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The Paternalistic Ideology of ERISA and Unforgiving Courts: Restoring Balance Through a Grand Bargain

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THE GRAND IRONY OF ERISA?: INTERSECTIONALITY OF ERISA PREEMPTION AND REMEDIAL ISSUES

SYMPOSIUM

THE PATERNALISTIC IDEOLOGY OF ERISA AND UNFORGIVING COURTS:

RESTORING BALANCE THROUGH A GRAND BARGAIN

Edward A. Zelinsky[*]

I am flattered to be making these remarks to a gathering that includes so many leading experts on ERISA, retirement, and employee benefits issues. There are those that suggest that this type of face-to-face symposium is obsolete—that modern technology eliminates the need for individuals to come together in one place, at one time to discuss matters of mutual concern.

The editors of the *Hofstra Labor & Employment Law Journal* have wisely ignored this advice. Despite the enormous benefits of contemporary telecommunications, there is still a need to convene periodically like our grandparents did. There is, in the final analysis, a limit to the quality of a human relationship which can be established by e-mail.

It is, moreover, particularly appropriate that this group convenes now. Congress passed the Employee Retirement Income Security Act of

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1974[1] ("ERISA") while I was in law school. In the subsequent thirty-five years, the statute and its import have grown enormously.[2] As the leading edge of the Baby Boomers moves into retirement mode, challenges which were real but remote in 1974 are today urgent and apparent. Even before the Crash of 2008,[3] there was understandable concern about the level of retirement savings or, to be more accurate, the lack of such savings by many.[4]

Moreover, we are now posed for a national debate on health care.[5] For most working Americans, ERISA-regulated, employer-provided health care is their principal means of obtaining medical services.[6]

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1. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 U.S.C., 29 U.S.C.).

2. *See, e.g.*, JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 1-2 (2004) (noting that although ERISA was originally intended to reform pension law, it has come to have profound impacts on "health, life, and disability insurance" as well as other "non-related fields of law[, such as] finance . . . , securities, banking, marriage and divorce, [and] real property, to name a few").

3. *See* Kirk Shinkle, *The Crash of 2008: How Bad Is It, and When Will It End?*, U.S. NEWS & WORLD REPORT, Oct. 17, 2008, *available at* http://www.usnews.com/articles/business/investing/2008/10/17/the-crash-of-2008.html (stating that the 2,400 point drop in the Dow Jones industrial average in late September 2008 was comparable to Black Monday in 1987 or the 1929 crash before the Great Depression); Mary Williams Walsh, *After Losses, Pensions Ask for a Change*, N.Y. TIMES, Nov. 20, 2008, at B1 (stating that since the crash, the "total value of company pension funds is thought to have fallen by more than $250 billion").

4. *See, e.g.*, TERESA GHILARDUCCI, WHEN I'M SIXTY-FOUR: THE PLOT AGAINST PENSIONS AND THE PLAN TO SAVE THEM 261-62 (2008) (stating that for the last three decades "overall pension coverage has stayed flat rather than expanding, leaving half of all workers with no workplace retirement plan"); Steven Hipple, *Contingent Work in the Late-1990s*, 124 MONTHLY LAB. REV. 3, 21 tbl.13, 23 (2001) (finding a low proportion of contingent workers have pension coverage).

5. *Compare* United States National Health Care Act, H.R. 676, 111th Cong. (1st Sess. 2009) (submitting a publicly financed, privately delivered health care system that will provide all Americans access to health-care, regardless of income), *and* President's Address Before a Joint Session of the Congress, DAILY COMP. PRES. DOC. 200900105, at 5-6 (Feb. 24, 2009), *available at* http://www.gpoaccess.gov/ presdocs/2009/DCPD200900105.pdf ("[W]e can no longer afford to put health care reform on hold. . . . Now, there will be many different opinions and ideas about how to achieve that reform . . . . [But] let there be no doubt: Health care reform cannot wait."), *with* REPUBLICAN NAT'L COMM., 2008 REPUBLICAN PLATFORM 37 (2008), *available at* http://platform.gop.com/2008Platform.pdf ("Republicans support the private practice of medicine and oppose socialized medicine in the form of government-run universal health care system."), *and* Jim Rutenberg, *Health Critic Brings a Past and a Wallet*, N.Y. TIMES, Apr. 2, 2009, at A1 (discussing the campaign of President Obama's "most visible conservative opponent," Richard Scott, whose "sole policy interest is to see to it that . . . [President] Obama and Congress . . . [do] not move the country toward a socialized system").

6. *See* U.S. Dep't of Labor, Health Plans & Benefits, http://www.dol.gov/dol/topic/health-plans/index.htm (last visited Apr. 10, 2009) ("Most private sector health plans are covered by . . . ERISA."); *see also* Lorraine Schmall & Brenda Stephens, *ERISA Preemption: A Move Towards Defederalizing Claims for Patients' Rights*, 42 BRANDEIS L.J. 529, 538-39 (2004). *But see*

As is true for most of us at this Symposium, ERISA, employee benefits and retirement issues have played a central role in my professional life. I wish I could tell you that this resulted from a plan carefully conceived while I was young and consistently executed with foresight and skill. The truth, I am afraid, is distinctly less flattering.

I was one of many research assistants for Professor Boris Bittker while he was writing his magisterial treatise on the federal tax law.[7] This was during the Nixon Administration when the release of the White House tapes made "expletive deleted" part of our national lexicon.[8] At one point, Professor Bittker indicated to me that he was interested in reports that Congress was considering comprehensive legislation concerning qualified retirement plans. He asked me to explore this.

Today, of course, one can push some buttons and easily retrieve proposals and other relevant materials. For the benefit of those who were not there, the world of legal research was once quite different and, I dare say, more challenging. After days of effort, I had a modest grasp of the possible scope of federal legislation. Accordingly, Professor Bittker took me out for a cup of coffee so I could brief him on my research.

Within seconds of starting, I realized that this briefing was not going as I had planned. Wordlessly but effectively, Professor Bittker communicated to me his disbelief that Congress would do anything along the lines I was describing. Finally, after ten minutes, Professor Bittker sagely looked at me and declared, "Ed, they won't do anything this crazy."

Shortly thereafter, President Ford signed ERISA into law.

I finished law school and completed my clerkship without giving another thought to ERISA. Then, on my first day as a junior associate, I walked into the office of the partner to whom I had been assigned. He seemed very old to me though he was fifteen years younger than I am today. He held in his hands the CCH copy of ERISA, which he unceremoniously threw at me. Declared this elderly partner, "I'm too

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Employment Retirement Income Security Act (ERISA) of 1974 § 4(b), 29 U.S.C. § 1003 (2006) (exempting from coverage health plans established and maintained by government or church entities; plans maintained outside the United States primarily for nonresident aliens; plans maintained solely to comply with workers' compensation, unemployment compensation or disability law; and unfunded deferred compensation plans for a select group of top management or highly qualified executives).

7. BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS (2d ed. 1989).

8. *See* 3 STEPHEN E. AMBROSE, NIXON: RUIN AND RECOVERY, 1973-1990, at 328-29 (1991).

old to learn this"—here I delete an expletive. "Besides," he continued, "Bittker told us you are his ERISA expert."

Thus, my ERISA career was launched.

Several years later, as a newly-minted assistant professor, the senior tax faculty members at Benjamin N. Cardozo School of Law asked me what courses I wanted to teach. When I said that I wanted to teach about ERISA, I elicited incredulous stares. Why did I possibly want to teach such a course?

I wish I could recount for you an eloquent response about the growing importance of retirement savings to our national capital markets,[9] the looming challenge of financing the Baby Boomers' golden years,[10] or the incipient concern about rising health care costs.[11] Instead, I mumbled the less elegant truth that ERISA was the only thing I knew much about. This barely satisfied my inquisitors who volunteered that it was all right for me to teach one oddball course as long as I carried my weight as to the real curriculum.

When I taught an ERISA course in those early years, I was the bane of the Cardozo secretarial pool. In those benighted days, we did not have the fine ERISA textbooks available to us today.[12] Lexis, Westlaw, and other electronic databases were in their infancies. The legal literature addressing ERISA issues was sparse.

As a result, we cut, pasted, and photocopied thousands of pages of cases and articles which my students unhappily lugged to class and the secretaries even more unhappily prepared for them to lug to class.

I now have thirty years' inventory of these kinds of ERISA anecdotes. I also have a reasonably captive audience for the duration of this presentation and four children who invariably excuse themselves from the family dinner table when they hear the dreaded term "ERISA." My offspring are particularly unappreciative of my observation, as they flee the supper-time telling of my anecdotes, that ERISA over the years

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9. *See* Maurice Obstfeld & Kenneth Rogoff, *The Intertemporal Approach to the Current Account*, *in* 3 HANDBOOK OF INT'L ECON. 1731 (G. Grossman & K. Rogoff, eds., 1995).

10. *See, e.g.*, LAURENCE J. KOTLIKOFF & SCOTT BURNS, THE COMING GENERATIONAL STORM 66-67, 141 (2004) (arguing that the Baby Boomers' retirement will wreak havoc on society because there is not enough money to finance them).

11. *See* HEALTHREFORM.GOV, THE COSTS OF INACTION: THE URGENT NEED FOR HEALTH REFORM 1, http://www.healthreform.gov/reports/inaction/inactionreportprintmarch2009.pdf (last visited Apr. 10, 2009).

12. LAWRENCE A. FROLIK & KATHRYN L. MOORE, LAW OF EMPLOYEE PENSION AND WELFARE BENEFITS (2d ed. 2008); JOHN H. LANGBEIN, SUSAN J. STABILE & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW (4th ed. 2006); COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE (2d ed. 2007).

has helped to pay their not inconsiderable tuition bills.

I shall nevertheless resist the temptation to invade further my inventory of ERISA stories as the editors of the *Hofstra Labor & Employment Law Journal* quite rightly expect something more substantive. So let me attempt to distill the lessons ERISA has taught me over the years: ERISA and its thirty-five year legislative and administrative evolution reflect a very precise ideology, what might be called the ideology of ERISA, a paternalistic ideology of good intentions.[13] Simultaneously, the courts have often approached ERISA issues from a totally different vantage, in an unforgiving fashion.[14] These disparate approaches have led to a pronounced imbalance between ERISA as a statutory and administrative phenomenon, and ERISA as a judicial phenomenon. Ideally, a grand bargain could restore balance to the benefit of all concerned, employers and employees alike.

In many respects, it seems naive for a law professor, and for me in particular, to argue that the adoption and subsequent evolution of ERISA is in large measure a story of good intentions gone awry. Even before the rise of modern public choice theory, the most acute observers of democratic government have understood the influence of special interests upon legislative deliberations.[15] When Edmund Burke famously observed that the members of Parliament owe their constituents not merely the members' energies, but also the members' independent judgments,[16] he was advancing a normative claim in a legislative environment notoriously dominated by what we today call

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13. *See* WOOTEN, *supra* note 2, at 271-72 (explaining that ERISA has evolved under a "worker-security theory"); Gregory S. Alexander, *Pensions and Passivity*, 56 LAW & CONTEMP. PROBS. 111, 112-13 & n.10 (1993).

14. *See, e.g.*, Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144, 148 (1985) (holding that plaintiff was not entitled to compensatory and punitive damages for the pension administrator's breach of fiduciary duty under ERISA sections 409 and 502(a)); Mertens v. Hewitt Assocs., 508 U.S. 248, 255-58 (1993) (holding that money damages are not "appropriate equitable relief" under ERISA section 502(a)(3)); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 218 (2002) (holding that a pension plan could not seek reimbursement for medical payments for plan participants because such reimbursement would not constitute equitable restitution).

15. *See, e.g.*, ISSAC KRAMNICK, BOLINGBROKE AND HIS CIRCLE 50, 70-75 (1968) (describing Lord Bolingbroke's polemics against British Prime Minister Robert Walpole since the late 1680s, who Bolingbroke claimed was controlled by "stockjobbers," financiers, and monopolistic corporations).

16. Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774), *in* 1 THE FOUNDERS' CONSTITUTION 391, 392 (Philip B. Kurland & Ralph Lerner eds., 1987), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html. ("Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.").

special interests.[17] Just as famously, James Madison described democratic government in a large republic as the clash of "factions" assembled into inherently unstable majorities.[18] Modern public choice theory[19] translates and elaborates these venerable observations into a contemporary idiom capturing the same truth: Democratically elected legislatures respond to well-organized interest groups.[20]

In a variety of contexts, I have found this insight helpful to explain important phenomena such as the persistence of unfunded mandates.[21] Moreover, the impact of particular interests upon ERISA's initial adoption and subsequent evolution is undeniable.[22] The story of ERISA cannot be told coherently without acknowledging the influence of employer groups, organized labor, the insurance industry, and other important constituencies.[23]

But if that influence cannot be denied, neither should it be overstated. An explanation of ERISA which focuses only on those groups and their respective agendas misses an essential part of the story.

ERISA, both in its original form and in its subsequent elaborations, reflects an influential ideology. Like most successful ideologies, the ideology of ERISA is rarely articulated because it is so deeply embedded. The first premise of this ideology is that the Internal Revenue Code's treatment of qualified plans is a tax expenditure.[24] From this premise is drawn the corollary that the federal government

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17. *See* STEPHEN MILLER, SPECIAL INTEREST GROUPS IN AMERICAN POLITICS 1-2 (1983).

18. THE FEDERALIST NO. 10 (James Madison).

19. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 284-88 (1962); *see also* Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355, 1369-80 (1993) [hereinafter Zelinsky, *Unfunded Mandates*]; Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gluch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1171-73 (1993).

20. *See* Zelinsky, *Unfunded Mandates*, *supra* note 19, at 1380-86.

21. *Id.*; Edward A. Zelinsky, *The Unsolved Problem of the Unfunded Mandate*, 23 OHIO N.U. L. REV. 741, 744-45 (1997).

22. *See* Daniel M. Fox & Daniel C. Schaffer, *Semi-Preemption in ERISA: Legislative Process and Health Policy*, 7 AM. J. TAX POL'Y 47, 50-51, 58-59 (1988) (explaining the influence of organized labor, business groups, and the insurance industry in the provisions of ERISA).

23. *See generally* WOOTEN, *supra* note 2 (discussing the influence of special interest groups on the political history of pension reform).

24. Norman P. Stein & Patricia E. Dilley, *Leverage, Linkage, and Leakage: Problems with the Private Pension System and How They Should Inform the Social Security Debate*, 58 WASH. & LEE L. REV. 1369, 1373-74 (2001). I dissent from the prevailing consensus that the current tax treatment of qualified plans is properly characterized as a tax expenditure. EDWARD A. ZELINSKY, THE ORIGINS OF THE OWNERSHIP SOCIETY: HOW THE DEFINED CONTRIBUTION PARADIGM CHANGED AMERICA 38 n.23, 150-51 (2007).

properly conditions and channels this tax expenditure by regulating in great detail the terms and operations of qualified retirement plans.[25] More regulation is always better because it is, in large measure, the Treasury's money being regulated.[26]

The second premise of the ideology of ERISA is that most individuals, and certainly most rank-and-file employees, are incapable on their own of making good decisions about retirement savings and about other fringe benefits.[27] Because such overtly-articulated paternalism is so disfavored in American political discourse, this premise, though widely-shared among ERISA mavens, is rarely acknowledged. But this usually unarticulated premise also underpins the belief that more regulation is invariably better.[28]

This regulation-inducing ideology has fueled more and more statutory and administrative complexity. Congress' successive amendments to ERISA, most recently the Pension Protection Act of 2006[29] ("2006 Act"), have turned what was originally a complicated statute into a document emulating the Talmud's intricacy while lacking the Talmud's wisdom.[30] The Treasury and the Department of Labor ("DOL") regulations enforcing ERISA's statutory maze implement a difficult law by compounding the difficulties.[31]

However, much of this statutory and regulatory complexity has been well-intentioned, designed and administered by persons who,

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25. *See* Stein & Dilley, *supra* note 24, at 1374.

26. *Cf.* Yun Zhang, *The Economic Growth and Tax Relief Reconciliation Act of 2001 and Private Pension System Reform*, 5 U. PA. J. LAB. & EMP. L. 629, 640, 649-50 (2003) (discussing the enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001, which "sacrificed almost fifty billion dollars of tax revenues on private pension plans and individual retirement arrangement," but also added "over forty provisions affecting pension plans and benefits").

27. *See* ZELINSKY, *supra* note 24, at 7-10.

28. *Cf.* Alexander, *supra* note 13, at 118 (stating that ERISA's "twin policies of passivity and paternalism seemingly require that employees not bear the investment risk").

29. Pub. L. No. 109-280, 120 Stat. 780 (2006) (codified as amended in scattered sections of 26 U.S.C., 29 U.S.C.).

30. *Compare Tax Planning: Pension Protection Act of 2006*, NEWSLETTER (Fitzsimmons Fin. Group, LLC, Pittsburg, Pa.), Oct. 2006, at 2, http://fitzsimmonsfinancialgroup.com/files/Tax_Planning_The_Pension_Protection_Act_of_2006.pdf (detailing the complexity the Pension Protection Act of 2006 adds to ERISA), *with* Rabbi Elliot Rose Kukla, *The Twisted Wick: Talmud Study as Spiritual Practice for Post-Modern Jews*, ZEEK, July 2007, http://www.zeek.net/707talmud/ (explaining the complexity of the Talmud, but at the same time illustrating its wisdom).

31. *See* Sylvester J. Schieber, *The Evolution and Implications of Federal Pension Regulations*, *in* THE EVOLVING PENSION SYSTEM 11, 24-25 (William G. Gale et al. eds., 2005); *see also* J. Reed Cline, *Administrative Aspects of Enhanced Fee Disclosure in 401(k) Plans*, 16 J. PENSION BENEFITS: ISSUES IN ADMIN. 62, 62-63 (2008).

consistent with the paternalistic ideology of ERISA, believe that they are channeling government revenues to encourage retirement savings for rank-and-file employees who cannot discern their own long-term interests or, if they understand those interests, cannot advance them without a heavy dollop of federal protection.[32]

Routinely we hear from those drafting, enacting, and administering these statutes and regulations that they appreciate that, under our voluntary system of employer-sponsored plans, excessive regulation and complexity can deter employers, particularly small employers, from sponsoring qualified plans and other fringe benefit arrangements.[33] However, this admonition is the employee benefit plan equivalent of "I'll respect you in the morning": The speaker really does not believe it and the listener is naive in thinking that the speaker does. In short, ERISA as it exists today is, in significant part, the product of a paternalistic ideology which ignores the costs of regulation since such regulation channels putative tax benefits and since the motivation for such regulation is benign.

The results have been more elaborate statutes and more detailed regulations and administrative programs, much of which, while well-intentioned, is counterproductive of the goal of extending and protecting employees' interests in their retirement incomes and other employee benefits.[34] At the end of the day, complexity and compliance costs deter employers—particularly small and medium-sized employers—from establishing and maintaining ERISA-regulated retirement and employee benefit plans.[35] Ideas often matter, particularly when they are wrong.

But life is never simple. If the employee-protective ideology of ERISA holds sway in the legislative and administrative agencies which supervise and manage the federal government's regulation of retirement income and employee benefits plans, that ideology does not prevail in one important venue: the courts.[36] This brings us to the subjects of today's Symposium: ERISA's preemptive effect and ERISA's remedial

32. *See Pension Plan Complexity: Hearing Before the Subcomm. on Private Retirement Plans and Oversight of the Internal Revenue Serv. of the S. Comm. on Finance,* 101st Cong. 127 (1990) (statement of Sen. David Pryor, Member, S. Comm. on Finance).

33. *See* Russell Korobkin, *The Battle over Self-Insured Health Plans, or "One Good Loophole Deserves Another,"* 5 YALE J. HEALTH POL'Y L. & ETHICS 89, 130-32 (2005).

34. *See* Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. (forthcoming Dec. 2009).

35. *See* Korobkin, *supra* note 33, at 130-32.

36. *See* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144, 148 (1985); Mertens v. Hewitt Assocs., 508 U.S. 248, 255-58 (1993); Aetna Health Inc. v. Davila, 542 U.S. 200, 205, 221 (2004); DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 453 (3d Cir. 2003).

provisions.

While the paternalistic or, if you prefer, protective doctrine of ERISA underpins legislative and administrative decision making as to employee benefits plans, that has not been true in the courts.[37] In the courts, a more unforgiving approach to ERISA and employee benefits has prevailed.[38] Thus, the courts have understood the preemptive effect of ERISA section 514[39] broadly, foreclosing the states from experimenting in ways intended to protect employees and their families.[40] Similarly, the judiciary has construed ERISA section 502[41] narrowly, indeed in a fashion which most observers find byzantine and unfair, denying remedies to injured individuals in circumstances which are troubling.[42]

The disadvantages of the courts' current, overly-restrictive concept of ERISA preemption manifest themselves most acutely today as states and localities seek to experiment in the health care arena but find themselves hampered by ERISA preemption. Maryland's "Wal-Mart" Act has been declared ERISA-preempted by the U.S. Court of Appeals for the Fourth Circuit.[43] Important parts of Massachusetts' new health law are similarly vulnerable to ERISA preemption challenge.[44] A splintered Ninth Circuit has sustained San Francisco's new health care ordinance against such a challenge[45] but I am skeptical that, under the Supreme Court's case law, the Ninth Circuit is correct.[46]

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37. *See, e.g.*, *DiFelice*, 346 F.3d at 453; Retail Indus. Leaders Ass'n v. Fielder, 475 F.3d 180, 197-98 (4th Cir. 2007).

38. *See, e.g.*, *Mertens*, 508 U.S. at 255-58; *DiFelice*, 346 F.3d at 453; *Fielder*, 475 F.3d at 197-98.

39. Employment Retirement Income Security Act (ERISA) of 1974 § 514, 29 U.S.C. § 1144 (2006).

40. *E.g.*, *Fielder*, 475 F.3d at 191, 193, 197-98.

41. ERISA § 502, 29 U.S.C. § 1132.

42. *E.g.*, *DiFelice*, 346 F.3d at 444, 446, 449, 453.

43. *Fielder*, 475 F.3d at 193, 197-98. *See also* Edward A. Zelinsky, *Maryland's "Wal-Mart" Act: Policy and Preemption*, 28 CARDOZO LAW REV. 847 (2006), *reprinted in* NEW YORK UNIVERSITY REVIEW OF EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION (Alvin D. Lurie ed., 2007).

44. Edward A. Zelinsky, *The New Massachusetts Health Law: Preemption and Experimentation*, 49 WM. & MARY L. REV. 229, 232 (2007).

45. In *Golden Gate Restaurant Ass'n v. City & County of San Francisco*, 558 F.3d 1000 (9th Cir. 2009), the active judges of the Ninth Circuit refused to hear en banc an appeal of a panel decision upholding the San Francisco health care ordinance against an ERISA preemption challenge. *Id.* at 1000-01. However, in a persuasive dissent, Circuit Judge Milan Smith was joined by seven of his colleagues in concluding that ERISA does preempt the San Francisco ordinance. *Id.* at 1009-10 (Smith, J., dissenting).

46. Edward A. Zelinsky, *Employer Mandates and ERISA Preemption: A Critique of* Golden Gate Restaurant Association v. San Francisco, 50 ST. TAX NOTES 503 (2008); Edward A. Zelinsky,

As to these state and local health care laws, for present purposes, the issue is not the design or wisdom of such laws. As a matter of policy, I have grave reservations about the Maryland and San Francisco ordinances. If, however, one believes (as I do) that the great strength of our federal system is that it encourages experimentation and accommodation of local preferences, these efforts—at least at the state level[47]—should be allowed to proceed.

Just as the courts discourage state and local health care initiatives through an expansive notion of ERISA preemption, the courts have construed ERISA's remedial provisions as foreclosing relief in compelling contexts.[48] Everyone has his own favorite horror story in this area. The bottom line is that the courts often treat section 502 as an anti-remedies provision.[49] This results in unfairness in particular cases and systemic underdeterrence as plans and employers are relieved of the consequences of bad behavior.

As to this judicial part of the ERISA story, a public choice explanation is quite revealing since, to maintain the ERISA status quo in the courts, all the employer community need do is block any legislative changes to sections 502 and 514. So far, this effort to preserve the status quo has been successful.

We thus have a remarkably unbalanced situation with Congress, the Treasury, and the DOL embracing the well-intentioned, paternalistic ideology of ERISA, generating more and more complex statutes and regulations without regard to the often counterproductive nature of this legal output. Simultaneously, the courts, at the other end of spectrum, stymie experiments in state regulation and often frustrate efforts to remedy quite real harms.

Can we get to a more balanced and productive approach? The journal editors who convened this Symposium have focused our attention upon the "grand irony" of ERISA. In that spirit, let me suggest "a grand bargain" to retool ERISA for the challenges of the twenty-first century. This grand bargain would have four major elements.

First, there should be a significant reduction of ERISA's regulation

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Employer Mandates and ERISA Preemption in the Ninth Circuit, 47 ST. TAX NOTES 603 (2008).

47. I am increasingly sympathetic to the argument that municipal regulation of employee fringe benefits, health care in particular, could impose an unacceptable burden on national employers since there are literally thousands of localities. *See infra* note 58.

48. *See, e.g.*, DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 444, 449, 453 (3d Cir. 2003).

49. *See, e.g.*, Aetna Health Inc. v. Davila, 542 U.S. 200, 221 (2004); *DiFelice*, 346 F.3d at 449; Mayeaux v. La. Health Serv. & Indem. Co., 376 F.3d 420, 430-32 (5th Cir. 2004); Briscoe v. Fine, 444 F.3d 478, 498-500 (6th Cir. 2006).

of employers and their employee benefit plans. To be meaningful, this reduction must be deep. It must cut away both provisions of the original statute which, however well-intentioned, are today more trouble than they are worth, as well as more recent regulation which should never have been adopted in the first place. Everyone will have his own list of targets for such a deregulation effort. Allow me to suggest two of mine.

It is time to abolish the summary plan description ("SPD").[50] Whatever the merits of the SPD thirty-five years ago, it makes no sense today. All employers can easily put their plan documents online or can transmit their plan documents as e-mail files. The DOL's auditing practices have forced employers to bulk up the summary plan document so that there is no longer anything "summary" about it.[51] Today, the principal function of the enhanced SPD is to make a particularly solid thud as employees throw it into the garbage can as they leave work. The second contemporary function of the SPD is to generate litigation as creative lawyers invariably find tensions between SPDs and the underlying plan documents.[52]

Among more recent snafus is the "qualified default investment alternative," authorized by the 2006 Act[53] just in time to nudge 401(k) participants to invest in common stocks and thereby experience the thrill of the Crash of 2008. As an example of misguided paternalism, it is hard to do better than this.[54] The passive, allegedly unsophisticated participant who let his 401(k) account default into money market funds looks a lot smarter today than the folks prodding him to invest in common stocks.

In the interests of time, I will let these two examples serve as proxies for a more thoroughgoing revision of the statutory and administrative thicket today surrounding ERISA-regulated plans.[55] The

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50. Employment Retirement Income Security Act (ERISA) of 1974 § 102, 29 U.S.C. § 1022 (2006).

51. I recently reviewed a set of prototype documents from a major supplier of such documents. The plan document was sixty pages long; the summary plan description was twenty-three pages long. It is hard to call a document a "summary" when it has over one third as many pages as the document it is supposedly summarizing.

52. LANGBEIN, STABILE & WOLK, *supra* note 12, at 571-73.

53. Pension Protection Act of 2006, Pub. L. No. 109-280, § 624, 120 Stat. 780, 980 (codified as amended at 29 U.S.C. § 1104(c)(5)) (adding to ERISA new section 404(c)(5), which authorized the Secretary of Labor to promulgate regulations concerning "default investment arrangements"). Pursuant to her authority, the Secretary issued a regulation pertaining to "qualified default investment alternatives." 29 C.F.R. § 2550.404c-5 (2008).

54. Posting of Edward A. Zelinsky to OUPblog, http://blog.oup.com/2008/09/401k_crash/ (Sept. 23, 2008).

55. My larger list for abolition would include the minimum required distribution rules, I.R.C.

larger point is that, as a first element of a grand bargain, there is much statutory and administrative regulation which should be repealed. It is important that that repeal go deep since the space thereby created will be offset in part by the other three elements of the bargain.

The second such element would be to update ERISA to add to the statute provisions which are genuinely needed to confront the conditions of the twenty-first century. These amendments should be added sparingly since we do not want to replant the thicket we have just pruned. There are, however, statutory and regulatory additions which, if made carefully and subtly, can bolster employees' well-being without overburdening employers.

Here, my example is disclosure of 401(k) investment fees. There is substantial evidence that full disclosure of such fees, while not costless, is worthwhile.[56] I have grave doubts about simply piling this and other regulations on top of the existing burdens already placed on employee benefit plans. On the other hand, as part of a grand bargain, there is a compelling argument that some of the regulatory space achieved by the first step of deregulation can be filled productively, if filled carefully.

The third element of the grand bargain, like the second, would absorb some of the regulatory space created in the first stage. Specifically, this third step would revise section 502 to expand and rationalize the remedies available to those harmed by ERISA violations.[57] I think that we should authorize consequential, tort-type damages for appropriate ERISA cases, should repeal the restrictions on remedies imposed by the courts through antediluvian notions of equity, and should cap noneconomic damages to some reasonable level. However, for present purposes, the specifics of a revised section 502 are less important than the broader proposal that section 502 be amended as part of a grand bargain which entails offsetting deregulation, rather than simply piled onto the regulatory status quo.

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§§ 401(a)(9)-(11), 417 (2000), and the joint-and-survivor annuity rules, Employment Retirement Income Security Act (ERISA) of 1974 § 205, 29 U.S.C. § 1055 (2006). *See* Posting of Edward A. Zelinsky to OUPblog, http://blog.oup.com/2009/01/ abolish-the-minimum-required-distribution-rules/ (Jan. 12, 2009).

56. *See, e.g.*, ECON. SYS., INC., STUDY OF 401(K) PLAN FEES AND EXPENSES §§ 4.2.2, 5.3.3 (1998), *available at* http://www.dol.gov/ebsa/pdf/401krept.pdf; Posting of Ryan Alfred to BrightScopeBlog, http://www.brightscope.com/blog/2009/01/26/ illuminating-the-battle-lines-around-401k-fee-disclosure/ (Jan. 26, 2009, 12:15 p.m.); Press Release, H. Comm. on Educ. & Labor, Chairman Miller Introduces Legislation to Require Full Disclosure of 401(k) Fees & Provider Conflicts of Interest (July 26, 2007), *available at* http://www.house.gov/apps/list/speech/edlabor_dem/rel072607.html.

57. *See* Aetna Health Inc. v. Davila, 542 U.S. 200, 223 (2004) (Ginsburg, J., concurring).

The same can be said of the fourth element of the grand bargain: reducing the scope of ERISA preemption. I prefer the simple repeal of section 514.[58] Since I doubt that this is in the political cards, I would at least propose that state laws relative to health care be given the same legal status as state criminal, banking, securities and insurance laws, namely, exemption from ERISA's heightened preemption standards.[59] But here again my point is not to provide specifics but rather to outline the possibility of a grand bargain.

Taken as whole, the grand bargain would reduce substantially the net regulatory burden placed on employers and their ERISA-governed retirement and employee benefit plans. It would at the same time assure that the regulation which persists will productively and meaningfully protect employees and their families.

Two sets of persons will reject out of hand the possibility of this grand bargain. Those irrevocably wedded to the paternalistic ideology of ERISA will object to the first, deregulating component of the package. If more regulation is invariably good, there is no warrant for a concerted effort to identify and eliminate unproductive burdens on employee benefit plans. Indeed, for the true believers (and they are many, articulate and well-intentioned), there is no such thing as unproductive legislation of employer-sponsored retirement and fringe benefit arrangements.[60]

Conversely, those who believe that no regulation is ever productive will reject the last three elements of the grand bargain, intended to update ERISA's regulatory scheme for the twenty-first century. This

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58. I note an important qualification: I am increasingly convinced by those commentators, including speakers at this Symposium, who argue that municipal regulation of employee benefits and of health care in particular would impose an unacceptably onerous burden on national employers. Thomas P. Gies & Jane R. Foster, *Leaving Well Enough Alone: Reflections on the Current State of ERISA Remedial Law*, 26 HOFSTRA LAB. & EMP. L.J. 449, 462-63 (2009). There are thousands of municipalities in the United States, many with overlapping jurisdictions. *See* Geoffrey K. Turnbull & Salpie S. Djoundourian, *Overlapping jurisdictions: Substitutes or complements?*, 75 PUB. CHOICE 231, 232 (1993). If each of these localities could pursue its own policy *vis-à-vis* employer-provided fringe benefits, the cumulative compliance burden could impact interstate employers unacceptably. *See id.*

In contrast, there are only fifty states. Permitting the states to experiment and accommodate different preferences will yield benefits while imposing more modest compliance costs on national employers. *See* Larry J. Pittman, *A Plain Meaning Interpretation of ERISA's Preemption and Saving Clauses: In Support of a State Law Preemption of Section 1132(a) of ERISA's Civil Enforcement Provisions*, 41 SAN DIEGO L. REV. 593, 640-41 (2004).

59. Employment Retirement Income Security Act (ERISA) of 1974 § 514(b)(2)(A), (b)(4), 29 U.S.C. § 1144(b)(2)(A), (b)(4) (2006).

60. *See, e.g.*, Gies & Foster, *supra* note 58, at 468.

position also has many intelligent and well-intentioned adherents.[61]

However, for mushy moderates like myself, a grand bargain along these lines carries the possibility of reducing significantly the overall net burden on employers and plans while simultaneously improving protection for plan participants and their families.

For those willing to entertain that bargain, there remain important caveats. Most obviously, the grand bargain, like all such compromise packages, is likely to be fragile and difficult to obtain. Implementing the grand bargain will require statesmanship and enlightened self-interest, two phenomena often in short supply. Nevertheless, a grand bargain along these lines is, I respectfully suggest, a goal worth pursuing.

And so, as I close, I observe many of you leaning over your coffee cups with the same skeptical look Professor Bittker had three and one-half decades ago as he and I first learned of ERISA. In the years which followed, ERISA, as they say, has been very, very good to me. I remain convinced that, despite all of its flaws and limitations (and these are real and serious), ERISA can be retooled and rebalanced in a grand bargain for the challenges which lie before us.

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61. *See, e.g.*, Theodore R. Groom & John B. Shoven, *Deregulating the Private Pension System*, *in* THE EVOLVING PENSION SYSTEM 123, 124, 152 (William G. Gale et al. eds., 2005).