Lochner Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits

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I. INTRODUCTION

In 1974, the year that Grant Gilmore published his famed pronouncement of the "death of contract," Congress enacted a statute in the interpretation of which the federal courts have begun to resuscitate the formalist contract doctrine that Gilmore said had died.[1] That statute is the Employee Retirement Income Security Act of 1974 (ERISA).[2] In ERISA, Congress rejected an administrative-regulation approach to employee benefits in favor of an approach that would necessarily rely heavily on the development of federal common law. Although ERISA is a long and detailed statute, there are many issues which ERISA does not address. Notably, ERISA says little about nonpension (also known as welfare) benefit plans.[3] Because ERISA preempts all state law that might otherwise fill the gaps, some courts have interpreted ERISA as calling for the creation of federal common law wherever the statute has no explicit provision regarding an issue.[4] Other courts, apparently not recognizing the

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[1] Gilmore actually assigned 1963 as the date of death, because in that year Stewart Macaulay, whom Gilmore dubbed the Lord High Executioner of contract, published his pathbreaking article, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963). GRANT GILMORE, THE DEATH OF CONTRACT 105 n.1 (1974).

In identifying the phenomenon that is the subject of this paper as the renaissance of contract, I might be read as accepting Gilmore's premise that contract died. In fact, I do not; I agree with Macaulay's assertion that "academic contract law is not now and never was a descriptively accurate reflection of the institution in operation." Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 466.

[2] 29 U.S.C. §§ 1001–1461 (1988 & Supp. IV 1992).

[3] ERISA divides employee benefit plans into two categories: those that provide pensions (pension plans) and those that provide anything else (welfare benefit plans). 29 U.S.C. § 1002 (1988). Pension plans are subject to more stringent regulation than welfare benefit plans because pension plans typically involve larger pools of assets than do welfare benefit plans.

[4] *See generally* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 156 (1985) (Brennan, J., concurring) (arguing that ERISA's legislative history demonstrates a congressional intent that federal courts develop a federal common law); Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1499–1500 (9th Cir. 1984) (discussing

large role Congress intended for common law, treat the statute as if Congress had created a "comprehensive and fully reticulated" statutory regime.[5] Finding few clear statutory guidelines, courts have concluded that many aspects of employee benefits should remain unregulated rather than, as Congress more likely intended, regulated by federal common law. In other words, courts act as though they were engaged in a rather limited project of statutory construction rather than a more involved project of creating federal common law.

Notwithstanding the twentieth-century expansion of contractual liability and the "erosion of the rigid rules of the late nineteenth century theory of contractual obligation" chronicled by Gilmore, the federal common law of contracts that courts have crafted for employee benefits takes a surprisingly narrow view of contractual obligation.[6] Essentially, the only obligations that courts will enforce are those reflected in written employee benefit plan documents.[7] And because the documents that courts will recognize as creating an obligation to provide employee benefits are almost invariably written by the employer's lawyers and are seldom subject to negotiation between employers and individual employees, the terms are often unfavorable to employees. The notions of consent and negotiation that legitimate contract as a form of social ordering typically are absent from the relationship. What remains is a legal guarantee of unrestrained managerial power. The irony is that the courts have resurrected contract in all its laissez-faire and formalist glory under the aegis of

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necessity of development of federal common law to fill in gaps in ERISA, to develop ERISA standards, and to develop ERISA principles in areas that previously had been exclusively matters of state law); EMPLOYEE BENEFITS COMMITTEE, SECTION OF LABOR AND EMPLOYMENT LAW, AMERICAN BAR ASS'N, EMPLOYEE BENEFITS LAW 611 (BNA 1991); Jay Conison, *Foundations of the Common Law of Plans*, 41 DEPAUL L. REV. 575, 576–79 (1992).

[5] Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980).

[6] FRIEDRICH KESSLER & GRANT GILMORE, CONTRACTS, CASES AND MATERIALS 1118 (2d ed. 1970). The relationship between the erosion of rigid rules and the expansion of contractual liability is the subject of Duncan Kennedy's masterful study, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). Kennedy's thinking was obviously influenced by Lon Fuller's *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

[7] The employee benefit plan "documents" to which I refer throughout this Article usually consist of an instrument by which the employer establishes the plan as a trust and which describes the plan in detail, and a document summarizing the plan terms, known as a Summary Plan Description (SPD), which ERISA requires every employer or benefit plan administrator to prepare and distribute to the employees. 29 U.S.C. § 1022 (1988). The SPD must describe the pertinent plan provisions in terms a layperson can comprehend. *Id.*

legislation which was at least nominally supposed to protect employees against the exercise of private power that nineteenth-century contract law had allowed.[8]

This renaissance of contract has occurred in the cases challenging employers' efforts to amend plans to eliminate or reduce benefits for employees with AIDS,[9] retirees,[10] or employees on strike.[11] Consider the now-familiar plight of the late John McGann.[12] After discovering that he had AIDS, McGann sought reimbursement for medical treatment from his employer's group medical plan. The plan comprehensively covered medical care for employees of McGann's employer, H & H Music Company in Texas, and provided for lifetime medical benefits of up to $1,000,000 per employee. Just over six months later, faced with a sharp increase in premiums, H & H Music changed its plan to limit coverage for AIDS to $5000, but imposed no similar limit on other diseases. Pointing out that he was the only employee known to have AIDS, McGann sued his employer for violating section 510 of ERISA, which prohibits discrimination against employees for the exercise of rights under the statute or a benefit plan.[13] McGann's theory was that the implicit promise his employer made when offering health insurance was to provide coverage in the event of illness. In singling out him and his illness for drastically reduced coverage, H & H Music discriminated against McGann for

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[8] Setting aside, for the moment, both skepticism about whether congressional declarations of policy in statutes can be accepted at face value, and the interest-group-deal nature of ERISA that may limit one's ability credibly to claim that it was principally about protecting employee expectations, I would note the avowed purposes of ERISA:

> The Congress finds . . . that owing to the lack of employee information and adequate safeguards concerning [the] operation [of employee benefit plans], it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; . . . that . . . many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered . . . .

29 U.S.C. § 1001(a) (1988).

[9] *See* McGann v. H & H Music Co., 946 F.2d 401 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992).

[10] *See, e.g.*, Bidlack v. Wheelabrator Corp., 993 F.2d 603 (7th Cir.) (en banc), *cert. denied*, 114 S. Ct. 291 (1993).

[11] *See Manufacturing: UAW Alleges Caterpillar Violated ERISA by Denying Pension Credits to Strikers*, Daily Lab. Rep. (BNA) 1 (Jan. 3, 1995).

[12] *McGann*, 946 F.2d 401.

[13] 29 U.S.C. § 1140 (1988).

invoking the employer's promise. The Fifth Circuit was unpersuaded. The court held that there was no discrimination because the amendment did not deprive him of rights to which he was or would become entitled under the plan. Inasmuch as the plan document reserved to the employer the right to "terminate or amend the Plan at any time or terminate any benefit under the Plan at any time," the court concluded, "*[d]efendants broke no promise to McGann.*"[14] Reasoning from the assumption that the employer never promised *not* to amend the plan to eliminate benefits, the court determined that ERISA offered McGann no protection against such an amendment. "McGann's claim," the court concluded, "cannot be reconciled with the well-settled principle that Congress did not intend that ERISA circumscribe employers' control over the content of benefits plans they offered to their employees."[15] The court saw the formal, written limits on promised obligation as determinative. If defendants "broke no promise," that was the end of the matter.[16] No other sort of unfair disappointment of expectations, no other breach of trust, and no other self-interested dealing would violate the statute.[17]

The court faced a genuine dilemma in *McGann*. On the one hand, McGann had a reasonable expectation that the existence of health insurance meant that his medical costs would be paid in the event he became sick. H & H Music, on the other hand, presumably believed that its obligation to provide health insurance encompassed, at most, only an obligation to incur reasonable expenses in doing so. Unanticipated circumstances meant that reasonable expectations had to be disappointed. Rather than searching outside the terms of the insurance document for a fair principle for dividing the unexpected losses, the Fifth Circuit defined the only enforceable obligations as being those explicitly guaranteed by the terms of the insurance plan.[18] The court's rigidly formalist understanding of the nature of right and obligation reflects an inability to imagine how to protect inchoate expectations without creating sweeping and vague entitlements.

In this Article, I explore the nature of and the reasons for the persistence of laissez-faire contractualism in the employee benefits relationship. It would advance understanding little to portray this manifestation of laissez-faire contract discourse either as an absurd attempt to discern some fictive intent of the parties, or as a bald-faced effort by conservative judges to help business at

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[14] *McGann*, 946 F.2d at 405 (emphasis added).

[15] *Id.* at 407.

[16] *Id.* at 405.

[17] McGath v. Auto-Body North Shore, Inc., 7 F.3d 665 (7th Cir. 1993), presented a similar situation involving discriminatory amendments to a pension plan. The Seventh Circuit reached the same result as the Fifth Circuit did in *McGann*.

[18] *McGann*, 946 F.2d at 408.

the expense of employees. It is more interesting to consider how the doctrine reveals a certain ideology of social insurance and a limited vision of the role that federal courts should play in devising a system of rights and remedies when Congress both failed to do so itself and, by preempting all state law, made it impossible for the states to do so.[19]

Courts, I will argue, resorted to contract notions in an unsatisfactory attempt to resolve a serious tension between the two faces of ERISA: its voluntarist face and its regulatory face. In its voluntarist aspect, ERISA reflects a preference for voluntary private arrangements over governmental structures to address the problems of income insecurity in a capitalist economy. I use the term "voluntarism" to mean a preference for private ordering over public arrangements as a source of rights and obligations. The voluntarism is reflected in Congress's decision to leave to employer choice whether to provide pension or welfare benefits and, more starkly, its failure to require vesting of nonpension benefits.[20] ERISA is a mainly voluntarist approach to the problem of social insurance. In it, Congress sought to encourage, but not to require, employers to provide benefits.[21]

It is also clear, however, that ERISA was animated at least in part by a recognition that purely voluntary arrangements had allowed exploitation of employees.[22] ERISA's regulatory face reflects Congress's recognition that neither the market nor pre-existing state common law regulation of employee

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[19] ERISA's preemption provision has been construed to preempt all state regulation of employee benefits, even where state laws affect employee benefit plans only indirectly. 29 U.S.C. § 1144 (1988). *E.g.*, District of Columbia v. Greater Washington Bd. of Trade, 113 S. Ct. 580 (1992) (stating that ERISA preempts a portion of the District of Columbia workers' compensation law that prohibits employers from terminating health benefits of workers receiving workers' compensation benefits).

[20] ERISA does not require that an employer provide any benefits to its employees. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985). If an employer does provide benefits, ERISA requires that the plan provide for full vesting of an employee's rights to receive pension benefits in no more than seven years. 29 U.S.C. § 1053(a)(2)(B) (1988 & Supp. 1993). There is no comparable vesting requirement for nonpension benefits. Since ERISA preempts all state law, 29 U.S.C. § 1144(a) (1988), ERISA makes unenforceable any state law requiring an employer to establish a benefit plan, Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987), or to provide for vesting of nonpension benefits, Standard Oil Co. v. Agsalud, 633 F.2d 760 (9th Cir. 1980), *aff'd*, 454 U.S. 801 (1981).

[21] The encouragement is provided by generous tax incentives. *See* 29 U.S.C. § 1202(c) (1988); I.R.C. §§ 401–419A (1988 & Supp. IV 1992). The tax exemptions for employee benefit plans constitute the single largest tax expenditure in the entire United States budget. OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1993, tbl. 24-3, at 2-39 (1992).

[22] 29 U.S.C. § 1001 (1988).

benefits adequately protected legitimate employee expectations in receiving benefits. Congress also recognized that an imbalance of power between employer and employee meant that neither the market nor the common law was neutral as between them, and that economic conditions and legal rules enabled employers unfairly to exploit employee trust.[23] Therefore, Congress, in ERISA, imposed a variety of restrictions on the administration of plans. In particular, ERISA requires disclosure to employees and imposes fiduciary duties on those with discretionary authority over plan administration and, with respect to pension plans, requires vesting of benefits, adequate funding of pensions, and protection of surviving spouses' claims to benefits, among other things.

ERISA's voluntarist aspects make it clear that contract is not an entirely inappropriate framework for analyzing rights and obligations in the benefits context. Thus, the tension between voluntarism and regulation is a product of congressional design: as long as employers are free not to provide pensions and health insurance to their employees, and as long as our social insurance system relies on employers voluntarily doing so, any regulatory regime faces a difficult problem. Stringent regulation to protect employees will increase the cost of benefits to employers and thus, at some point, will create an incentive for employers to exercise their prerogative not to provide benefits at all.

Rather than developing federal common law rules that are responsive both to the voluntarist and to the regulatory aims of ERISA, courts have eschewed the regulatory and ameliorative aspects of modern contract law in favor of a laissez-faire model. By treating documents as if they were negotiated contracts, by enforcing boilerplate disclaimers, by refusing to consider any source of obligation extrinsic to plan documents, and by refusing to impose liability under quasi- or non-contractual theories such as promissory and equitable estoppel, courts have accorded ERISA's voluntarist aspect more significance than its regulatory aspect—more significance than it deserves or was intended to have. To reconcile the voluntarist and regulatory sides of ERISA, courts must be more skeptical about the realities of bargaining over health benefits and the effectiveness of disclosure and implied consent, and should look to the aspects of modern contract law that were developed to ameliorate discrepancies of bargaining power and imperfect information.

My argument proceeds as follows. In Part II, I provide a brief sketch of the background of ERISA. I show how its central voluntarist-regulatory tension derives from reliance on pre-existing common law forms and concepts to effect a new regulatory initiative that was supposed to constrain the very sort of self-interested employer behavior that common law contract had long facilitated. I also discuss the institutional problem confronting the courts in having to create

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[23] *See infra* text accompanying notes 28–45; 29 U.S.C. § 1001(a).

federal common law in the interstices of a statute that appears to be, but is not, comprehensive and reticulated. Next, in Part III, I argue that courts turned to laissez-faire contract discourse in developing a common law of employee benefits, and that they did so for reasons not dissimilar to those that prompted Gilded Age courts to create the constitutional right of liberty of contract as a defense against legislative incursions into the exercise of private power.[24] My argument is analytical, not historical. I do not think we have to look all the way back to the 1920s to find this same pattern; the same faith in voluntary private ordering as the preferred form of social organization, which I call voluntarism, has persisted through much of the history of labor and employment law.[25] I show that classical contract doctrine is ill-suited for the task of identifying and resolving conflicts between the expectations of parties to an employee benefits relationship, and I suggest that resort to a few modern equitable principles would mitigate part of the problem, if only federal courts were not so hostile to these concepts in ERISA cases.

In Part IV, I suggest reasons laissez-faire contract seemed to the courts to be a logical choice of legal framework, an apparently anomalous choice of legal paradigm for giving content to the commands of protective labor legislation. As a discourse, contract has a particular appeal in this context: it is redolent of notions of free choice, fairness, equality, and consent; it offers courts a deceptively simple set of rules to apply to complicated relationships. The search for clear rules that sharply delimit obligations, even when the social reality suggests that obligations are diffuse and inchoate, is an appealing choice for institutions with limited resources to devote to sorting out complicated questions arising from a long-term employment relationship. The federal courts are reluctant to turn themselves into insurance claims adjusters or labor arbitrators, particularly without direction from Congress. One way to avoid undertaking these responsibilities is to limit liability, and laissez-faire contract is a ready-made legal structure that allows courts to do so.

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[24] When speaking about laissez-faire in this context, I think it is useful to observe the two distinct meanings that Morton Horwitz saw in the term: the nineteenth-century "contractarian ideology" was laissez-faire "in the traditional sense of being hostile to legislative or administrative regulation." But laissez-faire is often meant to suggest a systematic favoritism for capital, and in this sense the ideology was instrumental, "in the sense of promoting economic development." MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, at xv (1977).

[25] Voluntarism should not be equated entirely with laissez-faire liberalism, but there is intellectual common ground. Both philosophies share a preference for limited government and maximal private autonomy.

In sum, while ERISA's voluntarist approach made contract the all but inevitable framework for employee benefits, courts have missed opportunities to create a contract doctrine that might more equitably honor the interests of employees as well as employers. And they have developed a doctrine without sufficient sensitivity to the context of the employment relationship, which might call for altering traditional contract doctrine that was developed for commercial transactions among parties of equal sophistication.

The judges' laissez-faire contractualism is more than a bad habit learned in law school. It is a deliberate policy choice about the supposedly undesirable effects—on firms, on courts, and ultimately on employees—that would follow from courts' decisions to intervene on behalf of workers when employee benefit promises prove unreliable.

II. A PARADOX OF FORM AND SUBSTANCE

In this part of the Article, as its title suggests, I draw on Holmes's metaphor of the paradox of form and substance in the development of law[26] to describe the way that Congress borrowed pre-existing concepts in the creation of ERISA, and judges borrowed traditional common law contract concepts to give meaning to the new (and not well-defined or thoroughly elaborated) provisions that Congress created. In Holmes's metaphor, the paradox of form and substance in the law is that precedents (and I would add, conceptual structures) survive in the law long after the circumstances that gave rise to them have gone.[27] I show that ERISA, as a regulatory regime, was in large part an amalgam of past statutory and common-law contract and trust practice, but that courts in interpreting it have unduly emphasized the traditional aspects and, unfortunately, underemphasized the novel regulatory aspects of it.

A. *The Framework of Federal Regulation of Employee Benefits*

1. *A Short History of the Regulation of Private Benefit Plans*

After several infamous cases of wrongdoing in employee benefit plan administration and a few spectacular private pension plan failures—the most notable of which was the failure of the pension plan covering 11,000 autoworkers that accompanied the demise of the Studebaker auto manufacturer in 1963—Congress decided to regulate private employee benefit plans. The

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[26] OLIVER W. HOLMES, JR., THE COMMON LAW 35 (1881); *see infra* text accompanying notes 123–26, 243–44.

[27] HOLMES, *supra* note 26, at 35.

federal government had made relatively weak and incomplete efforts to regulate employee benefit plans in the Taft-Hartley Act of 1947[28] and in the Welfare and Pension Plan Disclosure Act of 1958 (WPPDA),[29] as well as in the Internal Revenue Code, but much regulation remained a matter of state law until Congress enacted ERISA in 1974.[30] With the exceptions of tax law and plans created by collective bargaining agreements, private employee benefit plans were, until 1974, regulated mainly by state law. ERISA thus represented an enormous undertaking and a novel federal statutory venture into areas of substantive law and policy that previously had been matters of state common law. Not surprisingly, Congress's approach to the problem was part historical accident, part accretion of past practice, and part novel design.

ERISA is a hybrid. It is protective labor legislation that imposes minimum standards on employee benefit plans and provides enforcement power to the Department of Labor to protect employees, and it is also a tax scheme that attempts to provide incentives to employers to maintain plans and to prevent abuse of tax incentives. Because private pension funds represent the largest pool of investment capital in the United States, ERISA's function as protective labor legislation is tangled up with its function as a device to regulate capital formation and financial intermediaries.[31] ERISA is administered both by the Treasury Department and by the Department of Labor, a division of function which reflects the fact that, historically, national private pension policy was entirely a matter of tax incentives until the WPPDA gave the Labor Department a limited oversight role in 1958. Since the legitimacy of the tax breaks demanded some protection of employee pension expectations, Congress and the Treasury conditioned the tax preferences on compliance with requirements designed to protect employees' expectations in receiving pensions. The hybrid structure led not only to serious problems of bureaucratic disorganization,[32] but also to a schizophrenia of purpose.[33] This confusion

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[28] Labor Management Relations [Taft-Hartley] Act, 29 U.S.C. §§ 141–197 (1988).

[29] *Id.* §§ 301–309 (repealed 1974).

[30] This issue and the literature on it are discussed in Conison, *supra* note 4, at 583–89.

[31] For an explanation of the significance of pension funds as financial intermediaries, see PAUL P. HARBRECHT, PENSION FUNDS AND ECONOMIC POWER (1959). As Harbrecht points out, pension funds are comparable to other forms of financial intermediation such as banking, insurance, and securities markets, all of which have reshaped capitalism in the late twentieth century. On the significance of financial intermediation, see Robert Clark, *The Four Stages of Capitalism: Reflections on Investment Management Treatises*, 94 HARV. L. REV. 561 (1981).

[32] *See* Beverly M. Klimkowsky & Ian D. Lanoff, *ERISA Enforcement: Mandate for a Single Agency*, 19 U. MICH. J.L. REF. 89 (1985).

[33] Whereas the WPPDA was intended mainly to protect workers, ERISA, as modified by the tax committees during the legislative process, reflected as much concern for reducing

profoundly affects what courts can say about what Congress intended in enacting it. Therefore, in the many circumstances in which the statute is ambiguous or silent, the intent of the statute is equally inscrutable. This creates serious interpretive problems for courts.

To understand the conceptual vision underlying ERISA, one must bear in mind the historical context in which it was designed and appreciate a deep ambivalence about the proper role of government in providing social insurance. The 1960s, when Congress began to design ERISA, were years of boundless optimism about what the federal government could do. When ERISA was enacted, some in Congress may have believed that making employee benefits an area of exclusive federal concern was merely the first part of a new phase in the construction of the American welfare state. And even among those who thought it was not a prelude to radical change, the legislative history suggests there was consensus that ERISA's particular provisions were provisional and experimental.[34] By the late 1970s and early 1980s, however, the skeptics came

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taxpayer abuse as for protecting workers. Nancy J. Altman & Theodore R. Marmor, *ERISA and the American Retirement Income System*, 7 AM. J. TAX POL'Y 31, 35 (1988). ERISA was in significant respects more than just a compromise; it was an interest-group deal between large employers, pension consultants, organized labor, insurers, and financial advisors of all sorts. *See* Michael S. Gordon, *Overview: Why Was ERISA Enacted, in* U.S. SENATE SPECIAL COMM. ON AGING, 98th Cong., 2d Sess. (1984), THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE 19–22.

[34] The statute itself recognizes that the effects of its novel regulatory efforts should be subject to study and revision; it provided for creation of committees to study the effect of various provisions. *See* 29 U.S.C. §§ 3022(a)(4), 1222(a)(5) (1988) (creating the Joint Pension Task Force to study the effects of preemption of state law); *Id.* §§ 1142, 1143. The principal sponsor of the bill in the Senate, Jacob Javits, explained the need for further study of the preemption of state law:

> The conferees—recognizing the dimensions of such a policy—also agreed to assign the Congressional Pension Task Force the responsibility of studying and evaluating preemption in connection with State authorities and reporting its findings to the Congress. If it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made.

120 CONG. REC. 29,942 (Aug. 22, 1974) (remarks of Sen. Javits); *see also* 120 CONG. REC. 4278 (Feb. 26, 1974) (remarks of Rep. Perkins); 120 CONG. REC. 29,929 (Aug. 22, 1974) (remarks of Sen. Williams). The provisional nature of ERISA is discussed in Conison, *supra* note 4, at 576–77.

Unfortunately, the Joint Pension Task Force, which was supposed to study the effects of ERISA preemption, did not receive adequate funding to complete its work. Thus, although the statute was intended to be subject to further revision in light of experience, the

to the fore.[35] As confidence in federal regulation plummeted, the construction of the new welfare state drew to a halt. What had been provisional became permanent. ERISA had swept away existing state common law regulation of benefits and preempted any further state legislative or judicial efforts to regulate in the field, but had put little in the place of what was dismantled.[36] Like an urban renewal project that ran out of funds after the old neighborhood was razed, the federalization of social insurance abruptly ceased before the project was complete. Reluctant federal judges have had to pick through the rubble to begin constructing some sort of structure for employee benefits that Congress sketched out but did not completely design.

In the early 1970s, states had begun to regulate employee benefits, and ERISA preempted these state statutes. Hawaii, for example, had created a mandatory employer-provided health insurance system that guaranteed virtually every state resident health insurance, which ERISA does not.[37] Minnesota created a pension protection system that would have been preempted by ERISA had the Supreme Court not invalidated it on other grounds.[38] We will never know what innovative solutions to the problem of social insurance state courts and legislatures might have developed had ERISA not cut short all such state common-law or statutory experimentation.[39]

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studies of experience have not materialized, and few "appropriate modifications" have been made.

[35] For an excellent historical discussion of changing attitudes towards regulation, see THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN (1984).

[36] ERISA supersedes "any and all" state laws "insofar as" they "relate to" an employee benefit plan. 29 U.S.C. § 1144(a). Courts have construed this preemption provision extremely broadly. *See, e.g.*, District of Columbia v. Greater Washington Bd. of Trade, 113 S. Ct. 580 (1992); FMC Corp. v. Holliday, 498 U.S. 52 (1990).

[37] HAW. REV. STAT. §§ 393-1 to 393-51 (1985 & Supp. 1992). After the courts held that ERISA preempted Hawaii's statute, the senators from Hawaii pushed through Congress a partial exemption to ERISA preemption for Hawaii's statute. 29 U.S.C. § 1144(b)(5)(A)–(C) (1988 & Supp. IV 1992). Hawaii's experience in making health benefits a matter of entitlement rather than contract has been the subject of much study in the recent national health care reform debate.

[38] MINN. STAT. ANN. §§ 181B.01–181B.17 (West 1993). The Supreme Court struck down the Minnesota statute as violating the federal constitutional proscription on state laws impairing the obligations of contracts. Allied Structural Steel v. Spannaus, 438 U.S. 234 (1978). My voluntarism thesis is buttressed by the Supreme Court's characterization of the regulation of pensions as one of the very few violations of the Contracts Clause it has found since the *Lochner* era. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 400–04 (4th ed. 1991).

[39] *See generally* Nelson Lichtenstein, *From Corporatism to Collective Bargaining: Organized Labor and the Eclipse of Social Democracy in the Postwar Era*, *in* THE RISE AND

2. *ERISA's Protections: Disclosure and Fiduciary Obligations*

With limited exceptions, ERISA applies to all employee benefit plans maintained by any employer or union affecting commerce except government- and church-sponsored plans, and plans maintained solely to comply with state workers' compensation, unemployment, or disability insurance laws.[40] In simplest terms, ERISA requires those who maintain employee benefit plans to disclose the terms of the plan to the participants and to report the terms to the federal government. It imposes fiduciary duties on those who administer plan assets and make benefit eligibility determinations. In addition, ERISA imposes further and important restrictions on pension plans, but not on nonpension plans: it requires that a plan grant vested, nonforfeitable rights to benefits, and it prohibits discrimination in eligibility for participation. It also conditions the availability of tax benefits on compliance with statutory requirements for pensions, but grants tax benefits to welfare benefit plans regardless of whether they comply with the statute.[41] Thus, the core notions are disclosure and fiduciary duties and, as to pensions, vesting of rights and regulation of participation.

Congress did not invent many of the concepts on which its regulatory framework depends. Fiduciary duties had applied since the earliest benefit plans were established as trusts. The WPPDA had previously used reporting requirements.[42] Participation requirements and vesting rules had been developed by private-sector employee benefit specialists, and the Internal Revenue Code already incorporated some of them. ERISA simply codified and established minimum standards that did not differ radically from existing practice.[43] Thus, ERISA was in some respects nothing more radical than a federal codification of the existing regulatory and contractual practices, not a dramatic reform. Congress's great leap forward in the protection of employees stumbled over the fact that much in the statute was not a radical reform.

In enacting ERISA, Congress gave sustained attention to the problems of pension plans, and the statute reflects this careful consideration. Congress gave relatively little thought to the problem of health benefits, apart from joint union-employer Taft-Hartley funds, because the highly publicized problems in welfare benefits were mainly fraud and sharp practices in the administration of

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FALL OF THE NEW DEAL ORDER 1930–1980, at 122 (Steve Fraser & Gary Gerstle eds., 1989).

[40] 29 U.S.C. § 1003 (1988 & Supp. IV 1992).

[41] 29 U.S.C. §§ 1201–1204 (1988); I.R.C. §§ 419–419A (1988 & Supp. IV 1992).

[42] 29 U.S.C. §§ 301–309 (1988) (repealed 1974).

[43] STEPHEN R. BRUCE, PENSION CLAIMS: RIGHTS AND OBLIGATIONS 2–3 (2d ed. 1993).

union funds.[44] There was enough concern in the early 1970s about the need to protect nonunion employee expectations in receiving welfare benefits to prompt Congress to include those plans within the coverage of the statute. But the sharp increases in health care costs that would reveal the incongruence between employer and employee interests were still some years away.

The application to welfare benefits of disclosure and fiduciary duty rules, but not vesting requirements, was premised on Congress's perception that fraud and shady dealing in Taft-Hartley funds were the principal problems afflicting the nonpension benefit system. In 1974, that was not an unreasonable perception. Vesting was not thought necessary for nonpension benefits because Congress did not consider the possibility that then-existing assumptions about health care costs would turn out to be wrong. Congress did not anticipate that employers—absent any fraudulent or illicit motives—would have interests at odds with those of employees and have the power to defeat systematically employee expectations that employers themselves had encouraged.

The legislative history makes it clear that Congress deliberately rejected the possibility of requiring vesting of welfare benefits. The House and Senate Reports on the bill state that "[t]o require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income."[45] The need to protect the expectations of active employees and retirees did not seem pressing enough to outweigh the costs to employers and the administrative difficulties that vesting would impose. But there is nothing in the legislative history to suggest that Congress intended its judgment about the lack of need for statutory vesting to *foreclose* common law responses to changed circumstances consistent with the statute's protective purposes. Indeed, in charging courts with the responsibility of developing common law to flesh out the statute's minimum standards, Congress presumably expected that the courts would take the protective purposes of the statute as a starting point. Given that employee expectations of continued health coverage are being disappointed today, much as employee's pension expectations were being disappointed before Congress enacted ERISA, Congress may have expected the courts to fashion protections that Congress did not create expressly. Instead, courts have assumed just the opposite: because Congress did not create protections, the courts have seemed to assume that employees were to be left unprotected.

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[44] *See, e.g.*, Blankenship v. Boyle, 329 F. Supp. 1089 (D.D.C. 1971).

[45] H.R. REP. No. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4726; S. REP. No. 383, 93d Cong., 1st Sess. 51, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4935.

3. *Filling in the Blanks: Federal Common Law*

ERISA regulates some aspects of plans in mind-boggling detail.[46] But parts of plan administration, some of which are extremely important, receive only the sketchiest mention in the statute. For example, because the vesting rules apply only to pension plans, ERISA says nothing about an employer's power to eliminate welfare benefits that it previously promised to provide. Nor does ERISA say anything about the circumstances under which a plan participant is entitled to recover disputed benefits from a plan, except to authorize suits to recover such benefits.[47] The dividing line between extensive and sketchy regulation in the statute runs roughly along the line between pension and welfare benefit plans. For instance, in requiring that employees' rights to pension benefits vest after a period of years, Congress committed itself to providing detailed subsidiary rules to be sure that employees had vested rights to something of value. Hence, Congress provided elaborate rules governing the rate at which pension benefits must accrue, the funding that a pension plan must maintain to ensure assets are available to pay promised benefits, and the like.[48] But for welfare benefit plans, Congress did little more than make plan administrators fiduciaries, require reporting and disclosure, and provide a cause of action in federal court for breach of those duties or of the terms of a plan.[49] Because ERISA preempts all state regulation of employee benefit plans, ERISA's sketchy provisions are the *only* legal regulation of plans.[50] The result is that large parts of the legal structure governing plans, especially welfare benefit plans, must be developed by the courts as a matter of federal common law.[51]

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[46] *See, e.g.*, 29 U.S.C. §§ 1053–1054 (1988 & Supp. IV 1992) (vesting and accrual rules for pension plans).

[47] 29 U.S.C. § 1132(a)(1)(B) (1988).

[48] *Id.* §§ 1054, 1082–1085.

[49] 29 U.S.C. §§ 1002(1), 1003, 1023, 1102, 1109, 1132(a)–(d) (1988 & Supp. 1993).

[50] 29 U.S.C. § 1144 (1988).

[51] The legislative history makes it clear that Congress intended the federal courts to create a common law to govern at least some areas not covered by the Title I minimum standards. H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 327, *reprinted in* 3 ERISA LEGIS. HIST. 4594 (1976); *see also* Sampson v. Mutual Benefit Life Ins. Co., 863 F.2d 108, 110 (1st Cir. 1988); Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496 (9th Cir. 1984). On ERISA as providing authority for the creation of federal common law, see Conison, *supra* note 4, *passim*, and BRUCE, *supra* note 43, at 301–05.

Federal courts have authority to fashion federal common law when Congress's intent that they do so is clear.[52] Congress's intent that ERISA provide a mandate for courts to create federal common law under ERISA is clear both from the structure of the statute, inasmuch as Congress preempted all state law and did not draft statutory provisions to cover every issue, and from the legislative history.[53] Nevertheless, the fact that ERISA itself contains many detailed provisions on many subjects has prompted courts to take the view that ERISA is comprehensive, and consequently courts have been less creative about fashioning additional liabilities than they might have been had the statute been sketchier, as in the cases of section 301 of the Taft-Hartley Act or the Sherman Act.[54] The courts have been reluctant to imply additional rights or remedies in the statute, and thus ERISA often is held to preempt state law claims and yet to provide no remedy for the injured employee.[55] Instead, courts treat the task almost as if they were deciding whether to imply a private right of action in a statute that provides no remedies for harms to individuals[56] rather than acting on a mandate to create federal common law in a statute that was intended to remedy private harms and to be enforced by those whom it protects.

In developing common law under ERISA, courts have been plagued by the crucial tension that Congress did not resolve: the notion that ERISA should function to protect employees' expectations inevitably conflicts with the notion that ERISA should foster the growth of private employee benefit plans by preserving employers' economic prerogative over the labor force and the costs

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[52] *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). On the creation of federal common law, see generally ERWIN CHEMERINSKY, FEDERAL JURISDICTION ch. 6 (2d ed. 1994).

[53] *See supra* note 51. In the final debate on ERISA, Senator Jacob Javits, the principal Senate sponsor of the legislation, stated that Congress "intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 3 ERISA LEGIS. HIST. 4771 (1976).

[54] 29 U.S.C. § 185 (1988) (Taft-Hartley Act); 15 U.S.C. §§ 1–7 (1988 & Supp. IV 1992) (Sherman Act); *see* BRUCE, *supra* note 43, at 301.

[55] *See, e.g.*, Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) (finding a permanently disabled worker's state law tort claim for work-related injury "relate[d] to" the employee benefit plan and therefore was preempted by ERISA); Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985) (refusing to recognize a claim for extracontractual damages for breach of fiduciary duty because ERISA contains an "interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a comprehensive and reticulated statute" (citation and internal punctuation omitted)); Olson v. General Dynamics Corp., 960 F.2d 1418 (9th Cir.), *cert. denied*, 112 S. Ct. 2968 (1992); Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1986).

[56] *See generally* CHEMERINSKY, *supra* note 52, §§ 7.6-7.7.

associated with labor. Congress was at least dimly aware of the tension between ERISA's voluntarist and regulatory aims at the time it enacted the statute. As the principal Senate sponsor of the legislation, Jacob Javits, explained:

> The problem, as perceived by those who were with me on this issue in the Congress, was how to maintain the voluntary growth of private plans while at the same time making needed structural reforms in such areas as vesting, funding, termination, etc., so as to safeguard workers against loss of their earned or anticipated benefits—which was their principal cause of complaint and which—over the years—had led to widespread frustration and bitterness. [The] new law represents an overall effort to strike a balance between the clearly-demonstrated needs of workers for greater protection and the desirability of avoiding the homogenization of pension plans into a federally-dictated structure that would discourage voluntary initiatives for further expansion and improvement.[57]

Although Javits referred only to pension plans, there is no reason to think that Congress had different aspirations for nonpension plans. In the statute itself, this tension is reflected in the difference between the treatment of pension and nonpension benefits; the former are statutorily nonforfeitable after a period of years, whereas the latter are not. ERISA circumscribes the pension bargain in various ways and holds the employer to it with government insurance to protect employees when employers cannot pay. With respect to nonpension benefits, ERISA does neither. In adopting a regulatory framework that relies on employer incentives that are often at odds with employee interests, ERISA left to the courts the task of resolving the tension ad hoc.

In confronting this tension, courts have been conservative about creating common law liabilities to fill gaps in the statute. Generally, the only obligations that courts view ERISA as imposing are those explicitly stated in the statute and those that employers set out in plan documents. The federal common law thus focuses mainly on the interpretation of plan instruments and on the meaning and application of the fiduciary and disclosure duties. Although modern rules of contract interpretation allow for expansive implied liabilities, the rules of interpretation that the courts employ in ERISA cases generally do not. Thus, with a few exceptions, courts have not looked to the rules under state insurance law to reflect the fact that plans, like insurance policies, are contracts of adhesion between parties of disparate knowledge and power.[58]

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[57] Gordon, *supra* note 33, at 25.

[58] *See* BRUCE, *supra* note 43, at ch. 7; Evans v. Safeco Life Ins. Co., 916 F.2d 1437, 1441 (9th Cir. 1990). One of the exceptions is Kunin v. Benefit Trust Life Ins. Co., 898 F.2d 1421, 1425-28 (9th Cir.) (adopting, as a matter of federal common law, the California

Further, courts limit themselves to plan terms, rejecting any and all parol evidence that might create broader (or narrower) liabilities. And, beyond interpretation, courts often refuse to impose liability under any of the modern theories that have evolved to redress inequities when no formal contractual obligation can be found; courts seldom allow recovery based on promissory estoppel, equitable estoppel, mistake, unconscionability, equitable reformation, restitution, or the like.[59]

Nothing in the legislative history of ERISA compels this conservatism in creating implied rights under the statute. If it were clear that Congress rejected vesting of welfare benefits because it valued employer flexibility above all else, the case against judicial recognition of implied obligations would be unassailable. But it is not clear that Congress made such a judgment. Rather, Congress intended to encourage employers to create plans and federal courts to hold employers to the terms of those plans, and thereby to protect employee expectations.

B. *Voluntarism and Entitlements Within the Sphere of Contract*

1. *The Tension Between Voluntarism and Entitlements*

The great reform that ERISA is supposed to have effected was to transform private employer largesse into a contractual right, and to protect employees further by imposing fiduciary standards developed under the common law of trusts. The idea was that traditional legal jurisprudence of contract and trust could be harnessed to protect employees.

In adopting the voluntarist model, Congress bypassed other models for approaching the problem of social insurance. Congress could have created a system of entitlements, such as it considered recently for health care, in which every person is entitled to have his or her employer provide health insurance, a pension, paid sick leave, disability insurance, child care, and so forth. Or Congress could have committed the public treasury to providing these assurances. Either of these entitlements approaches would have generated problems of equitable distribution, implementation, federal-state relations, and governmental oversight. Under an entitlements approach, Congress would have had to confront these issues directly. As it is, the issues remain, but are being dealt with indirectly, piecemeal, and by courts, with relatively little statutory direction.

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rule that ambiguities in insurance polices will be construed in favor of the insured), *cert. denied*, 498 U.S. 1013 (1990).

[59] *See* cases cited *infra* notes 210–16, 218–21.

But ERISA does not entirely jettison the entitlement notion. Certainly the vesting rules in the pension context represent quasi-entitlements.[60] Although the case for entitlement to nonpension benefits is harder to make because Congress clearly chose not to require vesting, the ethos of the statute—assuming it makes any sense to talk of an ethos that is not fully translated into statutory commands—is about protecting employees' expectations and ensuring that employees receive promised benefits. Congress wanted flexibility and simplicity in welfare benefit plans, and for that stated reason did not require vesting of welfare benefits. Making employer-provided health insurance an employee benefit rather than an employment right offers the allure of flexibility. Requiring disclosure of benefit terms, making promises enforceable in federal court, and making plan administrators fiduciaries evidences a desire that flexibility not completely dominate employee expectations. By imposing fiduciary duties and obligations to disclose, Congress limited self-interested action by employers, acknowledged disparities of bargaining power, and recognized that preexisting contract law had allowed frustration of employee expectations. Thus, although ERISA creates no substantive entitlements to welfare benefits, its formal requirements have substantive purposes and effects.

It is difficult, however, to reconcile the regulatory and voluntarist faces of ERISA without turning welfare benefits into broad entitlements. If employee expectations become entitlements, employers may be confronted with potentially serious unanticipated costs. If expectations do not become entitlements, employees are left with reduced protection. This is the tension with which courts struggle in the welfare benefit amendment cases.[61]

Having chosen the voluntarist model over a pure entitlements model, it was inevitable that a contract paradigm of some sort would develop. But there is

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[60] ERISA imposes statutory vesting requirements on pension benefits; hence, employees are fully vested after a maximum of seven years and so the same problems of defeated expectations do not arise. 29 U.S.C. § 1053 (1988 & Supp. IV 1992).

[61] The voluntarist-regulatory duality is perhaps the yin and yang of the American legal tradition, and certainly of the law of contracts, as is made clear in a contracts casebook:

> Kessler and Sharp, and later Kessler and Gilmore, saw contracts as an expression of the political philosophy and ideological struggles of this nation. On one hand, there was an ideal of free contract and a minimal limited state. This was rationalized in the name of freedom and unleashing creative energies. On the other hand, there always was a countertheme calling for regulation in various forms seeking substantive justice. Kessler and Sharp saw American contract law as expressing theme and countertheme, overgeneralizations and overcorrections. In short, they saw it as contradictory.

1 STEWART MACAULAY ET AL., CONTRACTS: LAW IN ACTION 23 (1991–92 ed.) (on file with author).

contract law and there is contract law. Some versions of contract law recognize implied rights to a greater extent than others. For example, state statutes regulating insurance and state common law that restricts discharge from employment both blend contract and implied-right notions.[62] One can infer from the fiduciary and disclosure obligations a congressional intent to license courts to create a common law that would structure the benefits relation as one of fairness and commitment as opposed to self-interest and arm's length transacting. But courts have not read the statute in that way, and that has been a crucial mistake. Essentially, courts read ERISA in the nonpension context as providing little protection for employees other than disclosure. So long as employers disclose through a written disclaimer that they retain the right to eliminate benefits at will, courts will impose no limits on the employers' prerogative. In this manner, courts effectively allow employers to opt out of ERISA's regulatory goals by disclosure, and courts presume employee consent. If we allow opting out of regulation through disclosure and implied consent, even where disclosure and consent are largely fictional, voluntarism will entirely swallow regulation.

Courts have not been especially inventive in exploring the space between unconstrained managerial flexibility and broad employee expectations in the welfare benefit cases. It is here that the courts' vision of their work as statutory interpretation rather than as common law development is most apparent.

2. *The Tension Manifested in the Presumption Against Vesting*

The tension between voluntarism and entitlements, and the limits of the contract paradigm in addressing this tension emerge most clearly in cases discussing whether there should be a presumption that welfare benefits vest. The contract principles that courts have developed for these cases have responded to the tension between voluntarism and entitlements by capitulating almost entirely to the demands of voluntarism. As I will show, courts usually proceed directly from the observation that ERISA does not dictate the content of welfare benefit plans to the proposition that courts ought not impose any obligation on an employer apart from the ones the employer anticipated in the plan documents.[63] The courts typically reason that: (a) ERISA does not

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[62] *See* Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988) (citing cases and commentary on the evolving law of wrongful termination); Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-901 to 39-2-905, 39-2-911 to 39-2-915 (1993).

[63] *E.g.*, Senn v. United Dominion Indus., Inc., 951 F.2d 806, 816–17 (7th Cir.) (discussing presumption against vesting of health benefits in construing a collective

require an employer to provide benefits; (b) ERISA requires vesting of pension benefits; and (c) the legislative history is clear that Congress did not intend to require vesting of nonpension benefits.[64] From these three postulates courts infer not only that ERISA does not require vesting, but that—and this involves a further logical step—in the absence of some explicit written agreement, ERISA directs courts to presume that welfare benefits do not vest.[65] Thus, courts read ERISA as *creating* a presumption that welfare benefits do not vest.

The most extensive analysis of the presumption against vesting is in the Seventh Circuit's en banc decision in *Bidlack v. Wheelabrator Corp.*[66] In *Bidlack*, retirees sued their former employer, Wheelabrator, claiming that collective bargaining agreements between Wheelabrator and the union conferred rights to health benefits that survived the expiration of the collective

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bargaining agreement), *cert. denied*, 113 S. Ct. 2992 (1992). In *Moore v. Metropolitan Life Insurance Co.*, the court dealt with the problem of vesting as follows:

> Automatic vesting does not occur in the case of welfare plans, and Metropolitan clearly reserved in the plan documents and in the "SPDs" or summary plan descriptions the right to amend or terminate the plans at issue. . . .
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> . . .
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> Congress intended that plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans. This intention was based on a sound rationale. Were all communications between an employer and plan beneficiaries to be considered along with the SPDs as establishing the terms of a welfare plan, the plan documents and SPDs would establish merely a floor for an employer's future obligations. Predictability as to the extent of future obligations would be lost. . . .

856 F.2d 488, 491–92 (2d Cir. 1988); *see also* Sejman v. Warner-Lambert Co., Inc., 889 F.2d 1346, 1350 (4th Cir. 1989) ("[C]ourts should hesitate to impose upon companies unwritten contractual liabilities. Payment of severance benefits here would constitute a significant, unforeseen, and costly liability."), *cert. denied*, 498 U.S. 810 (1990).

[64] *See* Bidlack v. Wheelabrator Corp., 993 F.2d 603 (7th Cir.) (en banc), *cert. denied*, 114 S. Ct. 291 (1993); Owens v. Storehouse, Inc., 984 F.2d 394 (11th Cir. 1993); *Senn*, 951 F.2d 806; McGann v. H & H Music Co., 946 F.2d 401, 407 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992); Reichelt v. Emhart Corp., 921 F.2d 425, 430 (2d Cir. 1990), *cert. denied*, 501 U.S. 1231 (1991); Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1160 (3d Cir. 1990); *Sejman*, 889 F.2d at 1348; Musto v. American General Corp., 861 F.2d 897, 901 n.2 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Moore*, 856 F.2d at 491.

[65] *See* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 732 (1985); Shaw v. Delta Air Lines, 463 U.S. 85, 91 (1983); *Bidlack*, 993 F.2d 603; United Paperworkers Int'l Union v. Jefferson Smurfit Corp., 771 F. Supp. 992 (E.D. Mo. 1991), *aff'd*, 961 F.2d 1384 (8th Cir. 1992).

[66] 993 F.2d 603 (7th Cir.) (en banc), *cert. denied*, 114 S. Ct. 291 (1993).

bargaining agreement at the closure of the plant. The district court granted summary judgment for Wheelabrator, determining that neither the collective bargaining agreement nor the health plan documents revealed an intent to grant benefits beyond the term of the collective bargaining agreement, and held that extrinsic evidence of such an intent was inadmissible. The Seventh Circuit took the case en banc before the three-judge panel issued any opinion and reversed the district court, ruling that the contract was ambiguous and that extrinsic evidence is admissible to show the parties' intent.[67] On the threshold question of when a contract should be deemed ambiguous on the vesting of benefits, the court recognized the need for a rule or a presumption for identifying ambiguity. It is in this context that the court considered the problem of default rules about vesting.

Judge Posner's plurality opinion rejected what he characterized as the "extreme position" that "the contract must either use the word 'vest' or must state unequivocally that it is creating rights that will not expire when the contract expires."[68] This approach, Judge Posner wrote, "could be defended only as a means of making life simpler for courts by creating a form that parties must use to create enforceable rights and obligations."[69] Posner acknowledged that courts invented the common law doctrine requiring consideration for a contract for this purpose, but he concluded that "courts should be cautious about adding formal hoops that contract parties must jump through" to obtain enforcement of their agreement.[70] The plurality also rejected what Judge Posner characterized as "[t]he second extreme, that of allowing parties to substitute oral testimony for contractual language," because it "depriv[es] parties of the protection of a written contract."[71] For a similar reason, the plurality rejected a third rule that would allow admission of extrinsic (or parol) evidence when a contract was completely silent on the question of retiree benefits. Perceiving no reason to assume that benefits should vest, the plurality thought that allowing the use of extrinsic evidence to create obligations not mentioned in the contract "would unjustifiably deprive the parties of the limitation of liabilities that is implicit in the negotiation of a written contract having a definite expiration date."[72] In Posner's view, contracts are both a source of rights and a sort of defensive wall against obligations that one party may think arise over the course of a relationship. The

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[67] *Id.* at 608.
[68] *Id.* at 607.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at 608.

plurality therefore adopted a rebuttable presumption that benefits do not vest and allowed the use of extrinsic evidence to rebut the presumption.

In an opinion concurring in the judgment, Judge Cudahy, joined by Judges Ripple and Rovner, characterized the plurality opinion as rejecting a "strong no-vest" rule and a "parol substitution rule" in favor of a "weak" no-vest rule which would allow extrinsic evidence but would otherwise presume no vesting.[73] Judge Cudahy explored other possible rules: a strong vest rule, a weak vest rule, and a parol substitution rule that defaults to vesting rather than to no vesting. In arguing for a weak vesting rule rather than the plurality's weak no-vesting rule, Judge Cudahy asserted that a presumption of vesting more accurately reflects the parties' likely intent:

> I may see a different social reality within which these agreements were entered. Before about 1980, I seriously doubt that it occurred to many employers to grant retiree health benefits on anything less than a lifetime basis. The overwhelmingly prevalent trend of labor contracts was to continue or improve retiree benefits from contract to contract. It was only in the eighties, with spiraling medical costs, heightened foreign competition, epidemic corporate takeovers and the declining bargaining power of labor, that thought was first given to reducing retiree benefits from contract to contract . . . .[74]

In Cudahy's view, the contract is only a partial expression of the obligations that arise in a relationship, and the law ought to recognize and enforce the full range of obligations.

In dissent, Judge Easterbrook defended a strong presumption against vesting. He offered two reasons why courts should presume no vesting in the absence of explicit contract language. First, in his view, "as the duration and cost of the supposed promise increase," so too should "the level of formality required to conclude that a promise exists."[75] Presumably Judge Easterbrook thought such a rule necessary either to protect against false claims of breach of contract or because he thought parties write down all the important obligations that arise over the course of their relationship. If the latter is not true (and human experience with informal contracts suggests it is not), his former justification for the rule would allow the obligor to take advantage of the obligee's understandable reliance on the lack of need for a formal written expression of all the significant terms of the relationship.

Judge Easterbrook located his second rationale for a no-vesting rule in the nature of labor relations. Like Cudahy, he thought the nature of the relationship

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[73] *Id.* at 611.

[74] *Id.* at 613.

[75] *Id.* at 618.

relevant to assessing the extent of obligation, but he drew very different conclusions than Cudahy did from the nature of the relationship:

> Unlike one-shot contracts for the sale of goods, labor agreements endure and evolve. Relational contracting over long periods requires flexibility. What worked yesterday may be counterproductive today. . . . When we use extrinsic evidence to create long term promises, however, we defeat accommodation to changed circumstances. Vesting means that however much labor and management believe that a new approach is called for, they are forbidden to achieve it: the employees, as third party beneficiaries, may enforce the old agreements no matter what union and management now prefer.[76]

Easterbrook thus perceived a presumption of vesting as thwarting management's desire to retain unconstrained discretion about when and if it will assume responsibility for the retirees' expected welfare benefits. His is a perfectly clear statement of the voluntarist ideology of social insurance.

The arguments as to why the employment relationship should give rise to a presumption in favor of vesting, what Judge Cudahy called a strong vest rule, are stated in *United Automobile Workers v. Yard-Man*,[77] and, more recently, in *Armistead v. Vernitron Corp.*[78] In these cases, the courts focused principally on the dependent status of retirees. Once retired, they lack the power to protect themselves through negotiations. Because retirees are not represented by the union in contract negotiations after retirement, the union has no duty to consider their interests and only has an incentive to do so to the extent that the issue is of concern to present employees.[79] Conceiving retirement welfare benefits as "a form of delayed compensation or reward for past services," the *Yard-Man* court thought it unlikely that such benefits "would be left to the contingencies of future negotiations," particularly since the union has no duty to bargain on behalf of retirees.[80] Finally, because "retiree benefits are in a

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[76] *Id.*

[77] 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

[78] 944 F.2d 1287 (6th Cir. 1991). In the years following *Yard-Man*, the Sixth Circuit backed away slightly from the broad language of "status benefits." *See* Smith v. ABS Indus., Inc., 890 F.2d 841, 846 (6th Cir. 1989). But, as *Armistead* shows, it never entirely abandoned it. *See also* Bower v. Bunker Hill Co., 725 F.2d 1221, 1223 (9th Cir. 1984) (explaining that summary judgment is appropriate only if the contract is unambiguous, and that an employer must demonstrate that documents show that retiree medical insurance expired with the collective bargaining agreement, and that all possible inferences must be drawn in favor of retirees, as nonmoving parties).

[79] *See* Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass, 404 U.S. 157 (1971).

[80] *Yard-Man*, 716 F.2d at 1482.

sense 'status' benefits," in the courts' view, they "carry with them an inference that they continue so long as the prerequisite status is maintained."[81]

The *Bidlack* and *Yard-Man* opinions together present four different approaches to the problem of identifying contractual ambiguity and presuming contractual intent when a union and an employer bargained over the terms of employment. Nothing in these cases addresses the very different concerns that might arise when there has been no bargaining and when the plan has been designed unilaterally by the employer and its lawyers. Nor do the opinions satisfactorily address the effect that ERISA might have on the choice of presumptions about vesting. They assume the existence of actual historical intent on the part of both the union and the employer and simply seek a rule that will most readily ascertain it or most closely approximate it. Where there is no union, presumptions about the parties' intent are often misguided because the parties to the plan generally do not share a contractual intent at the formation of the benefits relationship.

When there is no bargaining, the choice of a default rule about vesting must derive its legitimacy from some source other than the parties' intent and the underlying notion of free and informed consent. If Congress made no choice about vesting, and the parties made no choice, the judge must confront his or her own responsibility for making the choice. Loath to do so, most courts avoid the question, falling back on a questionable presumption of a congressional choice. This imputed statutory presumption rests on unspoken assumptions about entitlements in employment relations. Employee entitlements are narrow exceptions to an expansive realm of employer prerogatives, power, and property. Employee rights or entitlements are whatever is left over when the court gets done defining an employer's rights of property and of control over the terms of employment, labor costs and liabilities to its employees.[82] That employees would become entitled to lifetime health insurance because they earned it, because they need it, or because the employer led them to believe they would have it, strikes a court as a radical notion.

As will become apparent in the next part, the courts' formalist contract discourse has a finger-in-the-dike quality to it. Against a widely held, intuitive sense that employee expectations of continued health care coverage are being unfairly disappointed, courts maintain a rigid formalist view of the limits on employer liability because they see the alternative as being limitless liability

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[81] *Id.*

[82] *See generally* Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921 (1992).

and an unfathomable morass of conflicting and undefined expectations.[83] As time has worn on, there seems increasingly to be a divergence between legal norms and reasonable expectations. The courts' hesitance about creating common-law entitlements that they would have to define and administer has led them to create a formalist doctrine that has left substantially less room for ameliorative solutions than there was in the beginning. The formalism has also sidetracked the debate to battles over formal rules—like the written document requirement—rather than focusing on the real issue, which is the problem of allocation of loss and responsibility. The dissonance between the doctrine on the one side, and the ethical sense and economic reality on the other, has led the courts to retreat ever more into a mechanistic view of the law.[84] Whatever space there might have been for innovative legal interpretations of the protections of ERISA has been reduced to the point that now the courts are defending an exceedingly cramped reading of ERISA's protections against popular disgust and discontent.

III. THE RENAISSANCE OF CONTRACT

Although the courts have been justified in adopting the position that the nature and extent of benefit obligations is a matter of contract between employer and employee, the contract law that they have designed is unduly formalist and ill-suited to the task of fairly allocating the benefits and burdens of the relationship. By formalism, I mean the notion that the proper decision can be deduced from a pre-existing set of rules, which themselves are deduced logically from largely determinate statutory directives. The courts' preferred contract model reflects a skewed picture of employment relationships. I begin this part of the Article by teasing out of selected laissez-faire era employment cases the core elements of the contract discourse of that era. The laissez-faire discourse is highly formalist, and liability must be based on consent or on the clear commands of positive law. The discourse is abstract, and abstraction ensures that the complex webs of expectations and the correspondingly diffuse nature of obligations that people may feel in reality reduce to a limited and clearly bounded set of legal obligations.

In the second section of this part of the Article, I explore the similarities of the laissez-faire era discourse to the contract doctrine that the federal courts have devised for employee benefits. First, I describe the contract doctrine that courts have developed in the employee benefit context. The preeminent

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[83] *See generally* Leslie P. Francis, *Consumer Expectations and Access to Health Care*, 140 U. PA. L. REV. 1881 (1992).

[84] *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 121, 198, 232 (1975).

characteristic of the doctrine is an almost naive positivism: the relationship is what the plan documents say it is. The courts defend this conclusion as reflecting the parties' intent. To do so, they resort to two main rhetorical devices: (1) they employ a trope of bargaining; and (2) they appeal to the importance of formalities, especially the significance of written contract terms and the dangers of allowing oral modifications of them. As I show, the notion of parties' intent in this context is fundamentally incoherent. The courts' rhetorical efforts to justify adherence to this approach twist the notion of bargaining almost beyond recognition. In the third section of this part of the Article, I show how these cases are a subset of a larger problem in employment law: the difficulty of trying to shoehorn the parties' inchoate expectations and the constantly evolving employment relationship into the fixed categories of old-fashioned contract doctrine. Finally, I conclude this part by suggesting that some principles of modern contract law—promissory and equitable estoppel—could ameliorate some of the problems.

A. *The Laissez-Faire Employment Contract*

Although the basic character of laissez-faire legal discourse is doubtless known to us all, it is worth pausing to look at a few cases again. For, notwithstanding the opprobrium that we have heaped on the old cases, the similarity of discourse between them and modern employment cases is startling. At the risk of being terribly reductionist, for the purposes of this discussion I will posit the existence of four essential themes of the laissez-faire era employment contract discourse: (1) legal (though not actual) equality of employer and employee and a view of them as individuals rather than as members of groups embedded in complex relationships; (2) the notion that imposing any noncontractual obligation on employers is an unfair and socially undesirable burden on business; (3) the notion that whatever moral claims employees might have to an adequate standard of living is a claim that is properly made against society, not employers; and (4) the notion that moral claims are not cognizable in law. Let me use *Adkins v. Children's Hospital*[85] as an example to describe the essential elements of the laissez-faire vision of the employment relationship. In *Adkins*, the Court invalidated a statute fixing minimum wages for women and children on the grounds that it infringed the liberty of contract protected by the Fifth Amendment. In reasoning to this result, the Court made several observations about the employment relationship and about the role of law in shaping that relationship that capture the Gilded Age legal vision of employment relations.

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[85] 261 U.S. 525 (1923).

The Court posited that employees and employers are equal in the eyes of the law, and therefore have equal rights to "obtain from each other the best terms they can as the result of private bargaining."[86] Given this formal equality, the employer's liberty is unjustifiably infringed by "compelling him to pay not less than a certain sum . . . irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss."[87] From this standpoint, the minimum wage is "a compulsory exaction from the employer for the support of a partially indigent person."[88] Gone is the pre-nineteenth-century view that the law had a role to play in defining a "fair" wage;[89] rather, any such legal regulation was a statutory wealth transfer from employer to employee. The wealth transfer seemed unfair because the employer had "no peculiar responsibility" for the financial plight of its workers, and the minimum wage "therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole."[90] Thus, while acknowledging the moral claim of every person to subsistence, the Court made clear that it was not a claim that could be made on employers:

> The ethical right of every worker, man or woman, to a living wage may be conceded. One of the declared and important purposes of trade organizations is to secure it. And with that principle and with every legitimate effort to realize it in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it.[91]

Since the employer has not caused the problem, in the Court's view the employer is not obliged to remedy it: "Certainly the employer by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty."[92] All of this reasoning follows from the Court's perception that an employment relationship is not fundamentally different from a contract for the sale of goods:

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[86] *Id.* at 545.

[87] *Id.* at 557.

[88] *Id.*

[89] On the role of law in defining a "fair" wage for labor, see ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH & AMERICAN LAW AND CULTURE, 1350–1870 (1991), and KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES (1991).

[90] *Adkins*, 261 U.S. at 558.

[91] *Id.*

[92] *Id.*

> In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker or grocer to buy food, he is morally entitled to obtain the worth of his money but he is not entitled to more. If what he gets is worth what he pays he is not justified in demanding more simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities.[93]

The Court saw nothing about the power structure of the employment relationship, the long-term nature of the relationship, the trust that the employer and employee must repose in each other, or the emotional attachments that may form to suggest that the law should differ in this context from that applicable to a one-shot commercial transaction between strangers. The vision of employer and employee as lone, unattached individuals haggling over the terms of their agreement and contracting de novo as if in a marketplace was, as Roscoe Pound revealed, a seductively misleading but even then anachronistic image:

> Men have changed their views as to the relative importance of the individual and of society; but the common law has not. Indeed, the common law knows individuals only. . . . It tries questions of the highest social import as mere private controversies between John Doe and Richard Roe. And this compels a narrow and one-sided view . . . .[94]

An additional theme in nineteenth-century liberty of contract discourse about employment is the notion that protective legislation ultimately is not only ineffectual but is actually bad for employees. Consider Justice Peckham's famous argument for the legal equality of employee and employer in *Lochner v. New York*:

> There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action.[95]

The notion is that employees are better off without the "protecting arm of the State" interfering with their ability to secure whatever protections their bargaining power can garner for them. And the contract discourse in the cases is directed to advancing just this view.

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[93] *Id.* at 558–59.

[94] Roscoe Pound, *Do We Need a Philosophy of Law?* 5 COLUM. L. REV. 339, 346 (1905).

[95] 198 U.S. 45, 57 (1905).

These same images appear throughout the old common-law employment cases as well. In an oft-cited early case articulating the doctrine of employment at will, *Payne v. Western & Atlantic Railroad Co.*, the Tennessee Supreme Court posited the equality of employer and employee in law, and likened the employment relationship to a commercial transaction:

> [M]en must be left, without interference to buy and sell where they please, and to discharge or retain employe[e]s at will for good cause or for no cause, or even for bad cause without thereby being guilty for an unlawful act *per se*. It is a right which an employe[e] may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.[96]

The court also rejected the notion that the law could justly infringe an employer's liberty to run its business and thus to retain its employees as it deemed fit:

> The sufficient and conclusive answer to the many plausible arguments to the contrary, portraying the evil to workmen and to others from the exercise of such authority by the great and strong, is: They have the right to discharge their employe[e]s. The law cannot compel them to employ workmen, nor to keep them employed.[97]

To regulate, in the court's view, was unfairly to impose, for the good of society or of some in it, an undue burden on the employer. As in *Adkins*, the court acknowledged that exercises of power by employers may be "censurable and unjust."[98] Yet, as in *Adkins*, the court professed the inability of the law to deal with abuse of private power without severely infringing liberty: "[T]he law can adopt and maintain no such standards for judging human conduct."[99]

The image that the *Payne* court articulated of the relationship of a railroad company to its employees was that of the head of a household to his family and servants:

> May I not refuse to trade with any one? May not I forbid my family to trade with any one? May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster? And, if one of them, why not all four? And, if all four,

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[96] 81 Tenn. 507, 518–19 (1884).
[97] *Id.* at 520.
[98] *Id.* at 517–18.
[99] *Id.* at 518.

> why not a hundred or a thousand of them? The principle is not changed . . . by the number.[100]

The same discourse prevailed in early private pension cases. When Progressive Era labor law scholars first focused on private pension plans in the early 1920s, they likened the common-law treatment of pension promises to the law's treatment of gifts.[101] Judicial rhetoric made the comparison easy. In *McNevin v. Solvay Process Co.*,[102] the New York Court of Appeals thought it obvious that a pension plan was employer largesse, and that the employer, like any philanthropist, could place whatever limits on his bounty that he thought appropriate: "It must be conceded at the outset that a person or a corporation proposing to give a sum for the benefit of any person or any set of persons has the right to fix the terms of his bounty, and provide under what circumstances the gift shall become vested and absolute."[103] The gift discourse persisted for decades. In 1944, the Eighth Circuit observed that since "[n]o statute then in force required of the company the assumption of the burden which it took upon itself in providing for pensions for its employees, . . . [the company] therefore had the right to condition its bounty in such manner as it saw fit."[104] This so-called "gift theory" of the pension promise, like the *Payne* court's metaphor for the employer as head of a household, was part of the nineteenth-century vision of the personal and hierarchical employment relation that is captured by the legal characterization "master and servant."

B. *The Renaissance of Laissez-Faire Contract*

In this section, I sketch the prominent features of the modern laissez-faire discourse of employee benefits. After describing three main characteristics in the first part of the section—formalism, a trope of bargaining, and a rhetoric of private philanthropy—I turn in the second part of the section to the sociology of "relational" contracts for a critique of this doctrine. Relational contract theory could, I think, deepen judicial understanding of the employee benefits relationship. To date, however, it has not had much impact in this field.

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[100] *Id.*

[101] *See generally* MURRAY LATIMER, INDUSTRIAL PENSION SYSTEMS IN THE UNITED STATES AND CANADA (1932); WILLIAM C. GREENOUGH & FRANCIS P. KING, PENSION PLANS AND PUBLIC POLICY (1976).

[102] 53 N.Y.S. 98 (1898), *aff'd*, 60 N.E. 1115 (N.Y. 1901) (per curiam).

[103] *Id.* at 99.

[104] Menke v. Thompson, 140 F.2d 786, 790 (8th Cir. 1944) (denying pension to employee with over 45 years seniority because he participated in a three-month strike 10 years before retirement).

1. *Contract Discourse in Employee Benefit Cases*

a. *Formalism and Abstraction*

The formalism of the contract discourse in modern employee benefit cases is anomalous in today's contract law, and fits Roscoe Pound's description of the "mechanical jurisprudence" of the Gilded Age: "rigorous logical deduction from predetermined conceptions in disregard of and often in the teeth of actual facts."[105] For example, the Seventh Circuit summed up the law governing the power of a unionized employer to eliminate health benefits for retired employees in *Senn v. United Dominion Industries, Inc.*,[106] and made it quite clear that bargaining, honoring of reasonable expectations, and consent to contract terms are no part of the rules: that the retirees had worked in earlier years in the expectation that they were receiving money today and health benefits later would not matter. Because of the time limit on the collective bargaining agreement, any subjective expectation they may have had was not enforceable.[107] In *Senn*, there was evidence that the company actually promised lifetime benefits and that the retirees reasonably relied on that promise. In rejecting their claim, the court invoked some sort of ironclad command of the law, and disclaimed any responsibility for it: "We certainly are sympathetic to the plight of retirees who may have erroneously thought that the company would pay the cost of their life and health insurance throughout their lifetimes. But we are not permitted to allow our sympathies and desires to vitiate clear principles of contract and labor law . . . ."[108] One may fault the court for failing to identify the "clear principles" of law that compel its conclusion. More importantly, the court's image of itself dutifully carrying out the dictate of some unambiguous imperative of greater authority eclipses both the court's own role in creating those principles of law and the lack of clarity in them.

Similarly, the courts' treatment of employer disclaimers evidences a most primitive form of positivism. For instance, in *Owens v. Storehouse, Inc.*,[109] in which an employee afflicted with AIDS argued that ERISA prohibits an employer from eliminating coverage for AIDS once the employee has contracted the disease, the court rejected the claim because the employer had included in the plan documents a boilerplate reservation of rights to amend the plan. The court concluded that the inclusion of the disclaimer in a plan meant that the employer had not in fact bound itself to pay benefits and could not be

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[105] Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 462 (1908).

[106] 951 F.2d 806 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2992 (1993).

[107] *Id.* at 814.

[108] *Id.* at 818.

[109] 984 F.2d 394 (11th Cir. 1993).

held to have done so.[110] In another case, the court held that a boilerplate reservation of rights to amend or terminate a plan could be enforced, and the court declined even to hear the evidence that the employees' union and the employer had agreed otherwise during collective bargaining.[111] Because the vested rights allegedly created during collective bargaining had not been included in the terms of the insurance plan, and because the plan contained a disclaimer, the court held that no other agreement conceivably could or did exist.[112]

The courts' results in these cases are thus at odds with the trend in other areas of contract doctrine—such as bailments and some consumer goods contracts—where courts have declined to enforce such disclaimers as contrary to public policy. The resemblance to pre-ERISA pension cases is unmistakable. In making the written terms determinative, irrespective of any other evidence, the court echoes the views of the Eighth Circuit in an early pension case: "By the rules and regulations promulgated by the company . . . , the company only obligated itself to pension such employees as the Board of Pensions, in the fair exercise of the power conferred upon it, determined to be eligible to receive the benefits of the plan."[113] That the rules of the pension plan thus construed promised the employees nothing did not appear to trouble the court then, but such an approach now seems archaic, at least in comparison to the generally accepted contract doctrine of illusory promises.

The willingness to enforce whatever disclaimer happened to be included in a plan document reached its logical conclusion in *Hamilton v. Air Jamaica, Ltd.*, in which the court read a disclaimer to mean that the employer had promised nothing.[114] If the employer in fact promised nothing, the contract was

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[110] *Id.* at 398; *see also* Ryan v. Chromalloy Am. Corp., 877 F.2d 598, 604 (7th Cir. 1989) (rejecting challenge to termination of retiree benefits because plan documents reserved right of termination); Hamilton v. Travelers Ins. Co., 752 F.2d 1350, 1351 (8th Cir. 1985) (per curiam) (finding no contractual duty to refrain from terminating health insurance absent language to the contrary).

[111] United Paperworkers Int'l Union v. Jefferson Smurfit Corp., 961 F.2d 1384, 1386 (8th Cir. 1992).

[112] *Id.*

[113] Menke v. Thompson, 140 F.2d 786, 790–91 (8th Cir. 1944).

[114] 945 F.2d 74 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1479 (1992). Other courts have rejected challenges to similar plan provisions that purported to require payment of benefits only when the company deemed it to be in its best interests. In these cases, employees challenged their denial of benefits on the ground that the employers' self-interested decisions breached both contractual obligations to pay benefits under the plan and fiduciary obligations imposed by ERISA to act in the interest of the participants. The courts found breaches neither of contractual nor of fiduciary duties, reasoning that the contracts allowed such self-interested provisions. Adams v. LTV Steel Mining Co., 936 F.2d 368

illusory—there was no contract.[115] The parties' actions over the years bely such a conclusion.[116] In *Hamilton*, Air Jamaica offered its employees various fringe benefits including severance pay. As part of a corporate reorganization, Air Jamaica terminated Robert Hamilton, whom it had employed as an account executive for thirteen years.[117] Hamilton requested severance pay according to terms laid out in an employee handbook that Air Jamaica had given him two months before terminating him. Air Jamaica, however, would only pay severance benefits substantially lower than those described in the handbook. Hamilton sued under ERISA, alleging that Air Jamaica breached its promise under the terms of the handbook.[118] Air Jamaica argued that the description of the benefits provided in the handbook was not binding because the handbook contained a disclaimer which stated that it "reserve[d] the right, whether in an individual case or more generally, to alter, reduce or eliminate any pay practice, policy or benefit, in whole or in part, without notice."[119]

"Read literally," the Third Circuit observed, "the Air Jamaica disclaimer could be taken to mean that Air Jamaica is under no obligation at any time to award benefits in accord with its written obligations."[120] To enforce this disclaimer, the court thought, seemed inconsistent with Congress's intent that ERISA "provide security in benefits packages."[121] Indeed, enforcement of such provisions undermines the goal of certainty that the written plan requirement is supposed to protect. Nevertheless, the court enforced it, saying: "While ERISA was enacted to provide security in employee benefits, it protects only those benefits provided in the plan."[122] Since the disclaimer meant that Air Jamaica effectively promised no benefits, there were no promised benefits for ERISA to protect.

The essence of the discourse in these cases is as radically formalist a notion of contract as that which prevailed in the *Lochner* era. Apparently oblivious to

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(8th Cir. 1991), *cert. denied*, 112 S. Ct. 968 (1992); Berger v. Edgewater Steel Co., 911 F.2d 911 (3d Cir. 1990), *cert. denied*, 499 U.S. 920 (1991); Hlinka v. Bethlehem Steel Corp., 863 F.2d 279 (3d Cir. 1988).

115 *See infra* text accompanying notes 194–95.

116 An economist might think even an illusory promise of benefits is of some value if the employer ever pays anything based on it. The value would be the face value of the promise reduced by the percentage chance that the employer will not honor the promise. But modern contract law would find the employer's promise to be worth so much less than the employee reasonably believed as to allow the employee some remedy.

117 *Hamilton*, 945 F.2d at 76.

118 *Id.*

119 *Id.*

120 *Id.* at 77 (citation omitted).

121 *Id.* at 78.

122 *Id.*

the disparities of bargaining power, to the fact that individual bargaining over the terms of the employee benefit plan never occurs, and to the long-term nature of the employment relationship in which expectations might be ill-defined, constantly evolving, and not represented by any express or written agreement, courts assert that employees should protect themselves by inserting language limiting managerial prerogative into the terms of employee benefit plans.[123] What, one wonders, happened to the core insights of Legal Realism? As the Realists long ago observed about the freedom of contract doctrine of *Lochner* and its progeny, the notion of equality and bargaining between employer and employee is a fallacy "[t]o everyone acquainted at first hand with actual industrial conditions."[124] Of course, courts know now, just as courts knew then, that employers and employees often do not have equal bargaining power and that bargaining over the terms of employment often does not occur. The legal equality of the parties and the trope of bargaining serve a legitimating function for rules designed to serve purposes other than effectuating the intent of the parties.[125]

The application of classical contract doctrine to employee benefits relationships that bear little resemblance to the usual contract relationship is an illustration of what Holmes called "the paradox of form and substance in the development of law."[126] Abstract formulas and categories persist in the law long after their original rationales cease to make sense. The old forms and rules "gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted."[127] The persistence of formalist contract as

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[123] *See, e.g.*, Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155 (3d Cir. 1990).

[124] Pound, *supra* note 105, at 454.

[125] Legal formalities, both Lon Fuller and Duncan Kennedy have observed, serve the purpose of providing certainty to transactions at the expense of some arrangements that both parties thought was a contract. *See* Fuller, *supra* note 6; *see also* Kennedy, *supra* note 6, at 1688. As Fuller observes, formalities can provide a handy excuse for one party to get out of what turned out to be a bad deal.

Kennedy claims that the purpose of formalities—including the Statute of Frauds, the parol evidence rule, and other contract doctrines—is "to force [the contracting parties] to be self conscious and to express themselves clearly, not to influence the substantive choice about whether or not to contract, or what to contract for." Kennedy, *supra* note 6, at 1692. But when formalities can be consistently invoked by one class of contracting parties at the expense of another, as is the case with disclaimers in ERISA plans, and because formalities "operate through the contradiction of private intentions," they are not neutral as between the parties. *Id.* at 1691. Formalities with which Congress arguably intended to protect employees are consistently used by employers to frustrate employee expectations.

[126] HOLMES, *supra* note 26, at 35.

[127] *Id.* at 36.

the preeminent legal relationship in employment is an example of this paradox.[128]

In both the contract paradigm in employment generally and in the specific case of employee benefits, the contract paradigm has constricted courts' vision of the nature of the obligations.[129] There is historical irony in this, for in the beginning judges and scholars offered the notion of an enforceable contract regarding employee benefits as a reform over an earlier and more oppressive vision of benefits as a gift from employer to employee.

b. *Consent, Intent, and the Trope of Bargaining*

In this section, I examine the courts' use of the discourse of consent, intent, and bargaining to describe the employee benefits relationship. I examine the origins of these concepts in cases interpreting collectively bargained plans, and trace their migration to cases in which the plan is not the product of bargaining.

At the level of rhetoric or ideology, to equate the content of an insurance policy or employee benefit trust document with the intent of the employer and employees is to equate consent to be in an employment relation with knowledge of and consent to the terms of the employee benefit plan. Through this equation, the legitimacy of the plan terms is established.

At the same time courts pursue a formalist and positivist approach to employee benefits promises, they also talk as though they conceived of the question whether benefits may be terminated as being one of ascertaining the intent of the parties. The intent, they suggest, is to be determined by looking at the terms of the health insurance policy or the summary plan description.[130] Many courts refuse to consider any extrinsic evidence of the parties' understanding on the grounds that ERISA requires plans to be maintained in

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[128] For a brilliant study of the evolution of contract as a legal concept and as a social structure in the employment relationship, see PHILIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 52–72 (1969).

[129] As Robert Gordon observed about contract doctrine:

> [T]he law embodies a set of fantasies about the world that become real when people act upon them as if they are real: when, for example, people accept the terms of a deal imposed upon them by powerful others as the product of circumstances and their own volition rather than simply of the power of others . . . .

Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 578.

[130] *See, e.g.*, Boyer v. Douglas Components Corp., 986 F.2d 999, 1005 (6th Cir. 1993).

writing and permits no oral modification of plans.[131] Thus, courts equate the intent of the parties with the terms of a health insurance policy drafted by the employer's insurer or the summary plan description drafted by the employer's lawyers.

The line of reasoning I have just sketched represents an amalgam of two dominant styles of contract reasoning and reflects in microcosm the historical evolution of contract law in the nineteenth century.[132] The initial framing of the inquiry as being about the parties' intent is reminiscent of the early nineteenth-century "will theory" of contract, in which courts conceived their task as identifying and giving effect to the subjective intent of the parties. On this theory, contract is a legitimate form of private ordering because it advances the freedom and autonomy of the parties. Later in the nineteenth century, the notion of contract law as effectuating actual subjective intent was supplanted by what is now known as the "objective" theory of contract, according to which the actual intent of the parties was, if not irrelevant, at least second in importance to orderly predictable rules. The emphasis on objective rules furthered the goals of predictability and stability in commercial transactions.

The same trajectory of historical evolution is seen in the vision of the "contract" of employee benefits. The rules are legitimated initially on the basis of consent and subjective intent. But, as that rule structure leads to unpredictability, the courts transform the structure. The equation of subjective intent with contract language reflects the ascendance of the objective notion of contract, in which effectuation of the parties' intent is sacrificed for certainty of rules, irrelevance of factual questions, and ease of administration.

Courts treat this line of reasoning as totally unremarkable and quite obvious. In fact, however, it is premised on controversial assumptions about vesting. I have already questioned the underpinnings of the assumption that ERISA compels the courts to treat the question of vesting of benefits as a matter of written contract.[133] Even accepting the legitimacy of that assumption, however, what does it mean to say that the key to vesting is the intent of the parties? The search for the putative "intent of the parties" raises three interrelated concerns. First is the question whether ascertaining the "intent of the parties" is an intelligible approach to the problem. The parties generally do not share a common or identifiable "intent"; rather, they have many inchoate and incongruent expectations. The search for some shared intent is a poor heuristic device. Instead, courts need to confront explicitly the question of whose expectations should be honored and why. Second, there are evidentiary

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[131] *See* cases cited *infra* notes 210–11.

[132] *See generally* Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

[133] *See supra* text accompanying notes 7, 14, 17, 32–34, 45, 51–53, 63–82.

problems. How is the parties' "intent" to be identified and proven? What evidence should courts consider on this and why? If the courts limit the inquiry to plan documents drafted by the employer's lawyers, they will not find that intent, even if it exists. But if courts significantly broaden the range of evidence admissible to prove intent, they complicate resolution of disputes.[134] Third, there are problems of default rules to adopt when, as is often the case if courts consider all the evidence, there is an evidentiary toss-up as to what the parties meant by their agreement, or whose expectations to disappoint. Should courts assume that benefits vest or not? If not, should courts provide any other remedies?

Under the modern "objective" theory of contractual agreement, the subjective intent of the parties may be irrelevant; what the courts recognize as "intent" is what a reasonable person would believe their intent to be under the circumstances. If that is so, then courts should offer some explanation of why the plan documents, rather than other manifestations of the parties' expectations, should be the exclusive source of evidence of the parties' agreement.

The historical and logical origin of the search for the parties' intent lies in the rules of interpretation of benefit agreements for the unionized workplace, where there is a factual basis for asserting that the nature and extent of benefits is the subject of agreement between the employer and the representative of employees. The metaphor that I refer to as the trope of bargaining stems from the assumption that employees belong to unions that can bargain on their behalf, or that they can bargain individually to protect themselves. In the nonunion workplace, agreement is largely fictional. An employer offers a benefit package on a take-it-or-leave-it basis to its employees; there is no negotiation over the terms. The benefit plan is agreed upon in the sense that an employee might leave his or her job if he or she feels strongly enough about it. But it is not obvious that the employee has in fact agreed to specific terms since, in all likelihood, he or she is unaware of the details. Given that only twelve percent of the private sector workforce is unionized, the courts' formalist contract structure is built on assumptions about bargaining that bear little resemblance to reality.

The origins of ERISA make the existence of these assumptions quite understandable. Many of ERISA's provisions were derived from the law that had developed under the Taft-Hartley Act to govern joint employer-union benefit funds. With respect to Taft-Hartley funds, courts had been called on repeatedly over the years since the statute was enacted in 1947 to invalidate terms of such plans on the ground that they were so unfair to employees as to violate the statute's requirement that trust fund administration not be arbitrary

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[134] *See infra* text accompanying notes 188, 259–89.

and that benefit funds be used solely for the purpose of paying benefits.[135] In *United Mine Workers Health & Retirement Funds v. Robinson*, the Supreme Court put an end to that line of argument, holding that federal courts lacked authority to review the reasonableness of collective bargaining agreement provisions allocating health benefits among potential beneficiaries of benefit trust funds.[136] In *Robinson*, a group of miners' widows challenged a plan eligibility rule that was made as part of a package deal to settle a strike.[137] Noting the origins of the rule in a collective bargaining compromise, the Court upheld the rule on the ground that

> inevitably financial and actuarial considerations sometimes will provide the only justification for an eligibility condition that discriminates between different classes of potential applicants for benefits. As long as such conditions do not violate federal law or policy, they are entitled to the same respect as any other provision in a collective bargaining agreement.[138]

The basis for the judicial deference in *Robinson* was plainly the fact that the plan rule was the product of collective bargaining. *Robinson* did not address the question whether courts had authority under section 302(c)(5) to scrutinize employee benefit eligibility rules that were not the product of negotiations but

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[135] The specific provision on which this argument rested was § 302(c)(5) of the Labor Management Relations (Taft-Hartley) Act, which provides:

> The provisions of this section [prohibiting an employer from paying money to a labor organization that is a representative of the employer's employees] shall not be applicable . . . with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents . . . *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund . . . .

29 U.S.C. § 186(c)(5) (1988 & Supp. IV 1992). For a thorough discussion of this strand of jurisprudence under § 302(c)(5) and case citations, see Central Tool Co. v. International Ass'n of Machinists Nat'l Pension Fund, 811 F.2d 651 (D.C. Cir. 1987).

[136] 455 U.S. 562, 576 (1982).

[137] *Id.* at 567.

[138] *Id.* at 575.

were instead adopted unilaterally by a plan trustee.[139] Although *Robinson* did not consider noncollectively bargained plans, since section 302(c)(5) does not apply to them, at least one court has explicitly adopted the *Robinson* rationale for single-employer, noncollectively bargained plans, and others have done so by implication. In *Moore v. Reynolds Metals Co. Retirement Program for Salaried Employees*, an employee's widow challenged under ERISA a provision in a single-employer, nonunion pension plan requiring a five-month waiting period before a participant could be eligible for benefits.[140] The Sixth Circuit, relying on *Robinson*, held that "federal courts do not have authority to review the provisions of such a plan."[141] The court began its reasoning from the premise that "an employer has no affirmative duty to provide employees with a pension plan," and that in ERISA, "Congress continued its reliance on *voluntary* action by employers by granting substantial tax advantages for the creation of qualified retirement programs."[142] In response to the widow's argument that *Robinson* should not be extended to plans established unilaterally by an employer, the court found the logic of *Robinson* persuasive in either context:

> Perhaps the decision to include the waiting period was made due to financial considerations. Clearly, a company such as Reynolds Aluminum is entitled to determine without judicial interference the amount of money it desires or can afford to appropriate for disability benefits. This is especially reasonable in light of the fact that Reynolds Aluminum Company provides all funding for the Retirement Program; participants make no contribution.[143]

In the court's view, decisions about "which benefits employers must confer upon their employees . . . are more appropriately influenced by forces in the marketplace."[144]

The court's observation that Congress made a deliberate choice to rely on voluntary action by employers to deal with the problem of social insurance is true, so far as it goes. ERISA clearly does assume that negotiated solutions to

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[139] *See Central Tool Co.*, 811 F.2d 651.

[140] 740 F.2d 454, 455 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985).

[141] *Id.* at 455.

[142] *Id.* at 456.

[143] *Id.* at 456 n.3.

[144] *Id.* at 456; *see also* United Paperworkers Int'l Union v. Jefferson Smurfit Corp., 961 F.2d 1384, 1385-86 (8th Cir. 1992); Kyrouac v. Northern Ill. Gas Co., 1991 U.S. Dist. LEXIS 11920 (N.D. Ill. 1991). In White v. Distributors Ass'n Warehousemen's Pension Trust, the court held that the *Robinson* deference to collectively bargained plan provisions applies to suits brought under ERISA as well as under § 302(c)(5). 751 F.2d 1068, 1071 (9th Cir. 1985).

social insurance issues are preferable to government mandates. But ERISA does not reflect a deliberate congressional choice that courts abdicate any effort to devise a set of rules to deal with failures of negotiation or the allocation of unanticipated losses. As the costs of providing social insurance—especially health care—have grown, the ability even of unionized employees to negotiate a mutually acceptable compromise has been tested, and courts have been unable to devise a reasonable approach to dividing unanticipated losses. Further, as organized labor has steadily lost ground, the foundation has been eroded from Congress's assumption that *ex ante* bargaining and triennial renegotiation of plan terms would protect employees against the self-interested behavior that voluntarism otherwise allows.[145]

The trope of bargaining has become pervasive in ERISA cases, irrespective of evidence showing the existence or absence of bargaining. In *Moore*, for example, there are all sorts of reasons to think that the five-month waiting period for a disability benefit plan is not a term of employment that is likely to be susceptible to market pressure. Similarly, in a case in which an employer unilaterally amended a severance pay policy to reduce benefits, the Third Circuit held that the fiduciary duty protections do not apply to an employer's decision to amend or terminate an employee benefit plan, reasoning that protection against self-interested employer conduct was unnecessary because "employees and their unions remain free to bargain for vesting requirements in the terms of their plans above and beyond those required by statute."[146] Judicial deference to the product of collective bargaining is transmuted into a notion of deference to the product of an employer's *voluntary* choices about who shall be the beneficiaries of its largesse. This deference is what the *Moore* court was driving at when it remarked that a company's unreviewable decision to establish plan rules is "especially reasonable" when the employer provides the funding and employees do not contribute out of their take-home pay.[147]

As the *Robinson* line of reasoning has spread beyond formulation of eligibility rules to their modification and application, courts have found themselves in a quandary. The original justification for deference was that participants would be protected adequately by the bargaining process in the formulation and modification of rules and by fiduciary duties in their application. When rules are created unilaterally by an employer, employees

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[145] On the effect of the decline of organized labor on the laws regulating nonunion work relationships, see Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575 (1992).

[146] Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1162 (3d Cir. 1990).

[147] Moore v. Reynolds Metals Co. Retirement Program for Salaried Employees, 740 F.2d 454, 456 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985).

have tried to persuade courts to substitute fiduciary protections for the bargaining protections, but have been largely unsuccessful. Particularly when the line between rule modification and application is fuzzy, as it often is, the courts' deference leaves employees with no protection. Thus, the only rationale for deference becomes the one that the Sixth Circuit offered in *Moore*: employers can decide to spend their benefit dollars however they want, just as philanthropists can decide how to allocate their charitable contributions.

c. *Contract and Gift*

The modern rhetoric of employee benefits is suffused with images of employer largesse. Although courts mainly talk about contract, one can hear echoes of the laissez-faire statements that statutory wealth redistribution is coerced charity, as in *Adkins*, and that deferred compensation is a gift rather than an obligation, as in *McNevin*.[148] The gift metaphor emerges most clearly in the cases addressing whether an employer's decision to amend a benefit plan is subject to fiduciary duties. In rejecting such claims, courts observe that, if fiduciary duties were to apply, the decisions "would have to be made solely with the interests of the covered employees in mind. Under that standard, it is virtually impossible to see how a decision to terminate or cut back benefits could pass muster, absent some calamitous circumstance like the imminent insolvency of the employer."[149] This outcome, as far as the court is concerned, would undermine Congress's decision not to require vesting of welfare benefits: "under plaintiffs' reading of ERISA, although nothing in the statute requires the creation of employee benefit plans in the first place, the fiduciary duty provisions in effect require that benefits, once created, cannot ordinarily be narrowed or eliminated by later amendment."[150] Such extensive regulation would be inconsistent with the court's perceived congressional "concern with minimizing employers' compliance costs."[151]

In rejecting the applicability of fiduciary duties to plan amendments, the courts reject one possible way to transform the benefits relationship from one of arm's length self-interestedness into one of fairness and commitment. There may be a middle ground between the courts' feared scenario in which all amendments disadvantaging employees would be impossible, on the one hand, and total laissez-faire, on the other. For instance, employers may have fostered expectations of continued benefits, and an amendment reducing those benefits might violate an implied covenant of good faith and fair dealing. Alternatively,

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[148] *See supra* text accompanying notes 85–104.

[149] *Hozier*, 908 F.2d at 1159.

[150] *Id.* at 1159–60.

[151] *Id.* at 1160.

courts might be more skeptical of the distinction between the employer's role as entrepreneur and its role as fiduciary, and restrict employers' freedom to occupy both roles simultaneously.

The refusal to apply fiduciary standards to plan amendments rests on the distinction between the employer's role as entrepreneur when designing or amending its plan and its role as a fiduciary when administering its plan and determining claims for benefits.[152] The distinction between the two roles is not always terribly clear, as *Adams v. LTV Steel Mining Co.*[153] illustrates. In *Adams*, the early retirement plan provided for benefits if the employer "considers that retirement would . . . be in its interest . . . ."[154] The company determined that it would not be in its interests if a group of otherwise eligible employees took early retirement, and on that basis denied benefits under the program.[155] The Eighth Circuit rejected the employees' argument that this self-interested decision, although permitted by the plan documents, violated the statutory fiduciary duties. "Business decisions can still be made for business reasons,"[156] the court remarked, and "[h]ere, LTV made a business decision that early retirement was not cost effective."[157] Thus, relying entirely on the plan language, the court allowed the employer to wear its fiduciary and capitalist hats simultaneously while determining eligibility for benefits, a result at odds with basic precepts of trust law.

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[152] *See, e.g.*, Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1416–17 (2d Cir. 1985) (holding that ERISA permits an employer to wear "two hats" and fiduciary duties apply only when employer wears its plan administrator hat, not its plan sponsor hat), *cert. dismissed*, 474 U.S. 1113 (1986); *see also* McGath v. Auto-Body North Shore, Inc., 7 F.3d 665 (7th Cir. 1993); Adams v. LTV Steel Mining Co., 936 F.2d 368, 370 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 968 (1992); Berger v. Edgewater Steel Co., 911 F.2d 911, 918–19 (3d Cir. 1990), *cert. denied*, 499 U.S. 920 (1991); Musto v. American Gen. Corp., 861 F.2d 897, 911 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); Phillips v. Amoco Oil Co., 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987); Sutton v. Weirton Steel Div. of Nat'l Steel Corp., 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984).

[153] 936 F.2d 368.

[154] *Id.* at 369 (quoting the Ore Mining Companies Pension Plan, the plan at issue in the case).

[155] *Id.* at 370.

[156] *Id.*

[157] *Id.* at 369 (quoting Dzinglski v. Weirton Steel Corp., 875 F.2d 1075, 1079 (4th Cir.), *cert. denied*, 499 U.S. 920 (1989)).

2. *The Problem of Long-Term Relationships: Conceptualizing the Employment Relationship as Contract*

The failings of the courts' current approach to developing a common law of contract for employee benefits and ideas for a partial solution may be understood by reconceptualizing the employment "contract."

In this section, I draw on the sociology of long-term contracts to criticize the conventional legal understanding of the nature of employment generally and employee benefits in particular. The archetypal contractual relationship is one in which two strangers come together at a particular moment in time to negotiate some form of exchange. It is a discrete transaction where negotiation over the terms of the exchange occurs before the legal relationship is formed. The exchange occurs according to agreed-upon terms, and the relationship then ends.[158] In this model, the contract serves two functions: it organizes the exchange, and it allocates risk of loss or gain from unforeseen events.[159] The classical laissez-faire law of contract "presumes a world of independent, roughly equal actors who achieve their objectives by making determinate arrangements with predictable outcomes."[160] It also assumes there is social utility in such transactions and in their enforcement.

Freedom of contract has social value when the parties have the ability to make choices in their own best interests. Where those assumptions do not hold, the modern law of contract recognizes mitigating principles. The employment relationship is one where, in many cases, the freedom of contract assumptions do not operate. Thus, even under modern contract principles, the courts in ERISA cases may be subject to critique.

We have long known of the disjunction between the contract doctrine's implicit assumption of a single, discrete transaction between strangers and the reality of many relationships governed by that doctrine, in which the parties are in a long-term continuing relationship.[161] One firm may regard another as a valued, long-term customer, and officers of the two firms (unless they are

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[158] The Restatement (Second) of Contracts defines a contract as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

[159] P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 716 (1979).

[160] SELZNICK, *supra* note 128, at 55.

[161] *See generally* Macaulay, *supra* note 1. Macaulay is one among several scholars whose view of the sociology of contracts changed the way many think of contract law. The 1985 Wisconsin Law Review symposium, *Law, Private Governance and Continuing Relationships*, provides a good survey of the field and bibliographic footnotes to the literature. *See* 1985 WIS. L. REV. 461.

lawyers, and perhaps even if they are) may believe that there are rights and obligations that bind them without any of this being spelled out in a contract.[162] This is the phenomenon of the "relational contract." A relational contract is "a voluntary agreement for the creation of continuing relationship."[163] The employment relationship is a paradigmatic example. It is a long-term relationship, not a discrete transaction. Most of the terms are not negotiated in advance. Contract "terms" are "renegotiated" as time passes, often without the parties realizing that "negotiations" are occurring. It is not an *ex ante* exchange of explicit or even implicit promises. Nor is it really a unilateral contract in which a discrete promise or set of promises is exchanged for performance of identifiable acts.[164] Often the employer is a bureaucratic organization in which different players may have entirely different understandings of the content of the agreement between the organization and the employee.

The source of terms or rules for governing the relationship is different in a relational contract than in a discrete contract.[165] A relational contract "is voluntary at its inception, but once the act of adherence occurs, the relationship is governed by preexisting rules or by the authority of the dominant partner. . . . The commitments accepted are general and diffuse; they are not

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[162] *See generally id.* In particular, see Gordon, *supra* note 129, at 566–74.

[163] SELZNICK, *supra* note 128, at 54. Selznick actually called it a "status contract"; the "relational contract" expression is associated with Ian Macneil. *See* sources cited *infra* notes 169, 196–212.

[164] *See* Bidlack v. Wheelabrator Corp., 993 F.2d 603, 606 (7th Cir.) (en banc) (citing 1A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 152, at 13–14 (1963)), *cert. denied*, 114 S. Ct. 291 (1993); *cf.* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983). Nor can the employment relationship be accurately analogized to a "supply" contract, in which one party (the employer) agrees to buy the labor output from the employee. What does the employer purchase? A reasonable amount of labor? What the employee wants to do? What the employer thinks is necessary? Does the employer also buy the right to control the employee's work day? The right to control the employee's conduct, such as drug use, during off hours? Even if the labor market theory answered these questions in the most general way (which it does not) by saying that the employer buys both the employee's labor and the right to make rules regarding the extraction of that labor, as a matter of ordinary contract doctrine the employer would not also be granted the unilateral right to decide whether the rules so made are consistent with the contract. But the employment at will doctrine grants the employer just that right. *See* SELZNICK, *supra* note 128, at 135.

[165] *See* SELZNICK, *supra* note 128, at 54. Selznick deployed Weber's distinction between "status" contracts and "purposive" contracts. *See* MAX WEBER, ON LAW IN ECONOMY AND SOCIETY 100–21 (Max Rheinstein ed., 1954).

premised on explicit consent to particular obligations."[166] Employment viewed as a relational contract might be an agreement to enter upon a status defined by law or it might be an agreement to submit to private power.[167] With the ascendance of the free market in the nineteenth century, the employment contract became more the latter than the former; the employment contract became "a device for entering *legally unsupervised* relations."[168]

The employee benefit plan, when viewed as a contract, adds an additional layer of complexity. It is a relational contract like the employment relation, but with an added twist: it is more formal, in that the terms are written, and less subject to individual negotiation or modification. It is the quintessential contract of adhesion, offered on the same terms to all employees and seldom subject to modifications for any particular individual. Further, typically neither the person who conveys the offer nor the person who accepts it knows exactly what the terms are.[169]

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[166] SELZNICK, *supra* note 128, at 54; *see* WEBER, *supra* note 165, at 105–06. Jay Feinman has suggested that Macneil's relational contracts approach would call for a court to decide first whether the contract involved a long-term relationship. If it were a discrete transaction, the court should enforce the agreement the parties struck when they entered the deal. If it were a relational contract, however, the court should explicitly consider "norms of flexibility and contractual solidarity" that are manifest in the parties' actions, as well as "the community's actions and understanding, the broader society's values, and the legal system's principles." Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1303 (1990).

[167] SELZNICK, *supra* note 128, at 123–34. Selznick observes that in Anglo-American master and servant law, "most of the terms and conditions of employment were implied by law rather than set by mutual agreement . . . . Above all, *it was not contemplated that the parties would design their own relationship.* As in the case of marriage, the relation might be entered voluntarily but its character was fixed by law." *Id.* at 123–24; *see also* 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (W.C. Jones ed., 1915).

[168] SELZNICK, *supra* note 128, at 131; *see also* ORREN, *supra* note 89.

[169] To test the truth of these assertions, I—with this research in mind and being the very definition of a sophisticated consumer of employee benefits—tried a little experiment. Before I accepted an offer to join the law faculty of the university where I teach, I inquired of the dean, who conveyed the faculty's offer, about the terms of the employee benefit plan. He told me that he did not know the precise terms, but that they were generous and comparable to the terms of any major university's employee benefit package. Although not wishing to offend a person whose good opinion of me would be important to my future, I nevertheless pressed for details. The dean told me that the personnel director would explain the terms when I began work, and that he did not know further details. He believed he was answering my questions, and he seemed puzzled that I would persist in focusing on such picayune matters when I should have been concerned with whether this university is superior to others that had offered me teaching positions.

In a relational contract, traditional contract categories of offer, acceptance, material terms, and the like are of only limited utility for thinking about breach of obligations, both in terms of identifying obligations and in evaluating appropriate sanctions for their breach. When it comes to identifying obligations, the notion of a contract evolving over the course of a long-term relationship suggests that the parties may understand themselves to be obligated in ways different than or in addition to those spelled out in their written contract. As for breach, a core insight of relational contract theory was that obligations are honored in long-term relations not because of a fear of the legal consequences of breach but rather out of fear of the harm that nonperformance will have on the future relationship. This interest in future relations may mean that there is an implicit agreement to rely only on each other's honor and good faith, not on legal process, to enforce the contract. Or it may affect what the parties understand their obligations to be, or what constitutes waiver or modification. In other words, both rights and remedies under the relational contract may be either more or less expansive than under the written contract.

In any event, what is clear is that the parties do not regard the written document as a definitive statement of the proper allocation of responsibilities or of the risks of loss or gain from unforeseen events in their relationship. And, if the parties do not so understand it, assuming the task of contract law is to effectuate the parties' intent, the law should not either. At a minimum, the

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What would have happened had I insisted on knowing the terms of the plans and, were I dissatisfied with any, asked that they be modified for me? Doubtless the dean would have told me that the law school was powerless to modify the university's health insurance programs for one employee. Asking for such a contract modification would be as if I, in purchasing a compact disc player, were to ask the salesperson at the stereo store to waive the limitations on warranties that are printed on papers packed deep inside the plastic wrapping inside the box. The person selling the CD player would protest (a) that she did not know what the warranties were; (b) that she lacked authority to modify them; and (c) that the company would only sell the CD player on the same terms to all except for price. The employee benefit contract is thus the typical standardized contract. Frequently both parties, and virtually always one party, have "little effective choice in the matter at all, and neither reads nor understands, nor in any real sense agrees to the terms contained in such standard documents." ATIYAH, *supra* note 159, at 731.

In our complex modern society, we must rely on form contracts drafted by lawyers we hire to act in our interest. The fact that we are not always aware of every detail in those forms does not mean the detail is unimportant or that one party might not refuse to enter into the deal if he or she were aware of some details. But the mere presence of the provisions in a form contract is not itself a reason to enforce them in every case. Some other theory is necessary to explain why we should enforce contract terms of which one party was unaware. There are theories that offer such an explanation, and counter-arguments as well. None of the theories of which I am aware justifies the treatment of employee benefits that courts have accorded them.

parties' understanding of their relationship should be relevant to the law's definition of the extent of the legally binding obligations under a consent-based theory of contract.[170] Modern contract law can at least partially account for this problem under the rubric of the parol evidence rule: if the writings do not make up a fully "integrated" agreement, the parties are free to offer evidence that their true agreement was other than what the written documents suggest. When courts reject parol evidence in ERISA cases, they reject a source of evidence of what the parties' actual "contract" may have been.

As applied in the employee benefits context, relational contract theory might suppose that the terms of the plan document are not the definitive statement of the employer's responsibility for the employee's welfare. John McGann might actually have had a claim to continued health coverage for his AIDS treatment. But, as evidenced by the opinions in the *Bidlack v. Wheelabrator* decision, that aspect of modern contract law has not found easy acceptance in the ERISA cases.[171] Of course, to the extent that a theory of contract law is less concerned with effectuating the parties' intent, and more concerned with establishing a system of easily administered, bright-line rules—which is a concern in the employee benefits context—liabilities might be more limited. But that would call for a rationale for decisions that would differ markedly from the intent-of-the-parties rationale which is most commonly invoked.

If contract law is about structuring expectations according to some notion of consent—distinguishing those that are legally enforceable from those that are not, and allocating risks of loss when unexpected events frustrate expectations—it cannot help but fail in the employee benefits context. The failure becomes particularly apparent at a time when economic change generates many unforeseen events. Economic change has altered employment relationships profoundly in the last fifteen years, and the increasing cost of health care has altered expectations regarding employee benefits radically as well. Employees expect continued health care on reasonable terms. Employers expect that payroll costs will not exceed some unstated limits. When the costs of employer-provided health insurance have increased faster than the rate of inflation for years, someone's expectations are bound to be disappointed. It is one thing to assume, as does the traditional contracts model, that it is best to enforce an agreement reached by two entrepreneurs negotiating from positions of equal strength when the deal turns bad for one side. It is something else to assume that workers would assume the risk of destitution or that employers would assume the risk of bankruptcy to pay health care bills. We have reached

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[170] If the parties do not share the same understanding of their contract, other problems arise. I examine those problems elsewhere. *See infra* text accompanying notes 175–205.

[171] *See supra* text accompanying notes 63–76.

a situation that neither party imagined could occur. It makes no sense to enforce a contract premised on an entirely different social situation.

C. *More Form than Substance: Contract Language and the Problem of Incongruent and Inchoate Expectations*

Having committed themselves to a line of reasoning in which the question of whether benefits can be terminated is said to be a matter of the parties' intent,[172] the courts encounter the insoluble problem of reconciling employee and employer expectations that are both inchoate and incongruent. As I discuss in this section, the inchoate nature and incongruence of the parties' expectations render the courts' search for contractual intent futile in many cases. The absence of contractual intent is the principal difference between employee benefit plans in the union sector and those in nonunion workplaces. The closest analogy in the law is the state law of wrongful termination involving employee handbooks. Not surprisingly, the ERISA cases exhibit much of the same doctrinal difficulties that the employee handbook cases do, as I will explain. The scholarly literature and a few courts have recognized the failure of the conventional view of employment when interpreting employee handbooks, and I suggest that some of the same insights should be applicable in employee benefits cases.

The phenomena of incongruent and inchoate expectations explain why employee benefit plans present fundamentally different issues in the union and nonunion workplaces. First, when there is collective bargaining, it is reasonable to assume that the employees, through their union, are aware of the terms of the plan and have the bargaining power and the institutional structure to negotiate to protect themselves. In economic terms, the information problems and the transaction costs associated with challenging adhesion contracts are reduced. There is, moreover, an institutional framework for working out differences, through the grievance arbitration process and triennial negotiations for a new contract. As a consequence, a collectively bargained contract is a different social artifact than an employee benefit plan that is

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[172] Boyer v. Douglas Components Corp., 986 F.2d 999, 1005 (6th Cir. 1993) ("To determine whether the parties have agreed to vest the welfare benefit plan, we apply principles of federal common law to ascertain the parties' intent. To ascertain the parties' intent, we first examine the plan documents. The written terms of the plan documents control and cannot be modified or superceded by the employer's oral undertakings.") (citations omitted); Gill v. Moco Thermal Indus., Inc., 981 F.2d 858, 860 (6th Cir. 1992) ("Essentially, the court must look to the intent of the parties and apply federal common law of contracts to determine whether welfare plan benefits have vested.").

drafted unilaterally by the employer's lawyers and insurer.[173] In the nonunion workplace, there is no contract between the employer and the employees regarding benefits analogous to the collective bargaining agreement. A collective bargaining agreement and a plan document are very different kinds of instruments and present different kinds of interpretive problems. The former actually can be said to represent the parties' shared intent about the terms of their relationship; the latter cannot. As I have shown, the effort to find actual intent in the terms of an adhesion contract contorts doctrine. Moreover, the effort to resolve the voluntarist-entitlement tension by interpretation of plan language transforms the debate from one about entitlements to one about formal rules.

In the difficult task of reconciling written terms and inchoate expectations, the development of the federal common law has followed a trajectory similar to that of the state common law of wrongful termination in cases involving employee handbooks. In the beginning, courts apparently thought that making the manuals contractually binding was a progressive reform that would protect

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[173] In Bidlack v. Wheelabrator Corp., for example, a case in which retired employees challenged their former employer's effort to reduce insured health benefits for retirees, the insurance agreement between the company and the insurer expressly authorized the company to change the level of benefits; the collective bargaining agreement between the company and the union did not explicitly address the issue. 993 F.2d 603, 608 (7th Cir.) (en banc), *cert. denied*, 114 S. Ct. 291 (1993); *see supra* text accompanying notes 64–76. The Seventh Circuit concluded that the insurance agreement did not have "much relevance" to the issue in the case because "[t]he union was not a party to the contract between Wheelabrator and its insurer, and anyway the issue is not the obligations of [the insurer] to Wheelabrator but Wheelabrator's obligations to its retired employees. Those obligations are defined by the collective bargaining agreements, not by the insurance contract." *Id.* at 606. In the nonunion context, the formal employee benefit plan serves a function similar to the insurance contract in Wheelabrator; it is written largely for the purpose of defining the insurer's risks and liabilities. It is a dual purpose document, in that it also, by virtue of ERISA, defines the employees' rights under the plan; but the important point is that it is part of a conversation of sorts between the employer and its insurer.

As the Sixth Circuit summed it up:

> Even though a welfare benefit plan is not subject to mandatory vesting requirements, the parties can agree to vest a welfare benefit plan. To determine whether the parties have agreed to vest the welfare benefit plan, we apply principles of federal common law to ascertain the parties' intent.
>
> To ascertain the parties' intent, we first examine the plan documents. The written terms of the plan documents control and cannot be modified or superceded [sic] by the employer's oral undertakings.

Boyer, 986 F.2d at 1005 (citations omitted).

employees. In *Woolley v. Hoffmann-La Roche, Inc.*, for example, the New Jersey Supreme Court, in an opinion plainly intended to protect employees, rejected what it characterized as the majority and outmoded view that refused to enforce handbook assurances of job security.[174] Yet, it turns out that treating the manual as a contract is a very limited sort of protection, just as ERISA's enforcement of plan terms is limited: as long as the employer can draft the terms, it can write its way around the protections of the law. Since ERISA was meant to be a repudiation of the failures of state common-law regulation of the benefits aspect of the employment relationship, the similarity is unfortunate.

The state common-law employee handbook cases are in many ways similar to employee benefit cases: employers often create an employee handbook that sets up a dispute resolution procedure and makes explicit or implicit promises that employees will not be discharged without just cause; obligations evolve over time and are often inchoate, negotiation does not occur on many terms of the employment "contract"; and both parties have legitimate expectations that are not spelled out in any written document.[175] In both situations, employers make a variety of assurances to employees that give rise to expectations of future security. Because the assurances are intended to improve employee morale, employers obviously intend that employees rely on them by remaining loyal to the company, not forming a union, turning down other job offers, working harder, and the like. Yet employers presumably do not intend that every assurance of future security be interpreted as a legally binding promise. The task for the court is the standard contract law problem of sifting out "mere puffery" from binding promises. That inquiry can be made through a search for actual intent or by imposing rules derived elsewhere.

Some courts have seized upon these employee handbooks as evidence of what the assurances were and have called the handbooks contractually binding.[176] There is a certain naive positivism in declaring a handbook to constitute the terms of employment, inasmuch as handbooks are often used more for internal managerial guidance than for describing or defining the

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[174] *See, e.g.*, Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1258 (holding that "absent a clear and prominent disclaimer, an implied promise contained in an employment manual that an employee will be fired only for cause may be enforceable against an employer," and discussing contrary authority and commentary), *modified*, 499 A.2d 515 (N.J. 1985).

[175] Matthew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733, 744.

[176] The use of disclaimers in employee manuals is discussed and cases are cited in Michael A. Chagares, *Utilization of the Disclaimer as an Effective Means to Define the Employment Relationship*, 17 HOFSTRA L. REV. 365 (1989); and Cynthia W. Scherb, Note, *The Use of Disclaimers to Avoid Employer Liability Under Employee Handbook Provisions*, 12 J. CORP. L. 105 (1986).

parties' expectations of the terms of the employment relationship. These might be reasons to treat the handbook as some, but not definitive, evidence of the terms of the relationship. Additionally, employers typically include in handbooks boilerplate provisions disclaiming any legal obligation that might arise from the handbook's assurances, attempting to protect themselves from being held legally accountable for the assurances they have made. Employers then argue that *none* of the assurances made in the handbooks are enforceable, and contend they are not the basis for liability under a theory of promissory estoppel because the employee cannot reasonably rely on assurances for which the employer has disclaimed legal responsibility. The employer essentially claims that legally enforceable obligations cannot arise because its document says they cannot.[177]

Courts perceive the legal significance of employee handbooks as a dilemma of contract law. The employer wants to use the manual or its policies to induce desirable employee behavior, to give the appearance of rational management and workplace due process, yet wants to be free to disregard the manual's policies and to act arbitrarily when the employer so desires. There may be cases in which a clear and conspicuous disclaimer should be interpreted to mean that an employer and an employee have agreed to look only to honor and good faith, not to law, to enforce the manual's assurances.[178] And there may be cases in which enforcement of the disclaimer might appropriately be denied under traditional contract analyses for mistake and unconscionability. But the majority of cases will not clearly present either situation.

The enforceability of provisions of employee benefit plans presents a similar dilemma. The employer wants the employee to feel secure in the knowledge that the employer's health insurance will cover any future illnesses, and not to feel insecure about the adequacy or generosity of the employer's benefit plan. But employers also want to control the extent of their future liabilities. Historically, employers dealt with this problem by leaving the terms of their plans vague or ambiguous, by not reducing plan promises to writing, by not providing employees written explanations of plan provisions, or by including in written plans a right to amend the plan to eliminate benefits previously or prospectively promised. One of ERISA's reforms, therefore, was to require that all employee benefit plans be maintained pursuant to a written document so that employees would be able to determine with precision what

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[177] *See, e.g.*, Dell v. Montgomery Ward & Co., 811 F.2d 970, 972–73 (6th Cir. 1987); Smith v. Neyer, 8 Indiv. Empl. Rts. Cas. (BNA) 1607 (E.D. Pa. 1993); Leahy v. Federal Express Corp., 609 F. Supp. 668, 670–72 (E.D.N.Y. 1985); *see also* Finkin, *supra* note 175, at 749.

[178] Finkin, *supra* note 175, at 749.

their rights were under the plan.[179] By requiring plans to be maintained in writing, and summaries of the terms to be distributed to employees, ERISA deals with part of the uncertainty problem. But ERISA does not address two significant subsidiary problems: what effect to give inconsistent unwritten promises or assurances, and what effect to give written disclaimers and reservations of rights to amend plan terms.

In addressing these two problems, courts have resorted to the same mechanical formalism that has characterized so much of the discussion of the enforceability of employee manuals and of disclaimers in them. Consider first the issue of the effect of unwritten promises. The problem has arisen in a variety of circumstances: an employer promises, orally and in letters and filmstrips, "lifetime" medical benefits "at no cost" but then later seeks to terminate or modify the promised benefits as permitted by the terms of the written plan;[180] an employer offers early retirement with a specific benefit package to an employee contrary to the terms of the written plan;[181] an employer maintains a written severance pay plan providing for generous severance benefits and seeks to pay reduced severance benefits based on an unwritten modification of the plan.[182] Each of these situations presents issues of fairness, reliance, and defeated expectations. The courts' most common response, however, has been to declare unenforceable any assurances made outside the terms of the formal plan document and the summary plan description.[183] What the courts have done, in effect, is to create out of the written plan reform an amalgam of the parol evidence rule and the Statute of Frauds which applies to all extra-plan promises.

Once a court determines (through whatever evidence is relevant) that a written contract is intended to represent the entire contract (*i.e.*, is fully integrated), the parol evidence rule limits the enforceable obligations of a fully integrated contract to those that are part of the written contract.[184] Specifically, the parol evidence rule prohibits one party to a written contract from asserting that prior or contemporaneous oral or written understandings external to the written contract are part of the contract. Extra-contractual evidence is admissible, however, for the purpose of determining whether the contract is

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[179] 29 U.S.C. § 1102(a)(1) (1988).

[180] Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 490 (2d Cir. 1988); *see also* Sprague v. General Motors Corp., 843 F. Supp. 266 (E.D. Mich. 1994).

[181] Rizzo v. Caterpillar, Inc., 914 F.2d 1003, 1005–06 (7th Cir. 1990); *see also* Cefalu v. B.F. Goodrich Co., 871 F.2d 1290, 1292 (5th Cir. 1989).

[182] Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1163 (3d Cir. 1990).

[183] *See supra* notes 63, 112–16; *see infra* notes 190–91, 209–11.

[184] E. ALLAN FARNSWORTH, CONTRACTS 447 (1982); JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 99 (2d ed. 1977).

integrated, or for interpretation of ambiguous terms. The rule is said to have the purpose of giving "legal effect to whatever intention the parties may have had to make their writing at least a final and perhaps also a complete expression of their agreement."[185] It gives the parties certainty about the nature of the contractual obligations.

The development of the parol evidence rule is conceptually and historically linked to the "objective" approach to the formation and interpretation of contracts, in which the contracting parties' actual subjective intent is irrelevant. The vagaries in the application of the rule reflect a persistent philosophical tension as to whether contract law is about effectuating the parties' subjective intent, or whether it is about devising a set of rules about what agreements reasonably should mean. The objective theory developed, it has been surmised, for two reasons: one was "a determination to keep factual questions down to a bare minimum," and the second was to prevent people from denying, when it was in their self-interest to do so in litigation, that their apparent intent was their real intent.[186] Consistent with the objective theory, the parol evidence rule precludes inquiry into actual historical intent. According to Atiyah, the parol evidence rule was a response to anxiety that, if parol evidence were admissible, "'every man's will and intention, however expressed, would be liable to be defeated, not . . . by his own defective expression of that will, but contrary to his own plainly declared intention.'"[187]

The transformation of the written plan requirement from a rule requiring employers to take steps to prevent employees from being misled to the current rule that unwritten promises of benefits are unenforceable represents the same development in the law that occurred in the nineteenth century: the formalism of the objective rules of contract formation and interpretation reduces factual questions (which presumably reduces litigation costs and promotes certainty) and prevents dishonesty. It reduces the unsavory possibility that substantial money judgments will turn on the self-serving testimony of employers or employees.

From the institutional perspective of courts, the exclusion of extrinsic evidence is an astute move. It vastly simplifies employee benefit cases for judges. The equation of the plan documents with the parties' intent makes other evidence irrelevant, and the cases can be disposed of on summary judgment.[188] However, the courts' concern with judicial efficiency is misplaced, for ERISA

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185 FARNSWORTH, *supra* note 184, at 451.

186 ATIYAH, *supra* note 159, at 459.

187 *Id.* at 460 (quoting Shore v. Wilson, 8 Eng. Rep. 513 (1842)).

188 *See, e.g.*, Miller v. Metropolitan Life Ins. Co., 925 F.2d 979, 986–87 (6th Cir. 1991); Guthrie v. Hewlett-Packard Co. Employee Benefits Org., 773 F. Supp. 1414, 1417 (D. Colo. 1991); *see also infra* text accompanying notes 259–89.

was arguably based on different premises. By granting federal courts the power—and in many cases exclusive jurisdiction—to protect employees, Congress subordinated the institutional concerns of federal courts to the needs of employees. To the extent that courts create rules of limited liability for reasons of judicial efficiency while portraying them as serving congressional intent, courts actually thwart that intent.

From the employers' perspective, the exclusion of extrinsic evidence is highly desirable. By ruling that only written documents are relevant, courts give employers the ability to control the scope of their liability for benefits. The employer is free of liability from the assurances made by sympathetic or misinformed personnel officers, or even from promises made by company officers whose word would in any other context bind the firm. As the Fourth Circuit put it, "Courts should hesitate to impose upon companies unwritten contractual liabilities."[189] The courts' hesitance is not without justification. Uncertainty about liabilities might discourage some employers from establishing plans (although, as I explain below, whether and the extent to which this is true is unclear, and it may be that the benefits of greater flexibility outweigh the costs of uncertainty).[190] Certainty may be important to multi-employer plans to prevent the plans from becoming obligated to pay benefits based on promises made by individual contributing employers when the plans' funding is based on different actuarial assumptions.[191] Certainty can be desirable for employees to prevent an employer from orally modifying a plan to make benefits less generous than promised in a summary plan description on which an employee may have relied. And certainty is also important to the single employer plan so that the employer may know the extent of its liabilities.

But certainty is not the same thing as absolute employer control.[192] Taken to its logical conclusion, the exclusion of extrinsic evidence totally vitiates the

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[189] Sejman v. Warner-Lambert Co., Inc., 889 F.2d 1346, 1350 (4th Cir. 1989), *cert. denied*, 498 U.S. 810 (1990).

[190] *See infra* text accompanying note 201.

[191] Chambless v. Masters, Mates & Pilots Pension Plan, 772 F.2d 1032 (2d Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986); Aitken v. IP & GCU-Employer Retirement Fund, 604 F.2d 1261 (9th Cir. 1979).

[192] Any employer whose lawyers have the foresight to include a clear and prominent provision reserving the right to amend or eliminate benefits can control its liability. Courts have uniformly enforced such provisions. *See* Boyer v. Douglas Components Corp., 986 F.2d 999, 1005 (6th Cir. 1993); Gill v. Moco Thermal Indus., Inc., 981 F.2d 858, 860 (6th Cir. 1992); Rizzo v. Caterpillar, Inc., 914 F.2d 1003, 1007 (7th Cir. 1990); Alday v. Container Corp., 906 F.2d 660, 666 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Sejman*, 889 F.2d at 1349–50; Ryan v. Chromalloy Am. Corp., 877 F.2d 598, 603–04 (7th Cir. 1989); Cefalu v. B.F. Goodrich Co., 871 F.2d 1290, 1296 (5th Cir. 1989); Musto v.

notion that courts seek to effectuate the intent of the parties. In fact, it makes it difficult to call whatever is enforced a contract at all. Recall, for example, *Hamilton v. Air Jamaica, Ltd.*, in which Air Jamaica included such a broad disclaimer in its severance pay plan that it in effect promised to pay benefits only when it wanted to.[193] Under traditional contracts analysis, Air Jamaica's promise might qualify as illusory, and, because it has not promised anything, there is no contract at all.[194] If a contract is illusory, a court can excuse the party whose promise is not illusory from performance and perhaps order restitution,[195] but neither of those remedies would help the employee. Alternatively, a court might exercise limited power to imply obligations to give substance to the illusory promise.[196] If the obligation implied were one of good faith, Hamilton might be aided rather little, as Air Jamaica could probably satisfy most good faith tests.[197] I consider in Part III(D) below some of the techniques available under modern contract law to deal with the problem of disappointed expectations. For the moment, it suffices to note that rather than pursuing these alternatives, the court endeavored to explain why construing the promise to be illusory did not offend ERISA's protective purposes.

The court began by asserting that since "ERISA does not require Air Jamaica to provide its employees with a benefits plan, nor does ERISA require that Air Jamaica provide any particular set of benefits, if it decides to establish a welfare benefits plan," Air Jamaica could offer benefits on whatever terms it

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American Gen. Corp., 861 F.2d 897, 900 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988).

[193] 945 F.2d 74, 78 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1479 (1992); *see supra* text accompanying notes 113–22.

[194] FARNSWORTH, *supra* note 184, at 72–82.

[195] *Id.* at 98–104.

[196] *Id.* at 74–78. For example, in Anthuis v. Colt Industries Operating Corp., which involved a severance plan that reserved total discretion to the employer to decide whether to award benefits, the court implied an obligation to make a case-by-case determination; on that basis, the court invalidated a blanket denial of benefits. 971 F.2d 999, 1008 (3d Cir. 1992). Referring to *Hamilton*, the court held that reservations of complete discretion are permissible, but that no discretion was actually exercised in the plaintiff's case because he had been denied benefits along with a whole group of employees solely because he had accepted another kind of bonus payment from the firm. *Id.* The dissent perhaps justly criticized the majority for failing to explain how a blanket denial of benefits to a group failed to constitute an exercise of discretion and for failing to offer guidance as to what sort of case-specific determination would suffice. *Id.* at 1014–15 (Cowen, J., dissenting). Nevertheless, the majority was struggling to impose some sort of limit on the employer's discretion, given the broad rule of *Hamilton*.

[197] *See, e.g.*, Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917); FARNSWORTH, *supra* note 184, at 75.

chose.[198] This conclusion is anomalous under contemporary contracts reasoning, for freedom to contract is not usually taken as a rationale for not policing the fairness of bargains at all. Moreover, in response to Hamilton's argument that this interpretation of ERISA would "render the protections of ERISA illusory," the court reasoned that the only protection ERISA offers is requiring employers to state in writing exactly what the benefits offered were, including the existence of a disclaimer.[199] The disclaimer, according to the court, put Air Jamaica's employees "on notice that they [had] no guaranteed benefits," and thus they could "bargain further or seek other employment if they are dissatisfied with their benefits."[200]

The court in *Hamilton* sought to explain not only why enforcing a boilerplate disclaimer of promises is not prohibited by ERISA, but why it actually "furthers the interest of employees":

> Employers are understandably more willing to provide employee benefits when they can reserve the right to decrease or eliminate those benefits. To the extent that employees have sufficient bargaining power to obtain guaranteed benefits, ERISA will enforce those rights and will ensure—through its disclosure requirements—that employees know what benefits they will receive. Therefore, allowing employer reservations of the right to make individual benefit determinations takes nothing away from employees who can command guaranteed benefits and will allow other employees to obtain benefits the employer would refuse to provide on a guaranteed basis.[201]

It is not clear whether enforcing disclaimers in fact makes employers more willing to *provide* benefits or, more likely, simply more willing to *promise* them. At worst, enforcing such disclaimers encourages employers to deceive employees about the real (and paltry) nature of their benefit plans. Although the *Hamilton* court assumed the employee was aware of the limits on the benefits because the disclaimer was written in the manual, the employee in fact claimed not to know of the disclaimer. To say that he is bound by the disclaimer because the disclosure means that the plan somehow reflects his intent is pure fiction.[202] The fiction skews the court's perception about the feasible ways that

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[198] Hamilton v. Air Jamaica, Ltd., 945 F.2d 74, 78 (3d Cir. 1991) (citation omitted), *cert. denied*, 112 S. Ct. 1479 (1992).

[199] *Id.*

[200] *Id.*

[201] *Id.* at 79.

[202] Stewart Macaulay was among the first to theorize about the challenges that form contracts present for traditional contract doctrine:

employees can protect their interests in the relationship. The court assumes that an employee is capable of bargaining for greater protection. This is plainly not true. Robert Hamilton, we may assume, had no idea that Air Jamaica's benefit plan was so evanescent. Bargaining only works if the parties know *ex ante* the terms of the arrangement. Since ERISA's disclosure obligations are not triggered until a person becomes an employee participant, the statute does not facilitate bargaining *ex ante*. Now that he knows, of course, it is too late. Relational sanctions might have some effect within the ongoing relationship because the employer might fear the morale problems that amending a plan or denying benefits might generate. In the severance pay context such as Hamilton's, however, the relationship has terminated and the employer has nothing to fear, except from current employees who may fear the same treatment. Additionally, as noted above, the group nature of employee benefit plans makes individual bargaining less feasible.

The employee, the court might say, has entered into a relationship with the employer in which the employer has the right to dictate the terms on which benefits shall be offered. The Third Circuit presumes consent to the terms of the plan by inference from consent to be in the employment relationship.[203] On this analysis, however, the legitimacy of onerous benefit plan terms must be identified by a different method, which the court does not do.

In sum, the difficulty with the courts' formalist approach to welfare benefits is that a promise such as Air Jamaica's—"We'll pay benefits when, if, and in whatever amount we choose"—cannot be said to reflect Hamilton's

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> For example, a company that manufactures paper uses a purchase order form printed on gray paper. On the back are a number of terms and conditions printed in such light gray ink that they can be seen only by holding the paper at an angle to the light. Clearly, if a court were ever to enforce any of these terms and conditions, it would be marching to some other ideology than "choice," even "choice" in one of its more extreme definitions. More difficult are the cases where the words are there in a form more easily read and understood but where the probabilities are very great that only the most suspicious will discover and translate them correctly. This is often true of printed form "contracts" and procedures for using them which are produced by large corporations to govern what to them are routine transactions. As we know, often these organizations attempt to use contract ideology to legislate privately; sometimes successfully, sometimes not. How then should we decide that one does or does not have a duty to read and understand?

Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1051 (1966) (footnotes omitted).

[203] *See* Ian R. Macneil, *Bureaucracy and Contracts of Adhesion*, 22 OSGOODE HALL L.J. 5, 20–21 (1984).

intent in any meaningful sense. Not only is the equation of plan language with actual, subjective, historical intent fictional, it is a particularly "deadening" sort of fiction.[204] The parties' relationship and their lives together are flattened into words on a page and the words dominate them. The diffuse nature of the parties' expectations and sense of obligation are collapsed into a few discrete and tightly bonded rights set out in the language of the plan instruments. One suspects that everyone—the employer, the employee, and the judge—must at least vaguely wonder why it is that the complexity of the relationship and the many different expectations cannot be reflected in the law. These cases have a peculiar fairy-tale quality in which judges are *compelled*, as if in a trance, to allow employers to deprive employees of basic human needs. No one is responsible, and although the outcome makes no sense, nothing can be done about it. "[I]t is the contract that governs, that 'does' everything, that absorbs all responsibility and deflects all other recourse."[205]

D. *Alternative Discourses*

There are, in some of the cases, traces of alternative discourses in which courts directly confront the substantive issues of entitlements and assume responsibility for designing rules to address the countervailing concerns. In these discourses, the debate shifts from formalist to functional or substantive regulatory terms. There are at least four well-developed ameliorative state common-law doctrines that occasionally surface in ERISA cases and that should be given closer scrutiny by courts.

First, there is the well-known principle of contract interpretation under which a contract, especially a form contract, is construed against the party that drafted it.[206] This interpretive rule is sensitive to the problem of interpreting language of a legal instrument that is dictated by one party. It was widely used in pre-ERISA pension cases under state law.[207] Since ERISA was enacted, however, courts only very occasionally have employed such a rule in construing employee benefit plan terms, and some have explicitly rejected the

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[204] PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 224 (1991).

[205] *Id.*

[206] *See* RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

[207] Rochester Corp. v. Rochester, 450 F.2d 118, 121 n.4 (4th Cir. 1971); Ehrle v. Bank Bldg. & Equip. Corp., 530 S.W.2d 482, 492 (Mo. App. 1975); *see also* Hurd v. Hutnik, 419 F. Supp. 630, 655 (D.N.J. 1976); Miller v. Dictaphone, 334 F. Supp. 840, 842 (D. Ore. 1971).

rule's application in the ERISA context.[208] By and large, courts seldom even address the question whether such a rule should be applicable. Perhaps the rule is alien to ERISA cases because parties seldom invoke it, but more likely its absence is because it is not applied to collective bargaining agreements, for there are separate rules of interpretation to advance the policies of fairness where a contract is actually negotiated. But interpretation of benefit agreements outside the union context is the classic situation calling for such a rule of interpretation: the document is drafted unilaterally by one party with far greater sophistication than the other, and the terms of the agreement are not negotiated. Such a rule of interpretation may not be necessary in every case. Where the court is reviewing a benefit plan administrator's interpretation of a plan in the context of reviewing a denial of benefits, the fiduciary principles may adequately guard against enforcement of unfair plan terms. But where the court interprets a plan term de novo, as where it considers an employer's actions in its entrepreneurial capacity in amending a plan, the principle of interpreting a contract against the drafter should be applicable.

A second strand of alternative discourse is found in the cases in which courts interpret the provision of ERISA that requires that plans be maintained in writing.[209] In the majority of these cases, courts read ERISA's written document requirement as meaning that oral evidence of employee benefit promises is not part of the "plan" and that oral promises are therefore unenforceable as plan terms.[210] Courts regard oral or written promises that are

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[208] Bower v. Bunker Hill Co., 725 F.2d 1221, 1223 (9th Cir. 1984). In *Taylor v. Continental Group Change in Control Severance Pay Plan*, the court explicitly rejected the contention that ambiguous plan terms should be construed against the drafter on the ground that the plan is more like an employment contract than like an insurance contract. 933 F.2d 1227, 1233 (3d Cir. 1991); *accord* Brewer v. Lincoln Nat'l Life Ins. Co., 921 F.2d 150 (8th Cir. 1990), *cert. denied*, 501 U.S. 1238 (1991). *But see* Kunin v. Benefit Trust Life Ins. Co., 910 F.2d 534 (9th Cir.), *cert. denied*, 498 U.S. 1012 (1990).

[209] 29 U.S.C. § 1102 (1988).

[210] ERISA § 402(a)(1) requires that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1) (1988). Some courts have interpreted this provision to preclude oral or informal amendments to plans, and thus to deny recovery on estoppel theories. Farley v. Benefit Trust Life Ins. Co., 979 F.2d 653, 659 (8th Cir. 1992); Awbrey v. Pennzoil Co., 961 F.2d 928, 930 (10th Cir. 1992) (extrinsic evidence of meaning of plan terms is inadmissible); Confer v. Custom Engineering Co., 952 F.2d 41, 43 (3d Cir. 1991); Hamilton v. Air Jamaica, Ltd., 945 F.2d 74, 77 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1479 (1992); Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1163 (3d Cir. 1990); Straub v. Western Union Tel. Co., 851 F.2d 1262, 1264–66 (10th Cir. 1988); Nachwalter v. Christie, 805 F.2d 956, 960–61 (11th Cir. 1986); Rosile v. Aetna Life Ins. Co., 777 F. Supp. 862, 871 (D. Kan. 1991), *aff'd*, 972 F.2d 357 (10th Cir. 1992). Occasionally the refusal to entertain extrinsic evidence benefits

not in accord with formal plan documents as putative amendments to a plan and therefore invalid because they are not made in accordance with plan procedures for amending the plan.[211] Whatever the actual understandings of the parties may have been, ERISA is read to make unenforceable any obligation with respect to benefits that is not part of the formal plan documents.

Some courts, however, treat the enforceability of extra-plan promises as raising claims of equitable estoppel.[212] Under the ordinary rule of equitable estoppel, a party who makes a misleading representation of a material fact to another, with the intent that the other rely on it, is estopped to deny liability when the other reasonably relies to her detriment on that representation.[213] The courts that decline to apply equitable estoppel in ERISA amendment cases do so on the ground that:

> Congress's purpose in requiring that benefit plans be in writing can only be served if the plan is enforced as written. When a party is estopped from asserting a right in a written plan, the plan as enforced is not the same as the

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employees, as when the employer seeks to show less generous plan terms than appear on the face of the plan. *See* Bellino v. Schlumberger Technologies, Inc., 944 F.2d 26, 32 (1st Cir. 1991).

Other courts, however, will enforce unwritten benefit promises on theories of equitable estoppel. Armistead v. Vernitron Corp., 944 F.2d 1287, 1298–1300 (6th Cir. 1991); Black v. TIC Investment Corp., 900 F.2d 112, 115 (7th Cir. 1990); Apponi v. Sunshine Biscuits, Inc., 809 F.2d 1210, 1217 (6th Cir.) (decided under the LMRA), *cert. denied*, 484 U.S. 820 (1987); Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1155 (9th Cir. 1986); Landro v. Glendenning Motorways, Inc., 625 F.2d 1344, 1355 (8th Cir. 1980); Coonce v. Aetna Life Ins. Co., 777 F. Supp. 759, 771 (W.D. Mo. 1991).

[211] *See, e.g.*, *Confer*, 952 F.2d at 43.

[212] National Cos. Health Benefit Plan v. St. Joseph's Hosp., 929 F.2d 1558 (11th Cir. 1991) (allowing recovery on equitable estoppel theory); Rosen v. Hotel and Restaurant Employees & Bartenders Union Local 274, 637 F.2d 592 (3d Cir.) (allowing estoppel under pre-ERISA law), *cert. denied*, 454 U.S. 898 (1981); Alday v. Container Corp., 906 F.2d 660 (11th Cir. 1990) (no estoppel), *cert. denied*, 498 U.S. 1026 (1991); Cleary v. Graphic Communications Int'l Union Supplemental Retirement and Disability Fund, 841 F.2d 444 (1st Cir. 1988) (no estoppel); Chambless v. Masters, Mates & Pilots Pension Plan, 772 F.2d 1032 (2d Cir. 1985) (no equitable estoppel against multi-employer plan), *cert. denied*, 475 U.S. 1012 (1986); Chesser v. Babcock & Wilcox, 753 F.2d 1570 (11th Cir. 1985) (no estoppel); Haeberle v. Board of Trustees of Buffalo Carpenters Healthcare, Dental, Pension and Supplemental Funds, 624 F.2d 1132, 1139–40 (2d Cir. 1980) (no estoppel).

[213] *Armistead*, 944 F.2d at 1298; *Black*, 900 F.2d at 115.

> plan as written. For this reason, ERISA would seem to preclude application of equitable estoppel to disputes over benefit plans under the statute.[214]

In allowing plaintiffs to recover based on an estoppel arising from extra-plan assurances, courts have emphasized that the writing requirement is principally to protect employee expectations, and to protect the actuarial soundness of funded plans. Where equitable estoppel would protect employee expectations and where, because the plan is a single-employer plan, liability by estoppel would not deplete a fund on which several employers rely, courts properly have allowed estoppel.[215]

Allowing employees to recover on an equitable estoppel theory is not, however, a complete solution to the problem of devising fair rules for honoring incongruent expectations. It is more difficult to establish liability under an equitable estoppel theory than it is to establish the enforceability of a promise on a contract theory because of the need to prove intent, misrepresentation, and reliance. Thus, if extra-plan promises are enforceable only under an estoppel theory, the liability of the employer or plan is more limited than under a contract theory.

Two other possible traditional common-law solutions to the problem of defeated expectations are the doctrines of promissory estoppel and unjust enrichment. Although plaintiffs invoked these doctrines relatively often (with only mixed success) before ERISA, these are the common-law doctrines least often seen in the reported decisions since.[216] Promissory estoppel allows enforcement of promises based on evidence of reliance by the promisee; unjust enrichment allows enforcement of promises when the promisee has conferred some benefit on the promisor.[217] The unavailability of these common-law remedies under ERISA in many cases leaves plaintiffs with fewer protections than were available before ERISA was enacted,[218] an anomalous result under a

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[214] *Armistead*, 944 F.2d at 1300 (summarizing Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1986)).

[215] *Id.* at 1300; *Black*, 900 F.2d at 115. *See generally* BRUCE, *supra* note 43, at 411–17.

[216] Kolentus v. AVCO Corp., 798 F.2d 949, 958–59 (7th Cir. 1986) (finding neither promissory estoppel nor unjust enrichment applicable), *cert. denied*, 479 U.S. 1032 (1987); Hurd v. Hutnik, 419 F. Supp. 630, 656–57 (D.N.J. 1976) (applying promissory estoppel); Hardy v. H.K. Porter Co., 417 F. Supp. 1175, 1181–82 (E.D. Pa. 1976) (no unjust enrichment); Lucas v. Seagrave Corp., 277 F. Supp. 338, 344–47 (D. Minn. 1967) (finding unjust enrichment).

[217] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981); FARNSWORTH, *supra* note 184, at 92–96.

[218] *See* Olson v. General Dynamics Corp., 960 F.2d 1418, 1423 (9th Cir. 1992). One particular anomaly is that promissory estoppel is available against plans when the plaintiff is

statute designed to improve upon pre-existing common-law regulation of employee benefits.

Promissory estoppel and unjust enrichment, broadly applied, could be quite subversive of an employer's power to control its employee benefit obligations, and this possibility obviously troubled the pre-ERISA courts that considered these theories. Ultimately, however, the state courts perhaps might have worked out an accommodation between the need to protect employees, on the one hand, and the potential to create vast and unforeseeable liabilities for employers on the other. The difficulties in applying unjust enrichment were just beginning to be worked out in the courts at the time ERISA was enacted. In a widely cited case, a court allowed employees whose termination in a corporate restructuring prevented them from attaining vested pension rights to assert an unjust enrichment theory that would allow them to recover the partial value of their pensions.[219] The argument was that the employer's actions prevented him from satisfying all requisites of pension eligibility, and that the employer should not reap the benefits of the employees' long service in anticipation of a pension and recoup the assets of the pension fund that would otherwise have gone to pay the terminated employees' pensions. A later case recognized the dangers (from the employer's perspective) of wide availability of an unjust enrichment theory: every employee terminated before attaining a vested pension could seek a recovery of the value of his service that would have been compensated by the pension.[220] Yet the court also recognized that in some cases such a recovery should be available, so the court suggested that the theory be available when there was no bargaining over the terms of the plan and no reason to believe that the parties themselves allocated the risk that

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someone other than an employee or plan participant. For example, in a case in which an employee health plan assured a participant and his health care provider that a treatment was covered by the plan, and in reliance the participant sought the treatment, the plan later denied coverage and sought to rely on the written terms of the plan to defeat the claim. The health care provider sued the plan on a promissory estoppel theory. This is the classic case of promissory estoppel: an assurance reasonably expected to induce action in reliance, and action in reliance where it would be unjust to allow the promisor to renege. The Tenth Circuit rejected the plan's argument that ERISA preempted the promissory estoppel claim and allowed the provider to assert the claim, but strongly suggested that if it were the employee who were asserting the claim, it would be preempted and ERISA would provide no remedy. Hospice of Metro Denver, Inc. v. Group Health Ins., 944 F.2d 752, 754–55 (10th Cir. 1991). In particular, the court said that although "preemption normally is not dependent upon the availability of ERISA remedies," because the plaintiff "is not a participant or a beneficiary . . . its lack of alternate remedies in the event of preemption is deserving of consideration." *Id.* at 755.

[219] *Lucas*, 277 F. Supp. at 345.

[220] Craig v. Bemis Co., 517 F.2d 677, 684 (5th Cir. 1975).

termination would prevent the employees attaining the benefit of the pension bargain.[221]

The process of creating and adjusting ameliorative rules for the enforcement of employee benefit agreements was in full swing in the state courts at the time ERISA was enacted. The federal courts, being perhaps less familiar with these common-law doctrines and the common-law approach to cases, have begun to do some of the same work, but have not yet come close to the point that state courts had reached at the time ERISA abruptly halted the process.

IV. THE ROMANCE OF CONTRACT

I began with Grant Gilmore's notion that the narrow scope of social obligation implicit in nineteenth-century contract theory expanded over the course of the twentieth century to the point that contract's hallmark consent-based theory of duty was supplanted by a broad range of societally imposed obligations. Or, to put it in Gilmore's oft-quoted terms, contract merged with tort to form "Contort."[222] In his view, the law of contract experienced an "erosion of the rigid rules of the late nineteenth century theory of contractual obligation," and expansion of "the range and the quantum of obligation and liability," to the point of a "socialization of our theory of contract."[223] I have suggested that the nineteenth-century version of contract is not dead yet, but is alive and well in ERISA cases. I now consider this question: what accounts for the resort to classical contract discourse in interpreting a statute that was meant to be at least a partial repudiation of some of the assumptions underlying such a discourse? Why are we still puzzled by the phenomenon that Roscoe Pound complained about nearly ninety years ago: namely, that "the legal conception of the relation of employer and employee [is] so at variance with the common knowledge of mankind?"[224]

In the previous part, I explored the explanations courts have offered for their choice of the free contract paradigm. In this part, I offer three interrelated, unspoken explanations for the persistence of contract. There is an explanation of external ideology that I call the appeal of voluntarism, one of internal legal ideology that I call the appeal of formalism, and one of institutional constraints that I call the problem of bounded obligations and federal common law. The three are not alternatives to one another: rather, each explains some aspects of the phenomenon, and the three work together, reinforcing certain unarticulated

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221 *Id.* at 685.

222 GILMORE, *supra* note 1, at 90.

223 KESSLER & GILMORE, *supra* note 6, at 1118.

224 Pound, *supra* note 105, at 454.

assumptions. As explanations, none of the three is entirely persuasive on its own; in combination, they offer a bit more.

The first phenomenon is straightforward: the ideology of voluntarism pervades the legal consciousness about the nature of the employment relationship and the limits on employers' responsibility for the welfare of their employees. The second is more subtle. Contract strikes judges as an appealing framework both because it is a conceptual habit learned in law school and because it offers apparently neutral, noncoercive, and legitimate rules for resolving conflicting moral claims. Contract allows judges to avoid, to renounce, and to obscure their responsibility for making difficult value choices with little statutory guidance. The third explanation focuses on the respects in which contract doctrine responds to institutional strains that Congress placed on the federal courts when it federalized the law of employee benefits without providing either specific substantive guidance for making difficult value choices or an agency to work out such choices in the first instance. The federal courts' choice of contract discourse reflects an understandable institutional reluctance to create a set of broad common-law rights that would necessarily be difficult to define and to administer.

A. *The Appeal of Voluntarism*

The easiest and most obvious explanation of the resurgence of laissez-faire era contract analysis in employee benefit cases, and an explanation that has no little force, is the ideological orientation of the law and, more specifically, the federal judiciary. The ideological orientation of a legal system can be assessed at different levels of sophistication and nuance. At the most unvarnished and simplistic extreme, one could note that many of the decisions were written by politically conservative or law-and-economics-minded judges. For instance, Judge Kennedy, a Carter appointee on the Sixth Circuit, and Judge Nelson, a liberal on the Ninth Circuit, wrote opinions in *Yard-Man* and in *Bower v. Bunker Hill*, respectively, that imposed greater obligations on employers to provide retiree health benefits than Judges Posner and Easterbrook, conservative Reagan appointees on the Seventh Circuit, were willing to allow in their opinions in *Bidlack*, or than Judge Manion, another conservative on the Seventh Circuit, allowed in *Ryan v. Chromalloy*.[225] Or, to take an example from another area of employment law, a liberal California Court of Appeal

[225] *Compare* United Automobile Workers v. Yard-Man, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) *and* Bower v. Bunker Hill, 725 F.2d 1221 (9th Cir. 1984) *with* Bidlack v. Wheelabrator Corp., 993 F.2d 603, 618 (7th Cir.) (en banc), *cert. denied*, 114 S. Ct. 291 (1993) *and* Ryan v. Chromalloy Am. Corp., 877 F.2d 598 (7th Cir. 1989).

justice and a noted labor law scholar, Joseph Grodin, wrote a seminal opinion creating implied contract protections against unjust dismissal, and the California Supreme Court under the stewardship of the liberal Chief Justice Rose Bird further expanded common-law protections against unjust dismissal; later, under the conservative Chief Justice Malcolm Lucas, the California high court narrowed those protections.[226]

The appeal of voluntarism is far more complex than simply the judges' personal politics. Laissez-faire opinions have been written by judges who are neither politically nor judicially especially conservative.[227] Liberal and moderate judges concurred in many more such opinions.[228] The appeal of the ideology of voluntarism must be more than simply a judicial sympathy for capital at the expense of labor.[229] Voluntarism is more deeply ingrained and holds a more pervasive grasp on American law than simply in labor and employment cases.[230]

By the time that courts came to interpret ERISA, they had firmly in their minds an image of labor law as being limited in its goals and orientation. The voluntarist ideology that the employment relationship should be shaped largely by private negotiation, with only minimal governmental direction, mediation,

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[226] *Compare* Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917 (Cal. App. 1981); Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980); Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 686 P.2d 1158 (Cal. 1984) (opinion of Bird, C.J., concurring and dissenting) *with* Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988).

[227] *E.g.*, Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155 (3d Cir. 1990) (Judge Becker).

[228] For instance, Judge Higginbotham joined in Hamilton v. Air Jamaica, Ltd., 945 F.2d 74 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1479 (1992); District Judge Pollak, sitting by designation, joined in Taylor v. Continental Group Change in Control Severance Pay Plan, 933 F.2d 1227 (3d Cir. 1991); and Judge Godbold joined in Owens v. Storehouse, Inc., 984 F.2d 394 (11th Cir. 1993), all of which allowed employers summarily to cut off benefits to employees.

[229] That judicial consciousness about legal protections for workers cannot be attributed simply to the judges' political affiliation or persuasions was demonstrated systematically in Title VII cases by Vicki Schultz and Stephen Petterson in *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1167–80 (1992). My suggestion that there is at most a correlation in ERISA cases is based simply on anecdotal evidence, and might have to be revised if one were to do a thorough study.

[230] Recently, it has been argued that "contract images and ideology exert a strong hold on the legal imaginations of the Justices" of the Supreme Court. G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433, 436 (1993). Shell traces the phenomenon of a federal common law of laissez-faire contract through many recent decisions of the Supreme Court, characterizing it as a "well-integrated, even radical, aspect of its pro-market jurisprudence." *Id.*

and allocation of obligations, had become the paradigm of federal labor law. Whatever potential for radical redistribution of power and wealth that existed in the federal labor legislation initially—a question as to which I am agnostic—by the early 1970s most judges regarded labor law as being about mediating interest group power.[231] More generally, the creation of the private welfare state in the 1940s marked the eclipse of the social democratic and redistributivist vision of labor law and labor politics.[232] Long before ERISA was enacted, the labor movement had given up serious effort to persuade policymakers to intervene in any substantial or systematic way in capital and labor markets. The voluntarist assumption underlying the courts' interpretation of ERISA is the same as that underlying their approach to the NLRA and to state common-law protections for individual employees: labor and management have equal power in the workplace and the law should enforce their formal contracts (but not their informal understandings) and should restrain really extreme abuses of power. Just as courts often resort to the need for managerial flexibility and the rights of property to derive a legal entitlement to managerial prerogative in labor cases (such as the right to replace striking workers,[233] the right to close plants without union involvement,[234] or the right to restrict employee access to union organizers[235]), so too do they invoke the same managerial preogatives in ERISA cases.

The contemporary appeal of voluntarism in labor cases is at least in part attributable to the modern penchant for analyzing legal issues from the premises of classical economics, although voluntarism's appeal is more profound than that. Law and economics thinking has become pervasive among the legal intelligentsia. Judges often assume, without evidence, that efforts to regulate working conditions tend to result in a reduction of wages or other collateral harms to workers.[236] Thus, courts have justified rejecting the possibility that ERISA should be interpreted to require the vesting of health benefits because granting employees greater entitlements to benefits would cause employers to

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[231] *See generally* Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978).

[232] *See* Lichtenstein, *supra* note 39; Gary Gerstle and Steve Fraser, THE RISE AND FALL OF THE NEW DEAL ORDER, 1930–1980, at xiii (Gary Gerstle and Steve Fraser eds., 1989).

[233] NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938).

[234] First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981); Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965).

[235] Lechmere Inc. v. NLRB, 112 S. Ct. 841 (1992); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

[236] *See supra* text accompanying notes 103, 143–47, 151.

refuse to offer such benefits at all.[237] This scenario may be true in some cases; it may not be in others. The point is, judges offer it as a reason for a cramped interpretation of ERISA without any evidence of the actual economic effects of a particular regulatory model.

Voluntarism has influenced the image of the employment relationship more generally. The notion that employees can bargain with their employers for the protections that the court declines to enforce as a matter of statutory right[238] is premised on a vision of an employee and employer haggling over terms of employment or terms of a benefit plan in a way that realistically seldom happens. The judicial imagination has been captured by the vision of the labor market as a daily auction in which each side can walk away to a higher (or lower) bidder if the other will not meet certain terms. While some labor economists have criticized the auction model, noting that in many firms the labor market is largely internal to the organization because both sides rely on the employee's firm-specific knowledge, the vision of the employee and the employer meeting de novo in the marketplace remains prevalent.[239] There may be some employment relationships that the labor auction model accurately describes, and those employees may indeed be better off under the laissez-faire contract rule than they would be if the courts imposed more expansive liabilities on employers. For most employees however, a market governed solely by laissez-faire legal rules will not produce an optimal amount of reliable social insurance. The laissez-faire contract model reflects a contested and at best partial vision of employment relationships, not a universal truth.

A related ideological explanation for the contract discourse comes from the prevailing culture of employee benefits. Outside the realm of Taft-Hartley plans, the culture of private pension plans had long been one in which the altruistic motives for establishing such plans were overshadowed by the employers' self-interest in maintaining control over the workforce. As the first historian of pension plans remarked in 1932, in private pension plans "the relief aspects have tended to decline in importance though perhaps never to disappear entirely, and economic motives have come more to the fore."[240]

The voluntarist framework of ERISA provided ample encouragement to these views and little reason to question them. The same images of managerial prerogative and the need for capital mobility that color the courts' view of the NLRA[241] and common-law protections for individual workers,[242] are reflected

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[237] *See supra* notes 143, 151, 201, and *infra* notes 257–58.

[238] Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155 (3d Cir. 1990).

[239] The literature on internal labor markets is discussed in Finkin, *supra* note 175, at 734, 742, 751.

[240] LATIMER, *supra* note 101, at 18.

[241] *E.g.*, cases cited *supra* notes 233–35.

in the voluntarist face of ERISA and are magnified through the prism of judicial interpretation. It takes an external crisis, such as the unanticipated increase of health care costs, to reveal to courts, and to the rest of us, just how much unrestrained power the employer has over the terms of employment and how vulnerable the employee is. The contract paradigm and the deference to private decisionmaking obscures these exercises of power from view in the vast majority of cases.[243] What is not seen cannot challenge the dominant way of seeing, and the dominant way of seeing keeps things from being seen.

B. *The Appeal of Formalism*

The preceding explanation for the continuing appeal of classical contract doctrine is not entirely satisfying. Even a thoroughgoing commitment to voluntarism does not compel reluctance to allow use of extrinsic evidence to prove contractual liabilities, unwillingness to interpret contracts against the drafter, or skepticism about the use of promissory or equitable estoppel as theories of liability. While voluntarist ideology might account for some of the discourse about bargaining and concern about limiting unanticipated employer liability, it does not account for the formalist rhetoric. The explanation for formalism lies, I think, in the reasoning and the nature of the issues themselves. While I am not prepared to launch a headlong assault on the task of explaining the appeal of formalism in legal doctrine, and I recognize the difficulty of inferring from the rhetoric of judicial opinions the actual motives of the judges themselves,[244] nevertheless, it is worth speculating briefly on what the discourse reveals.

The dominant image in much of the common law of labor and employment law has changed little over the course of the twentieth century: employees can and will bargain to protect themselves, and therefore, the common law need not treat them differently than participants in any commercial transaction. The prevalence of this image in the early decades of this century may be attributed to the legal training of the judiciary, their social class, and their politics, all

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[242] *See generally* WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES (2d ed. 1993).

[243] One image of social insurance that was seldom challenged until feminists gained political voice in the late 1970s was the gender bias of a regime that provided social insurance only through participation in the paid labor force. *See generally* Mary Jo Bane, *Politics and Policies of the Feminization of Poverty*, *in* THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES ch. 11 (Margaret Weir, Ann Shola Orloff & Theda Skocpol eds., 1988).

[244] *See generally* RICHARD A. WASSERSTROM, THE JUDICIAL DECISION (1961) (exploring the difference between discovery and justification in judicial reasoning).

without impugning their good faith. Those explanations are less persuasive now that all of us—including judges—are supposed to be legal realists.[245] Notwithstanding the trenchant criticisms of Legal Realism, Critical Legal Studies, and Critical Race Theory, law school trains all of us to be formalists, at least in our views of the nature of judicial decisionmaking. We may reject formalist approaches to problems in many circumstances, but the concepts are there when we need them. This is both the genius and the irrationality of the common law, Holmes's paradox of form and substance in the development of law, to which I have previously alluded:[246]

> [J]ust as the clavicle in the cat only tells of the existence of some earlier creature to which a collar-bone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from the merely logical point of view.[247]

The abstract formulas persist, but their content changes as the law adapts to social change. Thus, if we learn in law school that an enforceable contractual obligation consists of offer, acceptance, and consideration, and that the terms of the deal must be identified only by scrutiny of the offer and, perhaps, the acceptance, we will tend to apply that framework to any private consensual relationship. We see a relationship, we call it a contract, and all else seems to flow inevitably and naturally from that initial characterization, whether or not it makes any sense. In short, doctrinal rules serve a legitimating function and an orienting function, even though their logic is lost in the past.[248]

One circumstance in which the formalist tools come in handy is when judges are presented with irreconcilable claims or expectations, with strong moral claims on both sides. Formalist discourse allows judges to absolve themselves of responsibility for the difficult value choices they make, without even acknowledging that they are making such difficult choices. Confronted by the claim of an employee dying of AIDS without health insurance, the judge can say to herself: "I didn't consign him to his dismal fate; the law made me do it." This rhetorical gambit is not uncommon among judges confronted with wrenching choices. One reason for this phenomenon was suggested by the late Robert Cover in his study of fugitive slave cases in the antebellum era; judicial acquiescence to an unjust law

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[245] WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 382 (1985 reprint) (1973) ("Realism is dead; we are all realists now."); *see also* William Twining, *Talk About Realism*, 60 N.Y.U. L. REV. 329 (1985).

[246] *See supra* text accompanying notes 26–27, 126–27.

[247] HOLMES, *supra* note 26, at 35.

[248] *See* SELZNICK, *supra* note 128, at 53.

> was the result neither of a failure to appreciate the creative input of the judiciary, nor of a failure to understand the limitless bounds of discretion and of its exercise. Rather, the self-abnegation was the very product of the realization that judicial input was inevitable, substantial, and controversial. If the rhetoric of impersonality served as a response to critics of the judiciary, it also operated, among serious and conscientious men, as a limit upon self.[249]

If an employee benefit plan is a deal between employer and employee, the judge can legitimate his or her choice of a rule of limited obligation from that premise. The judge who wants to impose a more altruistic obligation on the employer has greater difficulty justifying her decision, except on the basis of fact-intensive arguments about unfairness or irrationality. That line of reasoning, however, reveals how deeply the judge is involved in defining the obligations of employer to employee.

The disavowing of the possibility of dividing unanticipated losses according to some notion of fairness, and the refusal to adopt rules that might do justice in particular cases, flow from an appropriate concern about the genuine difficulties of administering rules that do not allow a complete capitulation to managerial prerogative. As the stakes have grown higher in employee benefit cases, as the nature of the disputes has become publicized and politicized, formalism has grown more appealing.[250] In the absence of social or legal consensus as to whose expectations to protect, judges become more vulnerable to attack for deciding cases by imposing their own views rather than

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[249] COVER, *supra* note 84, at 147.

[250] In the years when ERISA was being debated, one saw a similar retreat to formalism in pension cases in which employees with long years of service were denied pensions for failure to comply with some rule of eligibility. For example, one court remarked:

> [W]e sympathize with plaintiffs' views that, after long years of faithful service with the Company which was concluded through no fault of their own, they ought to receive some pension benefits. However that may be, the clear language of four collective bargaining agreements between plaintiffs' union and the Company stands between plaintiffs and their requested recovery. Minnesota contract law compels the conclusion that where, as here, an employer and a union bargain time and again over employees' working conditions and establish specific requirements for the vesting of pension benefits, the courts must hold the parties to strict compliance with the terms of the contract.
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> . . . Courts must enforce contracts which may be morally and economically unreasonable, and so long as the law permits bloodless pension plans, we cannot supply this one with corpuscular circulation.

Craig v. Bemis Co., 517 F.2d 677, 686–87 (5th Cir. 1975).

the law. The judge, says Duncan Kennedy, "can respond to this with legalistic mumbo jumbo, that is, by appealing to the concepts and pretending that they have decided the case for him. Or he can take the risks inherent in acknowledging the full extent of his discretion."[251] The embrace of "legalistic mumbo jumbo," my study suggests, is an understandable judicial response when confronted with complicated cases that require explicit moral choices.[252]

An additional, and related, explanation for the formalism of the courts' common law is a hostility to overt judicial intervention in the society or the economy. The same judicial reluctance about ameliorative intervention in matters of social justice such as school desegregation, and the same minimalist approach to statutory interpretation that has led to hostility to implied statutory rights, is at work in these cases.[253] The courts' only task, as they see it, is to identify and to enforce the terms of the parties' agreement. The courts neither make or remake agreements nor judge the fairness of terms. All that is required for their task is a set of rules to apply. Formalism in legal reasoning is the product of laissez-faire as a legal philosophy.

Yet, formalist analysis is peculiarly inappropriate for mediating in an ongoing relationship. As I have suggested above, the law of contracts not only does not describe the mutual obligations in a long-term relationship, it does violence to the relationship when it is forced into the task. This has long been the received wisdom about interpretation of collective bargaining agreements. When resolution of a dispute under a collective bargaining agreement turns on an ambiguous provision, resort to "rules or canons of interpretation is neither practical nor helpful."[254] Courts "cannot, by occasional sporadic decision, restore the parties' continuing relationship" and their intervention may do as much harm as good.[255] Rather, "[i]n the last analysis, what is sought is a wise

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[251] Kennedy, *supra* note 6, at 1732.

[252] Perhaps too, as Duncan Kennedy hypothesized, there is a connection between a formalist discourse of rigid rules and substantive rulings of limited liability. In particular, Kennedy theorized that the twentieth-century *erosion of rigid rules* was causally linked to a *socialization* of the legal theory; that "[t]here *is* a connection, in the rhetoric of private law, between individualism and a preference for rules, and between altruism and a preference for standards," in that the same economic, political, and moral arguments tend to appear in defense of each. *Id.* at 1776.

[253] The Supreme Court's increasing unwillingness over the last 20 years to find implied private rights of action in protective statutes is traced in CHEMERINSKY, *supra* note 52, § 6.3.3. *See also* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1317 (1982).

[254] Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1016 (1955).

[255] *Id.* at 1024.

judgment. It is judgment, said Holmes, that the world pays for."[256] But faith to the role of the judge is thought to be inconsistent with deciding cases according to this sort of "wise judgment" that is valued in arbitrators. To craft a body of rules that recognizes diffuse obligations arising from complex relationships is contrary to the intellectual habits of the federal judiciary. And, as I suggest in the next section, it would tax the courts institutionally as well.

Law and economics thinking also tends to generate formalism in legal analysis. Formalist analysis generally favors bright-line rules; bright-line rules are in turn valued because they are predictable and therefore encourage transactions and reduce transaction costs. Further, rules give the illusion that judges intervene less in the economy than if judges were to attempt to decide cases based on moral judgments. And the courts' preferred rules appear to save courts time and to reduce the costs of dispute resolution. The reasoning that excludes extrinsic evidence of promises, that rejects estoppel theories or interpretation against the drafter, or any other protective standard, is generally justified by the claim that an attempt to intervene in the relationship to protect the employee will be counterproductive.[257] This proposition is a standard classical economic argument in favor of laissez-faire: "the theory is that permitting A to injure B may be the best way to save B from injury."[258] As I suggested above, this argument may have considerable force in some contexts, but in others it does not. The point is that some judges have adopted law and economics thinking without apparent awareness of its limits in any given case. The ideology shapes the legal consciousness, which shapes the discourse, which in turn perpetuates the consciousness.

C. *Bounded Obligations and Federal Common Law*

Many have observed that the ideology of voluntarism and the reality of human association are fundamentally at odds. The premises of voluntarism are

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[256] *Id.* at 1016.

[257] *E.g.*, Owens v. Storehouse, Inc., 984 F.2d 394, 398 n.5 (11th Cir. 1993); Senn v. United Dominion Indus., Inc., 951 F.2d 806, 817 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2992 (1992); Hamilton v. Air Jamaica, Ltd., 945 F.2d 74, 79 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1479 (1992); Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1160 (3d Cir. 1990); *cf.* FMC Corp. v. Holliday, 498 U.S. 52, 60 (1990); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11 (1987) (noting in dicta that preemption of state protective legislation may be desirable because "[a] patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them").

[258] Kennedy, *supra* note 6, at 1743.

that the parties in a relationship should define the terms of the relationship for themselves; voluntarism envisions a world of independent actors who create themselves and their relationships by making "determinate arrangements with predictable outcomes."[259] The reality of human association in the employment context is otherwise. The parties demand and expect commitment and loyalty; their relationship is one of interdependence, not simply reciprocity. The structure of the relationship transcends the subjective agreement or understanding of any particular individuals.[260] All of this is explicitly acknowledged in the context of collective bargaining: the need for a specialized legal structure to translate the social norms of industrial justice and self-government into legally enforceable norms is at the core of the importance of labor arbitration.[261] Indeed, the voluntarist system in the context of a long-term relationship could not work if it relied on litigation and judicial decision for enforcement.

The problem in the employment context is precisely that there is no legal institution capable of the delicate task of facilitating resolution of conflict and translating inchoate expectations in informal practices into legal commands. Courts retreat to formalism because the alternative model of arbitration and ad hoc decisionmaking is inconsistent with their vision of the federal judicial role.

The abstract formalism and the narrow rules of liability thus stem in part from the fact that courts must invent the rules with little aid from the statute and none from an expert agency. To translate diffuse social obligations into rules of law is difficult for an institution that does not have the ability that arbitrators have to decide cases on an ad hoc basis, to make clear compromises, to wander around the workplace to assess the likely impact of decisions and the justification for claims. Making normative choices among competing concerns, wading through long and conflicting testimony, and assessing the likely effects of rules on the conduct of others are tasks that, in some other areas of federal labor relations law, administrative agencies do in the first instance. Here, the federal courts do the task largely without the assistance even of the Department of Labor.[262]

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259 SELZNICK, *supra* note 128, at 55.

260 *Id.*

261 *See* Shulman, *supra* note 254, at 1024.

262 The Department of Labor promulgates regulations that play an important role in refining and fleshing out ERISA's commands with respect to fiduciary obligations in plan asset management as well as pension plan termination, and reporting and disclosure requirements for all plans. *See* 29 C.F.R. §§ 2510–2580.412–36 (1993). The Labor Department has not, however, issued any regulations dealing with the problem of welfare plan amendments.

The courts' institutional concerns are manifest at a mundane level as well. To create rules in which obligations would arise from beyond the scope of plan documents would make fewer cases susceptible to resolution on summary judgment.[263] Without an agency to make detailed factual determinations in the first instance, courts would commit themselves to a great deal more work if they were to adopt rules (such as estoppel or unjust enrichment) that demand inquiry into patterns of behavior and expectations that span the course of many years. And the work would not be easy. Arbitrating disputes over responsibility for the financial security of employees at their most vulnerable moments is a wrenching task. It is difficult to design rules that will most equitably balance the welfare of employees against the need to protect employers from unanticipated liabilities that might ultimately undermine the private employee benefit system. Further, courts express concern that liability issues might turn largely on the self-serving testimony of employees and employers about who said what to whom and when, creating incentives to distort, stretch, or ignore the truth.[264]

The complex and diffuse nature of the expectations and obligations in the employment relationship necessarily makes any effort to define and enforce legal obligations correspondingly complex. Because ERISA does not explicitly deal with this issue, but preempts all state law that might do so, federal courts have had to develop a legal structure as a matter of federal common law. Ever since the Supreme Court announced in *Erie Railroad v. Tompkins* that "[t]here is no federal general common law," federal courts have been reluctant to create it without clear authorization from Congress.[265] In ERISA cases, this reluctance has been manifested in an effort to create as few liabilities as possible.

Since *Erie*, there has been no general federal common law of contract. To the extent that federal courts handle contracts cases (in diversity), they apply state law of contract. They do not see their role as being to develop or to expand the state contract law, but simply to apply the rules as articulated by the state courts. Applying existing rules is a project quite different from being responsible for the development of new ones; rule application is likely to prompt a more mechanistic and conservative approach to adjudication than rule creation.[266]

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[263] *See* Bidlack v. Wheelabrator Corp., 993 F.2d 603, 605, 609 (7th Cir.) (plurality opinion), *cert. denied*, 114 S. Ct. 291 (1993).

[264] *See id.* at 607.

[265] 304 U.S. 64, 78 (1938).

[266] On the nature of common-law adjudication, see generally MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW (1988).

The federal courts have authority to create federal common law when Congress intends that they do so.[267] Thus, for example, following the Supreme Court's direction in *Textile Workers Union v. Lincoln Mills*,[268] courts created most of the law governing collective bargaining agreements under the authority of section 301 of the Taft-Hartley Act, which made such agreements enforceable in federal court but did not provide any substantive provisions to govern them.[269] The legislative history of ERISA makes it clear that Congress intended that courts create a body of federal common law to govern ERISA cases, and indeed, Congress even referred to section 301.[270]

Thus, there *is* federal common law, notwithstanding what the Court said in *Erie*. At times, the difference between statutory interpretation and the creation of federal common law to fill gaps in a statute is not readily apparent, particularly in ERISA cases.[271] Yet the very definition of federal common law makes it clear that the question of the employer's power to eliminate previously promised welfare benefits must be dealt with as a matter of common law: the problem calls for a "rule of decision that is not mandated on the face of some authoritative federal text."[272]

ERISA calls on the federal courts, in the limited area of employee benefits, to pick up where they left off when *Erie* was decided in 1938 and to engage in a broadly conceived task of creating and applying a modern common law of contract informed by ERISA's voluntarist and regulatory aims. Regrettably, courts have not been nearly as adventuresome or as creative in creating common law under ERISA as they have been in creating common law under section 301 of Taft-Hartley. Rather than tackle the problem of designing a body of law that would reconcile divergent and inchoate expectations, the courts have attempted to duck the problem entirely by creating as few liabilities as possible. The absence of common-law rules defaults to private power, which resides largely in the employer's hands.

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[267] Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 642 (1981); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); *see also* CHEMERINSKY, *supra* note 52, § 6.3.

[268] 353 U.S. 448 (1957).

[269] 29 U.S.C. § 185 (1988).

[270] *See* sources cited *supra* note 52.

[271] *See, e.g.*, Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?* 78 MICH. L. REV. 311, 332 (1980) (arguing that the difference between statutory interpretation and creation of federal common law to fill gaps in statute is one of degree).

[272] Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985); *see also* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986); CHEMERINSKY, *supra* note 52, § 6.1.

The reasons for the courts' reluctance are several. Unlike section 301, ERISA appears at first glance to be just as the Supreme Court described it: a "comprehensive and reticulated" statute that requires no interstitial lawmaking.[273] As the Court said in *Massachusetts Mutual Life Insurance Co. v. Russell*, "[w]e are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA."[274] Section 301 makes the need for federal common law obvious by providing absolutely no substantive rules itself; in ERISA the need is less obvious because the statute governs many areas in fine detail. The trouble with the Court's approach in ERISA cases is the erroneous assumption that the statutory scheme is comprehensive and was crafted with such care as to foreclose judicial supplementation.[275]

There are other reasons for the courts' reluctance to create common law under ERISA. In the last twenty-five years, the Supreme Court has been increasingly unwilling to create federal common law; in the *Lincoln Mills* era, the Court was less grudging.[276] The Court's unwillingness to create federal common law is grounded in separation of powers and federalism concerns: the Court does not want to trench upon the lawmaking authority of Congress or of the states. But those concerns are not implicated in ERISA cases. Congress plainly intended that courts supplement the statutory regime, and thus, there is no question of impinging upon Congress's domain. And by preempting all state law, Congress intended the states to have no role in regulating employee benefits. Therefore a federal common law of employee benefits will raise no federalism problems that have not already been raised by ERISA's extraordinarily broad preemption provision.

Indeed, it is the sweeping breadth of ERISA preemption that makes the federal courts' reluctance to deal with these issues so problematic. Although state common law regulation of employment has many failings, ERISA has made matters worse by preempting the efforts of those state courts and legislatures willing to grapple with the problem.

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[273] Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980). There is a similarity between the Court's reluctance to supplement ERISA's remedial scheme and the Court's reluctance to create a private right of action. *Compare* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) *with* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979). In both cases, the Court reasoned that the existence of some remedies in the statute evidenced Congress's desire that the statutory remedies be exclusive. The Court seems to think that if the statute is comprehensive as to some subjects, Congress must have intended to leave others unregulated.

[274] 473 U.S. 134, 147 (1985).

[275] *See generally* George L. Flint, Jr., *ERISA: Extracontractual Damages Mandated for Benefit Claims Actions*, 36 ARIZ. L. REV. 611 (1994).

[276] I am grateful to Erwin Chemerinsky for pointing this out to me.

Before ERISA ousted state law from the benefits field, the state courts had developed an extensive body of common law contract and trust principles for plans, and some of the law was more favorable to employees than the federal law that has replaced it.[277] For instance, state courts held that plans should be construed against the employers that drafted them and "liberally in favor of the employee."[278] The federal courts do not. To take another example, state courts had struggled with the problem of employers invoking boilerplate provisions that allowed unfettered discretion to eliminate promised benefits, and the courts were beginning to come down on the side of employees. As the Ohio Supreme Court reasoned in a much-cited case, "under our present economic system, an employer cannot offer a retirement system as an inducement to employment and, after an employee has accepted employment under such circumstances, withdraw or terminate the program after an employee has complied with all the conditions entitling him to retirement rights thereunder."[279] The court acknowledged the existence of the provision allowing the employer to amend or terminate the plan, but found it all but immaterial in the face of the common use of pensions as a form of deferred compensation to induce long service in an economy that depends on stability of employment.[280] The Ohio Supreme Court

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[277] *See* Flint, *supra* note 275, at 649–56.

[278] Rochester Corp. v. Rochester, 450 F.2d 118, 121 n.4 (4th Cir. 1971); *accord* Hoefel v. Atlas Tack Corp., 581 F.2d 1, 7 (1st Cir. 1978) (applying Massachusetts law, but citing law from other states), *cert. denied*, 440 U.S. 913 (1979); Ehrle v. Bank Bldg. & Equip. Corp., 530 S.W.2d 482, 492 (Mo. Ct. App. 1975) ("It is firmly established that the terms of a plan formulated by an employer in behalf of his employees, even if gratuitously instituted, are to be taken most strongly against the employer."); Stopford v. Boonton Molding Co., 265 A.2d 657, 665 (N.J. 1970); Davilla v. Court Employment Project, Inc., 383 N.Y.S.2d 140, 142 (Civ. Ct. 1976). *But see* Alt v. Long Island R.R., 365 N.Y.S.2d 480, 484 (Sup. Ct. 1975) ("Where the provisions are clear and unambiguous, they must be strictly construed and the Court may not rewrite the plan."), *aff'd*, 387 N.Y.S.2d 610 (1976).

[279] Cantor v. Berkshire Life Ins. Co., 171 N.E.2d 518, 522 (Ohio 1960).

[280] *Id.*; *accord Hoefel*, 581 F.2d at 5–6; *Rochester*, 450 F.2d at 122; Hurd v. Hutnik, 419 F. Supp. 630, 655 (D.N.J. 1976) ("Though the legal framework of the fund and its relationship to the collective bargaining parties were purportedly constructed to prevent the assumption of responsibility by the employers for the representations made to the employees, a court of equity will not permit the reasonable and justified expectations of those employees, knowingly wielded by the employers for whom they labored for so many years, to be frustrated in this manner."); Miller v. Dictaphone Corp., 334 F. Supp. 840, 842 (D. Ore. 1971); *Stopford*, 265 A.2d at 665; Sheehy v. Seilon, Inc., 227 N.E.2d 229, 230 (Ohio 1967). *But see* Kolentus v. AVCO Corp., 798 F.2d 949, 955–58 (7th Cir. 1986) (applying pre-ERISA law, electing to follow *Boase* rather than *Hoefel* line of cases), *cert. denied*, 479 U.S. 1032 (1987); Boase v. Lee Rubber & Tire Corp., 437 F.2d 527 (3d Cir. 1970).

even so held in a case involving insurance benefits other than pensions, which is obviously far beyond what courts have been willing to do under ERISA.[281]

One wonders whether some employer support for ERISA was not motivated by a fear, which might well have existed by 1974, that state courts were likely to protect employees more vigorously than the federal courts would under ERISA.[282] In any event, what is apparent is that before ERISA, courts exhibited a certain creativity and skepticism about legal doctrine, and a willingness to regard traditional legal categories and employer defenses as "legal fiction" and thus to cast them aside in an effort to do justice in particular cases.[283] The results were by no means uniformly pro-employee; many courts were as formalist before ERISA as the federal courts have been since.[284] But some employees did recover, and the rules that had traditionally limited employer liability became less efficient.

The aspects of the employment relationship implicated in welfare benefits, and the legal framework to address them, are traditionally concerns of state

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[281] *Sheehy*, 227 N.E.2d at 230.

[282] In this respect, employer support for the enactment of ERISA would be somewhat similar to employer support for the enactment of workers' compensation in the second decade of this century: employers in both circumstances noted emerging trends in cases in favor of employees and supported "moderate" reform legislation for fear that the state courts would ultimately accomplish more as a matter of common law than the legislation would achieve. *See* JAMES WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900–1918, at 40–61 (1968); Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

[283] *E.g.*, Gould v. Continental Coffee Co., 304 F. Supp. 1, 3 (S.D.N.Y. 1969), in which the court said, in allowing a plaintiff to recover a pension:

> In the instant case, the trustees are both defendant's agents and its principal officers and/or directors. Thus, despite the practical identity of interest which exists between the corporation and its trustees, defendant argues that there is a legal distinction between the trustees who declared plaintiff's forfeiture and the corporation which seeks to disavow any responsibility therefor. Such distinction is at best a legal fiction and cannot be recognized by this Court.

Id. Thus, the "two-hats" distinction that has been so universally accepted in current ERISA cases was at least sometimes rejected as fiction in pre-ERISA cases. *See supra* text accompanying notes 149–56.

[284] *E.g.*, Dwyer v. Climatrol Indus. Inc., 544 F.2d 307 (7th Cir. 1976), *cert. denied*, 430 U.S. 932 (1977); Craig v. Bemis Co., 517 F.2d 677 (5th Cir. 1975); Boase v. Lee Rubber & Tire Corp., 437 F.2d 527 (3d Cir. 1970); Alfaro v. Stauffer Chemical Co., 362 N.E.2d 500 (Ind. Ct. App. 1977). One wonders whether a thorough survey of the case law would reveal a greater conservatism among federal courts than among state courts of the era. My preliminary research suggests there was such a tendency.

common law of contracts and trusts. Many federal forays into the employment issues that were traditionally matters of state law avoided problems by not preempting state law (as in the case of wages and hours regulation[285]) or by establishing joint state-federal enforcement regimes (as in the case of antidiscrimination law[286]) so that the state machinery was not entirely shoved aside. Broad preemption of state law regulating unions and collective bargaining worked to the extent that it has in part because the Supreme Court took up the task of defining federal labor policy and in part because Congress gave the rest of the task to the National Labor Relations Board. With neither an expert agency nor the federal courts able and willing to articulate the policy, to decide the tens of thousands of cases, and to control the flow of litigation, federal preemption of issues that were traditionally concerns of state law has been problematic.

One should not overlook that these cases involve courts in issues that they regard as being at the periphery of the concerns of federal law. Labor relations has become a matter of federal law in the union sector, and some aspects of the employment relationship are commonly litigated in federal courts, notably safety and health,[287] and discrimination,[288] but implied contractual promises are otherwise governed by state common law. The doctrines at issue here—of the law of trusts and contracts—are traditional concerns of state law with which federal courts have limited experience. Finally, one should not underestimate the adverse reaction to the very notion of ERISA—it is widely regarded as being complicated, technical, confusing, boring, and decidedly unsexy. When the courts set about deciding cases involving complicated bodies of law with which many of the judges and most of their clerks have little familiarity and even less interest, one should not be surprised to discover that the opinions do not reflect the best of the federal courts' intellectual output.[289]

V. CONCLUSION

The failure of Congress to enact health care reform despite the apparent popularity of the idea in the 1992 election illustrates the intractability of the

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[285] Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (1988 & Supp. IV 1992).

[286] Civil Rights Act of 1964, 42 U.S.C. §§ 2000(a)–2000(h)(6) (1988 & Supp. IV 1992).

[287] Occupational Safety and Health Act, 29 U.S.C. §§ 651–678 (1988 & Supp. IV 1992).

[288] Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000(e) (1988 & Supp. IV 1992).

[289] I am not the first to notice that the Supreme Court's ERISA jurisprudence is of rather uneven quality. *See* John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 228–29.

voluntarism-entitlement tension in health insurance. The Clinton Administration's health financing reform proposal would have transformed basic health insurance into an entitlement by mandating that employers provide certain coverage and guaranteeing coverage for the unemployed.[290] The demise of proposals for radical health care reform suggests that the episode of legal development I have described here is not soon to be consigned to the dustbin of legal history. Even if some reform were passed mandating that employers provide minimum benefits, to the extent that employers provide benefits beyond the statutorily mandated minimum, the same problem of contract will arise. And, with respect to employee benefits other than health insurance, the same problems remain. Moreover, most of the proposals that were introduced in the 103rd Congress did not resolve the voluntarist-entitlement tensions. Nor can the tension be resolved except to the extent that the proposals eschew employer incentives in favor of mandates (as did the Clinton Administration plan[291] and the single-payer plan[292]). So long as Congress relies on voluntary private finance of health care, the tension between voluntarism and entitlements will persist.

As long as ERISA maintains the voluntarist strategy, courts will have to resort to some sort of contract principles for defining and enforcing obligations. But courts do have a choice in the kinds of contract rules they apply. The narrow and formalist rules that courts have chosen do violence to the statutory language and purpose. Without minimizing the institutional constraints on courts that make such rules particularly appealing, I hope I have shown the potential benefits of a system of rules that recognize the diffuse nature of obligations in the employment relationship. Estoppel theories and rules of interpretation that are more sensitive to the reality of adhesion contracts in the nonunion sector will doubtless make ERISA litigation even more complicated and difficult than it already is. Yet, however much judges may wish that Congress had assigned these value choices and factual inquiries to a specialized administrative agency, they are tasks that are not beyond the competence or the responsibility of the federal courts.

Skeptics might respond that judicial doubt as to competence or responsibility is not the issue and that the conservatism of the federal judiciary is. It seems to me to be too reductionist to believe that the apparent anti-employee bias in these cases is simply a product of the ideology of the judiciary and the law. That being so, it is worth showing that there are alternative paths

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[290] National Health Security Act, H.R. 1691, 103d Cong., 1st Sess. (introduced Apr. 5, 1993).

[291] S. 1757, 103d Cong., 1st Sess. (introduced Nov. 20, 1993); H.R. 1691, 103d Cong., 1st Sess. (introduced Apr. 5, 1993).

[292] H.R. 1200, 103d Cong., 1st Sess. (introduced Mar. 3, 1993).

that courts could follow in applying the statutory protections to the reality of the employment relationship. It has not been my project to explore in detail exactly what those paths might be, but rather to reveal and to account for the flaws in the path that the courts have taken. The best argument for that path not taken is that employees, those who depend on them for support, and the legitimacy of the law would be well-served by a more candid and creative approach to the problem of social insurance in the private welfare state.