ARTICLE

THE LAST ARTICLE ABOUT THE LANGUAGE OF ERISA PREEMPTION? A CASE STUDY OF THE FAILURE OF TEXTUALISM

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The Employee Retirement Income Security Act of 1974 has been held to preempt a vast array of state statutes and common law, ranging from family leave programs to health care finance reforms. In this Article, Professor Fisk argues that the Supreme Court's misguided faith in textualist methods of interpreting ERISA's preemption provisions has produced doctrinal confusion and unintended public policy. While she endorses the Court's move last Term to a more pragmatic approach to ERISA preemption, Professor Fisk's account of the development of ERISA preemption doctrine helps to explain how textualist methods of statutory interpretation may have significant—and oftentimes unintended—effects on the development of law and public policy.

The future of health care reform, if it has any, seems now to lie in the states. Yet the conventional wisdom is that the states are powerless to act unless Congress grants so-called "ERISA waivers." That is, in order for states to have authority to reform private health care payment systems, Congress must amend section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA, or "the Act"), which broadly preempts state laws that "relate to" employee benefit plans.[1] Many states enacted

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[1] 29 U.S.C. § 1144(a) (1988). An "ERISA waiver" is a shorthand way of referring to an amendment to the ERISA preemption provision to eliminate preemption of state law in a particular circumstance. Unlike Medicaid, where an administrative agency decides on a state's request for an exemption from federal law, there is no agency to fine-tune the relationship between state and federal law in regard to ERISA; state reforms must await action from Congress. On the general problem of ERISA waivers and state health care reform, see Devon P. Groves, *ERISA Waivers and State Health Care Reform*, 28 COLUM. J. L. & SOC. PROBS. 609 (1995); HEALTH, EDUCATION, AND

health care reform legislation, and many believed that such legislation was preempted by ERISA.[2] Although several states have sought congressional exemptions from ERISA preemption, none has been granted, except to Hawaii in 1983.[3] Thus, ERISA preemption has thwarted reform efforts in a large number of states.[4]

ERISA's sweeping preemption of state laws regulating health care payment is odd, because ERISA itself has little to do with the regulation of health finance; it simply imposes fiduciary and reporting obligations on private employee benefit plans.[5] ERISA does not require employers to provide health insurance or any

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HUMAN SERVICES DIVISION, U.S. GAO, EMPLOYER-BASED HEALTH PLANS: ISSUES, TRENDS, AND CHALLENGES POSED BY ERISA, REP. NO. GAO/HEHS 95-167 (July 1995).

[2] *See, e.g.*, Edwin Chen, *States Take Up Health Reform Fight*, L.A. TIMES, Sept. 30, 1994, at A18; William Claiborne, *Health Reform on the Go, State by State*, WASH. POST, Nov. 26, 1993, at A29.

[3] The House Committee on Education and Labor recommended in 1993 that § 514 be amended to grant waivers to Maryland, Minnesota, New York, and Hawaii. H.R. REP. NO. 111, 103d Cong., 1st Sess. 109–12 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378. However, no waivers were enacted. Omnibus Budget Reconciliation Act of 1993, Pub L. 103-66, 107 Stat. 512 (1993).

[4] Oregon and Washington both enacted ambitious health care financing reforms, but state officials reportedly believed that congressional waivers of ERISA preemption were essential to the validity of the state laws. *See* 139 CONG. REC. E3126 (Nov. 24, 1993) (statement of Rep. Wyden (D-Or.)); John Kitzhaber & Mark Gibson, *The Crisis in Health Care: The Oregon Health Plan as a Strategy for Change*, 3 STAN. L. & POL'Y REV. 64 (1991). Both Oregon and Washington sought waivers, but neither bill was enacted, and both states' reforms could not take effect without the waivers. *See id.* 139 CONG. REC. E1974-02 (daily ed. Aug. 4, 1993) (statement of Rep. Kriedler (D-Or.)); 138 CONG. REC. E3059-02 (daily ed. Oct. 5, 1992) (statement of Rep. Wyden). As one Oregon official put it: "It goes down the toilet without a waiver." Chen, *supra* note 2. Washington repealed its law recently, just two years after enacting it. *Washington Governor Signs Bills Repealing Health Care Reform Law*, L.A. TIMES, May 10, 1995, at A25. Florida, Hawaii, Minnesota, Oregon and Vermont enacted health care reform proposals that depended in part on waivers from ERISA preemption. Milt Freudenheim, *States Seek Aid for the Uninsured,* N.Y. TIMES, June 23, 1992, at D2. Massachusetts enacted similar legislation which was never enforced in part because of concerns about ERISA preemption. *See* Mary Anne Bobinski, *Unhealthy Federalism: Barriers to Increasing Health Care Access for the Uninsured*, 24 U.C. DAVIS L. REV. 255, 305–24 (1990). An initiative on the November 1994 ballot in California that would have established a state-funded, single-payer health care system was considered likely by the State Legislative Analyst to require a change in the ERISA preemption provision. ANALYSIS BY THE LEGISLATIVE ANALYST, CALIFORNIA BALLOT PAMPHLET 45 (November 1994). *See generally* Jerry Mashaw, *Taking Federalism Seriously: The Case for State-Led Health Care Reform*, DOMESTIC AFF. (Winter 1993-94), *reprinted in* 140 CONG. REC. E59,957 (daily ed. July 28, 1994) (statement of Sen. Phil Gramm (R-Tex.)); *Look Behind Today's Worst Health Insurance Horrors and the Same Monster Lurks . . . . ERISA: The Law That Ate Health Care Reform.* CAL. LAW., May 1993, at 40.

[5] In contrast to ERISA's sparse regulation of health and other benefit plans, ERISA comprehensively regulates pension plans. Thus, sweeping preemption of state laws relating to pension plans has not created the regulatory void that preemption of laws relating to nonpension (welfare benefit) plans has created.

other benefit; it does not regulate what employers can charge for benefits; it does not prevent employers from eliminating benefits (except pensions). In divesting states of authority to regulate, ERISA preemption has created an enormous, unanticipated "regulatory vacuum": ERISA has been interpreted to preempt a wide variety of state common law and statutes, including family leave[6] and workers' compensation programs,[7] prevailing wage laws,[8] provisions regulating working conditions of apprentices,[9] mechanics' liens,[10] statutes allocating damages in tort[11] and wrongful death[12] actions, taxes on hospitals,[13] novel state efforts to address the perceived crisis of the unavailability of health insurance,[14] and even certain medical malpractice claims.[15] Moreover, ERISA eliminates state claims even when ERISA itself provides

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[6] *See* Gabrielle Lessard, Note, *Conflicting Demands Meet Conflicts of Laws: ERISA Preemption of Wisconsin's Family and Medical Leave Act*, 1992 WIS. L. REV. 809.

[7] *See* District of Columbia v. Greater Washington Bd. of Trade, 113 S. Ct. 580 (1992); Benson v. Wyatt Cafeterias, Inc., 780 F. Supp. 1132 (N.D. Tex. 1991). *But see* Eurine v. Wyatt Cafeterias, Inc., No. 3-91-0408-H, 1991 WL 206172 (N.D. Tex., Aug. 21, 1991), *amending*, 13 Employee Benefits Cases (BNA) 2728.

[8] Dillingham Constr. N.A. Inc. v. County of Sonoma, 57 F.3d 712 (9th Cir. 1995); Chamber of Commerce v. Bragdon, 769 F. Supp. 1537 (N.D. Cal. 1991), *aff'd*, 64 F.3d 497 (9th Cir. 1995).

[9] *See infra* text accompanying notes 200–214.

[10] Trustees of the Elec. Workers Health & Welfare Trust v. Marjo Corp., 988 F.2d 865, 868 (9th Cir. 1993).

[11] Travitz v. Northeast Dept. ILGWU Health & Welfare Fund, 13 F.3d 704, 709–10 (3d Cir. 1994).

[12] McInnis v. Provident Life & Accident Ins. Co., 21 F.3d 586, 589–90 (4th Cir. 1994).

[13] NYSA-ILA Med. v. Axelrod, 27 F.3d 823 (2d Cir. 1994), *vacated*, Chassin v. NYSA-ILA Med., 115 S. Ct. 1819 (1995); Connecticut Hosp. Assn v. Pogue, 870 F. Supp. 444 (D. Conn. 1994), *rev'd*, Connecticut Hosp. Assn. v. Weltman, 66 F.3d 413 (2d Cir. 1995). Both of these cases were overturned on the strength of the Supreme Court's recent decision in N.Y.S. Conference of Blue Cross/Blue Shield Plans v. Travelers Insurance Co., 115 S. Ct. 1671 (1995) [hereinafter *New York Blues*].

[14] *See supra* note 4. In *New York Blues*, 115 S. Ct. 1671 (1995), the Supreme Court rejected a challenge to the system of differing surcharges that New York imposes on hospital rates. The surcharges depend on whether the payer is a private health insurance company, an HMO, Blue Cross/Blue Shield, etc., in order to equalize rate advantages between those payers that allow open enrollment and use community-based risk ratings (thus insuring the otherwise uninsurable), and those that do not. *See also* Bricklayers Local No. 1 Welfare Fund v. Louisiana Health Ins. Assn., 771 F. Supp. 771 (E.D. La. 1991); General Split Corp. v. Mitchell, 523 F. Supp. 427 (E.D. Wis. 1981) (Wisconsin risk-pool statute preempted).

[15] The courts are in conflict over the extent of ERISA preemption of medical malpractice claims. The problem arises because many health plans make medical decisions in evaluating whether to provide care (in the case of an HMO) or coverage (in the case of a plan). When the medical decision proves harmful, the patient ordinarily would have a malpractice claim under state law. But since ERISA preempts state claims arising out of claims for benefits under ERISA plans, medical malpractice claims are arguably preempted. ERISA provides only contract-type damages, which are obviously inadequate to remedy the harm caused by negligent medical decisions.

no remedies.[16] Every single ERISA preemption decision from the Supreme Court has involved an effort to preempt state statutes or common law created to protect employees, consumers, or the participants or beneficiaries of employee benefit funds.[17]

It is a rich irony that ERISA, which was heralded at its enactment as significant federal protective legislation,[18] has through its preemption provision been the basis for invalidating scores of progressive state laws. This Article explains that irony. I argue that the disastrous effects of ERISA preemption are the unwanted offspring of the Supreme Court's failed twenty-year love affair with variations of textualism as the dominant mode of interpreting ERISA's preemption provision. I use "textualism" in a slightly unconventional way to refer to methods of interpretation that claim to find determinate meaning in the language, history, or structure of a statute rather than acknowledge judicial responsibility for augmenting legislation to deal with unforeseen

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Some courts have held ERISA to preempt malpractice claims. Tolton v. American Biodyne, Inc., 854 F. Supp. 505 (N.D. Ohio 1993); Corcoran v. United Healthcare, Inc., 965 F.2d 1321 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 812 (1992). Both courts characterized the claim as relating to a "benefit determination." The most problematic cases are those involving HMOs, where the "plan" itself is basically made up of a hospital and its physicians. If ERISA preempts the claims against the HMO and its employees, the plaintiff has no one to sue for malpractice. Some courts have held all claims preempted. Kuhl v. Lincoln Nat. Health Plan, 999 F.2d 298 (8th Cir. 1993); Pomeroy v. Johns Hopkins Med. Servs., Inc., 868 F. Supp. 110 (D. Md. 1994); Rollo v. Maxicare of Louisiana, Inc., 695 F. Supp. 245 (E.D. La. 1988); Craft v. Northbrook Life Ins. Co., 813 F. Supp. 464 (S.D. Miss. 1993); Dukes v. United States Health Care Sys., Inc., 848 F. Supp. 39 (E.D. Pa. 1994); Rice v. Panchal, 875 F. Supp. 471 (N.D. Ill. 1994); Ricci v. Gooderman, 840 F. Supp. 316 (D.N.J. 1993). Some courts have held that ERISA does not preempt claims against HMOs based on vicarious liability for the negligence of physicians, even though ERISA preempted claims based on direct liability for the plan's negligence in the selection of doctors or in the administration of the plan. Pacificare v. Burrage, 59 F.3d 151 (10th Cir. 1995); Stroker v. Rubin, Civ. A. No. 94-5563, 1994 WL 719694 (E.D. Pa., Dec. 22, 1994); *see also* Dearmas v. Av-Med, Inc., 865 F. Supp. 816 (S.D. Fla. 1994); Haas v. Group Health Plan, Inc., 875 F. Supp. 544 (S.D. Ill. 1994); Jackson v. Roseman, 878 F. Supp. 820 (D. Md. 1995); Elsesser v. Hospital of the Philadelphia College of Osteopathic Med., 802 F. Supp. 1286 (E.D. Pa. 1992). One court held that ERISA preempted claims against an HMO, but it allowed claims against the physician to proceed. Altieri v. CIGNA Dental Health, Inc., 753 F. Supp. 61 (D. Conn. 1990). *See generally* Larry J. Pittman, *ERISA's Preemption Clause and the Health Care Industry: An Abdication of Judicial Law-Creating Authority*, 46 FLA. L. REV. 355 (1994); Michael A. Hiltzik, *Supreme Court Won't Allow Suit in Death Case Litigation*, L.A. TIMES, May 16, 1995, at D1.

[16] *See, e.g.*, Olson v. General Dynamics Corp., 951 F.2d 1123, 1128 (9th Cir. 1992); Phillips v. Amoco Oil Co. 799 F.2d 1464, 1470 (11th Cir. 1986).

[17] *See* cases cited *infra* note 104.

[18] H.R. REP. No. 533, 93d Cong., 2nd Sess., *reprinted in* 1974 USCCAN 4639–40, 4666–67, 4676–77; S. REP. No. 127, 93d Cong., 2nd Sess. 34 (1974), *reprinted in* 1974 USCCAN 4838–39; S. REP. No. 383, 93d Cong., 1st Sess. 81 (1974), *reprinted in* 1974 USCCAN 4890–91, 4898–4906.

circumstances.[19] Through sometimes extreme forms of textualist interpretation, the Court has transformed an ill-considered and hastily drafted legislative compromise into a matter of principle, asserting that Congress intended to leave regulation of employee benefits largely to the market and to private contract. But Congress neither foresaw nor intended that ERISA would effect this vast deregulation. Rather, it was a result of expansive judicial interpretation of the preemption provision and an unintended by-product of textualism as a method of statutory interpretation. Not only was the irrationality of ERISA preemption not the deliberate choice of Congress, it was not even the deliberate choice of the Supreme Court. Indeed, it was inconsistent with the Rehnquist Court's avowed preference for federalism.[20] Moreover, the Court's textualism generated uncertainty in the law which complicated the administration of employee benefit plans and states' regulatory efforts.[21] If ever there were a case study of the failures of textualism as a method of statutory interpretation, this is it. Fortunately, the Supreme Court last Term decided a case that suggests that the Justices have realized they erred and are taking a different approach, if not to statutory interpretation in general, at least to ERISA preemption of state law.[22]

Last Term, in *New York State Conference of Blue Cross/Blue Shield Plans v. Travelers Insurance Company* ("*New York Blues*"),[23] the Court abandoned its slavish devotion to literalist textualism in interpreting ERISA's broad preemption provision and instead

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[19] I use "textualism" in a broader sense than it is ordinarily used. By "textualism," I mean not only strict "plain language," but also plain language aided by methods of statutory interpretation—often called intentionalist or purposivist—that purport to decide cases by looking at the legislative history to discern the legislature's intent about a provision or its purpose in enacting a provision. *See* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 123–30 (1990). I lump all three of these disparate modes of interpretation together into one category to distinguish them from a mode of interpretation that abandons the notion of a legislatively determined statutory meaning and instead recognizes that the courts are making choices with little legislative guidance. The contrast is drawn in Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991). In the conventional typology, my suggested mode of interpretation is aligned with the new version of "legal process" and "pragmatist" theories of statutory interpretation. *See* sources cited *infra* note 253.

[20] E.g., Gregory v. Ashcroft, 501 U.S. 452, 457–61 (1991); New York v. United States, 505 U.S. 144 (1992). *See infra* text accompanying notes 32–38.

[21] *See* Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacaphony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995).

[22] N.Y.S. Conference of Blue Cross/Blue Shield Plans v. Travelers Insurance Co., 115 S. Ct. 1671 (1995).

[23] *Id.*

adopted a pragmatic approach. The Court will no longer look to the dictionary definition of the words of section 514, but instead will ask whether preemption of state law will serve the objectives of ERISA. This signals a long overdue and laudable reorientation in the Court's approach to ERISA preemption. Attention to the consequences of ERISA preemption, however, will force the Court to confront a significant policy issue that contributed to the preemption problem in the first place: namely, that Congress evaded the task of defining the appropriate spheres of state and federal regulation of employee benefits. Allocation of state and federal regulatory authority is a vexing issue in the area of health policy.[24]

I begin my argument, in Part I of this Article, with a brief review of preemption doctrine. I note that although implied preemption is said to raise concerns about undue interference with state authority, even express preemption provisions such as ERISA's raise the same issues. The problem, I argue, is that Congress cannot readily define the scope of preemption *ex ante* with sufficient specificity to relieve the courts of the obligation to accommodate state and federal law in each case. I then examine the ambiguities in the language and legislative history to support my claim that the apparent breadth of the ERISA preemption provision (which calls for ERISA to supersede "any and all" state laws "insofar as they . . . relate to" ERISA-covered employee benefit plans)[25] is *not* evidence that Congress intended to divest states of their traditional authority to regulate all terms of employment that happen to relate to employee benefit plans.

In Part II, I trace the evolution of the ERISA preemption doctrine in the Supreme Court. Although, as I show, the Court relied mainly on three variations of textualism, I also show that what seemed the obvious and unambiguous meaning to the Supreme Court seemed so at least partly because of unspoken assumptions about federalism and unregulated contract in the

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[24] Allocation of state and federal regulatory authority was one of the major points of controversy during the recent debate over nationwide health care reform legislation. *See, e.g.*, Robert R. Rosenblatt, *Health Reform: Tangled Up in a Knot of Deal-Killers*, L.A. TIMES, Aug. 21, 1994, at A1 (characterizing as a "deal-killer" any proposal that would allow states to regulate employee benefits); *See generally*, Candice Hoke, *Constitutional Impediments to National Health Reform: Tenth Amendment and Spending Clause Hurdles*, 21 HAST. CONST. L.Q. 489, 499–503 (1994); Fernando R. Laguarda, Note, *Federalism Myth: States as Laboratories of Health Care Reform*, 82 GEO. L.J. 159 (1993).

[25] 29 U.S.C. § 1144(a) (1988).

law of labor relations. Put another way, the meaning that the Court gave to the preemption clause did not inhere in the text, but was put there by the Court because it believed that private, contractual approaches to problems of employee benefits were to be preferred and that the contractual scheme implicit in ERISA must be protected against undue state encroachment. By failing to recognize that the problem of ERISA preemption is one of regulatory federalism—and not one of giving life to an unambiguous statutory structure—the Justices obscured, even from themselves, the nature of the choices they were making.

Congress' decision to preempt state law without either creating a federal regulatory structure to fill the gap or instructing courts whether or how to create a federal common law to do so, put courts in the position of resolving elemental disputes about employment policy. The Supreme Court resorted to textualism in an effort to avoid explicitly making the choices that Congress had failed to make in drafting the legislation. At the close of Part II, I suggest that the problem of ERISA preemption is a consequence of the disintegration of the post-war paradigm of labor law.[26] In the New Deal-era vision that animated the liberal labor-business coalition that enacted ERISA, national legislation regulating employment was to be preferred to the inconsistent and inadequate protections of state law and the hostility of the state judiciary. But broad preemption under ERISA, as under the federal labor law, became problematic when the deficiencies of the federal law protections were revealed.[27]

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[26] *See generally* Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981); JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983).

[27] The literature criticizing ERISA preemption is large and growing. Some of the more recent and more notable contributions are Jay Conison, *ERISA and the Language of Preemption*, 72 WASH. UNIV. L. Q. 619 (1994); Paul O'Neil, *Protecting ERISA Health Care Claimants: Practical Assessment of a Neglected Issue in Health Care Reform*, 55 OHIO ST. L.J. 724 (1994); Bobinski, *supra* note 4; Leon E. Irish & Harrison C. Schaffer, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. MICH. J. L. REF. 109 (1985); William J. Kilberg & Paul D. Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 TEX. L. REV. 1313 (1984). The chapter on preemption in the leading ERISA casebook is excellent, JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION & EMPLOYEE BENEFIT LAW ch. 9 (2d ed. 1995), as is the summary of preemption in STEPHEN R. BRUCE, PENSION CLAIMS: RIGHTS AND OBLIGATIONS (2d ed. 1993).

There is also a literature criticizing broad preemption in labor law. *See, e.g.*, Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355 (1990); Eileen Silverstein, *Against Preemption in Labor Law*, 24 CONN. L. REV. 1 (1991); Lee Modjeska, *Federalism in Labor Relations—The Last Decade*, 50 OHIO ST. L. J. 487 (1989); William B. Gould IV, *When State and Federal Laws Collide: Preemption—Nightmare or Opportunity?*, 9 INDUS. REL. L.J. 4,

In Part III, I argue for a theory of statutory interpretation that would allow courts to adopt an approach to preemption that facilitates consideration of the policy consequences of broad preemption. The Supreme Court had it right when it indicated in *New York Blues* that henceforward courts should decide whether ERISA preempts state law not by asking whether the language requires it or whether Congress intended it, but by asking whether preemption makes sense as a matter of ERISA policy. To know whether preemption makes sense in light of the purpose and function of ERISA, however, courts must do what Congress failed to do: develop a preemption doctrine sensitive to the different degrees of substantive regulation that ERISA imposes on pensions as opposed to nonpension benefits.

Unlike others, I do not believe that legislative revision of the ERISA preemption provision is necessary to reorient preemption doctrine.[28] Even if a significant revision were to pass Congress (which, as I explain in Part III, is unlikely to happen), Congress would face difficult line-drawing problems that could not be resolved *ex ante*. As a practical matter, this means that the courts, rather than Congress, will have the leading role in defining the scope of ERISA preemption.

Whatever the future of health care reform at the federal level, these problems will have to be addressed under ERISA. If, as appears likely, health care reform in the 104th Congress amounts to nothing or to only slight modification of the rules on portability of benefits and preexisting condition exclusions,[29] the preemption problems will remain for health benefits as for other ERISA-covered benefits. Even if Congress were to enact more dramatic health care reform, the preemption problems will remain for child care, vacation, sick leave, apprenticeship pro-

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19–29 (1987); Michael Shultz & John Husband, *Federal Preemption Under the NLRA: A Rule in Search of a Reason*, 62 DENV. U. L. REV. 531 (1985); Archibald Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO STATE L.J. 277 (1980).

[28] E.g., James D. Hutchinson & David M. Ifshin, *Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974*, 46 U. CHI. L. REV. 23, 24 (1978) (arguing that "continued whittling away of the preemptive reach of ERISA seriously threatens the regulatory scheme devised by Congress, and that it is up to Congress, not the courts, to narrow ERISA's preemption of state law where particular policy reasons make such action appropriate").

[29] For example, H.R. 995, 104th Cong., 1st Sess. (1995), would amend ERISA to provide portability of health insurance. S. 308, 104th Cong., 1st Sess. (1995) would waive ERISA preemption of certain state health reform programs in limited circumstances. There is no legislation currently pending that would exempt from ERISA preemption all state health care reform legislation.

grams, and other benefits that are administered by ERISA-covered plans.

I. The Ambiguous Language and History of the ERISA Preemption Provision

A. *Express and Implied Preemption: A Distinction Without Much Difference*

All federal statutes raise an issue of preemption of state law. The general principle of federal preemption is that, subject only to the substantive limitations on Congress's power, Congress may preempt state law to whatever extent Congress may choose.[30] For this reason, the judicial preemption inquiry is conventionally described as being a matter of discerning Congress's intent.[31] The Supreme Court has insisted that congressional intent to preempt state law be "clear" so as not to impinge unduly upon state power.[32] Thus, the Court often says that it assumes Congress does not intend federal law to supersede "the historic police powers of the States . . . unless that was the clear and manifest purpose of Congress."[33] However, Congress often does not attempt to expressly articulate its intent regarding preemption. In such circumstances, courts may infer preemptive intent either from the fact that the federal statute "occupies the field" or from the fact that state law directly conflicts with or somehow "stands as an obstacle to" the objectives of Congress.[34] Judges

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[30] Although most cases assert that this congressional authority derives from the Supremacy Clause, recent scholarship has suggested that preemption need not always be a matter of the Supremacy Clause, but rather is derived from congressional power to enact substantive legislation. *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell. L. Rev. 767 (1994); *see also* S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 Conn. L. Rev. 829 (1992); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. Rev. 685 (1991).

[31] E.g., Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987).

[32] *E.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). *Cf.* Gregory v. Ashcroft, 501 U.S. 452, 457–61 (1991) (requiring a "plain statement" by Congress).

[33] Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 715 (1985); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). The reason for this assumption is unclear, but presumably it comes from some generalized constitutional notion of the value of federalism. As I suggest in part III, I do not believe the assumption is helpful, much less compelled, either as a matter of constitutional law or sensible policy. *See infra* text accompanying notes 254–257.

[34] *E.g.*, Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm., 461 U.S. 190, 204 (1983). Although this is the conventional "implied"

complain about these implied preemption analyses, for it is difficult to discern when Congress has occupied a field and what the scope of that field is, or when state law is an obstacle to some congressional goal.[35] Although the Supreme Court recently has insisted that Congress must make a "plain statement" when it enacts legislation that alters the balance of power between the state and federal governments,[36] it has been suggested that this "plain statement" rule may conflict with some implied preemption cases.[37] However, the conflict is nothing new; implied preemption doctrines have always been in tension with the Court's claim that congressional intent to preempt be "plain."[38]

Given the difficulties implied preemption analyses pose for judges, ERISA's express preemption provision was greeted with a sigh of relief by some commentators and judges, including initially the Supreme Court, which treated ERISA preemption as

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preemption rule, *see generally* KENNETH STARR, ET AL., AMERICAN BAR ASSOCIATION, THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES CONFERENCE 19–30 (1991), it has been criticized. *See, e.g.*, Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL. L. REV. 767, 807–12 (1994); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69 (1988).

[35] As federal judges who authored an ABA monograph on preemption point out:

> Under occupying the field analysis, a broad legislative scheme is deemed to inform the courts that Congress, reflecting upon the interests of the states, intended all state laws touching the area to be superseded. But it may equally be reasonable to assume just the opposite—that the intrusion on state prerogatives sanctioned by the comprehensive federal program represents all that Congress considered appropriate. Further, even if one accepts the inference that courts often draw from federal statutory complexity, it remains difficult to claim that this implied intent can be taken to preempt state laws that supplement or are otherwise in harmony with the federal scheme.

Starr, *supra* note 34, at 34–35.

A similar problem exists with regard to the second form of implied preemption, the "obstacle" doctrine:

> It is unclear when, if ever, Congress has *not* balanced and compromised in enacting legislation. If every state law affecting one of the many interests reconciled by a particular federal statute were preempted under a delicate balance theory, there would seem to be little if any room for state regulatory authority. In short, lack of standards to guide this inquiry can transform a delicate balance into federal occupation of a field.

Id.

[36] Gregory v. Ashcroft, 501 U.S. 452, 470 (1991).

[37] Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 FORDHAM L. REV. 469, 528 (1993).

[38] If *Gregory*'s "plain statement" rule were applied to preemption (which the Supreme Court apparently has not considered), entire bodies of preemption doctrine might be called into question. For example, since Congress did not clearly state an intent to preempt all state law regulating labor relations, many of the cases following San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), and Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976), might be of doubtful validity. *See infra* notes 237–241.

if it were straightforward.[39] Unlike many federal statutes, such as the National Labor Relations Act, ERISA expressly addresses the problem: the Act "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ."[40] ERISA appeared to represent a clear statement of Congress's intent to preempt *all* state law. The experience of courts with ERISA preemption, however, demonstrates that interpretation of an express preemption provision can raise the same problems of regulatory federalism that implied preemption raises, at least when the federal statute applies as broadly as does ERISA.

Interpreting an express preemption provision like ERISA's, I contend, does not differ dramatically from the task of interpreting the preemptive effect of a statute without an express preemption provision. In both cases, the courts must engage in a pragmatic process of determining when the enforcement of state law is consistent with the objectives of federal regulation. Certainly in the case of ERISA, and perhaps in other areas as well, the judicial preemption analysis is less constrained by legislative direction than the "congressional intent" rhetoric would suggest. Although express preemption is the reform proposed by some scholars and judges who believe that the inferring of an intent to oust all state regulation when a federal statute seems to "occupy the field" is of questionable validity in a federal system,[41] the experience of federal courts with the ERISA preemption clause may suggest that clear statements are easier to ask for than to give or to receive. ERISA is thus evidence that the

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[39] As the Supreme Court said in its first ERISA preemption opinion, "we are assisted by an explicit congressional statement about the pre-emptive effect of" the statute which "demonstrates that Congress . . . meant to establish pension plan regulation as exclusively a federal concern." Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522–23 (1981).

[40] 29 U.S.C. § 1144(a) (1988). Although there are a number of express limits on the scope of preemption, they do little to give meaning to the main provision. First, only state laws affecting "employee benefit plans" covered by ERISA are preempted. While the term "plan" is not defined in the statute, the definition of "employee benefit plan" excludes plans maintained "solely" to comply with state workers' compensation or disability benefit laws; thus, laws relating to such plans are not preempted. § 4(b)(3), 29 U.S.C. § 1003(b)(3) (1988). Second, there are several categories of state laws that, although they relate to plans covered by ERISA, are nevertheless expressly saved from preemption; state insurance laws are the most significant among these. § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (1988). But, to limit the scope of the so-called "insurance savings" provision, ERISA states that no employee benefit plan may be deemed to be insurance for the purpose of state insurance law. § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) (1988).

[41] *E.g.*, Jose L. Fernandez, *Dynamic Statutory Interpretation: Occupational Safety and Health Act Preemption and State Environmental Regulation*, 22 FLA. ST. U. L. REV. 75, 109 (1994); Starr, *supra* note 34, at 40–56; Wolfson, *supra* note 34, at 112–14.

Court's supposed new effort "to merge federalism instincts with the plain meaning doctrine of statutory interpretation" is not likely to bring great clarity to the area of preemption.[42]

B. *The Ambiguities of Section 514 and Why They Matter*

Section 514 of ERISA is fundamentally ambiguous in important respects. The Supreme Court has noted that it is "not a model of legislative drafting."[43] Nevertheless, the Court has persisted in trying to decide cases solely by reference to "the ordinary meaning of 'relate to.'"[44] The Court's emphasis on the language of section 514 invites scrutiny of the section's ambiguous meaning. How ambiguities about its effect and scope are resolved has significant consequences for state labor, insurance, health care, and consumer welfare law and policy.

Section 514(a) states that ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" that is not exempt from ERISA.[45] ERISA exempts from its coverage plans maintained "solely" to comply with state workers' compensation, disability, or unemployment laws, as well as government and church-sponsored plans.[46] But, apart from these exemptions and a few others not pertinent here, ERISA covers any employer or employer-union "plan, fund, or program" that provides pensions or benefits for health care, child care, vacations, sickness, disability, death, apprenticeship, training, or scholarships.[47] Thus, any law that "relates to" one of those plans is "superseded," unless it is saved by one of the savings provisions in section 514(b). Section 514(b) saves from preemption generally applicable state criminal law,[48] state law "which regulates" insurance, banking, or securities,[49] the State of Hawaii's Prepaid Health Care Act,[50] state laws regulating

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[42] Frank L. Easterbrook, *Constitutional Law Conference*, 61 U.S.L.W. 2237, 2248 (Oct. 27, 1992). I am not certain that the Court's demand for clear statements of preemption, *see* Drummonds, *The Sister Sovereign States*, *supra* note 37, at 529; Wolfson, *Preemption and Federalism*, *supra* note 34, at 112–14, will achieve any less indeterminacy in the law than currently exists.

[43] Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985).

[44] District of Columbia v. Greater Washington Bd. of Trade, 113 S. Ct. 580 (1992).

[45] 29 U.S.C. § 1144(a) (1988).

[46] 29 U.S.C. § 1003(b) (1988).

[47] 29 U.S.C. § 1002(1), (2) (1988).

[48] 29 U.S.C. § 1144(b)(4) (1988).

[49] 29 U.S.C. § 1144(b)(2)(A) (1988).

[50] 29 U.S.C. § 1144(b)(5) (1988); HAW. REV. STAT. §§ 393-1 to 393-51 (1993).

certain entities known as Multiple Employer Welfare Arrangements,[51] and state family law orders that satisfy ERISA's definition of Qualified Domestic Relations Orders.[52]

The most obvious ambiguity concerns the meaning of "relates to." As the Supreme Court finally recognized last Term, "relates to" is a term that requires a modifier in order to have a concrete meaning,[53] and the wide spectrum of possible modifiers—directly, slightly, remotely—suggests a wide spectrum of possible meanings. Consider seven possibilities, drawn from actual or threatened ERISA preemption litigation dealing with health benefits. In each of these areas, ERISA is silent on the issues covered by the allegedly preempted state laws:

(1) A state law could "relate to" an employee benefit plan in a very direct sense, such as Hawaii's law that requires an employer to offer specified health benefits to all its employees.[54] (2) A law could relate to a plan in a less direct sense, such as provisions in the District of Columbia's workers' compensation law and Wisconsin's family and medical leave law that require employers who offer health benefits to their employees to continue those benefits while an employee is receiving workers' compensation benefits or is taking a leave to care for a family member.[55] (3) A law could relate in a still less direct sense, such as a Massachusetts law providing that every employer must pay a payroll tax to fund a state system of health benefits but exempting employers who maintain benefit plans.[56] (4) A law might relate in an even less direct sense by providing that an employer

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[51] 29 U.S.C. § 1144(b)(6) (1988).

[52] 29 U.S.C. § 1144(b)(7) (1988). A QDRO is defined in 29 U.S.C. § 1056(d)(3)(B)(i) (1988).

[53] N.Y.S. Conference of Blue Cross/Blue Shield Plans v. Travelers Insurance Co., 115 S. Ct. 1671, 1677 (1995).

[54] Standard Oil v. Agsalud, 633 F.2d 760 (9th Cir. 1980), *aff'd*, 454 U.S. 801 (1981), held that ERISA preempts such a law. Congress later responded to this decision by exempting Hawaii's law from ERISA preemption. 29 U.S.C. § 1144(b)(5) (1988); HAW. REV. STAT. §§ 393-1 to 393-51 (1993).

[55] District of Columbia v. Greater Washington Bd. of Trade, 113 S. Ct. 580, 583 (1992), held that ERISA preempts such a workers' compensation law. The Wisconsin Family Leave Act, which provides that health benefits must continue while an employee is on leave, raised the problem of ERISA preemption, *see* Lessard, *supra* note 6, at 834–40, but it was not litigated to a published disposition. The latter issue has been partially mooted by § 104(c) of the federal Family Medical Leave Act, which requires an employer to maintain group health benefits coverage for an employee who takes family or medical leave under the Act. 29 U.S.C. § 2601 (1988). A state law that grants more generous leave than available under the FMLA cannot require the employer to continue benefits, so an employee who opts to take the leave under the state law would not receive continued health benefits under the state law.

[56] This is what Massachusetts's so-called Pay or Play scheme would have done. *See*

must pay such a payroll tax without providing, as California's Proposition 186 would have, an exemption (which doubtless would have an impact by discouraging employers from offering private plans).[57] (5) A law, such as New York's, might impose taxes on hospitals or surcharges on hospital rates that differ depending on whether the payer is a commercial insurer, an HMO, a self-insurer, the Medicare or Medicaid systems, or Blue Cross/Blue Shield.[58] (6) A law might, as in the common law of most states, calculate damages for wrongful termination by including in the calculation of lost wages the cash value of health benefits.[59] (7) A law might simply provide, as does Michigan's business tax, that every business must pay taxes on the value it adds to the goods and services it produces; to the extent that the cost of labor, including employee benefits, is the measure of the value added, the tax would be computed by reference to the cost of providing benefits.[60]

Other examples can be found in the full range of benefits that can be offered in an ERISA plan.[61] Do state laws regulating the

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MASS. GEN. LAWS ANN., Ch. 118F (West Supp. 1990); *see generally* Bobinski, *supra* note 4, at 305–13 & n.193.

[57] This is what the California Health Security Act (CHSA) would have done. The CHSA appeared on the November 1994 California ballot as Proposition 186. It was defeated. Dan Morain and Virginia Ellis, *California Elections/ PROPOSITIONS Voters Approve 'Three Strikes' Law, Reject Smoking Measure Proposal for Government-Run Health Care System, Gasoline Tax to Fund Rail Projects are also Defeated*, L.A. TIMES, Nov. 9, 1994, at A1. The state Legislative Analyst opined that ERISA would preempt the payroll tax aspect of the proposed legislation. ANALYSIS BY THE LEGISLATIVE ANALYST, CALIFORNIA BALLOT PAMPHLET 45 (November 1994).

[58] NYSA-ILA Medical & Clinical Servs. Fund v. Axelrod, 27 F.3d 823 (2d Cir. 1994) (ERISA preempts state tax on gross receipts of medical centers where centers are operated by an ERISA plan); N.Y.S. Conference of Blue Cross/Blue Shield Plans v. Travelers Insurance Co., 115 S. Ct. 1671, 1673–75 (1995).

[59] *See* District of Columbia v. Greater Washington Bd. of Trade, 113 S. Ct. 580, 585 (1992) (Stevens, J., dissenting).

[60] In Thiokol Corp. v. Roberts, 858 F. Supp. 674 (W.D. Mich. 1994), the court rejected an argument that ERISA preempted the Michigan Single Business Tax, MICH. COMP. LAWS § 208.1–.145 (1995), on the ground that even though the state law referred to ERISA-covered employee benefits, it was not sufficiently related to a plan to compel preemption. In Boyle v. Anderson, 849 F. Supp. 1307 (D. Minn. 1994), the court held that ERISA did not preempt a state tax imposed on health care providers. *See generally* Kevin Matz, *ERISA's Preemption of State Tax Laws*, 61 FORDHAM L. REV. 401 (1992).

[61] To consider examples from the pension area, a state law might relate to a pension plan by prohibiting reduction of pension benefits to offset the value of other benefits, such as workers' compensation. *See* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) (holding that ERISA preempts such a statute). Or, a law might relate to a pension plan by according the non-employee spouse a partial share of the employee's pension benefits upon dissolution of the marriage. In General Motors Corp. v. Townsend, 468 F. Supp. 466 (E.D. Mich. 1976), the court held that a state family support order was preempted by ERISA. *But see* Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981); Cartledge

wages to be paid apprentices or the ratio of journeymen to apprentices on construction projects "relate to" plans if the apprenticeship program in question is an ERISA plan?[62] What if the operation of state law effectively dictates the amount of the employer contribution to a union-employer administered apprenticeship fund? If an employer established a child care center as an ERISA plan, would ERISA preempt state regulation of the center?[63]

ERISA simply does not unambiguously indicate whether any of the above laws bear such a relationship to a plan that they ought to be "superseded." The language of section 514(a) is, as the Supreme Court finally admitted, "unhelpful."[64] Indeed, if the state laws were unenforceable, one wonders what they would be "superseded" by, since ERISA itself says absolutely nothing about most of the subjects of the laws. Presumably, the laws would be superseded by silence, that is, by the absence of regulation. That makes little sense as a matter of statutory construction and even less sense as a matter of policy. But until last Term in *New York Blues*,[65] that was the interpretation the Court appeared to have chosen.

To decide which state laws survive preemption, a court must make interpretive choices, and those choices will profoundly affect a variety of important social and economic policy issues. Nevertheless, only three years ago, the Court took the view that

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v. Miller, 457 F. Supp. 1146, 1158 (S.D.N.Y. 1978) (refusing to apply a "literal-minded reading of ERISA" that would thwart state family law order attaching delinquent husband's pension to pay support to wife and children). Congress fixed this problem by amending § 514(b) to exempt from preemption certain state family law orders. 29 U.S.C. § 1144(b)(7) (1988). However, the fix is only partial. Only certain state law orders are saved from preemption, and the Ninth Circuit recently held that state community property laws that give a spouse a one-half interest in the earnings of the other spouse are preempted as applied to an ERISA pension plan. Ablamis v. Roper, 937 F.2d 1450 (9th Cir. 1991). Legislation to provide for division of pension benefits upon divorce is pending in Congress. H.R. 1048, 104th Cong., 1st Sess. (1995). A law might also relate to a plan by allowing creditors to attach all of the assets of an employee, including pension benefits. *See* Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988) (ERISA does not preempt such a statute).

[62] ERISA has been held to preempt both sorts of laws. *See, e.g.*, Boise Cascade Corp. v. Peterson, 939 F.2d 632 (8th Cir. 1991), *cert. denied*, 505 U.S. 1213 (1992) (ratios); Local Union 598 v. J.A. Jones Construction Co., 846 F.2d 1213 (9th Cir. 1988), *aff'd*, 488 U.S. 881 (1988) (wages). *See infra* text accompanying notes 200–215.

[63] These examples suggest that § 514 is ambiguous in the sense used by Professor Eskridge: The application of the language would lead to results that seem ridiculous or seem to contradict the historical basis for the statute. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483 (1987).

[64] N.Y.S. Conference of Blue Cross/Blue Shield Plans v. Travelers Insurance Co., 115 S. Ct. 1671, 1677 (1995).

[65] 115 S. Ct. 1671 (1995).

the plain meaning of the "relates to" language could decide cases and insisted that the dictionary definition of "relates to" ("To stand in some relation; to have bearing or concern; to pertain; to refer; to bring into association with or connection with")[66] was determinative. This approach invited the argument that any state law is preempted, since an employee benefit plan "stands in some relation" to almost any state law imaginable. State tort law, for example, which would require plan administrators to refrain from using physical force when disputing claims for benefits, might be preempted. Of course, such a construction of the statute is absurd—akin to suggesting that the request to bring every ashtray in the room means to tear them off walls, to seize them from the grip of those who are using them, and perhaps even to bring every receptacle that ever was or could be used as an ashtray.[67] The Court implicitly recognized this absurdity when it saved from preemption those laws that have only "tenuous, remote, or peripheral" connections to plans, such as many laws of "general applicability."[68]

The textualist deals with the problem of absurd results from literal readings by choosing an alternative meaning that "does least violence to the text."[69] But there is no single "alternative" meaning of "relates to" that allows a plain meaning textualist to pretend that the meaning of the statute is clear. Once the Court created the "tenuous, remote, or peripheral" exception to preemption, it in effect conceded that the "relates to" language was not itself determinative. Under the statute thus supplemented, only laws that were, in the Court's view, not *too* peripherally or *too* remotely related to plans were preempted.[70] But the diction-

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[66] District of Columbia v. Greater Washington Bd. of Trade, 113 S. Ct. 580, 583 (1992), quoting BLACK'S LAW DICTIONARY 1288 (6th ed. 1990).

[67] This is the example that Judge Richard Posner used in his book, THE PROBLEMS OF JURISPRUDENCE 268 (1990). *See also* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and Rule of Law*, 45 VAND. L. REV. 533, 544–50 (1992). On the difficulty of knowing when a particular result is "absurd," see Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127 (1994).

[68] *Greater Washington*, 113 S. Ct. at 583 n.1 (1992) (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1983)). *See, e.g.*, Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988) (generally applicable garnishment law not preempted); Aetna Life Ins. Co. v. Borges, 869 F.2d 142 (2d Cir. 1989) (escheat law not preempted though applied to unclaimed ERISA benefits), *cert. denied*, 493 U.S. 811 (1989).

[69] Green v. Bock Laundry Machine Co., 490 U.S. 504, 529 (1989) (Scalia, J., concurring).

[70] For this reason, the Court rested the holding of a case on this language only once, in *Mackey*, 486 U.S. 825 (1988). The Court's reluctance to use the language deprived

ary is then no help; only the exercise of common sense is. This approach then ceases to be "textualist" in the pure sense, and the judge instead must embark upon the task of designing a sensible preemption policy, which is precisely what the textualist thinks he is trying to avoid.

The ERISA preemption provision is ambiguous in parts other than the "relates to" language. For instance, ERISA saves from preemption state laws "which regulate insurance."[71] What is a law that "regulates insurance"? Is the tort of bad faith insurance practices such a law? In most states, it is a tort that can be committed only by an insurance company, and the law therefore "regulates insurance" in the sense that it has—or is supposed to have—an impact on the way that insurers handle claims.[72] In *Pilot Life Ins. Co. v. Dedeaux*,[73] the Supreme Court held that a cause of action based on the Mississippi common law of bad faith insurance practices was not a law which "regulates insurance" because it was not, in the Court's view, "'integral' to the insurer-insured relationship."[74] Since bringing such a suit against an insurer when it is acting as a claims processor for an employee benefit plan "related to" the plan, the Court concluded that the state law was preempted.[75] As a consequence, insurance companies face no state tort liability when handling claims through employee benefit plans.[76] This result made sense to the Court because ERISA creates other claims (none involving punitive or compensatory damages, however)[77] for the denial of claims for benefits, and the Court thought that ERISA's remedial scheme was comprehensive and ought therefore to be exclusive.[78] This

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it of much force, since lower courts declined to rely on it either. *See, e.g.*, NYSA-ILA Medical & Clinical Servs. Fund v. Axelrod, 27 F.3d 823, 827 (2d Cir. 1994).

[71] 29 U.S.C. § 1144 (1988).

[72] Mark Gergen, *A Cautionary Tale About Contractual Good Faith in Texas*, 72 TEX. L. REV. 1235, 1250 (1994).

[73] 481 U.S. 41 (1987).

[74] *Id.* at 51 (quoting Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1988)).

[75] *Id.* at 47–48.

[76] For criticism of *Pilot Life*, *see* Paul O'Neil, *Protecting ERISA Health Care Claimants: Practical Assessment of a Neglected Issue in Health Care Reform*, 55 OHIO ST. L.J. 723, 728–38, 763–79 (1994); Robert L. Aldisert, Note, *Blind Faith Conquers Bad Faith: Only Congress Can Save Us After* Pilot Insurance Co. v. Dedeaux, 21 LOY. L.A. L. REV. 1343 (1988); Karen L. Peterson, Comment, *ERISA Preemption of California Tort and Bad Faith Law: What's Left?*, 22 U.S.F. L. REV. 519 (1988).

[77] *See generally* George Lee Flint, Jr., *ERISA: Extracontractual Damages Mandated for Benefit Claims Actions*, 36 ARIZ. L. REV. 611 (1994) (discussing the prevailing views on the limits on extracontractual damages and arguing that ERISA does indeed authorize the award of such damages in some circumstances).

[78] *Pilot Life*, 481 U.S. at 52–56.

may or may not be a desirable result as a matter of policy, but it is not the only one compelled by the language of the statute or by its legislative history.

C. *The Origins of ERISA Preemption and the Problem of Congressional Intent*

Congress did not think very carefully about preemption when it drafted ERISA. Therefore, the ordinarily problematic process of either ascription or historical reconstruction of legislative intent and statutory purpose in section 514 is even more complicated. A legal doctrine that turns on legislative intent, as preemption does, assumes that there *is* a legislative intent to be found or that, even if an actual historic intent cannot be found, one can be imputed without undue difficulty. That is simply not true with ERISA.[79]

The actual historical evidence of congressional intent regarding preemption is sparse. Although the legislative history of ERISA is voluminous,[80] it reveals that Congress gave little thought to preemption. Careful scholarship on the history of section 514 has shown that the exceptionally broad language "was not a deeply considered result of the years of planning, negotiating, and drafting" that Congress put into ERISA.[81] As the Supreme Court has recognized, the versions of ERISA that worked their way through most of the legislative process tied the scope of preemption to the scope of ERISA regulation.[82] The House bill would have preempted state laws that "relate to the reporting and disclosure responsibilities and fiduciary responsibilities of per-

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[79] I do not refer here to the fact that collectivities such as legislatures do not have an "intent" in the ordinary sense of the term. *See* Farber, *supra* note 67, at 551 (1992); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930). Rather, I refer to aspects of ERISA's legislative history that make identification of a collective legislative "intent" especially problematic.

[80] The legislative history of ERISA up to 1974 has been compiled and published in a three-volume set. SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUB. WELFARE, 94TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (Comm. Print 1976) ("ERISA Legislative History").

[81] Daniel C. Schaffer & Daniel M. Fox, *Semi-Preemption in ERISA: Legislative Process and Health Policy*, 7 AM. J. TAX POL'Y 47, 48 (1988). Much of the discussion of legislative history that follows is drawn from this excellent article, and from another superb study, Leon E. Irish & Harrison J. Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. MICH. J.L. REF. 109 (1985).

[82] *See generally* Schaffer & Fox, *supra* note 81; Irish & Cohen, *supra* note 81; Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98 (1983).

sons acting on behalf of" ERISA-covered plans, and state laws that "relate to" funding and benefits-vesting provisions of pension plans.[83] The Senate version would have preempted state laws that "relate to the subject matters regulated by this Act."[84]

In the final joint conference on the bills, the Conference Committee abandoned these approaches and adopted the present language. When the Conference Committee Report was made available to the full Congress only ten days before the bill was enacted, little was said about the change.[85] The Committee Report said nothing about the change, other than describing the provision.[86] Senator John Williams (R-Del.) told the Senate that the broad language would make it impossible for "state professional associations" to prevent "unions and employers" from agreeing on particular benefit plans.[87] The concern was whether ERISA would prevent state bar associations from prohibiting "closed panel" prepaid legal services plans.[88] Section 514 was broadened to preclude such enforcement of state legal ethics rules against plans.[89] The problem with the narrower language,

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[83] H.R. 2, 93d Cong., 1st Sess. (1973), 120 CONG. REC. 4742 (1974).

[84] S. 4200, 93d Cong., 1st Sess. (1973), 120 CONG. REC. 5002 (1974).

[85] *See* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 745 n.23 (1985).

[86] H.R. CONF. REP. No. 1280, 93d Cong., 1st Sess. (1973); S. CONF. REP. No. 1090, 93d Cong., 1st Sess. (1973).

[87] 120 CONG. REC. 29,933 (1974) (remarks of Sen. Williams (R-Del.)). Courts often cite Sen. Williams' floor statement and a similar one by Representative Dent in the House as evidence of congressional intent to preempt broadly. 120 CONG. REC. 29,197 (1974) (remarks of Rep. John Dent (D-Pa.)). *See, e.g.*, Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 99 (1983). As principal sponsors of the bills in the Senate and House, their statements were given great weight when the Court first defined the contours of ERISA preemption, during the high point of the use of legislative history. Without entering the debate over whether such statements are reliable, I would simply note that the statements, like the language of the statute, are ambiguous.

[88] Specifically, the question was whether ERISA would preempt a state legal ethics law regulating whether an employer-provided legal services plan could limit the participants' choice of lawyers, much as an HMO limits the choice of doctors. *See* Robert S. McDonough, Note, *ERISA Preemption of State Mandated-Provider Laws*, 1985 DUKE L.J. 1194, 1201.

[89] The interest group politics surrounding preemption involved more than simply the question of whether state bars could regulate prepaid legal services plans. Organized labor apparently wanted ERISA to preempt state health laws mandating benefits in order to prevent such laws from circumscribing their freedom in collective bargaining. Schaffer & Fox, *supra* note 81, at 51. Labor's chief lobbyist on ERISA is reported to have said in 1987, "We understood we were giving up good state mandated benefits but we wanted the freedom to give up particular benefits in return for cash wages, and to trade in one benefit for another." *Id.* Apparently business remained relatively quiet on this aspect of preemption, and the insurance industry remained silent on almost all aspects. *Id.*

Other provisions of ERISA's preemption provision also were added to fix specific perceived problems without apparent awareness of the possible ramifications of the language. The "deemer clause," which prevents states from regulating self-insured

Senator Williams suggested, was that it would have given rise to difficult line-drawing problems.[90] In a futile effort to save ERISA from the line-drawing that dogs every preemption issue, a frustrated conference committee decided at the last minute to preempt "any and all" laws that "relate to" plans covered by ERISA. Congress wanted to enact legislation, and it fixed the immediate problem with the bills it had before it.

This legislative history confirms the observation that plain language interpretation and the actual legislative process of writing statutory language work at cross purposes.[91] Drafters tend to choose language to fit a paradigmatic case and then try to imagine circumstances where the language might produce an undesirable result. ERISA shows how their imaginations can be constrained by a shortage of time or experience. Drafters also tend to think about the meaning of a particular provision in the context of the entire statutory scheme, which courts often fail to do.[92] And, as the difficulty of revising ERISA's preemption language suggests, legislatures always face collective action problems that make the renegotiation of language costly, difficult, and unpredictable. In the context of an enormous and complex statute, those problems may become especially acute.[93] The inferences that courts have drawn from the expansion of ERISA's preemption language are the wrong inferences.

The Act and its legislative history both suggest that those members of Congress who paid attention to the preemption issue may have thought that the quick fix to the preemption problem was provisional. Section 3022 mandated the creation of a Joint Pension Task Force to study the practical effect and desirability of federal preemption. In addition, in commenting on the newly broadened preemption provision, Senator Javits (D-Fla.) said that "the desirability of further regulation—at either the State or

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ERISA plans, *see infra* text accompanying notes 157–167, was a response to a lower court decision in Missouri that treated a benefit plan as an insurance company and reportedly fined Monsanto $185 million for operating an insurance company without a license. *See* Conison, *supra* note 27, at 648–49.

[90] 120 CONG. REC. 29,197 (1974) (remarks of Sen. Williams).

[91] *See* Eric Schnapper, *Statutory Misinterpretations: A Legal Autopsy*, 68 NOTRE DAME L. REV. 1095, 1107–08 (1993) (making this observation with regard to the Civil Rights Act of 1991); *cf.* James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1 (1994).

[92] Farber, *supra* note 79, at 550–52.

[93] Mathew McCubbins et al., *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 14 (1994).

Federal level—undoubtedly warrants further attention."[94] But the Task Force study never materialized. Although Congress clearly thought that its preemption solution was provisional, it is not clear what role Congress intended courts to play in fine-tuning preemption, or how Congress's apparent desire to return to the problem affects the latitude it expected courts to exercise. What is clear, however, is that to the extent Congress thought at all about preemption, "section 514(a) was more in the nature of a quick statement of general principle than a workable, final rule."[95] Thus, "neither before nor after enactment of ERISA did Congress . . . view preemption policy issues as settled in the way that the sweeping statutory language of section 514 might suggest."[96] The change to section 514 is simply not evidence that Congress intended the enormously broad preemption, especially of laws remote from ERISA's purposes, that courts have created.[97]

Thus, the problem in interpreting section 514 is not simply that the plain language is unhelpful; other forms of what I have termed textualism are equally unavailing. If one looks to the purpose of the statute, one could concoct an argument either way as to whether its protective purposes would be better served by compelling national uniformity on all these matters (even if the nationwide standard is one of no regulation) or by allowing states to enforce legislation for the benefit of employees who are also the supposed beneficiaries of ERISA's protections. Nor is a consideration of the structure of the Act much more enlightening. That ERISA itself does not regulate the terms of employment in apprenticeship programs could be viewed as evidence that it allows the states to play their traditional role in regulating such programs. On the other hand, that ERISA does not regulate the terms of health benefit plans is generally not taken to mean that states could play their traditional role in regulating those conditions of employment. Again, the complexity of the legislative process makes it difficult to infer from ERISA's structure and coverage exactly what role Congress intended state law to

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[94] 120 CONG. REC. 29,942 (1974) (remarks of Sen. Jacob Javits).

[95] Irish & Cohen, *supra* note 81, at 114.

[96] *Id.* at 116.

[97] Irish & Cohen observe that Congress enacted ERISA, including its preemption provision, while it was ignorant of the full range and complexity of the issues surrounding employee benefits. *Id.* at 11. The authors also note that "[a]t least one of ERISA's principal authors has consistently suggested that the apparent principle section 514(a) states is broader than the rule that ought to be enforced." *Id.*

play. But certainly the Court has erred in seeing ERISA's apparent comprehensiveness as evidence of an intent to supersede all state law.[98]

In sum, the legislative history of ERISA suggests at least three problems with a preemption inquiry that is a search for congressional intent.[99] One is that, as I have just described, intent simply did not exist on much of anything beyond the desire to federalize an area of law that previously had been left to the states while avoiding line-drawing problems of the sort exemplified by the prepaid legal services plan dispute. A second problem stems from the fact that Congress did not give a great deal of thought to whether the scope of preemption should reflect the different degrees of federal regulation of pension plans, as opposed to welfare benefit plans. Broad preemption of state law may make sense when Congress decides to regulate a field extensively, as it did with respect to pensions. But broad preemption makes little sense when Congress does not extensively regulate in an area, as is the case with nonpension benefits. There is no evidence that Congress realized that broad preemption of state law would create a large regulatory void with regard to nonpension benefits in particular, nor is there evidence that employers, plans, and insurance companies realized they could use ERISA preemption as a shield against a very wide range of state regulation.

The third difficulty with the conceptualization of preemption as a search for congressional intent is that times have changed so much that the meaning of Congress's choice to preempt broadly is drastically different today, when the social context relevant to state and federal regulation of employee benefits differs dramatically from what it was in 1974. The changed context means that giving effect to Congress's particularized intent—broad preemption—thwarts Congress's general intent—creation of a compre-

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[98] *See, e.g.*, Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98 (1983); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987). In another context, commentators have cautioned against attributing too much comprehensiveness to any statute:

> Public choice teaches that a statute reflects not only the preferences of the legislature, but also the procedural obstacle course of enactment. The fact that a statute explicitly regulates situations A and B, but not C, should not necessarily be interpreted as a decision to immunize C from regulation. It may only indicate that, for whatever reason, the legislative process failed to produce a bill covering C.

Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 892 (1991) (footnote omitted).

[99] Although I limit my conclusions to ERISA preemption, the same concerns may also apply beyond the scope of ERISA.

hensive federal system to protect beneficiaries of plans. One of the major changes is the shift of responsibility for health and welfare issues from the federal government to state and local governments, which began during the administrations of Presidents Ford and Carter but reached a frantic pace during the Reagan Administration and continues now in the 104th Congress. From the late 1970s to the present, with the exception of the first two years of the Clinton Administration, political efforts to expand access to health care increasingly have focused on the states. In 1974, "Senators Javits and Williams would have had reasonable grounds to believe that federal law, perhaps even national health insurance, would fill the regulatory gap that ERISA preemption had created."[100] ERISA's broad preemption of state law may have been regarded simply as a prelude to the creation of a national social insurance scheme for both health and pensions. Congress wanted to make private social insurance a purely federal concern in order to control the integration of private plans with Social Security and a national health insurance program.

However, after 1974, the movement for national social insurance lost steam. ERISA's nationalization of the law regulating privately provided social insurance was not followed by a national system addressing the social insurance needs that ERISA's private-contract approach left unmet. Because states and cities could not afford to provide the social insurance that the federal government would not, the effort to shift those costs to business became politically viable. The rising cost of health care only intensified the pressure. Yet preemption has prevented state efforts to solve the health insurance crisis by imposing costs on business. The problem of ERISA preemption has become acute because of institutional changes in federalism and social insurance that Congress did not anticipate in 1974.

In sum, section 514 is ambiguous. Courts must make significant choices about the scope of ERISA's preemptive effect; the language, legislative history, and purpose of the statute simply do not dictate answers.

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[100] Schaffer & Fox, *supra* note 81, at 53.

II. THE TORTURED HISTORY AND AN EXPLANATION OF ERISA PREEMPTION

Now that the Supreme Court appears to be entering a new era in its interpretation of the scope of ERISA preemption, it is time to examine what led to the failure of the old approach. In this Part, I will show how the Court relied on three variations of textualism in interpreting the ERISA preemption provision and why its reliance was misplaced. The Court's plain language approach could not decide difficult cases, which the Court ultimately admitted.[101] The Court's reliance on congressional intent hardly fared better, because the legislative history shows that the preemption language was an eleventh-hour fix to a particular problem rather than a considered choice about federalism in the full range of subjects that are "related to" employee benefits.[102] Finally, the inconsistency in the Court's treatment of statutory purpose reveals that reliance on legislative "purpose" provided little more guidance than reliance on language or legislative history.[103] In short, all three versions of the Court's textualism flopped.

The Court's methods neither provided certainty to the law nor absolved the Court of the responsibility for defining the relationship between state and federal law. The Court's failure to develop a coherent approach to preemption generated uncertainty, and its overbroad plain language analyses led to challenges to almost every kind of state regulation having an impact on employee benefit plans. In the twenty-one years since ERISA was enacted, the Court has rendered decisions with written opinions in twelve ERISA preemption cases,[104] and has decided a number

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[101] *See infra* text accompanying notes 123–142; District of Columbia v. Greater Washington Bd. of Trade, 113 S. Ct. 580 (1992); *New York Blues*, 115 S. Ct. 1671 (1995).

[102] *See infra* text accompanying notes 143–154.

[103] *See infra* text accompanying notes 171–188.

[104] *New York Blues*, 115 S. Ct. 1671 (1995); John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517 (1993); *Greater Washington*, 113 S. Ct. 580 (1992); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990); FMC Corp. v. Holliday, 498 U.S. 52 (1990); Massachusetts v. Morash, 490 U.S. 107 (1989); Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985); Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981).

Two other cases address ERISA preemption in determining the limits of removal jurisdiction over cases originally filed in state court and then removed to federal court

of others without opinion.[105] Preemption cases constitute roughly half of all the ERISA cases the Court has considered. The relatively large number of ERISA preemption opinions has not, however, led to clarity in the law. The lower courts have decided thousands of preemption cases,[106] yet remain mired in confusion about basic points. ERISA preemption offers proof that plain language textualism leads to uncertainty and incoherence in the law.[107] Moreover, although the Court relied on textualism to avoid the responsibility for deciding the appropriate balance of state and federal regulation, asserting that the irrational law it created was the fault of Congress,[108] the Court simply deluded itself about its responsibility for devising a coherent body of law.

The Court's primary preference was for a rule of interpretation (textualism) that seemed ideologically neutral; this preference explains the large number of unanimous opinions on issues that one would not expect to produce unanimity in an ideologically divided Court. Textualism was particularly appealing to a Court confronting a complex statute in an unfamiliar field of law. In this sense, faith in textualism was both cause and effect—it was a partial cause of the Court's failure to appreciate the implications of its decisions, but it was also an effect of the Court's lack of vision.

Textualism was not the only invisible agent. The ERISA cases also reveal the Court's historic preference for national rather than state control of labor law. The Court applied the framework of national dominance that it had developed for labor law to the new law governing employee benefit plans, even where federal law amounted to a preference for total employer discretion in designing social insurance arrangements free of governmental

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on the basis of complete preemption. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983).

[105] Local Union 598, Plumbers & Pipefitters Indus. Journeymen & Apprentices Training Fund v. J.A. Jones Constr. Co., 846 F.2d 1213 (9th Cir. 1991), *aff'd*, 488 U.S. 881 (1988); Stone & Webster Eng'g Corp. v. Ilsley, 690 F.2d 323 (2d Cir. 1982), *aff'd sub nom.* Arcudi v. Stone & Webster Eng'g Corp., 463 U.S. 1220 (1983); Standard Oil Co. v. Agsalud, 633 F.2d 760 (9th Cir. 1980), *aff'd*, 454 U.S. 801 (1981).

[106] A recent search in the Westlaw "Allfeds" database (ERISA /p preempt!) produced 3330 cases. In a 1992 Lexis search, Justice Stevens found over 2800 judicial opinions addressing ERISA preemption. *Greater Washington*, 113 S. Ct. at 586 n.3 (Stevens, J., dissenting).

[107] *See* Pierce, *supra* note 21.

[108] *See* FMC Corp. v. Holliday, 498 U.S. 52, 62 (1990) ("[W]e merely give life to a distinction created by Congress . . . ." (quoting Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 747 (1985))).

mandate. Under ERISA, as under the National Labor Relations Act, the consensus favoring broad preemption did not begin to erode until after the serious political consequences of broad preemption of state law became apparent. But because the Court had said that broad ERISA preemption was dictated by the language of the statute, revision of ERISA preemption doctrine was more difficult than revision of the more flexible implied preemption doctrine of the NLRA.

A. *The Evolution of ERISA Preemption in the Supreme Court*

In this section, I will explore the effect of the Court's interpretive practices on the development of ERISA preemption doctrine.[109] The development of the law has not been orderly. At times the Court has focused quite rigidly on plain language, while at other times it has strained against its plain language precedents to reach results that seem more sensible. Whether relying on the text of ERISA's preemption provision or relying on its purpose, the Court has obscured the value choices it has made about employee benefits, but it certainly has not avoided making choices.

1. The Rise and Fall of Plain Language

The Court's initial approach to ERISA preemption combined textualism with a substantive vision of national dominance borrowed from the National Labor Relations Act. In its first case considering preemption, *Alessi v. Raybestos-Manhattan, Inc.*,[110] a unanimous Court, per Justice Marshall, held that ERISA preempted a New Jersey workers' compensation law prohibiting pension plan provisions which deducted workers' compensation benefits from pension benefits.[111] The New Jersey law was designed to prevent employers from structuring their plans so that workers'

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[109] For another example of a case study on the effect of an interpretive method across an entire substantive area of law, see Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535 (1993).

[110] 451 U.S. 504 (1981).

[111] *Id.* at 506. In invalidating the state law, the Court accepted the position of the employer, who was joined by the United States, the Chamber of Commerce, various corporations, and the ERISA Industry Committee as *amici*.

pension benefits would be reduced when they received workers' compensation.

The Court began its preemption analysis by invoking "respect for the separate spheres of governmental authority preserved in our federalist system."[112] The New Jersey statute governed state workers' compensation awards, which, the Court acknowledged, are an area of traditional state concern "obviously . . . subject to the State's police power."[113]

Notwithstanding the invocation of federalism, the Court cut a wide swath for federal law. The Court initially observed that the inclusion of an explicit preemption provision in ERISA made it plain that Congress "meant to establish pension plan regulation as exclusively a federal concern."[114] Yet, the Court noted, the "relates to" language of section 514 "gives rise to some confusion where, as here, it is asserted to apply to a state law ostensibly regulating a matter quite different from pension plans."[115] The state law was presumably intended to protect workers' rights to their workers' compensation awards,[116] and thus was not inconsistent with the purpose or requirements of ERISA. The Court nevertheless concluded that "[w]hatever the purpose or purposes of the New Jersey statute, we conclude that it 'relate[s] to pension plans' governed by ERISA because it eliminates one method for calculating pension benefits—integration—that is permitted by federal law."[117] Thus, without much discussion, the Court decided that ERISA preemption is broader than ordinary federal preemption, which displaces only laws inconsistent with provisions or goals of federal law or in areas that federal law regulates.[118] The Court also determined that the subject and purpose of a state law are irrelevant to the ERISA preemption inquiry. These decisions turned out to be very important for the later development of ERISA preemption doctrine.

The Court's policy justification for its ruling was a vision that ERISA protects the "rights" of plan designers to structure their

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[112] *Id.* at 522.
[113] *Id.* at 524.
[114] *Id.* at 523.
[115] *Id.* at 523–24.
[116] *Id.* at 524.
[117] *Id.* at 524. This rationale—analogizing integration of workers' compensation benefits to integration of Social Security benefits—is troubling on the merits. The fact that ERISA permits integration with Social Security says nothing about whether pensions ought to be reduced due to receipt of an entirely different kind of benefit.
[118] *See supra* text accompanying notes 30–39.

plans as they see fit: "ERISA leaves integration, along with other pension calculation techniques, subject to the discretion of pension plan designers. Where, as here, the pension plans emerge from collective bargaining, the additional federal interest in precluding state interference with labor-management negotiations calls for preemption of state efforts to regulate pension terms."[119] This rationale placed the Court's ERISA preemption cases within the same conceptual framework it had used in determining the scope of preemption implied by the National Labor Relations Act—state laws that constrain the discretion of labor and management are preempted because they interfere with the regime of collective bargaining. This is consistent with what the Court had done in its line of labor preemption cases that began with *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission.*[120] The Court apparently overlooked the problem it created by applying to ERISA (under which most plans are *not* collectively bargained) a laissez-faire policy which makes sense only because it assumes that employees are protected by collective bargaining.

The invocation of an asserted "federal interest in precluding state interference with labor-management negotiations"[121] was a mistake insofar as it suggested that state laws guaranteeing minimum working conditions would be preempted because they interfere with labor-management negotiations. In later cases, where employers invoked this rationale to seek ERISA preemption of a variety of state protective labor laws, the Court backed away from it.[122] *Alessi*'s notion that plan design should be left to "the discretion of pension plan designers" conflated a vaguely articulated ERISA policy favoring national uniformity with a policy favoring unrestricted discretion in setting terms of employment, even though the latter was *not* part of ERISA and was only somewhat a part of the NLRA. In this way, the Court unwittingly

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[119] Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 525 (1981).

[120] 427 U.S. 132 (1976). The essence of the *Machinists* preemption doctrine is the notion that Congress intended some conduct that the NLRA neither protects nor prohibits to be left entirely unregulated.

[121] *Alessi*, 451 U.S. at 525.

[122] In Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987); and Massachusetts v. Morash, 490 U.S. 107 (1989), the Court upheld state insurance regulation and minimum working condition legislation against preemption challenges even though the legislation effectively regulated terms of employee benefit plans.

transformed a preference for national uniformity into a preference for the absence of regulation altogether.

The Court's preference for a textualist approach to ERISA preemption became even more apparent in its second published ERISA preemption decision,[123] which, like *Alessi*, also invalidated a state protective labor law. In *Shaw v. Delta Air Lines, Inc.*,[124] a unanimous Court held that ERISA preempts two state disability and human rights laws that prohibited discrimination on the grounds of pregnancy and required employers to provide sick leave to employees disabled by pregnancy.[125] Justice Blackmun wrote for the Court that the New York Human Rights Law, "which prohibits employers from structuring their employee benefit plans in a manner that discriminates on the basis of pregnancy," and the New York Disability Benefits Law, "which requires employers to pay employees specific benefits, clearly 'relate to' benefit plans."[126]

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[123] The Court's second ERISA preemption case did not produce a written opinion. In Standard Oil Co. v. Agsalud, 633 F.2d 760 (9th Cir. 1980), *aff'd*, 454 U.S. 801 (1981), the Court summarily affirmed the Ninth Circuit's holding that ERISA preempts a Hawaii law requiring employers to provide certain health care benefits for their employees. This holding was partially overturned when Congress amended the preemption provision to save part of Hawaii's statute. 29 U.S.C. § 1144(b)(5)(A) (1988).

The Court also used the summary procedure to establish the contours of preemption in another early case, Stone & Webster Engineering Corp. v. Ilsley, 690 F.2d 323 (2d Cir. 1982), *aff'd sub nom.* Arcudi v. Stone & Webster Engineering Corp., 463 U.S. 1220 (1983). The Court invalidated a Connecticut statute that required employers to continue health, accident and life insurance coverage for their employees while they received workers' compensation benefits.

Connecticut later successfully skirted the *Stone & Webster* obstacle by amending its workers' compensation statute to require employers to provide coverage, thus squeezing protection into the § 4(b)(3) exception for plans maintained to comply with workers compensation statutes. The Second Circuit rejected a preemption challenge to the revised statute. R.R Donnelley & Sons Co. v. Prevost, 915 F.2d 787 (2d Cir. 1990), *cert. denied*, 499 U.S. 947 (1991). The Supreme Court disapproved the *Donnelley* result and invalidated a scheme like Connecticut's in District of Columbia v. Greater Washington Bd. of Trade, 113 S. Ct. 580, 583 (1992).

[124] 463 U.S. 85 (1983).

[125] The Court held that ERISA preempted the laws only to the extent that their protections were more generous than Title VII (which the Court had previously held not to prohibit discrimination on the basis of pregnancy, General Electric Co. v. Gilbert, 429 U.S. 125, 133–46 (1976)). In other words, the Court held that employee benefit plans must comply with Title VII's antidiscrimination provisions but need not comply with state antidiscrimination laws. Since Title VII did not then prohibit pregnancy discrimination, the effect of the decision was to insulate plans from more egalitarian state antidiscrimination laws. The reason for the partial nonpreemption is that ERISA does not invalidate other federal laws, and Title VII relies on state law to enforce some of its protections.

[126] *Shaw*, 463 U.S. at 97 (1983). The actual holding of *Shaw* was a bit more complicated; its very complexity illustrates the irrationality of ERISA preemption. The Court held that the state disability law, which required employers to pay benefits to disabled employees equal to half the average weekly wage, was preempted as applied

In *Shaw*, the Court passed up the chance to distinguish preemption in the pension area from preemption in the non-pension area by failing to consider the possibility that the preemption clause could be interpreted differently in the two circumstances. The Court asserted as a matter of course that the meaning of the term "relates to" is unambiguous and that it necessarily requires broad preemption: "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, *if it has a connection with or reference to* such a plan."[127] As support for this proposition, the Court quoted the *Black's Law Dictionary* definition of "relate."[128] The Court also concluded that it was necessary to read "relates to" in its broadest sense, because it would otherwise have been unnecessary to exempt generally applicable state criminal laws from preemption, as section 514 does.[129]

The Court's reliance on the dictionary language "connection with or reference to" did nothing to reduce uncertainty about the scope of preemption, but instead created the possibility of exceedingly broad preemption. Just as the term "relates to" requires some modifier in order to have any useful meaning, so too do the terms "connection with" and "refer to," which the Court used to explain the meaning of "relate to." Although the Court implicitly recognized the potentially unlimited reach of "relates to" by creating in a footnote an exception that some state laws "may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan,"[130] the Court did not define the scope of the limit, nor did it try to derive it from the language, legislative history, or purpose of ERISA.[131] The Court's insistence that broad

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to plans that were not maintained as a separate administrative unit solely to comply with the state law. If the employer complied with the law by including state-mandated disability benefits along with other benefits, the plan would be covered by ERISA and the state law would be unenforceable against it. *Id.* at 107–08. It is difficult to see what purpose is served by allowing enforcement of state law against some disability plans but not others. The decision rests on the exemption from ERISA coverage of plans maintained *solely* to comply with state disability insurance laws. 29 U.S.C. § 1003(b)(3) (1988). The Court's wooden reading of the word "solely" converted a provision likely intended to prevent evasion of ERISA's requirements into a provision that allows evasion of state law where the employer is not required by state law to maintain a separate plan.

[127] *Shaw*, 463 U.S. at 96–97 (emphasis added).

[128] "To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *Id.* at 97 n.16.

[129] *Id.* at 98.

[130] *Id.* at 100 n.21.

[131] However, it did cite a Second Circuit decision finding an "implied exception" to ERISA preemption for state domestic relations orders. *Id.* at 100 n.21 (quoting

preemption was mandated by the "relates to" language, combined with its contrary invention of the "tenuous, remote, or peripheral" exception, revealed the contradictions in both the holding and the reasoning of the case.

In *Shaw*, the Court also resorted to the legislative history of ERISA to support its reading of the Act's language.[132] The Court surmised that the existence of specific exceptions to preemption and the rejection of narrower versions of the preemption provision during the legislative process made it clear that Congress "used the words 'relate to' in § 514(a) in their broad sense."[133] The Court quoted Senator Javits's remarks on the floor of the Senate, in which the Senator explained that broad preemption language was substituted for narrower language in the Senate and House bills because the bills that related preemption to the areas of federal regulation "raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation."[134] In choosing broad preemption, the Court gave effect to a congressional decision to preempt more state laws than those dealing with subjects to which ERISA directly spoke (i.e., pension law and trust law). But there is no evidence that Congress had considered how far beyond the substantive perimeters of ERISA it intended to preempt state law.

Although *Shaw* was the beginning of the Court's fruitless pursuit of a plain language approach to ERISA preemption, the Court did not rely entirely on ERISA's language until the plain language approach reached its zenith (or nadir) in *District of Columbia v. Greater Washington Board of Trade*,[135] a case in which the Court found "linguistic precision where it does not exist."[136] Justice Thomas, writing for eight members of the Court, took the Court's broadest position yet in asserting that ERISA preempts any state law that "*refers to* welfare benefit plans" or that "im-

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American Tel. & Tel. Co. v. Merry, 592 F.2d 118, 121 (2d Cir. 1979)). This may have been intended to signal a limit on preemption. The Court had previously signaled such a limitation by dismissing for want of a substantial federal question appeals of lower court decisions holding that ERISA does not preempt court-ordered spousal support to divorced nonemployee spouses. Carpenters Pension Trust Fund v. Campa, 444 U.S. 1028 (1980).

[132] In recent times, however, the Court has rarely refered to legislative history. *See, e.g.*, Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 355 (1994).

[133] *Shaw*, 463 U.S. at 98 (1983).

[134] *Id.* at 99 n.20 (quoting 120 CONG. REC. 29,942 (1974) (remarks of Sen. Javits)).

[135] 113 S. Ct. 580 (1992).

[136] Pierce, *supra* note 21, at 752. This case is a stark example of what Pierce calls the Court's "hypertextualism." *Id.*

pos[es] . . . requirements *by reference to* such covered programs."[137] At issue was a provision of the District of Columbia's workers' compensation statute which required any employer who provided health insurance for its employees to continue such health coverage while employees received workers' compensation benefits. Relying on the *Black's Law Dictionary* definition of "relates to" and what Justice Thomas characterized as the "ordinary meaning" of the term, the Court found "relates to" to be synonymous with "refers to" or "makes reference to."[138] The Court held the workers' compensation provision preempted because it set compensation benefit levels by reference to the amount of employee benefits employers pay.[139]

The outcome of *Greater Washington* is at least arguably defensible. One could conceivably read ERISA as preempting state laws imposing substantial social insurance costs on employers with benefit plans while not imposing costs on employers without plans. What is preposterous about the case is its reasoning. There is no reason to believe that any state law that simply *mentions* an ERISA plan should be preempted. As Justice Stevens pointed out in dissent, the Court's opinion calls into question ordinary principles of the state laws of tort and contract damages, which compute a wrongfully terminated or injured employee's lost wages by adding to the take-home pay the value of fringe benefits such as health insurance and vacation pay.[140] Justice Stevens's example turned out not to be fanciful, as employers relied on the majority opinion to challenge state laws that

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[137] 113 S. Ct. at 583, 584 (emphases added).

[138] *Id.* at 583.

[139] *Id.* at 584. The Court rejected D.C.'s argument that the statute should be saved from preemption even if it "related to" an ERISA plan because the same result could be achieved by requiring employers to maintain separate workers' compensation benefit plans exempt from ERISA regulation under § (b)(3), 29 U.S.C. § 1003(b). Characterizing this interpretation as a "two-step analysis," Justice Thomas rejected the contention summarily: "We cannot engraft a two-step analysis onto a one-step statute." *Greater Washington*, 113 S. Ct. at 585. He did not explain what makes § 514(a) a "one-step statute."

[140] *Id.* at 585. As Justice Stevens observed in a footnote, this reading of ERISA preemption had been considered and rejected in several lower court cases. *See id.* at n.1 (citing Martori Bros. Distributors v. James-Massengale, 781 F.2d 1349, 1358–59 (9th Cir. 1986), *modified*, 791 F.2d 799 (9th Cir. 1986), *cert. denied*, 479 U.S. 949 (1986); Teper v. Park West Galleries, Inc., 427 N.W.2d 535, 541 (Mich. 1988); Schultz v. National Coalition of Hispanic Mental Health and Human Services Organizations, 678 F. Supp. 936, 938 (D.D.C. 1988); Jaskilka v. Carpenter Technology Corp., 757 F. Supp. 175, 178 (D. Conn. 1991). *See also* Ethridge v. Harbor House Restaurant, 861 F.2d 1389, 1405 (9th Cir. 1988) (holding that ERISA does not preempt wrongful discharge claims in which damages include loss of future benefits, if discharge was not motivated by desire to avoid paying benefits).

simply mentioned ERISA plans. For instance, the Court's language generated a challenge to Michigan's business tax on the value added to goods, including the cost of labor (which is measured by wages and benefit plan contributions made).[141]

It is difficult to believe that the Court actually meant what the opinion says, i.e., that a state law that "specifically refers to welfare benefit plans regulated by ERISA [is] on that basis alone" preempted.[142] The opinion illustrates in extreme form the failure of "plain language" textualism as a device for dealing with ERISA preemption: The language of the preemption provision is fundamentally ambiguous. A state law may "relate to" an employee benefit plan to a very slight extent or to a very great extent, and the "tenuous, remote, peripheral" exception neither provides clarity nor has been given any teeth by the Court. The result has been indeterminacy in the law and understandable confusion in the lower courts.

2. In the Pursuit of Legislative Intent and Statutory Purpose

In other cases, the Court blended a plain language approach with reliance on legislative intent and statutory purpose, but the language as the Court defined it was in tension with Congress's apparent intent and purpose to protect employees. To reconcile the apparent conflict, the Court redefined ERISA as protecting employees by promoting national uniformity and administrative efficiency through the elimination of state regulation. For instance, the Court's decision in *Metropolitan Life Insurance Co. v. Massachusetts*[143] was the first of two cases that rejected ERISA preemption of state laws mandating minimum terms in insurance policies, but held that such laws could *not* be applied to self-insured plans.[144] The Court mixed a plain language analysis with a purposive analysis in an effort to reconcile ERISA's protective purposes with what the Court thought to be sweeping preemption of state law. The Court analyzed the language of the insurance savings clause (which saves from preemption state laws that "regulate insurance") and the exception to it (the so-called

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[141] The court rejected the challenge. *See* Thiokol Corp. v. Roberts, 858 F. Supp. 674 (W.D. Mich. 1994).

[142] *Greater Washington*, 113 S. Ct. at 583.

[143] 471 U.S. 724 (1985).

[144] The second such case was FMC Corp. v. Holliday, 498 U.S. 356 (1990), which is discussed *infra* at notes 155–167.

"deemer clause," which states that plans may not be deemed to be insurance for the purpose of the insurance savings provision) to create a result that even the Court had to admit did not make much sense.

A unanimous Court, per Justice Blackmun, held that a Massachusetts law requiring that certain health care benefits be included in any health insurance policy or employee health benefit plan was not preempted as applied to insurance policies because it was saved by the state insurance law exception. However, the provision could not be applied to benefit plans directly, because to the extent it was applied directly it was not an insurance law and hence was not saved. The Court thus created a framework that enabled employee benefit plan sponsors to evade state regulation by self-insuring rather than purchasing insurance. The Court recognized that allowing states to regulate insured plans but not self-insured plans thwarted the alleged purpose of creating uniform national law, at least for plans that purchase insurance, and the Court also conceded that the differential regulation of insured and uninsured plans served no useful purpose and was probably unintended.[145] Yet, the Court disclaimed responsibility for the irrational result; it stated, "we merely give life to a distinction created by Congress," and pointed out that a congressional committee had become aware of the problem some years after ERISA was enacted but that legislation to correct the problem had died in the Senate.[146] The Court's distinction between insured and self-insured plans led employers to self-insure to avoid state regulation, which in turn has led to a significant but unintended shift in the structuring and financing of health plans.[147]

Perhaps recognizing the weaknesses of a plain language approach that produces irrational law, the Court looked to the purpose of the statute for additional support. In rejecting the contention that ERISA ought not preempt state mandated-benefits laws that both concern subjects that ERISA does not regulate and are consistent with ERISA's protective purposes, the Court

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[145] *Metropolitan Life Insurance Co.*, 471 U.S. at 747.

[146] *Id.* at 747 n.25.

[147] A recent report by the General Accounting Office concludes that self-funding of health plans has increased among both large and small businesses, and notes that state officials fear that the increase of self-funding poses a danger to plan beneficiaries because self-funded plans may be inadequately funded. HEALTH, EDUCATION, AND HUMAN SERVICES DIVISION, U.S. GAO, EMPLOYER-BASED HEALTH PLANS: ISSUES, TRENDS, AND CHALLENGES POSED BY ERISA, REP. NO. GAO/HEHS 95-167 (July 1995). *See infra* text accompanying notes 168–170.

rejected two possible limits on preemption. After noting again the "broad scope" of the preemption clause, the Court asserted that the clause was "intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements."[148] In the course of its discussion, the Court returned to the difficult problem of discerning Congress's intent. It noted that the significant broadening of the preemption provision happened "at the last minute," that it was not carefully considered, and that it was broadened for a rather narrow reason.[149] Yet, notwithstanding whatever doubt the Court harbored about the rationality or perhaps even the clarity of Congress's intent in adopting the "relate to" language, the Court did not back away from its prior broad preemption holdings.

The Court did, however, back away from the rationale for broad preemption that it had hinted at in *Alessi v. Raybestos-Manhattan, Inc.*[150] In particular, the Court qualified the notion of national laissez-faire in employee benefits which *Alessi* had seemed to invoke. It did so not in construing ERISA preemption, but rather in rejecting the insurer's argument that the mandated benefit law was preempted by the National Labor Relations Act. The argument was that state laws setting minimum terms of employment interfere with collective bargaining, and therefore are preempted by the NLRA.[151] The Court reasoned that "[t]he NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck."[152] Further, the Court noted, "[m]inimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA."[153] Most important, the Court sug-

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[148] *Metropolitan Life Insurance Co.*, 471 U.S. at 739.

[149] *Id.* at 745 n.23.

[150] 451 U.S. 504 (1981).

[151] This is the branch of labor law preemption doctrine known as "*Machinists* preemption" (after Lodge 76, International Association of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976)). The essence of the *Machinists* preemption doctrine is that Congress intended some conduct that the NLRA neither protects nor prohibits to be left entirely unregulated. Employers sought to characterize *Machinists* preemption as doing something beyond leaving some conduct unregulated by the NLRA; employers argued that *Machinists* created a group of subjects (i.e., mandatory subjects of collective bargaining) that are free from *any* regulation.

[152] *Metropolitan Life Insurance Co.*, 471 U.S. at 753.

[153] *Id.* at 755.

gested that to hold that federal law in effect prohibited states from setting minimal employment standards would cause federal preemption to effect deregulation: it would "artificially *create* a no-law area."[154]

The analysis that the Court employed in rejecting the NLRA preemption claim in *Metropolitan Life* could be equally applicable in the ERISA context, had the Court not already concluded that the language and legislative history of the ERISA preemption provision prove unambiguously that preemption must be extremely broad. The Court demonstrated in its discussion of NLRA preemption that it entertained concerns about the deregulatory consequences of federal preemption. Further, since the Court rejected the argument that Congress intended the NLRA to leave certain terms of employment to the free market, it could have rejected the analogous argument about ERISA. Yet the Court declined to draw the connection, instead adhering to the contractualist vision of employee benefits that it had flirted with in *Alessi* but had spurned in the second part of *Metropolitan Life*.

Not until several years later, when the Court again confronted the absurdity of the distinction between insured and uninsured plans in *FMC Corporation v. Holliday*,[155] did any Justice publicly acknowledge that the Court's interpretive choice had perhaps been a mistake. However, by then the Court apparently regarded itself as committed to the line of reasoning it had already taken. In *FMC Corporation*, the Court reviewed a provision in Pennsylvania's Motor Vehicle Financial Responsibility Law that prohibited "any program, group contract or other arrangement" from seeking subrogation or reimbursement from a participant's tort recovery in a motor vehicle accident case.[156] The Court held that, although the Pennsylvania law was an insurance law that would be saved by the insurance savings provision, it could not be applied to a self-insured ERISA health plan such as the one maintained by FMC because of the "deemer clause," which prohibits ERISA plans from being deemed to be insurance. As a consequence, the law could not be applied to

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[154] *Id.* at 757 (quoting Taggart v. Weinacker's, Inc., 397 U.S. 223, 228 (1970) (concurring opinion) (emphasis in *Taggart*)). This was the criticism of broad *Machinists* preemption that commentators had previously made. *See, e.g.*, Archibald Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO STATE L.J. 277 (1980).

[155] 498 U.S. 52 (1990).

[156] *Id.* at 55.

self-funded plans, although it could be applied to plans that purchase insurance.[157]

Returning to the plain language analysis of *Shaw*, the Court began by noting that the Pennsylvania law "has a 'reference' to" ERISA plans because it specifically mentions "'benefits payable by a hospital plan corporation.'"[158] The Court further determined that the state law "also has a 'connection' to ERISA benefit plans" because it "requires plan providers to calculate benefit levels in Pennsylvania based on expected liability conditions that differ from those in States that have not enacted similar antisubrogation legislation."[159] The Court then rejected two constructions of the deemer clause urged by the employee and an amicus, either of which would have narrowed the scope of preemption. On those readings, self-insured ERISA plans would be exempt only from state laws that "apply to insurance as a business, such as laws relating to licensing and capitalization," or state insurance laws that are "pretexts for impinging upon core ERISA concerns,"[160] which was the position the court of appeals had taken in the case.[161] These interpretations of the deemer clause would have narrowed the difference between insured and self-insured plans for purposes of ERISA and would have enlarged the range of state laws that could survive preemption. The Court rejected these constructions as being "unsupported by ERISA's language."[162]

As Justice Stevens pointed out in dissent, there is no reason for treating self-insured plans differently from insured plans, or for denying to beneficiaries of the former the state law protections that are available to beneficiaries of the latter. If Congress had so intended, Stevens reasoned, it would have said so, and in any event the entire mess could be avoided by a narrower reading of either the preemption clause or the deemer clause.[163] In Stevens' view, because the legislative history of section 514 showed that Congress was primarily concerned with overlap between federal and state requirements for plans, the "relates to" language ultimately adopted by Congress is "best explained as

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[157] *Id.* at 61.
[158] *Id.* at 58–59. The Court quoted and relied on *Shaw's* plain language analysis.
[159] *Id.* at 59.
[160] *Id.* at 56.
[161] FMC Corporation v. Holliday, 885 F.2d 79, 86 (3d Cir. 1989).
[162] *FMC Corporation*, 498 U.S. at 63.
[163] *Id.* at 66.

an editorial amalgam of the two bills rather than as a major expansion of the section's coverage," as the Court evidently believed.[164] Turning to the deemer clause, Stevens pointed out that it was probably motivated by concern that states would subject ERISA plans to the same detailed licensing and capitalization requirements that apply to insurance companies.[165] Finally, Stevens pointed out that the Pennsylvania law is an example of the many state laws that apply to insurance companies as well as others and that regulate the business of insurance "but do not require one to be an insurance company in order to be subject to their terms."[166] Thus, he concluded, there was no reason in the language, history, or purpose of ERISA, nor any reason of policy, to preempt the application of such laws to self-insured plans.

The debate between the majority and Justice Stevens over the purpose of ERISA turned on whether the desirability of national uniformity of regulation for self-insured plans should take precedence over the desirability of allowing equivalent state law protections for beneficiaries of insured and self-insured plans. Not surprisingly, the statute itself yields no clear answers. In the majority's view, the principal goal of preemption is national uniformity, which will simplify plan administration for large employers and, indirectly, benefit beneficiaries of such plans.[167] The insurance exception to preemption is thus a necessary but undesirable accident of the tradition of regulating insurance at the state rather than federal level. In Stevens' view, the principal purpose of the statute was to protect plan participants, and from that perspective there is no reason to distinguish between insured and self-insured plans or to preempt state laws more broadly than necessary to avoid conflict between state and federal law. He thus saw no reason to construe the preemption provision broadly or the insurance savings provision narrowly. Nothing in the statute itself can definitively resolve the debate over which should be the preeminent purpose; the majority's insistence on its own reading of the language silenced what might have been

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[164] *Id.* at 67.

[165] *Id.* at 69 (discussing a Missouri case, decided while ERISA was being considered, that subjected a pension plan to insurance licensing requirements, Missouri v. Monsanto Co., Cause No. 259,774 (St. Louis Cty. Cir. Ct., Jan. 4, 1973), *rev'd*, 517 S.W.2d 129 (Mo. 1974)).

[166] *Id.* at 70.

[167] *Id.* at 64–65.

a useful debate over how the Court should choose between these two plausible legislative purposes.

The distinction between insured and self-insured plans also produced significant unintended policy consequences. The majority approach created strong incentives for plans to self-insure in order to minimize exposure to regulation. To receive the benefits of some insurance protection, plans often purchase stop-loss insurance for claims above a certain amount. This raises the question whether states can regulate plans indirectly by regulating the stop-loss insurance, just as they could if the plan were fully insured. Courts have answered in the negative.[168] The widespread use of stop-loss insurance suggests that the Court's distinction between insured and self-insured plans is artificial, and the distinction has been criticized on this basis.[169] State insurance regulators fear that new forms of stop-loss insurance are really ordinary insurance with a high deductible and thus are essentially a subterfuge to evade state regulation.[170]

The development of the Court's ERISA preemption jurisprudence was not consistent. Whereas in some cases the Court appeared to be mainly textualist, at other times the Court combined an ostensible focus on language with a more significant examination of statutory purpose in an effort to reach sensible limits on preemption without abandoning its commitment to the notion that the language of the preemption provision can resolve cases. In two cases, the Court looked to the meaning of the term "employee benefit plan" to discern limitations on the scope of preemption. Since section 514 preempts state laws relating to "plans," the Court concluded that state laws that do not relate to plans, but only to "payroll practices" or "conditions of employment," are not preempted. The first of these cases was *Fort Halifax Packing Co. v. Coyne*,[171] holding that a Maine statute requiring severance payment in the event of a plant closing was not preempted by ERISA. Initially pursuing a plain language approach, the Court held that ERISA preempts laws relating to

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[168] Thompson v. Talquin Bldg. Prods. Co., 928 F.2d 649 (4th Cir. 1993); Drexelbrook Engineering Co. v. Travelers Ins. Co., 710 F. Supp. 590 (E.D. Pa. 1989).

[169] *See, e.g.*, Jeffrey G. Lenhart, *ERISA Preemption: The Effect of Stop-Loss Insurance on Self-Insured Plans*, 14 VA. TAX REV. 615 (1995).

[170] HEALTH, EDUCATION, AND HUMAN SERVICES DIVISION, U.S. GAO, EMPLOYER-BASED HEALTH PLANS: ISSUES, TRENDS, AND CHALLENGES POSED BY ERISA, REP. NO. GAO/HEHS 95-167 (July 1995). Three states as well as the National Association of Insurance Commissioners have adopted laws intended to reduce this practice. *Id.*

[171] 482 U.S. 1 (1987).

employee benefit "plans," and that a statutory requirement that a one-time severance payment be made was not a "plan."[172] Turning from the language to the purpose of the statute, the Court reasoned that "pre-emption of the Maine statute would not further the purpose of ERISA pre-emption."[173] The point of ERISA preemption, according to the Court, was to permit employers with employee benefit plans to comply with a single set of administrative requirements regarding the payment of benefits. "A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them."[174] Finally, the Court considered the consequences of preemption: it would make no sense for ERISA to preempt the Maine statute, because that statute "fails to implicate the regulatory concerns of ERISA itself . . . . The focus of [ERISA] is on the administrative integrity of benefit plans—which presumes that some type of administrative activity is taking place."[175] Because the Maine statute had nothing to do with an employee benefit plan, "[i]t would make no sense for pre-emption to clear the way for exclusive federal regulation, for there would be nothing to regulate."[176]

The Court, following the same analysis it had employed in *Metropolitan Life*, also rejected the employer's argument that the NLRA preempted the state law. The Court reasoned that the Maine statute merely set the backdrop against which the parties negotiated, just as state common law did. This is plainly correct.

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[172] *Id.* at 8. "The Maine statute neither establishes, nor requires an employer to maintain, an employee benefit *plan*. The requirement of a one-time, lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation." *Id.* at 12.

[173] *Id.*

[174] *Id.* at 11.

[175] *Id.* at 15.

[176] *Id.* at 16. The Court rejected the broad reasoning of the Maine high court, which had held that ERISA does not preempt state laws mandating the creation of benefit plans. Fort Halifax Packing Company, in a solicitude for employee protection that evidently did not extend to paying severance benefits in the event of plant closure, apparently had expressed concern that adherence to the rule adopted by the Maine Supreme Court would "create the opportunity for employers to circumvent ERISA's regulatory requirements by persuading a State to require the type of benefit plan that the employer otherwise would establish on its own," and that such a plan would presumably not be subject to any of ERISA's protections. *Id.* at 16. To avoid this result, the Supreme Court saved from preemption only state laws regarding employee benefits that have no effect on "plans," not the broader range of laws that the Maine court sought to protect.

In some respects, state law gives employers advantages: common law generally grants employers the right to run the workplace as they wish, absent a collective bargaining agreement restraining that right. And sometimes, as in this case, state law gives employees rights: here, the right to severance pay from employers.[177] To the extent that different state entitlements "complicate" negotiations for a nationwide collective bargaining agreement, the Court has not seen that as a serious impediment to the goal of a uniform national labor law. Yet the Court has never consistently held this view about ERISA preemption, as is clear from *Alessi*. The difference between *Fort Halifax* and *Metropolitan Life*, on the one hand, and *Alessi*, on the other, is the Court's unarticulated perception that the former cases involved the state mandating entitlements for all workers, while the latter concerned a state trying to interfere in contractual benefits relationships that were already established. The distinction is not analytically sound, but it is one that has never been exposed or defended.

In another case challenging a state law mandating benefits for all workers, the Court candidly acknowledged that the language of section 514 is unhelpful and proceeded quickly to focus on the purpose of ERISA. *Massachusetts v. Morash*[178] involved a state law mandating payment of unused vacation benefits to a terminated employee. The Commonwealth of Massachusetts had instituted a criminal proceeding against the president of a state bank for failing to pay discharged employees their full wages, including unused vacation time. The bank officer argued that ERISA preempted the Massachusetts statute because the bank's vacation policy was an employee benefit plan.[179] The Court began by noting that forty-seven states, the District of Columbia, and the United States all had similar wage payment laws and that over half included vacation pay as did the Massachusetts statute.[180] Although the Court commenced its preemption inquiry,

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[177] Justice White, joined by Justices Rehnquist, O'Connor, and Scalia, dissented. In their view, "[a] state law 'which requires employers to pay employees specific benefits' clearly relate[s] to 'benefit plans' as contemplated by ERISA's pre-emption provision." *Id.* at 24 (quoting *Shaw*, 463 U.S. at 97). In the dissent's view, the Court's rationale created a loophole that would "allow States to effectively dictate a wide array of employee benefits that must be provided by employers" by simply characterizing them as not requiring the creation of an administrative scheme. *Id.* at 23.

[178] 490 U.S. 107 (1989).

[179] *Id.* at 108–09.

[180] *Id.* at 109–10.

just as it had in *Fort Halifax*, by trying to find the answer in the statutory definition of what is and is not an employee benefit plan, the Court quickly noted that ERISA's definition of "employee benefit plan" is circular: an "employee benefit plan" is defined as a "plan."[181]

Finding a plain language analysis unhelpful, the Court looked to the purpose of ERISA. Once the Court did so, a sensible answer to the preemption problem began to seem clear. If an employer does not maintain a separate fund for payment of benefits, a policy of paying benefits may not be a plan, because the purpose of ERISA is to prevent "the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds."[182] According to the Court, "[b]ecause ordinary vacation payments are typically fixed, due at known times, and do not depend on contingencies outside the employee's control, they present none of the risks that ERISA is intended to address."[183] When vacation pay schemes require the creation of a fund, such as a multi-employer fund involving workers "who regularly shift their jobs from one employer to another," the protective concerns of ERISA are implicated, and the preemption provision would apply.[184]

What the Court found most convincing, however, were the undesirable consequences of preemption. Preemption of state laws such as the Massachusetts statute would "displace the extensive state regulation of the vesting, funding, and participation rights of vacation benefits; because ERISA's vesting and funding requirements do not apply to welfare benefit plans, employees would actually receive less protection if ERISA were applied to ordinary vacation wages paid from the employer's general assets."[185] The Court's effort in *Morash* to link the scope of preemption to the scope of protection provided by ERISA was unique until *New York Blues*.

Yet, reading *Morash* alongside *FMC Corporation*, it is easy to see the indeterminacy of statutory "purpose." This indeterminacy makes reliance on statutory purpose problematic for the Court. In *Morash*, the Court characterized the purpose of the statute as the protection of workers through the regulation of benefit plans,

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[181] *Id.* at 113.
[182] *Id.* at 115.
[183] *Id.*
[184] *Id.* at 120.
[185] *Id.* at 119 (citations omitted).

and therefore suggested that state protective legislation only tangentially related to employee benefits should survive.[186] In *FMC Corporation*, the Court viewed ERISA as protecting workers by facilitating the formation and administration of plans, and thus minimizing the effect of state regulation;[187] in this analysis, preemption of state protective labor laws is consistent with ERISA's protective purposes. While the *FMC Corporation* view has dominated, *New York Blues* perhaps signals a resurgence of the *Morash* view.

The Court repeatedly asserted that broad preemption serves a fundamental purpose of ERISA, in that it encourages growth of the private employee benefit system by sparing plans and employer plan sponsors from the supposed inefficiencies that might result if plans were subject to state regulation.[188] The Court used a syllogism to articulate statutory purpose: the statute was intended to protect employees; benefit growth spawned by efficient management in the employee benefit system will be beneficial to employees in the long run; therefore, employees will benefit if plan sponsors are free of state regulation. The Court was evidently convinced that if plan sponsors find it unduly difficult to maintain plans, or if the law requires that plans be too generous to employees, plan sponsors will decide not to create plans or will reduce benefits. In *Shaw*, for example, the Court mused about how prohibiting the application of state antidiscrimination laws would in fact benefit employees rather than harm them:

> Obligating the employer to satisfy the varied and perhaps conflicting requirements of particular state fair employment laws, as well as the requirements of Title VII, would make administration of a uniform nationwide plan more difficult. The employer might choose to offer a number of plans, each tailored to the laws of particular States; the inefficiency of such a system presumably would be paid for by lowering benefit levels . . . . To offset the additional expenses, the employer presumably would reduce wages or eliminate those benefits not required by any State.[189]

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[186] *Id.* at 115.

[187] FMC Corporation v. Holliday, 498 U.S. 52, 60 (1990) ("To require plan providers to design their programs in an environment of differing state regulations would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits").

[188] *Id. See also* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 10 (1987).

[189] 463 U.S. at 105 n.25 (1983).

The Court thus justified deregulation of employee benefits with speculation about economic behavior: the absence of state regulation ensures national uniformity, national uniformity ensures efficiency, and efficiency protects employees.[190] This is reminiscent of the Court's *Lochner*-era solicitude for the "right" of employees to contract for substandard working conditions.[191]

3. Chaos in the Lower Courts

The Court's textualism produced chaos in the lower courts.[192] Its emphasis on the meanings of the "relates to" clause, the "insurance savings" clause, and the "deemer" clause did not provide guidance to the courts with the primary responsibility for deciding thousands of ERISA preemption cases. Many lower courts designed preemption tests which differed markedly from those of the Supreme Court. The Ninth and Tenth Circuits, for example, developed a four-part test that had little relation to the Court's decisions.[193] The First Circuit held that workers' compensation laws affecting all employers are not preempted, even if the laws affect ERISA plans offered by some employers.[194]

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[190] In suggesting that national uniformity is desirable or was intended by Congress, the Court had to confront the problem that ERISA does not explicitly displace other federal law and that many federal laws rely on states to set standards or to enforce federal mandates. The Court attempted to reconcile its view of preemption with the federal law savings provision as applied to Title VII, which itself relies on state law, by speculating the following:

> Congress might well have believed, had it considered the precise issue before us, that ERISA plans should be subject only to the nondiscrimination provisions of Title VII, and not also to state laws prohibiting other forms of discrimination. By establishing benefit plan regulation "as exclusively a federal concern," Congress minimized the need for interstate employers to administer their plans differently in each State in which they have employees.

Id. at 105 (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981)).

[191] *See generally* Fisk, *Lochner Redux*, *supra* note *.

[192] ERISA preemption is not the only area of law where the Court's reliance on textualism created confusion for lower courts. One scholar has traced a similar phenomenon in cases under 42 U.S.C. § 1981 in the wake of the Court's textualist decision in Patterson v. McLean Credit Union, 491 U.S. 164 (1989). *See* George H. Taylor, *Textualism at Work*, 44 DEPAUL L. REV. 259 (1995).

[193] Under this test, ERISA preempts state laws: (1) regulating terms of plans; (2) creating reporting, disclosure, funding, or vesting requirements; (3) calculating the amount of benefits to be paid by plans; or (4) providing remedies for actions arising out of the administration of plans. Martori Bros. v. James-Massengale, 781 F.2d 1349 (9th Cir. 1986) (holding that ERISA does not preempt calculation of make-whole award based on fringe benefits); Airparts Co. v. Custom Benefit Servs., 28 F.3d 1062 (10th Cir. 1994) (holding state law claims of negligence, implied indemnity, and fraud against expert benefit plan consultant not preempted by ERISA).

[194] Combined Management, Inc. v. Superintendent of the Bureau of Ins., 22 F.3d 1, 3 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 350 (1994).

The Second Circuit adopted a rule that a law indirectly affecting the cost of ERISA benefits is preempted if it operates in the "realm where ERISA plans must operate."[195] The Third Circuit rejected that rule and instead identified three factors to be used in determining whether ERISA preempts a state law.[196] One district court flatly rejected the Supreme Court's statement in *Greater Washington* that ERISA preempts any state law that specifically mentions or refers to ERISA plans, since following the Court's rule would have invalidated Michigan's method of taxing corporations based in part on labor costs, which of course include the costs of providing ERISA-covered benefits.[197] The Third Circuit also held that the Supreme Court's express reference rule does not apply when the express reference to the ERISA plan can be excised without changing the legal effect of the statute.[198]

Following the Supreme Court's language and cues about broad preemption, the lower courts found that ERISA preempted a wide variety of legislation having nothing to do with ERISA's purposes and concerns. There are far too many examples of the extraordinary breadth of ERISA preemption in the lower courts to note them all here.[199] One of the most egregious is presented by a series of cases in which the courts of appeals concluded

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[195] NYSA-ILA Medical & Clinical Servs. Fund v. Axelrod, 27 F.3d 823 (2d Cir. 1994), *vacated and remanded sub nom.* Chassin v. NYSA-ILA Medical & Clincal Servs. Fund, 115 S. Ct. 1819 (1995).

[196] The three factors were:

> (1) whether the state law represents a traditional exercise of state authority; (2) whether the state law affects relations among the principal ERISA entities . . . rather than relations between one of these entities and an outside party, or between two outside parties . . .; and (3) whether the effect of the state law upon the ERISA plan is direct or merely incidental.

Travitz v. Northeast Dep't ILGWU Health & Welfare Fund, 13 F.3d 704, 709–10 (3d Cir. 1994).

[197] Thiokol Corp. v. Roberts, 858 F. Supp. 674 (W.D. Mich. 1994).

[198] United Wire, Metal & Mach. Health & Welfare Fund v. Morristown Memorial Hosp., 995 F.2d 1179, 1192 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 382 (1993).

[199] For example, some courts have held as preempted state taxes which tax plan transactions or affect a plan's assets or investments. *See, e.g.*, E-Systems, Inc. v. Pogue, 929 F.2d 1100 (5th Cir. 1991) (holding that ERISA preempts Texas's "administrative services tax"); Morgan Guaranty Trust Co. v. Tax Appeals Trib. of N.Y. State Dep't of Taxation & Fin., 599 N.E.2d 656 (N.Y. 1992) (holding that ERISA preempts New York's capital gains tax as applied to plan assets); *but see* Retirement Fund Trust of the Plumbers Indus. v. Franchise Tax Bd., 909 F.2d 1266 (9th Cir. 1990) (holding California tax levy not preempted); Firestone Tire & Rubber Co. v. Neusser, 810 F.2d 550 (6th Cir. 1987) (holding municipal income tax not preempted). Courts have held state laws apportioning liability for tort damages to be preempted when an ERISA plan provdided one of the possible sources of insurance. *See, e.g.*, Travitz v. Northeast Dep't ILGWU Health & Welfare Fund, 13 F.3d 704, 709–10 (3d Cir. 1994) (holding survivor statute preempted but wrongful death statute not preempted); Auto Owners Ins. Co. v. Thorn Apple Valley, Inc., 31 F.3d 371 (6th Cir. 1994) (holding no-fault insurance law

that ERISA preempts state prevailing wage laws and state regulation of the terms of employment of apprentices. While the Supreme Court's textualist approach seems to compel such preemption (state laws regulating wages or working conditions of apprentices "relate to" ERISA-covered apprenticeship training funds), Congress clearly did not intend to eliminate the long tradition of state regulation of the wages and working conditions of apprentices. Preemption is simply an inadvertent consequence of the traditional way that apprenticeship programs are structured in the construction trades.[200]

In *Boise Cascade Corp. v. Peterson*,[201] the Eighth Circuit held that ERISA preempts state regulation of the conditions of employment of apprentices in the construction trades. ERISA covers "apprenticeship or other training programs,"[202] and thus state laws which "relate to" employee benefit plans covered by ERISA are preempted. Although the court noted that the state had regulated high-pressure pipefitting since 1937 because it is "a very dangerous activity" where shoddy work can cause explosions,[203] and that the suit arose out of the state's effort to end growing disregard of the apprentice-to-journeymen ratios that had prevailed since the 1940s, the court nevertheless invalidated the regulation because it related to an employee benefit plan covered by ERISA.[204] The court buttressed its plain language analysis by referring to ERISA's purpose of ensuring national uniformity in all matters pertaining to employee benefits and by asserting that enforcement of state rules regulating apprentices would expose employers to "conflicting or inconsistent state and local regulations."[205] The court did not explain how these sorts of regulations differ from any other state occupational safety or employment

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preempted); *but see* Winstead v. Indiana Ins. Co., 855 F.2d 430 (7th Cir. 1988) (holding no-fault insurance statute not preempted), *cert. denied*, 488 U.S. 1030 (1989).

[200] In addition to the cases discussed in the text, there are others reaching similar results on similar reasoning. *See, e.g.*, National Elevator Indus. v. Calhoon, 957 F.2d 1555, 1562 (10th Cir. 1992) (invalidating Oklahoma's prevailing wage law as applied to apprentices); General Elec. Co. v. New York State Dep't of Labor, 891 F.2d 25 (2d Cir. 1989) (holding New York's prevailing wage law preempted), *cert. denied*, 496 U.S. 912 (1990); Keystone Chapter, Assoc. Builders & Contractors, Inc. v. Foley, 37 F.3d 945 (3d Cir. 1994) (holding order of the Pennsylvania Prevailing Wage Appeals Board preempted).

[201] 939 F.2d 632 (8th Cir. 1991), *cert. denied*, 502 U.S. 1027 (1992).

[202] 29 U.S.C. § 1002(1)(A) (1988).

[203] 939 F.2d at 634.

[204] *Id.* at 638.

[205] *Id.* at 637.

laws, or if these laws would also be preempted as applied to apprenticeship programs.

The Ninth Circuit reached the same result in *Local Union 598, Plumbers and Pipefitters Industry Journeymen and Apprentices Training Fund v. J.A. Jones Construction Co.*,[206] holding that the California prevailing-wage statute for apprentices on public works created a funding obligation for a plan and was thus preempted.[207] The prevailing-wage law, the court held, interfered with the employment contract by "'fundamentally and directly alter[ing] the employer's negotiated obligations,'" and "'add[ing] an additional statutory requirement—the cost of which [was] to be borne by the employer—to a private employee benefit plan.'"[208] In response to the plan's argument that preemption of the state law left no regulation in its place, the court noted that ERISA preemption cleared the way for future congressional action on the issue of apprenticeship wages: "'section [514(a)] has cleared the decks for such provisions, should Congress choose to address this concern in the future.'"[209] This is a new theory of preemption: prospective preemption in anticipation of hypothetical future federal legislation.[210]

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[206] 846 F.2d 1213 (9th Cir. 1988), *aff'd mem.*, 488 U.S. 881 (1988).

[207] *Id.* at 1219. The court found support for its position in the Second Circuit's decision in Stone & Webster Eng'g Corp. v. Ilsley, 518 F. Supp. 1297 (D. Conn. 1981), *aff'd*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem.*, 463 U.S. 1220 (1983), which had invalidated a Connecticut statute requiring an employer to continue the health benefit coverage of an employee who was receiving workers' compensation benefits.

[208] *Id.* at 1219 (quoting 690 F.2d at 329).

[209] *Id.* at 1220 (quoting 518 F. Supp. at 1301).

[210] The Ninth Circuit had previously reached the same conclusion in a line of cases beginning with Bechtel Construction, Inc. v. United Brotherhood of Carpenters & Joiners, 812 F.2d 1220 (9th Cir. 1987), in which the court held that the NLRA preempted a state law setting the wages to be paid to apprentices. In *Bechtel*, the court reasoned that since the NLRA protects the collective bargaining process, and wages are a mandatory subject of collective bargaining, the NLRA prevents states from dictating the outcome of wage negotiations by regulating wages. *Id.* at 1225. Recognizing that Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985), rejected the argument that the NLRA preempts state mandated minimum benefits, the Ninth Circuit determined that *Metropolitan Life* saved only *minimum* labor standards from preemption. Because the court of appeals interpreted the California law as permitting the parties to negotiate a wage lower than the state-set wage, the California law was not a minimum standard and was therefore not saved from preemption. *Bechtel*, 812 F.2d at 1222, 1225–26. Consequently, the *Bechtel* decision grants employers of unionized employees a power that non-union employers lack—the ability to pay apprentice wages below the level set by state law. The flaw in the court's analysis is obvious: "There is not the slightest reason to suppose that Congress intended to allow unions and employers, acting jointly, to establish employment conditions that a state forbids employers to establish unilaterally or by individual bargain." Cox, *supra* note 27, at 297. The court justified the anomalous treatment of unionized employees by assigning a "supreme value" to the collective bargaining process that trumps the

The Ninth Circuit expanded its rationale to invalidate California regulation of the training and pay for apprentices on public works projects in *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*.[211] In that case, an administrative agency had ordered Hydrostorage to comply with the state law, based on a finding that Hydrostorage had willfully failed to adhere to various state law requirements regarding the number of apprentices on the job site and had failed to make contributions to the training fund as required by statute.[212] Hydrostorage dashed into federal district court and obtained relief from the administrative order.[213] The Ninth Circuit determined that the fund was an employee benefit plan covered by ERISA and that the administrative order was preempted by ERISA because it was a state law relating to a covered plan.[214]

These cases illustrate that the Supreme Court's twin rationales for its ERISA preemption decisions—plain language and the importance of freeing plan sponsors (employers) from state regulation—were not only unhelpful to lower courts, but misleading and pernicious as well. The Court failed to develop a doctrine to guide the lower courts, and the language that it did provide invited results that did violence to any plausible congressional intent or statutory purpose.

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regulation that could be applied to nonunion negotiations. To allow state regulation of working conditions for apprentices "would subordinate the bargaining process for all tradespeople (not just apprentices) to the goal of establishing uniform apprenticeship wages at all job sites." *Bechtel*, 812 F.2d at 1224. The court concluded that this "subjugation of the collective bargaining principle" was an unreasonable construction of the California statute, because to allow a state agency to set wages "would in effect give apprentices more than one representative, in violation of fundamental principles of federal labor law." *Id.*

[211] 891 F.2d 719 (9th Cir. 1989), *cert. denied*, 498 U.S. 822 (1990).

[212] *Id.* at 729.

[213] *Id.* at 730.

[214] *Id.* at 732. The court also rejected the fund's contention that the state regulation of apprentices was saved from ERISA preemption by § 514(d), the provision of ERISA that saves other federal law from preemption. The fund had urged that the state regulation was pursuant to the Fitzgerald Act, which directs the Secretary of Labor to formulate labor standards to protect apprentices and "to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship," 29 U.S.C. § 50, and that the state regulation was saved by ERISA's savings of other federal law. The Ninth Circuit was unimpressed: "Assuming [the state law] was adopted in furtherance of the objectives of the Fitzgerald Act, it clearly is not an enforcement mechanism of federal law and to the extent orders under this section are preempted by ERISA, federal law is not impaired." 891 F.2d at 731.

B. *Why The Court Resorted to Textualism*

As illustrated in the preceding discussion, the Supreme Court's commitment to textualism has generated confusing law, outcomes that are inconsistent with the statutory purpose of employee protection, huge incursions on state regulatory authority inconsistent with the Court's supposed respect for the authority of state governments,[215] and a great deal of litigation. Given the serious consequences of these decisions, both for workers and for advocates of federalism, and given the Court's infrequent agreement regarding federalism and the balance of power between workers and firms, the predominance of unanimous ERISA opinions is surprising.[216] Furthermore, because Justices Blackmun, Brennan, and Marshall authored preemption opinions that significantly constricted the enforceability of state protective laws, the Court's concerns must have been more complex than simple anti-employee bias.

In this section, I offer two related explanations for why the Supreme Court adhered to textualism. One is that textualism was the reason for the decisions, and the other is that it was a rationale for decisions made, at least in part, on other grounds.[217] As to the first explanation, there are institutional reasons for relying on the plain meaning of language to decide cases. I will argue that the Court used textualism because the statute lacks—and the Court sought to avoid developing—a coherent vision of regulatory federalism that is an essential premise of an intelligible ERISA preemption analysis. The Court may have resorted to textualism in part because it offered an intellectually respectable basis on which to decide cases in an area of law that some or all members of the Court did not care to understand.

The second theory explaining the Court's decisions posits that the Court had a substantive vision that made the results the Court reached through textualism seem obvious, or at least plausible. The Court may have believed that ERISA established employee benefits as an exclusively federal concern, similar to the

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[215] *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[216] Of the Court's 14 ERISA preemption decisions, 10 were unanimous, 1 had one dissenting vote, 1 had 3 Justices dissenting, and 2 were decided 5-4.

[217] I thus distinguish between two processes in judicial decisionmaking, that of deciding the case and that of providing a justification for the decision. Richard A. Wasserstrom, who identified the difference, calls the former "the process of discovery" and the latter "the process of justification." RICHARD A. WASSERSTROM, THE JUDICIAL DECISION 27 (1961).

vision that animated the Court's jurisprudence under the National Labor Relations Act. According to this theory, the Court was committed to national legislative dominance until it recognized that the result was being transformed into a substantive vision of laissez faire. As the extreme laissez faire implications of broad preemption became apparent, the Court began to struggle with preemption and with the textualist methods it had until then employed.

1. Textualism as a Reason

The "plain meaning" approach to statutory interpretation, according to Professor Frederick Schauer, functions less as a basis for accurately interpreting legislative intent or meaning than as a way of enabling judges to reach a decision about that intent or meaning.[218] Writing opinions that rely on the plain meaning of the statute facilitates development of a position upon which a majority of the Justices will agree. Judges on a multi-member court therefore might use plain meaning as a decisional rule simply to ease decisionmaking in those cases in which the judges have little knowledge, interest, or concern for the outcomes.[219] In such cases, Schauer explains, "where the substance of the dispute seems to the Justices . . . less politically or morally or economically charged, . . . jurisprudential views about methods of legal decisionmaking . . . are more likely to dominate."[220]

Some of the Supreme Court's ERISA preemption cases illustrate the phenomenon that Schauer has identified. *District of Columbia v. Greater Washington Board of Trade*,[221] *Shaw v. Delta Air Lines, Inc.*,[222] and, to a lesser extent, *FMC Corporation v. Holliday*,[223] *Ingersoll-Rand v. McClendon*,[224] and *Fort Halifax Packing Co. v. Coyne*,[225] focused on the meaning of the language of section 514. Although only *Greater Washington* purported to

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[218] Frederick Schauer, *Statutory Interpretation and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231; *see also* Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715 (1992).

[219] Schauer, *Statutory Interpretation*, *supra* note 218, at 254; Schauer, *The Practice and Problems of Plain Meaning*, *supra* note 218, at 723.

[220] Schauer, *Statutory Interpretation*, *supra* note 218, at 248.

[221] 113 S. Ct. 580 (1992).

[222] 463 U.S. 85 (1983).

[223] 498 U.S. 52 (1990).

[224] 498 U.S. 133 (1990).

[225] 482 U.S. 1 (1987).

rely exclusively on plain meaning, several of the opinions illustrate the coordinating function of strict textualism. The Court relied on the language and, in some cases, the legislative history, which rejected narrower preemption and emphasized uniformity of regulation. The Court seemed oblivious to the nuances of employee benefits and unaware that language in its opinions would drastically alter the enforceability of state laws far removed from ERISA's concerns. This cannot be explained simply by a desire to immunize employers from regulation, since the Court's first two ERISA preemption opinions, *Alessi v. Raybestos-Manhattan, Inc.*[226] and *Shaw*,[227] were unanimous opinions written by Justice Marshall and Justice Blackmun, respectively. These decisions dramatically reduced the scope of operation for state protective laws, even in areas where ERISA provided inadequate protection, thereby producing far-reaching and undesirable consequences for employees and participants in benefit plans. These results seem flatly inconsistent with Justice Marshall's and Justice Blackmun's usual solicitude for workers' rights.[228] Additionally, Justice O'Connor authored *Pilot Life Ins. Co. v. Dedaux*,[229] another unanimous decision, in which the Court held that insurance bad faith tort claims were preempted; this view that state law should have no role seems inconsistent with Justice O'Connor's clear preference for federalism.[230]

Conversely, the Court also decided by unanimous opinion two cases during the 1980s that one might have expected to produce dissents from conservative members of the Court. In *Metropolitan Life Ins. Co. v. Massachusetts*[231] and *Massachusetts v. Morash*,[232] the Court used reasoning that elevated ERISA's protective purposes above the importance of national uniformity to hold that ERISA did not preempt state insurance and wage payment statutes. Both the reasoning and the result of these two decisions are difficult to reconcile with the Court's other ERISA preemption cases, and they are more protective of employees

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[226] 451 U.S. 504 (1981) (holding a workers' compensation anti-offset provision invalid).

[227] 463 U.S. 85 (1983) (holding pregnancy discrimination provisions preempted).

[228] *See, e.g.*, Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 661 (1989) (Blackmun, J., dissenting, joined by Marshall, J.); Patterson v. McLean Credit Union, 491 U.S. 164, 188 (1989) (dissenting opinion of Brennan, J., joined by Blackmun, J., and Marshall, J.).

[229] 481 U.S. 41 (1987).

[230] *See, e.g.*, New York v. United States, 505 U.S. 144 (1992).

[231] 471 U.S. 724 (1985).

[232] 490 U.S. 107 (1989).

than one would expect from some of the Justices. The predominance of unanimous opinions in deciding what have proven to be important questions of employment law is puzzling, because one would not expect such an ideologically divided Court to be in complete accord.[233]

Textualism can explain how the Court could have achieved unanimity in many decisions that had significant, ideologically charged consequences. On the surface, these decisions seemed to involve relatively unimportant and technical questions of the meaning of ERISA's preemption provision, insurance savings clause, and deemer clause. Focusing at this level obscured the significance these decisions would have in the struggle between employers and insurers on the one hand and workers and consumer groups on the other. If the political, social, and economic ramifications of the decisions had been clear to the Justices (as, for example, the social significance of the technical burden of proof issues in employment discrimination litigation are apparent to them[234]), there likely would have been fewer unanimous opinions.[235]

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[233] I am not the first to see in the predominance of unanimous ERISA opinions a lack of attention to the detail or the significance of the law. Professor Langbein similarly criticized the Court's decision in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989):

> The Supreme Court's opinion in *Bruch* garbles long-settled principles of trust law, [and] confuses trust and contract rubrics . . . . *Bruch* is such a crude piece of work that one may well question whether it had the full attention of the Court. I do not believe that either Justice O'Connor or her colleagues who joined this unanimous opinion [footnote omitted] would have uttered such doctrinal hash if they had been seriously engaged in the enterprise.
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> Unfortunately, *Bruch* is not the first instance in which the Supreme Court has discharged ERISA business shoddily. [Langbein here cites as examples Connolly v. PBGC, 475 U.S. 211 (1986); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985); PBGC v. Gray, 467 U.S. 717 (1984); and International Brotherhood Teamsters v. Daniel, 439 U.S. 551 (1979).] I understand why a Court wrestling with the grandest issues of public law may feel that its mission is distant from ERISA . . . . If the court is bored with the detail of supervising complex bodies of statutory law, thought should be given to having that job done by a court that would take it seriously.

John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, at 228–29.

[234] The Court's protracted and divisive struggle over burdens of proof in employment discrimination cases manifests underlying disagreement about the existence or pervasiveness of bias in employment. *See, e.g.*, St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993); *see generally* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229 (1995).

[235] Interestingly, in two cases in which the Court did not rely principally on plain meaning in its decisions, but instead relied on the protective purpose of ERISA to find state laws saved from preemption, the Court split 5-4. *See Fort Halifax Packing Co.*, 482 U.S. 1 (1987); Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988).

2. Textualism as a Rationale

The Schauer theory is not, however, a complete explanation. Textualism does not appear to have been the sole reason for the decision in some ERISA preemption cases. In many cases, it was not exclusively invoked, but was instead one reason among others that the Court gave for reaching a result. In addition to the textualist approach, the Court may have operated on a set of assumptions about federal dominance in regulating labor that made its interpretation of the language seem obvious.

The Court may have concluded that ERISA preempted state laws of all kinds because Congress appeared to have nationalized the entire employee benefits relationship, just as Congress had nationalized the entire union-management relationship under the NLRA. As long as the Court had confidence in the adequacy of the federal regulation, the scope of preemption seemed relatively straightforward, even though cases at the margins would always be difficult. When confidence in the federal scheme—and in Congress's ability to maintain that scheme's coherence—began to erode, so too did the Court's confidence in the exclusivity of federal law. ERISA preemption became problematic in part because the relationship between state and federal law in the whole field of labor and employment law became problematic.

The broad preemption of state legislation that the Court chose for ERISA was consistent with one of the Court's approaches to preemption under the National Labor Relations Act.[236] This is true even though ERISA preemption is express and NLRA preemption is implied.[237] The Court has read the NLRA to preempt not only state laws that conflict with specific provisions of the NLRA[238] or with the power of the National Labor Relations Board to define what constitutes permissible and prohibited ac-

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[236] *See supra* text accompanying notes 143–149 (discussing NLRA preemption holding in Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)).

[237] The NLRA is largely silent on the relationship between federal and state law. It mentions the role of state law in only two instances: Section 14(b) of the Taft-Hartley Act grants states the option of adopting "right to work" statutes, and § 14(c)(2) allows states to assert jurisdiction over labor disputes as to which the NLRB has declined to assert jurisdiction. 29 U.S.C. §§ 164(b), 164(c)(2) (1988).

[238] *See, e.g.*, ARCHIBALD COX ET AL., CASES AND MATERIALS ON LABOR LAW 987 (11th ed. 1991) (citing Bethlehem Steel Co. v. New York State Labor Rel. Bd., 330 U.S. 767 (1947); La Crosse Tel. Corp. v. Wisconsin Employment Rel. Bd., 336 U.S. 18 (1949); Plankington Packing Co. v. Wisconsin Employment Rel. Bd., 338 U.S. 953 (1950)).

tivity,[239] but also laws that conflict with what the Court believes Congress intended to be left unregulated by state or federal law.[240] The Court's statements that the NLRA broadly preempts state law in the field of labor relations were premised on the view that the NLRA and affiliated statutes[241] comprehensively regulate the relations between workers, unions, and employers, and that state courts would be hostile to the aims and methods of the federal scheme. Textualism therefore was not the sole basis on which the Court found meaning in section 514; textualism may also have been a jurisprudentially palatable rationale for decisions that seemed intuitively obvious based on the Court's belief in the dominance of federal labor law. The Court may have assumed that ERISA broadly preempted state law because ERISA seemed to fit within the established tradition of dominant and exclusive federal regulation of labor.

The Court's reliance on textualism became problematic when the significance of ERISA preemption and the ideological agenda of employers in arguing preemption became apparent to the Court and to commentators.[242] Justice Stevens was the first member of the Court to perceive the consequences of ERISA preemption for employees, and he was the first to dissent from the textualist approach, pointing out that in some cases the Court's view of the plain meaning of "relate to" led to absurd or unjust results. For instance, Justice Stevens stated in dissent in *FMC Corporation v. Holliday*[243] that the majority's analysis made little sense "[f]rom the standpoint of the beneficiaries of ERISA plans—who after all are the primary beneficiaries of the entire statutory program . . . ."[244] Similarly, when Justice Thomas wrote for the Court in *Greater Washington*[245] and relied on the same dictionary definition of "relates to" that the Court had used without dissent in *Shaw*, Justice Stevens dissented. Justice Stevens protested that the "growing emphasis on the meaning of the words

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[239] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

[240] Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976).

[241] *See, e.g.*, The Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401–531 (1988).

[242] *Cf.* O'Neil, *Protecting ERISA Health Care Claimants*, *supra* note 27, at 723–24 (noting that ERISA "now often serves as a shield for employers, insurance companies, and plan administrators, rather than to protect participants' rights").

[243] 498 U.S. 356 (1990).

[244] *Id.* at 366 (Stevens, J., dissenting).

[245] 113 S. Ct. 580 (1992).

'relate to'"[246] had diminished reliance on common sense in ERISA preemption cases, and he urged the Court "to take a fresh look at the intended scope of the preemption provision that Congress enacted."[247] Perhaps Justice Stevens' view finally garnered the support of the entire Court last Term in *New York Blues* because it was a case in which the consequences of following the Court's prior plain language reasoning would have been both especially preposterous (invalidating almost all state regulation of hospital charges) and far afield from the Court's vision about national dominance in labor relations.

ERISA preemption has been vexing just as labor law preemption has been vexing for the Court. In both areas, the Court has decided a disproportionately large number of preemption cases but failed to bring clarity to the law.[248] Under both the NLRA and ERISA, the Court stated that the field was comprehensively regulated by federal law and that the areas about which the federal statute was silent were best left without regulation.[249] But neither statute is actually comprehensive. Labor preemption became problematic in part because the significance of collective

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[246] *Id.* at 586 n.6 (Stevens, J., dissenting).

[247] *Id.* at 586 (Stevens, J., dissenting).

[248] *See, e.g.*, Cox, et al., *supra* note 238, at 959 ("No legal issue in the field of collective bargaining has been presented to the Supreme Court more frequently in the past thirty years than that of the preemption of state law, and perhaps no other legal issue has been left in quite as much confusion."). The Court's most recent attempt to reconcile its NLRA preemption cases was Livadas v. Bradshaw, 114 S. Ct. 2068 (1994), in which it held that the NLRA preempted a state labor commissioner's policy of declining to enforce a wage payment statute against employers of unionized employees. The Court emphasized that state law forms the backdrop against which parties negotiate collective bargaining agreements, and that it defeats the goal of the NLRA to deprive unionized employees of the protections of state law. The Court used this same reasoning to reject NLRA preemption in Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 752–58 (1985), but declined to use that same reasoning in ERISA cases. *See supra* text accompanying notes 151–154.

[249] *Compare* Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 149 (1976); Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352 (1972); *and* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98–99 (1983).

The evolution in Archibald Cox's thinking on labor preemption tracked and shaped the rise and fall of enthusiasm about broad preemption. Cox initially favored broad federal preemption, *see, e.g.*, Archibald Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954), but he later had some second thoughts, at least as to particular topics. Cox, *supra* note 27. Cox's doubts about very broad preemption apparently influenced the Court's decision to retreat from the unnecessarily broad language of *Lodge 76*. *See Metropolitan Life*, 471 U.S. at 753 (citing Cox); New York Telephone Co. v. New York State Dept. of Labor, 440 U.S. 519 (1979) (citing Cox in several places and holding that NLRA does not preempt New York unemployment insurance law which pays benefits to strikers).

bargaining as a source of protection for workers has declined in relative importance compared to state law,[250] just as ERISA preemption has become problematic because of the increased significance of state regulation of health benefits. The Court quickly realized that its suggestion in *Machinists* that the holes in the NLRA are intended to create space for laissez faire was an overstatement, and it retreated from the overbroad *Machinists* preemption.[251] The Court did not have the same flexibility about ERISA preemption because of its early commitment to a textualist approach to section 514. The Court has not yet decided how much of the area not directly regulated by federal law under ERISA is intended for laissez faire and how much remains a proper subject for state regulation. Congress itself did not provide an answer. As Congress avoids this task, either through silence or through drafting ill-considered language, the burden of determining the appropriate relationship between federal and state law in employee benefit regulation shifts to the judiciary.[252] It is to that task that I now turn.

III. THE NEED FOR PRAGMATISM AND FOR A THEORY OF REGULATORY FEDERALISM

Because ERISA does not definitively resolve the proper balance between state and federal law in matters of employee benefits, courts should approach the preemption inquiry pragmatically. The question should *not* be the meaning of "relates to," but rather whether allowing employers to be subject to state regulation would defeat the goals of protecting employee expectations in receiving benefits. The ERISA preemption inquiry requires an appraisal of the need for national uniformity balanced against

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[250] *See* Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575 (1992); Gottesman, *supra* note 27, at 361–62; Silverstein, *supra* note 27, at 28–33.

[251] *Metropolitan Life*, 471 U.S. at 754–57.

[252] It is not uncommon for Congress to remain silent on important matters when enacting legislation:

> The hard fact of political life is that, in order to draft a bill that can pass both Houses of Congress and garner a presidential signature, it is sometimes politic to leave some things unsaid. But that political decision is also a judgment to delegate those matters to the courts without much direction.

Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923, 927 (1993).

the advantages of regulation at the state level. This calls for pragmatism.

A pragmatic approach to statutory interpretation requires courts to recognize the inevitability of statutory ambiguity, and further requires a self-conscious process of deciding cases in accordance with the goals of the legislation. The judge's role should complement the legislative process, for the legislative process is inherently only a part of the lawmaking process. The approach I advocate is something like that described most prominently by William Eskridge, Jr., Philip Frickey, Daniel Farber, and Cass Sunstein.[253] As applied to ERISA preemption, a "pragmatic" judge would develop a theory of regulatory federalism to assess whether ERISA should supersede a particular state law.

The preemption questions that scholars and courts *should* consider differ from the preemption questions that judges normally consider. This different concept of regulatory federalism is not even a distant cousin of the general notion of federalism that judges reflexively invoke to create a presumption against preemption.[254] First, it is not a constitutional argument. There is no constitutionally compelled reason for courts to revise preemption doctrine. My argument is entirely functional: courts should modify ERISA preemption doctrine because the current doctrine makes no policy sense and is not dictated by the statute. Second, in suggesting that courts should consider regulatory federalism in deciding ERISA preemption cases, I am not advocating that courts necessarily strive to save state law from preemption, which is what the usual federalist presumption is supposed to do. A presumption in favor of state law would not necessarily result in a more coherent ERISA doctrine or in greater loyalty to the

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[253] This is a drastic oversimplification, of course, and it asks the reader to set aside for the moment the question of the legitimacy of the judicial role thus defined. *See, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Sunstein, *supra* note 19, at 160–233. Influential earlier versions of the same notion were articulated by GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTE (1982), and HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey, eds., 1994).

I have borrowed the term "complement" from Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 626–36 (1995).

[254] *E.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518, 532–33, 542 (1992).

legislative goals. In short, whether the traditional presumption in favor of federalism is one of statutory interpretation, as the Court suggested in *Gregory v. Ashcroft*,[255] or constitutional law, as the Court suggested in *New York v. United States*,[256] federalism is not a reason to decide a case; it is a rationalization. Usually federalism is asserted as a rationale to support decisions that seem to be motivated more by views on, for example, civil rights than on state sovereignity as a value in itself.[257]

If, however, the courts were to take seriously their assertion that federalism principles command a presumption that Congress did not intend to supersede state laws in areas of traditional state concern, I submit that ERISA preemption of some state regulation of welfare benefit plans violates their oath of fealty to state power. Notwithstanding the existence of an express preemption provision, congressional intent to invalidate the vast range of state laws that have fallen prey to ERISA preemption is anything but "manifest." Thus, the Court's ERISA preemption cases are inconsistent with its assertion that Congress cannot, through the existence of its preemption power, create a "federally mandated free market" unless its intent to do so is "clear and manifest."[258]

What the courts ought to ask themselves in deciding ERISA preemption cases, therefore, is a pragmatic question: to what extent will decentralization of regulatory authority over this area of law facilitate or hamper the sensible operation of the law? If this were the question, then courts could pay attention to something that ought to be relevant in assessing ERISA preemption of state law—the fact that Congress paid different degrees of

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[255] 501 U.S. 452 (1991).

[256] 505 U.S. 144 (1992).

[257] My views on the nature and values of federalism are in accord with those of critics of federalism. *See, e.g.*, Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994). These authors persuasively argue that federalism does not do any of the things normally claimed to its credit. As they put it, federalism (as opposed to decentralization) "does not secure citizen participation, does not make government more responsive or efficient by creating competition, and does not encourage experimentation." Nor, they say, does it diffuse governmental power or secure community. *Id.* at 909. *See also* Erwin Chemerinsky, *The Values of Federalism*, FLA. L. REV. (forthcoming 1995); Erwin Chemerinsky, *Rehabilitating Federalism*, 92 MICH. L. REV. 1333 (1994) (book review).

[258] Puerto Rico Department of Consumer Affairs v. ISLA Petroleum Corp., 485 U.S. 495, 500 (1988). In the *ISLA Petroleum* case, the Court considered the possibility that federal regulation of some aspects of a contractual relationship could operate through broad preemption to create a federally mandated free market. The Court held that Congress could deregulate petroleum allocation and pricing by preempting state law, but that Congress's intent to use preemption to create a free market regime must be clear. The Court failed to find the requisite clarity of intent. *Id.*

attention to different subject matters of ERISA. For example, Congress focused far more on the problem of adequate funding of pension plans than on the restrictions that should be placed on a plan's or an employer's power to eliminate or modify coverage in a health benefit plan. Moreover, Congress paid no attention in ERISA to the regulation of the terms of apprenticeship programs. These facts about the coverage of ERISA ought to be relevant when courts decide whether to invalidate state law.

The Court took a step in the right direction in *New York Blues*.[259] The Court stated, "[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."[260] The Court then asserted that the objective behind section 514(a) was to "minimize the administrative and financial burden of complying with conflicting directives . . . ."[261] After reconciling its prior cases under this new pragmatic approach, the Court looked at the purpose and effect of the state law to decide whether it imposed unacceptable administrative or financial burdens. Accepting that the state law would affect the cost of providing benefits in New York, the Court concluded that this indirect economic effect "does not bind plan administrators to any particular choice"[262] about which benefits to provide, and does not "preclude uniform administrative practice or the provision of a uniform interstate benefit package if a plan wishes to provide one."[263] Therefore, the Court believed that there was no conflict with ERISA, because "cost-uniformity [between states] was almost certainly not an object of pre-emption, just as laws with only an indirect economic effect on the relative costs of various health insurance packages in a given State are a far cry from those conflicting directives from which Congress meant to insulate ERISA plans."[264]

The Court's assumptions that the purpose of ERISA preemption was to minimize administrative and financial burdens on

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[259] 115 S. Ct. 1671.

[260] *Id.* at 1677.

[261] *Id.* (quoting Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990)). Although I disagree with this characterization of the objective of § 514(a), I do agree that the Court used the appropriate method of interpretation in looking at the objective of the statute to define the scope of preemption.

[262] *Id.* at 1679.

[263] *Id.*

[264] *Id.* at 1680 (internal quotation marks omitted).

interstate plans, and that broad preemption serves that goal, are open to question. First, the legislative history does not suggest that Congress intended preemption to minimize administrative or financial burdens on plans irrespective of the harm that elimination of state law could cause to plan participants. Second, invalidation of state regulation may not always serve the statute's protective purposes. As long as the provision of income security is a cost of doing business, national uniformity may be desirable as a way of eliminating competition and creating economies of scale for large employers subject to uniform national requirements. But whether, and the extent to which, either of these propositions is true is an empirical question. For example, it has been argued that environmental regulation at the federal level may not be necessary to prevent states from competing for industry by offering pollution standards that are too lax.[265] I do not know whether national uniformity is more efficient for business or will avoid a "race to the bottom" in the environmental field, the employee benefits field, or any other area of federal law. The point is that these are not by themselves arguments for broad preemption, although they are usually offered as such, without some empirical basis for assessing whether they are valid assertions.

One needs to be similarly concrete about the desirability of state regulation, for state regulation may be consistent with ERISA's purposes and requirements. ERISA was enacted against a backdrop of extensive state regulation of employment, health care, and insurance. Although Congress has authority to legislate on these subjects, it is not obvious that ERISA should be read to effect a broader displacement than is necessary to foster ERISA's objectives. To shift from mostly state to mostly federal control of these areas would cause confusion during transition and would add to the workload of a Congress that already has too little time to keep all the existing federal statutes up to date. Indeed, decentralized regulatory authority may foster ERISA's protective purposes. For instance, it may be (although this too is an empirical question) that state legislatures are more responsive to the concerns of consumer and worker groups than is Congress, because it is less expensive to mount a successful

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[265] Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

lobbying campaign in most states. Thus, although significant health care reform may be blocked at the federal level by a well-organized and well-financed business and insurance lobby, it may not be blocked at the state level. Alternatively, the facts may be otherwise: it may that the states do not make good "laboratories."[266] These various possibilities illustrate that a pragmatic approach to interpreting ERISA's preemption provision should avoid the tendency to rely on unexamined and perhaps erroneous assumptions such as "federalism," "states as laboratories," and "national uniformity equals regulatory efficiency."

Having explained what a pragmatic approach to ERISA preemption is, let me be clear about when and why such an approach is appropriate. I do not believe that a pragmatic approach should be used to interpret every provision in every statute. The pragmatic approach is appropriate only when, as is the case with some aspects of ERISA preemption, the statutory language is ambiguous and there are otherwise no clear answers from the structure or history of the legislation. This will be particularly true when Congress first regulates in a field, as with ERISA, or when it undertakes major revision of existing legislation.

Textual theories of interpretation make major reform legislation terribly problematic,[267] especially when the new federal law is intended to displace any substantial amount of state law. Congress dramatically changed the landscape of employee benefits and had many big problems and small details to consider. Therefore, it is not surprising that it failed to define precisely which state laws should survive. Thus, pragmatism is necessary when, as in the case of ERISA, Congress obviously fails to consider fully the effect of a new federal law on a complex body of state regulation.

But the failure of congressional oversight is not the only justification for pragmatism about ERISA preemption. If the impossibility of congressional oversight were the only justification for courts to adopt a pragmatic approach, I would have to address the obvious argument that Congress could have, but con-

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[266] "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. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *See* Laguarda, *supra* note 24, at 191 (arguing that the states have not been good laboratories for health care reform).

[267] SUNSTEIN, *supra* note 19, at 113–22.

sciously did not, adopt different preemption standards for state laws relating to pensions and fiduciary behavior (which ERISA extensively regulates) than for welfare benefits (which ERISA does not comprehensively regulate). The dispute about enforcement of state legal ethics rules against legal services plans, it could be argued, alerted Congress to the hazards of broadly preempting state laws only indirectly related to ERISA's requirements, and Congress forged ahead with broad preemption anyway. Thus, the argument would go, judicial fine-tuning cannot be justified as a remedy for legislative oversight. However, ERISA is not simply a case of oversight.

Even if Congress had had time to consider the implications of section 514's language carefully, it could not have formulated *ex ante* a policy that would decide all cases. It may be that when Congress passes a statute covering a relatively narrow subject, it can decide in advance all the preemption issues that are likely to arise and resolve them itself. But when it enacts a lengthy and complex statute that displaces state law and regulates across the scope of the employment relationship (as well as financial relationships far removed from employment), Congress simply cannot anticipate all the preemption problems that are likely to arise.[268]

Unless very detailed, statutory language is often necessarily more of a statement of principle than a specific directive. Proceeding by the common law method is therefore inevitable, as the Supreme Court itself has noted. For example, in interpreting the preemption provision of the Airline Deregulation Act of 1978, which uses the same "relates to" language as does ERISA,[269] the Court struggled with the same problems of overbroad language and recognized the need for case-by-case accommodation between state and federal law.[270]

Moreover, when Congress regulated as broadly as it did in ERISA, it could not have anticipated how context or social change would fundamentally alter the significance of the preemption of state laws pertaining to health benefits. For example, extremely broad preemption has had consequences for health

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[268] Preemption is often (though not always) a less difficult problem when the federal statute makes federal law a floor, not a ceiling, for state authority. *See* California Fed. Sav. & Loan Ass'n. v. Guerra, 479 U.S. 272 (1987).

[269] 49 U.S.C.A. § 1305(a)(1) (1988).

[270] *See* American Airlines, Inc. v. Wolens, 115 S. Ct. 817, 819 (1995); *see also* Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992).

care financing that Congress could not have anticipated in 1974. State laws like the one at issue in *New York Blues*[271] address problems in the health insurance market that were not perceived in 1974. Nor could Congress have considered the effect of ERISA on medical malpractice litigation against HMOs and insurance utilization review firms, because both were relatively unusual in 1974.

In any event, whether or not Congress could have resolved the issues about the desirable relationship of state and federal law in the ERISA context, Congress plainly did not do so in section 514. Therefore, courts, whether they admit it or not, are forced to do it. In two extreme cases, where the courts were blatantly wrong,[272] Congress corrected judicial interpretations. But Congress plainly does not have the time to oversee each of the hundreds of ERISA preemption issues that arise in litigation each year and to correct each of the failures. Courts ought not decide cases on the assumption that Congress will correct all of the errors they make, or that Congress's failure to change a statute necessarily constitutes an endorsement of the results.

There are two main arguments against pragmatism: that judges ought not, for reasons of legitimacy, decide cases based on their notions of enlightened public policy, and that judges cannot competently do so. Both arguments hold that if statutes are flawed, as ERISA's preemption provision clearly is, the onus is on Congress to fix them.[273] Even if the preemption provision is

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[271] 115 S. Ct. 1671.

[272] At least, this was the case in the judgment of some in Congress who decided to expend their political capital on ERISA issues.

[273] Congressional efforts to "fix" problems with ERISA preemption have had a mixed history. On the one hand, Congress did amend the preemption provision in response to decisions holding that ERISA preempted state marital property laws that protected a non-employee spouse's interest in an employee spouse's pension. *See supra* note 61. Furthermore, Congress amended the preemption provision in response to a determination that ERISA preempted Hawaii's law requiring employers to provide health benefits for employees. *See infra* text accompanying notes 281–283. Also, Congress amended § 514 to clarify the role of state laws in regulating multiple employer welfare arrangements (MEWAs). 29 U.S.C. § 1144(b)(6) (1988).

But, as I explain below, Congress has failed to enact other bills that would save additional state laws from preemption. Notable examples include bills to overturn *Pilot Life*'s preemption of state insurance bad faith laws, *see* O'Neil, *supra* note 27, at 763–70 (describing myriad bills), to overturn court of appeal decisions regarding state regulation of apprenticeship programs, e.g., H.R. 1036, 103d Cong., 1st Sess. (1993), and to eliminate the different treatment of insured and self-insured plans, *see supra* notes 143–147 and accompanying text. While the failure to act may be taken as evidence that Congress approves of the outcomes in these cases, it may also mean that a well-organized group may prevent action to overturn an interpretation of the statute that would not be favored by Congress. *See infra* text accompanying notes 282–288.

the product of congressional error rather than a deliberate policy choice, so the argument goes, the courts should not fix the error. They should allow public excoriation to prod Congress into action. When courts attempt to fix congressional mistakes, they encourage congressional dereliction of duty. In this view, judges have the institutional role of forcing Congress to do its job better, not of taking on Congress's job themselves.[274]

The plain meaning theory may allay our doubts about judicial legitimacy.[275] The supposed virtue of plain meaning theory from a jurisprudential standpoint is the fiction that judges simply give life to the inherent meaning of the words, rather than choosing among several possible meanings, thus reducing judicial activism. The evidence, however, is to the contrary. Recent studies on the Supreme Court's new penchant for using dictionaries to decide cases suggest that the use of dictionaries does not constrain judicial activism. As Professor Pierce has shown, the Court has used plain language to overturn long-settled construction of statutes, to reject interpetations preferred by politically accountable administrative agencies, and to disregard clearly contrary legislative intent.[276] Thus, the dictionary has been a powerful weapon for a new brand of judicial activism. Moreover, the legitimacy of plain meaning theory rests on factual premises—that the legislature usually means what it says, and that it can express that meaning unambiguously—which are questionable in the case of ERISA's preemption provision. The intentionalist and purposive theories of interpretation find legitimacy in the view of judges

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[274] A thoughtful statement of this position is found in Schacter, *supra* note 253, at 636–46. This was the view advanced by Bickel and Wellington in their article criticizing § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1988), and by Justice Frankfurter in his dissent in Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). *See* Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 26, 34 (1957). They argued that Congress defaulted on its responsibility to design a federal law governing collective bargaining agreements by creating federal jurisdiction to enforce collective agreements without at the same time enacting a body of rules for the federal courts to use in doing so.

[275] There are two jurisprudential defenses of textualism. In one view, judges are the agents and the legislature is the principal; the unelected judge simply carries out the legislative direction and does not pursue her own agenda. *See* SUNSTEIN, *supra* note 19, at 112–13. Alternatively, textualist theory may view the courts as "autonomous interpreters" who enforce the meaning of the statute as a reasonable person would understand it, not necessarily as the legislature intended it. In this view, democratic legitimacy of the unelected judge comes from him standing in the shoes of the person to whom the law applies and reading the law as that person would read it. *See* Merrill, *supra* note 132, at 353; Schacter, *supra* note 253, at 636–46.

[276] Pierce, *supra* note 21. *See also* Merrill, *supra* note 132.

as agents of the legislature, carrying out its predefined will. What I have said thus far about ERISA's history, however, suggests that current preemption doctrine bears little fealty to Congress's will, such as it was in 1974.

If one believes that courts should not correct statutory errors, one must believe either that Congress will fix the problem or that the cost of its failing to do so is worth the gain in judicial legitimacy. As for the former idea, it is doubtful that opponents of pragmatism really believe that Congress will fix the problems, although their theory forces them to pretend that they do. The comparatively small number of amendments to section 514 and the large number of problems that remain suggest that Congress will not fix the Court's errors. As for the latter idea, a great deal of unintentionally irrational law is not a fair price for a small fig leaf of judicial legitimacy.

ERISA is an excellent example of the classic observation that it is a great deal more difficult for Congress to correct flawed statutes than it is to enact them in the first place.[277] The reason is that interests coalesce around the advantageous aspects of the status quo. If legislative action is the only method of correcting statutory errors, then error will be the inevitable result of Congress's first stab at regulating in an area, unless Congress gets it entirely right the first time.[278] In the case of ERISA preemption, no one fully perceived in 1974 that broad preemption was a tremendous benefit for employers, insurers, and plans. However, these parties soon figured it out, and they have fought hard ever since to protect it.[279] The persistence of the unduly broad preemption language without amendment is thus an example of what Sunstein calls "statutory failure": the benefits of the language are significant for a highly organized though narrow group, while the costs may be great but are spread widely among a population that is not likely to organize effectively for change.[280]

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[277] CALABRESI, *supra* note 253, at 6; GRANT GILMORE, THE AGES OF AMERICAN LAW 95 (1995).

[278] *Id.*

[279] *Compare* Schaffer & Fox, *supra* note 81, at 51 (arguing that although business firms later defended ERISA preemption of state regulation of health benefits on the ground that it interfered with freedom to design benefits packages, there is no evidence that they did so in 1974) *with* Robert R. Rosenblatt, *Health Reform: Tangled Up in a Knot of Deal-Killers*, L.A. TIMES, Aug. 21, 1994, at A1 ("America's biggest corporations will fight to the end any effort to let states write their own rules for regulating employee health benefits.").

[280] SUNSTEIN, *supra* note 19, at 102.

There is evidence in the history of efforts to amend the ERISA preemption provision to support this hypothesis. In 1974, just as Congress was putting the finishing touches on ERISA, the state of Hawaii enacted a statute that required employers to provide health insurance for their employees.[281] When ERISA took effect, business groups in Hawaii challenged the Hawaii Pre-Paid Health Care Act as being preempted by ERISA, and the courts so held.[282] Beginning in 1974, and for nine years thereafter, the senators from Hawaii waged a legislative battle to save their state statute from ERISA preemption. The Hawaiian senators' first bill simply eliminated all ERISA preemption of state health insurance laws; they encountered strong opposition and few allies. Later bills were less sweeping, seeking an exemption only for Hawaii's statute. Finally, in 1983, Congress amended the preemption provision to save the Hawaii statute. But the final version was not a complete victory for employees, as it saved only the 1974 version of the Hawaii statute, not the statute as it was modified by a 1976 amendment providing more generous benefits than the original version. Interestingly, the amendment to the ERISA preemption provision contained an unusual statement of legislative intent that made clear that only Hawaii's health care law was saved: "The amendment made by this section shall not be considered a precedent with respect to extending such amendment to any other State law."[283] Hawaii's success in saving the Health Care Act may be credited to the extraordinary legislative power of Senators Inouye and Matsunaga and to the perception by the rest of the Congress that Hawaii is in some sense unique. Moreover, the congressional correction hardly seems to be the result of careful consideration of the best way to accommodate state and federal law. Why, for example, would Congress require Hawaii to maintain the law enacted in 1974, rather than the later one, which may have been passed in response to changed conditions or experience? Bills that would allow Hawaii to make its system more generous to employees have been introduced in Congress, but have died there.[284]

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[281] This story of the amendment to save the Hawaii statute is drawn from Schaffer & Fox, *supra* note 81, at 54–60. The story is repeated in Laguarda, *supra* note 24, at 179–85.

[282] Standard Oil Co. v. Agsalud, 633 F.2d 760 (9th Cir. 1980), *aff'd mem. sub nom.* Agsalud v. Standard Oil Co., 454 U.S. 801 (1981).

[283] Act of Jan. 14, 1983, Pub. L. No. 97-473, sec. 301(b), 96 Stat. 2605, 2612 (1983) (not codified).

[284] *E.g.*, S. 287, 103d Cong., 1st Sess. (1993); *see* 139 CONG. REC. S1174–75, (daily

A second example, one that Congress has yet to fix despite several years of legislative struggle, is drawn from the preemption of state laws regulating apprenticeship programs and the working conditions of apprentices. As described above,[285] courts of appeals held these state laws preempted, even though ERISA does not regulate the working conditions of apprentices and there is no evidence that Congress thought by enacting section 514 it was invalidating well-established state regulations regarding a whole category of workers.[286] Bills have been introduced to overturn these decisions, but none has been enacted.[287] Business, of course, strenuously objects to state regulation of the wages and working conditions of workers (including apprentices), and thus far apprentices and their allies have not mustered enough support to overcome determined business opposition. If Congress fails to amend ERISA in response to these literal, but mistaken, applications of the overbroad preemption provision, it allows unintended irrational consequences to persist. However, it is unclear how much would be gained as a practical matter by forcing Congress to spend its scarce time correcting judicial errors.

The question thus arises as to whether judges are competent to design a more sensitively calibrated preemption doctrine. The most obvious response is that judges have been doing precisely that for federal statutes which lack an explicit congressional statement regarding presumption. For all the criticism that various particular preemption doctrines have received,[288] there is no reason to believe that the task is necessarily beyond the ken of the federal judiciary. The real question is one of comparative institutional competence: are the courts or Congress better suited to make these sorts of determinations?[289] The competence ques-

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ed. Feb. 3, 1993) (remarks of Sen. Akaka (D-Haw.)); S. 590, 102d Cong., 1st Sess. (1991); *see* 137 CONG. REC. S2932–33 (daily ed. Mar. 7, 1991) (remarks of Sen. Akaka). Senator Akaka reintroduced the bill in the 104th Congress, but it has not been enacted. S. 266, 104th Cong., 1st Sess. (1995); *see* 141 CONG. REC. S1443–45 (daily 3d. Jan.24, 1995) (remarks of Sen. Akaka).

[285] *See supra* notes 200–214 and accompanying text.

[286] *Id.*

[287] H.R. 1036, 103d Cong., 1st Sess. (1993); H.R. 2782, 102d Cong., 2d Sess. (1992). Both H.R. 1036 and H.R. 2782 were debated in the House, 139 CONG. REC. H8958–76 (daily ed. Nov. 9, 1993); 138 CONG. REC. H7274–96 (daily ed. Aug. 4, 1992), but neither became law.

[288] *See, e.g.*, Gardbaum, *supra* note 30 (discussing preemption generally); Wolfson, *supra* note 34; Drummonds, *supra* note 37 (discussing preemption in the labor and employment law context).

[289] *See generally* Neil K. Komesar, *A Job for the Judges: The Judiciary and the*

tion is answered in part by the Court's own recognition that case-by-case adjudication is sometimes necessary to accommodate state and federal law.[290] Even Congress seems to recognize that in certain circumstances some other entity may be better suited to make individualized assessments of the desirable scope of ERISA preemption. This recognition appears in a bill pending in Congress that would grant to an executive branch agency the authority to waive ERISA preemption for qualifying state health care reform plans at the same time it authorizes such plans under the Medicaid program.[291] As I have suggested, Congress simply cannot anticipate all preemption problems when it enacts a far-reaching law that displaces a substantial amount of state law. If there is no executive agency to work out an accommodation, the courts are the only institution capable of making the case-by-case assessment that is required.

IV. CONCLUSION

By last Term, judicial and scholarly discourse over the scope of ERISA preemption of state law had reached a dead end. While the lower courts continually complained that the language of the statute could not mean what it says, the Supreme Court persisted in pretending that the language had a meaning and that its meaning could decide cases. For years, scholars criticized the language of the statute and the results of the cases to no avail, until last Term in *New York Blues*. Now, the Court has finally admitted that the language of ERISA offers virtually no help to courts in deciding cases and has thus all but given the lower courts license to ignore it.

The Supreme Court's commitment to textualist interpretation was the main catalyst in the evolution of ERISA preemption from its origins as a last-minute compromise in a massive piece of new legislation to its current status as one of the most important aspects of health care and employment law policy. Judicial interpretation accorded section 514 significance in restricting state policy options in the fields of health care and employment

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Constitution in a Massive and Complex Society, 86 MICH. L. REV. 657 (1988); Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984).

[290] *See* American Airlines, Inc. v. Wolens, 115 S. Ct. 817, 827 (1995).

[291] *See supra* note 1.

that Congress never intended. Ironically, the Court's textualism prevented the Court from fully appreciating the consequences of its decisions and made it difficult for the Court to change direction even when it became apparent how far ERISA preemption doctrine had strayed from the statute's protective purposes. The Court's recent change of emphasis evidenced in *New York Blues* indicates that only when the Court abandoned its reliance on textualism could it begin the difficult task of making sense of ERISA preemption. Thus, the story of the first twenty years of ERISA preemption doctrine is the story of the shortcomings of textualism as a method of statutory interpretation.

But this is more than just a case study of the failures of textualism. This history of ERISA preemption offers some valuable insights into general preemption doctrine as well. Foremost, it has taught us that the preemption doctrine's search for legislative intent is doomed to fail. Whether we admit it or not, courts are creating preemption doctrine in the ERISA context, as in many others, with little guidance from the legislature. As long as they are doing so, ERISA scholars should now do the research that will make the courts' jobs easier. It is time to think about and write about the proper balance between state and federal regulation of employee benefits rather than the meaning of section 514. While it is unwarranted hubris to suggest that this ought to be the last law review article written about the meaning of the words "relate to" in section 514 of ERISA, for the sake of us all, I hope it is.