

ERISA AND THE LANGUAGE OF PREEMPTION

JAY CONISON*

When the final version of the Employee Retirement Income Security Act of 1974 (ERISA) emerged from Conference Committee, its preemption clause had been significantly changed. Prior versions of the clause would have preempted state laws, but only “insofar as they may now or hereafter relate to the fiduciary, reporting, and disclosure responsibilities of persons acting on behalf of employee benefit plans”;¹ or “insofar as they may now or hereafter relate to the subject matters regulated by this Act”;² or with like subject-specific contours.³ By contrast, section 514(a) as enacted declares that the provisions of ERISA “supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.”⁴

* Associate Professor of Law, Oklahoma City University. B.A., 1975, Yale College; M.A., 1978, University of Minnesota; J.D., 1981, University of Minnesota. I received helpful comments on earlier drafts from Norwood Beveridge, Nancy Conison, Richard Coulson, Arthur LeFrancois, Robert Henry, and Andrew Spiropoulos.

1. H.R. 2, 93d Cong., 1st Sess. 114 (1973), *reprinted in* I SENATE COMM. ON LABOR & PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 51 (1976) [hereinafter LEGISLATIVE HISTORY]. *See also* S. 1557, 93d Cong., 1st Sess. (1973), *reprinted in* I LEGISLATIVE HISTORY, *supra*, at 319.

2. S. 4, 93d Cong., 1st Sess., § 602(a) (1973), *reprinted in* I LEGISLATIVE HISTORY, *supra* note 1, at 186.

3. *E.g.*, H.R. 12,906, 93d Cong., 2d Sess. 514 (1974), *reprinted in* II LEGISLATIVE HISTORY, *supra* note 1, at 2920-21.

4. Employee Retirement Income Security Act of 1974 § 514(a), 29 U.S.C. § 1144(a) (1988). The description in the text oversimplifies section 514(a) in two respects. First, only the provisions of Titles I and IV supersede state laws. Those titles deal respectively with the protection of participant rights and with plan termination. Section 514(a) does not give preemptive effect to Title II—the tax provisions of ERISA. However, that omission is largely immaterial, because the provisions of Title II that announce substantive standards for plans (other than standards prohibiting discrimination in favor of highly compensated employees) essentially duplicate provisions found in Title I.

Second, ERISA section 514(a) preempts state laws only insofar as they relate to plans governed by Title I. Plans are not covered by that title if they are not sufficiently connected with commerce. Employee Retirement Income Security Act of 1974 § 4(a), 29 U.S.C. § 1003(a) (1988); *Sheffield v. Allstate Life Ins. Co.*, 756 F. Supp. 309 (S.D. Tex. 1991). Also not covered by Title I are governmental plans (as defined in 29 U.S.C. § 1002(32)); church plans (as defined in 29 U.S.C. § 1002(33)); plans maintained solely for the purpose of complying with a state’s workers’ compensation, unemployment compensation or disability insurance laws; plans maintained outside the United States primarily for nonresident aliens; and unfunded excess benefit plans (as defined in 29 U.S.C. § 1002(36)). Employee Retirement Income Security Act of 1974 § 4(b), 29 U.S.C. § 1003(b) (1988). *See also* *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

These qualifications to the basic preemption standard quoted in the text are not relevant to this

The legislative history contains little explanation for this striking change. One was intimidated by Senator Javits, a principal author of ERISA. He told the Senate that a broad and simple standard was preferable because it would reduce controversies over interpretation: "Both House and Senate bills provided for preemption of State law, but . . . 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"⁵ But there is irony to this explanation. For if the language of section 514(a) was truly chosen to prevent litigation over the scope and meaning of the clause, Congress badly missed the mark. Since the Supreme Court's first ERISA preemption decision in *Alessi v. Raybestos-Manhattan, Inc.*,⁶ it has handed down an average of one opinion on the subject per year.⁷ Needless to say, those opinions are only the tip of the litigation iceberg. Federal and state courts render hundreds of ERISA preemption decisions each year.⁸

These preemption decisions, moreover, are often difficult ones. Uncertainty as to what principles, policies, and considerations courts should rely on generates rampant disagreement over even simple questions. To take one example, courts cannot agree whether ERISA preempts estoppel and misrepresentation claims by hospitals against plans for the cost of treating participants; in fact, they cannot even agree how to analyze the issue.⁹

Article's thesis and will be ignored.

5. 120 CONG. REC. 29,942 (1974), reprinted in III LEGISLATIVE HISTORY, *supra* note 1, at 4770-71.

6. 451 U.S. 504 (1981).

7. The cases following *Alessi* that deal with preemption are: *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988); *Massachusetts v. Morash*, 490 U.S. 107 (1989); *FMC Corp. v. Holliday*, 498 U.S. 356 (1990); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *District of Columbia v. Greater Washington Bd. of Trade*, 113 S. Ct. 580 (1992); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517 (1993).

8. In December 1992, Justice Stevens complained that there were then more than 2800 cases reported by LEXIS "addressing ERISA preemption." *District of Columbia v. Greater Washington Bd. of Trade*, 113 S. Ct. 580, 586 n.3 (1992) (Stevens, J., dissenting).

9. *Compare Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236 (5th Cir. 1990) (no preemption) and *Meadows v. Employers Health Ins.*, 826 F. Supp. 1225 (D. Ariz. 1993) (no preemption) with *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272 (6th Cir. 1991), cert. dismissed, 113 S. Ct. 2 (1992) (preemption) and *National Alcoholism Programs/Cooper City, Florida, Inc. v. Palm Springs Hosp. Employee Benefit Plan*, 825 F. Supp. 299 (S.D. Fla. 1993) (preemption) and *Barnes Hosp. v. Santus Passport/Preferred Servs., Inc.*, 809 F. Supp. 725 (E.D. Mo. 1992) (preemption).

In part, the surfeit of cases results from attorney ignorance and bad habits. For example, if anything in the field of ERISA preemption can be described as black-letter, it is the rule that a state law claim functionally equivalent to a suit for benefits is preempted.¹⁰ Yet state law claims for benefits, alleging fraud, contract, or estoppel are still routinely brought; sometimes out of ignorance, more often out of the litigator's penchant for including every logically possible claim.¹¹ But these facially preempted claims are only a small part of the flux, and the problem they create can be handled procedurally, through Rule 11 and the ERISA provision allowing recovery of attorney's fees.¹²

To a far greater extent, the flux of litigation is an unintended consequence of the language of section 514(a). That provision is framed as a general standard which can attain definiteness only through the case decision process. It demands the very litigation over "the validity of State action" that it supposedly was designed to avoid. Congress clearly understood the need for such clarifying litigation.¹³ Indeed, Senator Javits acknowledged this need in virtually the next breath after he stated that the provision as framed would reduce the need for litigation.¹⁴

Of course, it was not inevitable that a standard designed to be clarified through caselaw should generate large amounts of troublesome litigation. Had benefit plans remained in the legal and economic boondocks, and had plans not increasingly come to be involved in a panoply of activities governed by state laws addressing non-plan matters, the effect of section 514(a) would likely have been straightforward. It would have operated mainly to preempt laws that regulate plans, benefits, and plan fiduciaries.

For an effort to reconcile the cases, see *Parkside Lutheran Hosp. v. R.J. Zeltner & Assocs., Inc.* ERISA Plan, 788 F. Supp. 1002 (N.D. Ill. 1992).

10. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

11. *E.g.*, *Hughes v. K Mart Corp.*, 983 F.2d 1066 (6th Cir. 1993) (unpublished opinion); *Lowe v. Telesat Cablevision Inc.*, 825 F. Supp. 1000 (M.D. Fla. 1993); *Aliff v. BP America, Inc.*, 826 F. Supp. 178 (S.D. W. Va. 1993); *Khouri v. Gies*, No. 93-C-3291, 1993 WL 195343 (N.D. Ill. June 8, 1993).

12. Employee Retirement Income Security Act of 1974 § 502(f), 29 U.S.C. § 1132(f) (1988).

13. See *infra* notes 107-18 and accompanying text.

14. Accordingly, Senator Javits stated:

The conferees . . . 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 Congress. If it is determined that the preemption policy devised has the effect of precluding essential litigation at either the State or Federal level, appropriate modifications can be made.

120 CONG. REC. 29,942 (1974), reprinted in III LEGISLATIVE HISTORY, *supra* note 1, at 4771.

Given the limited economic and social role of plans in 1974, such a bounded scope for preemption may well have been what Congress expected. In this light, its hope that the "relate to [a] plan" language would curtail litigation may not seem so far-fetched.

But the world of plans has not remained simple. Plans are pervasive features of the business and economic landscape. Plans are involved in nearly every type of business and commercial transaction. They hold a substantial proportion of publicly traded securities. They form an integral part of the system for delivering health care. They commonly hold the major chunk of individual employees' net worth. They hold assets that become caught up in domestic relations and probate proceedings.¹⁵ This wide field of plan activity generates a wide field for preemption. Because the scope of preemption must be worked out by the courts, expanding plan activity inevitably generates expanding amounts of litigation.

Social and economic change thus helps to explain the volume of preemption case law. It also partially explains the difficulty of many of the cases: interpretive problems are inevitable when statutes written for one set of conditions must be applied to new and different ones. Yet there is more to the explanation: Congress, through unspecific statutory language, left it to courts to work out a law of preemption but gave little guidance on what considerations should mold that law. Perhaps because the language of section 514(a) emerged at the last minute without full consideration, neither the language, the legislative history, nor the context of its enactment supplies any real help in the task of determining what it means. The problem caused by lack of guidance is itself exacerbated by the wide lack of recognition that there even is a problem. The result is a body of law that has been aptly labelled a "morass."¹⁶

This Article has two aims: first, to show that there is indeed little to guide courts in interpreting section 514(a), and second, to show that despite this lack of guidance, courts can still apply the provision rationally. It is quite possible for courts to work out a law of preemption, even one hewing to the language of section 514(a), that can handle the endless variety of circumstances in which plans might be involved. However, conceptual changes are prerequisite. It will be necessary to consider just how the

15. The literature on the role of plans in the economy and in people's lives is enormous. An accessible source of information is the collection of publications of the Employee Benefit Research Institute, in particular its *Databook on Employee Benefits*, and its monthly *Notes and Issue Briefs*.

16. *Capital Mercury Shirt Corp. v. Employers Reinsurance Corp.*, 749 F. Supp. 926, 929 (W.D. Ark. 1990).

supposedly simple language of section 514(a) *can* be interpreted and to consider what kind of body of law *should* emerge through its interpretation and application. As we will see, current law is based on flawed assumptions about how section 514(a) must be interpreted and about what form the law of preemption should take. These flawed assumptions create unnecessary obstacles to developing a sensible body of law. The changes required will not demand a massive overturning of precedent. The current law of preemption already contains a good deal of correct decisional law and many sound insights. But for the law to develop rationally, those precedents and insights must be redeployed.

I. THE SEMANTICS OF "RELATE TO"

To determine the scope of ERISA preemption, it would appear that one must determine the meaning of "relate to [a] plan"—the heart of the section 514(a) standard. In practice, this inquiry is split into distinct parts: a primary inquiry into the meaning of "relate to" and a secondary inquiry into the meaning of "plan." The rationale for structuring the inquiry this way is the assumption that the meaning of "relate to [a] plan" is a simple sum of the meaning of "relate to" and the meaning of "plan." This assumption is one of the chief fallacies underlying the current law.

The assumption that the task of interpreting "relate to [a] plan" can largely be reduced to the task of interpreting "relate to"¹⁷ is itself bottomed on a further belief that a plain meaning interpretation is proper, if not required, for "relate to." That belief seems plausible. After all, "relate to" is an everyday phrase that we all grasp and it is unlikely that Congress intended it to have any unusual sense. Thus, in the Supreme Court's words: "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. . . . In fact, however, Congress used the words 'relate to' in § 514(a) in their broad sense."¹⁸ Further elaborating the point, the Court later explained (when analyzing "relate to [a] plan" in terms of its components) that the phrase "relate to" should be "given its broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference

17. The term "plan" has not proven terribly difficult to interpret. On the approaches that have been and might be taken, see Jay Conison, *Foundations of the Common Law of Plans*, 41 DEPAUL L. REV. 575, 645-53 (1992).

18. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983).

to such a plan.”¹⁹

Of course, for such an approach to be possible, “relate to” must have a plain meaning. The assumption that it does is the second fallacy underlying the law of preemption.

A. Does “Relate To” Have A Plain Meaning?

The contention that “relate to” does not have a plain meaning might at first seem implausible. After all, the term and its minor variants²⁰ are used every day without trouble or ambiguity. Yet the flaw in supposing it to have a plain meaning is easy to expose.

To begin, one must clarify what “plain meaning” is. Unfortunately, the meaning of “plain meaning” is itself not wholly plain.²¹ However, its most commonly used sense is probably that of *context-free meaning*.²² The context-free meaning of a term or a sentence is the meaning for which the term’s reference or the sentence’s truth conditions are independent of the context of usage.²³ One way to grasp context-free meaning is to think about the meaning a term or sentence would have if one were given a sheet of paper with the term or sentence written on it but one had no information concerning the sender or circumstances of transmission.²⁴

19. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1984). See also Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987).

20. Such as “relating to” and “is related to.”

21. See, e.g., REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 229-33 (1975).

22. On this sense of plain meaning, see Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 290-91 (1985); John Willis, *Statute Interpretation in a Nutshell*, 16 CAN. B. REV. 1, 10-11 (1938); FREDERICK SCHAUER, PLAYING BY THE RULES 56-57 (1993); John Searle, *Literal Meaning*, 13 ERKENNTNIS 207 (1978).

23. Searle has explained the doctrine of plain, or literal, meaning (in order to attack it) as follows:

Sentences have literal meanings. The literal meaning of a sentence is entirely determined by the meanings of its component words . . . and the syntactical rules according to which these elements are combined. A sentence may have more than one literal meaning (ambiguity) or its literal meaning may be defective or uninterpretable (nonsense).

. . . .

For sentences in the indicative, the meaning of the sentence determines a set of truth conditions; that is, it determines a set of conditions such that the literal utterance of the sentence to make a statement will be the making of a true statement if and only if those conditions are satisfied. . . . The literal meaning of the sentence is the meaning it has independently of any context whatsoever; and . . . it keeps that meaning in any context in which it is uttered.

Searle, *supra* note 22, at 207-08.

24. See JERROLD J. KATZ, PROPOSITIONAL STRUCTURE AND ILLOCUTIONARY FORCE 14 (1977). Katz explains:

It is easy to give examples of the distinction between context-free and context-dependent meaning. The meaning of "water," for example, in the sense of a collection of molecules of H₂O, is not context-free.²⁵ The use of "water" in this sense is appropriate to the context of, say, a discussion of chemistry. Under the term's chemical meaning, superheated, gaseous H₂O would count as water. It would not, however, count as water in the ordinary sense of the term because the ordinary meaning of "water" is something along the lines of a clear, potable liquid. This latter meaning is arguably context-free, for it is what is presumably meant by "water" in any context, on any occasion of use, unless there are special factors or circumstances making another meaning appropriate.

Most likely, what the Supreme Court understands by plain meaning for "relate to" is context-free meaning. Strong evidence is the Court's recent explanation (in a non-ERISA case) that the scope of ERISA preemption depends only "on express preemption principles and a construction of the phrase 'relates to,'" and its rejection of the view that the scope of such preemption depends on context—that is, on the nature of ERISA's regulatory scheme.²⁶ Further evidence is the Court's habit of quoting only the words "relate to" in describing the standard of preemption,²⁷ its penchant for seeking the meaning of "relate to" in dictionaries,²⁸ and its belief, already noted, that the meaning of the term can be ascertained independently of what is concatenated with it.²⁹

The anonymous letter situation is the case where an ideal speaker of a language receives an anonymous letter containing just one sentence of that language, with no clue whatever about the motive, circumstances of transmission, or any other factor relevant to understanding the sentence on the basis of its context of utterance. . . . We . . . draw a theoretical line between semantic interpretation and pragmatic interpretation by taking the semantic component to properly represent only those aspects of the meaning of a sentence that an ideal speaker-hearer of the language would know in such an anonymous letter situation.

This immediately provides a distinction between "grammatical meaning" (or "sentence meaning") and "contextual meaning" (or "utterance meaning"), where the former is what a semantic interpretation represents and the latter is what a pragmatic interpretation represents. Sentence meaning is the meaning of a sentence type *in the language*, whereas utterance meaning is the meaning of a particular use, or token, of a sentence type *on that particular occasion*.

Id.

25. For purposes of the discussion in the text, one could equally well take, instead of the word "water," the sentence "this is water," and focus on its meaning.

26. *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992).

27. *E.g.*, *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990).

28. *See, e.g.*, *Morales*, 112 S. Ct. at 2037; *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983).

29. *E.g.*, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). *Cf. Morales*, 112 S. Ct. at 2037 (stating that "the key phrase, obviously, is 'relating to'"). The view of the lower

But on this understanding of “plain meaning,” the plain meaning of “relate to” vanishes. To see why, contrast “relate to” with similar terms such as “pertain to,” “concern,” and “affect.” A thesaurus would classify each as a near-synonym of “relate [to],”³⁰ and the usage of each overlaps with the usage of that term. Yet each of those terms is more limited than “relate to.” Each can properly be applied only to specific types of relationships. “Pertain to” applies only to relationships having certain features, mainly of a semantic character. The novel *Moby Dick*, for example, pertains to (*i.e.*, is about) a whale. The responsibility to prepare for class, to take another example, pertains to (*i.e.*, is an aspect of) being a teacher. On the other hand—reflecting the limitations on the proper use of “pertain to”—fire does not pertain to warmth, even though one could fairly say that fire and warmth are related. “Concern” is equally limited, although not in quite the same way: it applies only to types of relationships involving aboutness or intentionality. “Affect,” too, is limited, applying only to relationships involving causation.

By contrast with its near synonyms, the term “relate to,” under its plain, or context-free meaning, is entirely indifferent to the characteristics of the relata. In its “normal sense,” says the Supreme Court, “relate to” simply means to have a “connection with,”³¹ where “connection with” is similarly understood in a context-free way. Under this view, “relate to ϕ ” would simply mean: to stand in some relationship to ϕ , or to have some connection with ϕ . But consider anything at all—a grain of sand, for example. It requires little imagination to find some relationship or some connection between the sand grain and anything else in the world. True, the relationship or connection in a given case might be strained or far-fetched, but it is *some* relationship or connection nonetheless.

What can be said for a grain of sand can be said for any law. With a little imagination, any given law and any given matter can somehow be found related. A law can relate to or be connected with a matter actively or passively, intentionally or unintentionally, directly or indirectly. It can do so by imposing limits or removing them. A law can relate to something by pertaining to, being concerned with, or affecting it, or in a host of other ways. It should not be surprising that the Supreme Court unanimously held that a clause in a garnishment statute, providing that the substantive

courts is the same. *See, e.g.*, *Monarch Cement Co. v. Lone Star Indus., Inc.*, 982 F.2d 1448, 1452 (10th Cir. 1992) (assuming that the key to ERISA preemption “is found in the words ‘relate to.’”).

30. *See, e.g.*, ROGET’S 21ST CENTURY THESAURUS 698 (Barbara Ann Kipfer ed., 1992).

31. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1984).

standards of the statute did not apply to plans, literally “relate[d] to” plans and was thereby preempted.³²

What follows from all this is that “relate to” has no plain meaning. For if the term, in its plain meaning, is so universally applicable that anything can be said to relate to anything else, then to say that A relates to B is to say nothing at all. That “A relates to B” would be a pure truism, no more informative than the truism that everything is what it is.

Of course, this conclusion seems to defy common sense. It appears to be contradicted by the fact that we succeed in using “relate to,” apparently in a “plain” way, to convey useful information. What, then, is wrong with the reasoning?

B. “Relate To” and the Context-Dependence of Meaning

To see what went wrong, it helps to note that the same sort of analysis can be given for many other terms—for example, “similar to” and “good”—when their meaning is assumed to be context-free. Consider “similar to.” For any two items, it is always possible to find some respect in which they are similar—for example, they may both be tangible. The same is true for “good.” Given any item, it is always possible to find some respect in which it is good—for example, this is good poison; it gets the job done quickly. These terms, like “relate to,” have unlimited applicability and thus would also appear to be meaningless.³³

Just as with “relate to,” one would not wish to say that “good” and “similar to” have no plain meaning. But the fallacy is easier to spot for these terms than it is for “relate to.” In everyday life we never use “good,” “similar to,” and like terms as characterizations whose meaning is independent of context. We always use them in a determinate context and in such a way that the context unavoidably affects the conditions for proper

32. Mackey v. Lanier Collections Agency & Serv. Co., 486 U.S. 825 (1988).

33. Cf. Hanna v. Plumer, 380 U.S. 460, 468 n.9 (1965). In *Hanna*, the Supreme Court rejected the court of appeals’ conclusion that a state procedural rule should apply in a diversity case because the rule was important to the state:

The Court of Appeals seemed to frame the inquiry in terms of how “important” § 9 is to the State. In support of its suggestion that § 9 serves some interest the State regards as vital to its citizens, the court noted that something like § 9 has been on the books in Massachusetts a long time, that § 9 has been amended a number of times and that § 9 is designed to make sure that executors receive actual notice. . . . The apparent lack of relation among these three observations is not surprising, because it is not clear what sort of question the Court of Appeals was addressing itself. One cannot meaningfully ask how important something is without first asking “important for what purpose?”

Id.

use. When we say, for example, "this coffee is good," we are not making a statement that somehow, in some respect, one could characterize the coffee as "good." Rather, we are making the assertion in a specific context where both we and the listener recognize that "good" coffee has certain characteristics—rich flavor, not too much bitterness—and that certain generalizations are likely to be true about it—for example, that most people who like coffee will like this coffee's flavor. In this context, and in this sense of "good," not all coffee is good. This is so despite the fact that, for any cup of coffee, some context can be imagined in which one could say that it is "good"—for example, good for acidifying soil. The fact that a given cup of coffee is a good soil acidifier is not relevant to the truth of the statement, "this coffee is good," as ordinarily used.³⁴

It is equally true that we never use "relate to" in a wholly context-free way. As with "good," we always use it in some identifiable context that helps fix its meaning. For example, if Jones is a birdwatcher, and he requests as a birthday present something related to birding, we understand that it would be reasonable and responsive to his wishes to give him binoculars or hiking shoes. We also understand that it would be unreasonable and unresponsive to his wishes to give him a poached egg. In the latter case it is irrelevant that a poached egg can, with little inventiveness, be characterized as somehow related to birding. When Jones asks for something related to birding, we do not grasp the meaning of the request by first divining the abstract meaning of "relate to" and then adding to it the meaning of "birding." To the contrary, "relate to birding" is an integral phrase. It is misguided to try to isolate some freestanding meaning for "relate to" that it retains in the phrase's context.

The same can be said for "relate to [a] plan." It is futile, for it misses the semantic point, to look for some meaning of "relate to" in isolation from "plan." In general, and contrary to the Supreme Court's basic assumption, the meaning of "relate to" is not context-free. To the extent one wishes to say that "relate to" has a meaning, its meaning will depend on the relata.

II. THE REASONABLENESS GAMBIT

The Supreme Court is well aware that giving "relate to" a plain meaning for purposes of section 514(a) can lead to absurd results. Its response to

34. For a similar analysis of "good," see RICHARD M. HARE, *THE LANGUAGE OF MORALS* ch. 6 (1952).

the insight, though, has not been to drop the assumption of context-free meaning. Instead, the Court has suggested in dictum that laws are saved from preemption if their effect on or connection with a plan is “too tenuous, remote, or peripheral.”³⁵ The invocation of this implied limitation bends the plain meaning rule, of course, but a little bending is clearly compelled.

The effect of adding a “tenuous, remote, or peripheral” limitation to the unbounded preemption resulting from a plain meaning approach is to transform the task of determining what falls within the scope of “relate to [a] plan” into the task of determining what falls without. Interpretation becomes a process of specifying which state laws are not preempted, rather than of specifying which ones are. On this approach, section 514(a) is read as if it preempted all state laws *except* those that relate to a plan too tenuously, remotely or peripherally. “Tenuous, remote or peripheral,” rather than “relate to,” becomes the key phrase for interpretation.

At times the Court treats the “tenuous, remote or peripheral” standard as legal geodesy—as a matter of determining how “far” from a plan a law must be to avoid preemption. Hence the use of distance metaphors such as “remote” and “peripheral.” At bottom, however, the Court is treating preemption as a matter of *reasonableness*: a state law is saved from preemption only if it is not reasonably related to a plan. That reasonableness is the foundation can be seen in *American Telephone & Telegraph Co. v. Merry*,³⁶ the court of appeals decision from which the Supreme Court borrowed the remoteness standard. There, in rejecting a literal and unbounded interpretation of section 514(a), the court of appeals objected that: “[A] strict, literal construction . . . would necessarily lead to the unreasonable conclusion that Congress intended to preempt even those state laws that only in the most remote and peripheral manner touch upon pension plans.”³⁷ In any event, it is difficult to see how “tenuous, remote, or peripheral” could be clarified except in terms of reasonableness.

A. *The Role of Reasonableness*

Inferring a reasonableness limitation to otherwise unbounded language

35. *District of Columbia v. Greater Washington Bd. of Trade*, 113 S. Ct. 580, 583 n.1 (1992); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983). The Court has yet to decide what would justify a finding that a law’s connection with a plan is too tenuous, remote or peripheral for preemption.

36. 592 F.2d 118 (2d Cir. 1979).

37. *Id.* at 121.

is an established interpretive method.³⁸ The Court has inferred such a limitation on other occasions, for example in connection with section 1 of the Sherman Act. Section 1 flatly prohibits any "contract, combination . . . or conspiracy, in restraint of trade."³⁹ Yet this categorical language has long been construed to prohibit only contracts, combinations and conspiracies in *unreasonable* restraint of trade.⁴⁰ The motivation for such a reading is that every contract affecting trade restrains it, yet the Sherman Act cannot plausibly be understood to outlaw all business agreements.⁴¹ On the basis of this inferred reasonableness qualification (the rule of reason), federal courts have developed a comprehensive body of case law governing market interactions. Presumably, federal courts could develop a comparable jurisprudence of preemption based on the notion of reasonably relating to a plan.

A tendency in contemporary law is to view reasonableness as a universal solvent, able to dispel all legal perplexities. The tendency is on many grounds understandable. Reasonableness, after all, involves appeal to reason,⁴² and the legal mind is trained to believe that legal problems can be solved through reason and argument. Reasonableness, moreover, is the minimal objective standard of rational acceptability. If something is not reasonable, it is objectionable virtually by definition. Finally, reasonableness is a standard that one naturally has confidence in his ability to apply. Reasonableness pervades common law and common sense and is a familiar notion for courts to fall back on.

Thus, reasonableness standards abound in the law. When is there liability for a non-intentional act causing bodily harm? When the actor does not show reasonable care under the circumstances.⁴³ When is state court jurisdiction over a defendant constitutional? When the exercise is

38. To infer a reasonableness requirement seems only to make explicit what is already implicit. It is a basic rule of statutory interpretation, and of common sense, that statutes should not be read to produce unreasonable results. See NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45.12 (5th ed. 1992).

39. 15 U.S.C. § 1 (1988).

40. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

41. "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). See *Standard Oil*, 221 U.S. at 60.

42. "To act reasonably is to be willing to reason and thereby submit to impersonal judgment." MAX BLACK, *Reasonableness*, in *THE PREVALENCE OF HUMBUG* 55 (1983).

43. RESTATEMENT (SECOND) OF TORTS § 283 (1977).

reasonable.⁴⁴ When is a warrantless search constitutional? When the search is reasonable.⁴⁵ When is notice of a legal proceeding constitutional? When the notice is reasonable.⁴⁶ When are consequential damages recoverable for breach of contract? When the damages can reasonably be foreseen.⁴⁷ Thus, it is natural for courts to have faith in reasonableness as a way to impose order on the law of preemption. Yet, faith in reasonableness should itself be reasonable. And the fact that many areas governed by a reasonableness standard are morasses of fact-specific decision making⁴⁸ or battlegrounds for competing policies⁴⁹ ought to give one pause.

B. Reasonableness as Beside the Point

There are two objections to relying on reasonableness as a way to give meaning to "relate to [a] plan." One is that the gambit misses the point. Return for a moment to Jones the birdwatcher, who has received a poached egg as a birthday present. Jones, of course, will not be satisfied with the gift. And he will remain dissatisfied even after he is reminded that the egg is from a bird—the type of creature he watches—and can thus be characterized as related to birding. But Jones will be dissatisfied, not because the poached egg fails to be reasonably related to birding or because the poached egg is related to birding too tenuously. Rather, Jones will be dissatisfied because, given the context of his request, the poached egg is not related to birding at all.

What the request meant⁵⁰ is that Jones should be given an item such as binoculars, which he could use in the course of his enjoyment of birding. He did not mean that he should be given anything in the world, so long as it is not too tenuously connected with birding. Jones' request is not a hidden exclusionary request, the meaning of which lies in its rejection of

44. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

45. *Soldal v. Cook County*, 113 S. Ct. 538 (1992).

46. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

47. RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981).

48. On the law of personal jurisdiction, see ROBERT C. CASAD, *JURISDICTION IN CIVIL ACTIONS* (2d. ed. 1991); Jay Conison, *What Does Due Process Have To Do With Jurisdiction?*, 46 RUTGERS L. REV. (forthcoming 1994).

49. On antitrust law, see, e.g., REVITALIZING ANTITRUST IN ITS SECOND CENTURY (Harry First et al. eds., 1991).

50. There is a difference between what a sentence means and what a person means in uttering it. See, e.g., H.P. Grice, *Meaning*, 66 PHIL. REV. 377 (1957); JOHN SEARLE, *SPEECH ACTS* 44-50 (1969). However, we may assume that Jones intended the request to have its ordinary meaning and thereby disregard any distinction between what Jones meant and what the sentence meant.

unreasonable items. Rather, Jones' request is an affirmative request for a fairly definite type of item. To suppose that the meaning of the request lies in what it implicitly excludes is to miss the point that "relate to birding" already has a definite and determinable meaning in the context, as a result of its concatenation with "birding." "Relate to" needs no further clarification through an appeal to reasonableness.

C. Reasonableness as Spurious Standard

The first objection was based on the assumption that "relate to ϕ " already has a definite meaning. The second objection avoids that assumption. Instead, it proceeds from the obvious point that to ask whether a state law reasonably relates to a plan can be helpful only if one already knows what "reasonable" means. "Reasonable," of course, is a context-dependent term.⁵¹ Yet it is a term that does not make sense in every context. In particular—and this is the objection—it does not make sense in the context of ERISA preemption.

Consider the contexts in which "reasonable" does make sense. Negligence law, based on the standard of reasonableness, is workable because the individuals called on to assess injury-causing conduct have a shared idea, based on experience and knowledge of community norms, of what it is reasonable and unreasonable for people to do in their everyday affairs. For similar reasons, the Uniform Commercial Code is intelligible in providing that, when a contract for the sale of goods omits a price term, the price of the goods is a reasonable price at the time of delivery.⁵² This standard is workable because the context of the contract provides a way to determine a reasonable price or a range of reasonable prices—the market price, for example, if it exists.

But there are contexts in which reasonableness is not a workable

51.

Like all such general standards, reasonableness varies not only with the circumstances but also with the purpose of the inquiry. In the tort world, a reasonable act is one taken with "due care," as measured by its utility relative to the magnitude of foreseeable harm discounted by its probability. The administrator of a trust acts reasonably by investing prudently with regard both for gain and for safety. The reasonableness of a corporate director's business decision or a policeman's search or a state's burden on interstate commerce are all judged, but not by any single standard. All call for balancing, usually without any quantitative calculus. Some rest on community standards, as in torts. Some are used to elevate community behavior, as in the progressive tightening of limitations on searches and seizures. Some rest on conventional behavior among those in a trade, as in prudent investment guides. In all cases, reasonableness is not an a priori deduction. Instead, its content follows from its function.

7 PHILLIP AREEDA, ANTITRUST LAW ¶ 1500, at 362 (1986).

52. U.C.C. § 2-305(1) (1977).

standard. Reasonableness is primarily a characteristic of persons and their thoughts and actions; it is not a property of inanimate or abstract things.⁵³ There are reasonable requests, but there is no such thing as a reasonable hammer. A reasonableness characterization that ostensibly applies to a thing must, at bottom, be elliptical, a way of stating what it would be reasonable for some person to think or do. The reasonable price standard for the sale of goods, for example, must ultimately mean the price a person would reasonably agree to pay or accept in the contract's context. To say that a hammer is reasonable is to say—if it is to say anything at all—that it would be reasonable for one to use the hammer for some task at hand.⁵⁴

Unfortunately, it is not always clear what should be taken as the proper translation of talk about the reasonableness of an inanimate or abstract thing. For example, it is often said that the constitutional standard for personal jurisdiction over an individual is whether the exercise of jurisdiction is reasonable. But what exactly does this mean? That it would be reasonable for a court to exercise jurisdiction in the case? That it would be reasonable for a legislature to authorize jurisdiction in such cases? That it would be reasonable for the defendant to foresee the exercise of jurisdiction over him? The proposed translations are not equivalent and it may make a great deal of difference which one is accepted. How is one to choose?

And translation alone may not end the interpretive problems. Even if one can settle on an acceptable translation, it may transpire that there is no objective way to assess the reasonableness of thought or deed. There might not be established norms to appeal to. Such is the case for personal jurisdiction, for example, where the supposed reasonableness standard can be shown to be spurious because of a lack of workable criteria under any of the possible translations.⁵⁵ Over half a century ago, Learned Hand likened the reasonableness-based law of jurisdiction to a “morass.”⁵⁶

A reasonableness standard for preemption is equally spurious. To say

53. See BLACK, *supra* note 42, at 43-45.

54. For a recent judicial example of such a translation, see *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 372 (1993) (Ginsburg, J., concurring). Justice Ginsburg stated:

The critical issue [under Title VII] . . . is whether . . . the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference . . . [i]t suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'ma[k]e it more difficult to do the job.'

Id.

55. See *Burnham v. Superior Court*, 495 U.S. 604, 622-27 (1990); *Conison*, *supra* note 48.

56. *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 142 (2d Cir. 1930).

that a law reasonably relates to a plan is presumably shorthand for a statement such as that it would be reasonable to deem the law preempted. But what does this mean? That a court could reasonably decide to preempt the law? That it would be reasonable for Congress to have expressly preempted the law? That it would be unreasonable for a state legislature to enact the law in light of ERISA? A reasonableness-based standard must ultimately mean something like this, but which is the correct translation? One can choose, of course, but any choice seems arbitrary.

Perhaps it makes no difference, because any choice also seems unavailing. Suppose, for example, that one takes the proper translation to be: it would be reasonable for a court to preempt the state law. The issue of preemption then becomes a matter of evaluating the reasonableness of a judicial determination of preemption. But how can one make this evaluation except by circling back to the question whether the law is preempted? There is no long history of ERISA preemption decisions to provide a framework for assessing these judicial determinations, in the way that everyday experience provides a framework for assessing harm-producing conduct. Nor are there criteria one could uncontroversially list and weigh in making the assessment. The only way to assess the reasonableness of a judicial determination of preemption is by reference to whether the law is preempted—that is, whether it relates to a plan. Yet if “relate to [a] plan” has a clear enough meaning to provide a criterion for reasonableness, then it was unnecessary in the first place to appeal to reasonableness: the only reason for invoking it was to help clarify “relate to [a] plan.” The appeal to reasonableness does not leave one better off. Similar problems arise for the other proposed translations.

III. THE SEMANTICS OF “RELATE TO [A] PLAN”

It follows from the above discussion that, in interpreting section 514(a), the smallest linguistic unit one can plausibly work with is the whole phrase, “relate to [a] plan.” Now, the conclusion that there is no plain meaning for “relate to” does not automatically rule out the possibility that there is a plain meaning for “relate to [a] plan.” After all, even though “good,” standing alone, does not have a plain meaning, “good coffee” does. Hence the question: Can one identify a plain meaning for “relate to [a] plan”? To answer this question, we need to examine more fully both the relationship between meaning and context, and the notion of “plain meaning” itself.

A. *Paradigms and Points*

No one doubts that context has an impact on meaning. The impact exists, not only for abstract terms like “relate to” and “good,” but also for ordinary terms. Consider “fruit.” Whether a tomato is a fruit depends on what the term means. The everyday meaning is: the sweet, juicy part of a plant, appropriately eaten in desserts. The term also has a botanical meaning: the ripened ovary of a seed-bearing plant. A tomato is not a fruit within the term’s everyday meaning but is a fruit within its botanical meaning.⁵⁷ Which meaning is appropriate depends on context. Even a botanist requesting fruit for dessert would be annoyed to be served a tomato. But the botanist requesting fruit for an experiment might be satisfied with the very same item.

While it is easy to see that context affects meaning, it is less easy to explain how and why it does. A full explanation would require a lengthy, and inevitably controversial, excursus into a theory of meaning. For present purposes, that is unnecessary. It suffices to observe that context affects meaning because two constituents of meaning—*paradigm* and *point*—tend to vary with context. These constituents, though seemingly technical, are really matters of common sense.

Consider how one normally explains the meaning of a term. One either lists defining characteristics or refers to a standard example. To explain “cup,” for example, one might offer a statement along the lines of: a small bowl with a semi-circular handle, of such size, shape and weight as to allow a person to hold it with one hand. Alternatively, one might point to an item that fits the above description and say, “this is a cup.” In either

57. See *Nix v. Hedden*, 149 U.S. 304, 306-07 (1893) (holding that tomatoes are vegetables, rather than fruits, within meaning of statute imposing custom duties on vegetables). The Court stated: The passages cited from the dictionaries define the word “fruit” as the seed of plants, or that part of plants which contains the seed, and especially the juicy, pulpy products of certain plants, covering and containing the seed. These definitions have no tendency to show that tomatoes are “fruit,” as distinguished from “vegetables,” in common speech, or within the meaning of the tariff act.

....

Botanically speaking, tomatoes are the fruit of a vine, just as are cucumbers, squashes, beans and peas. But in the common language of the people, whether sellers or consumers of provisions, all these are vegetables . . . which, whether eaten cooked or raw, are, like potatoes, carrots, parsnips, turnips, beets, cauliflower, cabbage, celery, and lettuce, usually served at dinner in, with, or after the soup, fish, or meats which constitute the principal part of the repast, and not, like fruits generally, as dessert.

case, one has given a paradigm for the term.⁵⁸

It takes little effort to see that, while a paradigm can serve as a useful beginning to the explanation of a term's meaning, it generally cannot be the full account. Merely knowing the paradigm does not enable one in general to determine whether items that fail to match it precisely are also cups. Merely knowing the paradigm does not, for example, permit one to determine whether an item is a cup if it substantially fits the paradigm but lacks a handle, or fits the paradigm but has additional characteristics, such as being glued firmly to a shelf. It is fair to say that if one does not know generally how to determine whether an item is a cup, one cannot be said to know the meaning of the term.⁵⁹

To complete the account of a term's meaning, one must expand the explanation to include the point of having the term. In the case of "cup," for example, one must describe the purpose of cups or else state one or more basic rules concerning them.⁶⁰ To this end, one might add that a cup is normally used for drinking liquids, in particular hot ones. This further explanation provides a basis for deciding whether something that varies from the paradigm is all the same a cup. Thus, a dictionary will define "cup" in part by reference to its point, for example as "an open bowl-shaped drinking vessel"⁶¹ or in some similar way.

As a first approximation, then, we can say that the paradigm of " ϕ " is the part of the term's meaning that enables one to identify canonical instances or prima facie cases.⁶² It is the aspect of meaning often sought through notions such as essence or essential characteristics, criteria or defining characteristics, or exemplars. One could elaborate the notion further,⁶³ but for present purposes this basic account will suffice.

Similarly, as a first approximation, we can say that the point of " ϕ " is the answer to the question: What difference does it make whether something is a ϕ ? It is answered by reference to generalizations or rules

58. For a similar notion, see Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 291 (1981).

59. JULIUS KOVESI, *MORAL NOTIONS* 39-40 (1967).

60. See HARE, *supra* note 34, at 100.

61. WEBSTERS' THIRD NEW INTERNATIONAL DICTIONARY 554 (1961).

62. For similar notions, see Hilary Putnam, *Is Semantics Possible?*, 1 METAPHILOSOPHY 187 (1970); Moore, *supra* note 58, at 291-92.

63. See Hilary Putnam, *The Meaning of "Meaning,"* in VII MINNESOTA STUDIES IN THE PHILOSOPHY OF SCIENCE 131 (Keith Gunderson ed., 1975).

in which ϕ 's play a part.⁶⁴ The point of " ϕ " is the aspect of meaning often sought through notions such as function or role, use, mode of verification, or cash value. Again, one could further develop the notion,⁶⁵ but again, it is not necessary to do so here.

Once one recognizes that, in the great majority of cases—and certainly in all cases of present interest—meaning involves paradigm and point,⁶⁶ it becomes easy to see how context affects meaning by affecting meaning components. Return, for example, to the question whether a tomato is a fruit. In the everyday context, the point of "fruit" lies in consumption: fruits are satisfying foods for breakfast or in desserts. The paradigm consists of, or includes, common fruits such as apples, peaches, and grapes. Whether a newly discovered plant product would be considered a fruit in this sense largely depends on whether it fulfills the same culinary and gustatory purposes as apples, peaches, and grapes. But change the context to that of botany and the point of "fruit" changes (and perhaps the paradigm does as well). The point is now to be found in botanical laws concerning plant propagation. Whether a newly discovered plant product is a fruit in the botanical sense depends on its satisfaction of those laws.

B. Context and Plain Meaning

Plain meaning is still meaning: it involves paradigm and point. This much is shown by the above example of the everyday meaning of "fruit"—a meaning one would naturally take to be the "plain" one. But the example further suggests that plain meaning and contextual meaning are structurally similar in yet another way. For it suggests that, contrary to the

64. See Wilfrid Sellars, *Concepts As Involving Laws and Inconceivable Without Them*, 15 PHIL. SCI. 287 (1948).

65. For a general treatment of the point of a concept, see KOVESI, *supra* note 59.

66. In many cases, one or the other of paradigm or point is substantially more important to meaning. For example, the paradigm is more important to the meaning of "porcupine" in its everyday usage. We have little reason to be concerned with porcupines in everyday life, and so far as we ordinarily are concerned, porcupines are "for" very little. Thus, we have little need to determine whether an ostensible porcupine really is a porcupine, and so need not be very concerned with the point. By contrast, the point is far more important to the meaning of "inadvertent." See KOVESI, *supra* note 59, at 15-17, 24. The reason is that there is essentially one purpose in characterizing an action as inadvertent—preventing the assignment of blame. Thus, the meaning of "inadvertent" is largely exhausted by its point.

It may be that, in some cases, either paradigm alone (for example, in the case of natural kind terms, see Saul Kripke, *Naming and Necessity*, in SEMANTICS OF NATURAL LANGUAGE 253 (Donald Davidson & Gilbert Harman eds., 1972); Putnam, *supra* note 63, at 166-67) or point alone is entirely determinative of meaning. Whether or not this is so is not important for present purposes.

prevailing view, plain meaning is not context-free; rather, that it is meaning relative to a context treated as normal or canonical. We commonly disregard this normal context precisely because it is normal.

Consider, for example, the plain meaning of "the book is on the table." This plain meaning is the applicable meaning only on the assumption that circumstances are normal. To see why, first consider "table." The plain meaning of "table" is something along the lines of: flat-topped, four-legged item, useful for placing objects on its upper surface. In a normal setting, such as a house, a flat-topped, four-legged item can usually be considered a table. Moreover, in those circumstances, a book resting atop such an item would usually count as an occasion of "the book is on the table." But not every flat-topped, four-legged item, on the top of which objects can be placed and which in normal circumstances would be considered a table, is a table under the circumstances at hand. Such an item might, if positioned over a small pit, be a rain-shield; or, if positioned so that the "legs" are upward and fastened to a block and tackle, a lift for construction material. An object that in a house would be considered and used as a table might well be considered and used as something very different in other circumstances. When we say that the plain meaning of "table" is a flat-topped, four-legged item on the top of which objects can be placed, we are presuming a context in which such items are normally tables.⁶⁷

A presupposition of normal circumstances also lies behind the word "on." Suppose that an item which is indisputably a table and an item which is indisputably a book have together been thrown out of an airplane. Suppose also that the book remains positioned above the table and barely in contact with it, so that it exerts no force on the table. This is not an instance of "the book is on the table" in the ordinary sense of the phrase, even though it bears a striking resemblance to the book being on the table.⁶⁸ When we say that the book is on the table, we presume that gravity is functioning normally so that if the table were moved horizontally, the book would also move horizontally and remain in pretty much the same position relative to the tabletop. This would not happen in free fall. Thus, again we see for this everyday sentence—and obviously for countless others—that plain meaning is distinguished from non-plain meaning, not as context-free meaning but as meaning relative to a default or normal context.

67. See generally G.E.M. Anscombe, *On Brute Facts*, 18 ANALYSIS 69 (1958).

68. See Searle, *supra* note 22. Searle makes the point through a similar, but more outlandish, example.

C. Does “Relate to [a] Plan” Have a Plain Meaning?

With these semantic notions in place, we can see why “relate to [a] plan” has no plain meaning. More generally, we can see why it has no meaning at all in the sense of “meaning” we have been using. The reason is that, to supply the meaning of “relate to [a] plan,” one must identify the paradigm and point for the phrase as it is used in the relevant context. That cannot be done.

Had section 514(a) retained its original formulation and preempted laws that “relate to the subject matters regulated by [ERISA],” its interpretation would pose fewer difficulties. For such a formulation, both paradigm and point would be quite obvious and easy to communicate. The paradigm would be a law of the type contained in ERISA. For example, a state law requiring pension plans to be 110% funded at all times would certainly be held preempted—one might say as a matter of plain meaning. Just as important, the phrase would have an easily ascertainable point: state laws relating to matters regulated by ERISA tend to interfere with the federal scheme, and such interference needs to be prevented. This point would appear virtually on the face of the statute as the obvious purpose in preempting laws dealing with matters that ERISA regulates. Under the formulation, to determine whether a state law diverging from the paradigm is preempted, one would consider whether holding the law preempted would further the point. For a preemption clause of this sort, if one wished to artificially isolate the term “relate to” and characterize its meaning, one would say that the meaning is essentially that of “regulate.”⁶⁹

The problem with the existing section 514(a) is that its meaning cannot be explained this way. For what is the paradigm of a law that “relate[s] to [a] plan”? It must be different from the paradigm of “relate[s] to a matter

69. In *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), the Supreme Court was called on to interpret the provision of the Airline Deregulation Act (ADA) that preempted state laws “relating to rates, routes, or services,” 49 U.S.C. app. § 1305(a)(1) (1988). The Court reviewed the broad interpretation given to the analogous language in ERISA section 514(a) and concluded that, “[s]ince the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here: State enforcement actions having a connection with or reference to airline ‘rates, routes, or services’ are pre-empted.” *Morales*, 112 S. Ct. at 2037. But this is a non sequitur. Although “relate to” appears in both statutes, it is associated with very different relata in each. In the ADA, “relate to” is used with the specific subjects deregulated by the ADA, suggesting that the phrase as used there has a meaning more along the lines of “regulate.” See 112 S. Ct. at 2057 (Stevens, J., dissenting) (“[T]he scope of the prohibition of state regulation should be measured by the scope of the federal regulation that was being withdrawn.”).

regulated by ERISA”—that is, a law of the type contained in ERISA. Although laws that “relate to a matter regulated by ERISA” arguably also “relate to [a] plan,” it does not follow that the phrases’ paradigms are the same. A cup is a vessel but the paradigm of cup is not the same as the paradigm of vessel. The paradigms differ; one would intuitively say that the latter is broader than the former.

If the paradigm of “relate to [a] plan” is not a law of the type contained in ERISA, then what is? It seems that one must find the paradigm in either the statute or everyday discourse. But here an intractable problem arises. ERISA cannot provide the paradigm. ERISA contains only the laws that relate to plans by regulating them in specific ways. Nothing in ERISA suggests what other types of laws might also constitute paradigmatic instances of laws that “relate to [a] plan.” Nor can everyday use supply the paradigm. “Relate to [a] plan” is simply not a phrase used outside the context of ERISA. It is not a phrase with a plain meaning in the normal-context sense. Hence, whether the relevant context of “relate to [a] plan” is considered ERISA or everyday use, we lack an essential component of that phrase’s meaning.

Even if one could overcome the problem of identifying the paradigm for “relate to [a] plan,” there would remain the problem of identifying its point. The point could not plausibly be the same as the point of “relate to a matter regulated by ERISA.” If the point of the phrase were simply that of preventing interference with ERISA’s regulatory scheme, it would be inexplicable that the test for preemption is “relate to [a] plan” rather than “relate to a matter regulated by ERISA.” What, then, could the point be? ERISA supplies no answer: it supplies no reason other than preemption to be interested in whether a law relates to a plan. Nor can everyday discourse supply the point of the phrase because, as we have noted, the phrase is not used in everyday discourse. We lack the second component of meaning as well as the first.

IV. THE PURPOSE OF PREEMPTION

The type of meaning we have found “relate to [a] plan” not to have is what one might call “recurrent meaning.” It is “recurrent” in that it is the meaning a term or sentence has on each occasion of use in the same relevant context. It is teachable meaning—teachable by conveying

paradigm and point⁷⁰—and is thus public meaning. One might even call it “plain meaning in context.” Statutory interpretation, with its preference for so-called plain meaning, normally seeks recurrent meaning. However, other types of meaning are also relevant to statutory interpretation.

In ascertaining the meaning of a statutory provision, courts often seek guidance from the historical background and legislative history. These factors are commonly used to seek the meaning a term or sentence has on a unique occasion of use—its use in the provision at hand. The difference between recurrent meaning and meaning in this single-occasion sense is akin to the difference between sentence meaning and speaker meaning.⁷¹ It is akin, for example, to the difference between the plain meaning of “I would like a piece of fruit for dessert” and what Jones, a speaker, means or intends, by the utterance, “I would like a piece of fruit for dessert,” on a specific occasion. In the field of statutory interpretation, the search for single-occasion meaning is often described as a search for legislative intent. One consults, for example, legislative history to divine what the legislature meant by the words it used.

What the legislative history and other sources indicate is that no reasonably definite purpose or intent lies behind the use of the phrase, “relate to [a] plan.” The language represents no more than a generalized desire for broad preemption of state law. The scope of preemption cannot be determined from the single-occasion meaning of “relate to [a] plan.”

A. *Federal and State Regulation Before ERISA*

The purpose of a statute can sometimes be found by examining pre-enactment problems that it seeks to redress. In the case of section 514(a), that approach is unhelpful. In general, preemption serves to eliminate federal and state conflicts in regulation. But before ERISA, there were no significant conflicts in the regulation of plans, or any other problems that might show the need for rampant preemption of state law. The reason is that, before ERISA, the regulation of plans—both federal and state—was fragmentary and weak.⁷² Indeed, it was the spottiness and inadequacy of

70. Cf. Putnam, *supra* note 62, at 195-97 (describing a theory of meaning on which conveying the meaning of a term involves the conveying of “core facts” about its use).

71. It is only akin because it is questionable whether legislatures can be said to “intend” in the way that individuals do.

72. See, e.g., Note, *Pension Plans and the Rights of the Retired Worker*, 70 COLUM. L. REV. 909, 924 (1970) (“There is no comprehensive statutory scheme which addresses itself to the many problems of the retiree. The legislative response to the retiree’s problems has typically been piecemeal and incomplete.”).

plan regulation that ERISA was enacted to cure.⁷³

1. Federal Law

Before the enactment of ERISA, federal regulation provided "only indirect, partial, or sporadic protection of participants, pensioners, and their beneficiaries under private pension plans."⁷⁴ This regulation, moreover, was premised on the existence of a more basic regime of state law. The fact that two bodies of law governed plans was not deemed problematic. To the contrary, proposals for reform generally assumed that concurrent regulation should continue.⁷⁵

The most substantial body of pre-ERISA federal pension plan law was tax law.⁷⁶ The relevant sections of the Internal Revenue Code (Code), of course, dealt mainly with taxation. However, some Code provisions and Treasury Regulations were designed to protect participants' interests in pensions or to effectuate federal policy on retirement security.⁷⁷ The Code then, as it does now, encouraged plan formation through tax incentives and sought to protect participants by conditioning favored tax treatment on the plan's compliance with various standards. In particular, plan assets were to be held in trust for the exclusive benefit of participants, and the plan could not discriminate in benefits or contributions in favor of corporate officers and highly compensated employees. Yet, these protections were of limited effectiveness: complying with them was voluntary (the favored tax treatment could be foregone) and the Internal Revenue Service was structured to raise revenues, not to protect participants.⁷⁸ There was little risk of conflict with or interference from state law: this body of federal law dealt mainly with taxation, the substantive rules for plans were few and voluntary, and enforcement was limited.

73. See Employee Retirement Income Security Act of 1974 § 2(a), 29 U.S.C. § 1001(a) (1988); Jay Conison, *The Federal Common Law of ERISA Plan Attorneys*, 41 SYRACUSE L. REV. 1049, 1058 (1990).

74. EDWIN W. PATTERSON, LEGAL PROTECTION OF PRIVATE PENSION EXPECTATIONS 111 (1960).

75. E.g., *id.*, at 246-52; Raymond Goetz, *Developing Federal Labor Law of Welfare and Pension Plans*, 55 CORNELL L. REV. 911, 929 (1970).

76. For descriptions of this law, see PATTERSON, *supra* note 74, at 85-99; MERTON C. BERNSTEIN, THE FUTURE OF PRIVATE PENSIONS ch. VII (1964); Nancy J. Altman, *Rethinking Retirement Income Policies: Nondiscrimination, Integration, and the Quest for Worker Security*, 42 TAX L. REV. 435, 444-54 (1987). This body of law dealt little with welfare benefit plans.

77. For a discussion of the policies underlying pre-ERISA tax law, see generally Altman, *supra* note 76.

78. PATTERSON, *supra* note 74, at 96-99. For other shortcomings, see BERNSTEIN, *supra* note 76, at ch. VII.

Another federal law, section 302(c)(5) of the Labor-Management Relations Act of 1947 (LMRA),⁷⁹ governed (and still governs) Taft-Hartley plans, which are jointly administered by employers and unions. Section 302(c)(5) has two purposes: to limit union control over funds contributed by employers and to protect the interests of employees in such plans. The first was the dominant purpose behind enactment.⁸⁰ Section 302(c)(5) imposes three main requirements on union-sponsored plans: that there be equal numbers of employer and union trustees; that the funds be held in trust; and that the funds be used for the exclusive benefit of employees and their beneficiaries.

For Taft-Hartley plans before ERISA, state law was viewed as the primary body of regulation⁸¹ and section 302(c)(5) as a limited supplement.⁸² Federal courts were reluctant to exercise federal question jurisdiction over disputes involving those plans. Controversies were usually treated as state law claims requiring diversity or pendent jurisdiction.⁸³ Accordingly, there was little risk of conflict between section 302(c)(5) and state law. Courts had little occasion even to consider the possibility that section 302(c)(5) might preempt state laws governing benefit plans.⁸⁴

The last of the federal statutes dealing with plans was the Welfare and Pension Plans Disclosure Act of 1958 (WPPDA).⁸⁵ The WPPDA was enacted in response to disclosures of corruption in the administration of union-sponsored plans. It required plans larger than a specified minimum size to maintain records and file reports with the Department of Labor.

79. 29 U.S.C. § 186(c)(5) (1988).

80. See Goetz, *supra* note 75, at 929-30; John S. Welch & Hugh S. Wilson, *Applicability of Traditional Principles of Trust Law to Union and Management Representatives Administering Taft-Hartley Trusts*, 23 LAB. L.J. 671, 674 (1972).

81. *E.g.*, Craig v. Bemis Co., 517 F.2d 677, 680 (5th Cir. 1975).

82. *E.g.*, Hurd v. Hutnick, 419 F. Supp. 630, 653 (D.N.J. 1976) (applying pre-ERISA law); Moses v. Ammond, 162 F. Supp. 866, 873-74 (S.D.N.Y. 1958).

83. *E.g.*, Snider v. All State Adm'rs., Inc., 481 F.2d 387, 390-91 (5th Cir. 1973), *cert. denied*, 415 U.S. 957 (1974); Bowers v. Ulpiano Casal, Inc., 393 F.2d 421, 423-26 (1st Cir. 1968). See PATTERSON, *supra* note 74, at 107-08; Welch & Wilson, *supra* note 80, at 675-76; Goetz, *supra* note 75, at 925-31.

84. A WESTLAW search discloses no pre-ERISA federal cases dealing with LMRA preemption of state law in the context of benefit plans. However, several state attorneys general and insurance departments concluded that section 302(c)(5) prevented application of state insurance law to uninsured Taft-Hartley welfare plans. See Raymond Goetz, *Regulation of Uninsured Employee Welfare Plans Under State Insurance Laws*, 1967 WIS. L. REV. 319, 330.

85. Pub. L. No. 85-836, 72 Stat. 997, *repealed by* Employee Retirement Income Security Act of 1974 § 111(a), 29 U.S.C. § 1031(a)(1) (1988).

However, it imposed few other restrictions.⁸⁶ As President Eisenhower lamented in signing the bill, it “establishes a precedent of Federal responsibility in this area, [but] it does little else.”⁸⁷ The WPPDA was repealed by ERISA.⁸⁸

The WPPDA expressly took a cooperative approach to state regulation. It specified that nothing in it should “be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of . . . any State affecting the operation or administration of employee welfare or pension benefit plans.”⁸⁹ As the Supreme Court explained, the WPPDA, like the LMRA, “contemplated that the primary responsibility for developing [standards for plan regulation] would lie with the States.”⁹⁰ As a result, it had negligible preemptive effect.⁹¹ In fact, the Supreme Court read the WPPDA as establishing (while it was in effect) a federal policy that limited the NLRA’s preemption of state laws affecting collectively bargained plans.⁹²

2. State Law

As noted above, before ERISA state law was viewed as the primary source of standards for plans. Yet, very little of that law dealt with plans specifically. The main source of standards, and the main body of law presupposed by federal statutes, was state common law. This law governed participant entitlement to benefits: for the most part, it was neo-classical

86. It also contained little in the way of enforcement mechanisms. The report to one of the bills leading to ERISA explained that “[WPPDA] is weak in its limited disclosure requirements and wholly lacking in substantive fiduciary standards. Its chief procedural weakness can be found in its reliance on the initiative of the individual employee to police the management of his plan.” H.R. REP. NO. 533, 93d Cong., 2d Sess. 4 (1973), reprinted in III LEGISLATIVE HISTORY, *supra* note 1, at 2351.

87. PATTERSON, *supra* note 74, at 99 (citation omitted).

88. Employee Retirement Income Security Act of 1974 § 111(a), 29 U.S.C. § 1031(a) (1988).

89. Pub. L. No. 85-836, 72 Stat. 1002, § 10(b) (1958) (repealed 1974).

90. *Malone v. White Motor Co.*, 435 U.S. 497, 512 (1978). See also H.R. REP. NO. 2283, 85th Cong., 2d Sess. 10 (1958), reprinted in 1958 U.S.C.C.A.N. 4189 (stating that WPPDA “reserv[es] to the States the detailed regulations relating to insurance and trusts, and other phases of . . . [plan] operations”).

91. A limited preemption clause provided that plans covering employees in more than one state were exempt from state laws requiring the filing of information required to be disclosed by the WPPDA, so long as specified conditions were met. Pub. L. No. 85-836, 72 Stat. 1002, § 10(a) (1958) (repealed 1974). However, the same clause made clear that “[n]othing contained in this subsection shall be construed to prevent any State from obtaining such additional information relating to any such plan as it may desire, or from otherwise regulating such plan.” *Id.*

92. See *Malone*, 435 U.S. at 512.

contract law applied to plans (considered a type of contract).⁹³ This contract law had few rules specific to plans and was not guided by principles or policies specific to plans. It was limited and weak, affording very few protections to participants.⁹⁴ The common law of trusts, too, was sometimes applied when plan assets were held in trust. This body of law also was not specially adapted to plans and gave little protection to participants.⁹⁵

A few state statutes pertained to plans. Insurance laws did because health plans commonly purchased insurance to meet benefit obligations and pension plans commonly purchased annuities to fund the payment of retirement income. Those laws, however, governed the activities of the insurer and its agents, not the activities of the plan. They protected participants only to a limited extent. Thus, there was little occasion for insurance law to conflict with federal laws more directly governing plans. The potential for conflict was further lessened by the federal policy announced in the McCarran-Ferguson Act, that regulation of the business of insurance should be left to the states.⁹⁶

A few states enacted special statutes to regulate plans. Most were enacted around the time of the WPPDA and in response to the same disclosures of corruption in union-sponsored plans. Their regulatory focus—disclosure—was also the same as that of the WPPDA. A few states also imposed substantive obligations relating to fiduciary duty and employer contributions and provided for civil enforcement.⁹⁷ Because these laws were largely addressed to the same problems as federal law and relied on similar means, there was little problem of conflict.

In summary, the pre-ERISA regime of plan regulation consisted of a primary body of state common law that was not specific to plans, supplemented by federal and state statutes of limited focus. There was no problem of federal and state conflict in plan regulation; rather, state and federal regulation was viewed as cooperative. Nothing suggested a need to oust state law to the extent ultimately provided for in section 514(a).

93. See Conison, *supra* note 17, at 590-610.

94. See *id.*

95. PATTERSON, *supra* note 74, at 175-76.

96. 15 U.S.C. § 1012(b) (1988).

97. See generally PATTERSON, *supra* note 74, ch. VI; Werner Pfennigstorf & Spencer L. Kimball, *Employee Legal Service Plans: Conflicts Between Federal and State Regulation*, 1976 AM. B. FOUND. RES. J. 787, 792-93.

B. *The Legislative History of the Preemption Provision*

ERISA's legislative history, like its historical background, provides no help in understanding the meaning of "relate to [a] plan."

This legislative history has been much discussed and can be reviewed briefly. The bills that led to ERISA provided, from the outset, for preemption of state law. Different phrasings were used in different bills, but the thrust was the same: preemption would be of laws relating to the subjects regulated by the new act. These preemption provisions were not given much attention by the committees responsible for the bills. The few explanations in the reports emphasized the need for uniformity in specific areas against a general background of cooperative regulation. For example, a House report explained that:

[T]he Committee believes it essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for the evaluation of fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports. . . . [H]owever, the Act expressly authorizes cooperative arrangements with state agencies as well as other federal agencies, and provides that state laws regulating banking, insurance or securities remain unimpaired.⁹⁸

At the end of the legislative process, the Conference Committee changed the language of the preemption clause to its current phrasing. However, it gave no explanation for doing so. Hence, the legislative process supplies no reasons for Congress's choice of expansive preemption.

This, so far, is the standard account. To it, one may add a small additional point: the Conference Committee also eliminated provisions that would have allowed state law to continue to supply the substantive standards in benefit suits. No reason was given for this change; indeed, the change was not even noted. However, it likely reflects congressional distrust of state courts' ability and willingness to protect the interests of participants. As several committee reports had lamented, "courts strictly interpret the plan indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording."⁹⁹ As discussed below, Congress was uncomfortable with state law and state courts and ultimately showed a strong preference for relying on federal courts to implement

98. H.R. REP. NO. 533, 93d Cong., 1st Sess. 17 (1973), *reprinted in* II LEGISLATIVE HISTORY, *supra* note 1, at 2364.

99. *E.g.*, S. REP. NO. 127, 93d Cong., 1st Sess. 5 (1973), *reprinted in* I LEGISLATIVE HISTORY, *supra* note 1, at 591.

ERISA's participant-protective goals.

Another part of the legislative history often cited to explain the purpose of preemption consists of statements by three of the legislators most responsible for ERISA—Representative Dent, Senator Javits, and Senator Williams. After the final bill returned from Conference, each spoke to his respective chamber to explain it; each sought to explain the new, broad preemption provision. Representative Dent, for example, stated that section 514(a) provides for the “reservation to Federal authority of the sole power to regulate the field of employee benefit plans.”¹⁰⁰ This statement is often cited to clarify the purpose of the preemption clause.¹⁰¹ Yet, it explains nothing unless one knows what is included in “the field of employee benefit plans.”¹⁰² That “field” surely encompasses more than the substance of the statute, but Representative Dent failed to describe how much more. Thus, the statement provides no real help in understanding what Congress meant by “relate to [a] plan.”

The three legislators also explained that a salutary effect of the new provision would be the elimination of “conflicting or inconsistent State and local regulation of employee benefit plans.”¹⁰³ But again, such an explanation is unhelpful unless one knows what counts as “conflicting or inconsistent State and local regulation of employee benefit plans.” Senator Javits added that section 514(a) preempts even state laws that “deal with some particular aspect of private welfare or pension benefit plans not

100. 120 CONG. REC. 29,197 (1974), *reprinted in* III LEGISLATIVE HISTORY, *supra* note 1, at 4670.

101. *E.g.*, *District of Columbia v. Greater Washington Bd. of Trade*, 113 S. Ct. 580, 588 (1992) (Stevens, J., dissenting); *Forbes v. Lucas (In re Lucas)*, 924 F.2d 597, 603 (6th Cir.), *cert. denied*, 111 S. Ct. 2275 (1991); *Nechero v. Provident Life & Accident Ins. Co.*, 795 F. Supp. 374, 380 (D.N.M. 1992); *Wagner v. Continental Bank*, No. CIV.A. 89-1878, 1991 WL 68024, at *9 (E.D. Pa. Apr. 25, 1991).

102. *See* William J. Kilberg & Paul Inman, *Observation, Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 TEX. L. REV. 1313, 1327 (1984) (“[A] law is preempted if it encroaches on the field Congress defined, but Congress demarcated that field in terms of the state laws it intended to preempt.”). *Cf.* *Hines v. Davidowitz*, 312 U.S. 52, 78 (1941) (Stone, J., dissenting). In *Hines*, Justice Stone observed:

Little aid can be derived from the vague and illusory but often repeated formula that Congress “by occupying the field” has excluded from it all state legislation. Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution.

Id.

103. 120 CONG. REC. 29,197 (1974) (statement of Rep. Dent), *reprinted in* III LEGISLATIVE HISTORY, *supra* note 1, at 4670.

clearly connected to the Federal regulatory scheme,"¹⁰⁴ but that much would be obvious in any event.

Thus, all one can extract from the legislative history is a congressional preference for exclusive federal regulation of private benefit plans. One cannot extract any more. In particular, one cannot discover the reasons for this strong preference or obtain guidance on how it should be implemented by the courts.

C. *Conflict During the Consideration of ERISA*

As is well-known, several events took place while ERISA was under consideration, which precipitated concern over the potential for state interference with the proposed law.¹⁰⁵ Yet while the incidents explain specific provisions of ERISA that deal with preemption, they do not explain why Congress chose the basic "relate to [a] plan" standard.

One incident was the decision of a Missouri circuit court, holding self-funded medical benefit plans to be insurance companies for purposes of state regulation. The court found Monsanto Company guilty of operating an insurance company without a license and imposed drastic penalties of \$185 million.¹⁰⁶

Before ERISA, states generally had not attempted to regulate self-insured plans under their insurance laws, even though one could argue that such plans, as risk-spreaders, were insurers.¹⁰⁷ Some statutes specifically exempted plans; in other states there was simply no effort to apply the insurance laws to them.¹⁰⁸ However, in the decade before ERISA, a movement developed to regulate self-funded plans as insurers.¹⁰⁹ State insurance departments were concerned over the loss of premium taxes as plans converted to self-funding, and insurance companies were concerned

104. 120 CONG. REC. 29,942 (1974), *reprinted in* III LEGISLATIVE HISTORY, *supra* note 1, at 4771.

105. *See generally* Daniel M. Fox & Daniel C. Schaffer, *Semi-Preemption in ERISA: Legislative Process and Health Policy*, 7 AM. J. TAX POL'Y 47, 48-52 (1988); Pfennigstorf & Kimball, *supra* note 97, at 796-98, 803.

106. *See* Pfennigstorf & Kimball, *supra* note 97, at 796.

107. *See, e.g.*, *Mutual Life Ins. Co. v. New York State Tax Comm'n*, 298 N.E.2d 632, 634-35 (N.Y. 1973).

108. *See* Goetz, *supra* note 84, at 323-29.

109. *See, e.g.*, *West & Co. of La., Inc. v. Sykes*, 515 S.W.2d 635 (Ark. 1974); *Mutual Life Ins. Co. v. New York State Tax Comm'n*, 298 N.E.2d 632, 634-35 (N.Y. 1973); *Williams v. Massachusetts Mut. Life Ins. Co.*, 427 S.W.2d 845 (Tenn. 1968).

over the supposedly favored position of self-funded plans.¹¹⁰ The efforts met with no success in the state legislatures,¹¹¹ and state supreme courts uniformly rejected them as well.¹¹² The *Monsanto* decision itself was overturned by the Missouri Supreme Court,¹¹³ but not until after ERISA had been enacted.

Concern over the *Monsanto* decision and over state efforts to subject unfunded plans to insurance regulation likely prompted the Conference Committee to add section 514(b)(2)(B) to ERISA.¹¹⁴ That provision specifies that self-funded plans shall not be deemed insurance companies for purposes of subsection (b)(2)(A), which otherwise saves from preemption state laws that "regulate[] insurance." Hence, the immediate problem created by the *Monsanto* decision was dealt with through a very specific rule. The decision may have further demonstrated to legislators a more general need for broad preemption. But if so, the decision does not explain the "relate to [a] plan" language actually chosen.

Another significant event was the American Bar Association's (ABA) continued resistance to prepaid legal services plans, especially closed panel plans.¹¹⁵ In 1974, at its annual meeting, the ABA amended the Model Code of Professional Responsibility in a way that would impede the formation of closed panel plans.¹¹⁶ This incident, too, prompted a

110. See Pfennigstorf & Kimball, *supra* note 97, at 795-96; Margaret Dawson Farrell, Note, *Self-Insured Employee Welfare Plans and the 501(c)(9) Trust: The Specter of State Regulation*, 43 U. Cinn. L. REV. 325, 337-43 (1974).

111. Goetz, *supra* note 84, at 347-48; Farrell, *supra* note 110, at 337-43.

112. See West & Co. v. Sykes, 515 So. 2d 635 (Ark. 1974); California-Western States Life Ins. Co. v. State Bd. of Equalization, 312 P.2d 19 (Cal. Dist. Ct. App. 1957); State Tax Comm'n v. John Hancock Mut. Life Ins. Co., 170 N.E.2d 711 (Mass. 1960); Mutual Life Ins. Co. v. New York State Tax Comm'n, 298 N.E.2d 632, 635 (N.Y. 1973); Williams v. Massachusetts Mut. Life Ins. Co., 427 S.W.2d 845 (Tenn. 1968).

113. State *ex rel.* Farmer v. Monsanto Co., 517 S.W.2d 129, 133 (Mo. 1974).

114. See Fox & Schaffer, *supra* note 105, at 50-51.

115. See Pfennigstorf & Kimball, *supra* note 97, at 803.

116. The House of Delegates adopted amendments proposed by the Section of General Practice, rejecting an alternative proposed by the Committee on Ethics and Professional Responsibility.

The [amendments adopted] wrote into the code restrictions that require lay organizations offering closed panel service to file with the disciplinary authorities their bylaws, agreements with counsel, schedules of benefits, subscription charges, and annual financial statements.

The [amendments] also contained a provision requiring organizations that provide closed panel legal services to give their members freedom of choice in selecting counsel and to reimburse the member who chooses to retain his own lawyer the amount the organization would have paid its closed panel counsel.

Rowland L. Young, *House of Delegates Acts on Group Legal Services, Shield Legislation, Court Organization Standards, and Uniform Divorce*, 60 A.B.A. J. 446, 446 (1974). The President of the ABA, Chesterfield Smith, "declared that the restrictions . . . would hinder the availability of legal

particular statutory response: defining “state” and “state law” so as to ensure that rules promulgated by state bars, relating to prepaid legal services plans, would be preempted.¹¹⁷ The incident may also have shown the need for generally broad preemption. Senator Williams explained that, as a result of the new preemption clause: “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—whether closed or open panel.”¹¹⁸ But again, while this may help show why Congress was concerned with the potential for state interference with plans, it does not explain the preemption language ultimately chosen.

D. Title III

The most telling evidence about the purpose of preemption and the meaning of section 514(a) is not always recognized as such. The bill that emerged from the Conference Committee also contained a provision establishing a Joint Pension Task Force (Task Force). The Task Force was charged with, among other things, making within 24 months “a full study and review of . . . the effects and desirability of the federal preemption of state and local law with respect to matters relating to pension and similar plans” and reporting the results to Congress.¹¹⁹ The Conference Report stated that the conferees “expect[] that the Pension Task Force will consult closely with State insurance, etc., authorities in the course of this study.”¹²⁰ Senator Javits further explained that:

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 Congress. If it determines that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal

services to the public and that he was ‘sick to his stomach’ with such restrictions.” *Id.* at 447.

117. See Pfennigstorf & Kimball, *supra* note 97, at 829.

118. 120 CONG. REC. 29,933 (1974), reprinted in III LEGISLATIVE HISTORY, *supra* note 1, at 4746.

119. Employee Retirement Income Security Act of 1974 § 3022(a)(5), 29 U.S.C. § 1222(a)(5) (1988). No report was ever submitted.

120. H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 383 (1974), reprinted in III LEGISLATIVE HISTORY, *supra* note 1, at 4650.

level, the appropriate modifications can be made.¹²¹

These events strongly suggest two remarkable features of section 514(a). First, the provision—in particular, the “relate to [a] plan” standard—was designed to be experimental. It was envisioned that it might subsequently have to be changed—perhaps substantially. Section 514(a) was intended as a first draft of a standard that extended preemption beyond the field regulated by ERISA, and Congress believed that experience would likely show the need for refinement.¹²²

Second, Congress had little if any idea what results the experiment would yield. Hence, it was important to provide for study of “the effects” and even the “desirability” of preemption. As Senator Javits admitted, the provision might even have the effect of “precluding essential legislation.”

* * *

In sum, the search for specific purposes behind section 514(a) is futile. So, too, is the search for specific examples of state laws, other than laws regulating plans, that would be preempted. Congress had only the most general aim of broadly preempting state law, and left it to the courts to develop a law implementing that broad goal.¹²³

V. THE PRINCIPLE OF PREEMPTION

The argument to this point shows that section 514(a) does not have a meaning in the way that statutory provisions are usually understood to have a meaning. Thus arises the question: What meaning, if any, does it have? The answer can be found by observing that section 514(a) differs from more conventional provisions in yet another way: it does not announce a rule.

121. 120 CONG. REC. 29,942 (1974), reprinted in III LEGISLATIVE HISTORY, *supra* note 1, at 4771.

122. See Leon E. Irish & Harrison J. Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 J.L. REF. 109, 115 (1985) (asserting section 514(a) was “perhaps . . . merely intended as a ‘first cut’ at the preemption problem”).

123. The argument has been put forward that the establishment of the Joint Pension Task Force requires courts to apply the language of section 514(a) rigidly, and that it debars them from developing a common law of preemption that takes into account various interests that might bear upon the appropriateness of preemption in a given case. Irish & Cohen, *supra* note 122, at 113-14. This is an unlikely reading of ERISA’s language and its history. The real flaw of the argument, however, is its presupposition that there exists a plain meaning of “relate to [a] plan” which courts can mechanically enforce. As this Article has shown, the language of section 514(a) does not allow courts to do that.

A. Section 514(a) and the Character of Rules

A rule is a type of norm. Students of jurisprudence disagree over what a rule is and how rules differ from other norms. Happily, we may ignore those disagreements. It suffices to track common usage, for which the paradigm of "rule" is a norm that can function as a self-sufficient basis for resolving controversies or guiding conduct.¹²⁴ Ruleness so understood is a matter of degree, inasmuch as the capacity of a norm to provide a self-sufficient basis for decision is itself a matter of degree. Nonetheless, it is clear what examples count as standard instances of rules. A simple example—one dealing with ERISA preemption—might be: No state shall enact any law regulating severance benefits. Such a rule would be self-sufficient in that, if it applied to a controversy (over the validity of a state law) one ordinarily could use it to resolve that controversy, without the need to appeal to other norms¹²⁵ and without the need for substantial exercise of discretion.¹²⁶

Rules—at any rate, paradigmatic ones—have a logical structure that permits this type of self-sufficient resolution. For example, the rule just stated contains a descriptive antecedent specifying the scope of its application (if x is a state law regulating severance benefits . . .) and a consequent specifying what should happen in cases within that scope (. . . then x may not be enacted).¹²⁷ The goal in interpreting such a rule is to facilitate its use in decision or action by clarifying the conditions and consequences of its application. Interpretation is successful in a given case when the rule is made sufficiently definite that it can either resolve a

124. This explanation is similar to Dworkin's:

Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.

RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 24 (1977). Dworkin's explanation, however, seems unnecessarily rigid because it identifies the meaning of "rule" with the paradigm.

125. This is not to say that the rule necessarily will resolve it alone. Rules can conflict with other rules and be overridden by other norms. See generally Joseph Raz, *Legal Principles and the Limits of Law*, 81 *YALE L.J.* 823 (1972).

126. Rules and discretion are inversely related. An aspect of the self-sufficiency of rules is their reduction of the need for a decisionmaker using them to exercise discretion to reach a decision. For a discussion of the relationship between rules and discretion, see generally Carl E. Schneider, *Discretion and Rules: A Lawyer's View*, in *THE USES OF DISCRETION* (Keith Hawkins ed., 1992); SCHAUER, *supra* note 22.

127. On this form for rules, see SCHAUER, *supra* note 22, at 23-24. For a more technical discussion of this type of formulation, see Jaako Hintikka, *Some Main Problems of Deontic Logic*, in *DEONTIC LOGIC: INTRODUCTORY AND SYSTEMATIC READINGS* 87-103 (Risto Hilpinen ed., 1971).

question within its scope or be found inapplicable.¹²⁸

Whatever it is that section 514(a) states, it is something other than a rule. Courts (and scholars) try to read that section as a rule of the form: if *x* relates to a plan, then *x* is preempted. But this reading is untenable. As we have seen, “relate to [a] plan” is not a conventional descriptive phrase. It cannot function as the antecedent of a rule and the ordinary interpretive process of trying to fix its details will not work. Furthermore, as we have seen, the standard of section 514(a) is not definite enough to be used by itself; thus the need for appeal to a “tenuous, remote or peripheral” limitation, or some additional norm, to help decide cases.

B. Section 514(a) as the Statement of a Principle

Judicial responses to the semantic insufficiency of section 514(a) vary. Many courts, by ipse dixit, simply rewrite the provision as a rule or group of rules. For example, the Fifth and Ninth Circuits read section 514(a) as if it stated that laws affecting certain relationships are preempted. Thus, for the Ninth Circuit, “the first question . . . is whether the state law reaches a relationship that is already regulated by ERISA.”¹²⁹ Other courts take a different approach. Rather than invent rules, they invent legislative history. For example, some courts assert—without any attempt at support—that “Congress struck a ‘bargain’ by granting broad protections to plan beneficiaries in exchange for forfeiture of state remedies.”¹³⁰ They then use this fictional legislative purpose to limit preemption.¹³¹

128. See DWORKIN, *supra* note 124, at 24.

129. General Am. Life Ins. Co. v. Castonguay, 984 F.2d 1518, 1522 (9th Cir. 1993). Similarly, says the Fifth Circuit, “we must ask ‘whether the state law affects relations among the principal ERISA entities.’” Harms v. Cavenham Forest Indus., 984 F.2d 686 (5th Cir.), *cert. denied*, 114 S. Ct. 382 (1993). For criticism of this type of test, see Conison, *supra* note 73, at 1088-89.

130. Fox, Curtis & Assocs., Inc. v. Employee Benefit Plans, Inc., No. 92-C-5828, 1993 WL 265474, at *4 (N.D. Ill. July 13, 1993). See also Memorial Hosp. Sys. v. Northbrook Life Ins. Co., 904 F.2d 236, 249 (5th Cir. 1990); Beth Israel Medical Ctr. v. Sciuto, No. 92 CIV. 8729, 1993 WL 258636 (S.D.N.Y. July 8, 1993); The Meadows v. Employers Health Ins., 826 F. Supp. 1225 (D. Ariz. 1993).

131. Not a shred of evidence supports the view that the preemption clause was designed to oust state law remedies or state law protections as part of an exchange of state protections for federal ones. The idea of such a bargain is, in fact, wildly implausible. As we have seen, there was little state law protection for participants to hypothetically bargain away. Moreover, the little evidence there is about the motivation for expansive preemption shows the concern to have been with the potential for state interference with federal regulation, rather than with states providing too much protection.

This is not the only instance of courts inventing legislative history for ERISA. Indeed, the statute seems to have begotten a new method of statutory construction. Faced with a sparse or cryptic provision, courts will sometimes create a story of the form: the provision means *x* because Congress *must* have intended *y*; where no legislative history is cited (or even could be cited) for *y*. Such an

Still other courts weigh a potpourri of factors in difficult cases.¹³² The trouble with all these responses is that they disregard the statute, rather than make use of it.

A better response is to accept as a given the insusceptibility of section 514(a) to treatment as a rule. Doing this does not end the analysis or leave the provision inoperative; after all, a rule is not the only form a law can take. Many take instead the form of principles. Principles clearly abound in common law. Indeed, until this century it was conventional to view common law as the adaptive working out of a body of principles, rather than as a determinate body of rules.¹³³ Principles also abound in constitutional law. The First Amendment provision, that "Congress shall make no law . . . abridging the freedom of speech," while ostensibly cast as a flat prohibition and thus a clear rule, is not read as such. Rather, it is read as a strong statement of principle against regulation of expression. First Amendment law is the application of that principle in different contexts; much of the law is highly fact-dependent.¹³⁴

Statutory principles are less often noticed, yet plentiful nonetheless. A well-known example is the prohibition in section 5 of the Federal Trade Commission Act of "[u]nfair methods of competition . . . and unfair or deceptive acts or practices"¹³⁵—a provision discretionarily implemented by the Federal Trade Commission and federal courts. Another is the provision authorizing federal court jurisdiction over civil actions "arising under" federal law¹³⁶—a provision discretionarily implemented by federal

account is to statutory interpretation what a Kipling tale is to evolutionary biology; one might well call it a *legislative just-so story*. The most notorious just-so story is the tale courts tell to justify the imposition of a requirement that claimants exhaust plan procedures before bringing a suit for benefits. See Jay Conison, *Suits For Benefits Under ERISA*, 54 U. PITT. L. REV. 1, 28-29 (1992).

132. See, e.g., *Arkansas Blue Cross & Blue Shield v. St. Mary's Hosp., Inc.*, 947 F.2d 1341 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 2305 (1992); *Pacific Airmotive Corp. v. First Interstate Bank*, 224 Cal. Rptr. 233 (Cal. Ct. App. 1986).

133. See, e.g., *Williams v. Miles*, 94 N.W. 705, 708 (Neb. 1903). Roscoe Pound, as Commissioner, observed:

The theory of our system [of common law] is that the law consists, not in the actual rules enforced by decisions of the courts at any one time, but the principles from which those rules flow; that old principles are applied to new cases, and the rules resulting from such application are modified from time to time as changed conditions and new states of fact require.

Id. See generally Conison, *supra* note 48. For a modern statement of the view that common law is not a body of rules, see A.W.B. Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE, SECOND SERIES (A.W.B. Simpson ed., 1973).

134. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-2, -8 (2d ed. 1988).

135. 15 U.S.C. § 45(a) (1988).

136. 28 U.S.C. § 1331 (1988).

courts.¹³⁷ There are even statutory principles regarding preemption. Section 2(b) of the McCarran-Ferguson Act provides that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance.”¹³⁸ If section 514(a) can be read to state a principle, its resistance to being cast as a rule should only be expected. Can it, then, be read this way?

When courts do not try to straightjacket section 514(a), they do read it that way: as expressing a principle of broad preemption of state law. For example, the Supreme Court recently summarized the meaning of section 514(a) as follows:

[T]he words [“relate to”] thus express a broad pre-emptive purpose. We have repeatedly recognized that in addressing the . . . pre-emption provision of the Employee Retirement Income Security Act of 1974 (ERISA), which pre-empts all state laws “insofar as they . . . relate to any employee benefit plan.” We have said, for example, that the “breadth of [that provision’s] pre-emptive reach is apparent from [its] language,” that it has a “broad scope,” and an “expansive sweep,” and that it is “broadly worded,” “deliberately expansive,” and “conspicuous for its breadth.”¹³⁹

What the present argument thus far suggests is that courts should stop with the insight that section 514(a) states a principle of broad preemption and cease forcing that principle to be a rule.¹⁴⁰

137. See *Gully v. First Nat'l Bank*, 299 U.S. 109, 117-18 (1936):

To define broadly and in the abstract “a case arising under the Constitution or laws of the United States” has hazards What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.

Id.

138. 15 U.S.C. § 1012(b) (1988).

139. *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992) (citations omitted).

140. *Cf. Irish & Cohen*, *supra* note 122, at 114 (“[S]ection 514(a) was more in the nature of a quick statement of general principle than a workable, final rule.”).

For a comparable argument that Federal Rule of Civil Procedure 52(a) should be read as a principle, rather than a rule, see Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 657-70 (1988). Rule 52(a) provides that:

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness.

FED. R. CIV. P. 52(a). Professor Cooper argues that the “clearly erroneous” language (like the “relate to [a] plan” language of ERISA section 514(a)) has no meaning in any conventional sense. Cooper, *supra*, at 645-47.

It is not difficult to understand why courts do not stop. After all, section 514(a) looks like a rule. In fact, it looks like a canonically formulated rule, with an ostensibly factual antecedent and a deontic consequent. Yet the appearance is deceptive, for principles can have the same logical form of rules,¹⁴¹ as some of the examples given above show. Courts miss this possible reading of section 514(a) because of their strong preference for reading statutes as rules.¹⁴²

But this preference cannot be absolute. As has often been pointed out, Congress, when enacting a statute, sometimes does no more than announce a policy or a preference for a type of result and leave it to courts to work out the ramifications.¹⁴³ When Congress does this, the written product may be formally indistinguishable from a rule. Congress has done this with section 1 of the Sherman Act, the fair use provision of the Copyright Act,¹⁴⁴ the ERISA provision imposing on plan fiduciaries a duty to act "solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries,"¹⁴⁵ and many other statutes. The lack of recurrent meaning for "relate to [a] plan" and the lack of discoverable purpose in the legislative history strongly indicate that, in section 514(a), Congress wrote a statute that must be read to function as a principle, rather than a rule.

C. *Ramifications of the New Reading of Section 514(a)*

It is important to note some consequences of reading section 514(a) this way. First, a fundamental difference between rules and principles lies in their respective degrees of particularity. Rules deal with specifically described states of affairs, while principles deal with matters described more abstractly.¹⁴⁶ Because of a principle's generality, it ordinarily

141. See Raz, *supra* note 125, at 836.

142. Especially when a statute is intended to guide the everyday conduct of individuals, it is important that the guidance be clear. In practical activity, people need to know what they may or may not do and how they can achieve desired ends. It is not helpful, indeed it is an obstacle, for one to have to engage in discretionary weighing of reasons and principles before taking action. See Raz, *supra* note 125, at 841.

143. See, e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1314 (1976).

144. 17 U.S.C. § 107 (1988).

145. Employee Retirement Income Security Act of 1974 § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) (1988). In the legislative history Congress made explicit that it expected courts to develop this standard, taking into account the special features of plans. H.R. REP. NO. 1280, *supra* note 120, at 302, reprinted in III LEGISLATIVE HISTORY, *supra* note 1, at 4569.

146. See Raz, *supra* note 125, at 838.

serves as only one of many considerations to be taken into account in reaching a decision.¹⁴⁷ A principle such as “forfeitures are to be avoided” may apply to a situation, but usually other principles, rules or reasons must also be considered to determine what, all things considered, one should do. If section 514(a) states a principle, rather than a rule, then other principles, reasons and rules will often have to be considered as well in resolving preemption questions.

Second, the meaning of a principle, unlike that of a rule, is not a matter of paradigm and point. We have already canvassed several senses of “meaning.” For principles there is yet another, one that is more pragmatic than semantic. When asked to explain the meaning of a principle—for example, that no one should profit from his own wrong—there is little one can say from a semantic perspective to make it any clearer. The difficulty is that the principle seems to be its own point. Hence, when one is asked for the meaning of the principle, the natural temptation is to just restate it in a slightly modified way.¹⁴⁸ To add something that might help clarify the meaning, one would have to go on to explain how the principle should be used to guide decision making. One can provide this additional information in a variety of ways. One can give examples of rules that result from the interaction of the principle with other norms; offer specific examples of the use of the principle; or explain the weight the principle is to be given in decision making. But with any approach, one describes how the principle is used in decision making. If section 514(a) states a principle then, to explain what it means, one explains how it is applied.

Finally, to read section 514(a) as a principle, and resist converting it into a rule, is not a trivial step. The principle in question deals with preemption. Preemption of a state law is conventionally viewed as displacement of a law which either already exists or has an antecedent claim to govern. Preemption—displacement—of state law is thus seen as an act in

147. Raz notes that principles have other, perhaps even more important, functions than contributing to the decision of particular cases. In particular, they serve as guides to interpreting statutes, grounds for finding exceptions to rules, and guides to the development of new rules. Raz, *supra* note 125, at 839-41.

148. The favored refrain of the Supreme Court is that “a state law ‘relate[s] to’ a covered employee benefit plan for purposes of § 514(a) ‘if it has a connection with or reference to such a plan.’” *E.g.*, *District of Columbia v. Greater Washington Bd. of Trade*, 113 S. Ct. 580, 583 (1992) (citing other cases using the same operative language). It takes little reflection to see that the statement clarifies nothing.

derogation of the sovereignty of the states.¹⁴⁹ Accordingly, it is an act demanding political legitimation. Courts tend to assume that this legitimation must come from a congressional choice to preempt, rather than from judicial decision. For this reason, courts usually characterize questions of preemption as questions of what Congress intended.¹⁵⁰ But to construe section 514(a) as stating a principle of broad preemption is to read it as leaving the decision of ERISA preemption questions to the discretionary judicial weighing of factors. It is to treat these preemption questions as ones for judicial resolution in the first instance. ERISA preemption thus has a different status in the scheme of federalism than does preemption of a more conventional type.

VI. THE PRESUMPTION OF PREEMPTION

The insight that section 514(a) states a principle, rather than a rule, is sterile unless one can show how the principle may be applied. Happily, section 514(a) can be used in a straightforward way. To see what that way involves, we must first examine a basic feature of the general law of preemption.

A. *Preemption and Presumptions*

Preemption of state law ordinarily results from statute.¹⁵¹ Most statutes that give rise to preemption differ from ERISA in that they do not expressly oust state law. For those statutes, both the fact of preemption and its scope must be inferred. The law of preemption has evolved to deal mainly with preemption arising in this way.

This body of law has two notable characteristics. One is its highly particularistic character. Preemption decisions commonly turn on a case-specific weighing of considerations for and against preemption (ostensibly in the form of an inquiry into congressional intent).¹⁵² As a result, it is

149. For a classic statement of this view of federalism, see *Hanna v. Plumer*, 380 U.S. 460, 474-78 (1965) (Harlan, J., concurring). For an overview, see Conison, *supra* note 73, at 1103-04. For criticism, see Louise Weinberg, *Federal Common Law*, 83 Nw. U. L. REV. 805, 818 (1989).

150. *E.g.*, *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992).

151. *But cf.* *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (finding preemption of state law by federal common law).

152. See Burt Neuborne, *An Overview of Preemption 2* (Fed. Jud. Confer.), Feb. 1993. Kenneth L. Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515, 520-25; 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, 36 (1978). For an example of such particularistic decision making, see *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), wherein—to quote one

a body of law with few general rules.

Second, the law of preemption makes extensive use of presumptions to help weigh relevant considerations. Most of the presumptions are against finding preemption. One such presumption, noted above, is against the implied supersession of state insurance regulation.¹⁵³ Other presumptions restrain the finding of preemption when state law deals with matters of local interest¹⁵⁴ or matters within the exercise of “the historic police powers of the States.”¹⁵⁵

In addition to these subject-specific presumptions, there is a broad and overriding one: state law should not be deemed displaced, *simpliciter*.¹⁵⁶ The significance of this presumption is that courts decline to find preemption unless there are strong reasons for doing so.¹⁵⁷ Courts in fact recognize only two acceptable reasons for overcoming the presumption: that the federal statutory scheme in question is so pervasive as to make it reasonable to find no room for state regulation, or that the state law in question conflicts with or otherwise constitutes an obstacle to the implementation of the federal statute’s objectives.¹⁵⁸

It is quite clear that section 514(a) negates the general presumption so far as it would apply to ERISA. But one can say more. One can read section 514(a) to create a presumption in favor of ERISA’s preemption of state law. Doing this, we shall see, implements the principle of broad preemption in a practical and familiar way.

B. *Presumptions as Automatic Reasons*

To understand the proposal to read section 514(a) as a presumption, it helps to understand how presumptions operate. The working of presumptions, like several other topics already discussed, is a matter of some

of the separate opinions—“the Court proceeds to create a crazy quilt of preemption from among the common-law claims implicated in this case.” *Id.* at 2631 (Blackmun, J., concurring in part and dissenting in part).

153. 15 U.S.C. § 1012(b) (1988).

154. For example, tort actions. *See, e.g.,* *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 253-55 (1984).

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

156. “Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.” *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). *See also* *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992); *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 715 (1985); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

157. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

158. *E.g., Gade v. National Solid Wastes Management Ass’n*, 112 S. Ct. 2374, 2383 (1992).

controversy,¹⁵⁹ but again, a controversy that can here be ignored.¹⁶⁰ It suffices to say that a presumption is an automatic reason for doing or believing (or not doing or not believing) something, operative in a class of cases. These automatic reasons have two important features.

First, a presumption ordinarily serves as one reason among many bearing on the resolution of an issue. It may even be a reason that makes no practical difference. Consider, for example, the presumption that a legislative enactment is constitutional.¹⁶¹ That presumption is a reason, automatically applicable in any constitutional case, for a finding of constitutionality. In any given case, there will likely be additional reasons for both constitutionality and unconstitutionality. The court must weigh those reasons along with the automatic reason for constitutionality in reaching its decision. In many cases, however, the substantive reasons for or against constitutionality are so overwhelming that the presumption becomes practically unimportant.

Second, a presumption is a peculiar type of reason. It is like a rule in that it applies to all of a class of cases. Yet it differs from a rule, not only in that (as a type of principle) it ordinarily is not dispositive, but also in that its rationale ordinarily can be disregarded. Interpretation and application of a rule are often guided by the rationale. When it is unclear whether a rule is applicable to a given set of facts, the rationale may be consulted to help resolve the question. And when a rule literally applies in a case, but in so doing appears to go beyond its rationale, pressures arise to modify the rule or recognize exceptions. The application and development of a rule are intimately connected with its rationale.

Matters are different for presumptions. Presumptions commonly apply to an extremely broad category of cases. The broad scope minimizes the field for dispute over application and reduces the need to consult the presumption's rationale. Moreover, the inaptness of a presumption's rationale in a case where the presumption applies merely constitutes a reason (but not necessarily a conclusive one) for a decision contrary to the presumption. It does not constitute a reason for the presumption not to apply or for it to be modified in some class of cases. Presumptions, unlike

159. See, e.g., JACK B. WEINSTEIN ET AL., *CASES AND MATERIALS ON EVIDENCE* 1178-82 (8th ed. 1988).

160. The controversy mainly surrounds the procedural effect of presumptions of fact in the context of evidentiary hearings.

161. E.g., *Parham v. Hughes*, 441 U.S. 347, 351 (1979); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

rules, are in general not evolutionary: experience ordinarily does not work to suggest modifications that would make a presumption better reflect some underlying purpose. For these reasons, the use of a presumption in decision making largely eliminates the need to attend to rationale. Indeed, in most instances it is irrelevant whether a presumption even has an articulable rationale.¹⁶²

Section 514(a), read as an automatic reason for preemption, would function in the manner just described. Ordinarily, it would constitute one among possibly many reasons to be considered in resolving a preemption question. In any given case, a court likely would have reasons both for and against preemption and would have to weigh those reasons, along with the automatic reason, to determine which way the balance tips. But, just as with any presumption, the substantive reasons for or against might be so overwhelming that the decision would be the same in its absence.

Moreover, the rationale (if any) for section 514(a) could largely be disregarded. The statutory presumption would automatically apply, irrespective of rationale, to a broad class of civil actions—in fact, it would be simplest for the presumption to apply to all civil actions involving state law.¹⁶³ If an ostensible rationale for the presumption should happen not to be pertinent in a given case, the presumption would still apply; the irrelevance of the rationale might simply be a reason to be weighed in the preemption calculus. Finally, because rationales, if any, for the presumption could largely be ignored in its application, there would be little reason to be concerned with modifying or improving its formulation.

C. The Advantages of Reading Section 514(a) as a Presumption

The above description of how section 514(a) should operate might seem paradoxical. It certainly marks a change from the way the provision is used today. Yet it is easy to see that treating section 514(a) as a presumption has many advantages, both practical and analytical. Far from being paradoxical, the treatment avoids paradoxes and problems that arise from the more conventional reading of the provision as a rule.

To begin, the treatment accomplishes what plain meaning interpretations of “relate to” and “relate to [a] plan” try without success to do. The presumption approach, like the plain meaning approach, would extend

162. “Presumption,” like “rule” or “principle,” is not a sharply defined concept. The text sketches the paradigm and point of “presumption” to the extent needed for present purposes. No doubt specific presumptions may vary from the paradigm in any of a variety of ways.

163. Doing so does not lead to absurdities, for reasons discussed below.

ERISA preemption, in principle, as far as the language can reach. The approach thus reads “relate to [a] plan” in as literal a way as is feasible. But it avoids the absurdities generated by literalism. For while it is absurd to extend the preemption of state law indefinitely far, it is not absurd to so extend the presumption. The presumption by itself does not logically compel the conclusion that any given state law is preempted.

Second, the treatment accommodates section 514(a)’s lack of an articulable purpose. The closest one can come to stating the purpose of section 514(a) is to note the comments in the legislative history about reserving to the federal government the sole power to “regulate the field of employee benefit plans.”¹⁶⁴ Those comments bespeak a general aim of ousting state law from a wide area. The interpretive problem has been that the comments do no more; they provide no guidance on the scope of the “field.” Thus, it has been difficult for courts to know what specific purpose they should implement in applying the supposed rule of section 514(a). Reading section 514(a) as a presumption implements the general purpose of ousting state law in a wide area, and does so in a way that makes it unnecessary to identify a more specific, but probably non-existent, intent. The fact that the provision’s purpose cannot be specified with definiteness poses no difficulty because the provision, read as a presumption, is not intended to resolve preemption questions by itself and does not require clarification through application.

Third, to say that the presumption does not evolve or become clearer with application is not to say that the law of ERISA preemption does not do so. The suggested approach is faithful to Congress’ evident decision to leave it for the courts to work out the details of this body of law. Because section 514(a) provides only a non-dispositive reason for preemption, courts must (at least in theory) engage in the process of weighing the totality of relevant reasons in each case. By doing so and by testing conclusions so drawn, they can rationally elaborate the contours of ERISA preemption. In doing so, they can work out the meaning of section 514(a), not by clarifying a purported plain meaning or congressional intent, but by developing common-law rules that implement the principle of broad ERISA preemption.

Fourth, the approach permits courts to take into account policies and concerns in favor of preemption that underlie section 514(a), ERISA as a

164. 120 CONG. REC. 29,197 (1974) (statement of Rep. Dent), *reprinted in* III LEGISLATIVE HISTORY, *supra* note 1, at 4670.

whole, and the law of preemption. Even though one cannot specify an overarching point of section 514(a) to be implemented through its application, there obviously are purposes, consistent with the scheme of ERISA and with the general law of preemption, which may be furthered in any given case. Courts already rely on these considerations—for example, on the need for uniformity in benefit plan law—in ERISA preemption decisions. Appeal to these considerations makes intuitive good sense, and it is difficult to see how a body of ERISA preemption law could rationally develop without appeal to them. But it is misguided for courts to assume that, because these considerations may be relied on, they must function as guides to the interpretation of section 514(a). They need not and, in fact, cannot function this way. Instead, their proper function is as reasons for preemption in addition to the automatic reason given by section 514(a). Appeal to these considerations is legitimate, not because they constitute the purpose of section 514(a), but because they are consistent with ERISA or preemption law generally, and thus provide legitimate bases for making common-law preemption decisions.

Fifth, the approach similarly permits courts to accommodate the considerations militating against preemption that they so often wish to take into account—considerations such as the area of state law involved is one of traditional state regulation.¹⁶⁵ Courts often appeal to these factors in ERISA preemption decisions and, again, it makes intuitive good sense for them to do so. Again, however, it is erroneous to suppose that these considerations must be treated as either guides to the meaning of “relate to [a] plan” or factors that determine when a law’s relation to a plan becomes too “tenuous.” Their proper use is as reasons against preemption, to be considered in the preemption calculus. Because section 514(a) states a presumption, rather than a rule, courts have room in appropriate cases to find that the reasons against preemption outweigh the reasons for it, and thus find no preemption. And they can find no preemption in such cases without contravening supposedly plain language or undermining congressional policy choice.

D. Objections to Treating Section 514(a) as a Presumption

Objections, of course, can be urged against treating section 514(a) as a presumption. One objection is that the treatment understates the force of section 514(a), at least with respect to state laws affecting matters regulated

165. See, e.g., *Horton v. CIGNA Individual Fin. Servs. Co.*, 825 F. Supp. 852 (N.D. Ill. 1993).

by ERISA. For such laws, the approach arguably fails to reflect the fact that preemption is indefeasible rather than just presumptive.

This objection is based on misunderstandings. To begin, as the Supreme Court has pointed out¹⁶⁶ (and as is clear in any event), a large domain of state law would be preempted even in the absence of section 514(a). Any state law conflicting with a provision of ERISA would be preempted through straightforward operation of the Supremacy Clause. In addition, state laws dealing with the subjects regulated by ERISA would be displaced under general preemption analysis because of the potential for interference with ERISA's scheme of regulation.¹⁶⁷ ERISA strikes a balance between encouraging plan formation and protecting interests in plans already formed, and state regulation could upset that balance. Preemption based on this protective rationale would almost certainly extend beyond areas specifically regulated by ERISA. Some of those areas (such as the details of benefits offered by welfare plans) were intended to be left unregulated.

Accordingly, one can identify a domain, extending even beyond the perimeters of ERISA, in which the presumption of preemption (when combined with these other, more general principles) becomes nearly irrebuttable. This is as strong as preemption based on the presumption needs to be because, except for cases of direct conflict with ERISA's provisions, preemption even in the core domain is not now indefeasible. On several occasions, courts, including the Supreme Court, have held that some state laws dealing with matters within the scope of ERISA regulation are not preempted. In *Mackey v. Lanier Collection Agency and Service, Inc.*,¹⁶⁸ for example, the Supreme Court held that state laws permitting the garnishment of interests in welfare plans are not preempted, even though "benefit plans subjected to garnishment will incur substantial administrative burdens and costs."¹⁶⁹ Dictum in the same opinion further notes that there is a class of "ordinary" state law claims against plans that

166. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142-45 (1990); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524-25 (1981).

167. In *Alessi*, the Supreme Court's first ERISA preemption decision, the Court found preemption simply because the state law in question prohibited a method of benefit calculation that ERISA permitted law was "an impermissible intrusion on the federal regulatory scheme." 451 U.S. at 525. The Court did not rely on the broad language of section 514(a). And in *Ingersoll-Rand*, the Court, in an alternative holding, concluded that a wrongful discharge action would be preempted even in the absence of section 514(a) because ERISA's civil remedy provision was intended to be exclusive. 498 U.S. at 140.

168. 486 U.S. 825 (1988).

169. *Id.* at 831.

are not preempted.¹⁷⁰ For example, before ERISA was amended to provide for such, lower courts had held that orders by courts in divorce cases, allocating benefits or plan interests to an ex-spouse of the participant, were not preempted, notwithstanding a clear conflict with ERISA's anti-alienation provision.¹⁷¹

A second objection—essentially the opposite of the first—is that the approach overstates the force of section 514(a) with respect to laws that—commonsensically—are only dimly related to plans. For example, it seems absurd to suppose that an ERISA-based presumption of preemption has any bearing on a state law requiring county engineers to execute bonds before assuming office. But this objection, too, is based on misunderstandings.

The section 514(a) presumption is only one item in the preemption calculus. In many cases, there will also be substantive reasons both for and against preemption. In general, the further removed a case is from the domain of ERISA's central concerns, the fewer and weaker are likely to be the reasons for preemption and the greater are likely to be the reasons against preemption. This is the valid insight behind the "remote, tenuous, or peripheral" limitation. At the limit—for example, as concerns the county engineer law—there are no reasons for preemption other than the automatic reason. That reason is easily outweighed by any significant reason against preemption and, as a practical matter, may be disregarded. Hence, there is an enormous domain where, although a preemption analysis could in principle be undertaken, to do so would be a plain waste of time.¹⁷²

VII. APPLICATION OF THE PRESUMPTION

The proposal here advanced for reading section 514(a) as a presumption is just that: a proposal. While there are good arguments to support it, the ultimate test must be success in application. Further academic discussion can contribute very little. Nonetheless, a few final comments on the impact and operation of the presumption may help clarify what it can and cannot do, and show what problems remain for the development of ERISA preemption law.

170. *Id.* at 833-34.

171. *American Tel. & Tel. Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979); *Stone v. Stone*, 450 F. Supp. 919 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981).

172. One could also, with plausibility, construe the presumption of preemption as diminishing as one (metaphorically) moves further away from the matters ERISA addresses.

First, as a practical matter, the presumption would leave much, if not most, of present law unchanged. As noted above, there is a large core area in which preemption is virtually absolute and an enormous domain in which the presumption is irrelevant. In both domains, it is possible to lay down rules which, if not black-letter, are at any rate good guides for decision. For example, it is a rule that a state law which treats areas regulated by ERISA is preempted;¹⁷³ that a state law, the operation of which presupposes an ERISA-covered plan, is preempted;¹⁷⁴ and that a state law claim which could be recast as a claim under ERISA section 502(a) is preempted.¹⁷⁵ Treating section 514(a) as a presumption would not affect the validity of these rules. Nor would it interfere with the development of other such rules.¹⁷⁶ The treatment would, however, help clarify that these rules are not interpretations or restatements of section 514(a). Rather, they are federal common-law rules that emerge from the application of section 514(a) to recurring types of cases.

Second, it is only in the class of cases lying between the domains of clear preemption and clear non-preemption that the presumption can materially affect analysis. How much difference it might make depends on its strength, and that would have to be worked out through case decisions. In this middle domain, the practical effect of the presumption would be to put a thumb on the scale—to tilt the analysis in favor of preemption (rather than against it, as would otherwise be the case). Rules still can develop to deal with recurring situations in this domain. But such rules become less and less easy to develop as the balance of considerations becomes closer. The law in this area likely would remain particularistic.

Third, especially in that middle domain, recognition of the case-specific character of preemption questions would give courts the flexibility to take into account all factors relevant to a decision. Currently, judicial zeal for rules tends to narrow the analytical focus, even when courts handle preemption questions by weighing a cluster of factors. For example, in *Arkansas Blue Cross & Blue Shield v. St. Mary's Hospital*,¹⁷⁷ the court

173. *E.g.*, Local Union 598, Plumbers & Pipefitters Indus. Journeymen & Apprentices Training Fund v. J.A. Jones Const. Co., 846 F.2d 1213 (9th Cir.), *aff'd*, 488 U.S. 881 (1988).

174. *E.g.*, Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 483 (1990).

175. *E.g.*, Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987).

176. Few rules for non-preemption have emerged, but there seem to be no insurmountable obstacles to their doing so.

177. 947 F.2d 1341 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 2305 (1992).

identified, as factors:

[W]hether the state law negates an ERISA plan provision, whether the state law affects relations between primary ERISA entities, whether the state law impacts the structure of ERISA plans, whether the state law impacts the administration of ERISA plans, whether the state law has an economic impact on ERISA plans, whether preemption of the state law is consistent with other ERISA provisions, and whether the state law is an exercise of traditional state power.¹⁷⁸

While these factors are plausible, the list, taken as a guide for every case, is over- and under-inclusive. Different cases may require consideration of different types of factors, and the preemption calculus should reflect this fact.

Fourth, it may be proper to consider factors that usually are ignored because of the courts' focus on interpreting the "relate to [a] plan" language. One such factor is the type of plan involved. It is difficult, if not impossible, to construe "relate to [a] plan" to mean something different for pension plans than it does for welfare plans. Yet, it might be sensible for a preemption calculus to generate different results for different types of plans. ERISA is far more concerned with pension plans and pension plan interests than with welfare plans and welfare plan interests; it regulates pension plans far more extensively than it does welfare plans. This relatively greater concern and greater degree of regulation arguably translates into a relatively greater degree of preemption for laws affecting pension plans. The proposed approach permits this result, either by permitting different factors to enter into the calculus or by permitting the presumption to be stronger for pension plans than for welfare plans.¹⁷⁹

Finally, for the law of ERISA preemption to develop properly, courts must be willing to develop common law where state law is ousted. A profound error that courts too often make is to conclude that a preemption decision with respect to matters not regulated by ERISA presents a choice between applying state law and having no law at all. For example, in *The*

178. *Id.* at 1344-45 (citations omitted).

179. However, care must be exercised because, in some instances, lack of ERISA regulation might mean that there should be lack of state regulation as well. *Cf. Pohl v. National Benefits Consultants, Inc.*, 956 F.2d 126, 128 (7th Cir. 1992). In *Pohl*, the court observed:

The fact that ERISA does not provide a substitute remedy reflects not a senseless gap in the statute but a determination to carry through the policy we have described by confining participants to the entitlements spelled out in writing. Not the semantics of the word "relate," but the policy of the statute, requires preemption *and* the denial of a remedy.

Id.

Meadows v. Employers Health Insurance,¹⁸⁰ a court declined to preempt a state law claim by a health care provider against a medical plan for the cost of medical services to a participant. The court reached this conclusion largely because it assumed that preemption of the state remedy would leave the provider with no remedy at all and was unwilling to believe that Congress had intended such a result. But the court's premise was wrong. There were two decisions to be made in sequence: whether to preempt, and then, if the court did preempt, whether to supply a federal common-law remedy in place of the superseded state law. If the court was correct in assuming that to leave the provider without a remedy would contravene the purposes of ERISA, it would follow that, upon preemption, the court should recognize a federal remedy.¹⁸¹ Courts have increasingly come to appreciate the close connection between questions of preemption and questions of developing a common law of plans.¹⁸² The presumption approach to section 514(a) may help place that connection in even better focus.

VII. CONCLUSION

Current ERISA jurisprudence tries to solve preemption questions with the rule of section 514(a). The approach does not work because there is no such rule. The apparently operative standard—"relate to [a] plan"—does not have plain meaning or other contextual meaning. Nor does it have single-occasion meaning—meaning as legislative intent. Section 514(a)

180. 826 F. Supp. 1225 (D. Ariz. 1993).

181. *Cf. Lincoln Mut. Cas. Co. v. Lectron Prods., Inc., Employee Health Benefit Plan*, 970 F.2d 206, 211 (6th Cir. 1992) (finding that state coordination of benefits law was preempted did not end inquiry; "[b]ecause no federal statutory law addresses . . . the conflict between the clauses, this case must be resolved by applying federal common law").

182. *See, e.g., UIU Severance Pay Trust Fund v. Local Union No. 18-U, United Steelworkers*, 998 F.2d 509 (7th Cir. 1993). The court stated:

This receptiveness to federal common law notwithstanding the comprehensive character of ERISA is the product of ERISA's broad preemption provision. Ordinarily, parties are not insulated from state causes of action simply because the activity in which they are engaged is subject to federal regulation. But ERISA provides, with certain exceptions, none of which are material here, that it "shall supersede any and all State laws insofar as they may . . . relate to any employee benefit plan . . ." As a result, the Union must rely upon federal law even for a simple claim . . .

Id. (citations and footnote omitted). For an extended discussion of the relation between preemption questions and questions of the appropriateness of federal common-law remedies, see *Shofer v. Stuart Hack Co.*, 595 A.2d 1078 (Md. 1991), *cert. denied*, 112 S. Ct. 1174 (1992). *See also Krishna v. Colgate Palmolive Co.*, 7 F.3d 11 (2d Cir. 1993); *Lincoln Mut. Cas. Co. v. Lectron Prods., Inc., Employee Health Benefit Plan*, 970 F.2d 206, 211 (6th Cir. 1992); *Singer v. Black & Decker Corp.*, 964 F.2d 1449 (4th Cir. 1992).

states a principle of broad preemption, not a rule, and it ordinarily cannot resolve preemption questions alone. Courts must take into account not only section 514(a)'s principle of broad preemption, but also other considerations, both for and against preemption, that are relevant to a case at hand.

Much criticism has been leveled at section 514(a): that it is unnecessary, that it sweeps too broadly, that it is too rigid. The thrust of all such criticism is that ERISA preemption jurisprudence is flawed and that section 514(a) is to blame. The law is indeed problematic. But if the argument of this Article is correct, the laws troubles derive less from the language and content of section 514(a) than from the judicial misreading of it. To treat as a rule what is not a rule inevitably generates wooden decision making. To disregard (or pretend to disregard) factors that principled decision making requires one to consider inevitably produces a confused and contradictory body of law.

This state of affairs can be avoided. It is true that much of the decision making about ERISA preemption must remain fact-specific. (In this respect it is no different from decision making about preemption generally.) But it is not true that this fact-intensive decision making must be structurally flawed. The law of ERISA preemption is necessarily a common law, and the process of developing it can be improved—made more workable and rational—by treating section 514(a) as a presumption. That presumption would be used in a calculus which takes into account interests and factors, both for and against preemption, that ERISA and general preemption law demand be taken into account. This approach permits the development of a more principled, even if particularistic, body of law. It also permits the law to fulfill the purpose of section 514(a) to the greatest extent feasible.

