opposed to the homophobic animus that prompted its enactment might be seen as undermining the contention that DOMA is unconstitutional under *Romer v. Evans*¹³⁵ because it is motivated *solely* by animus toward gays and lesbians. In *Romer*, the Supreme Court held that a state law that was motivated by nothing other than hatred toward gays and lesbians was unconstitutional under the Equal Protection Clause.¹³⁶ Even without determining that discrimination on the basis of sexual orientation should be given the same level of constitutional scrutiny as is given to race and gender classifications, the Court nevertheless found that a law that is motivated by nothing other than homophobia fails the rational basis analysis that all legislative classifications must survive.¹³⁷ After *Romer*, therefore, one possible avenue for challenging discrimination against gays and lesbians is to emphasize that the discriminatory law in question has no rational or legitimate governmental purpose and is therefore

135. 517 U.S. 620, (1996).

136. See 517 U.S. at 635.

137. See *id.*

unconstitutional because its only purpose is to harm gays and lesbians.

The argument advanced in this Article is entirely consistent with the argument that DOMA is unconstitutional because it is motivated entirely by animus against gays and lesbians as a disfavored group in society. I have not contended that it was the purpose of Congress that DOMA should protect gays and lesbians by providing for state and local control over domestic partnership. Rather, the purpose of Congress was quite clearly to allow state and local control so that the decision of some progressive states to legalize same-sex marriage would not compel other states to treat such marriages as the legal equivalent of a “traditional” marriage. The effect on ERISA preemption of the federalism rule adopted in DOMA is obviously an unintended consequence of the way that DOMA was drafted.¹³⁸ It most certainly is not evidence that DOMA was in fact motivated by a desire to protect the rights of gays and lesbians.

Courts confronted with the arguments I have sketched out in this Article, however, are faced with no hard choices. Whatever the intent of the proponents of DOMA, Congress wrote the statute as a states’ rights measure. Indeed, they had no other choice; Congress arguably lacks the power to federalize the law of marriage and family so as to prevent all states from recognizing same-sex relationships as legal families or family-like entities. By deciding to enact a federal law reaffirming the right of each state to make these decisions for themselves, and attempting to prevent federal uniformity by forcing one state to recognize a same-sex relationship solemnized in another state, Congress deliberately made the choice for local control at the expense of national uniformity.

Local variation in legal regulation always causes problems for entities that operate in many states; that is simply one of the less-happy “incidents of the federal system.”¹³⁹ Employee bene-

138. Moreover, to the extent that emphasizing the federalism principles in DOMA highlights the fact that DOMA (§ 2, at least) is not on its face directed to harming gays and lesbians, DOMA is no different from Amendment 2, struck down in *Romer*, which on its face appeared to be a neutral law repealing local antidiscrimination laws and preventing the enactment of future such laws. The Court had no trouble seeing through the “neutral” facade of Amendment 2 to find the animus underneath. *See id.* at 630; the Court should have no greater trouble seeing through the states’ rights patina of DOMA § 2 to find the animus that motivated it.

139. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

fits plans will be no worse or better off than all the other entities that do business in many states — all will have to sort out the consequences of some states recognizing family relationships that others do not. Whatever else DOMA is or does, it clearly removes federal law as a force compelling uniformity and dictates that federalism will reign unchecked over the issue of same-sex relationships. This is a principle of federal law that, under section 514(d), ERISA cannot modify. Therefore, ERISA does not preempt state or local laws that require the provision of domestic partner benefits to the same-sex partners of gay, lesbian, and bisexual employees.