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Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States to Regulate Managed Care?

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Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States to Regulate Managed Care?

Donald T. Bogan*

Prior to Congress's enactment of the Employee Retirement Income Security Act of 1974 (ERISA), the states regulated the health care and health insurance industries. In passing ERISA, Congress intended to reform the pension plan industry and provide comprehensive regulation of pension plans. As a result of Conference Committee action just prior to ERISA's enactment, however, the statute also contains a broad preemption clause that the courts have interpreted to preempt virtually all state regulation of health care benefit plans, not just pension plans. Congress did not investigate the nonpension employee benefits industry when it was considering ERISA; consequently, the statute provides no substantive regulation of nonpension plans. The combined effect of ERISA's failure to regulate nonpension employee benefits and court opinions that declare state regulations that relate to nonpension employee benefit plans preempted is that the managed care health benefits industry remains virtually unregulated, leaving consumers hopelessly unprotected from industry abuses.

Recent Supreme Court decisions recognize that ERISA's preemption language is ambiguous and that the Court's "plain meaning" interpretation of such language has not provided adequate guidance to the lower courts on how to resolve the myriad ERISA preemption issues that continue to flood the lower courts. This Article suggests that application of standard statutory interpretation principles to ERISA's ambiguous preemption language should return the substantive regulation of nonpension employee benefit plans to the states.

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*“I think it would greatly assist our function of clarifying the law if we simply acknowledged that our first take on [ERISA] was wrong”*¹

Congress adopted the Employee Retirement Income Security Act of 1974² (ERISA) “to protect . . . the interests of participants in employee benefit plans and their beneficiaries.”³ While the name of the Act forewarns that ERISA regulates pensions, the impact of this federal statute on health care and other common employee benefits, traditionally regulated by the states, may come as a surprise to those unfamiliar with ERISA.⁴ Given the stated purpose of the Act, it is

1. California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 336 (1997) (Scalia, J., concurring).

2. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (1994) and in scattered sections of 26 U.S.C.).

3. 29 U.S.C. § 1001(b) (1994).

4. ERISA impacts health care and other common employee benefits because ERISA governs both employee pension plans and employee welfare plans. See *id.* § 1002. Employee welfare plans include almost all nonpension employee benefits. I use the terms “welfare plan” and “nonpension plan” interchangeably throughout the Article, and focus on the effect of ERISA preemption on one type of employee benefit plan, health care benefit plans. ERISA defines a welfare plan as:

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers,

even more surprising that ERISA has failed so miserably to serve as a beneficial consumer protection statute for ERISA welfare plan participants. Inexplicably, ERISA preemption is the reason managed care health plans, including Health Maintenance Organizations (HMOs), Preferred Provider Organizations (PPOs), and other similar entities, can avoid state-mandated benefits laws, mandated provider laws, and state-law claims for extracontractual damages that would normally protect consumers covered under standard health insurance policies.⁵ Though Congress did not intend for ERISA to deregulate the health care benefits industry, “through peculiar federal judicial interpretation,”⁶ ERISA presents “a shield of immunity which thwarts the legitimate claims of the very people it was designed to protect.”⁷

The problem originates with ERISA’s ambiguous preemption language and has mushroomed with the Supreme Court’s failure to consistently apply well-settled rules of statutory construction to interpret that ambiguous language in harmony with the statute’s overall purposes.⁸ Congress detailed ERISA’s preemption of state law

scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Id. § 1002(1).

5. See discussion *infra* Part III.B.

6. *Cathey v. Metropolitan Life Ins. Co.*, 805 S.W.2d 387, 392 (Tex. 1991) (Doggett, J., concurring) (“By its reading of ERISA’s preemption clause, the United States Supreme Court has restricted the very rights of employees . . . that Congress sought to protect. Through peculiar federal judicial interpretation, a statutory addition to workers’ rights has been converted into a statutory removal of those rights. The law has been reshaped into a form that achieves the converse of its original purpose.”).

7. *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 56 (D. Mass. 1997) (“ERISA is a ‘comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.’ It is therefore deeply troubling that, in the health insurance context, ERISA has evolved into a shield of immunity which thwarts the legitimate claims of the very people it was designed to protect.” (footnote omitted) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983))).

8. See Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARVARD J. ON LEGIS. 35 (1996). Professor Fisk argues that the ERISA preemption debacle arises from a wrong-headed textualist interpretation of the statute. See *id.* at 38, 58-90. To correct the problems created by ERISA’s overbroad preemption language, she proposes that the Supreme Court apply a pragmatic approach to ERISA preemption, focused on policy considerations, rather than trying to decide what state laws “relate to” ERISA plans. See *id.* at 42, 90-102. I agree with Professor Fisk’s criticism of the Court’s plain meaning construction of ERISA’s preemption language, and I agree that courts should develop a preemption doctrine sensitive to the different degrees of substantive regulation that ERISA imposes on pensions as opposed to nonpension benefits. I disagree with Professor Fisk, however, on the statutory interpretation analysis that should be employed to correct the ERISA preemption quagmire. Professor Fisk encourages the Supreme Court to act as an independent policy maker, but I doubt that the Court is willing to openly anoint itself with such powers. This Article suggests that the

in three interrelated clauses, commonly referred to separately as the *preemption clause*, the *savings clause*, and the *deemer clause*.⁹ The preemption clause broadly states that ERISA “shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan.”¹⁰ The savings clause then broadly excepts from preemption “any law of any State which regulates insurance.”¹¹ Finally, the deemer clause provides that no employee benefit plan “shall be deemed to be an insurance company or other insurer . . . for purposes of any law of any State purporting to regulate insurance companies [or] insurance contracts.”¹²

ERISA’s preemption language inspires confusion.¹³ The expansive language of the preemption clause suggests that Congress intended to make the entire field of employee benefits an exclusively federal concern.¹⁴ The most significant commonly provided nonpension employee benefits, however, including health care, accident, disability, and death benefits, have traditionally been

standard statutory interpretation principles underlying traditional preemption doctrine provide the path to reach reasonable preemption results in ERISA welfare benefit plan cases.

9. See 29 U.S.C. § 1144 (1994). The statute provides in relevant part:

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

....

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

Id.

10. *Id.* § 1144(a).

11. *Id.* § 1144(b)(2)(A).

12. *Id.* § 1144(b)(2)(B).

13. See *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 717 (2d Cir. 1993) (describing ERISA’s preemption provision as “a veritable Sargasso Sea of obfuscation”), *rev’d sub nom.* *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

14. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-99 (1983) (adopting a broad interpretation of “relate to”).

provided through insurance,¹⁵ and Congress clearly intended that the regulation of insurance remain primarily a state concern.¹⁶ More importantly, ERISA's preemption of all state laws that "relate to any employee benefit plan"¹⁷ is inconsistent with the scope of ERISA's substantive regulations, which pertain only to pension plans, and with the statute's comparatively modest objective of protecting workers' rights to their pension benefits. Finally, the "relate to" phrase in the preemption clause, which Congress intended to identify the boundaries of ERISA's preemptive authority, does not define or limit the scope of state laws that may infringe upon the exclusive field of federal regulation.¹⁸ Without some identifiable limits to the field of ERISA's dominance, ERISA preemption challenges historic principles of federalism. Not surprisingly, given ERISA's confusing preemption

15. See HEALTH, EDUC., AND HUMAN SERVS. DIV., U.S. GEN. ACCOUNTING OFFICE, EMPLOYER-BASED HEALTH PLANS: ISSUES, TRENDS, AND CHALLENGES POSED BY ERISA 44-48 (GAO/HEHS-95-167 1995) [hereinafter ISSUES, TRENDS, AND CHALLENGES]. According to this report, based on a 1993 survey, approximately 140 million Americans received health care benefits from employer- or union-sponsored health plans. See *id.* Of those, 44 million were covered under self-insured plans (possibly including plans with stop-loss insurance), 69 million were covered under fully insured plans, and 27 million were covered under church or government plans exempt from ERISA's reporting requirements. See *id.*; see also *Travelers*, 14 F.3d at 711 ("Eighty-eight percent of non-elderly Americans have private health care insurance through their employee welfare benefit plans.").

16. State law has been the primary authority in the regulation of insurance since the Supreme Court held that "[i]ssuing a policy of insurance is not a transaction of commerce." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1868). The *Paul v. Virginia* holding was eventually overruled in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 533 (1945). In response to *South-Eastern Underwriters*, Congress adopted the McCarran-Ferguson Act, Pub. L. No. 79-15, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011-1015 (1994)), which reconfirmed the states' primary interest in insurance by delegating the regulation of the insurance business to the states.

When Congress enacted ERISA, it made clear that it did not intend to disrupt the states' role in regulating the insurance industry. In addition to the savings clause directive that ERISA does not preempt state insurance regulation, ERISA also preserves the McCarran-Ferguson Act authority by providing that the preemption clause "shall [not] be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States." 29 U.S.C. § 1144(d).

Addressing the apparent conflict between the preemption clause and the savings clause, in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739-40 (1985), the Supreme Court remarked that:

The two pre-emption sections, while clear enough on their faces, perhaps are not a model of legislative drafting, for while the general pre-emption clause broadly pre-empts state law, the saving clause appears broadly to preserve the States' lawmaking power over much of the same regulation. While Congress occasionally decides to return to the States what it has previously taken away, it does not normally do both at the same time.

Id.

17. 29 U.S.C. § 1144(a).

18. See *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995); see also discussion *infra* Part IV.C (discussing *Travelers*).

language and the tensions inherent whenever a court attempts to set a definitive border between federal and state authority, the Supreme Court has had difficulty defining the extent of ERISA's preemption of state laws.¹⁹

In its early ERISA preemption cases, the Supreme Court profoundly expanded the reach of federal authority over state law by creating a new category of "super-preemption" in ERISA welfare benefit plan cases.²⁰ Focusing on the "relates to" language in the preemption clause, the Supreme Court has boldly declared that ERISA "occupies the field" and preempts all state regulation of both pension plans and nonpension employee benefit plans, without any apparent recognition that ERISA itself does not comprehensively regulate nonpension employee benefits.²¹ Field preemption strips the states of all regulatory authority in the defined field and is normally inferred by the courts only when Congress has comprehensively regulated the subject area or when the subject is peculiarly within the federal domain.²² In ERISA pension plan cases, ERISA's broad preemption

19. See *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 808 n.1 (1997) ("The boundaries of ERISA's pre-emptive reach have been the focus of considerable attention from this Court. . . . [I]n the 16 years since we first took up the question, we have decided no fewer than 13 cases. The issue has also generated an avalanche of litigation in the lower courts." (citations omitted)); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987) ("Given the 'statutory complexity' of ERISA's three pre-emption provisions, as well as the wide variety of state statutory and decisional law arguably affected by the federal pre-emption provisions, it is not surprising that we are again called upon to interpret these provisions." (citation omitted)).

20. See *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983) (referring to the unique preemptive force of ERISA); *Haley v. Trees of Brookwood, Inc.*, 838 F. Supp. 1553, 1554 (N.D. Ala. 1993) (referring to ERISA's "super-preemption" status); see also William M. Acker, Jr., *Can the Courts Rescue ERISA?*, 29 CUMB. L. REV. 285, 287 (1999) (referring to preemption under ERISA as "super-duper preemption"); Fisk, *supra* note 8, at 61 ("[W]ithout 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.").

21. *Pilot Life*, 481 U.S. at 45-46 (holding that ERISA comprehensively regulates welfare benefit plans and thus preempts state regulation in that area); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981) (stating that the intent of ERISA is to establish pension plan regulation as exclusively a federal concern); see also discussion *infra* Part II.B (stating that ERISA does not comprehensively regulate welfare plans); discussion *infra* Part III.A (describing the creation of super-preemption).

22. See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983) (stating that federal preemption may be found in a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" (quoting *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))); see also Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 811-12 (1994) (describing preemption in jurisdictional terms); discussion *infra* Part I (discussing field and conflict preemption).

language corresponds with traditional indicia for application of the field preemption doctrine because ERISA provides a pervasive and coordinated regulatory scheme to govern pension plans and because the field of pension regulation does not have strong state-law roots.²³

Nonpension employee benefits are another matter. Under traditional implied preemption analysis, no removal of state jurisdiction to regulate nonpension employee benefit plans is justified because ERISA does not comprehensively regulate nonpension plans and because welfare plan benefits, long governed under the states' police powers, have never been viewed as a peculiarly federal concern.²⁴ Absent ERISA's express preemption provision, therefore, ERISA would never have been interpreted to occupy the field of welfare benefits regulation.

ERISA, of course, does contain an express preemption provision, and it is the Supreme Court's strained "plain meaning" construction of ERISA's preemption clause that has instigated the Court's unprecedented extension of field preemption doctrine to ERISA welfare benefit cases.²⁵ Applying a literal definition of ERISA's "relates to" language, the Supreme Court has nullified all manner of state laws with the oft-repeated observation that ERISA's preemption clause is "conspicuous for its breadth."²⁶ It is the very breadth of the preemption clause, however, that should have prompted the Supreme

23. See Fisk, *supra* note 8, at 88 (suggesting that the Supreme Court initially supported broad ERISA preemption because the Court categorized ERISA as a labor law and perceived labor law to be primarily a federal concern). See generally S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829, 887 n.279 (1992) (citing "ubiquitous" cases as illustrative of the federal government's traditional occupation of the field of labor law).

24. See *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 665 (1995) (stating that general health care regulation is historically a local concern).

25. Statutory construction labels such as "plain meaning," "textualist," and "intentionalist" often overlap depending on the definition given to such terms by various authors. See Fisk, *supra* note 8, at 39 n.19. The Supreme Court has often referred to the "plain" or "ordinary" meaning of ERISA's preemption language to justify a literal or dictionary definition of the preemption clause. See, e.g., *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983) ("We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning."). When I refer to the Supreme Court's use of the "plain meaning" statutory construction principles in this Article, I am generally referring to the Court's description of its own interpretive method without any attempt to provide a consistent use of the phrase because the Court's application of the "plain meaning" method has not been entirely consistent. My summary analysis attempts to document some of the inconsistencies in the Court's stated application of statutory construction principles. See *infra* Part V.A.

26. See *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 324 (1997) (listing similar oft-repeated observations concerning ERISA's preemption clause).

Court to conduct an interpretative examination of the statute in order to define the boundaries of the field Congress intended the legislation to occupy.²⁷

The Supreme Court's failure to interpret ERISA's preemption clause in harmony with the statute's disparate regulation of welfare benefit plans and pension plans, and in accordance with ERISA's protective purpose, has resulted in the unwarranted extension of field preemption doctrine to welfare benefit cases and has caused a troublesome regulatory void in the field of welfare benefit plan regulation.²⁸ ERISA does not comprehensively regulate nonpension employee benefits, but through super-preemption analysis, state regulation in the fields of health care, accident, and death and disability benefits is nullified to the extent consumers receive those benefits through their employment.²⁹ With the removal of state jurisdiction in these areas of traditional state regulation, the working men and women whom ERISA was designed to serve have lost virtually all of their extracontractual remedies against employers, plan sponsors and administrators, and insurers who have wrongfully denied their claims for benefits.³⁰

Recognizing ERISA's failure to protect plan participants as originally intended, courts³¹ and commentators³² have called upon Congress to amend the statute to correct its anticonsumer deficiencies.

27. ERISA's preemption clause is patently ambiguous. The "relates to" phrase is intended to provide some limit or boundary to the field of regulation occupied by ERISA, but as the Supreme Court has observed, "relates to" has no limits. See *Travelers*, 514 U.S. at 655 ("If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere.'" (alteration in original)); *Dillingham Constr.*, 519 U.S. at 335 (Scalia, J., concurring) ("But applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else."); see also discussion *infra* Part V (urging the Court to apply traditional principles of preemption).

28. See Karl Polzer & Patricia A. Butler, *Employee Health Plan Protections Under ERISA*, 16 HEALTH AFF. 93, 93-98 (1997) (discussing the regulatory void created by ERISA).

29. ERISA governs welfare benefit plans that are "established or maintained by an employer or by an employee organization." 29 U.S.C. § 1002(1) (1994).

30. See discussion *infra* Part III.B.

31. See, e.g., *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 53 (D. Mass. 1997) (citing cases in which plan participants alleging legitimate claims have been denied a remedy due to ERISA preemption).

32. See, 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) ("[I]t is up to Congress, not the courts, to narrow ERISA's preemption of state law where particular policy reasons make such action appropriate."); cf. Fisk, *supra* note 8, at 42 (suggesting that courts "will have the leading role" in resolving preemption issues).

Despite frequent discussion of the issue,³³ Congress has failed to correct abuses arising from the overbroad application of ERISA preemption.³⁴ It is, therefore, promising that the Supreme Court is rethinking its ERISA preemption analysis.

After years of wrestling with ERISA's confusing preemption language, the Supreme Court appears to be cautiously withdrawing ERISA's super-preemption status.³⁵ In a series of decisions highlighted most recently in *De Buono v. NYSA-ILA Medical & Clinical Services Fund*, the Court has rejected its previous reliance on a literal reading of the "relates to" clause to determine Congress's preemptive intent.³⁶ Justice Scalia, concurring in *California Division of Labor*

33. See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 n.16 (1985) (noting that commentators have suggested Congress amend ERISA's preemption provisions, but that a bill introduced in 1979 to protect state-mandated benefit statutes from preemption died in the Senate without being debated); Bipartisan Consensus Managed Care Improvement Act of 1999, H.R. 2723, 106th Cong. (proposing an amendment to ERISA's preemption provision that would allow plan participants and beneficiaries to sue a health plan or insurer under state law); Patients' Bill of Rights, S. 6, 106th Cong. (1999) (same); Patients' Bill of Rights, H.R. 358, 106th Cong. (1999) (same); 145 CONG. REC. 9517-9635 (1999) (debating the Bipartisan Consensus Managed Care Improvement Act of 1999, H.R. 2723, 106th Cong.).

34. Additionally, the lower federal courts have not developed common-law remedies to address unfair treatment of plan participants that falls outside the scope of ERISA's specific enforcement provisions. See William K. Carr & Robert L. Liebross, *Wrongs Without Rights: The Need for a Strong Federal Common Law of ERISA*, 4 STAN. L. & POL'Y REV. 221 (1992-1993) (arguing that the courts have the authority to develop common-law remedies under ERISA, and decrying the federal courts' failure to employ this authority for the benefit of abused plan participants).

35. It seems that the Court's criticism of the ERISA preemption language has become more severe as the Court has been increasingly called upon to deal with the language. The Court initially noted, in understated terms, that the preemption language is "not a model of legislative drafting." *Metropolitan Life*, 471 U.S. at 739. In a recent ERISA preemption case, Justice Stevens called the language "opaque" after citing the Court's long history with the statute and noting the large volume of litigation the preemption issue has spawned. See *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 808-09 (1997).

36. 520 U.S. at 813-14 ("[I]n *Travelers* we confronted directly the question whether ERISA's 'relates to' language was intended to modify 'the starting presumption that Congress does not intend to supplant state law.' We unequivocally concluded that it did not, and we acknowledged 'that our prior attempt[s] to construe the phrase 'relate to' d[fo] not give us much help drawing the line here.'" (alterations in original) (citation omitted) (quoting New York State Conference of Blue Cross & Blue Shield Plans v. *Travelers Ins. Co.*, 514 U.S. 645, 654-55 (1995))). The Supreme Court's most recent ERISA preemption decision, *UNUM Life Insurance Co. v. Ward*, 119 S. Ct. 1380 (1999), continues the current trend toward narrowing the scope of ERISA preemption by liberalizing the savings clause test. The *UNUM* opinion, however, does not significantly add to the Court's preemption clause analysis. See *infra* text accompanying notes 324-331. The Supreme Court recently granted certiorari in another ERISA benefits case, which should be decided in the spring or summer of 2000. See *Herdrich v. Pegram*, 154 F.3d 362 (7th Cir. 1998), *cert. granted*, 120 S. Ct. 10 (1999) (mem.).

Standards Enforcement v. Dillingham Construction, N.A., Inc., described his view of the Court's "new approach" to ERISA preemption:

"[W]e discern no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional pre-emption analysis." I think it accurately describes our current ERISA jurisprudence to say that we apply ordinary field pre-emption, and, of course, ordinary conflict pre-emption. Nothing more mysterious than that; and except as establishing that, "relates to" is irrelevant.³⁷

If Justice Scalia is correct in predicting the application of traditional conflict and field preemption analysis in ERISA cases, welfare plan participants should regain their lost state consumer protections.

Part I of this Article discusses modern conflict and field preemption principles that have emerged as the Supreme Court's instrument to implement legislative intent in the preemption arena. Part II reviews the history and structure of the statute to determine Congress's goals in enacting ERISA. Part III examines the early Supreme Court decisions that developed ERISA super-preemption and identifies the harsh results health care plan participants have suffered under super-preemption. Part IV explores the Supreme Court's guarded retreat from super-preemption. Finally, Part V urges the Supreme Court to return state consumer protections for welfare plan participants and their beneficiaries by accepting Justice Scalia's call for application of traditional preemption analysis in ERISA cases. Incorporating modern rules of conflict and field preemption doctrine, I conclude that the legislative history, structure, and purpose of the statute establish that Congress did not intend for ERISA to occupy the field of nonpension employee benefits regulation.

I. CONFLICT PREEMPTION AND FIELD PREEMPTION

Preemption analysis begins with the Supremacy Clause in Article VI of the United States Constitution,³⁸ which invalidates state laws that

37. 519 U.S. 316, 336 (1997) (Scalia, J., concurring) (alteration in original) (citations omitted) (quoting *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 99 (1993)).

38. Article VI states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, § 2.

“interfere with, or are contrary to the laws of Congress.”³⁹ Despite the constitutional superiority of federal law over state law, the Supreme Court has traditionally cautioned against a broad exercise of federal supremacy out of respect for the separate spheres of governmental authority preserved in our federalist system.⁴⁰ Consideration of preemption issues starts, therefore, “with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.”⁴¹

Modern doctrine recognizes two categories of preemption, conflict preemption and field preemption, which affect state law in substantially different degrees.⁴² Depending upon Congress’s perceived intent, federal law may either (1) supersede only contradictory state law (conflict preemption) or (2) exclusively “occupy the field” and nullify all state regulation of the subject (field preemption).⁴³ Under conflict preemption, states possess concurrent

39. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). Chief Justice John Marshall first addressed the relationship between federal and state law under the Supremacy Clause in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819). Though preemption analysis derives from the Constitution, preemption is not normally viewed as a constitutional issue because no specific power is granted by the Supremacy Clause. Courts prefer to view a preemption claim as “statutory” in order to avoid unnecessary constitutional adjudications. See *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 271-72 (1977); see also Hoke, *supra* note 23, at 879-84 (describing the Supremacy Clause as a rule of decision).

40. Preemption involves issues of federalism that have spawned controversy among policy makers since the enactment of the Articles of Confederation. For a summary of the debates and concerns surrounding adoption of the Supremacy Clause, see Hoke, *supra* note 23, at 856-75. For a concise history of Supreme Court preemption doctrine, see KENNETH STARR ET AL., *THE LAW OF PREEMPTION* 5-8 (1991). For scholarly comments on federalist principles affecting preemption analysis, see S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685 (1991).

41. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

42. The struggle with application of preemption rules has caused various commentators to suggest proposals to make preemption doctrine more consistent. Compare STARR ET AL., *supra* note 40, at 40-55 (urging Congress to make its preemption intentions clear in the legislation), with Fisk, *supra* note 8, at 40 (suggesting that the courts must decide preemption issues, and that Congress cannot possibly define the boundaries of a particular field), and Hoke, *supra* note 40, at 763-64 (urging that all preemption issues be viewed as a species of conflict preemption).

43. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (“[S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.” (citations omitted)); see also *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (summarizing the preemption rules); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (defining conflict preemption); *Santa Fe Elevator Corp.*, 331 U.S. at 230 (defining field preemption); Hoke,

authority with the federal government to regulate the subject area.⁴⁴ If state regulation and federal law collide, the Supremacy Clause dictates that the federal law will prevail; otherwise, states may enforce their consistent and supplemental laws in the federally regulated area.⁴⁵ Field preemption presents a more enveloping federal authority. Under the field preemption doctrine, Congress is presumed to have assumed exclusive jurisdiction to regulate the subject.⁴⁶ When federal law occupies a particular field, any state activity in the field is void, including state laws that are consistent with the federal act.⁴⁷

Courts have generally divided both conflict preemption and field preemption into two subcategories.⁴⁸ Conflict preemption applies where “compliance with both federal and state regulations is a physical impossibility,”⁴⁹ or where state regulation “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁵⁰ Field preemption arises where the scheme of federal regulation is so comprehensive as to reasonably infer that Congress “left no room” for supplementary state regulation, or where “the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”⁵¹

Preemption analysis is a species of statutory interpretation. As in all cases of statutory construction, the ultimate goal of the interpretive process is to divine and then enforce congressional intent.⁵² Conflict and field preemption rules identify specific criteria that provide some evidence of congressional intent where courts must infer the intended relationship between state and federal law from the structure and purpose of the federal act.⁵³ Occasionally, Congress provides direct

supra note 40, at 731-50 (describing the types of preemption currently recognized by the Supreme Court).

44. See *Santa Fe Elevator Corp.*, 331 U.S. at 229-31.

45. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211, 239 (1824).

46. See *Santa Fe Elevator Corp.*, 331 U.S. at 229-31.

47. Under field preemption, it may be said that the states are without jurisdiction to legislate in the occupied field. See Gardbaum, *supra* note 22, at 771-75.

48. See Hoke, *supra* note 40, at 731-52 (discussing the Supreme Court’s inconsistent categorization of preemption doctrine).

49. *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).

50. *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

51. *Id.* (quoting *Santa Fe Elevator Corp.*, 331 U.S. at 230).

52. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987) (stating that “the purpose of Congress is the ultimate touchstone” to guide courts in evaluating whether a federal statute supersedes state or local regulation (internal quotations omitted) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985))); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983) (“In deciding whether a federal law pre-empts a state statute, our task is to ascertain Congress’ intent in enacting the federal statute at issue.”).

53. See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

evidence of its preemptive intentions by including express preemption instructions within a statute. Whether preemption is express or implied, however, the question of federal supremacy over state or local regulation still depends on Congress's intent in enacting the federal legislation.⁵⁴

Where a statute contains an express preemption provision, the search for Congress's preemptive intent begins, of course, with the text of the preemption language.⁵⁵ Preemption instructions, however, do not provide substantive content in a statute and do not identify a statute's overall purposes. Preemption provisions exist to serve the greater legislation. Consequently, a statute's express preemption language should not be considered in a vacuum, as if the intent to preempt were independent from the intent of the legislation, but should be interpreted to preserve harmony with the object and policy of the statute and to serve the overall purposes of the legislation.⁵⁶ If we assume, then, that Congress intended ERISA's preemption clauses to advance the goals of the greater legislation, it is necessary to identify the statute's overall purposes in order to determine the intended scope of ERISA preemption.⁵⁷

II. CONGRESS'S GOALS IN ADOPTING ERISA

More than four centuries ago, the famed jurist, Lord Coke, summarized the pertinent criteria for courts to evaluate when construing a statute to divine the true intent of its makers.⁵⁸ Four things, said Lord Coke, should be discerned and considered:

- [1] What was the common law before the making of the Act[?]
- [2] What was the mischief and defect for which the common law did not provide[?]
- [3] What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth[?] [and]

54. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 533 (1992) (Blackmun, J., concurring) ("The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously.").

55. See *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) ("Since pre-emption claims turn on Congress's intent, we begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs." (citations omitted)).

56. See *infra* text accompanying notes 343-352.

57. See generally 2A NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 45.09, at 42-44 (5th ed. 1992) (discussing legislative purpose as a tool of statutory construction).

58. See *Heydon's Case*, 76 Eng. Rep. 637, 638 (K.B. 1584).

[4] The true reason of the remedy.⁵⁹

Lord Coke's inquiries continue to define the criteria courts should consider when interpreting a statute to arrive at the intent of the legislature. In ERISA, Congress conveniently documents its intentions by addressing all of Lord Coke's interrogatories in the statute's legislative history⁶⁰ and then confirms the purpose of the legislation in both the preamble to the statute and in the structure of the Act.⁶¹

A. *ERISA's Legislative History Establishes that Congress Adopted ERISA to Reform the Private Pension Industry*

ERISA's legislative history is uncommonly thorough in documenting Congress's purposes and goals, probably because various committees and authorities of both the legislative and executive branches had studied the pension industry for more than a decade before the ninety-third Congress finally enacted the statute.⁶² A review of ERISA's legislative history discloses the specific deficiencies in the law that presented the need for reform and Congress's well-considered plan to cure the deficiencies with a comprehensive and coordinated piece of legislation. To the extent that the scope of ERISA preemption depends upon Congress's overall intent, ERISA's legislative history informs us that Congress adopted ERISA to comprehensively reform the private pension industry.⁶³ Importantly, the legislative history also tells us that Congress did not

59. *Id.*

60. A selected history of ERISA, beginning in January 1973 with the introduction of House Bill 2, H.R. 2, 93d Cong. (1973), and Senate Bill 4, S. 4, 93d Cong. (1973), the bills which ultimately formed the basis of the final legislation, is compiled in a three-volume committee print. See SUBCOMMITTEE ON LABOR OF THE SENATE COMM. ON LABOR AND PUB. WELFARE, 94TH CONG., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (Comm. Print 1976) [hereinafter LEGISLATIVE HISTORY]. For a detailed summary of the social and political forces that contributed to ERISA's enactment, including a summary of legislative efforts in the field of pension benefits prior to 1973, see SPECIAL COMM. ON AGING, U.S. SENATE, 98TH CONG., THE EMPLOYMENT RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE 1-25 (Comm. Print 1984) [hereinafter THE FIRST DECADE].

61. See, e.g., 29 U.S.C. § 1001(a) (1994) (containing congressional findings and a declaration of policy).

62. See S. REP. NO. 93-127, at 5-8 (1973), reprinted in 1974 U.S.C.C.A.N. 4838, 4842-45, and in 1 LEGISLATIVE HISTORY, *supra* note 60, at 591-94; see also THE FIRST DECADE, *supra* note 60, at 6-8 (tracing congressional interest in pension plans to the 1950s).

63. See S. REP. NO. 93-127, at 1, reprinted in 1974 U.S.C.C.A.N. at 4838, and in 1 LEGISLATIVE HISTORY, *supra* note 60, at 587.

intend to dominate the field of nonpension employee benefits with the passage of the legislation.⁶⁴

Congress described the development of the private pension industry, and the minimal regulation of the industry prior to ERISA, as a factual predicate to support the legislation.⁶⁵ The American Express Corporation established the first employee pension plan in this country in 1875.⁶⁶ Growth within the industry, however, proceeded slowly until the economic and social upheavals of the Great Depression and World War II⁶⁷ combined to help fuel a phenomenal rise in the number of employees covered under private pensions from 1940 through the 1950s.⁶⁸ The industry then continued to expand throughout the 1960s

64. See *infra* notes 120-123 and accompanying text.

65. See S. REP. NO. 93-127, at 2-7, reprinted in 1974 U.S.C.C.A.N. at 4839-43, and in 1 LEGISLATIVE HISTORY, *supra* note 60, at 587-93; H.R. REP. NO. 93-533, at 2-5 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4640-43, and in 2 LEGISLATIVE HISTORY, *supra* note 60, at 2349-52; 120 CONG. REC. 29,933-35 (1974), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 60, at 4746-51 (statement of Sen. Javits).

66. See 120 CONG. REC. 4778-79 (1974), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 60, at 3587 (statement of Rep. Badillo); Hutchinson & Ifshin, *supra* note 32, at 24 n.5.

67. The Depression prompted heightened concern for retirement security among American workers. Congress responded to those concerns with the passage of the Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended at 42 U.S.C. §§ 301-1397 (1994)), and the Railroad Retirement Act of 1937, Pub. L. No. 74-162, 50 Stat. 307 (codified as amended at 45 U.S.C. § 231 (1994)). Wage freezes imposed during World War II and the Korean conflict then contributed to the rapid growth of the pension industry as private employers frequently offered deferred compensation plans in lieu of wage increases as a means to avoid the freeze restrictions and still attract needed workers. See S. REP. NO. 93-127, at 2-7, reprinted in 1974 U.S.C.C.A.N. at 4839-43, and in 1 LEGISLATIVE HISTORY, *supra* note 60, at 588-93; H.R. REP. NO. 93-533, at 2-5, reprinted in 1974 U.S.C.C.A.N. at 4640-43, and in 2 LEGISLATIVE HISTORY, *supra* note 60, at 2349-52; 120 CONG. REC. 29,933-35 (1974), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 60, at 4746-51 (statement of Sen. Javits). Tax benefits provided a further significant incentive for employers to offer pension plans to their employees because ordinary and excess profits tax rates on corporations were extremely high during the war years. Corporate contributions to qualified pension plans were deductible and the investment income earned by pension trusts was tax exempt. See THE FIRST DECADE, *supra* note 60, at 2-3; Hutchinson & Ifshin, *supra* note 32, at 26-27 (citing tax provisions).

Growth in the private pension industry received another boost in 1948 when the United States Court of Appeals for the Seventh Circuit held that pensions were a form of remuneration for labor within the terms of the National Labor Relations Act, 29 U.S.C. §§ 141-187 (1994), and therefore, were subject to the collective bargaining process. See *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *aff'd sub nom.* *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950); see also S. REP. NO. 93-127, at 3, reprinted in 1974 U.S.C.C.A.N. at 4839-40, and in 1 LEGISLATIVE HISTORY, *supra* note 60, at 589 (noting that the *Inland Steel* decision "paved the way" for the extension of pension benefits to union members); THE FIRST DECADE, *supra* note 60, at 2-5 (describing the role of organized labor in the growth of the private pension industry).

68. The number of employees covered under private pension plans more than doubled from 1940 (approximately 4 million) to 1950 (approximately 9.8 million), and more than doubled again by 1960 (over 21 million). See S. REP. NO. 93-127, at 3, reprinted in 1974 U.S.C.C.A.N. at 4839-40, and in 1 LEGISLATIVE HISTORY, *supra* note 60, at 589.

as expectations for retirement security blossomed among American workers.⁶⁹

The prodigious growth of the pension industry proceeded largely without government oversight.⁷⁰ Not surprisingly, as the amount of unregulated money in the hands of plan managers grew throughout the 1940s and the 1950s,⁷¹ reports of abuses in the administration and investment of pension plan assets escalated.⁷² In addition, policy makers suspected that the sheer amount of unregulated money controlled by pension funds was adversely influencing the operation of capital markets and fundamental elements of the nation's economic security, including the level of consumer savings.⁷³ Senator Jacob Javits summarized Congress's fears regarding the economic impact of the increasingly wealthy private pension funds when he stated:

The private pension system itself has grown like "topsy" to the point where it covers an estimated 30 to 35 million workers—nearly half the Nation's work force. The assets of private plans, estimated to be in excess of \$160 billion, constitute the largest private accumulation of resources which have avoided the imprint of effective governmental supervision.

The absence of any supervision over these funds and the lack of minimum standards to safeguard the interests of plan participants and beneficiaries has over the years led to widespread complaints signaling the need for remedial legislation.⁷⁴

In 1954, President Eisenhower asked Congress to study the management of employee benefit plan funds covered under collective bargaining agreements with a view to enacting legislation to protect

69. See *id.* (reporting that in 1973 over 30 million workers participated in some form of private pension plan).

70. See *id.* at 4, reprinted in 1974 U.S.C.C.A.N. at 4840, and in 1 LEGISLATIVE HISTORY, *supra* note 60, at 590 (describing previous regulation as minimal and ineffectual).

71. The total estimated assets held by pension plans increased from \$2.4 billion in 1940 to \$150 billion in 1973. See H.R. REP. NO. 93-533, at 3, reprinted in 1974 U.S.C.C.A.N. at 4641, and in 2 LEGISLATIVE HISTORY, *supra* note 60, at 2350; THE FIRST DECADE, *supra* note 60, at 5; Hutchinson & Ifshin, *supra* note 32, at 24.

72. See THE FIRST DECADE, *supra* note 60, at 6 n.22 (citing congressional hearings on abuse in pension plan administrations); see also David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. PITT. L. REV. 427, 443-45 (1987) (referring to the many abuses in employee pension plans listed in ERISA's legislative history).

73. The House Committee on Education and Labor reported that the phenomenal expansion in the number of workers covered under private pension plans "has been matched by an even more startling accumulation of assets to back the benefit structure." H.R. REP. NO. 93-533, at 3, reprinted in 1974 U.S.C.C.A.N. at 4641, and in 2 LEGISLATIVE HISTORY, *supra* note 60, at 2350.

74. 120 CONG. REC. 29,934 (1974), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 60, at 4748 (statement of Sen. Javits).

and conserve such funds.⁷⁵ Over the next four years, Congress observed numerous problems resulting from the lack of regulation of private pension funds, including widespread evidence of kickbacks, embezzlement, and mismanagement.⁷⁶ Despite these abuses, however, Congress concluded that the most serious weakness threatening consumers in the private pension industry was the common industry practice of preventing plan participants from fairly evaluating the economic security of their retirement plans by withholding information on pension plan assets and management practices.⁷⁷ In 1958, in an effort to guarantee workers' access to the financial information they needed to police the management and investment practices of their pension funds,⁷⁸ Congress enacted the Welfare and Pension Plans Disclosure Act (WPPDA), the first federal legislation specifically designed to exercise regulatory control over employee pension and welfare plans.⁷⁹

75. See *Malone v. White Motor Corp.*, 435 U.S. 497, 506 n.8 (1978) (plurality opinion) (quoting a portion of the President's message to Congress).

76. See S. REP. NO. 85-1440, at 2-11 (1958), *reprinted in* 1958 U.S.C.C.A.N. 4137, 4137-47. A special subcommittee of the Senate Committee on Labor and Public Welfare, chaired initially by Senator Irving Ives and subsequently by Senator Paul Douglas, conducted broad studies of welfare and pension plans in the mid 1950s. See *id.* at 2-4, *reprinted in* 1958 U.S.C.C.A.N. at 4137-39. The Ives/Douglas Senate subcommittee found that the rapid unregulated growth of the private pension industry had led to numerous abuses ranging from incompetent management of pension funds to outright looting, embezzlement, and kickbacks. See *id.* Additionally, unjustifiably high administrative costs, excessive investment of funds in employer securities, and improper insurance practices were identified as abusive conduct in the private pension industry, suggesting a need for legislative reform. See *id.*; THE FIRST DECADE, *supra* note 60, at 6 n.23.

77. See S. REP. NO. 85-1440, at 12, *reprinted in* 1958 U.S.C.C.A.N. at 4148 ("The most serious single weakness in this private social insurance complex is not in the abuses and failings enumerated above. Overshadowing these is the too frequent practice of withholding from those most directly affected, the employee-beneficiaries, information which will permit them to determine (1) whether the program is being administered efficiently and equitably, and (2) more importantly, whether or not the assets and prospective income of the programs are sufficient to guarantee the benefits which have been promised to them.")

78. See S. REP. NO. 93-127, at 4 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4840-41, and in 1 LEGISLATIVE HISTORY, *supra* note 60, at 590; H.R. REP. NO. 93-533, at 11, *reprinted in* 1974 U.S.C.C.A.N. at 4639, and in 2 LEGISLATIVE HISTORY, *supra* note 60, at 2358.

79. Pub. L. No. 85-836, 72 Stat. 997 (1958) (repealed 1974). Congress subsequently repealed the WPPDA and replaced it with ERISA. Prior to the enactment of the WPPDA, the Internal Revenue Code affected the administration of plans indirectly by authorizing the Internal Revenue Service to grant or withhold "qualified" status to plans which status dictated whether or not the plan received beneficial tax treatment. See *Hutchinson & Ifshin*, *supra* note 32, at 26-27. Additionally, the Labor-Management Relations Act, Pub. L. No. 80-101, § 302, 61 Stat. 157-58 (codified as amended at 29 U.S.C. § 186), provided guidelines for the establishment and operation of pension funds administered jointly by an employer and a union. However, it did not provide standards for the preservation of vested benefits, funding adequacy, security of investments, or fiduciary conduct. See *id.*; see also 120 CONG. REC.

Considering its role in the development of employee benefits regulation, the WPPDA is more significant for its lack of substantive regulatory controls than it is for guaranteeing plan participants the right to obtain some helpful information about their plans.⁸⁰ Congress designed the WPPDA as a disclosure statute; consequently, it did not prescribe funding rules or participation requirements for employee benefit plans, nor did it detail the fiduciary responsibilities of fund administrators or regulate employee benefit plans in any comprehensive manner.⁸¹ Each of the committees that reported to Congress on why abuses persisted in the private pension industry after enactment of the WPPDA found that the WPPDA failed to protect the American workers' reasonable expectations for retirement security due to the statute's lack of substantive regulatory controls.⁸²

Four years after Congress enacted the WPPDA, President Kennedy appointed a special cabinet-level task force to assess the financial impact of private retirement programs on the nation's economy and to determine why workers in private pension plans continued to lose anticipated retirement benefits.⁸³ Following a three-year investigation, the President's Committee on Corporate Pension Funds and Other Private Retirement and Welfare Programs (the

4281 (1974), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 60, at 3377 (statement of Rep. Gaydos) (discussing federal laws pertaining to pension plans).

80. The WPPDA required plan administrators to file annual reports with the Secretary of Labor and to provide a description of the plan and a copy of the annual report to plan participants upon written request. *See* H.R. REP. NO. 93-533, at 4, *reprinted in* 1974 U.S.C.C.A.N. at 4642, *and in* 2 LEGISLATIVE HISTORY, *supra* note 60, at 2351. It was expected that giving plan participants access to financial information would enable them to police their plans. *See id.*

81. *See* *Malone v. White Motor Corp.*, 435 U.S. 497, 507 (1978) (plurality opinion) (“[T]he legislation proposed is not a regulatory statute. It is a disclosure statute and by design endeavors to leave regulatory responsibility to the States.” (alteration in original) (quoting S. REP. NO. 85-1440, at 18 (1958))).

82. *See* S. REP. NO. 93-127, at 4, *reprinted in* 1974 U.S.C.C.A.N. at 4841, *and in* 1 LEGISLATIVE HISTORY, *supra* note 60, at 590 (“Experience . . . has demonstrated the inadequacy of the Welfare and Pension Plans Disclosure Act in regulating the private pension system for the purpose of protecting rights and benefits due to workers. It is weak in its limited disclosure requirements and wholly lacking in substantive fiduciary standards. Its chief procedural weakness can be found in its reliance upon the initiative of the individual employee to police the management of his plan.”); H.R. REP. NO. 93-533, at 4, *reprinted in* 1974 U.S.C.C.A.N. at 4642, *and in* 2 LEGISLATIVE HISTORY, *supra* note 60, at 2351 (reciting the same language).

83. *See* 120 CONG. REC. 29,934 (1974), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 60, at 4748 (statement of Sen. Javits). President Kennedy had previously served as a member of the Senate Labor and Public Welfare Committee and had played a key role in the development of both the WPPDA and the union reform law known as the Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. §§ 401-531 (1994) and in scattered sections of 29 U.S.C.). *See* THE FIRST DECADE, *supra* note 60, at 7-8.

Cabinet Committee) concluded that private pension plans should continue to receive tax incentives to promote the industry, but that regulation was necessary to improve the financial soundness and equitable character of the plans.⁸⁴ The Cabinet Committee recommended comprehensive federal legislation to impose mandatory minimum vesting⁸⁵ and funding⁸⁶ requirements on private pension plans. Additionally, the Cabinet Committee urged further study of proposals for pension plan portability⁸⁷ and pension plan termination insurance.⁸⁸

84. See PRESIDENT'S COMM. ON CORPORATE PENSION FUNDS AND OTHER PRIVATE RETIREMENT AND WELFARE PROGRAMS, PUBLIC POLICY AND PRIVATE PENSION PROGRAMS: A REPORT TO THE PRESIDENT ON PRIVATE EMPLOYEE RETIREMENT PLANS at vii-viii (1965) [hereinafter COMMITTEE REPORT]; see also THE FIRST DECADE, *supra* note 60, at 8-10 (describing the formation of the committee and its findings).

85. See COMMITTEE REPORT, *supra* note 84, at 42-46. Vesting occurs when an employee receives a nonforfeitable right to the money contributed to a defined benefit pension plan on his behalf. See S. REP. NO. 93-127, at 8-9, *reprinted in* 1974 U.S.C.C.A.N. at 4844-45, and in 1 LEGISLATIVE HISTORY, *supra* note 60, at 594. Typically, incremental payments are made to a retirement fund on behalf of the employee from the time the employee begins to work for a specific employer. See *id.* Prior to ERISA, the employee's right to receive such benefits would often be forfeited if the employee did not work for that same employer for a specified number of years or if the employee left work before reaching a specified age. See *id.*

86. See COMMITTEE REPORT, *supra* note 84, at 51-54. Funding refers to the accumulation of sufficient assets in a pension plan to assure the availability of funds for payment of benefits due to the employees as such obligations arise. See S. REP. NO. 93-127, at 9-10, *reprinted in* 1974 U.S.C.C.A.N. at 4845-46, and in 1 LEGISLATIVE HISTORY, *supra* note 60, at 595-96. Proper funding of pension obligations is always a concern because a pension is a promise to pay benefits in the future. Unless a secure, separate fund is established with enough assets to pay anticipated future obligations, there is a risk that no money will be available to pay the promised benefits when they become due. For example, if an employer plans to pay employee retirement benefits out of operating capital, but becomes insolvent or goes out of business for some reason, employees with claims for future benefits may have no source of money to satisfy their claims. A separate, but undercapitalized, fund poses similar risks. Additionally, even if an adequately capitalized separate fund is established, the fund may not be secure if the employer can borrow from the fund without restrictions, if the fund is not managed wisely, or if it is the subject of fraudulent financial dealings. See *id.*

87. See COMMITTEE REPORT, *supra* note 84, at 55-57. Portability refers to the process by which an employee is permitted to transfer his earned vested pension rights from job to job and at the end of his career be able to convert all such credits into a final benefit amount reflecting all of his prior service. See S. REP. NO. 93-127, at 10-11, *reprinted in* 1974 U.S.C.C.A.N. at 4847, and in 1 LEGISLATIVE HISTORY, *supra* note 60, at 596-97.

88. See COMMITTEE REPORT, *supra* note 84, at 57-58; see also 119 CONG. REC. 145 (1973), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 60, at 205 (statement of Sen. Javits) (speaking in support of pension and welfare reform legislation). See generally THE FIRST DECADE, *supra* note 60, at 6-10 (summarizing the political atmosphere and events influencing the Cabinet Committee and describing the shift to legislative efforts at pension reform following tepid reception of the Cabinet Committee recommendations by both business and labor).

Incorporating many of the Cabinet Committee's proposals, Senator Jacob Javits introduced federal legislation in 1967 to reform the pension industry by imposing substantive funding and participation regulations on pension plans.⁸⁹ Senator Javits' bill was not immediately adopted, but his continued efforts, along with the efforts of other leading policy makers, prompted Congress to embark on its own exhaustive study of the pension plan industry, which ultimately led to the adoption of ERISA.⁹⁰

In 1970, Congress delegated the task of investigating the pension industry to the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (the Subcommittee), chaired by Senator Harrison A. Williams, Jr.⁹¹ The Subcommittee conducted hearings in cities throughout the nation where victimized workers recounted heartbreaking stories of the loss of anticipated retirement benefits due to termination of inadequately funded pension plans, unreasonable participation and vesting requirements, and mismanagement of pension plan assets.⁹² The Subcommittee investigation confirmed the findings of President Kennedy's Cabinet Committee and, like the Cabinet Committee, recommended comprehensive federal legislation to reform the practices of the nation's private pension plans.⁹³

89. See 113 CONG. REC. 4650-53 (1967) (statement of Sen. Javits); see also 120 CONG. REC. 29,933-34 (1974), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 60, at 4748 (statement of Sen. Javits) (recounting his continued efforts to reform the private pension and welfare system). Senator Javits is known as the "father of ERISA." For insights into Senator Javits' crusade to affect pension reform, see THE FIRST DECADE, *supra* note 60, at 1-25, and Michael S. Gordon, *ERISA, ESOPs, and Senator Javits: The Mind of a Reformer*, 7 AM. J. TAX POL'Y 3 (1988).

90. See Harrison A. Williams, Jr., *Foreword to 1 LEGISLATIVE HISTORY*, *supra* note 60, at iii; see also 119 CONG. REC. 130 (1973), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 60, at 90-92 (statement of Sen. Williams); 119 CONG. REC. 145-47, reprinted in 1 LEGISLATIVE HISTORY, *supra* note 60, at 205-06 (statement of Sen. Javits).

91. Senate Resolution 360 authorized the initial study by the Subcommittee. See S. REP. NO. 92-634, at 1 (1972); see also 119 CONG. REC. 30,003 (1973), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 60, at 1598 (statement of Sen. Williams) ("This 3-year study was conducted by the Subcommittee on Labor pursuant to three successive resolutions of the Senate, and was undertaken to ascertain the need for statutory protections for workers' pension programs and to formulate appropriate corrective legislation.").

92. See H.R. REP. NO. 93-533, at 5-8 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4643-46, and in 2 LEGISLATIVE HISTORY, *supra* note 60, at 2355.

93. See 120 CONG. REC. 29,935-44 (1974), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 60, at 4748 (statement of Sen. Javits). Specifically, the Subcommittee recommended legislation to remedy the problems of oppressive vesting requirements and restrictions on portability that penalized employees for changing jobs; inadequately capitalized pension plans that were often terminated without the necessary funds to pay the plans' ongoing pension obligations; the lack of plan termination insurance; the lack of uniform fiduciary standards to protect against fraud, conflicts of interest, and mismanagement of pension plan assets; and inadequate reporting and disclosure standards.

Supported by the work of the Subcommittee, and now joined by Senator Williams, Senator Javits continued his efforts to reform the private pension industry when he introduced Senate Bill 4, the Senate version of what would become ERISA, on January 4, 1973.⁹⁴ Representative John Dent introduced the House version of ERISA at the same time.⁹⁵ The bills were referred to the Senate Committee on Labor and Public Welfare (the Senate Committee) and to the House Committee on Education and Labor (the House Committee), respectively, for debate and refinement.⁹⁶

The reports of the House Committee and the Senate Committee each detail Congress's concern with the abuses in the private pension industry documented by the Subcommittee's investigation as the basis for enacting ERISA.⁹⁷ The House Committee report describes the purposes of House Bill 2, the bill that would become ERISA as follows:

The Employment Benefit Security Act is designed (1) to establish minimum standards of fiduciary conduct for Trustees, Administrators and others dealing with retirement plans, to provide for their enforcement through civil and criminal sanctions, to require adequate public disclosure of the plan's administrative and financial affairs, and (2) to improve the equitable character and soundness of private pension plans by requiring them to: (a) vest the accrued benefits of employees with significant periods of service with an employer, (b) meet minimum

See 119 CONG. REC. 30,003-10 (1973), *reprinted* in 2 LEGISLATIVE HISTORY, *supra* note 60, at 1601-10 (statement of Sens. Williams and Ribicoff).

94. S. 4, 93d Cong. (1973); *see* S. REP. NO. 93-127 (1973), at 1, *reprinted* in 1974 U.S.C.C.A.N. 4838, 4838, *and in* 1 LEGISLATIVE HISTORY, *supra* note 60, at 587 ("The purpose of S. 4 is to prescribe legislative remedies for the various deficiencies existing in the private pension plan systems which have been determined by the Senate Subcommittee's comprehensive study of such plans.")

95. *See* H.R. 2, 93d Cong. (1973), *reprinted* in 1 LEGISLATIVE HISTORY, *supra* note 60, at 3.

96. The Senate Finance Committee and the House Ways and Means Committee also contributed to the legislation. *See* S. REP. NO. 93-383 (1973), *reprinted* in 1974 U.S.C.C.A.N. 4890, *and in* 1 LEGISLATIVE HISTORY, *supra* note 60, at 1069; H.R. REP. NO. 93-779 (1974), *reprinted* in 2 LEGISLATIVE HISTORY, *supra* note 60, at 2590. Differences in the House bill and the Senate bill were reconciled by the Conference Committee and the final version of the statute was signed into law on Labor Day 1974 by President Gerald Ford. *See* H.R. REP. NO. 93-1280 (1974), *reprinted* in 1974 U.S.C.C.A.N. 5038, *and in* 3 LEGISLATIVE HISTORY, *supra* note 60, at 4277; Remarks on Signing the Employee Retirement Income Security Act of 1974, 1974 PUB. PAPERS 76, 76-77 (Sept. 2, 1974), *reprinted* in 3 LEGISLATIVE HISTORY, *supra* note 60, at 5321-33.

97. *See* S. REP. NO. 93-127, at 1-36, *reprinted* in 1974 U.S.C.C.A.N. at 4838-89, *and in* 1 LEGISLATIVE HISTORY, *supra* note 60, at 587-622; H.R. REP. NO. 93-533, at 1-28, *reprinted* in 1974 U.S.C.C.A.N. at 4639-70, *and in* 2 LEGISLATIVE HISTORY, *supra* note 60, at 2348-75; 120 CONG. REC. 29,933-35 (1974), *reprinted* in 3 LEGISLATIVE HISTORY, *supra* note 60, at 4746-51 (statement of Sen. Javits).

standards of funding and (c) guarantee the adequacy of the plan's assets against the risk of plan termination prior to completion of the normal funding cycle by insuring the unfunded portion of the benefits promised.⁹⁸

Similarly, the report of the Senate Committee states that "[t]he principal issues affecting the vital and basic needs for legislative reform involve consideration of the essential elements of pensions": (1) "vesting," (2) "funding," (3) "reinsurance," (4) "portability" and (5) "fiduciary responsibility and disclosure."⁹⁹

Clearly, Congress intended ERISA to reform the private pension industry. ERISA's legislative history documents a long and thorough investigation of consumer abuses in the private pension industry as the basis for the legislation.¹⁰⁰ Additionally, the legislative history discloses a consistent concern among lawmakers with the lack of regulation over the accumulated wealth of pension plan funds.¹⁰¹ Given ERISA's broad preemption of state laws related to all employee benefit plans, ERISA's legislative history is remarkable, however, for what it does not contain. ERISA's legislative history provides no evidence that Congress seriously investigated, studied, or debated any issues or concerns with nonpension employee benefit plans.¹⁰²

98. H.R. REP. NO. 93-533, at 17-18, *reprinted in* 1974 U.S.C.C.A.N. at 4655-56, and in 2 LEGISLATIVE HISTORY, *supra* note 60, at 2364-65.

99. S. REP. NO. 93-127, at 8-11, *reprinted in* 1974 U.S.C.C.A.N. at 4844-77, and in 1 LEGISLATIVE HISTORY, *supra* note 60, at 594-97 (emphasis omitted). The Report of the House Ways and Means Committee states:

This legislation is concerned with improving the fairness and effectiveness of qualified retirement plans in their vital role of providing retirement income. In broad outline, the objective is to increase the number of individuals participating in employer-financed plans; to make sure to the greatest extent possible that those who do participate in such plans actually receive benefits and do not lose their benefits as a result of unduly restrictive forfeiture provisions or failure of the pension plan to accumulate and retain sufficient funds to meet its obligations; and to make the tax laws relating to qualified retirement plans fairer by providing greater equality of treatment under such plans for the different taxpayer groups concerned.

H.R. REP. NO. 807, at 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4676-77.

100. *See* LEGISLATIVE HISTORY, *supra* note 60.

101. *See id.*

102. It is significant that President Kennedy's Cabinet Committee, which Senator Javits relied upon heavily in presenting his 1967 pension reform bill, purposely did not investigate or consider any possible reforms of nonpension employee benefit plans. *See* COMMITTEE REPORT, *supra* note 84, at iv ("Although the area of investigation assigned to the Committee included welfare plans as well as retirement programs, the President's memorandum specifically raised questions about issues which arise primarily from retirement plans. Other types of welfare plans, such as health and insurance plans, make important contributions to the economic security of American workers; they do not, however, have the impact of pension plans on accumulation of savings, labor mobility, and similar

B. ERISA Comprehensively Regulates Pension Plans, but Does Not Provide Any Substantive Regulation of Welfare Plans

The Supreme Court has often referred to ERISA as a “comprehensive and reticulated statute.”¹⁰³ That language, however, arose in the context of a pension plan case and does not accurately describe the structure of ERISA’s regulation of welfare plans.¹⁰⁴ While it is true that portions of ERISA apply to nonpension benefit plans, the statute certainly does not provide a complete and coordinated network of rules to govern nonpension employee benefits.

ERISA comprises four titles. Title I contains both general provisions and a complex body of specific rules governing employee benefit plans.¹⁰⁵ Title II amends the Internal Revenue Code to implement ERISA’s tax incentives and covers self-employed pension plans, including Keogh plans, individual retirement accounts, individual retirement annuities, and simplified employee pensions.¹⁰⁶ Title III describes the jurisdiction of federal government agencies (the U.S. Department of Labor and the U.S. Department of the Treasury) over ERISA plans.¹⁰⁷ Finally, Title IV creates the Pension Benefit Guaranty Corporation to provide a type of termination insurance for pension plans.¹⁰⁸

Subtitle B of Title I contains ERISA’s specific regulatory provisions governing covered employee benefit plans¹⁰⁹ and is divided

matters touched upon by the President. Consequently, the Committee has confined its efforts to an inquiry into private employee retirement plans (i.e., excluding plans for self-employed persons) without any extensive study of other types of welfare plans.”)

103. See, e.g., *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980).

104. See *Nachman*, 446 U.S. at 361. In *Nachman*, the Court briefly described ERISA’s various titles as evidence of ERISA’s extensive and coordinated regulation, but the Court did not differentiate between ERISA provisions that apply only to pension plans and those that apply to welfare plans. See *id.*

105. See Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (1994) and in scattered sections of 26 U.S.C.). For instance, ERISA sets statutory minimums and maximums on the amounts that an employer may contribute annually to certain types of benefit plans. See 29 U.S.C. § 1082. Minimums help ensure that the fund has enough assets to cover its operating costs and liabilities. Maximum funding requirements protect against abuse of the tax advantages of ERISA.

106. See Employee Retirement Income Security Act of 1974, §§ 1001-2008, 88 Stat. at 898-994 (codified as amended in scattered sections of 26 U.S.C.).

107. See *id.* §§ 3001-3043, 88 Stat. at 995-1003 (codified as amended at 29 U.S.C. §§ 1201-1242 and in scattered sections of 26 U.S.C.).

108. See *id.* §§ 4001-4082, 88 Stat. at 1003-34 (codified as amended at 29 U.S.C. §§ 1301-1309, 1321-1348, 1361-1369 and in scattered sections of 26 U.S.C.).

109. ERISA divides Title I into Subtitle A (General Provisions) and Subtitle B (Regulatory Provisions). The General Provisions include ERISA’s preamble findings and declarations of policy, see 29 U.S.C. § 1001, definitions, see *id.* § 1002, and descriptions of

into five parts. Part 1 describes the information that plans must supply to government regulators and to plan participants.¹¹⁰ Part 2 establishes participation requirements for pension plans, including minimum standards dictating employee eligibility for plan coverage, and sets minimum time periods within which benefits must become nonforfeitable.¹¹¹ Part 3 imposes detailed requirements for defined benefit pension plans to establish the rates at which employers must fund plans to ensure that there are assets sufficient to meet benefit obligations.¹¹² Part 4 requires that plan assets be held in trust or in the form of insurance contracts and describes specific duties imposed on fiduciaries to safeguard the integrity of plan assets.¹¹³ Finally, part 5 of Title I, Subtitle B, provides criminal and civil enforcement provisions and also contains ERISA's preemption language.¹¹⁴

For the purpose of identifying Congress's preemptive intentions when it enacted ERISA, it is important to emphasize that the major

ERISA's coverage, *see id.* § 1003. The primary exceptions to ERISA's coverage of employment-provided fringe benefit programs are government plans and church-sponsored plans. *See id.* § 1003(b).

110. *See id.* §§ 1021-1031. Fund administrators are required to provide each participant and each beneficiary with a summary description of their plan written in language understandable by the average participant, *see id.* § 1022(a), and to make available a copy of the plan's annual report, *see id.* § 1023(a)(1)(A).

111. *See id.* §§ 1051-1061 (1994). A nonforfeitable claim "means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." *Id.* § 1002(19). Rather than imposing mandatory pension levels or methods for calculating benefits, ERISA sets outer bounds on permissible accrual practices, *see id.* § 1054(b)(1), and specifies three alternative schedules for the vesting of pension rights, *see id.* § 1053(a)(2). These provisions together assure a legally enforceable claim to 100% of the pension benefits created under a covered plan for those employees who have completed 15 years of service and for those employees aged 45 or older who have completed 10 years of service. Pension plans qualifying for advantageous tax treatment must ensure nonforfeiture of all accrued benefits derived from employee contributions and must use vesting and accrual rates assuring that portions of the benefits derived from the employer contributions benefit the employee should the employee leave the job before normal retirement age. *See id.* § 1053(a)(1)-(2); *see also* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 512-14 (1981) (discussing ERISA regulation of pension accrual practices).

112. *See* 29 U.S.C. §§ 1062-1086 (1994).

113. *See id.* §§ 1101-1114. Part 4 requires that the plan be in writing, sets rules for the allocation of fiduciary responsibility, describes liabilities that can be imposed on fiduciaries for breaches, describes limitations on plan-related business activities by parties-in-interest, dictates that plan assets be held exclusively for the benefit of employees, establishes a "prudent man" standard for fund administrators, and lists specific prohibited transactions. *See id.*

114. *See id.* §§ 1131-1144. Additionally, part 5 provides general guidelines governing claims procedures and gives the Secretary of Labor broad investigative powers and authority to promulgate regulations. *See id.* §§ 1133-1135; *see also* Wadsworth v. Whaland, 562 F.2d 70, 74 (1st Cir. 1977) (summarizing part 5 of Title I, Subtitle B of ERISA).

substantive protections established in the statute apply only to pension plans. ERISA's funding rules establish minimum capitalization requirements for pension plans to protect against plan insolvency; however, the funding rules do not apply to welfare plans. The funding of welfare plans is not regulated by ERISA.¹¹⁵ Additionally, while ERISA contains specific participation and vesting requirements for pension plans to assure that employees are not unreasonably denied their earned retirement benefits, ERISA does not establish any such rules for welfare plans.¹¹⁶ Finally, the program of termination insurance established in Title IV of ERISA protects only pension plan participants. Title IV does not apply to welfare plans,¹¹⁷ and ERISA does not establish any comparable program to protect welfare plan participants from plan insolvency.¹¹⁸

Congress declared its purpose in adopting ERISA and made specific findings to support the legislation in the statute's preamble. Congress found

that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; . . . that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries . . . that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; . . . that despite the enormous growth in

115. To the extent that a welfare plan is funded through the purchase of insurance, state law will normally require that the insurer meet various capitalization and reserve requirements. See ISSUES, TRENDS, AND CHALLENGES, *supra* note 15, at 40-41. Self-insured or unfunded welfare plans, however, are not protected by state insurance regulations because a self-insured plan cannot be "deemed" to be an insurance company under ERISA preemption provisions. See *infra* text accompanying notes 247-263.

116. See generally *Serrato v. John Hancock Life Ins. Co.*, 31 F.3d 882, 884 (9th Cir. 1994) (noting that health care services are not vested benefits). Vesting rules may appear to be peculiar to pension plans because of the delayed benefits inherent in the product; however, some right to continued coverage also seems necessary to protect consumer interests in their health care benefits plans. See *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) ("[W]e are mindful that ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits."). Congress made one of the few direct references to the regulation of welfare plans found in ERISA's legislative history when it determined that requiring employers to provide vested employee welfare benefits "would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." H.R. REP. NO. 93-807, at 60 (1974), reprinted in 1974 U.S.C.C.A.N. 4670, 4726, and in 2 LEGISLATIVE HISTORY, *supra* note 60, at 3180.

117. See 29 U.S.C. § 1321(a) (1994) (describing what plans are covered).

118. See ISSUES, TRENDS, AND CHALLENGES, *supra* note 15, at 15-16 (discussing state concerns that self-insured plans are not subject to state requirements that insurance companies maintain adequate reserves to assure they can pay anticipated claims).

such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries . . . that minimum standards be provided assuring the equitable character of such plans and their financial soundness.¹¹⁹

As demonstrated in ERISA's legislative history, all of Congress's purposes concern pension plans. For example, both the House and Senate Committee reports documenting the need for remedial legislation describe the history and rapid growth of the private pension industry and express concern with the lack of regulation over the \$150 billion in pension funds held by plan trustees.¹²⁰ Additionally, the lack of safeguards over plan administration, the lack of adequate disclosure to plan participants, unreasonable vesting requirements, inadequate funding of pension plans, and the lack of pension plan termination insurance are all issues identified in the Labor Subcommittee's investigation of pension plans.¹²¹ There is no documentation anywhere in ERISA's legislative history of any study or investigation of the history or growth of nonpension employee benefit plans, or of any specific concern with the management of nonpension plan assets.¹²² Further, ERISA's legislative history fails to disclose any concerted investigation of any complaints about nonpension benefits,

119. 29 U.S.C. § 1001(a) (1994).

120. See S. REP. NO. 93-127, at 2-11 (1973), reprinted in 1974 U.S.C.C.A.N. 4838, 4839-47, and in 1 LEGISLATIVE HISTORY, *supra* note 60, at 588-90; H.R. REP. NO. 93-533, at 2-8 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4640-46, and in 2 LEGISLATIVE HISTORY, *supra* note 60, at 2349-50; see also 120 CONG. REC. 29,934 (1974), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 60, at 4748 (statement of Sen. Javits) (calling for pension plan reform); 120 CONG. REC. 4280 (1974), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 60, at 3374 (statement of Sen. Madden) (speaking in support of pension reform).

121. See THE FIRST DECADE, *supra* note 60, at 15-17.

122. In the early history of union-controlled benefit plans, there was concern over alleged misuse of both union health and pension funds. See *id.* However, the majority of nonpension employee benefits outside of collectively bargained plans, including health care, accident, disability, and death benefits, were funded through the purchase of insurance at the time Congress was considering ERISA. See ISSUES, TRENDS, AND CHALLENGES, *supra* note 15, at 9-10. Insurance had long been regulated by the states, and the most significant issue concerning Congress, the lack of regulatory safeguards to guarantee the financial security of the fund designated to pay the workers' anticipated benefits, was not an issue in the case of nonpension benefits funded through insurance because the states already regulated insurance companies' reserve practices, investment practices, and rate-setting practices. See *id.* at 40-41.

such as inadequate health care, accident, death, or disability coverage, or problems with health, life, or disability benefits claims. In short, Congress just was not dealing with nonpension benefit plans when it enacted ERISA.¹²³

C. *The Conference Committee Expanded ERISA's Preemption Language*

Given that ERISA does not comprehensively regulate welfare plans, why did Congress purport to preempt all state laws that relate to any employee benefit plan, rather than just those state laws that infringe upon the field of pension regulation?¹²⁴ There is no good answer to that question, which is why ERISA preemption has spawned such controversy, but at least there is a ready explanation. ERISA's broad preemption language was adopted without the thorough

123. See *Taggart Corp. v. Life and Health Benefits Admin., Inc.*, 617 F.2d 1208, 1211 (5th Cir. 1980) ("ERISA's legislative history demonstrates that its drafters were principally concerned with abuses occurring in respect of private pension assets."); *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 56 n.29 (D. Mass. 1997) ("This Court further notes that although ERISA regulates both employee pension plans and employee welfare benefit plans . . . the primary impetus for its passage was to stop certain abuses involving employee pension plans. In contrast to the sweeping requirements that ERISA imposes upon employee pension plans, 'ERISA itself has little to do with the regulation of health finance; it simply imposes fiduciary and reporting obligations on private employee benefit plans. . . . [I]t does not regulate what employers can charge for benefits; it does not prevent employers from eliminating benefits (except pensions).'" (citations omitted) (quoting Fisk, *supra* note 8, at 36-37)).

A comparison of typical state health care and insurance regulations to ERISA's regulation of welfare plans confirms that the federal statute fails to provide meaningful regulation of the most significant nonpension employee benefits. For example, there are no mandatory benefits provisions that require ERISA health care plans to provide specified coverages, as are often found in state regulations of group health insurance policies. See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 729 (1985) (discussing "a matrix of state laws that regulate the substantive content of health-insurance policies to further state health policy"). State-regulated insurance policies usually must comply with notice provisions before changes in coverage will be effective, and most significant changes in coverage must be approved by the State Commissioner of Insurance. See NATIONAL ASS'N OF INS. COMM'RS, *ERISA: A CALL FOR REFORM* 12 (1994). Because ERISA preempts state laws regulating health care, accident, death, and disability plans and does not substitute any comparable federal regulations to govern such plans, ERISA plan sponsors can amend welfare plans at will to reduce anticipated benefits. See *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) ("Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans.").

124. The question itself prompts the further question: why does ERISA govern nonpension plans at all? The most likely reason is that ERISA was first introduced as a bill to amend the WPPDA. The WPPDA's disclosure requirements applied to all employee benefit plans, and the definition of employee benefit plan contained in WPPDA included both pension and nonpension plans. See 29 U.S.C. §§ 301-309 (repealed 1974). Congress copied the WPPDA's definition of employee benefit plan in ERISA. See 29 U.S.C. §§ 1001-1381 (1994).

investigation, spirited debate, and careful study that otherwise characterizes Congress's work in drafting the statute because the final preemption language was added only ten days before Congress approved the final bill.¹²⁵

The original House-passed version of ERISA and the original Senate version both contained a limited preemption clause expressly tied to ERISA's focus on pension regulation. The preemption clause of the Senate bill simply stated, "The provisions of this Act or the WPPDA supersede all state law as they relate to the subject matters covered by these two acts (i.e., vesting, funding, termination insurance, portability, reporting and fiduciary standards)."¹²⁶ The House version of ERISA included more specific language to accomplish much the same purpose as the Senate version. The preemption clause of House Bill 2 provided that

[t]he Act supersedes all state and local laws relating to fiduciary standards, reporting, disclosure, vesting, and funding (except for civil action by a participant or beneficiary to recover benefits due or to clarify rights to future benefits). No employee benefit plan subject to Title I (except plans primarily providing death benefits) can be considered an insurance company for purposes of State regulation.¹²⁷

Under either the House or Senate versions of the statute, the preemption provision would not have instigated the regulatory void that has resulted from super-preemption analysis under ERISA's final preemption language because the language in the preliminary bills limited ERISA's nullification of state laws to subjects regulated by the Federal Act. By equating the scope of preemption with the scope of ERISA's specific regulatory provisions, either of the preliminary bills would have saved virtually all state regulation of nonpension benefit plans because ERISA does not comprehensively regulate nonpension plans. Only state laws regulating welfare plan reporting and disclosure requirements or fiduciary responsibilities would have been superseded under the preliminary drafts because those are the only areas of welfare plan administration that ERISA governs.¹²⁸

125. See *Metropolitan Life*, 471 U.S. at 725; see also Daniel M. Fox & Daniel C. Schaffer, *Semi-Preemption in ERISA: Legislative Process and Health Policy*, 7 AM. J. TAX POL'Y 47, 48 (1988) (stating that the final language of ERISA's preemption clause "was not a deeply considered result of the years of planning, negotiating, and drafting").

126. S. 4, 93d Cong. § 699 (1973), reprinted in 120 CONG. REC. 8860 (1974), and in 3 LEGISLATIVE HISTORY, *supra* note 60, at 4272.

127. H.R. 2, 93d Cong. § 514 (1973), reprinted in 120 CONG. REC. 8860 (1974), and in 3 LEGISLATIVE HISTORY, *supra* note 60, at 4272.

128. The House and Senate Bills' original language also described the scope of preemption by using the ambiguous "relates to" phrase. See *supra* text accompanying notes

The ERISA preemption debacle resulting from the statute's overbroad preemption language originates with the work of the Conference Committee charged with the responsibility of reconciling the language of the House-passed version of ERISA with the Senate-passed version. With a symbolic Labor Day signing ceremony at the White House only weeks away,¹²⁹ the Conference Committee inexplicably broadened ERISA's preemption provision beyond any preemption language previously recommended or considered,¹³⁰ without any useful statement in the Conference Committee's report to explain its actions.¹³¹ In fact, the only explanatory comments in

126-127 (quoting the relevant statutory text). It may be argued, therefore, that problems with the scope of ERISA's preemption would have also arisen under the original preemption language due to the inherent ambiguity of that phrase.

129. See Gordon, *supra* note 89, at 3-4 (describing the Rose Garden signing ceremony).

130. See Administration Recommendations to the House and Senate Conferees on H.R. 2—To Provide for Pension Reform 107-09 (1974), in 3 LEGISLATIVE HISTORY, *supra* note 60, at 5047, 5145-47. Criticizing the Senate Bill's preemption language as too broad and the House version as too vague, the administration recommended the following preemption provision:

It is hereby declared to be the express intent of Congress that, except for actions authorized by Section (fill in Section which permits a participant to bring a civil action in State or Federal court) the provisions of (list the Titles or Sections which deal with participation, vesting, funding, reporting, disclosure and fiduciary standards, termination insurance, enforcement and additional plan requirements (as set out in House bill Section 1021)) or the Welfare and Pension Plans Disclosure Act, shall supersede any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter relate to the regulation of participation, vesting, funding, reporting, disclosure and fiduciary standards, termination insurance, enforcement and additional plan requirements (as set out in House bill Section 1021) or subject matters regulated by the Welfare and Pension Plans Disclosure Act, except that nothing shall be construed—

- (1) to exempt or relieve any employee pension benefit plan not subject to (list Titles or Sections above) or the Welfare and Pension Plans Disclosure Act from any law of any State;
- (2) to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities or to prohibit a State from requiring that there be filed with a State agency copies of reports required by this Act to be filed with the Secretary; or
- (3) to alter, amend, modify, invalidate, impair, or supersede any other law of the United States.

Notwithstanding the provisions of this section, a State shall have the authority to prescribe rules and regulations governing the tax qualification and taxation of contributions, distributions or income, of an employee pension benefit plan (including a trust forming a part of such plan) as defined in the Welfare and Pension Plans Disclosure Act (House bill).

Id. at 5147.

131. The report of the Conference Committee merely recites the new provisions and does not attempt to clarify its intentions or give any reasons for the broadening of the preemption language. See H.R. REP. NO. 93-1280, at 383 (1974), *reprinted in* 1974 U.S.C.A.N. 5038, 5162, and in 3 LEGISLATIVE HISTORY, *supra* note 60, at 4650.

ERISA's legislative history referring to the eleventh-hour expansion of the preemption language are the confusing remarks in floor debates of three individual members of the Conference Committee, Representative John Dent, Senator Harrison Williams, and Senator Jacob Javits.¹³²

Representative Dent and Senator Williams both stated that the Conference Committee intended that ERISA occupy the field of employee benefits regulation in order to "eliminat[e] the threat of conflicting and inconsistent state and local regulation."¹³³ Representative Dent's and Senator Williams' remarks are difficult to interpret because they confuse conflict and field preemption principles. The assertion of exclusive federal jurisdiction under field preemption is clearly overbroad if the conferees' only concern was with conflicting or inconsistent state regulation. Conflict preemption

132. The Supreme Court has noted that such comments were "not particularly illuminating." See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 745 n.23 (1985) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 104 (1983)). But see *Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1299-1300 (N.D. Cal. 1977) (discussing the legislative history of the preemption clause and suggesting that Congress fully understood the ramifications of the expanded preemption language), *aff'd*, 571 F.2d 502 (9th Cir. 1978).

133. Representative John Dent's remarks, reported at 120 CONG. REC. 29,197 (1974), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 60, at 4670-71, are as follows:

Finally I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by *eliminating the threat of conflicting and inconsistent State and local regulation*. . . .

The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of section 514 [29 U.S.C. § 1144] would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof—including any professional society or association operating under color of law—which would affect any employee benefit plan

Id. (statement of Rep. Dent) (emphasis added).

The following comments of Senator Harrison Williams are reported at 120 CONG. REC. 29,933 (1974), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 60, at 4745-46:

It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus *eliminating the threat of conflicting or inconsistent State and local regulation* of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law. Consistent with this principle, State professional associations acting under the guise of State-enforced professional regulation, should not be able to prevent unions and employers from maintaining the types of employee benefit programs which Congress has authorized—for example, prepaid legal services programs. . . .

Id. (statement of Sen. Williams) (emphasis added).

analysis would have been sufficient to nullify all state regulations inconsistent with ERISA without the need to usurp state regulatory authority in the historically state-regulated fields of health, accident, death, and disability benefits that ERISA does not pretend to regulate.

Senator Javits provided more detailed remarks directed to the Conference Committee's change in ERISA's preemption language, but even his comments evidence confusion with the concept of field preemption:

Both House and Senate bills provided for preemption of State law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.

Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs. The conferees—recognizing the dimensions of such a policy—also agreed to assign the Congressional Pension Task Force the responsibility of studying and evaluating preemption in connection with State authorities and reporting its findings to the Congress. If it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made.

In view of Federal preemption, State laws compelling disclosure from private welfare or pension plans, imposing fiduciary requirements on such plans, imposing criminal penalties on failure to contribute to plans—unless a criminal statute of general application—establishing State termination insurance programs, et cetera, will be superseded. It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.¹³⁴

While Senator Javits also mentioned the concern with conflicting state laws as a reason for the Conference Committee's expansion of ERISA's preemption language, he at least recognized that field preemption analysis would supersede a wide array of state laws "not

134. 120 CONG. REC. 29,942 (1974), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 60, at 4770-71 (statement of Sen. Javits).

clearly connected to the Federal regulatory scheme."¹³⁵ Unfortunately, like the statute itself, Senator Javits did not precisely define the boundaries of the field he expected ERISA to occupy.¹³⁶ To the extent that Senator Javits suggested some limits on the intended reach of ERISA preemption, he tied preemption to the scope of some undefined "comprehensive and pervasive Federal interest."¹³⁷ Since nonpension employee benefits are not a peculiarly federal concern, and since ERISA does not comprehensively regulate welfare plans, Senator Javits' remarks do not compel the conclusion that he intended ERISA to occupy the field of nonpension employee benefits.

It is apparent from Senator Javits' remarks that the broadening of ERISA's preemption language was not carefully considered. Particularly illuminating is his suggestion that any problems with the effects of the preemption provision could be remedied by further regulation "at the State or Federal level."¹³⁸ Obviously, the overbroad application of the field preemption doctrine cannot be fixed by corrective state regulation because field preemption, by definition, ousts the states of all jurisdiction to regulate the subject. Even more telling is the fact that neither Senator Javits, nor any other member of Congress, appears to have anticipated that ERISA's broad preemption of state laws governing the field of nonpension employee benefits would create the regulatory void that has resulted from ERISA's super-preemption.¹³⁹

135. *Id.* (statement of Sen. Javits).

136. Senator Javits' comments highlight the crucial flaw in ERISA's preemption language. Javits criticized the House and Senate proposals as inviting litigation because they attempt to define the boundaries of ERISA's field of authority. *See id.* (statement of Sen. Javits). The difficult fact of preemption in a federalist system of government is that boundaries must be drawn when the federal government assumes exclusive jurisdiction over a particular subject area. ERISA's express preemption language fails to provide complete instructions to courts weighing ERISA preemption issues because the express language only suggests the type of preemption analysis (field over conflict) intended by the legislature. The express language does not, however, provide any boundaries to the field of ERISA's exclusive authority; consequently, the very specter of mass litigation Senator Javits feared has come to pass. *See De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 808 n.1 (1997) (describing the "avalanche" of litigation generated by ERISA's preemption language).

137. 120 CONG. REC. 29,942 (1974), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 60, at 4771 (statement of Sen. Javits).

138. *Id.* (statement of Sen. Javits).

139. Significantly, there was no discussion in the legislative history addressing Conference Committee action indicating any intent to displace state laws regulating the predominant nonpension employee benefits, such as health care and disability. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 541 (1992) (Blackmun, J.,

Michael S. Gordon, Senator Javits' appointee as minority counsel to the Senate Labor and Public Welfare Committee from 1970-1975,¹⁴⁰ has written several papers to explain, in detail that does not appear in ERISA's legislative history, why the Conference Committee changed ERISA's preemption language.¹⁴¹ Mr. Gordon states that the Conference Committee altered ERISA's preemption provisions in response to intense, last-minute lobbying efforts by certain labor unions and employers.¹⁴² The conferees feared that these interest groups were powerful enough to derail ERISA entirely unless the conferees broadened the preemption language to address three separate concerns of these groups.¹⁴³ First, unions and employers who had established collectively bargained noninsured health plan trusts were concerned about a state trial court decision that allowed Missouri to regulate a noninsured plan as if it were a commercial insurer.¹⁴⁴ Second, Mr. Gordon reports that the AFL-CIO and "big business" feared that Hawaii's recently passed Prepaid Health Act, which California was threatening to emulate, would impose impossible compliance burdens on large multistate plans and would interfere with union and management judgment as to appropriate health benefits in collective bargaining plans.¹⁴⁵ Finally, Mr. Gordon describes union

concurring in part and dissenting in part) ("The Court in the past has hesitated to find preemption where federal law provides no comparable remedy [to state law].").

140. Mr. Gordon participated generally in the drafting of ERISA, and more specifically, in the drafting of the Conference Committee preemption language. Previously, Mr. Gordon had served as the Department of Labor's legal counsel to President Kennedy's Cabinet Committee. See *THE FIRST DECADE*, *supra* note 60, at 1.

141. See Michael S. Gordon, *Managed Care, ERISA Pre-emption, and Health Reform—The Current Outlook*, 22 *Pens. & Ben. Rep. (BNA)* 849, 852-56 (Apr. 3, 1995); Michael S. Gordon, *Health Reform and ERISA Preemption After the Travelers Decision—Defining the Role of the States*, Address at the National Health Policy Forum Conference (July 21, 1995) (on file with author); Michael S. Gordon, *The History of ERISA's Preemption Provision and Its Bearing on the Current Debate over Health Systems Reforms*, Address at the National Health Policy Forum Conference (Nov. 18, 1992) (on file with author) [hereinafter Gordon, *History of ERISA's Preemption*].

142. See Gordon, *History of ERISA's Preemption*, *supra* note 141, at 2-4.

143. See *id.*

144. See *State ex rel. Farmer v. Monsanto Corp.*, Cause No. 259,774 (Mo. Cir. Ct. Jan. 4, 1973), *rev'd*, 517 S.W.2d 129 (Mo. 1974); see also *FMC Corp. v. Holliday*, 498 U.S. 52, 69 (1990) (Stevens, J., dissenting) (discussing the *Monsanto* case and its apparent influence on the Conference Committee's actions in expanding ERISA's preemption language).

145. See Gordon, *History of ERISA's Preemption*, *supra* note 141, at 3. Mr. Gordon suggests that Senator Javits, a strong proponent of national health insurance, understood that by broadening ERISA's preemption language, they were threatening state regulation of health plans. See *id.* In a telephone interview with this author, Mr. Gordon stated that Senator Ted Kennedy, who was one of the conferees, was also concerned with the potential adverse effect on state regulation of health plans; however, Senator Kennedy was planning on introducing comprehensive national health care legislation in the next Senate session. See Telephone Interview with Michael S. Gordon, Former Minority Counsel to the Senate Labor and Public

concerns with interference from state bar associations in their collectively bargained prepaid legal service plans.¹⁴⁶ The complaining labor unions and union lawyers wanted the panel of lawyers authorized to serve plan participants to be closed, while the state bar associations wanted the panels to be open.¹⁴⁷ In order to avoid threatened state legislation that would have required legal services plan panels to operate under an open panel system, these labor interests lobbied for special protections under ERISA.

While Mr. Gordon's writings provide context for the actions of the Conference Committee that is lacking in ERISA's legislative history, from a statutory interpretation analysis, his work is largely immaterial. Only one of the three problems identified by Mr. Gordon as affecting the Conference Committee actions in rewriting ERISA's preemption provisions, the legal services plan issue, is even tangentially mentioned in the legislative history.¹⁴⁸ For statutory interpretation purposes, the Supreme Court cannot rely on eyewitness remembrances of legislative deal making to uncover congressional intent, but must confine itself to the recorded legislative history in order to divine the intent of the statute.¹⁴⁹ Additionally, it is important to remember that the overall intent of the statute should control the interpretation of the statute's lesser clauses. The Supreme Court's restricted focus on the language and legislative history of the preemption provisions ignores the rule that "[i]n expounding a statute, [courts] must not be guided by a single sentence or member of a

Welfare Committee (Mar. 3, 1999). Mr. Gordon remembers that Senator Kennedy was confident that some form of national health insurance would be enacted shortly after ERISA. *See id.*; *see also* *Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1302 (N.D. Cal. 1977) (holding that ERISA preempts California's Knox-Keene Health Care Service Plan Act of 1975), *aff'd*, 571 F.2d 502 (9th Cir. 1978) (mem.); *Standard Oil Co. v. Agsalud*, 442 F. Supp. 695 (N.D. Cal. 1977) (holding that ERISA preempts Hawaii's Prepaid Health Care Act), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd*, 454 U.S. 801 (1981) (mem.). Following the *Agsalud* decision, Congress amended ERISA to provide an exception to preemption for a portion of the Hawaii Act. *See* Act of Jan. 14, 1983, Pub. L. No. 97-473, § 301, 96 Stat. 2605, 2611-12 (1983) (codified at 29 U.S.C. § 1144(b)(5) (1994)).

146. *See* Gordon, *History of ERISA's Preemption*, *supra* note 141, at 3-4.

147. *See id.*

148. *See* 120 CONG. REC. 29,197 (1974), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 60, at 4670-71 (statement of Rep. Dent); 120 CONG. REC. 29,933 (1974), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 60, at 4645-46 (statement of Sen. Williams); 120 CONG. REC. 29,949 (1974), *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 60, at 4789 (statement of Sen. Javits); *see also* *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 745 n.23 (1985) ("The pre-emption clause apparently was broadened out of a fear that 'state professional associations' would otherwise hinder the development of such employee-benefit programs as 'prepaid legal service programs.'").

149. *See* Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 379.

sentence, but look to the provisions of the whole law, and to its object and policy.”¹⁵⁰

III. ERISA “SUPER-PREEMPTION”

Earlier in this Article, I identified ERISA “super-preemption” as a new category of preemption doctrine created by the Supreme Court’s unwarranted extension of field preemption principles to ERISA welfare plan cases.¹⁵¹ Super-preemption derives from the Supreme Court’s literal interpretation of ERISA’s overinclusive preemption language and the Court’s failure to appreciate that ERISA regulates pension plans and welfare plans differently.

Whenever a court is presented with a preemption issue, it must decide whether conflict or field preemption applies. In cases employing field preemption principles, the court must also define the boundaries of the field Congress intended the federal enactment to occupy. As we have seen, courts normally imply a congressional intent to impose exclusive federal authority over a particular subject only when a federal statute comprehensively regulates the subject or when the area of regulation is peculiarly within the federal domain.¹⁵² The considerations that support application of field preemption rules in traditional implied preemption analysis also serve, however loosely, to define the boundaries of the preempted field.¹⁵³ If field preemption is appropriate because of the peculiar federal interest in the subject, the extent of that predominant federal interest defines the limits of the preempted field. Similarly, if the comprehensive nature of the federal statute at issue supports field preemption, the scope of the regulation defines the boundaries of the occupied field.¹⁵⁴ It is important to emphasize that whether exclusive federal authority is implied or is expressly suggested in a federal act, the parameters of the preempted

150. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (alteration in original) (internal quotations omitted) (citing a string of cases employing this principle).

151. See *supra* text accompanying notes 20-30.

152. See *supra* text accompanying note 51.

153. Even where boundaries are specifically defined, there will always be cases at the edge of the definitional spectrum that will need to be decided by the courts on a case-by-case basis. Professor Fisk suggests that it is impossible for Congress to define the parameters of a preempted field and that the whole process should be left to the courts. See Fisk, *supra* note 8, at 42. In contrast, Judge Kenneth Starr and others, writing for the Appellate Judges Conference, have complained about Congress’s failure to provide specific preemption instructions in its statutory enactments. See STARR ET AL., *supra* note 40, at 40-55.

154. Unfortunately, no more precise formulation has been provided by the courts, and where the boundary of the preempted field is at issue, it has been necessary to determine the scope of federal preemption on a case-by-case basis. See Fisk, *supra* note 8, at 43-46; Hoke, *supra* note 40, at 738-48.

field must be somehow identified and limited. Otherwise, our federal system of government will be totally obscured.

In the Supreme Court's early ERISA preemption cases, the Court upset federalism principles by failing to identify any meaningful boundaries to the field of ERISA's exclusive regulatory jurisdiction.¹⁵⁵ The Court forsook traditional implied preemption criteria for discerning Congress's preemptive intentions because ERISA contains express preemption language.¹⁵⁶ Regrettably, ERISA's provisions do not clearly answer all of the questions presented in the preemption equation. While ERISA's preemption language may express some intent to assert exclusive federal authority, the statute fails to define the boundaries of the field Congress intended ERISA to occupy. The limiting language of the preemption clause, which states that ERISA "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan,"¹⁵⁷ was intended to define the borders of ERISA's preemptive reach, but is patently ambiguous because "relates to" provides no limits.¹⁵⁸ The Supreme Court's adherence to a literal interpretation of the limitless preemption clause has extended the field of exclusive federal authority under ERISA beyond the scope of the statute's comprehensive regulatory provisions and has initiated unprecedented federal dominance in areas of historic state regulation. This new ERISA super-preemption doctrine creates a glaring void in the field of welfare plan regulation because ERISA, with its detailed focus on pension issues, does not replace preempted state laws in the field of welfare benefit plans with any substantive federal regulation.

A. *The Supreme Court Creates Super-Preemption*

The evolution of ERISA super-preemption in the Supreme Court began with the Court's seemingly innocent description of ERISA as a "comprehensive and reticulated statute" in *Nachman Corp. v. Pension Benefit Guaranty Corp.*¹⁵⁹ *Nachman* involved the reimbursement rights of the Pension Benefit Guaranty Corporation vis-à-vis an employer that terminated its noncomplying pension plan the day before ERISA's vesting provisions became effective.¹⁶⁰ In the context of *Nachman's* discussion of ERISA's vesting provisions and the

155. See discussion *infra* Part III.A.

156. See discussion *infra* Part III.A.

157. 29 U.S.C. § 1144(a) (1994).

158. See *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

159. 446 U.S. 359, 361 (1980).

160. See *id.* at 365-66.

statute's pension plan termination insurance program, the Court's characterization of ERISA as a "comprehensive" statute appears uncontroversial.¹⁶¹ In Supremacy Clause jargon, however, the term "comprehensive" evokes justification for field preemption doctrine, and even though *Nachman* did not involve Supremacy Clause issues, *Nachman* branded ERISA with the lexicon of field preemption.

The Supreme Court's first actual discussion of ERISA's preemption clause arose in *Alessi v. Raybestos-Manhattan, Inc.*, a pension plan case.¹⁶² In *Alessi*, the Court called ERISA a "comprehensive and reticulated statute" that Congress enacted "after careful study of private retirement pension plans."¹⁶³ The quotation of *Nachman*'s "comprehensive and reticulated" phrase lent support to the Court's observation in *Alessi* that Congress "meant to establish pension plan regulation as exclusively a federal concern."¹⁶⁴ *Alessi*, however, did not necessarily suggest that Congress intended ERISA to occupy the field of nonpension employee benefits regulation.

In *Alessi*, the Supreme Court examined a New Jersey law that prohibited pension plans from reducing an employee's retirement benefits by an amount equal to any worker's compensation award that the employee might receive.¹⁶⁵ The Court's actual holding in *Alessi*, that ERISA preempted the New Jersey worker's compensation statute, can easily be justified. However, *Alessi* does not provide any clarity in the area of ERISA preemption because the decision can be rationalized under any number of preemption labels.¹⁶⁶ The opinion suggested that ERISA preempted the New Jersey law because the state law both conflicted with federal law and frustrated federal policy.¹⁶⁷ Additionally, the Court found that the New Jersey statute "relate[d] to" pension plans governed by ERISA and was, therefore, expressly

161. *See id.* at 361.

162. 451 U.S. 504 (1981).

163. *Id.* at 510.

164. *Id.* at 523.

165. *See id.* at 507.

166. The *Alessi* Court began its preemption analysis with well-settled implied preemption parlance. *See id.* at 521-22. It then noted, rather ironically, that in ERISA, "we are assisted by an explicit congressional statement about the pre-emptive effect of its action." *Id.* at 522.

167. *See id.* at 521 ("Congress . . . permitted integration along the lines already approved by the IRS, which had specifically allowed pension benefit offsets based on workers' compensation."); *id.* at 526 n.22 (stating that the New Jersey law conflicted with "the federal policy to keep calculation of pension benefits a subject of either labor-management negotiations or federal legislation"). In *Shaw v. Delta Air Lines, Inc.*, the Court said that *Alessi* was decided "not on [the basis of the preemption clause] language and legislative history, but on the state law's frustration of congressional intent." 463 U.S. 85, 97 n.15 (1983).

superseded.¹⁶⁸ The *Alessi* opinion identified the relevant criteria for discussion of preemption issues, including the comprehensiveness of the federal regulatory scheme, actual conflict, and frustration of federal policy, but the Court did not analyze how ERISA's express preemption language should be integrated with these traditional implied preemption criteria.¹⁶⁹

Two years after *Alessi*, the Supreme Court addressed ERISA's preemption clause in the context of a welfare benefits case, *Shaw v. Delta Air Lines, Inc.*¹⁷⁰ Here the inconsistencies between traditional preemption doctrine and ERISA's preemption language should have been confronted. Unfortunately, the breadth of ERISA's "relates to" language and the Court's insistence on a plain meaning interpretation of that phrase led the *Shaw* Court to apply field preemption analysis without reflecting on the overall purposes of the statute.¹⁷¹

In *Shaw*, several employers filed a series of declaratory judgment actions against various state agencies seeking to establish that ERISA preempted two New York laws that protected pregnant women from discrimination in the administration of the employers' disability benefit plans.¹⁷² The employers had each established disability benefit programs for their workers, but contrary to the requirements of the New York statutes, had failed to include pregnancy as a covered disability.¹⁷³ After first reciting that its task in deciding preemption cases "is to ascertain Congress' intent in enacting the federal statute at issue," the Supreme Court determined that the specific issue to be decided in *Shaw* was whether the New York laws "relate[d] to" employee benefit plans within the meaning of ERISA's preemption clause.¹⁷⁴ By narrowing the issue to an interpretation of ERISA's express preemption language, the Court unwittingly recharacterized its

168. See *Alessi*, 451 U.S. at 524-25 ("New Jersey's effort to ban pension benefit offsets based on workers' compensation applies directly to this [approved] calculation technique. We need not determine the outer bounds of ERISA's pre-emptive language to find this New Jersey provision an impermissible intrusion on the federal regulatory scheme.").

169. The *Alessi* Court flirted with the thought of carefully examining ERISA's preemption clause and noted that the "relates to" phrase "gives rise to some confusion where . . . it is asserted to apply to a state law ostensibly regulating a matter quite different from pension plans." *Id.* at 523-24. Instead, the Court summarily concluded that the preemption language was broad enough to cover the New Jersey law at issue and left the issue of defining the outer boundaries of the field that ERISA occupied for another day. See *id.*

170. 463 U.S. at 85.

171. See *id.* at 96-97.

172. New York's Human Rights Law forbade discrimination in employee benefit plans on the basis of pregnancy, and its Disability Benefits Law required employers to pay sick leave benefits to employees unable to work because of pregnancy. See *id.* at 88-89.

173. See *id.* at 92.

174. *Id.* at 95-96.

examination of congressional intent. The focus shifted from Congress's overall intent in enacting the legislation to a more limited examination of Congress's specific intent to preempt, as evidenced solely by the language and legislative history of the preemption provisions.¹⁷⁵

As a matter of statutory construction, the *Shaw* Court provided a dictionary definition of "relates to" that has persisted in the ERISA preemption arena, even though the definition adds scant clarification of the interpreted phrase. The Court said that "[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."¹⁷⁶ Applying that definition, the Supreme Court held that the state antidiscrimination laws at issue clearly related to benefit plans.¹⁷⁷ The *Shaw* Court reviewed ERISA's legislative history merely to describe the process that produced ERISA's final preemption language.¹⁷⁸ Finding support in the legislative history of the preemption provision for application of field preemption analysis, the Court did not consider the overall purposes of ERISA and therefore did not differentiate between ERISA's substantial and coordinated regulation of pension plans and the statute's minimal regulation of welfare plans.¹⁷⁹

175. The Court gave no weight to the traditional presumption that "the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The *Shaw* opinion never mentions this presumption or any of the other traditional preemption rules that typically preface Supreme Court preemption opinions.

176. *Shaw*, 463 U.S. at 96-97 (citing BLACK'S LAW DICTIONARY 1158 (5th ed. 1979)). *But see* *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) ("[A]n uncritical literalism [to construe 'connection with'] is no more help than in trying to construe 'relate to.' For the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections.").

177. *See Shaw*, 463 U.S. at 96-97.

178. *See id.* at 98-99. Professor Fisk describes plain meaning statutory construction, coupled with an examination of the legislative history of a particular statutory provision to support the plain meaning interpretation, as "intentionalist" or "purposivist" statutory construction. *See* Fisk, *supra* note 8, at 39 n.19.

179. The actual holding in *Shaw* is somewhat confusing. The Court held that both the Human Rights Law and the Disability Benefits Law related to ERISA, but then went on to evaluate certain exceptions to preemption contained within the statute to determine if the two New York laws could be enforced against the subject ERISA plans. *See Shaw*, 463 U.S. at 100-03. ERISA provides an exception to preemption for any employee benefit plan maintained solely for the purpose of complying with state disability insurance laws. *See* 29 U.S.C. §§ 1003(b), 1144(a) (1994). The Court held that only separately administered plans maintained to comply with state laws are exempt from ERISA. *See Shaw*, 463 U.S. at 108-09. Since the disability plan at issue was part of a multibenefit plan that offered disability benefits in excess of those required by the state law, the preemption exemption was inapplicable, and the New York Disability Benefits law could not be enforced against ERISA-covered plans. *See id.* The Court also found that states could require employers to

The Supreme Court's third ERISA preemption opinion also involved ERISA's effect on a state law that regulated welfare plans.¹⁸⁰ In *Metropolitan Life Insurance Co. v. Massachusetts*, the Massachusetts Attorney General filed suit in state court seeking a declaration that ERISA did not preempt a Massachusetts insurance regulation requiring all health insurance policies for Massachusetts residents to provide a minimum level of mental health coverage.¹⁸¹ *Metropolitan Life* touches on some of the problems presented by *Shaw's* literal interpretation of ERISA's preemption clause, but avoids confronting the difficult language of the preemption clause by applying the savings clause to exempt the Massachusetts statute from the overreaching grasp of super-preemption.¹⁸²

The *Metropolitan Life* Court recited that ERISA "comprehensively regulates employee pension and welfare plans."¹⁸³ The Court then immediately documented how ERISA imposes a variety of substantive regulatory requirements on pension plans but establishes only limited procedural rules to govern welfare plans.¹⁸⁴ The Court also noted that the statute does not contain any federal regulation of the terms of ERISA welfare plans, unlike prevailing state law that commonly dictates the terms of insurance policies, regulates insurance company claims practices, and provides regulatory protections against insurance company insolvency.¹⁸⁵ Unfortunately, the brief comparison of ERISA's comprehensive regulation of pension plans and its lesser regulation of welfare plans in *Metropolitan Life* did not spark any inquiry into the intended scope of ERISA's preemption clause. Citing *Shaw's* dictionary definition of "relates to," the

maintain separately administered disability plans that would have to comply with state law. *See id.*

The New York Human Rights Law presented a different preemption exception issue involving the relationship between the New York Human Rights Law and Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to -17 (1994 & Supp. III 1997). The issue arose from section 514(d) of ERISA, which provides that ERISA's preemption clause "shall [not] be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States." 29 U.S.C. § 1144(d). The Court held "that New York's Human Rights Law is preempted with respect to ERISA benefit plans only insofar as it prohibits practices that are lawful under federal law." *Shaw*, 463 U.S. at 108.

180. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).

181. *See id.* at 727 (discussing MASS. GEN. LAWS ANN. ch. 175, § 75B (West Supp. 1985)).

182. *See id.* at 744.

183. *Id.* at 732.

184. *See id.* ("ERISA imposes upon pension plans a variety of substantive requirements relating to participation, funding, and vesting. It also establishes various uniform procedural standards concerning reporting, disclosure, and fiduciary responsibility for both pension and welfare plans." (citations omitted)).

185. *See id.* at 727-32.

Metropolitan Life Court quickly concluded that the Massachusetts law fit within the ambit of ERISA's preemption clause.¹⁸⁶ The Court then focused its opinion on the application of ERISA's savings clause exception to preemption for insurance regulations to decide the case.¹⁸⁷

Super-preemption achieved its greatest infamy in the Supreme Court's next ERISA preemption case, *Pilot Life Insurance Co. v. Dedeaux*.¹⁸⁸ *Pilot Life* arose from a claim by an injured worker under a group disability insurance policy issued to the claimant's employer for the benefit of company employees.¹⁸⁹ The claimant injured his back in a work-related accident and submitted a claim for benefits.¹⁹⁰ *Pilot Life Insurance Company* paid temporary disability benefits for two years following the accident, then terminated the benefits, reinstated the benefits, terminated the benefits again, and repeated that same scenario several times over the course of the next three years.¹⁹¹ Ultimately, the insurance company denied the permanent disability claim.¹⁹²

Dedeaux filed a diversity action in a federal district court in Mississippi asserting state-law claims for breach of the insurance contract and for the common-law tort of bad faith breach of contract.¹⁹³ No claims were presented under ERISA's specific enforcement provisions,¹⁹⁴ and *Pilot Life Insurance Company* was the only

186. *See id.* at 739.

187. *See id.* at 738 ("The narrow statutory ERISA question presented is whether [the Massachusetts statute] is a law 'which regulates insurance' within the meaning of [the savings clause], and so would not be pre-empted by [the preemption clause]." (citations omitted)).

188. 481 U.S. 41 (1987).

189. *See id.* at 43.

190. *See id.*

191. *See Dedeaux v. Pilot Life Ins. Co.*, 770 F.2d 1311, 1313 (5th Cir. 1985), *rev'd*, 481 U.S. 41 (1987).

192. *See id.*

193. *See id.* at 1312.

194. ERISA's civil enforcement provision, 29 U.S.C. § 1132 (a) (1994), provides:

A civil action may be brought—

- (1) by a participant or beneficiary—
 - (A) for the relief provided for in subsection (c) of this section [concerning requests to the administrator for information], or
 - (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
- (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title [breach of fiduciary duty];
- (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provisions of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

defendant named in the lawsuit.¹⁹⁵ Dedeaux sought compensatory damages on the breach-of-contract claim and punitive damages for the insurer's alleged bad faith in processing the claim.¹⁹⁶ The district court held that ERISA's preemption clause voided all of Dedeaux's state-law claims and dismissed the action.¹⁹⁷ Based upon the reasoning of the then-recent Supreme Court decision in *Metropolitan Life*, the United States Court of Appeals for the Fifth Circuit reversed, ruling that ERISA's savings clause rescued Dedeaux's claims from ERISA preemption because the claims arose from state laws that regulate insurance.¹⁹⁸ The Supreme Court then reversed the court of appeals¹⁹⁹ in an opinion that has proven to be absolutely devastating to consumer interests, as much for its implied preemption analysis as for its continued literal application of the preemption clause.

In *Pilot Life*, the Supreme Court held that ERISA's express preemption language nullifies state common-law bad faith actions in claims arising from employment-provided insurance policies because the claims "relate to" an employee benefit plan and are not saved from preemption as laws that regulate insurance.²⁰⁰ Distinguishing *Metropolitan Life*, the Court found that the savings clause exception

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title [information to be furnished to participants];

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section.

195. See *Pilot Life*, 770 F.2d at 1313.

196. See *id.*

197. The district court issued its ruling several months after the Supreme Court's decision in *Metropolitan Life*, but apparently did not consider the savings clause exception to preemption when it dismissed Dedeaux's claim. See *id.* at 1314 n.5.

198. See *id.* at 1314-16. In his appeal, Dedeaux addressed his arguments only to the tortious breach-of-contract claim under Mississippi's common-law bad faith precedents. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48 (1987).

199. See *Pilot Life*, 481 U.S. at 48.

200. See *id.* at 47. *Pilot Life* did not consider any statutory unfair insurance practices claims. Arguably, state law claims arising from the violation of specific insurance regulations would fit within the ambit of the savings clause exception to preemption, particularly in light of the recent Supreme Court opinion in *UNUM Life Insurance Co. v. Ward*, 119 S. Ct. 1380, 1385-91 (1999), which clarifies the test for savings clause analysis. But see *Tri-State Mach., Inc. v. Nationwide Life Ins. Co.*, 33 F.3d 309, 315 (4th Cir. 1994) (holding that claims for violation of the insurance chapter of the West Virginia Unfair Trade Practices Act are not saved from preemption); *Tutolo v. Independence Blue Cross*, No. CIV.A.98-CV-5928, 1999 WL 274975, at *7 (E.D. Pa. May 5, 1999) (analyzing a Pennsylvania common-law bad faith claim under the *UNUM* standard and holding the claim to be preempted).

was inapplicable because Mississippi's bad faith law adhered to all contracts and was not specifically designed to regulate insurance.²⁰¹ As an alternative basis to support its holding, the *Pilot Life* Court also ruled that Dedeaux's claims asserting state-law remedies were impliedly preempted because ERISA's civil enforcement provisions evidenced a legislative intent to provide the exclusive remedies for all claims arising under any ERISA-governed employee benefit plan.²⁰² The result of the Court's implied preemption analysis was to eliminate plan participants' state-law claims for extracontractual damages, including punitive damages and treble damages, and to put plan participants in a significantly worse position than they were prior to ERISA.²⁰³

Pilot Life is a particularly frustrating opinion because of its inconsistent application of statutory interpretation principles. Quoting *Shaw v. Delta Air Lines, Inc.* and *Metropolitan Life Insurance Co. v. Massachusetts*, the Court first applied a plain meaning construction of the preemption clause to extend ERISA's preemptive scope beyond state laws specifically designed to affect employee benefit plans.²⁰⁴ Since Dedeaux asserted Mississippi's common-law tort of bad faith breach of contract in a claim arising from an ERISA plan, the Court

201. See *Pilot Life*, 481 U.S. at 49-57.

202. See *id.* at 52-57. On the same day that the Supreme Court issued its opinion in *Pilot Life*, it also decided *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), which applied implied preemption analysis in a removal jurisdiction case based upon the Court's conclusion that ERISA's civil enforcement provisions provide the exclusive remedies for all claims arising under an ERISA-governed employee benefit plan. In *Metropolitan Life Insurance Co. v. Taylor*, the Court held that the doctrine of complete preemption adopted in *Avco Corp. v. Aero Lodge No. 735, International Ass'n of Machinists*, 390 U.S. 557 (1968), applied to ERISA. See *Taylor*, 481 U.S. at 63-64. Removal based upon federal question jurisdiction is normally governed by the well-pleaded complaint rule, which states that for the purposes of federal question analysis, only the allegations stated on the face of a well-pleaded complaint are determinative. See *id.* at 63. Under that doctrine, if federal question jurisdiction is properly asserted as a defense to a state court complaint that alleges only state law claims, the case is not removable. See *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 7-12 (1983). *Avco Corp.* carved an exception to the well-pleaded complaint rule for removal jurisdiction for cases arising under section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1994). See *Avco Corp.*, 390 U.S. at 560-62. In *Taylor*, the Supreme Court extended the *Avco Corp.* removal jurisdiction doctrine to ERISA and ruled that Taylor's state-law tort and breach-of-contract claims were not only preempted by ERISA's express preemption language, but were completely displaced by ERISA's civil enforcement scheme. See *Taylor*, 481 U.S. at 66.

203. See discussion *infra* Part III.B.2.

204. See *Pilot Life*, 481 U.S. at 46-47. The Court applied *Shaw's* dictionary definition of "relates to" to invoke its field preemption analysis, but contrary to a strict textualist approach, the Court also examined the legislative history of the preemption clause to support its interpretation of the preemption clause. See *id.* The Court did not, however, consider ERISA's overall structure and purpose in construing the preemption clause. See *id.*

had no trouble finding that the claim “related to” a plan, even though the Mississippi bad faith law applied to all contracts.²⁰⁵

Following the Court’s plain meaning interpretation of the preemption clause, the Court then explored the savings clause exception to preemption and added some further analysis to its interpretative method.²⁰⁶ The Court stated that “[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”²⁰⁷ The Court did not consider the provisions of the whole law or its object and policy when the Court held that Dedeaux’s bad faith claim was subject to the preemption clause,²⁰⁸ but Dedeaux was probably expecting a better outcome with the Court’s stated approach to construing the savings clause. Following its recitation of this unremarkable rule of statutory construction, the Court immediately twisted its stated interpretive principle and, in fact, did not look to the object and policy of the statute or to the provisions of the whole law to aid in its interpretation of the savings clause. Instead, the Court focused on a single sentence in the statute, the civil enforcement provision, to inform the Court of Congress’s preemptive intentions.²⁰⁹ Because the Court determined Congress intended ERISA’s civil enforcement provisions to provide the exclusive remedies for all claims arising from any employee benefit plan, the Court narrowly

205. Compare *Pilot Life*, 481 U.S. at 48 (“The common law causes of action raised in Dedeaux’s complaint, each based on alleged improper processing of a claim for benefits under an employee benefit plan, undoubtedly meet the criteria for pre-emption under [the preemption clause.]”), with *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988) (holding that a state garnishment law specifically designed to affect ERISA plans was preempted, but that the state garnishment statute of general application was not preempted even though it affected a plan).

206. See *Pilot Life*, 481 U.S. at 47-57.

207. *Id.* at 51 (alteration in original) (internal quotations omitted).

208. See *id.* at 57.

209. See *id.* at 51-52. The Court stated:

In the present case . . . we are obliged in interpreting the saving clause to consider not only the factors by which we were guided in *Metropolitan Life*, but also the role of the saving clause in ERISA as a whole. On numerous occasions we have noted that [i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy. Because in this case, the state cause of action seeks remedies for the improper processing of a claim for benefits under an ERISA-regulated plan, our understanding of the saving clause must be informed by the legislative intent concerning the civil enforcement provisions provided by ERISA § 502(a), 29 U.S.C. § 1132(a).

Pilot Life, 481 U.S. at 51-52 (alteration in original) (citations omitted) (internal quotations omitted).

construed the savings clause exception to preserve the statute's broad preemptive effect.²¹⁰

The Supreme Court's opinion in *Pilot Life* was flawed from the outset. The Court began its analysis by stating that "ERISA comprehensively regulates, among other things, employee welfare benefit plans that, 'through the purchase of insurance or otherwise,' provide medical, surgical, or hospital care, or benefits in the event of sickness, accident, disability, or death."²¹¹ As previously demonstrated in this Article,²¹² however, ERISA does not comprehensively or substantively regulate welfare plans; ERISA comprehensively regulates pension plans and governs only some procedural aspects of welfare plan administration.²¹³ The distinction, while overlooked by the Supreme Court, is crucial in terms of preemption doctrine. If ERISA, in fact, comprehensively regulated welfare plans, then the preemption of state laws regulating health care, accident, death, and disability benefits would not have created a regulatory vacuum. The Supreme Court's continued assertion that ERISA comprehensively regulates welfare plans evidences the Court's failure to examine "the whole law, [and] its object and policy" in expounding the statute.²¹⁴

Pilot Life's implied preemption analysis, which relies on the civil enforcement scheme to discern the scope of Congress's preemptive intentions, put the cart before the horse. The overall intent of the statute should provide the basis for the interpretive decision regarding each subsection of the statute, rather than imputing the overall statutory purpose from the language of a particular subsection or sentence. Given that Congress's purpose in enacting ERISA was to

210. See *Pilot Life*, 481 U.S. at 57. The Court concluded its opinion with the following sentence:

Considering the common-sense understanding of the saving clause, the McCarran-Ferguson Act factors defining the business of insurance, and, most importantly, the clear expression of congressional intent that ERISA's civil enforcement scheme be exclusive, we conclude that Dedeaux's state law suit asserting improper processing of a claim for benefits under an ERISA-regulated plan is not saved by [the saving clause], and therefore is pre-empted by [the preemption clause].

Id.

211. *Id.* at 44 (quoting 29 U.S.C. § 1002(1) (1994)).

212. See discussion *supra* Part II.B.

213. ERISA's reporting and disclosure requirements are easily classified as procedural, rather than substantive, provisions. The labeling of ERISA's fiduciary responsibility rules as merely procedural, though, may spark some disagreement. I place the fiduciary provisions in the procedural category because ERISA's fiduciary standards were designed primarily to govern the investment and financial practices of the administrators of plan assets, rather than to secure any specific plan participant rights.

214. *Pilot Life*, 481 U.S. at 51.

effect pension reform,²¹⁵ the implied preemption analysis the Court applied to ERISA's civil enforcement scheme should have been limited to pension plan cases.

B. *The Harsh Results of Super-Preemption for Health Care Consumers*

ERISA super-preemption, proceeding in three often-overlapping categories, harms millions of workers by nullifying a myriad of state health care consumer protections. ERISA directly preempts state laws that "relate to" any employee benefit plan, including health care, disability, accident, and death benefit programs, whether insured or self-funded, when the state law "has a connection with or reference to" a plan²¹⁶ and is not saved from preemption as a law that regulates insurance.²¹⁷ ERISA even more broadly preempts state laws that "relate to" self-funded health care plans because the savings clause exception to preemption does not apply to self-funded plans.²¹⁸

215. See discussion *supra* Part II.B.

216. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). *Shaw* crafted a two-step analysis to determine when a state law "relates to" ERISA, separately exploring first whether a state law makes "reference to" a plan and then examining the challenged state law's "connection with" a plan. See *id.* at 97; see also *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997) ("Where a State's law acts immediately and exclusively upon ERISA plans, . . . or where the existence of ERISA plans is essential to the law's operation, . . . that 'reference' will result in [ERISA] pre-emption."); *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 130-31 (1992) (stating that a state law which specifically refers to ERISA is preempted on that basis alone); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 838 n.12 (1988) (holding a state garnishment law that specifically referenced ERISA was preempted, while a state garnishment law of general application was not preempted); *Prudential Ins. Co. v. National Park Med. Ctr., Inc.*, 154 F.3d 812, 824 (8th Cir. 1998) (finding Arkansas' Patient Protection Act preempted because it made "reference to" ERISA when the act expressly stated that it did not apply to self-funded plans).

In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), the Supreme Court provided further detail on how to analyze the "connection with" leg of the "relates to" definition described in *Shaw*. The *Travelers* Court ruled that to determine whether a state law has the forbidden connection with a plan, it is necessary to examine the "objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* at 656.

217. See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (holding that a state-mandated benefit statute requiring health care insurers and plans to include minimum levels of mental health coverage "relates to" ERISA plan but is saved from preemption when applied to insurers of ERISA plans). Drawing a distinction between insured plans and self-funded plans, the Court noted that, while states cannot directly regulate ERISA plans, they can indirectly regulate plans funded through the purchase of insurance by regulating the plan's insurer. See *id.* at 756-57.

218. ERISA preempts state regulation of self-funded plans through the interplay of ERISA's three preemption paragraphs. See 29 U.S.C. § 1144 (1994). ERISA supersedes state laws that relate to welfare plans; consequently, state attempts to regulate entities that provide health care plans, for example, fall within the ambit of ERISA's preemption clause if

Finally, ERISA impliedly preempts state law remedies that plan participants may assert against entities, including plans, plan administrators, and insurers, when they violate state consumer protection laws in the processing of participants' claims for benefits.²¹⁹ ERISA preemption causes unfairness in individual cases²²⁰ and contributes to a broad lack of security for all working people, contrary to ERISA's goals and objectives, by interfering with protective state policies in areas left unregulated by ERISA.²²¹ The harsh results of ERISA preemption can be examined in a study of ERISA's impact on the field of health care benefits, where the effect of ERISA preemption has been particularly disconcerting.

1. "[R]elates to" Preemption

Until the 1970s, most Americans received their medical care from a physician or hospital of the patient's own choosing. If the consumer had reason to believe that he should see a specialist for a particular ailment, the patient could go directly to the specialist without seeking a referral from a primary care physician. The doctor, in consultation with the patient, decided on a course of treatment, and the doctor determined what treatment was medically necessary.²²² After the patient received treatment, the doctor or hospital typically billed the patient for his copayment and billed the patient's insurance

the health care package is provided as an employee benefit. *See id.* § 1144(a). If the benefit provider (usually an employer or union) funds its payment obligations through the purchase of insurance, state insurance regulations may apply to the insurer due to the savings clause, allowing the state to regulate the plan indirectly. *See id.* § 1144(b)(2)(A). However, if the plan is self-funded, the deemer clause prevents states from enforcing its insurance laws against the plan because ERISA prohibits the states from viewing the plan as an insurance company or as engaging in the business of insurance. *See id.* § 1144(b)(2)(B); *see also* FMC Corp. v. Holliday, 498 U.S. 52, 61 (1990) (holding that a state anti-subrogation law was not saved from preemption because a self-funded plan cannot be deemed to be an insurance company); *Metropolitan Life*, 471 U.S. at 735 n.14 (describing how Massachusetts conceded that its mandated benefits statute would be preempted if applied to self-funded plans due to the deemer clause; consequently, the Massachusetts Attorney General never attempted to enforce the statute against self-funded plans).

219. *See Pilot Life*, 481 U.S. at 52 (stating that Congress intended ERISA's comprehensive civil enforcement scheme to provide the exclusive remedies available under ERISA); *see also* *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 62-63 (1987) (holding that plaintiffs' state bad faith claims preempted and, analyzing the claims for removal purposes, that ERISA provides "complete preemption" for cases involving claims for benefits under an ERISA plan).

220. *See* cases cited *infra* notes 236-242.

221. *See* ISSUES, TRENDS, AND CHALLENGES, *supra* note 15, at 14-17 (describing state complaints that they have lost oversight authority over the health care industry).

222. *See generally* Mark A. Hall & Gerard F. Anderson, *Health Insurers' Assessment of Medical Necessity*, 140 U. PA. L. REV. 1637, 1644 (1992) ("[P]rivate insurers were initially very deferential to both hospitals and physicians.").

company, retrospectively, for the remainder of the health care provider's fee-for-service bill.²²³ If the insurance company unreasonably refused to pay the bill, the patient could sue for the amount owed to the doctor, and additionally, the patient could sue for extracontractual damages if the insurer's actions in processing the claim were particularly egregious.²²⁴

When health care costs increased disproportionately as a percentage of gross national product in the 1980s,²²⁵ private financiers of health care services embarked on innovative cost-containment initiatives under so-called "managed care" programs that have revolutionized the health care delivery system and altered many of the relationships that previously controlled the health care industry.²²⁶

223. In traditional fee-for-service billing, doctors are paid separately for each procedure performed and for each patient office visit. Fee-for-service billing has often been replaced in managed care with capitated payment contracts for physicians or physician groups where the doctor or doctors are paid a fixed amount to provide all necessary care for a given patient population. *See id.* Some state insurance commissioners are investigating whether they can regulate physician groups under capitated pay plans because they believe that the insurance risk in capitated plans may have been shifted from the plan or plan insurer to the physicians. *See* PATRICIA BUTLER & KARL POLZER, PRIVATE-SECTOR HEALTH COVERAGE: VARIATION IN CONSUMER PROTECTIONS UNDER ERISA AND STATE LAW 17-18 (National Health Policy Forum, George Washington Univ., 1996) [hereinafter NHPF SPECIAL REPORT].

224. Extracontractual damages include compensatory damages for infliction of emotional distress, punitive damages for bad faith refusals to pay benefits, and treble damages under various state unfair trade practices or consumer fraud statutes. *See* Polzer & Butler, *supra* note 28, at 96.

The states have historically regulated the private health care industry under their police powers and through the regulation of insurance. *See* New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 665 (1995). At the time of ERISA's enactment, health insurance companies practiced relatively benign claims procedures, including retrospective payment of claims. Further, numerous safeguards existed in the various states to protect health care consumers from abuses by industry interests. Typical of the protections afforded consumers were mandated benefits laws and restrictions on insurance companies' ability to unilaterally terminate coverage. Additionally, since most private health care was financed through the purchase of insurance, and since states could and did regulate the financial practices of such insurers, prior to ERISA, consumers usually enjoyed some level of protection against the financial failure of their health insurer. *See* NHPF SPECIAL REPORT, *supra* note 223, at 11-24 (describing typical capitalization and reserve requirements and guaranty associations for state-regulated insurance companies).

225. *See* Joseph A. Califano, Jr., *Rationing Health Care: The Unnecessary Solution*, 140 U. PA. L. REV. 1525, 1526 (1992) ("Since the late 1970s, health care's share of GNP has jumped more than 50% . . .").

226. *See* NHPF SPECIAL REPORT, *supra* note 223, at 55-60. In 1983, the federal government instigated revolutionary cost-containment measures in the health care industry when it implemented Medicare diagnosis-related group (DRG) reimbursement protocols. *See* Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1326-27 (5th Cir. 1992). Under the DRG system, Medicare has established a comprehensive list of medical procedures for which the federal government will pay health care providers a set price. *See id.* The DRG system is not a pure prospective pay system, since precertification is not required; however, the health

Traditional fee-for-service, retrospective pay, health insurance policies have been largely replaced with Health Maintenance Organizations (HMOs),²²⁷ Preferred Provider Plans (PPOs),²²⁸ or with other types of prospective pay or capitated managed care plans.²²⁹

Many of the cost-containment policies initiated in the 1980s have gained widespread acceptance and have been viewed as a necessary step to assure the continued viability of the private health care delivery industry.²³⁰ Other practices, however, have been criticized as

care provider's reimbursement is set in advance of treatment. *See id.* Following Medicare's lead, the commercial health insurance industry began morphing into the managed care industry by shifting from a retrospective pay system to a prospective pay system. *See id.*

227. HMOs are managed care plans that generally act as both insurer and health care provider. Typically, the HMO receives a prepaid fee for the covered enrollee and in exchange provides comprehensive health care services for the enrollee through its own physician employees and facilities. *See generally* Brooks Richardson, Comment, *Health Care: ERISA Preemption and HMO Liability—A Fresh Look at ERISA Preemption in the Context of Subscriber Claims Against HMOs*, 49 OKLA. L. REV. 677, 686-88 (1996) (describing cost-containment measures of modern HMOs). "Because HMOs perform the dual function of bearing risk and arranging for the delivery of [health care] services, they are regulated in most states under separate HMO licensure laws." NHPF SPECIAL REPORT, *supra* note 223, at 56; *id.* at 59 n.10 (listing states that have adopted HMO regulatory provisions similar to the Model HMO Act of the National Association of Insurance Commissioners); *see also* Health Maintenance Act of 1973, 42 U.S.C. § 300e (1994) (establishing federal requirements for HMOs).

228. PPOs are managed care plans that typically contract with physician groups to cover a large group of subscribers. *See* Diana Joseph Bearden & Bryan J. Maedgen, *Emerging Theories of Liability in the Managed Health Care Industry*, 47 BAYLOR L. REV. 285, 297-98 (1995). The PPO uses the high volume of guaranteed patients that the plan controls through contracts with employers to negotiate with doctors and other health care providers. *See id.* PPOs are usually able to contract with individual doctors or doctor groups for lower fees in exchange for the right to access the PPOs' large pool of patients. *See id.* Patients may have the choice to use providers outside of the preferred provider network, but strong incentive is presented for the patients to utilize the preferred physicians and PPO-owned facilities because the plan will usually cover less of the fees charged by nonparticipating physicians and hospitals than it will cover for preferred providers or facilities. *See id.*

229. Under a retrospective pay system, it is difficult to challenge the appropriateness of the patient's treatment because the patient has already incurred the expense of the treatment. With the advent of prospective pay plans, insurers and plan providers have implemented various utilization review procedures that allow the payers of health care services to examine and question proposed treatment plans prior to delivery of the health care services. *See* John D. Blum, *An Analysis of Legal Liability in Health Care Utilization Review and Case Management*, 26 HOUS. L. REV. 191 (1989). While managed care providers consider the prospective pay system vital to their efforts at cost containment, the utilization review procedures of prospective pay plans have come under criticism due to the lack of independent review of claims denials, the shift in power to managed care providers to determine what is medically necessary treatment, and the inability of plan members to obtain quick review in the courts of claims denials in emergent situations. *See* NHPF SPECIAL REPORT, *supra* note 223, at 1-3, 55-60.

230. *See* Califano, *supra* note 225 (describing some of the causes for the rise in health care costs and the need for cost containment).

overbearing and overreaching.²³¹ For those industry practices that unfairly harm consumer interests, states have responded by enacting consumer protection regulations to control the practices of the new managed care plans.²³² Unfortunately, due to the application of ERISA under the Supreme Court's early preemption decisions, state attempts to protect consumer interests in the new managed care environment have been stymied.²³³

Under the *Shaw*²³⁴ and *Metropolitan Life*²³⁵ analyses, courts routinely nullify state laws that directly regulate the health care industry, as opposed to laws that indirectly regulate the industry by regulating insurance, because the laws "relate to" ERISA plans. For

231. Managed care practices that have prompted criticism include capitation contracts, physician gag clauses, conflicts of interests in utilization review, and a myriad of incentives in HMO practices or managed care contracts with physicians that encourage the use of self-owned facilities and discourage physicians from using expensive diagnostic testing or from referring patients to specialists. See NHPF SPECIAL REPORT, *supra* note 223, at 55; Polzer & Butler, *supra* note 28, at 97; see also *Herdrich v. Pegram*, 154 F.3d 362, 374 (7th Cir. 1998) (opining that a managed care plan discourages the use of costly diagnostic testing and encourages the use of self-owned facilities), *cert. granted*, 120 S. Ct. 10 (1999) (mem.); *Shea v. Esensten*, 107 F.3d 625, 627 (8th Cir. 1997) (recounting how an HMO plan discouraged referrals to specialists); *Weiss v. CIGNA Healthcare, Inc.*, 972 F. Supp. 748, 751 (S.D.N.Y. 1997) (describing an HMO's gag clause and capitated reimbursement contract with physicians).

232. See, e.g., *CIGNA Healthplan v. Louisiana ex rel. Ieyoub*, 82 F.3d 642, 645 (5th Cir. 1996) (holding that Louisiana's "any willing provider" statute "relates to" a plan and is not saved from preemption as a law that regulates insurance); *Corporate Health Ins. Inc. v. Texas Dep't of Ins.*, 12 F. Supp. 2d 597, 625 (S.D. Tex. 1998) (discussing a Texas statute that authorizes suits against HMOs arising from medical treatment decisions, requires HMOs to provide independent review of its decisions to deny benefits, and prohibits health insurers, HMOs, and other managed care entities from firing physicians who advocate for their patients); *Self-Insurance Inst. v. Gallagher*, No. TCA-86-7308-WS, 1989 WL 143288 (N.D. Fla. June 2, 1989) (holding that Florida statutes, which require insurance companies and other entities that provide administrative service contracts to self-funded plans to disclose their financial condition, adhere to advertising rules, and post bonds, are preempted to the extent administrators perform such functions with respect to self-funded plans), *aff'd*, 909 F.2d 1491 (11th Cir. 1990).

233. During President Clinton's first term in office, his administration responded to the public demand for regulation of the health care industry by sponsoring an ambitious plan to reform the industry through comprehensive federal legislation. See Health Security Act of 1993, H.R. 3600, 103d Cong. The Clinton health care plan failed to gain congressional support. As indicated in the cases cited herein, the states are virtually powerless to protect health care consumers due to ERISA preemption. As a result of ERISA preemption, the balance of power in the health care industry has shifted dramatically toward industry interests. As of the date of this publication, a bill to amend ERISA and provide some level of consumer protection for health care plan participants under federal law is languishing while debate continues over whether the bill should allow consumers to sue their health care plans under traditional state-law theories of liability. See Bipartisan Consensus Managed Care Improvement Act of 1999, H.R. 2723, 106th Cong.

234. See *supra* text accompanying notes 170-179.

235. See *supra* text accompanying notes 180-187.

example, a Texas statute requiring an HMO or other managed care entity to provide independent review of decisions to deny benefits and forbidding HMOs from terminating physicians who advocate for their patients has been preempted because the state law relates to an ERISA plan.²³⁶ Additionally, the Eighth Circuit has held that Arkansas' "Patient Protection Act," which guarantees the right of health care consumers to choose their own doctors, was entirely preempted by ERISA because the statute specifically refers to ERISA plans, even though the reference is merely to announce that self-funded plans are exempt from the state law.²³⁷

A group of cases in the health care field where the "relates to" analysis has subjected individual consumers to particularly harsh results involves claims against plans for refusing to cover recommended procedures.²³⁸ Under the prospective pay component of managed care plans, the plan (or some plan affiliate) must precertify or preapprove significant medical procedures before the patient receives treatment, or the plan will not pay for the treatment.²³⁹ The plan often denies coverage recommended by a treating physician when the plan administrators perceive that the procedure is experimental or is not medically necessary.²⁴⁰ When the plan refuses to precertify, the patient may not be able to afford the procedure and, therefore, often will not receive the treatment. If a plan participant suffers harm due to an erroneous refusal to pay for necessary and covered medical treatment, ERISA preemption will likely prevent the plan participant from obtaining any meaningful recovery for the plan's wrongful refusal to pay for the recommended treatment. Numerous federal courts of appeals have dismissed state-law claims for such wrongful medical decisions, leaving plan participants without redress. The courts have reasoned that, because the plan made the decision that the contemplated treatment was "experimental" or not "medically necessary" in the context of the claims handling process, rather than in

236. See *Corporate Health Ins. Inc. v. Texas Dep't of Ins.*, 12 F. Supp. 2d 597, 625, 628 (S.D. Tex. 1998).

237. See *Prudential Ins. Co. v. National Park Med. Ctr., Inc.*, 154 F.3d 812, 824 (8th Cir. 1998).

238. See, e.g., *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1333 (5th Cir. 1992) (holding that a state tort action for wrongful death was preempted). See generally Peter D. Jacobson & Scott D. Pomfret, *Form, Function, and Managed Care Torts: Achieving Fairness and Equity in ERISA Jurisprudence*, 35 HOUS. L. REV. 985, 1063-67 (1998) (citing cases and discussing the issue); Jeffrey E. Shuren, *Legal Accountability for Utilization Review in ERISA Health Plans*, 77 N.C. L. REV. 731, 763-72 (1999) (same).

239. See *Corcoran*, 965 F.2d at 1331-32.

240. See generally Hall & Anderson, *supra* note 222, at 1637-51 (discussing litigation ensuing from denial of treatment by managed health care plans).

the direct treatment of the patient, the plan participant's state-law claims were related to ERISA and were preempted.²⁴¹ Further, when courts have recast state-law claims sounding in tort to fit within ERISA's civil enforcement scheme, the plan participants' claims for extracontractual damages have been dismissed because ERISA does not provide any remedies comparable to the tort remedies available under state law, including punitive damages and treble damages.²⁴²

2. *Pilot Life's* Implied Preemption

In cases where a plan participant seeks tort damages for a plan's refusal to precertify or pay for physician-recommended treatment, *Pilot Life's* implied preemption often provides an alternative basis for preempting the participant's state law claims.²⁴³ The anticonsumer

241. See *Danca v. Private Health Care Sys., Inc.*, 185 F.3d 1, 7 (1st Cir. 1999) (holding that ERISA preempted state-law claims alleging that a plan failed to follow a physician's recommendations in directing treatment and were negligent in overseeing precertification decisions); *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1489 (7th Cir. 1996) (holding that ERISA preempted a claim arising from refusal to authorize physical therapy after knee surgery); *Cannon v. Group Health Serv. of Okla., Inc.*, 77 F.3d 1270, 1273-74 (10th Cir. 1996) (finding that a medical malpractice claim brought against an HMO for refusal to precertify a bone marrow transplant against a doctor's recommendation was preempted); *Spain v. Aetna Life Ins. Co.*, 11 F.3d 129, 131 (9th Cir. 1993) (holding that a state cause of action seeking damages for negligently denying authorization of a bone marrow transplant "relates to" a benefit plan and was preempted by ERISA); *Kuhl v. Lincoln Nat'l Health Plan of Kan. City, Inc.*, 999 F.2d 298, 303 (8th Cir. 1993) (holding that a medical malpractice claim against plan administrator for delaying precertification of heart surgery arose from administration of benefits and therefore was preempted); *Corcoran*, 965 F.2d at 1333 (holding that ERISA preempted a wrongful death claim arising from a utilization review decision to refuse doctor-recommended hospitalization for a woman experiencing a problem pregnancy); *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 53-55 (D. Mass. 1997) (finding that claims for medical malpractice and unfair insurance practices brought against a plan insurer and its utilization review subcontractor who refused to precertify a 30-day detoxification stay, even though the plan covered it, were preempted). *But see In re U.S. Healthcare, Inc.*, 193 F.3d 151, 162-63 (3d Cir. 1999) (holding that state-law medical negligence claims against an HMO regarding its policy of encouraging the discharge of newborns from hospitals within 24 hours of birth were not preempted); *Pacificare of Okla., Inc. v. Burrage*, 59 F.3d 151, 155 (10th Cir. 1995) (holding that a medical malpractice claim against a doctor employed by an HMO regarding his alleged negligence in treating a patient was not preempted); *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 356 (3d Cir. 1995) (holding that claims for medical malpractice arising from treatment at an employment-provided, HMO-affiliated hospital were not removable under the "complete preemption" doctrine because the claims were not claims for benefits under the terms of the plan); *Independence HMO, Inc. v. Smith*, 733 F. Supp. 983, 988-89 (E.D. Pa. 1990) (holding that medical malpractice claims brought against an HMO for vicarious liability due to negligent treatment by a surgeon associated with the HMO were not preempted).

242. See *Jass*, 88 F.3d at 1485 (holding that extracontractual and compensatory damages are not available when a plaintiff's claims are recharacterized under ERISA's civil enforcement provisions); *Kuhl*, 999 F.2d at 304-05 (same).

243. For a discussion of *Pilot Life's* implied preemption analysis, see *supra* notes 202-203 and accompanying text.

effects of the preemption of state-law remedies under the *Pilot Life* analysis cannot be overstated. Because the implied preemption analysis employed in *Pilot Life* operates beyond ERISA's express preemption language, it encroaches even more broadly into traditional areas of state authority than express ERISA preemption. Consequently, *Pilot Life* implied preemption applies to all cases arising from a claim for benefits under an ERISA plan, even claims against insurers asserting the violation of state insurance laws that arguably should escape ERISA preemption under the savings clause.²⁴⁴

The most prevalent and significant state-law remedies that have been preempted under implied preemption are bad faith claims and unfair insurance practices claims seeking extracontractual remedies.²⁴⁵ Without the threat of these extracontractual remedies, courts cannot punish either the plan or the insurance company that may fund a plan and control claims decisions when such entities engage in abusive practices. The unavailability of extracontractual remedies to plan participants severely alters the balance of power between the managed care industry and the health care consumer.²⁴⁶

3. Self-Funded Plans

Employers often promise to provide health care benefits for employees as part of the employment contract.²⁴⁷ This promise to provide benefits can be funded in various ways. The employer can merely promise to purchase an insurance policy for its employees,

244. See *Tri-State Mach., Inc. v. Nationwide Life Ins. Co.*, 33 F.3d 309, 314-15 (4th Cir. 1994) (holding that a state law is not saved from preemption as a law regulating the business of insurance if the type of regulation is not unique to the business of insurance); *Ramirez v. Inter-Continental Hotels*, 890 F.2d 760, 763-64 (5th Cir. 1989) (same). The savings clause analysis in both these and similar cases should be reevaluated in light of *UNUM Life Ins. Co. v. Ward*, 119 S. Ct. 1380 (1999). See also *Tutolo v. Independence Blue Cross*, No. CIV.A.98-CV-5928, 1999 WL 274975, at *7 (E.D. Pa. May 5, 1999) (citing *UNUM*, but holding that Pennsylvania's bad faith law does not regulate insurance and, therefore, is not saved from preemption).

245. See *Andrews-Clarke*, 984 F. Supp. at 57 (discussing the "catastrophic consequences" of the overbroad interpretation of ERISA's preemption clause).

246. See *Bast v. Prudential Ins. Co.*, 150 F.3d 1003, 1009 (9th Cir. 1998) (holding that extracontractual damages were not available), *cert. denied*, 120 S. Ct. 170 (1999) (mem.); *Painter v. Golden Rule Ins. Co.*, 121 F.3d 436, 440 (8th Cir. 1997) (holding that the plaintiff's state-law claims were preempted), *cert. denied*, 523 U.S. 1074 (1998) (mem.); *Tri-State Mach.*, 33 F.3d at 310 (same); *Tingey v. Pixley-Richards West, Inc.*, 953 F.2d 1124, 1133 (9th Cir. 1992) (same); *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489, 494 (9th Cir. 1988) (same); *Andrews-Clarke*, 984 F. Supp. at 59; *Ryan v. Fallon Community Health Plan, Inc.*, 921 F. Supp. 34, 38 (D. Mass. 1996) (same).

247. *Polzer & Butler*, *supra* note 28, at 93 (stating that 114 million Americans are covered through private employers).

thereby transferring the risks inherent in the promise to a third party.²⁴⁸ Alternatively, the employer may choose to self-fund the obligation to pay for its employees' health care costs. If the employer self-funds the health plan, it may pay claims out of its operating capital or general assets or set aside funds to pay for the health care liabilities, often in a form of a trust.²⁴⁹ The nature of the employer's promise and the manner in which the employer chooses to fund its obligations pursuant to that promise can have a profound effect on plan participants due to the interplay between ERISA's savings and deemer clauses.

State insurance regulations have historically protected consumers from abuses by overreaching insurance companies. Self-funded plans, however, receive near absolute immunity from state regulation under current ERISA preemption doctrine because self-funded plans cannot be deemed to be insurance companies.²⁵⁰ Consequently, self-funded health care plans may disregard state-mandated benefits²⁵¹ and mandated provider laws,²⁵² state notice-of-cancellation and conversion

248. Typically, when insurance is purchased to fund health care benefit obligations, a group policy of insurance is issued to the employer, and each covered employee receives a certificate of insurance evidencing an individual contract between the insurer and the employee governed by the terms of the group policy.

249. See ISSUES, TRENDS, AND CHALLENGES, *supra* note 15, at 54 n.79.

250. See *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990) (explaining that the deemer clause of ERISA forbids states from deeming employee benefit plans to be insurance companies).

251. See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 735 n.14 (1985) (explaining that a state law requiring all insurance policies and health care plans covering residents of the state to include a minimum level of mental health benefits is preempted as applied to self-funded plans, though the statute is saved from preemption as a law that regulates insurance to the extent that the law governed insurers who provided health insurance products purchased by ERISA plans); *Washington Physicians Serv. Ass'n v. Gregoire*, 147 F.3d 1039, 1043 (9th Cir. 1998) (holding that Washington's "alternate provider" statute avoids the preemption issue regarding self-funded plans by specifically excluding self-funded plans from the operation of the statute), *cert. denied*, 119 S. Ct. 1033 (1999) (mem.); *Insurance Bd. Under the Social Ins. Plan of Bethlehem Steel Corp. v. Muir*, 819 F.2d 408, 412-13 (3d Cir. 1987) (holding that Pennsylvania's mandated benefits and mandated provider laws requiring insurers to provide coverage for newborns, maternity, psychological testing, and certain health care providers were preempted as to Blue Cross/Blue Shield, which provided an administrative services contract to an ERISA plan); *Blue Cross & Blue Shield v. Bell*, 798 F.2d 1331, 1336 (10th Cir. 1986) (holding that a Kansas' mandated benefit and mandated provider statute that required insurers to cover newborn infants from the date of birth and to cover services provided by optometrists, dentists, chiropractors, and psychologists was preempted as to self-funded plans but was saved from preemption as a law that regulates insurance when applied to insurance products sold to plans).

252. See *CIGNA Healthplan of La., Inc. v. Louisiana ex rel. Ieyoub*, 82 F.3d 642, 650 (1996) (holding that Louisiana's "any willing provider" statute relates to an ERISA plan and is not saved from preemption because it applies to entities in addition to insurers). See generally Robert S. McDonough, Note, *ERISA Preemption of State Mandated-Provider*

rights laws,²⁵³ and state laws that require health care plans to provide participants the right to choose their own doctors.²⁵⁴ Perhaps most importantly, self-funded plans are exempt from state attempts to regulate their financial practices.²⁵⁵ Since ERISA's funding rules do not apply to welfare plans, and since ERISA prevents the states from regulating self-funded plans, self-funded health care plans receive no regulatory oversight over financial practices, leaving plan participants extremely vulnerable to plan insolvency.²⁵⁶

As the costs of health care benefits have continued to escalate, employers have increasingly self-insured their health care plans specifically because self-funded plans are exempt from state regulation and state insurance premium taxes.²⁵⁷ Self-insurance, of course, carries significant financial risks for employers.²⁵⁸ Small employers, particularly, may be unable to meet their self-insured health care benefits obligations to their employees if one or several employees suffer catastrophic injury or illness. In order to reap the benefit of ERISA's grant of regulatory exemption to self-funded plans, a cottage

Laws, 1985 DUKE L.J. 1194, 1199 (“[S]tate insurance laws are preempted to the extent that they purport to regulate self-insured employee benefit plans.”)

253. See *Smith v. Jefferson Pilot Life Ins. Co.*, 14 F.3d 562, 569-70 (11th Cir. 1994) (holding that a Georgia statute requiring an insurer to give the insured advance notice of termination “relates to” ERISA and is not saved as a law that regulates insurance); *Howard v. Gleason Corp.*, 901 F.2d 1154, 1158-59 (2d Cir. 1990) (holding that a New York statute requiring that notice of right to conversion be given by the insurer or the employer is preempted); *Presley v. Blue Cross-Blue Shield*, 744 F. Supp. 1051, 1060-61 (N.D. Ala. 1990) (holding that an Alabama common-law rule requiring insurers to notify beneficiaries when an employer had ceased making premium payments for health insurance coverage is preempted). *But see Cisneros v. UNUM Life Ins. Co.*, 134 F.3d 939, 946-47 (9th Cir. 1998) (holding that ERISA does not preempt a state-law notice/prejudice rule due to the savings clause), *cert. denied*, 119 S. Ct. 1495 (1999) (mem.).

254. See *Prudential Ins. Co. v. National Park Med. Ctr., Inc.*, 154 F.3d 812, 816 (8th Cir. 1998) (explaining that the Arkansas Patient Protection Act does not apply to self-funded health care plans).

255. See NHPF SPECIAL REPORT, *supra* note 223, at 11-24.

256. See *id.*; see also ISSUES, TRENDS, AND CHALLENGES, *supra* note 15, at 6, 14-16 (describing the growth of self-funded plans and the states' concerns with the lack of regulation).

257. The states are concerned that ERISA interferes with their historic police powers by allowing self-funded plans to avoid state consumer protection regulations. A particular concern is that participants in self-funded ERISA welfare benefit plans are not adequately protected from plan insolvency because the states cannot regulate or monitor the financial practices of self-funded plans. The spectacular growth of self-insured plans has been fueled by employer and plan efforts to avoid state regulation. See ISSUES, TRENDS, AND CHALLENGES, *supra* note 15, at 14-16; Gregory Acs et al., *Self-Insured Employer Health Plans: Prevalence, Profile, Provisions, and Premiums*, 15 HEALTH AFF. 266, 267 n.2 (1996).

258. See Troy Paredes, *Stop-Loss Insurance, State Regulation, and ERISA: Defining the Scope of Federal Preemption*, 34 HARV. J. ON LEGIS. 233, 234 (1997).

industry has developed in the insurance world designing, promoting, and selling so-called "stop-loss" insurance.²⁵⁹

Stop-loss insurance operates as a kind of excess insurance to reimburse self-insured plans when the plan has to pay claims above a stated limit.²⁶⁰ Insurers assert that self-funded plans which purchase stop-loss insurance remain self-funded for purposes of ERISA preemption analysis because the insurance covers only the employer and does not directly cover plan participants.²⁶¹ Though there is some split in authority, most courts have held that self-funded plans which purchase stop-loss insurance remain exempt from state insurance regulations.²⁶² State insurance commissioners have documented a steady increase in the sale of stop-loss coverage and view the practice as a subterfuge, designed specifically to avoid state regulation and state taxes.²⁶³

IV. SUPER-PREEMPTION PEAKS

A. *A False Start*

Following *Pilot Life*, the Supreme Court decided three ERISA preemption cases involving welfare benefit plans in which the Court began to place some limits on ERISA preemption, though without disapproving the super-preemption analysis established in the Court's earlier decisions. In *Fort Halifax Packing Co. v. Coyne*, the Court held that ERISA did not preempt a Maine statute requiring certain employers to provide a one-time severance payment to eligible employees in the event of a plant closing.²⁶⁴ The Court did not address ERISA's "relates to" language, but instead found that the state-mandated severance benefit was not a "plan" within the meaning of the preemption clause because the nature of the payment did not require the employer to implement any continuous administrative oversight.²⁶⁵

259. *See id.* at 234-35.

260. *See id.* at 234.

261. *See Polzer & Butler, supra* note 28, at 102 n.23.

262. *See Jeffrey G. Lenhart, ERISA Preemption: The Effect of Stop-Loss Insurance on Self-Insured Health Plans*, 14 VA. TAX REV. 615, 627-38 (1995) (discussing the split in authority).

263. *See NHPF SPECIAL REPORT, supra* note 223, at 7-10; ISSUES, TRENDS, AND CHALLENGES, *supra* note 15, at 14-16. *See generally* Paredes, *supra* note 258, at 251-56 (discussing the lack of state regulation of stop-loss insurance).

264. 482 U.S. 1, 19 (1987).

265. *See id.* at 18 ("Some severance benefit obligations by their nature necessitate an ongoing administrative scheme, but others do not. Those that do not, such as the obligation imposed in this case, simply do not involve a state law that 'relate[s] to' an employee benefit

In *Mackey v. Lanier Collection Agency & Service, Inc.*,²⁶⁶ the Supreme Court held that a creditor could enforce a state garnishment statute of general application against an ERISA plan.²⁶⁷ The plan administrator argued that the Georgia statute related to an ERISA plan because it required the plan to incur substantial administrative burdens and costs in order to comply with a creditor's notice of garnishment.²⁶⁸ The Supreme Court disagreed, stating that "certain ERISA provisions, and several aspects of the statute's structure, indicate that Congress did not intend to forbid the use of state-law mechanisms of executing judgments against ERISA welfare benefit plans, even when those mechanisms prevent plan participants from receiving their benefits."²⁶⁹

Finally, in *Massachusetts v. Morash*, the Court held that a state criminal law requiring employers to pay discharged employees their full wages on the date of discharge, including unused vacation pay, did

'plan.'" (quoting 29 U.S.C. § 1144(a)). The Court distinguished *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *aff'd sub nom. Brooks v. Burlington Indus., Inc.*, 477 U.S. 901 (1986) (mem.), and *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd*, 477 U.S. 901 (1986) (mem.). The *Burlington Industries* cases held that a plan that pays severance benefits out of the employer's general assets, rather than out of an ERISA trust fund, is an ERISA plan. See *Holland*, 772 F.2d at 1145; *Gilbert*, 765 F.2d at 325. The *Fort Halifax* Court stressed that it was the necessity of maintaining an administrative scheme that created the "plan." See *Fort Halifax*, 482 U.S. at 9. Since *Burlington Industries'* benefit commitment was made to each eligible employee as that employee left employment, the benefit obligation required the employer to create an ongoing administrative oversight to implement the obligation. See *Holland*, 772 F.2d at 1144; *Gilbert*, 765 F.2d at 323. The Maine statute, on the contrary, only created an obligation upon the one-time event of a plant closing; consequently, the statute did not mandate that employers implement an ongoing administrative scheme that would have been subject to ERISA's reporting, disclosure, and fiduciary responsibility rules. See *Fort Halifax*, 482 U.S. at 5-6, 17-19.

266. 486 U.S. 825 (1988). *Fort Halifax* and *Mackey* are the first ERISA preemption decisions in which the Court was divided as to the outcome of the case. In *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), Justices Brennan and Marshall concurred in the result; all of the other previous Supreme Court ERISA preemption cases were decided unanimously. *Mackey* and *Fort Halifax*, however, are both five-to-four decisions. See *Mackey*, 486 U.S. at 825; *Fort Halifax*, 482 U.S. at 1.

267. See *Mackey*, 486 U.S. at 831-38. In addition to the general garnishment statute, Georgia had enacted an antigarnishment statute that applied only to ERISA plans. See *id.* at 828. The purpose of the antigarnishment statute was to protect ERISA plans from state garnishment proceedings; consequently, the antigarnishment statute appears to be consistent with ERISA's broad preemption provision. See *id.* The Court held that the antigarnishment statute was preempted, even though it was consistent with ERISA's goals, because it expressly referred to an ERISA plan. See *id.* at 829-30.

268. See *id.* at 831.

269. *Id.* at 831-32. The Court noted that ERISA plans can sue and be sued, but the statute does not contain any mechanism for a successful litigant to collect on a judgment obtained against the plan. Consequently, "state-law methods for collecting money judgments must . . . remain undisturbed by ERISA; otherwise, there would be no way to enforce such a judgment won against an ERISA plan." *Id.* at 834.

not relate to an ERISA plan.²⁷⁰ The employer bank had a policy of paying earned vacation benefits to discharged employees but failed to follow that policy when it fired two vice presidents.²⁷¹ After being charged under the Massachusetts statute, the bank president asserted ERISA preemption as a defense in the criminal court proceeding.²⁷² The Supreme Court held that Massachusetts could maintain the criminal action against the bank president because the bank's policy of paying unused vacation benefits to discharged employees out of the bank's general assets did not establish an employee benefit plan within the meaning of ERISA.²⁷³

The brief trend toward upholding state law in the face of ERISA preemption was halted by *FMC Corp. v. Holliday*, in which Justice O'Connor, writing for the majority, returned to a plain meaning interpretation of ERISA's preemption language in order to nullify state law.²⁷⁴ *FMC Corp.* involved the common circumstance of overlapping coverage for health care costs incurred by a plaintiff injured in an automobile accident.²⁷⁵ FMC Corporation provided a health care benefits program covering Cynthia Holliday, the daughter of an FMC Corporation employee, through a self-funded ERISA welfare benefit plan.²⁷⁶ The plan contained a reimbursement provision, in violation of a Pennsylvania insurance statute, that allowed the plan to recover any payments made by the plan toward Cynthia Holliday's medical expenses from any recovery Cynthia obtained in a tort action against the party that caused the accident.²⁷⁷ The Supreme Court held that ERISA preempted Pennsylvania's antisubrogation statute because the state law "related to" a plan, and even though the law regulated

270. 490 U.S. 107, 114 (1989).

271. *See id.* at 110.

272. *See id.*

273. *See id.* at 120-21. The bank did not maintain a separate fund to pay vacation benefits, but rather paid vacation benefits in the same way it paid regular wages, that is, out of the bank's general assets. *See id.* at 111-20. Because no separate funds were set aside to meet the benefit obligations, there were no ongoing administrative tasks required to maintain a fund. *See id.* at 114-15. The Court noted that "Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employee benefits from accumulated funds." *Id.* at 115. Writing for the majority, Justice Stevens also stressed the Court's reluctance to displace state law in an area historically regulated by the states, particularly where ERISA does not replace the state regulation with any federal standards. *See id.* at 119 ("[B]ecause 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." (citation omitted)).

274. 498 U.S. 52, 58, 65 (1990).

275. *See id.* at 55.

276. *See id.* at 54.

277. *See id.* at 55-56.

insurance, the deemer clause barred application of the Pennsylvania insurance law to a self-funded plan.²⁷⁸

The plain meaning statutory construction rules applied in *FMC Corp.* again prevented the Supreme Court from considering ERISA's preemption language in the context of the statute's overall purposes. As a preface to her statutory interpretation analysis, Justice O'Connor indicated that her task was to "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."²⁷⁹ Justice O'Connor recalled the Court's observation in *Metropolitan Life Insurance Co. v. Massachusetts* that ERISA's preemption provisions "are not a model of legislative drafting,"²⁸⁰ but she promptly disregarded that warning and found that the operation of ERISA's preemption provisions are "nevertheless discernable."²⁸¹ Justice O'Connor refused to acknowledge that ERISA's preemption provisions are ambiguous, and consequently the majority opinion in *FMC Corp.* does not examine ERISA's structure and purpose to construe the preemption provisions in harmony with ERISA's overall goals.²⁸²

B. Justice Stevens Dissents

FMC Corp. presents a significant step in the evolution of ERISA preemption doctrine, not because anything new appears in the majority opinion, but because the case marks Justice Stevens' first dissent questioning the plain meaning statutory construction principles that had come to dominate the Court's ERISA preemption decisions.²⁸³ Justice Stevens recognized that the language of the Court's previous opinions supported the majority's "unnecessarily broad reading" of the

278. See *id.* at 61-65.

279. *Id.* at 57 (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). To buttress her plain meaning interpretive approach, Justice O'Connor also repeated the axiom that "[i]f the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." *Id.* (omission in original) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

280. *Id.* at 58 (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985)).

281. *Id.* ("The pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that 'relate[s] to' an employee benefit plan governed by ERISA." (alteration in original)).

282. The Court explored only the legislative history of the preemption provisions to find evidence of congressional intent. See *id.* at 58-59, 63-64. The intent to preempt trumped the overall intent of the statute. See *id.* at 58-59.

283. See *id.* at 65 (Stevens, J., dissenting).

phrase “relates to any employee benefit plan.”²⁸⁴ However, he thought the Court’s method produced an absurd result in *FMC Corp.*²⁸⁵ Justice Stevens concluded that “[w]hen there is ambiguity in a statutory provision pre-empting state law, we should apply a strong presumption against the invalidation of well-settled, generally applicable state rules.”²⁸⁶ Viewing the preemption clause as ambiguous and applying the presumption in favor of upholding state law, Justice Stevens concluded that only “state laws that purport to regulate subjects regulated by ERISA or that are inconsistent with ERISA’s central purposes” should be preempted.²⁸⁷

Justice Stevens dissented again in the Supreme Court’s next welfare plan ERISA preemption case, *District of Columbia v. Greater Washington Board of Trade*.²⁸⁸ In the majority opinion, written by Justice Thomas, the Court held that ERISA preempted a District statute that required employers who provide health insurance for their employees to provide equivalent health insurance coverage for injured employees eligible for workers’ compensation benefits.²⁸⁹ Justice Thomas’s opinion adheres unquestioningly to the Court’s previous ERISA preemption pronouncements.²⁹⁰ Justice Stevens’ dissent

284. *Id.* at 66 (Stevens, J., dissenting).

285. *See id.* (Stevens, J., dissenting). Justice Stevens criticized the majority opinion for drawing “a broad and illogical distinction between benefit plans that are funded by the employer (self-insured plans) and those that are insured by regulated insurance companies (insured plans).” *Id.* at 65 (Stevens, J., dissenting). In *Metropolitan Life*, 471 U.S. at 747, the Court had questioned this seemingly absurd distinction, but stated that since Congress created the distinction, it was up to Congress to alter the statute if it so desired.

286. *FMC Corp.*, 498 U.S. at 67 (Stevens, J., dissenting). Justice Stevens summarily dismissed any issues arising from the Conference Committee’s actions in changing ERISA’s preemption language. He stated, “[A]lthough the compromise that produced the statutory language ‘relate to any employee benefit plan’ is not discussed in the legislative history, the final version is perhaps best explained as an editorial amalgam of the two bills rather than as a major expansion of the section’s coverage.” *Id.* (Stevens, J., dissenting).

287. *Id.* (Stevens, J., dissenting).

288. 506 U.S. 125 (1992). In between *FMC Corp.* and *Washington Board of Trade*, the Supreme Court decided an ERISA preemption case involving a pension plan. In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 135-36, 138 (1990), the Court held that a state-law wrongful discharge claim was preempted where the plaintiff alleged that Ingersoll-Rand Company fired him in order to avoid contributing to his pension fund. The Court held that ERISA expressly preempted the claim and that preemption supported Congress’s goal of creating a uniform body of pension regulations. *See id.* at 142. Additionally, the Court held that the state-law claim conflicted with ERISA’s civil enforcement provisions. *See id.* at 142-45.

289. *See Washington Bd. of Trade*, 506 U.S. at 132-33.

290. The majority opinion begins with the same foundational inaccuracy recited in most of the Court’s previous ERISA preemption opinions, stating that “ERISA sets out a comprehensive system for the federal regulation of private employee benefit plans, including both pension plans and welfare plans.” *Id.* at 127. Justice Thomas then repeated the dictionary definition of “relates to” that was first announced in *Shaw* and noted that because

reexamined those pronouncements, particularly questioning the assertion that ERISA preempts all state laws that have a “connection with, or reference to” a plan.²⁹¹ Justice Stevens determined that this broad definitional language used in the Court’s previous decisions was dicta, and he suggested that it was “time to take a fresh look at the intended scope of the pre-emption provision that Congress enacted.”²⁹² Justice Stevens then proceeded, with some irony, to negate the Court’s broad preemption holdings by employing a plain meaning construction of the single word in the statute that most clearly implicates Supremacy Clause doctrine. He emphasized that ERISA’s so-called preemption provisions do not use the word “preempt”; rather, the statute says that ERISA shall “supersede” state laws that relate to any employee benefit plan.²⁹³ Applying his understanding that the word supersede means to replace, not to nullify, Justice Stevens concluded that “if we were to decide this case on the basis of nothing more than the text of the statute itself, we would find no pre-emption (more precisely, no ‘supersession’) of the District’s regulation of health benefits for employees receiving workers’ compensation because that subject is entirely unregulated by ERISA.”²⁹⁴ Despite the Court’s avowed “plain meaning” approach to statutory interpretation in ERISA preemption cases, no other Supreme Court opinion has discussed the argument that the “term ‘supersede’ connotes supplanting one thing with another.”²⁹⁵

the District statute “specifically refers to welfare benefit plans regulated by ERISA[,] on that basis alone [the District law] is pre-empted.” *Id.* at 130.

291. *See id.* at 135 (Stevens, J., dissenting).

292. *Id.* (Stevens, J., dissenting).

293. *See id.* at 136 (Stevens, J., dissenting).

294. *Id.* (Stevens, J., dissenting).

295. *Gast v. Oregon ex rel. Stevenson*, 585 P.2d 12, 23 (Or. Ct. App. 1978) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2295-96 (1971)). *Gast* explored the intended scope of ERISA’s preemptive reach very early in the history of ERISA litigation and made the point that the correct usage of the term ‘supersede’ does not mean to nullify even more clearly than Justice Stevens. *See id.* In *Gast*, the Oregon Court of Appeals was asked to decide whether ERISA preempted an Oregon statute that prohibited discrimination in the administration of fringe benefit programs based upon pregnancy. *See id.* at 15. The Oregon court stated:

Plaintiffs broadly interpret [“supersede”] to mean that Congress has totally occupied the field of fringe benefits We decline to make such a broad interpretation in the absence of any legislative declaration that Congress intended to create an enormous regulatory vacuum in areas that traditionally have been matters of vital state concern. Correct usage of the term “supersede” connotes supplanting one thing with another. Here Congress has only in small part supplanted state regulation. The substantive nature of health and welfare benefits provided by employers and employee organizations has not been addressed by Congress. We will not presume congressional intent to preempt unless Congress “has unmistakably so ordained.” Here it has not.

C. *The Court Abandons Literalism*

The Supreme Court's next welfare benefit plan preemption case presented a breakthrough in the Court's construction of ERISA's preemption clause. In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, the Court held that ERISA did not preempt enforcement of a New York law that imposed surcharges on hospital rates for commercial insurers but not on Blue Cross and Blue Shield plans or HMOs, even though the law had an indirect financial impact on ERISA plans.²⁹⁶ The 1995 opinion marks a fundamental shift in the Court's interpretive analysis of ERISA's preemption language as Justice Souter, writing for a unanimous Court, finally recognized that an "uncritical literalism" is no help in trying to construe ERISA's "relates to" phrase.²⁹⁷ Rather than repeating the tired and ineffectual practice of assuming that Congress intended ERISA's ambiguous language to have a plain meaning, Justice Souter dusted off the not-so-novel interpretive rule suggesting that a statute's language should be construed in context.²⁹⁸ He stated that "we begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs."²⁹⁹

The *Travelers* opinion identified the inherent conflict in the language of the preemption clause that had escaped the Court's focus in its early preemption decisions. Despite ERISA's clearly expansive language, Justice Souter realized that there must be some boundary to ERISA's preemptive scope and that Congress intended the "relate to" clause to define that boundary.³⁰⁰ Describing the linguistic border dispute presented in ERISA's preemption clause, Justice Souter explained:

The governing text of ERISA is clearly expansive. [The preemption clause] marks for pre-emption "all state laws insofar as they . . . relate to any employee benefit plan" covered by ERISA, and one might be excused for wondering, at first blush, whether the words of limitation ("insofar as they . . . relate") do much limiting. If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all

Id. at 23 (citations omitted).

296. 514 U.S. 645, 668 (1995). The Supreme Court decided another pension plan preemption case prior to *Travelers*. In *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 90 (1993), the Court held that ERISA's fiduciary standards apply to the manager of a pension plan's participating group annuity contract.

297. See *Travelers*, 514 U.S. at 656.

298. See *id.*

299. *Id.* at 655.

300. See *id.* at 656.

practical purposes pre-emption would never run its course, for “[r]eally, universally, relations stop nowhere.” But that, of course, would be to read Congress’s words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality. That said, we have to recognize that our prior attempt to construe the phrase “relate to” does not give us much help drawing the line here.³⁰¹

Justice Souter concluded that “[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.”³⁰²

After such a promising beginning, *Travelers* sorely disappointed. Immediately following the Court’s revelation that ERISA’s preemption language is ambiguous, the opinion leapt back into the past, as if two different authors divided the work and pasted it together. Instead of following the above discourse with an examination of ERISA’s extensive legislative history to see what problem Congress intended ERISA to remedy, or a review of the structure of the Act to disclose the legislation’s substantive regulations, or even a recitation of Congress’s purposes as described in the statute’s preamble, the opinion limited its inquiry to a brief examination of the inconclusive legislative history of ERISA’s preemption clause.³⁰³ Justice Souter continued to search for an intent to preempt independent of the statute at large, rather than trying to harmonize preemption with ERISA’s overall objectives.³⁰⁴ Justice Souter never returned to his insightful observation that ERISA’s express language fails to define the field of ERISA’s exclusive authority, and the opinion never referenced ERISA’s overall objectives as a guide to mark the borders of ERISA’s preemptive field. Instead, the Court decided the case on the basis of

301. *Id.* at 655 (citation omitted) (omissions in original) (second alteration in original).

302. *Id.* at 656.

303. *See id.* at 656-57 (citing Representative Dent’s and Senator Williams’ remarks addressing the Conference Committee’s purpose in expanding the preemption language).

304. *See id.* at 656 (“As we have said before, [ERISA’s preemption provision] indicates Congress’s intent to establish the regulation of employee welfare benefit plans ‘as exclusively a federal concern.’” (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981))). It must be observed that the *Travelers*’ reference to *Alessi* is terribly misleading. As noted earlier, *Alessi* was a pension plan case, and the complete context of the quoted language from *Alessi* indicates that the *Alessi* Court was not addressing welfare plans when it suggested that Congress intended to create a field of exclusive federal authority. *See Alessi*, 451 U.S. at 523 (finding that the preemption clause “demonstrates that Congress intended to depart from [the WPPDA] that ‘envisioned the exercise of state regulation power over pension funds,’ and meant to establish pension plan regulation as exclusively a federal concern” (citation omitted) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 512, 514 (1978) (plurality opinion))).

the presumption against preemption and a “gut judgment” that the New York health care financing statute’s connection with covered plans was just too “tenuous, remote, or peripheral” to renounce historic state-law jurisdiction.³⁰⁵

Despite *Travelers*’ hurried retreat from its criticism of the Court’s ERISA preemption precedents, the force of its logic created hope that *Travelers* would lead to a more reasonable and discernable ERISA preemption doctrine.³⁰⁶ The *Travelers* opinion signaled that super-preemption had peaked, but failed to provide any clear test or set of criteria that lower courts can employ to decide the continuing glut of ERISA preemption cases streaming into the courts.

D. *Post-Travelers Uncertainty*

The Supreme Court did not decide any ERISA preemption cases in 1996, allowing the lower courts some time to digest *Travelers*’ impact. In 1997, however, the Court issued two welfare plan ERISA preemption opinions that continued the Court’s trend toward upholding state law in the face of ERISA preemption challenges.³⁰⁷ Both of the 1997 welfare plan cases repeated *Travelers*’ more exacting inquiry for determining when a state law has a “connection with” an ERISA plan, but neither majority opinion advanced *Travelers*’ discussion of ERISA’s limitless preemptive boundaries.

The Court’s first 1997 ERISA preemption opinion, *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, involved the validity of a state law regulating apprenticeship training programs.³⁰⁸ California allowed public works contractors to pay apprentice employees at a lower rate than the prevailing

305. See *Travelers*, 514 U.S. at 661. *Shaw* first recited that “[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law ‘relates to’ the plan.” *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983).

306. See, e.g., Rebecca S. Fellman-Caldwell, Note, New York State Conference of Blue Cross & Blue Shield Plans v. *Travelers Insurance Co.*: *The Supreme Court Clarifies ERISA Preemption*, 45 CATH. U. L. REV. 1309, 1343 (1996) (characterizing the *Travelers* decision as a “turning point”).

307. See *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806 (1997); *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316 (1997). The Court also decided an ERISA preemption case involving a pension plan in 1997. In *Boggs v. Boggs*, 520 U.S. 833, 841-44 (1997), the Court determined that ERISA preempted a Louisiana law allowing a nonparticipant spouse to transfer an interest in undistributed pension plan benefits by testamentary instrument. A divided court held that the state law operated to frustrate ERISA’s objectives and therefore was preempted under traditional conflict preemption rules. See *id.* at 841-44. Consequently, the Court did not need to address the “relate to” problem or consider the applicability of field preemption.

308. 519 U.S. at 316.

journeyman wage if the apprentice were enrolled in a state-approved apprenticeship training program.³⁰⁹ A Dillingham Construction subcontractor employed apprentice craftsmen on a public works job and paid the apprentice workers a reduced wage; however, the subcontractor's apprenticeship program was not state-approved.³¹⁰ Dillingham Construction sued to prevent the state from interfering with the construction company's payments under its subcontract, alleging that ERISA preempted California's prevailing wage statute.³¹¹

The *Dillingham* majority found that the state law in question did not relate to an ERISA plan because the California apprenticeship program regulation did not require that an employer maintain a separate fund for payment of apprenticeship training expenses.³¹² Since an employer could defray the expenses of a covered apprenticeship program out of general assets, the Court reasoned that the regulation did not necessarily impact or "relate to" the administration of an ERISA fund.³¹³ The *Dillingham* Court parroted the new and enhanced "connection with" test announced in *Travelers* and emphasized the presumption against preemption of state law to decide the case, yet continued to cite the Court's early preemption decisions with approval.³¹⁴ Most importantly, the *Dillingham* Court did not explore the statute's structure, legislative history, or express declarations of policy to discern the object of the legislation.

Disappointed with the majority's refusal to acknowledge a more formal break from the Court's early ERISA preemption precedents, Justice Scalia filed a concurring opinion in *Dillingham* to emphasize his belief that the Court had embarked on a new ERISA preemption path.³¹⁵ Like Justice Souter in *Travelers*, Justice Scalia recognized that the fundamental difficulty in defining the intended scope of ERISA preemption arises from Congress's failure to identify any boundaries

309. *See id.* at 319.

310. *See id.* at 321-22.

311. *See id.* at 322.

312. *See id.* at 326-27.

313. *See id.*

314. *See id.* at 328, 330-31.

315. *See id.* at 335 (Scalia, J., concurring). Justice Scalia stated:

I join the Court's opinion today because it is a fair description of our prior case law, and a fair application of the more recent of that case law. Today's opinion is no more likely than our earlier ones, however, to bring clarity to this field—precisely because it does obeisance to all our prior cases, instead of acknowledging that the criteria set forth in some of them have in effect been abandoned.

Id. (Scalia, J., concurring).

to the field it intended ERISA to occupy.³¹⁶ Justice Scalia merged this boundary discussion with a quotation from a recent pension plan case to underscore his view that the Court should expressly reject the old "relate to" ERISA preemption analysis.³¹⁷ Justice Scalia opined:

I think it would greatly assist our function of clarifying the law if we simply acknowledged that our first take on this statute was wrong; that the "relate to" clause of the pre-emption provision is meant, not to set forth a *test* for pre-emption, but rather to identify the field in which ordinary *field pre-emption* applies Our new approach to ERISA pre-emption is set forth in *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*: "[W]e discern no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional pre-emption analysis." I think it accurately describes our current ERISA jurisprudence to say that we apply ordinary field pre-emption, and, of course, ordinary conflict pre-emption. Nothing more mysterious than that; and except as establishing that, "relates to" is irrelevant.³¹⁸

Less than four months after *Dillingham*, the Supreme Court did emphasize that *Travelers* marked a shift in ERISA preemption doctrine, but still declined to expand on the field preemption boundary discussion introduced in *Travelers* or to expressly overrule any previous ERISA preemption case. In *De Buono v. NYSA-ILA Medical & Clinical Services Fund*, the Court of Appeals for the Second Circuit initially ruled that ERISA preempted a New York gross receipts tax on the income of medical centers owned and operated by an ERISA plan because the state law "related to" the plan.³¹⁹ After issuing its opinion in *Travelers*, the Supreme Court vacated the Second Circuit judgment and remanded the case for further consideration in light of *Travelers*.³²⁰ On reconsideration, the Second Circuit again relied upon a literal

316. See *id.* at 335-36 (Scalia, J., concurring).

317. See *id.* at 336 (Scalia, J., concurring).

318. *Id.* (Scalia, J., concurring) (alteration in original) (citations omitted) (quoting *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 99 (1993)). Justice Scalia described the intended preemptive field as "the field of laws regulating 'employee benefit plan[s] described in section 1003(a) of this title and not exempt under section 1003(b) of this title.'" *Id.* (Scalia, J., concurring) (quoting 29 U.S.C. § 1144(a) (1994)). Unfortunately, Justice Scalia's description of the field by reference back again to ERISA's ambiguous language does nothing to cure the confusion over ERISA's limitless field of preemption.

319. See *NYSA-ILA Med. & Clinical Servs. Fund ex rel. Bowers v. Axelrod*, 27 F.3d 823, 828 (2d Cir. 1994), *vacated sub nom. Chassin v. NYSA-ILA Med. & Clinical Servs. Fund*, 514 U.S. 1094 (1995) (mem.).

320. See *Chassin v. NYSA-ILA Med. & Clinical Servs. Fund*, 514 U.S. 1094 (mem.) (1995).

interpretation of the preemption clause to nullify the New York tax.³²¹ Justice Stevens, writing for the majority in *De Buono*, scolded the Second Circuit for “failing to give proper weight to *Travelers*’ rejection of a strictly literal reading of [the preemption clause].”³²² Justice Stevens repeated that the “connection with” leg of the “relates to” test must be implemented in the context of the structure and purpose of the statute, while also emphasizing the presumption that ERISA should not be construed to preempt state law in areas of historic state regulation.³²³ The Court allowed New York to collect its tax, but again, despite the command to view preemption in the context of ERISA’s overall objectives, the opinion contained no analysis of the legislative history, structure, or purposes of the statute.

The Supreme Court’s most recent ERISA preemption case, *UNUM Life Insurance Co. v. Ward*, focused on the savings clause exemption to preemption for state insurance regulations and did not supplement *Travelers*’ discussion of the preemption clause ambiguity.³²⁴ California law, like that of most states, requires insurers who seek to avoid paying benefits based upon untimely notice of claim to show actual prejudice resulting from the delay in order to defeat the claim.³²⁵ In *UNUM*, the insurer asserted that ERISA preempted the California rule when applied to an insured ERISA disability benefits plan.³²⁶ The Supreme Court upheld the California law and clarified the savings clause analysis announced in *FMC Corp.* by ruling that the McCarran-Ferguson Act factors for determining whether a law regulates the business of insurance are mere checking points, rather than mandatory criteria, for establishing an exception to ERISA preemption.³²⁷

In a brief passage, the *UNUM* Court also addressed preemption clause analysis because the Court of Appeals for the Ninth Circuit had relied upon the preemption clause as an alternate basis for upholding the plan participant’s claim.³²⁸ The Ninth Circuit had ruled that even if California’s notice/prejudice rule were not saved from preemption, the

321. See *NYSA-ILA Med. & Clinical Servs. Fund v. Axelrod*, 74 F.3d 28 (2d Cir. 1996), *rev’d sub nom.* *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806 (1997).

322. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 812-13 (1997).

323. See *id.* at 813-14.

324. 119 S. Ct. 1380 (1999).

325. See *Dang v. UNUM Life Ins. Co.*, 175 F.3d 1186, 1189 n.3 (10th Cir. 1999).

326. See *UNUM*, 119 S. Ct. at 1387, 1390-91.

327. See *id.* at 1389 (citing 15 U.S.C. §§ 1001-1015 (1994)).

328. See *id.* at 1391.

plan had timely notice of the claim due to the application of California law, which provides that an employer is the agent of the plan for notice purposes.³²⁹ Under *Travelers'* more narrow preemption clause doctrine, the Ninth Circuit held that California's agency rules do not "relate to" ERISA plans.³³⁰ Without discussion of *Travelers*, and without citing *Dillingham* or *De Buono*, the *UNUM* Court summarily rejected the court of appeals' preemption clause analysis and found that California agency law "relates to" ERISA because it "would have a marked effect on plan administration."³³¹

Though *UNUM's* savings clause analysis continued the Supreme Court's trend of upholding state law in the face of ERISA preemption challenges, the opinion's preemption clause discussion hinders more than helps the effort to clarify how courts should define the boundaries of ERISA's preemptive field. The lower courts know that ERISA preemption rules have changed, but the Supreme Court must unequivocally shed the burdens of its early precedents if the ERISA preemption litigation specialists are ever to return to more beneficial work.

V. THE RETURN OF TRADITIONAL CONFLICT AND FIELD PREEMPTION ANALYSIS

ERISA's preemption of state-law consumer protections is too often documented in court opinions expressing regret and frustration that the law does not provide a remedy for welfare plan participants' legitimate claims.³³² Despite ERISA's expansive preemption

329. See *Ward v. Management Analysis Co. Employee Disability Benefit Plan*, 135 F.3d 1276, 1281-89 (9th Cir. 1998), *aff'd in part and rev'd in part sub nom. UNUM Life Ins. Co. v. Ward*, 119 S. Ct. 1380 (1999).

330. See *id.* at 1287-89.

331. *UNUM*, 119 S. Ct. at 1392.

332. See *Bast v. Prudential Ins. Co.*, 150 F.3d 1003, 1005 (9th Cir. 1998) ("Although this case presents a tragic set of facts, the district court properly concluded that under existing law the Bastas are left without a remedy."), *cert. denied*, 120 S. Ct. 170 (1999) (mem.); *Cannon v. Group Health Serv. of Okla., Inc.*, 77 F.3d 1270, 1271 (10th Cir. 1996) ("Although moved by the tragic circumstances of this case and the seemingly needless loss of life that resulted, we conclude the law gives us no choice but to affirm [the grant of summary judgment to the insurer]."); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1338 (5th Cir. 1992) ("The result ERISA compels us to reach means the Corcorans have no remedy, state or federal, for what may have been a serious mistake."); *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 52-53 (D. Mass. 1997) ("The tragic events set forth in Diane Andrews-Clarke's Complaint cry out for relief. . . . Under traditional notions of justice, the harms alleged . . . should entitle [her] to some legal remedy Nevertheless, this Court had no choice but to pluck [her] case out of the state court in which she sought redress (and where relief to other litigants is available) and then, at the behest of Travelers . . . , to slam the courthouse doors in her face and leave her without any remedy." (footnotes omitted)); *Florence Nightingale Nursing Serv., Inc. v. Blue Cross & Blue Shield*, 832 F. Supp. 1456,

language, Congress neither directed nor intended the broad nullification of state laws affecting nonpension employee benefits that has emerged from the Supreme Court's ERISA super-preemption doctrine. Congress certainly created troublesome issues in ERISA by adopting a hastily drafted and patently overbroad preemption provision. It was the Supreme Court, though, that implemented the ERISA preemption mischief by adhering to two fundamental, and monumental, miscalculations. First, the Supreme Court insisted upon a plain meaning construction of ERISA's preemption language despite the Court's early awareness of ambiguities in Congress's selected words and phrases.³³³ Second, and equally important in formulating a solution to the ERISA preemption puzzle, the Court has carelessly maintained that ERISA regulates nonpension plans comprehensively.³³⁴

In *Travelers*, the Supreme Court finally acknowledged that ERISA's confusing preemption clause forestalls a simple, plain meaning interpretation of the statutory language.³³⁵ Clearly, plain meaning is now out, but there remains some question as to what will follow because the Court still has not proposed a workable method to define the field of ERISA's exclusive authority. In his concurring opinion in *Dillingham Construction*, Justice Scalia hinted that traditional conflict and field preemption analysis might provide the

1457 (N.D. Ala. 1993) ("A hyperbolic wag is reputed to have said that E.R.I.S.A. stands for 'Everything Ridiculous Imagined Since Adam.' This court does not take so dim a view of the Employee Retirement Income Security Act of 1974. Instead, this court is willing to believe that ERISA has lurking somewhere within it a redeeming feature."), *aff'd*, 41 F.3d 1476 (11th Cir. 1995); *Jordan v. Reliable Life Ins. Co.*, 694 F. Supp. 822, 827 (N.D. Ala. 1988) ("The ERISA quicksand is fast swallowing up everything that steps in it or near it. This morass serves as the stage for a theater of the absurd. If Reliable had issued this very policy of insurance directly to its insured, instead of to Vulcan Materials for the benefit of the insured and others as members of an employee group, the widow would clearly enjoy the Seventh Amendment's guarantee of trial by jury. Except for alleged ERISA preemption, [the] plaintiff here would clearly have a common law cause of action for a simple breach of contract, the result depending upon a jury resolution of disputed material facts."); *see also* Acker, *supra* note 20, at 286 (stating that ERISA invites frustration); Fisk, *supra* note 8, at 38 ("It is a rich irony that ERISA, which was heralded at its enactment as significant federal protective legislation, has through its preemption provision been the basis for invalidating scores of progressive state laws." (footnote omitted)).

333. *See* *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739-41 (1985); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523-24 (1981).

334. Even in the seminal case of *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 650-51 (1995), the Court recited that "ERISA's comprehensive regulation of employee welfare and pension benefit plans extends to those that provide 'medical, surgical, or hospital care or benefits' for plan participants or their beneficiaries 'through the purchase of insurance or otherwise.'"

335. *See id.* at 656.

answer.³³⁶ Though a majority of the Court has not seized upon Justice Scalia's suggestion, a logical extension of the *Travelers'* analysis compels application of traditional implied preemption rules. Implied preemption, of course, often hinges on the perceived comprehensiveness of the federal enactment. Consequently, it is imperative that the Court acknowledge ERISA's lack of substantive regulation of nonpension employee benefits if a sensible ERISA preemption doctrine is to be achieved.

A. Plain Meaning

When the Supreme Court first addressed ERISA's preemption language, the Court introduced years of preemption confusion by employing the wrong canon of statutory construction to interpret ERISA's preemption language. Under the "plain meaning" rule, if the language of a statute is unambiguous, courts apply a literal interpretation of the text and, generally, do not examine any extrastatutory source to determine congressional intent.³³⁷ A corollary to the plain meaning rule, however, dictates that even if the words of a statute are plain and unambiguous on their face, courts must still construe the language if the plain meaning of the words conflicts with the policy of the statute or a clearly expressed legislative intention

336. See *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 336 (1997) (Scalia, J., concurring).

337. Though plain meaning opinions recite that they merely implement congressional intent as expressly provided, those same opinions often go on to cite legislative history to support their plain meaning construction. Compare *id.* at 452-53 (Scalia, J., concurring) ("Although it is true that the Court in recent times has expressed approval of [the above cited] doctrine, that is to my mind an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity. Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent." (citations omitted)), with *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987) ("[T]he plain language of this statute appears to settle the question before us. Therefore, we look to the legislative history to determine only whether there is 'clearly expressed legislative intention' contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses.").

The debate concerning the plain meaning view of statutory construction has been advanced in recent years by Justice Scalia's attention to the issue. See generally Fritz Snyder, *Legislative History and Statutory Interpretation: The Supreme Court and the Tenth Circuit*, 49 OKLA. L. REV. 573, 589-91 (1996) (calling Justice Scalia "the most prominent of the textualists"); Arthur Stock, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160 (examining Justice Scalia's "textualist" approach to statutory interpretation). Compare Starr, *supra* note 149 (eschewing reference to legislative history in statutory interpretation), with Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, (favoring reliance on legislative history as an aid to determine congressional intent). See generally SINGER, *supra* note 57, § 46.01, at 81-83 (discussing the plain meaning rule).

contrary to the ordinary meaning of the words.³³⁸ Similarly, if Congress writes a patently ambiguous provision, courts must view the ambiguous words and phrases in the context of the statute's structure and overall objectives to arrive at the legislation's intended meaning.³³⁹

The Supreme Court's early ERISA preemption cases characterized the Court's initial plain meaning approach to the statute by announcing that the analysis should "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."³⁴⁰ Recognizing the failure of this plain meaning approach to ERISA preemption, *Travelers* instead implemented the rule's corollary principle. In *Travelers*, Justice Souter heralded that "we begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs."³⁴¹ With that colossal advance in interpretative method, the *Travelers*' opinion set the stage for a new drama in welfare plan preemption litigation.³⁴² Now that the Court has recognized ERISA's express language does not define the scope of

338. See *Escobar Ruiz v. INS*, 838 F.2d 1020, 1023 (9th Cir. 1988).

339. See *supra* text accompanying notes 52-57.

340. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)); see *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990) ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." (quoting *Chevron U.S.A. Inc. v. National Resources Defense Council*, 467 U.S. 837, 842-43 (1984))); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987) (approving a broad common-sense meaning of "relate to"); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983) ("We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning."). It must be observed that in *FMC Corp.*, 498 U.S. at 58-58, 63-64, *Pilot Life*, 481 U.S. at 46, *Metropolitan Life*, 471 U.S. at 745, and *Shaw*, 463 U.S. at 98, the Court emphasized the legislative history of the preemption clause to support the Court's preemption analysis. Presumably the Court explored the legislative history of the words it was interpreting in order to confirm that the legislative history did not contain a clear expression of intent contrary to the ordinary meaning of those words.

341. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

342. By declaring the preemption clause ambiguous, Justice Souter freed the Court (even Justice Scalia) to examine the entire legislative history of the statute, along with its structure and any stated purposes, to discern Congress's overall purposes in enacting ERISA so that the ambiguous preemption language could then be construed in harmony with those overall objectives. See *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335-36 (1997) (Scalia, J., concurring) ("The statutory text provides an illusory test, unless the Court is willing to decree a degree of pre-emption that no sensible person could have intended—which it is not.").

ERISA's exclusive field of authority, how are courts to decide the extent of ERISA's preemptive reach?

B. Absent Clear Instructions, Courts Must Infer the Intended Scope of ERISA Preemption

The Supreme Court's ERISA preemption cases following *Travelers* failed to advance the fundamental statutory construction thesis that should naturally flow from the opinion's labeling of the preemption clause as ambiguous. Neither *De Buono* nor *Dillingham* examined ERISA's legislative history to determine why Congress enacted the statute, and neither opinion discerned from the structure of the Act that ERISA regulates pension plans and nonpension plans differently.³⁴³ Even in *Travelers*, the Court never attempted to discover "the mischief and defect for which the common law did not provide" prior to ERISA or the "remedy [Congress] hath resolved and appointed to cure the disease."³⁴⁴ Since *Travelers*, the Court seems stuck, first categorizing ERISA's language as ambiguous, but then refusing to employ standard interpretative techniques to construe the statute's indeterminate words and phrases in order to discern congressional intent.

Given the freedom granted by *Travelers* to explore extrastatutory evidence of congressional intent, I cannot blame textualism for the Court's continued failure to clarify ERISA preemption doctrine. I suggest the problem is that the Supreme Court continues to search only for evidence of some intent to preempt, without also searching for evidence of the intended extent of preemption. With apologies to Justice Thomas, application of field preemption doctrine is a two-step process.³⁴⁵ Did Congress intend the federal enactment to regulate the field exclusively so that even complementary state laws should be

343. Even Justice Stevens, who pioneered the demise of super-preemption with his early dissents, failed to add any substance to *Travelers*' new method of ERISA preemption analysis. Writing for the Court in *De Buono*, Justice Stevens merely relied upon a vigorous application of the presumption against preemption of historic state police powers to stem the tide of super-preemption. See *De Buono v. NYSA-ILA Med. & Clinical Serv. Fund*, 520 U.S. 806, 814 (1997) (stating that because the state law at issue operates in a traditionally state-regulated field, "[r]espondents . . . bear the considerable burden of overcoming 'the starting presumption that Congress does not intend to supplant state law'" (quoting *Travelers*, 514 U.S. at 654)).

344. *Heydon's Case*, 76 Eng. Rep. 637, 638 (K.B. 1584).

345. See *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 133 (1992) (responding to an admittedly different ERISA preemption argument, Justice Thomas stated that "[w]e cannot engraft a two-step analysis onto a one-step statute").

nullified? If so, what are the boundaries of the preempted field?³⁴⁶ ERISA's express preemption language only answers the first question; the answer to the second inquiry must be inferred, and that inference must flow from the overall intent of the legislation.

Traditional implied preemption doctrine derives from very standard rules for interpreting ambiguous statutory language with the added gloss arising from federalist principles that courts must begin preemption analysis with the presumption against preempting historic state police powers. Conflict and field preemption analyses identify specific criteria in a statute's structure and goals that evidence Congress's preemptive intentions.³⁴⁷ If a statute comprehensively regulates a particular subject, congressional intent to occupy that field is presumed.³⁴⁸ Additionally, addressing the federalism principles inherent in preemption analysis, implied preemption rules dictate that courts consider the subject of a federal enactment to determine if Congress intended to exclusively control that subject.³⁴⁹ If the matter is peculiarly within the federal domain and has not been historically state-regulated, field preemption applies.³⁵⁰

Applying implied preemption rules to ERISA's ambiguous preemption language produces a sensible and workable ERISA preemption doctrine. From ERISA's broad preemption language, and from the remarks of a few members of the Conference Committee that produced the final preemption language, it appears that Congress intended ERISA to occupy some field of employee benefits regulation. ERISA's express language does not help define the intended scope of ERISA preemption, though, because a literal interpretation of the express language produces an absurdly large field of federal dominance. The language that produces the absurd result, therefore, should be construed, if possible, in a manner that is consistent with the express intention to apply field preemption principles to ERISA, but also in a manner that is in harmony with the structure of the Act and with the overall purposes of the statute. Since ERISA does not comprehensively regulate nonpension employee benefit plans,³⁵¹ and since nonpension plans have historically been governed by the

346. See *Cipollone v. Liggett Group, Inc.*, 505 U.S., 504, 517 (1992) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. . . . Therefore, we need only identify the domain expressly pre-empted by each of [the preemption] sections.").

347. See discussion *supra* Part I.

348. See discussion *supra* Part I.

349. See discussion *supra* Part I.

350. See discussion *supra* Part I.

351. See discussion *supra* Part II.B.

states,³⁵² the implied preemption doctrine requires application of conflict preemption rules to nonpension cases.

VI. CONCLUSION

The task of identifying the scope of Congress's preemptive intentions in ERISA should present an easier exercise than traditional implied preemption analysis precisely because ERISA contains an express preemption provision.³⁵³ ERISA proves, however, that even when Congress includes express preemption language in a statute, establishing Congress's preemptive intentions in a given case can be a slippery undertaking. In formulating its approach to ERISA preemption, the Supreme Court attempted to apply a "plain meaning" construction of ERISA's preemption language to determine the scope of federal authority over state law.³⁵⁴ Unfortunately, because ERISA's express preemption language provides no limitations on the extent of state laws that Congress intended to preempt, the Court's plain meaning approach to ERISA preemption has led to an astonishingly overbroad nullification of state consumer protection regulation.

The Supreme Court has recognized the failure of its plain meaning approach to ERISA preemption,³⁵⁵ but it is not yet clear that the Court will embrace traditional preemption doctrine as the solution to the ERISA preemption puzzle. To cure the super-preemption infection, the Supreme Court must declare the preemption clause to be ambiguous and then look to the legislative history of the statute and its structure and purpose to imply the intended boundaries of ERISA preemption. The rules are already in place for that interpretative analysis in traditional conflict and field preemption doctrine. Applying those traditional field preemption criteria to determine the intended scope of Congress's preemptive intentions, ERISA's legislative history, structure, and purpose dictate that ERISA only

352. See *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995) (noting that general health care regulation is historically a local concern).

353. In the Supreme Court's first experience with ERISA preemption, the Court optimistically observed that "we are assisted by an explicit congressional statement about the pre-emptive effect of its action." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981).

354. See discussion *supra* Part III.A.

355. See *Travelers*, 514 U.S. at 656 ("We simply must go beyond the unhelpful text and 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.").

supersedes state laws that conflict with ERISA's minimal regulation of welfare plans.

