PROPOSITION

The Inalienable Rights of

We The People

TO LIFE, LIBERTY, THE PURSUIT OF HAPPINESS, DUE PROCESS OF LAW . . .
TRUMP ANY AUTHORITY (CONSTITUTIONAL OR OTHERWISE) ASSERTED BY CONGRESS
TO MANDATE UNIFORM NATIONAL LAWS PREEMPTING SUCH INALIENABLE RIGHTS

Considered with Regard to the
Employee Retirement Income Security Act of 1974

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PREFACE

A wise man once said: "If a person, after moving several fences bordering your apple orchard so that most of your apple trees now appear to be growing on his land, can engage you in a lengthy legal battle regarding who owns a few bushels of apples, you may never recover your orchard!" Moral: Just as an orchard can be lost one apple at a time, Liberty can be lost one principle at a time!

The Constitution was written pursuant to the "positive grant" principle. This is quite straightforward: The Federal Government is authorized to exercise only those powers which are specifically listed and granted to it in the Constitution. If a power is *positively* listed in the Constitution, the Federal Government is granted the authority to use it. The Founding Fathers felt that this principle was so important that they codified it in the Constitution as the 10th Amendment in the Bill of Rights:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Simple, isn't it? All discussions regarding what is, or is not, Constitutional may be reduced to a clear and concise principle. And yet a growing number believe that much of what the Federal Government engages in these days is not a power *positively* listed in the Constitution.

It is almost a universal truth in government that "power corrupts and absolute power corrupts absolutely" - as Lord Acton wrote long ago. Politicians in all three branches of government have little incentive to follow the plain English of the Constitution - which as a set of rules tends to restrict their power. Their goal, naturally, is to increase their power, which is directly at odds with the 10th amendment, and the wisdom of the founding fathers.

We will return to this subject later in this paper, asking where certain ostensible Congressional "powers" to impose new laws on us came from, and whether the People's orchard, where many believe Freedom blooms and grows, periodically watered by patriot's blood, is being lost due to the gardener's neglect. Or perhaps simply from a few fences being stealthily moved.

1. Federalism and the 10th Amendment

What is "Federalism," and how is it supposed to work? Widely regarded as one of America's most valuable contributions to political science, federalism is the constitutional division of powers between the national (i.e., federal) and state governments. James Madison, deemed the father of the Constitution, explained it this way:

> *"The powers delegated to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, [such] as war, peace, negotiation, and foreign commerce..The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people."*

Thomas Jefferson emphasized that the states are not subordinate to the national government, but rather that the two are *"coordinate departments of one simple and integral whole..The one is the domestic, the other the foreign branch of the same government."*

Since governments tend to overstep the bounds of their authority, the founders knew it would be difficult to maintain a balanced federalism. That was one of the central issues raised by the state ratifying conventions as they met to decide whether to approve the new Constitution. Responding to this concern, Alexander Hamilton expressed his hope that *"the people will always take care to preserve the constitutional equilibrium between the general and the state governments."* He believed that *"this balance between the national and state governments forms a double security to the people. If one [government] encroaches on their rights, they will find a powerful protection in the other. Indeed, they will both be prevented from overpassing their constitutional limits by [the] certain rivalry which will ever subsist between them."*

Opponents of the Constitution strongly feared that the states would eventually become subservient to the federal. Madison acknowledged that this danger existed, but he predicted that the states would band together to combat it. *"Plans of resistance would be concerted,"* he said. *"One spirit would animate and conduct the whole. The same combinations would result from an apprehension of federal [domination] as was produced by the dread of a foreign yoke; and the same appeal to a trial of force would be made in the one case as was made in the other."*

As it turns out, James Madison was right. The states have started combining to oppose federal intrusions on their authority, and this growing movement is now becoming a focal point all over the country. A recent Governor of California (Pete Wilson) asserted: *"it's time to set the states free and to let the people reclaim control over their destiny. For years, congressional liberals have tried to impose their will on the nation. Well, they should study their early American history and remember what happened to the last imperial government that handed down edicts and ignored the will of the people."*

And a former Governor of Utah (Mike Leavitt) similarly said: *"The Founding Fathers clearly intended that states were to be equal with the federal government. But over the last 50 to 60 years, the federal government has assumed more and more of a dominant role. Instead of a peer-to-peer relationship, it is now a master-to-servant relationship. If we are ever to reverse this trend of rampant centralization of authority at the national level, it will have to be governors and [state] legislators who do it. States, in a constitutional sense,*

are not to be trifled with. Collectively, states have the authority to fundamentally alter and improve the federal-state relationship."

Television commentator and syndicated columnist George Will, noting that *"the federal government is making a mockery of federalism,"* has reported the beginnings of *"a broad insurrection of state and local officials"* against Washington's heavy-handedness.

And two scholars at the Heritage Foundation recently wrote: *"Throughout much of American history, especially since the New Deal, the federal government increasingly has encroached upon the fiscal and constitutional prerogatives of state and local governments. Today, this imbalance has reached a crisis point, and the states are fighting back."*

How are the states "fighting back"? Here is an example:

In the early nineties, the legislatures of eight states passed resolutions asserting state sovereignty and demanding that the national government stop violating the 10th Amendment to the U.S. Constitution (which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people").

Several states are establishing legal-defense funds and filing lawsuits against the federal government for specific violations of the 10th Amendment.

In the view of economics professor and columnist Walter E. Williams: *"The 10th Amendment movement may be America's last chance to peacefully get Congress to obey the Constitution. [National] politicians have seriously underestimated public anger and are blind to the rebellion spreading across the land."*

After reading this brief overview of Federalism and the 10th Amendment, please re-read this Paper's Proposition!

2. A Brief Pre-ERISA Retirement Plan History

The first employer-sponsored retirement plans were established in the late 19th century, primarily in the railroad industry and among a few large industrial employers. Pension benefits were regarded as a gift from the employer in recognition of long and faithful service.

In the 1920s, shortly after the adoption of the federal income tax, Congress accorded "qualified" retirement plans special tax-favored treatment that has continued to the present. As the income tax was very low, these rewards provided an employer with very little tax incentive to establish and maintain a qualified retirement plan.

The development of employee pensions was temporarily thwarted by the Great Depression. Thereafter, in 1935, Congress passed the Social Security Act, which established a basic level of retirement income protection. Other legislation added numerous specific requirements governing qualified plans. If a plan satisfied the requirements for tax qualification, the employer could tax deduct, within certain limits, its contribution to the plan. Earnings on plan assets were tax-exempt, and a participant was not taxed until a benefit was actually received by the participant. Many retirement programs merely supplemented the benefits provided by the Social Security system; i.e., the tax laws allowed an employer to "integrate" or "offset" Social Security benefits (funded in part by employer paid payroll taxes) against employer provided retirement benefits as long as the combined result of the two types of pensions did not discriminate in favor of highly paid employees.

In the 1940s, the fact that pension plans were exempt from wartime wage controls enabled employers (like GM) to channel large amounts of money into such plans. Court decisions (like Inland Steel Co. v. NLRB, 170 F.2d 247, 253 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949)) holding that retirement benefits were mandatory subjects of collective bargaining likewise encouraged the growth of the private pension system by forcing many employers with a unionized workforce to establish such programs. And, as income tax rates rose and became more progressive the "tax deferred" shelter offered by a qualified retirement plan became more attractive to both employers and employees.

The booming economic times of the 1950s and 1960s fostered the growth of the defined benefit pension plan; that is, a plan which “promised” a fixed monthly payment for life. An employer could credit workers for “past service” and thus encourage the retirement of older, less productive workers. As pension funds grew, financial abuses followed. In 1958, Congress enacted the Welfare and Pension Disclosure Act (remember Forms D-1 and D-2 foreshadowing the SPD and SAR?) to “shed light” and stop such abuses.

The closing of the Studebaker automobile plant in South Bend, Indiana, is generally regarded as a pivotal event in the history of the movement toward comprehensive federal regulation of private pension plans. On December 9, 1963, Studebaker Corporation announced that it was closing its automotive manufacturing plant in South Bend, Indiana, and consolidating its remaining automating activity at its Hamilton, Ontario, plant. This announcement followed a long period in which the American plant had been losing money. As a result of the plant closing, some 5,000 workers were dismissed, in addition to the 2,000 that had already been laid off. In the end, 1,800 workers eventually lost their jobs. The dismissed workers were members of the United Automobile Workers and were covered under a single-employer defined benefit pension plan negotiated between the United Auto Workers (UAW) and Studebaker.

When the plant closed, the UAW and Studebaker entered into an agreement settling the terms for terminating the plan. The termination did not produce litigation; it implemented default priorities contained in the plan and divided the participants into three groups: 3,600 retirees and active workers who had already reached the permitted retirement age of 60; approximately 4,000 employees, aged 40 to 59, who had at least ten years of

service with Studebaker and whose pension benefits had therefore vested; and a residual group of 2,900 workers who had no vested rights.

Persons in the first group had the first claim on the pension assets; they received full lifetime annuities. The cost of the annuities purchased for this group was about $21.5 million. After the annuities, only $2.5 million remained in the pension fund, less than the amount necessary to cover the benefits of the members of the second group who received approximately 15% of the personal value of their earned pension benefits. The third group received nothing.

The original Studebaker plan was effective in November 1950. It granted prior service credits, creating an immediate unfunded liability of $18 million that was supposed to be funded over a thirty-year period. Benefits were increased in 1953, 1955, 1959, and 1961. Each time, additional unfunded liabilities for past service credits were created. Each increase was to be amortized over a new thirty year period. These unfunded past service liabilities could not be funded with the pension assets.

In the nineteen-sixties, Studebaker was the oldest major auto producer in the United States. Several years before the shutdown, Studebaker had celebrated its 100th anniversary. Thousands of workers were laid off from their jobs a few days before Christmas, 1963. The number of persons affected by the termination attracted attention, since the plan covered almost 11,000 Studebaker employees. The average age and length-of-service of the workers who received only a small percentage of their expected pension benefits made them a very appealing group of victims. The 4,000 or so workers in the age 40 - 59 group, who got only fifteen cents for every expected dollar of vested pension benefits, had an average age of 52 and an average period of service with the employer just under 23 years.

RESULT: ERISA!

As the principle provisions of ERISA, per se, are not the primary focus of this Paper, we will move ahead to review the interplay between the SUPREMACY clause of the Constitution and ERISA's "preemption" and "remedy" provisions.

3. Supremacy Clause vs. ERISA's Preemption and Inadequate Remedies

SUPREMACY CLAUSE: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Constitution, Article VI, Paragraph 2.

Under the Supremacy Clause, everyone must follow federal law in the face of a conflicting state law. It has long been established that "a state statute is void to the extent that it actually conflicts with a valid federal statute" and that a conflict will be found either where compliance with both federal and state law is impossible or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress (see Edgar v. Mite Corp., 457 U.S. 624, 631 (1982)).

Considering the SUPREMACY clause, many have asked why ERISA "preemption" is even necessary. That is, if SUPREMACY is to have meaning, it obviously incorporates a form of *indirect* preemption. Query: considering the dismal "remedies" ERISA provides, why preemption? Answer: textbooks tell us that to achieve "uniformity" and supplant an assortment of federal labor laws and state regulations, Congress included a *direct* preemption provision in ERISA. Thus, section 514(a) of ERISA provides for the provisions of Title I and IV to "supersede any and all State laws" so far as "[the State laws] **relate to** any employee benefit plan." Determining the meaning of the inherently vague phrase "relate to" is frequently a key issue in ERISA litigation.

Additional insight was provided when Senator Jacob Javits, R-NY) explained ERISA's preemption provision to his Senate colleagues in August 1974. Javits observed that the conference committee had chosen broad preemption language to mitigate "the possibility of endless litigation over the validity of State action that might impinge on Federal regulation." [Senate Committee on Labor and Public Welfare, Legislative History of the Employee Retirement Income Security Act of 1974: Public Law 93-406, 94th Cong., 2d sess., Committee Print (Washington: GPO, 1976), 4770].

Sadly, and as employee benefits lawyers nationwide well know, the ERISA preemption provision appears to have had anything but this effect. It may not be accurate to say that there has been "endless litigation" (it has only been 33 years), but ERISA's preemption language has generated a huge volume of confusing and conflicting judicial opinions and a large body of critical commentary from judges, practitioners, and scholars. However, the desire for federal preemption was a key factor—perhaps, the key factor—in creating the powerful coalition that pushed ERISA through Congress. Why?

Because fundamental to any right is the ability to enforce that right. However, ERISA's remedies, as interpreted by the courts, border on the absurd. An insured in every state has the basic right to sue an insurance company for, at least, breach of contract. Further, the core essence of such a fundamental right has existed since the Magna Carta. An insured also typically has the right to sue for fraud, outrageous conduct, breach of fiduciary duty, and similar torts, where applicable. In many states, one may also sue if claiming to be a victim of a deceptive trade practice.

But under ERISA a person has only one claim; he may only file a lawsuit claiming his benefit! This claim is far inferior even to a simple state claim for breach of contract. First of all, in many instances, there is no one to sue. The federal appellate courts have uniformly ruled that an ERISA plan participant cannot sue the insurance company denying his benefit! ERISA requires him to sue the ERISA plan. In other words, an action brought under § 1132(a)(1)(B) of ERISA may only be enforced against the "plan" as an entity and may not be

enforceable against any other person unless liability against such person is established in his individual capacity (see § 1132(d)(2)). Unfortunately, in many/most instances no "plan" exists to sue.

But perhaps the most significant failure of ERISA is that there is no right to obtain compensatory damages for all of the harm which may have been caused for the wrongful denial of benefits. Further, there are no punitive damages no matter how egregious, outrageous or intentional the conduct may be. Thus, if an insurer wrongfully denies a medical claim, which results in the death of an insured, the decedent's family has no remedy at all. If the denial of disability benefits results in the bankruptcy of the plan participant, there is no remedy.

Why does ERISA provide no remedy, whatsoever, in so many heart-wrenching cases? Did Congress simply "forget" to provide such remedies in an act intended to have a far-reaching federal judicial monopoly in the area of employee benefits, thus affecting practically every family in America, by voiding (via preemption) all other federal laws, state laws, as well as centuries of common law?

And if Congress somehow "forgot" to provide such remedies, in the very law which destroys all other existing remedies, have *We The People* been deprived of a fundamental and inalienable right, i.e., the due process of law?

In this regard, it is all but shocking to read the words of Justice Scalia in Great-West Life and Annuity Ins. v. Knudson (534 U.S. 204 (2002)):

> *We have observed repeatedly that ERISA is a . . . comprehensive and reticulated statute, . . . the product of a decade of congressional study of the Nation's private employee benefit system. We have therefore been especially reluctant to tamper with [the] enforcement scheme embodied in the statute by* ***extending remedies not specifically authorized by its text*** (emphasis added). *Indeed, we have noted that ERISA's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to authorize other remedies* ***that it simply forgot*** (emphasis added) *to incorporate expressly.*

So there it is, in simple language: the Supreme Court has noted that Congress SIMPLY FORGOT to provide *We The People* with federal remedies under ERISA that it had totally voided everywhere else. So what are *We The People* to do?

CONCLUSION

Many good citizens firmly believe that Congress simply does not have the Constitutional power to pass a law such as ERISA; that is, a law that establishes a uniform national law and judicial framework that is imposed on all citizens, like it or not, omitting (or forgetting) obvious remedies at the same time that it voids all others.

An analogy often used to make this argument uses "family law" to illustrate. All are aware of the disparity among the states regarding family law - that is, marriage, divorce, adoption, and so forth. Could Congress enact a flawed Family Security Act ("FSA") in 2008, with FSA preempting all federal and state laws, as well as centuries of common law? In so doing, assume that preemption voided 1,000 remedies that had evolved to protect *We The People* over the past several hundred years, and only provided 100 remedies within the new FSA federal legal paradigm, "forgetting" the others. Does anyone care to argue that we are helpless wards of such a sorry state?

Fortunately, we do not reside in a binary world. That is, we do not have to accept either (1) or (2) where (1) is a flawed federal uniform and universally preemptive law providing just 100 remedies where there had been 1,000 previously, or (2) no federal uniform preemptive type law at all.

We could live with a (still) flawed federal uniform law provided it was a "contingently" or "conditionally" preemptive law! That is, such a law (ERISA for example) would only preempt any other law which directly, specifically, and indisputably conflicted with the federal law. Sound familiar? Well, it should, for it is the heart and soul of the SUPREMACY CLAUSE in the Constitution!

We will take the FSA to illustrate such a contingent preemptive law. Assume the FSA provided that the first failure to timely pay court ordered child support would be punishable by a $1,000 fine; and that the State of Texas had a state law that said the same act was punishable by a $10 fine. The Law in Texas would be directly preempted by FSA (as well as the SUPREMACY CLAUSE in the Constitution).

On the other hand, assume that FSA simply did not mention failure to timely pay Child Support; assume that Congress "forgot" about this aspect of family life, and thus did not provide a remedy. Now assume that Colorado did not forget, and that a Colorado state law made failure to timely pay Child Support punishable by a $500 fine for the first failure to timely pay. Result: the Colorado law would NOT be deemed preempted by FSA (nor the SUPREMACY CLAUSE in the Constitution for that matter). In short, FSA preemption would be contingent - it would never operate to leave a citizen without a remedy.

Reasonable citizens do not expect Congress to be perfect. Nor, considering the changes that have occurred over the past several centuries - and those to come in the centuries ahead - do reasonable citizens object to new federal initiatives seeking to establish uniform national laws.

But *We The People* don't merely object to a new federal law that destroys (via direct preemption) 1,000 remedies that were developed pursuant to the Rule of Law over centuries, with a new federal uniform domestic law providing only 100 remedies due to the fact (observed by the Supreme Court) that Congress simply forgot the rest. Oh no; patriots deem such a law, purporting to extinguish our inalienable right to the due process of law, as not merely illegal, but as constitutionally null and void, and thus due no allegiance whatsoever.

PROPOSITION: Congress should amend ERISA immediately to only provide for a "contingent" or "conditional" form of preemption as illustrated above, since an absolute statutory preemption by a forgetful Congress deprives *We The People* of one of our most sacred inalienable rights - the due process of law.

Some may oppose anything which appears to diminish the granite wall that direct statutory preemption has become, while providing plan participants with not even half-a-loaf of justice. To those we would observe that the granite wall is beginning to show cracks.

In this context the further words of Justice Scalia in Knudson are noteworthy:

> *We express no opinion as to whether . . . a direct action by petitioners against respondents asserting state-law claims such as breach of contract would have been pre-empted . . .*

suggesting that ERISA preemption may not be as absolute as it has appeared. Contingent (i.e., a prudent conditional) preemption may thus be a true win-win for all lovers and defenders of liberty.

EPILOGUE

The eventual framework of ERISA is still being judicially crafted. In that regard the following comments have been added to hopefully assist the reader to identify the current legal latitude and longitude.

1st Recently in a concurring opinion regarding Aetna Health Inc. v. Davila, 542 U.S. 200, 223 (2004), Supreme Court Justice Ginsburg referred to an argument in the Government's amicus brief mentioning a specific uncharted area of the law that may potentially provide monetary relief to ERISA plan members. In net effect, Justice Ginsburg pointed out that the Supreme Court had not yet precluded "make-whole relief" under a breach of fiduciary duty claim.

Furthermore, and in a surprising about-face of loyalty from the strict *textualist* Scalia camp to the more *purposivist* side, Justice Stevens switched from his majority opinion in Mass. Mutual Life Ins. Co. v. Russell, 473 U.S. 134, against individual compensatory relief under §502(a)(2), to the dissent approach in Mertens v. Hewitt Assocs., 508 U.S. 248, favoring individual compensatory relief under § 502(a)(3). He, along with Chief Justice Rehnquist and Justice O'Connor, joined Justice White's dissent. The dissent argued that monetary compensatory damages to "*make the victims [of the breach] whole*" are an acceptable form of equitable relief traditionally awarded in trust common law. Thus, according to the dissent, the majority under Justice Scalia was mistaken in precluding all forms of compensatory damages. Stay tuned!

2nd On November 26th, 2007, the U.S. Supreme Court heard oral argument in LaRue v. DeWolff, Boberg & Assoc., and accordingly is now deciding whether a worker has a right to sue to recover losses when his instructions on where to invest his retirement money are disregarded. Justices Breyer, Ginsburg and Souter seemed sympathetic to LaRue's argument that ERISA enables him to seek recovery of his alleged losses through the federal courts. On the other hand, Chief Justice Roberts and Justices Scalia and Alito seemed concerned that opening the door to LaRue's lawsuit under ERISA could hurt other investors in the plan.

LaRue sued under ERISA seeking to have DeWolff reimburse the ERISA plan. The trial court entered judgment on the pleadings in favor of DeWolff on the ground that the monetary relief sought by LaRue was simply unavailable under ERISA. The 4th Circuit affirmed on two grounds: (1) LaRue was claiming a loss to his account rather than a loss to the plan as a whole, and (2) LaRue was not seeking "equitable relief" within the meaning of ERISA Section 502(a). The questions presented in the petition for certiorari were:

(1) Does § 502(a)(2) of ERISA permit a participant to bring an action to recover losses attributable to his account in a 'defined contribution plan' that were caused by fiduciary breach?

(2) Does § 502(a)(3) permit a participant to bring an action for monetary "make-whole" relief to compensate for losses directly caused by fiduciary breach (known in pre-merger courts of equity as "surcharge")?

Notice the "make-whole" issue in LaRue. Again; stay tuned!