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I. Introduction

In 1922, Roscoe Pound wrote that "[w]ealth in a commercial age is made up largely of promises."[1] The primary purpose of the Employee Retirement Income Security Act of 1974 ("ERISA") was to ensure that employers honored their promises to pay pension benefits to employees.[2] Congress had to protect employees, however, without discouraging employers from voluntarily providing pension plans.[3] As part of that balancing act, Congress decided to delegate substantial responsibility for administering ERISA to employers whose fiduciary role mandates that they protect employees who participate in ERISA plans ("participants") and their beneficiaries.[4]

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1. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 236 (1922), *cited in* John H. Langbein, *Rise of the Management Trust*, TR. & ESTATES 53 (2004).

2. Employee Retirement Income Security Act (ERISA) § 2, 29 U.S.C. § 1001 (2012); ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2012).

3. *Pension and Welfare Plans: Hearing on S. 3421, S. 1024, S. 1103 and S. 1255 Before S. Subcomm. on Labor and Pub. Welfare*, 90th CONG. 122 (1968) (statement of Sen. Jacob Javits).

4. *See* ERISA § 402, 29 U.S.C. § 1102(a) (2012).

ERISA permits executives and agents of the employer to serve as fiduciaries[5] but includes a broad definition of fiduciary to ensure that they act in the best interests of participants and beneficiaries instead of the employer. Anyone who has discretion to manage the plan or its assets or "has any discretionary authority or discretionary responsibility in the administration of such plan" is a fiduciary and subject to ERISA's enforcement provisions.[6]

New York Senator, Republican Jacob Javits, was a long-time proponent of pension reform. With respect to enforcement, Javits wrote:

> I think a single agency is required for the purpose and it will be a very difficult task to regulate the operation of the employee benefit

5. ERISA § 408, 29 U.S.C. § 1108(c) (2012) ("Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from. . . (3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.").

6. *Id.* ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (2012). As the conference committee explained:

> Under this definition, fiduciaries include officers and directors of a plan, members of a plan's investment committee and persons who select these individuals. Consequently, the definition includes persons who have authority and responsibility with respect to the matter in question, regardless of their formal title. The term 'fiduciary' also includes any person who renders investment advice for a fee and includes persons to whom 'discretionary' duties have been delegated by named fiduciaries.
>
> While the ordinary functions of consultants and advisers to employee benefit plans (other than investment advisers) may not be considered as fiduciary functions, it must be recognized that there will be situations where such consultants and advisers may because of their special expertise, in effect, be exercising discretionary authority or control with respect to the management or administration of such plan or some authority or control regarding its assets. In such cases, they are to be regarded as having assumed fiduciary obligations within the meaning of the applicable definition.

H.R. REP. NO. 93-1280, at 64-65 (1974) (Conf. Rep.).

> plans sufficiently to assure legitimate expectations of employee participation while avoiding undue and unnecessary interference in the operation of these plans. Overregulation or unnecessary regulation would be worse than none for it would deter the installation and improvement of these much-needed programs. We have to steer between frustrated expectations for pension plan members growing out of no regulation and frustrations caused by overregulation which will deter the employer from instituting a pension plan.[7]

Despite the consensus among most pension reform advocates that a single bureaucratic agency was preferable to fragmented bureaucratic jurisdiction, Congress (for the reasons discussed below) placed principal responsibility for enforcing the statute with two existing bureaucratic agencies rather than creating a single agency to regulate pensions and adjudicate disputes.[8]

The decision to rely on two agencies to enforce the statute paved the way for the federal courts to develop pension policy because Congress depended in part upon a private litigation remedy instead of placing the adjudicative function within the bureaucracy.[9] That remedy placed a heavy burden on plan participants to initiate and litigate their claims in federal court.[10]

Congress intended for courts to enforce ERISA's primary mission of safeguarding pension promises.[11] As was the case

7. *Pension and Welfare Plans: Hearing on S. 3421, S. 1024, S. 1103 and S. 1255 Before S. Subcomm. on Labor and Pub. Welfare*, 90th CONG. 122 (1968) (statement of Sen. Jacob Javits).

8. As discussed further below, participants and beneficiaries were authorized under ERISA to file lawsuits to enforce their rights under the statute, and the courts have sole adjudicative power under ERISA to resolve disputes between plan administrators and participants and beneficiaries.

9. *Private Pension Plan Reform Part II: Hearings Before the S. Comm. on Private Pension Plans of the Comm. Fin.*, 93d CONG. 222 (1974) (statement of Frank Cummings) [hereinafter "*Private Pension Plan Reform, Part II*"].

10. *See id.*

11. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2012).

before ERISA (when plan participants relied on trust theories and breach of contract to seek redress in court), however, the courts gave sustained deference to the decisions made by employer representatives.[12] Faced with fiduciaries who had more experience and expertise in the administration of benefit plans and their own conflicting objective of judicial efficiency, courts abdicated the role Congress intended for them to play in the regulation of private pensions after ERISA and expanded the delegation of authority to fiduciaries.[13] This left fiduciaries the power to decide all benefit claims essentially without supervision by an outside, disinterested party. And it left participants with little more protection than they had prior to ERISA.

Section II of this Article addresses how courts failed to adequately supervise employers administering pension plans before ERISA. Relying on a number of different legal theories—from an initial theory that pensions were gratuities offered by employers to the recognition that pension promises could create contractual rights—the courts repeatedly found ways to allow employers to promise much and provide little to workers expecting retirement security. In Section III, this Article addresses how Congress failed to create an effective structure for strong bureaucratic enforcement and the bureaucratic agencies with enforcement responsibilities failed to fulfill those functions. Finally, in Section IV, this Article discusses how the courts abdicated their duty to supervise ERISA fiduciaries once bureaucratic failings made ERISA's private litigation remedy and the supervisory function of the courts increasingly important.

As the government expands its role in regulating the provision of healthcare while maintaining employer involvement, an examination of the balance between employer control and worker rights under ERISA should inform implementation and enforcement of the Patient Protection and Affordable Care Act. While legislative battles over healthcare have dominated the news, this Article serves as a reminder

12. Brown v. Blue Cross & Blue Shield of Ala., Inc., 898 F.2d 1556, 1564 n. 7 (11th Cir. 1990).

13. *See* Mathew D. McCubbins, *Abdication or Delegation? Congress, the Bureaucracy, and the Delegation Dilemma*, 22 REG. 30, 37 (1999).

that the execution of laws can undo congressional bargains.

II. Pension Lawsuits Prior to ERISA

Prior to ERISA, employees faced many obstacles when challenging the pension decisions of employers in the courts. Consider the testimony of Frank Cummings, Chief of Staff to Senator Javits during the passage of ERISA, before the Senate Finance Committee on June 4, 1973 regarding the problems faced by a participant seeking to litigate against a pension plan.[14]

Cummings started his discussion at the point when a hypothetical participant tells a potential lawyer that "they owe him a pension" or "they are misusing the money in the pension fund."[15] The first of several problems facing the lawyer was to figure out who "they" are—what corporate entity employs the participant, who are the trustees, which bank holds the money, which insurance company (perhaps) funds the plan, and which unions and officers are involved.[16]

The next question is what jurisdiction's law to apply and whether a single court has jurisdiction over all of the relevant parties.[17] The individuals and entities that make up the less than cohesive "they" in question may be located in several different states, and the plan documents may not have a choice of law provision.[18]

The final—and most substantive question—is what legal claim the participant will assert and whether participants and their lawyers will have an adequate incentive to litigate.[19] If the lawyer argues misuse of funds by the plan, the recovery will go to the pension fund and not the individual plaintiff.[20] The plaintiff gets nothing except a more well-funded pension

14. *Private Pension Plan Reform, Part II*, *supra* note 9 (statement of Frank Cummings).

15. *Id.* at 221.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Private Pension Plan Reform, Part II*, *supra* note 9, at 221 (statement of Frank Cummings).

fund.[21] If the plaintiff sues to recover his pension, the value of the lawsuit is the net present value of one pension.[22] In either case, the benefit recovered, if any, will likely be too small to motivate most lawyers to tackle the complexities of pension law.[23] Only in the event of a class action lawsuit, which is typically organized and financed by a larger entity (such as a union), does the potential recovery justify the costs and uncertainties of litigation for prospective lawyers.[24]

With great foresight, Cummings concluded:

> In short, private lawsuits, under existing law, do not provide a meaningful remedy for the employee in most pension cases. What is needed is a national law, with a national agency to enforce it, which will get this whole matter out of the area of ordinary, garden variety, litigation, which simply does not work.[25]

As Cummings made clear, private litigation remedies did not sufficiently protect employees prior to ERISA.

A. *Pension Promises as Gratuities*

Beginning in the late nineteenth century and lasting until the middle of the twentieth century, courts viewed pensions as gratuities (*i.e.*, gifts) to be altered or withdrawn freely by employers.[26] Plan documents for pensions also limited an

21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 222. "You can't sue for a pension today. Even if the plan owes it to you, you can't sue unless someone is backing you or unless you have a class action. The legal fee for the first day of the lawsuit would exceed the amount of recovery." *Private Pension Plan Reform, Part II*, *supra* note 9, at 13 (statement of Frank Cummings).
26. The gratuity theory was followed in cases until the 1950s. JOHN H. LANGBEIN ET AL., PENSION AND EMPLOYEE BENEFIT LAW 134 (4th ed. 2006) ("Because the plan authorized the employer to revoke promised pension benefits at will, those promises were treated like a promise to make a gift in the future, which is unenforceable until the gift is actually completed. (Notice

employer's legal liability to employees, and courts found that offering pensions to employees created no judiciable rights.[27] For example, in *McNevin v. Solvay Process Co.*, the plaintiff sued to recover $52.54 from a pension fund established by his employer. [28] The court found that the amount credited to his "account" under the plan by his employer was a gift completed only upon "actual payment" and that the employee had no vested right to the money until payment.[29] In the governing documents, the employer had reserved the right to determine whether its employees were entitled to the "gift", and the court refused to review that decision:

> It seems to me that the scheme by which this fund is created is simply a promise on the part of the defendant to give to its employees a certain sum in the future, with an absolute reservation that it may at any time determine not to complete the gift, and if it does so determine, an employee has no right of action to recover the sum standing to his credit on the books of the pension fund.[30]

the similarity to the common law doctrine of employment at will.)").

27. Timothy J. Heinsz, *A Reappraisal of the Private Pension System*, 57 CORNELL L. REV. 278, 282 (1972); *see* Norman Stein, *Raiders of the Corporate Pension Plan: The Reversion of Excess Plan Assets to the Employer*, 5 AM. J. TAX POL'Y 117, 138 (1986) (stating the majority rule for early pension promises was that they were "more akin to charity than to earned wages" and reviewing a few representative cases and relevant treatises).

28. McNevin v. Solvay Process Co., 53 N.Y.S. 98, 98 (N.Y. App. Div. 1898).

29. *Id.* at 99-100.

30. *Id.* at 100; *see, e.g.*, Menke v. Thompson, 140 F.2d 786, 790-91 (8th Cir. 1944) ("The company was within its rights in providing that the pensions awarded under the plan were gratuities . . . By the rules and regulations promulgated by the company and administered by the Board of Pensions [an entity set up and controlled by the employer], 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."); Fickling v. Pollard, 179 S.E. 582, 583 (Ga. Ct. App. 1935) (Although the plaintiff argued the existence of an implied contract, the cessation of his disability pension payments was not actionable because the payments "amounted to no more than a gratuitous arrangement by the company for the payment, at its option, of pensions to old employees . . . [and] was 'expressly' made subject to denial, suspension, or permanent

Courts that denied participants their pensions emphasized the voluntary, non-contributory (*i.e.*, entirely employer funded) nature of the plans.[31] The gratuitous nature of these plans and the reservations of the employer's right to amend or cancel the terms at any time meant that employees' and retirees' pension benefits never vested.[32] Even in cases where the employer and the court acknowledged that the employer's pension promises benefited the employer through improved employee morale and increased tenure based on the promise of a pension, courts refused to find that pension promises constituted a binding contract.[33] Some courts still denied claims even when

discontinuance by the company at any time.").

31. *See* Neuffer v. Bakery & Confectionery Workers Int'l Union, 307 F.2d 671, 672 (D.C. Cir. 1962) ("Here, the Pension Plan voluntarily established by the appellee Union required no contribution from Neuffer or any other participant, and none was made. The Union could properly prescribe, as it did here, conditions on payment of pension benefits reasonably related to the Union's welfare."); Hughes v. Encyclopaedia Britannica, Inc., 117 N.E.2d 880, 882 (Ill. App. Ct. 1954) ("These provisions say that the defendant is paying the entire cost of the plan; that the payments are voluntary; that no contractual relationship is intended or created between the defendant and its employees."); Umshler v. Umshler, 76 N.E.2d 231, 233 (Ill. App. Ct. 1947) ("The uncontroverted evidence shows that the pension plan of defendant railroad company is wholly voluntary. All the benefits are paid out of the corporate treasury. No pension fund is provided, nor were any contributions required of or made by defendant Umshler or any other employee and, so far as the record shows, all the expense of the administration of the plan is borne by defendant railroad company.").

32. *See* Kravitz v. Twentieth Century-Fox Film Corp., 160 N.Y.S.2d 716, 719 (N.Y. Sup. Ct. 1957) ("The donor of a gift has the right to fix the terms and the objects of his bounty. The terms of the Retirement Plan give no vested rights to others than those specifically provided for. . . . The most that may be said for plaintiffs is that each enjoyed an inchoate gift. This never ripened into a vested one."); Dolan v. Heller Bros., 104 A.2d 860, 861 (N.J. Super. Ct. Ch. Div. 1954) ("[I]t seems well settled in other jurisdictions that a pension plan which is purely voluntary on the part of the employer and to which the employee makes no contribution, is not an enforceable contract, but a mere gratuity, in which the employee has no vested right until he begins to receive benefits thereunder.").

33. *See Hughes*, 117 N.E.2d at 882.

> Defendant concedes that an employer receives a benefit from instituting a pension plan by way of increased stability of employment and in the greater security and contentment of its employees and that it is largely for this reason it instituted and presently maintains such a program. It does not follow, however, that where a pension plan is placed into

recognizing that pension promises were a form of deferred compensation. As the New York Court of Appeals stated when denying former employees access to funds set aside in a retirement and profit sharing plan:

> There were some references in the testimony that a portion of the funds would otherwise have been distributed as bonuses, and in that sense the members were contributors. However, bonuses were gratuities which might or might not be distributed at the pleasure of the Board of Directors of the Company. It cannot be gainsaid, we think, that the benefits conferred on the Members of the Plan were tantamount to gifts, and the Company had the right, as the donor, to fix the terms and limitations of the gifts.[34]

As a federal appeals court noted in denying pension benefits: "No 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. It therefore had the right . . . to condition its bounty in such manner as it saw fit."[35] While pension law subsequently advanced beyond viewing pension promises as gratuities, the voluntary nature of our private

> effect the employee thereby acquires a vested right to have the plan kept in effect.

Id.

34. Fernekes v. CMP Indus., Inc., 195 N.E.2d 884, 887 (N.Y. 1963). *But cf.* Schofield v. Zion's Co-Op. Mercantile Inst., 39 P.2d 342 (Utah 1934). In *Schofield*, the court found that a contract did exist providing the retirees with a vested pension that could not be reduced. The terms of the pension plan stated that the purpose of the plan was to "encourage long and faithful service" and that after such service an employee would be entitled to a pension in the amount stated in the plan. *Id.* at 344-45. The court held that the pension acted as an inducement for the plaintiffs to continue their employment, and after their long service and the determination that they had met the terms required for the pension, no modification of the contract was possible by the employer. *Id.* at 345. The lack of equivocation and plan language carefully stating that the pension promised was a gift that could be modified or withdrawn at any point distinguishes this case from the bulk of pension claims during this era, however.

35. *Menke*, 140 F.2d at 790.

pension system remains.

B. *Pension Promises as Contracts*

Although in the decades prior to ERISA's enactment most courts ruled that pension promises were contracts and not gratuities,[36] "employees fair[ed] no better under this theory than they did under the gratuity theory."[37] Most judges believed that they had no choice but to favor employers and strictly construe the terms of the pension plans that they drafted.[38]

Neuffer v. Bakery & Confectionery Workers Int'l Union, highlights the evolution of pension jurisprudence from viewing pensions as gratuities to contracts. [39] The district court initially approved the defendant union's actions forfeiting a retiree's pension and terminating payments.[40] It held that there were "none of the essential elements of a contract" and it would not construe the terms of a "voluntary non-contributory plan strictly against an employer."[41] Since the employer reserved its rights to modify the plan and to determine eligibility and

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36. *See* Heinz v. Nat'l Bank of Commerce of St. Louis, 237 F. 942, 949-50 (8th Cir. 1916), for an early example of the recognition of contractual rights to a pension.

37. Heinsz, *supra* note 27, at 284; *see* Stein, *supra* note 27, at 138-39 (finding trend in case law towards recognition of unilateral contract rights through pension plans by the 1930s and stating that "some courts, faced with the argument that employees who were promised pensions just might have given some consideration—namely, their labor—found more satisfactory legal doctrines to deny many dissatisfied employees their pensions *most* of the time"). One dissenting judge protested a circuit court decision upholding an employer's termination of a retiree's pension, writing, "I am unwilling to endorse the employer's brutal treatment of a pensioner who served it for most of his mature life. We open ourselves to the charge that judicial concern for individual rights in this jurisdiction is confined arbitrarily and capriciously to criminal cases." Neuffer, 307 F.2d at 676 (Burger, J., dissenting).

38. *See* Wallace v. N. Ohio Traction & Light Co., 13 N.E. 2d 139, 143 (Ohio Ct. App. 1937) ("To hold otherwise, is to become involved in a discussion of purely ethical questions with no pertinent rule of law or related principle in equity to form a standard for our conclusion.").

39. Neuffer, 307 F.2d at 671.

40. Neuffer v. Bakery & Confectionery Workers Int'l Union, 193 F.Supp. 699, 700 (D.D.C. 1961).

41. *Id.*

forfeiture under the terms of the plan, the union was within its rights to suspend payments.[42] The appellate court, while still siding with the employer, found that the terms of the pension plan did create a valid contract between the employee and the union.[43] Any vested rights created by the plan were subject to reasonable conditions placed on the continued receipt of a pension, however, and the court "nevertheless enforces reasonable contracts."[44] The strongly worded dissent, on the other hand, affirms that a pension is now considered a contractual form of deferred compensation and not a gratuity but disagrees with the result reached by the majority.[45] Since the employer drafted the contract, it should have been strictly construed against the union.[46]

Under the "unilateral contract theory," a pension contract was created when the employer offered a pension plan and the employee accepted employment or remained on the job based in part on that pension—relying on the promise of a future pension and presumably accepting some decrease in current wages.[47] To qualify for a pension, the employee had to satisfy

42. *Id.*

43. *Neuffer*, 307 F.2d at 673.

44. *Id.*

45. *Id.* at 674 (Burger, J., dissenting).

46. *Id.* at 674-75 (Burger, J., dissenting).

47. *See* Heinsz, *supra* note 27, at 283-85; Stein, *supra* note 27, at 138-40; *see also In re* Schenectady R.R., 93 F. Supp. 67, 70 (N.D.N.Y. 1950) (holding that promised pensions were a part of the consideration for employees' labor under the collective bargaining agreement and that, like wages, vacation pay, and other benefits, pensions were "a part of the reward for his effort"); Hunter v. Sparling, 197 P.2d 807, 814 (Cal. Dist. Ct. App. 1948) ("[W]here the employer has a pension plan and the employee knows of it, continued employment constitutes consideration for the promise to pay the pension. The pension is considered to be deferred compensation."); Gearns v. Commercial Cable Co., 32 N.Y.S.2d 856, 858 (N.Y. Civ. Ct. 1942) (denying plaintiff's pension claims on other grounds but confirming that "it is doubtful if defendant arbitrarily could have refused payment as the plan was not merely a benefaction but a contract supported by plaintiff's consideration of continued services under the plan and his acceptance of other obligations under it."). *Compare* Sigman v. Rudolph Wurlitzer Co., 11 N.E.2d 878, 880 (Ohio Ct. App. 1937) ("During these years [the employee] was led to believe that 2 per cent of his earnings would be paid him when the company considered him more favorably in the position of a pensioner than as an employee receiving a full salary or wage. The appellant has made its election. It has concluded that he has reached the point of industrial old age. . . . He,

the terms set forth in the pension plan's governing documents—none of which he had any say in—and then had to hope he was not laid off from his job and that the employer remained financially sound.[48]

In *Texas N. O. R. Co. v. Jones*, for example, a Texas appellate court found that the defendant employer could not terminate the plaintiff's pension because he had been committed to a state-run mental facility.[49] Quoting the trial court decision, the appellate court found:

> That the offer made under said pension system was an inducement to the company's employees to remain in its service and render to it the long continued faithful service, giving their entire time to its service, as required, in order to reap the benefits offered under said pension system, and that the rendering of the long continued faithful service of its employees as required by it, was a benefit to the railroad company, and that

however, cannot be in good faith and justice denied the alternative held out by the employer as an inducement, for more than a quarter of a century, to continue service with the appellant.") *and* Wilson v. Rudolph Wurlitzer Co., 194 N.E. 441 (Ohio Ct. App. 1934) (refusing to allow the company to avoid its contractual pension obligation by firing an employee arbitrarily at age 65 because its pension promises were "a daily inducement to continuation of service and to exertion to satisfy"), *with* Bos v. U.S. Rubber Co., 224 P.2d 386 (Cal. Dist. Ct. App. 1950) (rejecting plaintiff's claim that his discharge at age 60 violated his pension contract because he had no right to retire under the plan at age 60 and receive a pension).

48. *See* Heinsz, *supra* note 27, at 283 (noting that even if an employee was able to "survive the hazards of job changes, layoffs, mergers, or business failures, and . . . meet all of the conditions of the employer's pension plan, the insurance contract or trust indenture, or the collective bargaining agreement, he may still be denied his pension."). In *Gallo v. Howard Stores Corp.*, the plaintiff sued to receive early retirement pension benefits after relying on a booklet issued by the company which failed to mention that the employee needed the company's consent to retire early and receive the pension to which he had contributed for years. Gallo v. Howard Stores Corp., 145 F. Supp. 909, 910 (E.D. Pa. 1956). Setting aside a jury verdict that ruled that the plaintiff's reliance on the booklet was reasonable, the court held that the booklet could not replace the tripartite contract between the employee, the employer, and the insurance company guaranteeing the pension benefits—a contract the plaintiff had never seen. *Id.* at 912.

49. *See* Tex. & N. O. R. Co. v. Jones, 103 S.W.2d 1043, 1046 (Tex. Civ. App. 1937).

> the offer and acceptance by performance constituted a mutual consideration.[50]

The court was careful to note, however, that the pension promise only became a "binding contract" *after* the employee had continued his employment with the employer until retirement and officially been awarded a pension.[51]

Finally, in a mistake not likely to be repeated by savvy employers following the case, the company failed to include an unconditional reservation of its right to terminate pension payments at any time in the plan documents, instead only reserving the right to cancel payments due to gross misconduct by the former employee.[52] Thus, many employees who forfeited their pensions still remained unprotected by the contractual framework.[53]

Even if an employee remained with his employer until retirement, an employee could still be denied his pension based on decisions by those administering the pension plan.[54] Employers created boards composed of their executives to administer pension plans, giving them the power to decide whether an employee qualified for a pension.[55] Their decisions sometimes had harsh consequences for employees.[56] For example, in *Menke v. Thompson*, a federal appellate court affirmed the denial of a pension to an employee of the Missouri Pacific Railroad Company from 1886 to 1932.[57] Any person who voluntarily left employment, even for a day, was denied a

50. *Id.*

51. *Id.* at 1045-46.

52. *Id.* at 1046.

53. *See id.*

54. *See id.*

55. Jones, 103 S.W.2d at 1045. Employees in collectively bargained plans at least had the representation of union officials on these boards. Heinsz, *supra* note 27, at 284.

56. *See* Wallace, 13 N.E. 2d at 143 (company could abandon its pension plan and any employees or former employees who had not yet qualified for a pension were not entitled to any benefits—no matter how close they were to qualifying for a pension); Heinsz, *supra* note 27, at 284 ("For example, boards have been allowed to disqualify employees whom they concluded did not meet physical disability requirements in a pension plan, despite medical evidence to the contrary.").

57. Menke,140 F.2d at 792.

pension under the terms of the plan, and Menke went on strike in July 1922 and did not return until October 1922.[58] Although the company argued that the pensions were gratuities, the court found that even under the unilateral contract theory, Menke was not entitled to his pension.[59] The terms of the plan gave the Board of Pensions nearly unbridled discretion to interpret (and amend) the rules of the plan and decide eligibility for a pension.[60] The Board's decision was final "'in the absence of fraud or such gross mistakes as imply bad faith or a failure to exercise an honest judgment.' The burden of proof . . . was upon the appellant here, and, to sustain such a showing, the evidence 'must be more than a mere preponderance, it must be overwhelming.'"[61]

Courts occasionally achieved equity in individual cases of hardship through other legal theories while leaving the general practice of deference to employers in place. Section 90 of the Restatement of the Law of Contracts provides:

> A promise which the promisor should reasonably expect to induce action or forbearance [of a definite and substantial character] on the part of the promisee. . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.[62]

58. *Id.* at 787-88.

59. *Id.* at 790-92.

60. *Id.* at 791 ("[T]he 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.").

61. *Id.* (internal citations omitted); *see* Dowling v. Texas & N. O. R. Co., 80 S.W.2d 456, 458 (Tex. Civ. App. 1935) (denying appellant a pension after he worked for his railroad employer for approximately thirty-four years because his voluntary separation of less than a year in the middle of his employment violated the plan's eligibility terms even though he "never had a copy of the rules and regulations with reference to the pension").

62. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981). An example that the Restatement gives of the concept is: "*A* promises *B* to pay him an annuity during *B*'s life. *B* thereupon resigns a profitable employment, as *A* expected that he might. *B* receives the annuity for some years, in the meantime becoming disqualified from again obtaining good employment. *A*'s promise is binding." Feinberg v. Pfeiffer Co., 322 S.W.2d 163, 163-68 (Mo. Ct. App. 1959).

Courts relied on the quasi-contractual theories of promissory estoppel and unjust enrichment to temper the worst injustices visited upon individual pension claimants.[63] Those theories were, however, applied narrowly and infrequently.[64]

Even when courts utilized quasi-contractual theories to protect workers' rights, the holdings were limited and did not affect the overwhelming legal bias in favor of employers. In *Lucas v. Seagrave Corp.*, the court used unjust enrichment and quantum meruit to reject a harsh enforcement of the pension contract. [65] *Lucas* involved the purchase by Seagrave of another company's assets and an assumption of its liabilities under a non-contributory pension plan.[66] After consummating that transaction, Seagrave terminated 30 of the 65 employees of the company it acquired.[67] The plaintiffs (terminated employees) contended that Seagrave terminated them to avoid making future contributions to the pension plan since forfeited pension credits could be used to cover those obligations.[68]

The plaintiffs in *Lucas* alleged that the accrued pension contributions were compensation for services already rendered,

63. West v. Hunt Foods, Inc., 225 P.2d 978, 982-83 (Cal. Dist. Ct. App. 1951) (holding that repeated promises made by management to the plaintiff that confirmed he would receive a pension according to the company's customary policy as he understood it may state a claim for promissory estoppel where they induced him to remain on the job – even though the plaintiff's understanding of the company's policy was incorrect); Hunter, 197 P.2d at 815-16 (finding in plaintiff's favor where he retired and received roughly half of his promised pension because even if a contract had not existed, the gift would be enforceable under the doctrine of promissory estoppel since the plaintiff knew about the pension promise and rejected other offers of employment in reliance on the promise of a future pension).

64. Hughes, 117 N.E.2d at 883 (holding that the employer's pension plan constituted an unenforceable gratuity and rejecting plaintiff's theory of promissory estoppel because "there is no fraud, no intent to deceive and no detrimental change of position" by the employee); Sbrogna v. Worcester Stamped Metal Co., 234 N.E.2d 749 (Mass. 1968) (denying claim of unjust enrichment where all of the plaintiffs' previously-purchased retirement annuities were cancelled by the defendant employer when they went on strike after the expiration of their union's collective bargaining agreement with the employer).

65. Lucas v. Seagrave Corp., 277 F. Supp. 338, 344 (D. Minn. 1967).

66. *Id.* at 340.

67. *Id.*

68. *Id.*

and they were therefore entitled to recover the value even if they did not meet the terms of the pension contract.[69] Although the court discussed how participants generally did not have vested pension rights unless they had strictly met the terms of the plan, the court "found no decision which has ruled directly on the assertion of a quasi-contractual right of recovery of pension benefits on the basis that such benefits are essentially a form of compensation."[70] Instead, relying on cases about collective bargaining agreements where pensions were held to be a component of wages, the court found that as an employee approaches retirement age, pension accruals "may even overshadow his cash wages as consideration for his services."[71] Although noting that "present decisions apparently give no weight or recognition to the existing and accepted characteristic of pension plans as a mode of employee compensation," the court found theory rooted in quasi-contract for protecting these workers terminated by an employer allegedly attempting to avoid its obligations while retaining the value of the unpaid services of the workers.[72]

While the *Lucas* case may seem to be an example of judicial activism at its best, the procedural posture of the case is a motion for summary judgment.[73] Thus, in the end, all the court does is to deny defendant's motion and allow that plaintiffs in such an egregious set of circumstances may have a claim in quasi-contract if they can develop the facts to support their theories—a difficult endeavor.[74] More importantly, the plaintiffs must prove that the employer acted in bad faith by terminating the employees because simply dismissing an employee nearing retirement who had not yet vested in his pension rights would not be actionable. The employee was found to have assumed such a risk.[75] As the court stated:

69. *Id.* at 339-40.

70. *Id.* at 343.

71. Lucas, 277 F. Supp. at 343.

72. *Id.* at 344-45.

73. *Id.* at 339.

74. *Id.* at 346 ("At this stage of the record it is not clear whether the facts of the instant case justify such a recovery.")

75. *Id.*

> [I]t seems harsh to assert that employees assume knowingly the risk of all contingencies which might prevent their recovery of benefits; as if the plan were a negotiated contract agreed upon through arm's length bargaining. It hardly seems equitable to apply the literal contract language, which may not have been inserted to cover such a situation, to uncritically rule that employees bear the risk of a group termination which may not have been contemplated by the contract or the actuarial expectations upon which the plan is funded. Such a literal enforcement of plan provisions may defeat rather than foster plan purposes. This approach seems particularly unjustifiable where there may be indications of bad faith or where the doctrine of unjust enrichment is invoked.[76]

Thus, even after courts acknowledged that employees had contractual rights with respect to pension promises, few courts were willing to deviate from enforcing strictly contracts written and enforced by employers to meet their needs—leaving workers with little recourse.[77] As two law students presciently

76. *Id.*; James E. Coleman & Jonathan Herlands, *Private Pension Plans: The Prospects for Reform*, 5 COLUM. HUM. RTS. L. REV. 465, 477-78 (1973).

77. Some advocates for pension reform in the years leading up to the passage of ERISA argued that courts should use a theory of deferred wages to adjudicate pension disputes. The germs of the theory can be seen in the *Lucas* case discussed above, *see supra* text accompanying notes 65-76, but are fundamentally derived from cases holding that pensions are considered wages for the purpose of collective bargaining. *See generally* Inland Steel Co. v. NLRB, 170 F.2d 247, 251 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 ("While, as the Company has demonstrated, a reasonable argument can be made that the benefits flowing from such a plan are not 'wages,' we think the better and more logical argument is on the other side, and certainly there is, in our opinion, no sound basis for an argument that such a plan is not clearly included in the phrase, 'other conditions of employment.'"). The deferred wages theory holds that when an employer contributes to a pension plan on an employee's behalf, these contributions are wages withheld and the employee's property. Comment, *Consideration for the Employer's Promise of a Voluntary Pension Plan*, 23 U. CHI. L. REV. 96, 102 (1955). As a result, the employee's right to the funds vests immediately when they are withheld, and he does not forfeit this property even if terminated for cause. *Id.* at 103;

wrote in a journal article on the eve of ERISA's passage:

> In view of the many possible ways employees can lose their benefits, it would seem logical and desirable as a matter of public policy for the courts to strive to safeguard the rights of pension plan participants. . . . [T]he courts have not attempted to achieve this aim. . . . [T]he courts' strict interpretation of pension plans, the paucity of available legal theories to support recoveries by employees, and the hesitancy of the courts to utilize those few theories that have been accepted, have vitiated the potential of the judiciary to champion workers' rights and institute reform.[78]

III. The Triumph of ERISA's Private Litigation Remedy

While struggling over the details of pension reform, Congress sought to regulate a field dominated by the private actors who had administered pension plans for decades without significant government intervention. Proposed legislation left

Coleman & Herlands, *supra* note 76, at 478-79 (quoting Senator Williams: "Pensions are not gratuities, but earnings saved and deferred to retirement. They represent compensation which the employee would have received in his paycheck had he not belonged to a pension plan."). While many argue that a theory of deferred wages presents itself in the cases under the contractual framework because deferred wages form a basis for finding the consideration necessary for contract formation, this theory takes a leap to immediate vesting not found in the case law.

The theory of deferred wages does have its problems, although it at least respects the importance of pension promises. First, when focusing on the defined benefit plans more prevalent at this time, pension benefits are based on a formula that emphasizes earnings late in a career and years of service – reducing the value of pension benefits accrued for much of an employee's earlier service and stacking the deck for work in later years. *Id.* at 467. Second, the goal of private pensions is to help workers maintain quality of life during retirement. *Id.* at 479. Treating pension accruals as wages may result in a feeling that employees should have the right to spend the money now instead of engaging in the always difficult process of delayed gratification. *Id.* Pension portability would help solve the temptation to treat deferred wages as current wages, however. *Id.* at 467, 479.

78. Coleman & Herlands, *supra* note 76, at 474.

the task of daily administration of private pensions to employers and their representatives.[79] Any legislation requiring employers to fund pension plans with no control over who would receive a pension, when, and for how much would discourage the formation or maintenance of these voluntary plans.[80]

Given the extent of the authority it was delegating to employers as fiduciaries, Congress faced an important question when deciding who would enforce the bargain reached to better protect workers against abuses: (1) the bureaucracy—and if so, which agency, or (2) the courts. In the end, Congress split regulatory authority between the Department of Labor ("DOL") and the Internal Revenue Service ("IRS") to resolve conflict between congressional committees, bureaucratic agencies, and interest groups.[81] The result was overlap, confusion, and inefficiency, which left the bulk of the ERISA enforcement responsibilities to the courts and to the participants themselves who would initiate lawsuits in the absence of bureaucratic enforcement.[82]

A. *The Death of the Single Agency Proposal*

In his congressional testimony discussed above, Frank Cummings argued that because pension rights were litigated rarely as a result of the large costs involved and the small potential recovery, "you need an agency to enforce these private rights, or a union."[83] But which agency? The Department of

79. *See generally Private Pension Plan Reform, Part II*, *supra* note 9.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 138 (statement of Frank Cummings). Cummings asserted that the Internal Revenue Service could not be an enforcement agency because:

> [i]t isn't equipped to enforce private rights. Only the Labor Department is, which, after all, enforces private rights all the time. For example, if you don't pay time and one-half for overtime, you go to the Labor Department and the Labor Department says "do it" and it goes into the court and the judge says "do it." So, if you want to protect private rights, you have to create private rights and you have to create an

Commerce was viewed as favorable to business, while the Department of Labor supposedly sided with workers. [84] The Internal Revenue Service already helped regulate the tax qualification of pension plans.[85]

The debate over where to place enforcement authority within the bureaucracy embroiled congressmen, their committees, and their business and labor constituencies for years.[86] Their inability to agree on where to locate enforcement duties doomed the proposal of a single, powerful agency regulating private pensions and consequently enhanced the significance of the private litigation remedy.[87]

When Senator Javits introduced the first comprehensive bill for pension reform, the Pension and Employee Benefit Act of 1967, he proposed a single agency with oversight—"an independent commission that would have jurisdiction over the new regulations as well as most existing federal oversight of employee benefit plans."[88] Drawing on recent pension

agency that will enforce those private rights.

Id. at 139.

84. While unions and the Democrats who traditionally represented them favored enforcement by the DOL, employers favored the Securities and Exchange Commission or Internal Revenue Service since the Department of Commerce lacked expertise in the area. *See* JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 47 (2004).

85. *Id.* at 45.

86. *Id.* at 45-49.

87. Controversy over which part of the bureaucracy should have oversight of pension regulation began in the decades prior to ERISA's enactment as momentum for pension reform built. Legislation to force increased and more accurate disclosure from plans was gutted prior to passage because of disagreement over the location and extent of enforcement powers. An Eisenhower bill from January 1956 required pension plans to report to the DOL, the traditional regulators of the employment relationship. The Douglas-Ives-Murray bill introduced in May 1956 in the Senate, however, provided that pension plans would register and file reports with the SEC. Employees would receive summaries of plan terms, and the SEC could penalize incomplete or inaccurate disclosure with fines or imprisonment. In the end, the Welfare and Pension Plans Disclosure Act of 1958 placed oversight within the DOL but denied automatic disclosure to employees and eliminated penalties for false statements, omissions, and even embezzlement. Thus, the legislation denied the DOL "the investigative and enforcement authority it would need to implement the law." *Id.*, at 45-49, 121-22.

88. *Id.* at 129-30. Senator Williams also called in February 1972 for "the centralization in one agency of all existing as well as prospective regulation of

legislation in Ontario,[89] Javits' "United States Pension and Employee Benefit Plan Commission" would have included five members appointed by the President with the advice and counsel of the Senate.[90] Among the duties of the Commission were "to promote the establishment, extension, and improvement" of pension plans and to register or decline to register plans.[91] As part of those duties, the Commission had the power to inspect the books and records of pension plans and broadly "to require any such administrator, employer, insurer, trustee, or other person to furnish, in a form acceptable to the Commission, such information as the Commission deems necessary for the purpose of ascertaining whether this Act and regulations of the Commission hereunder have been or are being complied with."[92]

Although those working on pension reform had assumed that all vesting, funding, and termination insurance proposals would amend the tax code, Javits and his staff placed all elements of his bill under the labor laws to avoid the powerful and hostile House Ways and Means Committee and instead give jurisdiction to the Senate Labor Committee.[93] Thus began a lengthy battle between congressional committees with jurisdiction over labor matters and those supervising taxation.[94] The single agency proposal fell victim to the jurisdictional dispute.[95]

As soon as Javits proposed a single agency to administer pension reform, opposition to the idea arose. A memorandum

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private pension plans." *Id. at* 177.

89. *See* Province of Ontario, Pension Benefits Act, R.S.O. 1 1965 (Can.); Letter from Allen E. Kaye to Frank Cummings (Mar. 7, 1966) (on file with Senator Jacob K. Javits Collection, Special Collections, Stony Brook University Libraries); Letter from R. M. Gaby to Allen E. Kaye (Mar. 21, 1966) (on file with Senator Jacob K. Javits Collection, Special Collections, Stony Brook University Libraries); Letter from Laurence E. Coward to Allen E. Kaye (Mar. 24, 1966) (on file with Senator Jacob K. Javits Collection, Special Collections, Stony Brook University Libraries).

90. Pension and Employee Benefit Act of 1967, S. 1103, 90th CONG. § 3(a) (1st Sess. 1967).

91. S. 1103 at § 4(a).

92. *Id.* at § 4(b).

93. WOOTEN, *supra* note 84, at 129-31.

94. *See generally id.* at 130-180.

95. *Id.* at 178.

from the Bureau of the Budget ("BOB Memo") dated September 8, 1967 explains why even without "thorough study" of current and prospective pension regulation, "[i]t does not appear feasible to vest all functions relating to pension plans in a single agency" and "[i]t does not appear feasible to vest the new functions, or the existing functions which may be separable, in a new agency."[96] The BOB Memo argued that a single agency was unworkable because pension functions already performed by existing agencies were tied to their core missions.[97] For example, the IRS determination of qualification for tax deductions was related to basic tax administration.[98] "Similarly, Labor's functions with respect to bargaining rights and overtime rate computations with respect to pension plans do not appear separable from its broader role in those areas."[99] No explanation of why these tasks could not be performed by a different agency is given.

The BOB Memo finds problems with creating an independent agency to administer and enforce pension regulation—or as much as can be separated from existing agencies:

> Such an agency, even with the broadest possible program now envisioned, would be small and isolated from the major policy-making agencies of Government. It would have little chance of access to the President, and problems could develop in trying to develop its programs in the context of related programs affecting the labor force and income maintenance in other agencies.[100]

The Johnson administration task force considering pension reform opposed bureaucratic consolidation for practical

96. Memorandum from the Exec. Office of the President, Bureau of the Budget, Howard Schnoor for Mr. March on Organization For Private Pension Plan Program (Sept. 8, 1967) (on file with the Senator Jacob K. Javits Collection, Special Collections, Stony Brook University Libraries).

97. *See generally, id.*

98. *Id.* at 2.

99. *Id.*

100. *Id.*

reasons.[101] Representative Wilbur Mills, chairman of the House Ways and Means Committee, opposed many of the reforms proposed.[102] Focusing on substantive reforms in areas such as vesting and funding, the task force wanted to avoid Mills by drafting a bill under the jurisdiction of labor committees in Congress and enforced by the DOL.[103] This made consolidation of the IRS' current pension duties impossible at the time (although Mills and congressional tax committees later become involved in pension reform).[104]

For the next several years, Javits continued to push for a single agency to enforce ERISA within the bureaucracy. On May 14, 1969, he again introduced legislation that sought to "establish an SEC-style agency" that would have oversight of new pension standards and "any existing regulatory standards dealing with pension and welfare plans that now rest in other Federal agencies."[105] Recognizing the deep divisions even among those involved within the pension reform movement, Javits hedged: "I do not, however, claim that this bill represents the only way of dealing with problems in the pension field; there are other approaches which can and should be explored."[106]

Further study of the structure of pension regulation emphasized the political difficulties of consolidating enforcement within a single agency while acknowledging its benefits. The Secretaries of Labor and Commerce on April 14, 1969 charged a Joint Task Force with reviewing the "'security' issues of vesting, funding, insurance and portability."[107] The

101. STEVEN A. SASS, THE PROMISE OF PRIVATE PENSIONS: THE FIRST HUNDRED YEARS 212-13 (1997).

102. *Id.* at 212.

103. *Id*

104. *Id.* at 212-13.

105. Press Release, Office of Senator Jacob K. Javits, Javits Seeks SEC-Type Agency to Oversee $100-Billion Private Pension Plans; Bill Protects Against Last-Minute Pension Forfeiture After Long Service (May 14, 1969) (on file with the Senator Jacob K. Javits Collection, Special Collections, Stony Brook University Libraries).

106. *Id.*

107. JOINT LABOR/COMMERCE TASK FORCE, 91ST CONG., REP. ON REVIEW OF PENSION SECURITY ISSUES AND OPTIONS (on file with the Senator Jacob K. Javits Collection, Special Collections, Stony Brook University Libraries).

Task Force included in its resulting report a chapter that examined potential routes of administration and enforcement for pension reform legislation.[108] Specifically, it looked at the questions: (1) "Should all pension plan activities of the Federal government be vested in a single agency?" and (2) "Assuming that pension regulatory functions should be consolidated in a single agency, should that agency constitute a new independent regulatory agency?"[109]

The Task Force concluded that a single agency should administer and enforce all pension regulation.[110] Among the benefits of the single agency concept noted were easing the burden on employers administering pension plans, reducing duplication, and achieving coordinated pension policy to safeguard pensions while also encouraging the expansion of private pension plans.[111] "A single agency, possessed of all the expertise and experience available, would be able to focus in the most efficient and flexible way on the complex and dynamic aspects of the private pension system."[112]

The Task Force acknowledged that the real question was not whether the federal government's regulation of pensions *should* be consolidated in a single agency but instead whether such an action was "feasible."[113] Jurisdiction over pension issues was already fragmented because it involved the IRS, DOL, SEC, National Labor Relations Board, Department of Justice, and assorted other agencies applying their rules to pension plans.[114] It might not be possible to avoid IRS and

108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. REP. ON REVIEW OF PENSION SECURITY ISSUES AND OPTIONS, *supra* note 107. The report notes that current jurisdiction included: (1) the IRS management of tax qualification of plans and employer deductions; (2) the DOL enforcement of wage and hour laws that are affected by pension credits and gathering of labor statistics; (3) the SEC's application of rules to plan investments and information gathering on the same; (4) the NLRB's oversight of the Taft Hartley's provisions on whether pension plans penalize union members and are fairly bargained; (5) the enforcement by the DOJ of a section of the Taft Hartley Act dealing with improper use of benefit funds for purposes not benefiting employees; and (6) the application of EEOC, HUD,

Securities and Exchange Commission ("SEC") interaction with pension plans, for example, because their missions touched on the conduct of plans (as the BOB Memo had noted).[115] If all pension matters could not be brought under one roof, the benefits of consolidation could not be fully achieved.[116]

Most of the DOL's pension functions, such as enforcement of disclosure standards,[117] were found capable of transfer and consolidation, but it was more difficult to transfer all IRS duties to another agency. Functions such as determinations that plans met qualification standards and the gathering of data on pension plans could be consolidated, but concerns of tax evasion, discrimination by pension plans in favor of highly compensated employees, and allowable deductions by employers and exclusions of trust income from taxation by pension plans related to the IRS' tax policy mission.[118] The report concluded that "centralization to the maximum feasible extent" was still worthwhile given the benefits that would result. [119]

The Task Force then considered which agency should administer and enforce pension regulation—an existing agency

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and DOD regulations to benefit plans. *Id.*

115. *Id.*

116. *Id.* The report cites Javits' seeming concern over the difficulties of implementing a single agency proposal:

> It may be that the entire scope of Treasury operations affecting pension plans should be transferred to the Commission. And yet, such determinations as the manner of integrating pension benefits with social security benefits and the determination of reasonable levels of compensation obviously have an important impact on Federal revenue considerations. Similarly, the extent to which regulations of pension plan investments is now performed by the Securities and Exchange Commission warrants careful consideration as to what functions, if any, should be transferred to the proposed Commission.

Id. (quoting 113 Cong. Rec. 4653 (1967) (statement of Sen. Javits)).

117. *Id.*

118. REP. ON REVIEW OF PENSION SECURITY ISSUES AND Options, *supra* note 107. The need for the Secretary of Labor to use the value of employee benefits as a component in the prevailing wage rates used to set the minimum wages was not readily subject to consolidation, though. *Id.*

119. *Id.*

and, if so, which one, or a new, independent agency.[120] Although the IRS was perhaps the best qualified to handle complex pension matters, "the public interest factor [of pension reform] transcends revenue considerations."[121] At the SEC, the mission to regulate securities might force labor and pension issues to a subsidiary role despite the SEC's experience handling disclosure, investments, and fiduciary law. While pension regulation did not clash with any preexisting core agency mission at the DOL, the report noted correctly that a decision to consolidate regulation at the DOL would result in backlash from employers.[122]

Uncertain which existing agency should have primary responsibility for pensions, the Task Force addressed the advantages and disadvantages of creating a new, independent body.[123] Although independent agencies are typically thought to have greater political independence from the President (and thus have greater continuity of staffing at high levels), be more bipartisan, and be more efficient since they are focused on the statute they administer, the Task Force found no clear support for these supposed advantages. Similarly, the evidence was inconclusive on the supposed disadvantages of independent agencies, including that the President cannot control them or coordinate their policies, they are more readily subject to capture by the industries they regulate, and they have trouble juggling administration and enforcement with long-term policy coordination. The Task Force concluded by refusing to take a position on whether consolidation within an existing agency or the creation of a new agency was preferable, noting that political factors should influence the choice.[124] The fact that this group agreed that consolidation within a single agency was best but could not agree on which agency should have primary power to administer and enforce pension laws indicates how sensitive the issue was and how difficult the task of consolidation would be.

120. *Id.*

121. *Id.*

122. *Id.*

123. REP. ON REVIEW OF PENSION SECURITY ISSUES AND OPTIONS, *supra* note 107.

124. *Id.*

Ironically, however, labor put the final nail in the coffin of Javits' proposal for an independent agency with oversight of pension regulation. Javits attempted to gain the support of labor by placing that independent agency within the DOL in a draft bill proposed in February 1972.[125] He did this in spite of arguing earlier that his U.S. Pension and Employee Benefit Commission, should have jurisdiction over pension regulation (including tax qualification) instead of the Department of Labor.[126] The AFL-CIO, however, rejected his proposal.[127] After years of government scrutiny of labor actions, including hearings focusing on pension misdeeds by union leaders, the organization did not want to empower another government agency to investigate unions.[128] If any agency was to have such power, it would need to be the DOL—the traditional friend of labor—not an independent and unknown power within that agency.[129]

Javits was forced to advocate instead for consolidation of pension regulation within the DOL instead of an independent agency. Cummings' congressional testimony is illustrative of Javits' position that an independent commission was best but given the lack of support for that idea, the DOL should manage as much ERISA enforcement as possible.[130] Cummings argued that an independent, SEC-like commission was the best answer for pension reform (as he helped Javits argue for years) because it could consolidate pension expertise and place all

125. WOOTEN, *supra* note 84, at 178.

126. *See Pension & Welfare Plans: Hearing on S. 3421, S. 1024, S.1103, and S. 1255 Before: the S. Subcomm. on Labor of the S. Comm. on Labor and Pub. Welfare*, 90th CONG. 122 (1968) (statement of Sen. Jacob Javits) ("I think that the question of whether the Commission should run it or the Secretary of Labor should run it is a substantive difference, perhaps of a major character.").

127. WOOTEN, *supra* note 84, at 178 ("Labor leaders 'feel they must have 'their man' in the Cabinet to protect them against the possibilities of extreme action . . . .' The same concern led the AFL-CIO to demand Labor Department oversight of pension regulation. An 'independent agency . . . housed at the [DOL]' would not do. The idea had to go and did.").

128. *Id.*

129. *Id.*

130. *Private Pension Plan Reform, Part II, supra* note 9, at 223-27 (1973) (statement of Frank Cummings).

regulation under one agency for "one-stop service."[131] His key point here is the importance of consolidating all pension expertise in one agency to strengthen bureaucratic regulation:

> If the pension thrust of the IRS really has such extensive expertise, there is no reason why the personnel of that branch could not be transferred, en masse, to such a commission. If there is expertise in the Bureau of the Labor Department which now administers the Disclosure Act, the personnel of that branch could be transferred there, to such a Commission. With a corps of personnel like that, drawn from the IRS, the Labor Department, and perhaps also from the SEC, the Justice Department and from State Agencies preempted by federal law, I would doubt very much that any great additional bureaucracy would be needed.[132]

The same results could not be achieved merely by consolidating such expertise within an existing agency such as the IRS or DOL because they were already devoted to their core missions and would not devote the same attention and resources to pension regulation.[133]

Yet, given that "no one seemed interested" during the years Javits pushed for the independent commission and there was "no evidence of increasing interest in it now," any consolidation of pension regulation needed to take place within the IRS or DOL.[134] Only the DOL was qualified to respond to employee complaints since the IRS—not used to responding to complaints from workers—offered merely the remedy of tax penalties or disqualification for the pension plan. This would present the employee the equivalent remedy of cutting off one's nose to spite one's face since the plan would then be less able to

131. REP. ON REVIEW OF PENSION SECURITY ISSUES AND Options, *supra* note 107.

132. *Private Pension Plan Reform, Part II, supra* note 9, at 223-27 (1973) (statement of Frank Cummings).

133. *Id.*

134. *Id.*

pay the employee pension benefits because its assets would be diminished by increased taxes on earnings and tax penalties.[135] This left the DOL as the best of the "half-loaf" options.[136]

Congressional hearings held immediately prior to the passage of ERISA indicate the ongoing dispute over regulatory jurisdiction. Senator Javits and other reform advocates affiliated with congressional labor committees as well as unions[137] thought the DOL should have as large a role as

135. *Id.* ("The IRS is not essentially an investigating and enforcing agency. . . . Indeed, if a pension participant were to go to the IRS and complain . . . he would only be cutting his own throat. The most he could accomplish would be to disqualify the plan, and if he did so, he would be, in effect, reducing his own pension.").

136. Influential pension scholar Merton Bernstein argued against "half-loaf" pension reform as "legislation that is inadequate and less than can be attained." *Second Panel Discussion on Private Pension Plan Reform, Vesting and Funding Provisions; Termination Insurance; Portability; and Fiduciary Standards: Hearing Before the S. Comm. on Fin., Subcomm. on Private Pension Plans*, 93d CONG. 828 (1973) (statement of Merton Bernstein). Rebutting the argument that the legislation could be enhanced in the future, he asserted, "Pension reform factors are approaching a critical mass. Once legislation results, that mass will be dissipated." *Id.*

137. Testimony by union representatives for the United Steelworkers of America and the United Auto Workers shows that they preferred jurisdiction within the DOL to the IRS. Similarly, a summary of AFL-CIO testimony provides that it:

> Urges that the [DOL] administer the pension plan requirements, as in S. 4. Considers pension plans to be an integral part of the collective bargaining process. Suggests that placing the administration in an agency whose primary interest is in collection of taxes may place the agency in a conflict-of-interest situation in relation to policing any funding standard because the more rapidly a pension plan funds, the less it pays in taxes. Maintains that regulatory supervision under the IRS hinges on an employer's self interest in obtaining tax deductions. Feels that this is a very weak enforcement mechanism from the viewpoint of the beneficiaries. Considers possible IRS solutions to noncompliance to not really protect the interests of beneficiaries because if the plan's tax exemption is removed or the plan terminated, this does not help the beneficiaries.
>
> Asserts that better administration would occur if a single agency were to be responsible for both enforcement and reporting.

possible.[138] Employers, their interest groups, and members of congressional tax committees favored primary IRS jurisdiction because they viewed the DOL as biased in favor of employees.

The testimony of Senators Javits and Williams before the Senate Finance Committee's Subcommittee on Private Pension Plans shows not only the ongoing jurisdictional dispute over pension regulation within the Senate but also how Javits and Williams hedged and left the door open for significant IRS involvement because it was politically expedient.[139] Senator Javits stated that employers' primary motivation for maintaining pension plans is to improve employee morale and "employee relations," elements of the DOL's mission[140] Among the other reasons cited why IRS administration was inappropriate was that half of pension plans were collectively bargained, tax penalties were insufficient, only the DOL

STAFF OF JOINT COMM. ON INTERNAL REVENUE TAX'N, 93d CONG., DIG. OF TESTIMONY ON PROPOSALS FOR PRIVATE PENSION PLAN REFORM 37 (Comm. Print 1973).

138. A summary of testimony on the proper administering agency and enforcement for pension legislation shows that the American Bankers Association and the Chamber of Commerce believed that the IRS should have jurisdiction because of its expertise and impartiality. Interestingly, the National Association of Manufacturers (NAM) felt that "regulatory functions in the pension area performed by the various departments and agencies of government should continue under their respective jurisdictions and should not be centralized in one agency, thus preserving the technical expertise required." *Id.* at 38. Perhaps not incidentally, the NAM's position was also likely to (and did in fact) continue the existing inefficiency and uncoordinated regulation of pension promises.

139. *Private Pension Plan Reform, Part II*, *supra* note 9, at 278-86 (remarks of Sen. Javits and Sen. Williams).

140. *Id.* at 284. Senator Williams added,

> Now it just seems to me that we have reached a point where pension legislation most clearly falls within the state purpose in the law of the [DOL] as a Department "to foster, promote, and develop the welfare of the wage earners of the United States and to improve their working conditions and to advance their opportunities for profitable employment." This is intimately part of the job of benefit protection and, historically, that part of the workers' arrangement with his employer has been watched over under law and regulation by the [DOL].

Id. at 283.

jurisdiction would provide the necessary preemption of state law to ensure coordinated policy, and—most importantly—that the primary mission of the IRS is collecting revenue through taxes and pension regulation would suffer from the IRS' need to focus on its core mission.[141]

When members of the Senate Finance Committee questioned Javits and Williams as to whether they believed that there was any role for the IRS in pension regulation, they relented and agreed to some form of IRS involvement. As Javits said "[a]gain . . . this doesn't denigrate the interests of the tax authorities nor their interest in the deductions which are taken for payment to pension plans. They have a vital interest. We don't challenge that at all."[142] When trying to define exactly the ongoing role that they foresaw for the IRS in pension regulation, however, Senators Javits and Williams ran into trouble. As Senator Williams admitted, "this is not finally formed in my mind"—even after many years of work on the issue.[143] Senator Javits added that the IRS would have a role in determining reasonableness of compensation for purposes of discrimination in favor of highly compensated employees as well as enforcing eligibility and vesting standards "for tax

141. *Id.* at 282.

> Senator, we believe very strongly that the weight of administrative judgment is for administration in the Labor Department because, while you are absolutely right about the fact that IRS is doing more than they did, the fact is that it is still their primary jurisdiction to collect taxes and punish evasion and define people who evade. This represents such an enormous range in which they must operate, that pension plan supervision would only be one item.

Id.; see WOOTEN, *supra* note 84, at 205 (explaining that it was uncertain whether the IRS' implementation of the power to tax could include preemption of state pension regulation while the DOL's control of the employment relationship through Congress' power to regulate interstate commerce allowed for such preemption.

142. *Private Pension Plan Reform, Part II*, *supra* note 9, at 278 (remarks of Sen. Javits and Sen. Williams).

143. *Private Pension Plan Reform, Part II*, *supra* note 9, at 286 (remarks of Sen. Williams).

purposes only."[144]

Having conceded a necessary role for the IRS in areas like eligibility, vesting, and funding, Senators Javits and Williams then faced questions about the problem of dual—and potentially conflicting—jurisdiction in these areas if the DOL also regulated here.[145] This is the question not fully resolved as the parties fought over jurisdiction and reached a compromise that involved duplication, overlap, and conflict.

B. *The Inability of the Bureaucracy to Enforce ERISA*

The administration and enforcement regime put in place under ERISA divides responsibility between the DOL and the Department of Treasury (mainly the IRS).[146] Pensions historically fell within the purview of the IRS because they needed to be qualified for favorable tax treatment. As discussed above, however, the deferred wages theory of pensions also makes pension regulation part of the DOL's mission.

Turf battles within Congress and the bureaucracy resulted in the political compromise of overlapping—and frequently conflicting—jurisdiction.[147] Indeed, even while the Conference Committee was resolving the final details of dual administration of ERISA by the DOL and IRS, many doubted that the statute could be effectively enforced in the planned manner. As staff members noted at one point, "While recognizing the staffs have made a valiant effort to resolve the jurisdictional problem, some staff members believe the

144. *Id.* (remarks of Sen. Javits).

145. *Id.* at 288.

146. A newly created agency—the Pension Benefit Guaranty Corporation—also administers the statute's insurance program, but its involvement is not relevant to this discussion. *See* LANGBEIN ET AL., *supra* note 26, at 90.

147. S. SPECIAL COMM. ON AGING, 98TH CONG., IMPLEMENTATION OF ERISA IN THE EXECUTIVE BRANCH, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974; THE FIRST DECADE 83 (Comm. Print 1984) (prepared by Beverly M. Klimkowsky) [hereinafter Klimkowsky] ("When President Ford signed ERISA into law on Labor Day 1974, the administrative apparatus charged with implementing the new law reflected the ambiguity concerning the proper jurisdictional sphere for the law and continued congressional rivalry over turf.").

proposed solution falls short of eliminating the inevitable complexities, costs and inequities which will result from dual jurisdiction and enforcement."[148]

After the passage of ERISA, it quickly became clear that dual jurisdiction needed to be sorted out for the agencies to implement ERISA. The impracticalities of the IRS and DOL issuing regulations together slowed the process of implementation.[149] By executive order, President Carter issued Reorganization Plan No. 4 of 1978.[150] The IRS gained exclusive control over participation, vesting, and funding (among other areas), while the DOL governs fiduciary management and disclosure and prohibited transactions.[151] The DOL and IRS also share control over decisions regarding whether a plan meets the exclusive benefit rule.[152] This plan completed the transition away from the previous notion that the DOL would have primary control of pension regulation.

Early conflicts within the DOL after ERISA's passage also prevented effective administration and enforcement of fiduciary obligations. DOL leaders could not even agree on an internal structure for pension regulation. For three years and under five different administrators, the agency struggled with whether to house ERISA responsibilities under a new Assistant Secretary or under the existing Labor Management Services Administration that administered the Welfare and Pension Plan Disclosure Act but had other primary responsibilities. After three years, the DOL finally decided upon the Office of Pension Benefit Welfare Programs reporting to the Assistant Secretary for Labor Management Relations—at least for the moment.[153]

Effective administration and enforcement of fiduciary responsibilities at the DOL was also hampered by the

148. *Staff Comments Relating to Jurisdictional Matters*: *Before Pension Reform Leg. House/Senate Conference on HR 2*, 98th Cong. (1974) (on file with Senator Jacob K. Javits Collection, Special Collections, Stony Brook University Libraries).

149. Klimkowsky, *supra* note 147, at 84.

150. Exec. Order No. 12108, 44 F.R. 1065 (Jan. 3, 1979), available at http://www.dol.gov/ebsa/regs/exec_order_no4.html.

151. Klimkowsky, *supra* note 147, at 95.

152. *Id.*; LANGBEIN ET AL., *supra* note 26, at 91.

153. Klimkowsky, *supra* note 147, at 86-87.

complexity of ERISA and the agency's lack of resources.[154] Policy analyst Beverly Klimkowsky noted in a paper prepared for the Senate Special Committee on Aging on the tenth anniversary of ERISA:

> As one of the most complex laws Congress ever passed, ERISA suffers from having an unclear mandate. Multiple jurisdiction is a major example of congressional indecision being papered over and left to the administrators to sort out. Some of ERISA's provisions (e.g., paperwork) are too specific, leaving administrators with little flexibility. Many other provisions were so vague that over 100 regulations needed to be issued.[155]

The DOL lacked financial and manpower resources initially to administer this complex statute.[156] The IRS had many pension experts on staff already because of its previous work in the area, but the DOL lacked expertise and experienced higher turnover.[157]

Although the Reorganization Plan allocated tasks more efficiently between the IRS and DOL and aided administration greatly, enforcement was still an issue of concern.[158] The IRS and DOL maintained control over enforcement in their respective areas of ERISA, making coordinated pension policy difficult to achieve.[159] The Secretary Labor has the power to file or intervene (in most circumstances) in civil lawsuits related to its areas of administration and also assess civil penalties.[160] The Secretary of Labor can also investigate conduct that may constitute a violation of ERISA's title I by reviewing books and

154. *Id.* at 87-88.

155. *Id.* at 88.

156. *Id.*

157. *Id.* at 88-89, 93.

158. *Id.* at 84, 98 ("ERISA enforcement constitutes the weakest link in implementation . . .").

159. Klimkowsky*, supra* note 147, at 95-97.

160. ERISA § 502, 29 U.S.C. § 1132 (2012); BLOOMBERG BNA EMPLOYEE BENEFITS LAW § 3-14 (3d ed. 2012).

records and interviewing the relevant people where "reasonable cause" to believe there has been a violation exists or where the plan gives consent.[161] No plan, however, can be forced to provide its books and records to the DOL more than once in a 12 month period unless such "reasonable cause" to believe there has been a violation exists.[162] The DOL engaged in few enforcement activities until a lengthy and involved matter with the Central State Teamsters Plan, and the DOL's problems with internal organization left overall enforcement inadequate.[163]

After a critical report by the General Accounting Office ("GAO") in 1977, the DOL announced that it would use the significant case theory to guide its enforcement efforts—requiring regional audits of large pension plans.[164] The significant case theory was controversial, however.[165] What constituted a large plan in one region might not in another.[166] In addition, the strategy left the many participants in small plans unprotected.[167] The Solicitor's Office was also overwhelmed and unable to respond to all proposed cases.[168] When Reagan took office, however, personnel at the DOL changed and the significant case strategy ended.[169] Other strategies of emphasizing criminal cases and more centralized enforcement were attempted.[170]

Since that time, reports on DOL enforcement of ERISA's fiduciary provisions have routinely been critical.[171] The GAO's January 1989 report to the House Ways and Means

161. ERISA § 504(a), 29 U.S.C. § 1134(a) (2012); *see* BLOOMBERG BNA EMPLOYEE BENEFITS LAW, *supra* note 160, at § 3-13.

162. ERISA § 504(b), 29 U.S.C. § 1134 (2012); *see* BLOOMBERG BNA EMPLOYEE BENEFITS LAW, *supra* note 160, at § 3-13.

163. Klimkowsky, *supra* note 147, at 97.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. Klimkowsky, *supra* note 147, at 97.

170. *Id.* at 97-98.

171. U.S. GEN. ACCOUNTING OFFICE, GAO/HRD-89-32, PENSION PLANS: LABOR AND IRS ENFORCEMENT OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (1989).

Committee's Subcommittee on Oversight found that the DOL's enforcement efforts had a limited reach.[172] By 1994, the GAO noted improvements made by the DOL in enforcement but still had substantial recommendations for change in its report entitled *Pension Plans: Strong Labor ERISA Enforcement Should Better Protect Plan Participants*.[173] Of the 117 cases referred to the DOL Solicitor's Office for civil litigation or to the Department of Justice for criminal litigation, only 38 lawsuits were filed.[174]

Recent problems found with DOL ERISA enforcement include a lack of plan audits and resources for proper enforcement. After once again noting significant problems in 2002, the GAO (which now stands for the Government Accountability Office) issued another report in January 2007 finding protection of participants still inadequate.[175] The DOL still did not have an accurate picture of ERISA noncompliance and therefore could not properly target its enforcement

172. *See id.* at 2-4. During the period examined, fiscal years 1985 to 1987, the DOL only closed roughly 1,300 pension plan investigations per year, though in 1987 there were an estimated 870,350 private pension plans. *Id.* Only one in four plans investigated were cited for ERISA violations, and the number was one in five for the first eight months of fiscal year 1988. *Id.* The DOL found 574 fiduciary violations in 1987. *Id.*

173. U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-94-157, PENSION PLANS: STRONGER LABOR ERISA ENFORCEMENT SHOULD BETTER PROTECT PLAN PARTICIPANTS 1-2 (1994). Area office enforcement staff had grown from 266 to 365 between 1986 to 1993. *Id.* at 5. By program year 1993, the number of investigations closed was 2,998 (although 1,480 of these cases had been opened to test computer targeting programs that were still in the exploration stage). *Id.* While the DOL managed to recover $183 million for plans and "impact" 72,199 plans and 21 million participants in 1993 with its focus on "significant issue" cases, only 303 cases resulted in a monetary recovery, only 125 had fiduciary results (fiduciaries were removed, fiduciaries were forced to diversify plan investments or discontinue a particular investment, or other administrative practices were altered) and only 187 cases had non-fiduciary results (changes were made to comply with reporting and disclosure or bonding requirements). *Id.* at 5-6.

174. *Id.* at 6. The report recommended reviewing the amount of resources focused on the "significant issue" strategy, focusing more on targeted computer programs, and increasing the use of penalties. *Id.* at 14-15.

175. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-22, EMPLOYEE BENEFITS SECURITY ADMINISTRATION: ENFORCEMENT IMPROVEMENTS MADE BUT ADDITIONAL ACTIONS COULD FURTHER ENHANCE PENSION PLAN OVERSIGHT (2007).

efforts.[176] The DOL did not conduct routine plan audits or risk assessments like other agencies and was focused on problems identified by plan sponsors, participants, or other agencies.[177] Finally, although it had recruited more skilled personnel needed to administer the complex statute, the DOL had a high attrition rate for related personnel.[178] By fiscal year 2005, the DOL's Office of the Solicitor litigated only 178 of the 258 ERISA civil cases referred by the DOL's Employee Benefit Security Administration ("EBSA").[179] As the report summarized:

> EBSA is a relatively small agency facing the daunting challenge of safeguarding the retirement assets of millions of American workers, retirees, and their families. . . . EBSA's ability to protect plan participants against the misuse of pension plan assets is still limited, because its enforcement approach is not as comprehensive as those of other federal agencies, and generally focuses only on what it derives from its investigations.[180]

The importance of enforcing ERISA's fiduciary provisions is clear from ERISA's legislative history.[181] Yet Congress has never provided funding or authorization sufficient for the DOL to audit plans on a regular basis as the SEC and banking agencies do to enforce regulations in their sectors.[182] Given the current economic climate and push for deficit reduction, it is highly unlikely that the executive agencies will soon be given

176. *Id.*

177. *Id.* at 3.

178. *Id.* at 2-4. The DOL's Employee Benefits Security Administration ("EBSA") had a ratio of personnel to regulated plans/entities of 1:8,000 as compared to 1:3,000 for the IRS and 1:9 for the SEC. *Id.* at 10.

179. Formerly called the Pension and Welfare Benefits Administration. *Id.* at 11.

180. GAO-07-22, at 28.

181. Beverly M. Klimkowsky & Ian D. Lanoff, *ERISA Enforcement: Mandate for a Single Agency*, 19 U. MICH. J. L. REFORM 89, 96-97 (1985).

182. *Id.* at 97.

the resources necessary for proper enforcement.[183]

Years after the passage of ERISA, there are still calls for a single agency to administer the statute and its amendments. As one article noted, "A review of fiduciary enforcement, in particular, indicates that the Department of Labor cannot enforce ERISA; the IRS does not enforce ERISA; and coordination in this area does not function well."[184] Its authors argued that the only hope for proper enforcement of the statute and coordinated policymaking was a single agency with jurisdiction over private pension regulation.[185]

183. *See* Julius G. Getman, *Public Policy Implications of ERISA*, 68 ST. JOHN'S L. REV. 473, 476 (1994) ("Complex statutes are inevitably difficult to enforce. Enforcement of a statute of this magnitude and complexity requires a major bureaucracy. The need for this type of bureaucracy, however, is arising at a time when public opinion is strongly opposed to governmental expansion. . . . It would be difficult to reconcile today's hostility toward increasing bureaucracy with the need for the expanded bureaucracy required to enforce ERISA. Enforcing the statute selectively would create more complexity, confusion, and political resentment.").

184. Klimkowsky & Lanoff, *supra* note 181, at 90 (blaming problems with enforcing the statute on Congress for setting an "impossible task" of joint administration for the DOL and IRS).

185. *Id.* at 91.

> As ERISA was written, DOL and the IRS shared responsibilities jointly, as opposed to having divided responsibilities, necessitating intensive coordination between the two agencies if the law was to be implemented. Because political compromise rather than ease of administration dictated the administrative structure of ERISA, severe management problems surfaced as soon as managers attempted to implement the new law.

Id. at 94. But note the problems facing the idea of consolidation after ERISA's enactment (many of which helped doom the idea initially):

> The structure and leadership of a new agency would be open to much debate and possible disagreement which could kill the idea entirely. It might not be possible to wrestle pensions away from the IRS entirely, since the issue remains very much a tax issue. Also, it is critical that interest be aroused on the Hill before anything can be accomplished. Few if any legislators have appeared to accept the mantle of leadership from ERISA's founding fathers.

Klimkowsky, *supra* note 147, at 101.

The current insufficient bureaucratic enforcement of ERISA has left private litigation as the main enforcement mechanism. Policy analyst Beverly Klimkowsky wrote on the tenth anniversary of ERISA that "ERISA implementation has not reached the mature stage of implementation in which the administering agencies act as powerful players in the policy process."[186] The same remains true today, and the courts have picked up the policymaking mantle.

IV. Abdication or Delegation by the Judiciary After ERISA[187]

ERISA provides for civil action by both plan participants and beneficiaries in addition to the Secretary of Labor. The statute created a private right of action as follows:

> A civil action may be brought—(1) by a participant or beneficiary—. . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. . . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provisions of this subchapter or the terms of the plan.[188]

When creating private litigation remedies, Congress is aware that the courts may not always enforce the legislation as expected or desired.[189] "It is in the nature of statutory

186. Id. at 84 (noting that pension policy was largely being influenced by groups that do not regard "the fulfillment of the promise for a private pension as [their] sole or primary concern").

187. *See* McCubbins, *supra* note 13, at 13 (discussing the delegation of authority by Congress to the bureaucracy and its re-delegation).

188. ERISA § 502(a), 29 U.S.C. § 1132(a).

189. Work by political scientist Sean Farhang suggests that the presence of divided government – a Republican president and majority-Democrat

interpretation that the interpreter, whether judicial or administrative, will frequently be called upon to make policy."[190] In the absence of strong bureaucratic enforcement of ERISA, however, the judiciary has become the central pension policymaking institution in the United States. Many legal scholars have argued that the courts have used this position in ways not intended by "ERISA's language, legislative history, or purposes."[191]

When examining congressional delegation to bureaucratic agents, political scientist Mathew McCubbins noted conditions under which delegation fails and becomes abdication:

> Principals may lack an effective check because their agent has expertise that the principals do not possess *or* because of conflicting interests among the principals. Where delegation occurs under such conditions, agents may be free to take any action that suits them, regardless of the consequences for the principles. Delegation then becomes abdication.[192]

In the case of pension regulation, Congress delegated authority over the administration of private pensions to fiduciaries.[193] The courts were supposed to supervise that

Congress – during the passage of ERISA likely influenced Congress' decision to enact a private litigation remedy. Farhang studies the decision by Congress to develop private litigation remedies that effectively call on private individuals to enforce the statute passed through the courts. Over 90% of litigation enforcing statutes with private rights of action is litigated by a diverse group of individuals acting in their own interests but also carrying out a larger public service by enforcing the statute for all those affected. Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821, 821-23 (2008).

190. *Id.* at 825 (internal citations omitted). *See* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 7 (1977) ("The individual litigant, though still necessary, has tended to fade a bit into the background. Courts sometimes take off from the individual cases before them to the more general problem the cases call up, and indeed they may assume—dubiously—that the litigants before them typify the problem.").

191. Jay Conison, *Suits for Benefits under ERISA*, 54 U. PITT. L. REV. 1, 4 (1992).

192. McCubbins, *supra* note 13, at 37.

193. LANGBEIN ET AL., *supra* note 26, at 649.

delegation through the private right of action, but they both lack the expertise necessary to control fiduciary administration and have conflicting interests in judicial efficiency.[194] The result is judicial abdication in the enforcement of ERISA's mission to safeguard benefit promises made to workers.

The "'vast majority of ERISA cases are simple benefit claim disputes in which a federal judge is reviewing the decision of a plan fiduciary.'"[195] Under ERISA, making determinations of a participant or beneficiary's benefits is a fiduciary function because "a person is a fiduciary with respect to the plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets."[196] The courts are authorized to review such determinations because ERISA provides that a participant or beneficiary may sue "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."[197] Most pension participants or beneficiaries therefore seek the assistance of the courts to resolve benefit claims and are mainly concerned about fiduciary decisions that deny them all or part of the benefits to which they believe they are entitled. Because of this point, I will focus on how the courts have abdicated their role to supervise fiduciaries in deciding benefit claims, although the same can be said of many other ERISA claims decided by the courts.[198]

While Congress intended for the courts to fill gaps in the statute and create common law to implement ERISA, many legal scholars argue that federal common law regarding ERISA

194. *Id.*

195. *Id.*

196. ERISA § 3(21)(A)(iii), 29 U.S.C. § 1002(21)(A)(iii).

197. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

198. Law Professor Jay Conison notes the importance of ERISA benefit claims and calls them the "bottom-line" of ERISA. In his view, benefit claims are first in ERISA's hierarchy because "[u]nder ERISA, there is nothing else to protect." Vesting, accrual, and funding standards, as well as remedial provisions for fiduciary breaches are all designed solely to ensure that participants and beneficiaries receive the benefits to which they are entitled. Conison, *supra* note 191, at 32-33.

benefit claims directly contradicts congressional intent.[199]

A. *Conflating Delegation to Private Actors with Delegation to Bureaucratic Actors*

The analogy of private fiduciaries to agency bureaucrats by federal courts reviewing the decisions of fiduciaries under ERISA demonstrates the blurring of the line between delegation to government officials and delegation to private actors.[200]

In the landmark case of *Firestone Tire & Rubber Co. v. Bruch*, the Supreme Court ruled that the standard of review for courts reviewing an ERISA fiduciary's administrative decision is *de novo*, meaning that the court should review all evidence without giving any deference to the fiduciary's decision.[201] However, the Court then created an enormous legal loophole that ERISA fiduciaries drove right through by holding that if the plan documents reserved the fiduciary's right to exercise its discretion to determine benefit claims, then the fiduciary's decision would be reviewed under the deferential "arbitrary and capricious" standard.[202] This standard provides that unless the fiduciary's decision was clearly arbitrary and capricious, then the court cannot overturn the original decision—even if the judge believes that another decision is proper. *Bruch* permits the exception to eat the rule since nearly all plans now contain reservations of rights that lead to the more lax standard of review. This arbitrary and capricious standard grants the same deference to ERISA fiduciaries as to decision-makers in executive agencies.[203]

199. *See id.* at 7. Conison also discusses legislative history that suggests Congress preempted state law on benefit claims as too restrictive because state courts "'strictly interpret the plan indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording.'" *Id.* at 16.

200. See John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials under ERISA*, 101 NW. U. L. REV. 1315, 1331-33 (2007), for a discussion of this analogy and a review of key cases.

201. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 101 (1989).

202. *Id.* at 109.

203. Discussing the cases prior to *Bruch* that mandated an arbitrary and

Some courts have compared ERISA fiduciaries to executive branch administrators without fully acknowledging the implications of such an analogy. Judge Easterbrook from the Seventh Circuit, for example, compared administrators at a company that manages a large portion of disability benefit plans covered by ERISA (which applies to most disability and health benefit plans in addition to pension plans) to administrative law judges at the Social Security Administration who determine eligibility for Social Security disability benefits.[204] In considering whether to apply the arbitrary and capricious standard of review to UNUM Life Insurance Company in light of its interest in keeping costs down, the court noted that each benefit claim has little impact on a large company's balance sheet, its employees do not necessarily share its self-interest, and its clients want to maintain good relationships with their employees and would not want benefit claims summarily denied.[205] Adding to these factors that UNUM passes along the costs of benefit claims to employers (though imperfectly) through experience rating (*i.e.*, increased employer costs to reimburse third parties administering benefit plans for retrospective benefit payments), the court concluded, "Thus we have no reason to

capricious standard of review, Conison writes that "courts in ERISA cases appreciated the irony of applying an approach whose main effect was to facilitate defeat of benefit expectations. Because the approach was perceived as well established, however, courts were reluctant to make any substantial changes." Conison, *supra* note 191, at 48. He then systematically undermines the Court's attempt to justify deferential review through assumptions that benefit claims are a form of judicial review and that trust law governs such claims. *Id.* at 51-60. The focus, he argues, should instead be on whether benefit claims are decided correctly. *Id.*; *see also* Donald T. Bogan, *ERISA: The Foundational Insufficiencies for Deferential Review in Employee Benefit Claims – Metropolitan Life Insurance Co. v. Glenn*, 27 HOFSTRA LAB. & EMP. L.J. 147, 197 (2009) (arguing that contract law and not trust law should govern ERISA benefit claims, making summary deferential judicial proceedings inappropriate).

204. *See* Perlman v. Swiss Bank Comprehensive Disability Prot. Plan, 195 F.3d 975, 978 (7th Cir. 1999) ("[W]e have held that courts may treat welfare benefit plans just like administrative law judges implementing the Social Security disability-benefits program.") (citations omitted); Langbein, *supra* note 200, at 1330-33.

205. *See Perlman*, 195 F.3d at 981 ("We have no reason to think that UNUM's benefits staff is any more 'partial' against applicants than are federal judges deciding income-tax cases.").

think that the actual decisionmakers [sic] at UNUM approached their task any differently than do the decision-makers at the Social Security Administration, and ordinarily deferential review is the order of the day."[206]

As Judge Wood noted in her dissent, however, the analogy between decision-making by ERISA fiduciaries and that of the Social Security Administration is improper because of a lack of safeguards to protect those whose benefits are in question.[207] She argued:

> Most importantly, the SSA is a public agency, whose decisions are subject to the strictures of the Administrative Procedure Act, while ERISA plan administrators are private sector actors subject to regulation under the ERISA statute. A host of federal constitutional rights and statutory rights combine to assure procedural regularity in the case of public agencies that are not available to those who attack private action.[208]

206. *Id.*; *see* Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1006 (4th Cir. 1985):

> While the [arbitrary and capricious] standard is perhaps more commonly associated with appellate court review of administrative findings, deference is likewise due when a district court reviews the action of a private plan trustee. Here, as in other contexts, the standard exists to ensure that administrative responsibility rests with those whose experience is daily and continual, not with judges whose exposure is episodic and occasional.

Id. For an argument that Judge Easterbrook inappropriately combines "rulemaking" and "administrative adjudication" under a category of judicial deference to agencies that he terms "delegation," see Daniel T. Bogan, *Reply to Judge Easterbrook: The Unsupported Delegation of Conflict Adjudication in ERISA Benefit Claims under the Guise of Judicial Deference*, 57 OKLA. L. REV. 21 (2004). Bogan argues that because Congress did not delegate the adjudicative function under ERISA to any executive agency, the function belongs with the federal courts and not private fiduciaries. *Id.* at 23-28.

207. *See Perlman*, 195 F.3d at 985 (7th Cir. 1999) (Wood, J., dissenting).

208. *Id.*

The absence of these procedural safeguards for ERISA fiduciaries deciding benefit claims makes the analogy of ERISA fiduciaries to agency decision-makers inappropriate.[209]

ERISA's required claims procedures, discussed further below, are insufficient in several ways when compared with the procedural safeguards available under the Administrative Procedure Act ("APA") and to Social Security claimants, for example. Within the Social Security Administration, an Administrative Law Judge presides over an administrative trial where the claimant can present evidence and subpoena and cross-examine witnesses. When federal courts hear an appeal, the claimant has already had an opportunity to be heard in the trial.[210] Yet courts use the same arbitrary and capricious standard to review ERISA benefit claims even though participants have not been heard by a neutral decision-maker, been permitted discovery or been able to cross-examine witnesses at trial.[211]

Nor do ERISA fiduciaries necessarily have the expertise that agency administrators possess to justify greater deference.[212] Fiduciaries, particularly executives of the employer appointed to help administer the plans and contain costs, frequently lack basic ERISA knowledge or legal or accounting training to prepare them for their duties.[213] They may have no knowledge of legal rules of evidence or other procedures to make sure they have investigated benefit claims

209. Herzberger v. Standard Ins. Co., 205 F.3d 327, 332 (7th Cir. 2000) ("The Social Security Administration is a public agency that denies benefits only after giving the applicant an opportunity for a full adjudicative hearing before a judicial officer, the administrative law judge. The procedural safeguards thus accorded, designed to assure a full and fair hearing, are missing from determinations by plan administrators."); Mark D. DeBofsky, *The Paradox of the Misuse of Administrative Law in ERISA Benefit Claims*, 37 J. MARSHALL L. REV. 727, 738-43 (2004); Langbein, *supra* note 200, at 1332-33.

210. Bogan, *supra* note 206, at 26-27.

211. *Id.* at 28; DeBofsky, *supra* note 209, at 738-39 ("Although the ERISA claim regulations provide many of these guarantees, the most crucial protections are denied ERISA claimants. . . . Such claims are not presented to an unbiased tribunal; and claimants lack any opportunity to challenge adverse evidence through cross-examination.").

212. Bogan, *supra* note 206, at 26-27.

213. *Id.* at 26.

sufficiently.[214]

Under the APA, agency decisions made without the hallmarks of substantive or procedural due process are subject to *de novo* review by courts.[215] Yet decisions by ERISA fiduciaries that lack such safeguards receive the same deferential arbitrary and capricious standard of review.[216]

Other federal courts have also cautioned against the analogy between ERISA fiduciaries and executive agencies because of the conflict of interest that fiduciaries face between acting for the exclusive benefit of participants and to preserve the assets of employers funding pension plans or third parties insuring ERISA welfare plans. In *Bruch*, the Court acknowledged that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a "'facto[r] in determining whether there is an abuse of discretion.'"[217] Courts have been unsure how exactly conflicts should alter their review of benefit claims, and in *Metropolitan Life Insurance Co. v. Glenn*, the Supreme Court did not clarify its answer substantially.[218] Instead, the Court reiterated that the "arbitrary and capricious" standard of review applies when an employer or insurer decides benefit eligibility and also pays approved claims out of its own pocket.[219] As a circuit court wrote regarding the problem of applying administrative law in the ERISA context:

214. *Id.*

215. DeBofsky, *supra* note 209, at 738-40.

216. *Id.*

217. Bruch, 489 U.S. at 115 (quoting RESTATEMENT (SECOND) OF TRUSTS § 187, cmt. d (1959)).

218. Metropolitan Life Ins. Co. v. Glenn, 554 U.S. 105, 117 (2008) (confirming that courts need to weigh different factors when reviewing benefit claims, and conflict of interest is only one, although it carries more weight "where circumstances suggest a higher likelihood that it affected the benefits decision" and less weight "where the administrator has taken active steps to reduce potential bias and to promote accuracy"); *see* Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U. L. REV. 1083 (2001); LANGBEIN ET AL., *supra* note 26, at 665-669.

219. Glenn, 554 U.S. at 108, 122.

> Use of the administrative agency analogy may, ironically, give too much deference to ERISA fiduciaries. Decisions in the ERISA context involve the interpretation of contractual entitlements; they 'are not discretionary in the sense, familiar from administrative law, of decisions that make policy under a broad grant of delegated powers.' Moreover, the individuals who occupy the position of ERISA fiduciaries are less well-insulated from outside pressures than are decision-makers at government agencies.[220]

This conflict of interest that occurs when an employer or insurer decides benefit eligibility and also pays approved claims out of its own pocket is one not typically faced by decision-makers at executive agencies.[221]

Because of the lack of procedural safeguards and the conflicted nature of ERISA fiduciaries, the fiduciaries are supposed to be mere "interpreters of contractual entitlements."[222] Continuing to treat fiduciaries as bureaucrats, courts have instead required that participants and beneficiaries first pursue their claims through the ERISA plan's internal grievance procedures (referred to as the

220. Brown, 898 F.2d at 1564 n. 7 (internal citations omitted).

221. To take a classic ERISA example, when an employer sponsors a defined benefit pension plan, the employer assumes the risk of paying a stated amount to workers and their beneficiaries in the future. If, for example, the stock market underperforms and the money set aside by the employer is insufficient to pay the required pension, the employer will need to contribute more money. If, on the other hand, the employer can find a way to deny a claim for pension benefits, then the employer will not have to contribute as much to the pension plan. Benefit claims therefore directly affect the employer's finances, and because high-level employees or third parties hired by the employer administer pension plans and owe their employment to the plan sponsor, the employees and third parties have a conflict of interest when deciding benefit claims. *See* LANGBEIN ET AL., *supra* note 26, at 652-53 (noting that "because ERISA § 408(c)(3) allows management officers to serve as plan fiduciaries, ERISA all but invites conflicts of interest in plan administration").

222. Van Boxel v. Journal Co. Emps. Pension Trust, 836 F.2d 1048, 1050 (7th Cir. 1987) (noting that ERISA sought to limit freedom of contract to protect pension participants, and they deserve a fair judicial hearing to determine their rights).

exhaustion requirement) prior to seeking review in the federal courts.[223]

Section 503 of ERISA provides:

> In accordance with regulations of the Secretary, every employee benefit plan shall—(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.[224]

The text above does not require that a claimant exhaust the plan's review process prior to seeking review of the benefit determination in the courts. [225] Yet courts have held exhaustion of a plan's internal administrative remedies to be mandatory with very limited exceptions.[226] In effect, the courts have required that claimants petition the very administrator(s) who initially rejected their claims prior to seeking any assistance from the courts.[227]

Courts have relied on ERISA's text and legislative history to justify requiring exhaustion of internal remedies prior to seeking recourse in the courts.[228] In ERISA's requirement that benefit plans have internal claims procedures for participants who want to petition the plan to review its decision to deny benefits, the courts have found that Congress intended the procedures to be used for all benefits claims.[229] Courts relied on

223. Amato v. Bernard, 618 F.2d 559, 567 (9th Cir. 1980).

224. ERISA § 503, 29 U.S.C. § 1133.

225. DeBofsky, *supra* note 209, at 732.

226. *Id.*; Conison, *supra* note 191, at 21-22; LANGBEIN ET AL., *supra* note 26, at 754-56.

227. Amato, 618 F.2d at 569.

228. *Id.* at 566.

229. *Id.* at 567 ("It would certainly be anomalous if the same good

Congress' supposed concern with efficient resolution of ERISA claims—favoring efficiency over correcting flawed decisions.[230] According to one district court, it is in the best interests of both employers and employees that costs of administering benefit claims be minimized:

> If claimants were allowed to litigate the validity of their claims before a final trustee decision was rendered, the costs of dispute settlement would increase markedly for employers. Employees would also suffer financially because, rather than utilize a simple procedure which allows them to deal directly with their employer, they would have to employ an attorney and bear the costs of adversary litigation in the courts.[231]

The courts even justified the exhaustion requirement as a burden that Congress had placed on fiduciaries to review their actions and efficiently enforce the plan's provisions.[232] In *Maker*

reasons that presumably led Congress and the Secretary to require covered plans to provide administrative remedies for aggrieved claimants did not lead the courts to see that those remedies are regularly used.").

230. Makar v. Health Care Corp. of Mid-Atlantic, 872 F.2d 80, 83 (4th Cir. 1989) (internal citations omitted) ("Congress' *apparent* intent in mandating these internal claims procedures was to minimize the number of frivolous ERISA lawsuits; promote the consistent treatment of benefit claims; provide a nonadversarial dispute resolution process; and decrease the cost and time of claims settlement." (emphasis added)); Taylor v. Bakery & Confectionary Workers Union & Indus. Int'l Welfare Fund, 455 F. Supp. 816, 820 (E.D.N.C. 1978) (internal citations omitted) ("Tied to these inter-fund claims procedures was Congress' awareness of the potential costs of pension reform, and it sought to 'strike a balance between providing meaningful reform and keeping costs within reasonable limits.' Congress was particularly concerned with outlining a private insurance system that would operate efficiently, thereby increasing its acceptance and institution among American business.").

231. *Taylor*, 455 F. Supp. at 820.

232. *Makar*, 872 F.2d at 83 (internal citations omitted) ("By preventing premature interference with an employee benefit plan's remedial provisions, the exhaustion requirement enables plan fiduciaries to efficiently manage their funds; correct their errors; interpret plan provisions; and assemble a factual record which will assist a court in reviewing the fiduciaries' actions."); Denton v. First Nat'l Bank, 765 F.2d 1295, 1303 n.13 (5th Cir. 1985) ("Another important facet of the exhaustion requirement is that it prevents

v. Health Care Corporation of Mid-Atlantic, the court states that "[i]n short, Congress intended plan fiduciaries, not the federal courts, to have primary responsibility for claims processing."[233]

Contrary to the rule adopted by the courts, the legislative history indicates that Congress required claims procedures merely to provide another avenue to address participant grievances.[234] The House labor bill did not require an internal claims review procedure.[235] While the Senate labor bill did include a version of ERISA Section 503, the bill that went to the conference committee instead provided for voluntary arbitration.[236] The main concern was protecting participants and giving them easy, cheap ways to recover their benefits.[237] As Senator Williams stated, a participant or beneficiary "would have the right" to know why his or her claims was denied and "would be entitled to a full and fair review."[238] This language focuses on the participant or beneficiary's rights – not the employer's rights. The adoption of an exhaustion requirement actually represented a step backwards from state law pre-ERISA.[239]

> Congress unquestionably intended courts to develop *some* set of rules to govern actions for benefits under section 502(a)(1)(B). But the rules

fiduciaries from avoiding their duties under the Plan by insulating all benefit decisions in the protective mantel of federal judicial review. If fiduciaries were to find their decisions more closely supervised by an intervening federal judiciary, it is likely that they would go to court to seek instruction by declaratory relief on questions involving claims for benefits, rather than deciding those questions themselves as Congress intended."); Amato, 618 F.2d at 567 ("[I]mplementation of the exhaustion requirement will enhance their ability to expertly and efficiently manage their funds by preventing premature judicial intervention in their decision-making processes.").

233. *Makar*, 872 F.2d at 83 (4th Cir. 1989) (internal citations omitted).

234. Conison, *supra* note 191, at 24.

235. *Id.* at 22.

236. *Id.* at 22-23.

237. *Id.* at 24.

238. *Id.* at 25.

239. *Id.* ("Thus, the legislative history provides no support for the view that a suit for benefits was intended to be the second, appellate stage of a process beginning with the plan claims procedures.").

> developed must be consistent with the purposes of ERISA. The current law pays little attention to ERISA's central purpose of safeguarding benefit expectations. Indeed, it often seems perversely designed to thwart benefit expectations, for no better reason than judicial force of habit.[240]

While Frank Cummings worried about the dollar amounts of pension claims being too small to motivate lawyers to take the cases as necessary to pursue a participant's rights, perhaps he should instead have worried about whether the courts would be willing to review pension cases. As Law Professor Jay Conison argues, "the main policy argument advanced for deference has been that it reduces judicial caseload," but this was not the concern of ERISA.[241] Courts are hostile to benefit claims because they are fact-intensive and usually involve small value claims, even though there is no evidence that a less deferential standard of review would overwhelm court dockets.[242] Regardless, Congress mandated that courts decide benefit claims, and the judicial thwarting of its role has allowed governmental control over retirement security to flow unhindered to the private sector.[243]

B. *Bring on the "Death Panels"*

The furor over the myth that new healthcare legislation would ration healthcare and engage in a form of euthanasia attracted great attention and caused a provision reimbursing for end-of-life discussions between doctors and patients to be removed prior to passage of the Patient Protection and Affordable Care Act ("ACA").[244] A draft of the legislation included under the heading "Advanced Care Planning

240. Conison, *supra* note 191, at 3.
241. *Id.* at 61.
242. *See id.* ("[T]he control argument is speculative.").
243. *See id.*
244. Patient Protection and Affordable Care Act of 2009, H.R. 3200, 111th CONG. (2009).

Consultation" authorized Medicare reimbursement for doctors who counseled patients on end-of-life issues ranging from palliative care to living wills, health proxies, and powers of attorney. [245] When politicians and pundits on the right became involved, however, the provision took on a very different meaning. Sarah Palin's inflammatory Facebook posting is illustrative:

> The America I know and love is not one in which my parents or my baby with Down Syndrome will have to stand in front of Obama's 'death panel' so his bureaucrats can decide, based on a subjective judgment of their 'level of productivity in society,' whether they are worthy of health care. Such a system is downright evil.[246]

Called the "Lie of the Year" by the website PolitiFact, Palin's comment was merely one example of the rhetoric on the right "mischaracterize[ing] as bureaucratic 'death panels'" such end-of-life consultations.[247]

More outrage erupted when economist and *New York Times* contributor Paul Krugman announced that the solution to the budget deficit "will and should rely on both 'death panels and sales taxes.'"[248] His point was that healthcare cost containment is necessary and inevitable and that a cost-benefit

245. *Id.* at § 1233.

246. Paul Westfall, *Ethically Economic: The Affordable Care Act's Impact on the Administration of Health Benefits*, 14 DEPAUL J. HEALTH CARE L. 99, 109-10 (2011) (quoting Palin's well-known Facebook posting); *see* Joshua E. Perry, *A Missed Opportunity: Health Care Reform, Rhetoric, Ethics and Economics at the End of Life*, 29 MISS. C. L. REV. 409, 411-12 (2010).

247. Perry, *supra* note 246, at 412 (citing comments on Fred Thompson's July 16, 2009 radio show that the provision "'would make it mandatory—absolutely require—that every five years people in Medicare [would be required to have a] counseling session that will tell them how to end their life sooner'" and by Republican House Leader John Boehner that it "'may start us down a treacherous path toward government-encouraged euthanasia if enacted into law'").

248. Paul Krugman, *Death Panels and Sales Taxes*, N.Y. TIMES, Nov.14, 2010, http://krugman.blogs.nytimes.com/2010/11/14/death-panels-and-sales-taxes/?_r=0.

analysis for all medical treatments will be necessary.[249] The nation's healthcare system must ration healthcare to be financially sustainable. The less well-known and discussed reality is that ERISA fiduciaries ration healthcare every day with little review of their decisions by courts as a result of the arbitrary and capricious standard of review.[250]

While the legislative history of ERISA focuses on pension reform, ERISA dramatically altered healthcare in the United States with few outside the industry aware of the changes. ERISA did not impose detailed rules for the provision of health benefits by employers other than reporting and disclosure requirements and fiduciary protections.[251] Yet the courts' use of the arbitrary and capricious standard to review benefit claims applied to health plans as well, and ERISA's broad preemption clause effectively allowed employers and health insurance companies to opt in to the generous deference provided by courts to ERISA-covered benefit plans through self-insurance.[252]

ERISA's preemption clause allowed employers to avoid state regulation of healthcare and deny benefits to an increasing number of participants.[253] The clause mandates that ERISA "supercede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" with an exception for any law that "regulates insurance, banking, or securities."[254] The "deemer clause" then prevents the application of these state insurance, banking, and securities laws to employee benefit plans. In the case of health plans, the "deemer clause"[255] provides that an employee benefit plan will not be "deemed to be an insurance company or other insurer . .

249. *See id*.

250. *See* David Goldin, Survey, *External Review Process Options for Self-Funded Health Insurance Plans*, 2011 COLUM. BUS. L. REV. 429 (2011) (addressing opportunities to provide less deference to the decisions of self-funded health insurance plan administrators than the courts currently require under ERISA through the ACA's requirement that insurance companies develop an external review process).

251. WOOTEN, *supra* note 84, at 281.

252. *Id.*

253. *Id.*

254. ERISA § 514, 29 U.S.C. §§ 1144(a), (b)(2)(A).

255. WOOTEN, *supra* note 84, at 281.

. or to be engaged in the business of insurance" for the purpose of state insurance laws.[256]

To take advantage of the pre-emption of state laws and the favorable standard of review for benefit claims, particularly when healthcare costs started to skyrocket in the 1980s, many additional employers began to self-insure.[257] Although at the time of ERISA large health plans had begun to self-insure, the trend now included many smaller plans.[258] The development of utilization review brought employers administering health plans and their third party administrators (often insurance companies) into diagnostic decisions.[259] The plans now frequently had to approve healthcare decisions before the services could be provided—in effect deciding what type of care an employee or relative could receive.[260]

Self-insurance benefited employers with little risk of significant liability.[261] Employers purchased "stop-loss" policies to prevent unanticipated liability if benefit payments exceeded estimated costs.[262] Additionally, employers increasingly denied benefit claims through utilization review, while plan participants faced an uphill battle appealing denials in court.[263] At worst, the plan would have to pay the claim and attorneys' fees after a lawsuit because courts also interpreted ERISA's remedies narrowly.[264] Scandals over bad faith denials of benefit claims were exposed slowly and called into question the involvement of ERISA fiduciaries in healthcare decisions.[265]

Courts downplayed the conflict of interest faced by these fiduciaries deciding benefit claims.[266] They argued that "small" benefit claims did not make an administrator at a company

256. ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B).

257. WOOTEN, *supra* note 84, at 281.

258. *Id.*

259. *Id.* at 282-83.

260. *Id.* at 283.

261. *Id.* at 281-82.

262. *Id.* at 282.

263. WOOTEN, *supra* note 84, at 283.

264. *Id.*

265. See Langbein, *supra* note 200 at 1317-21 (discussing scandal over the Unum/Provident Corporation's long-term policy of denying valid disability benefit claims to increase profits).

266. *Id.* at 1327.

with billions of dollars in annual revenue conflicted.[267] Yet the pattern of denial of small benefit claims added up to significant additional revenue.[268] Courts also found comfort in employers' reputational concerns, arguing that if their health plans unfairly denied benefit claims, employees would go elsewhere.[269] Given the opaque process of deciding benefit claims, however, employees had little chance to compare employers based on their administration of health plans.[270] Employers and third party administrators also had significant financial incentives to deny claims that overrode reputational concerns.[271] Finally, courts argued that benefit costs were passed on to employers through experience rating later.[272] In the competitive insurance market, insurance companies needed to absorb much of the unexpected costs, though.[273]

Given their outrage over the idea of the government rationing healthcare, Americans obviously do not understand the extent to which employers and insurance companies already ration healthcare to contain costs. While there is hope that the ACA's provisions requiring external review will provide an opportunity to increase the fairness of decisions by administrators of health plans,[274] the political pressure applied by employers and insurance companies to contain costs and increase profits will be difficult to resist.

The idea of rationing healthcare by denying benefit claims attracted significant attention, but the crisis caused by denying pension benefit claims attracts little attention. Perhaps the decline in defined benefit pensions has ameliorated the effects of these benefit denials. Or maybe the economic recession made salary the primary concern of the workforce. Employees also notoriously discount the value of pension benefits when they are younger. Regardless, the debate over rationing healthcare may be the foot in the door necessary to change the arbitrary

267. *Id.*
268. *Id.* at 1327-28.
269. *Id.* at 1328-29.
270. *Id.* at 1328.
271. *Id.* at 1329.
272. *Id.* at 1330-31.
273. *Id.* at 1331.
274. *See* Goldin, *supra* note 250.

and capricious standard currently being used by courts to review ERISA benefit claims.

As the ACA begins the process of revamping our healthcare system, the question of who should ration access to traditional employee benefits such as healthcare and private pensions needs to be addressed. If employers and insurance companies retain control over healthcare decisions, then there is no chance to better protect pension promises. If, however, the external review process for health claims provides for review by a neutral party or simply eliminates the arbitrary and capricious standard of review for health plans, pension claims should not be left behind.

V. Conclusion

The United States is not the only country whose judiciary has failed to adequately protect pension beneficiaries when available tools made it possible. Law Professor Elizabeth Shilton declared, "[f]or employee pension rights [in Canada], the promise of trust law has proved to be a false one."[275] Recognizing that courts "share a responsibility with legislatures for distributive outcomes within employment pension plans," Shilton takes issue with the abdication of Canadian courts in their role as protectors of employee pension rights.[276] In the end, Shilton finds that the need to facilitate voluntary pensions overcomes the moral aspect of the fiduciary duties inherent in trust law.[277] "If employers can over-ride the most 'fundamental' characteristics of a trust simply by inserting explicit wording, then it is employers, rather than the courts, who will ultimately define the scope and content of trust commitments."[278]

Refusing to absolve judges of their responsibility for the turn that pension law has taken in Canada, Shilton notes, "[t]he analysis of the case law in this paper has identified

275. Elizabeth Shilton, *Employee Pension Rights and the False Promise of Trust Law*, 34 DALHOUSIE L.J. 81, 83 (2011).

276. *Id.* at 84.

277. *Id.* at 113.

278. *Id.* at 98-99.

numerous analytic nodes where courts applying the common law have made choices—choices not dictated by 'the law,' but by predispositions and values, and the weighing of those policy factors they identify as relevant and important."[279] While acknowledging the need for additional legislation to safeguard employee pension rights and the hesitancy of the legislature to act on this sensitive issue, Shilton sees an important role for the courts in shifting the common law and finding a stronger role for fiduciary protections.[280]

Similarly, I argue here that the failure to create a single, expert bureaucratic agency to supervise Congress' delegation of authority to private fiduciaries has left the courts as the only government institution capable of properly supervising fiduciaries and finally creating a coherent body of pension policy that focuses on protecting workers' expectations. The courts have made choices, as Shilton says, and these choices were not mandated by ERISA but instead based on factors important to the judges and fear of involvement in this unwieldy statute. It is time for the courts to reexamine ERISA's legislative history and focus on its underlying goals. Congress did not mandate a highly deferential standard of review for benefit claims or a restriction on the types of evidence that courts will hear; the courts did. The courts, therefore, can find a way to better enforce pension promises.

279. *Id.* at 113.
280. *Id.* at 114.