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FOUNDATIONS OF THE COMMON LAW OF PLANS

Jay Conison*

BACKGROUND TO THE PROBLEM

I. ERISA AND FEDERAL COMMON LAW

The Employee Retirement Income Security Act of 1974 ("ERISA")¹ is the repository of law and policy concerning private employee benefit plans.² State law is largely irrelevant, since ERISA preempts virtually all state laws that relate to such plans.³ And no other federal law regulates these plans in any systematic way.⁴


². ERISA does not regulate governmental plans (as defined in ERISA § 3(32), 29 U.S.C. § 1002(32)). Among private plans, ERISA exempts from coverage certain church plans (as defined in ERISA § 3(33), 29 U.S.C. § 1002(33)); plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws"; certain foreign plans; and unfunded excess benefit plans (as defined in ERISA § 3(36), 29 U.S.C. § 1002(36)). ERISA § 4(b), 29 U.S.C. § 1003(b). The conclusions reached in this Article are not necessarily applicable to plans that are not subject to ERISA.


⁴. Other federal statutes that deal with limited aspects or special problems of benefit plans are section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5) (1988); section

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I received very helpful criticisms of earlier drafts from Norwood Beveridge, Nancy Conison, Peter Dillon, Edward Eberle, Michael Gibson, John Langbein, and Joseph Weeks.


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3. ERISA divides all employee benefit plans to which it applies into two categories: pension benefit plans, which provide retirement income, ERISA § 3(2), 29 U.S.C. § 1002(2); and welfare benefit plans, which provide medical and other forms of current benefits to employees, ERISA § 3(1), 29 U.S.C. § 1002(1).

Pension benefit plans are further divided into two main kinds: defined benefit plans, in which retirement benefits are determined by a formula, usually dependent on compensation and years of service, ERISA § 3(35), 29 U.S.C. § 1002(35); and defined contribution plans (or individual account plans), in which an individual's retirement benefit is determined by the amount contributed over time to his individual account in the plan, and to the investment performance of the funds in that account, ERISA § 3(34), 29 U.S.C. § 1002(34).


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Yet ERISA is often no more than the starting point for legal analysis because it makes federal courts primarily responsible for developing much of benefit plan law. ERISA treats many subjects with such excruciating detail that little room remains for judicial interpretation or clarification. But other subjects—indeed, some of the most fundamental and most important ones—are treated only through announcement of general principles that must be refined and elaborated in judicial decisions. Nor is this the only way that ERISA leaves matters to the courts. For still other subjects, ERISA ousts state law on a wholesale basis without itself supplying any rules to fill in the gaps. In these latter areas, the extrapolation of ERISA's principles and the development of gap-filling rules has been left entirely to the courts, with little or no express statutory direction.

There are two reasons for this deference, indeed delegation of lawmaking authority, to the courts. One is that ERISA, while ambitious in its goal of righting plan-related wrongs, is a statute largely without precedent. Congress had determined that employee rights to anticipated benefits were woefully underprotected and concluded that the threats to employees' interests demanded an expansive and thorough legislative response. Yet Congress had few legislative models to draw on as guide to the problems' solution because, prior to ERISA, the law of plan-related matters had been developed mainly by the courts. In the Ninety-third Congress, which enacted ERISA, various regulatory approaches were proposed that ultimately were pieced together into the


6. See, e.g., Black v. TIC Inv. Corp., 900 F.2d 112, 114 (7th Cir. 1990), where the court stated:

To determine whether estoppel is applicable to ERISA actions, our first resort would ordinarily be to the statute itself. In this case, the statute is silent. This is not so much a question of statutory interpretation as a question of public policy. Is it better to allow estoppel in employee benefit cases or to bar them?

Id.

final bill. Much of ERISA was intended to be experimental, to consist of regulatory first approximations, later to be refined through experience and in the courts. Congress wished the federal courts to work out the ramifications and details of the statute's principles and approaches, so that it could learn how subsequently to improve the statute and make it more effective.

The second reason for Congress' deference to the courts is its recognition that the law of benefit plans had long been a part of the common law. ERISA, of course, was intended to provide benefit plan law with a statutory grounding. Yet Congress was very much aware of the traditional role of courts in developing the law of plans, and nothing in the statute or its legislative history suggests any intent that that role should be eliminated.

The statute itself makes clear that it is neither comprehensive nor the last word on the subject of benefit plan regulation. In it, Congress provided for many different groups to study ERISA's effects and to report on the need for further legislation. See ERISA §§ 512, 513, 3021-3022, 3031, 29 U.S.C. §§ 1142, 1143, 1221-1222, 1231.

A clear expression of this intent can be found in Congress' sweeping decision to preempt state laws. It was not until the Senate and House bills emerged from the conference committee that the section on preemption was amended so that it would have its current expansive language. HR. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 82 (1974), reprinted in 3 LEGISLATIVE HISTORY, supra note 7, at 4357, and in 1974 U.S.C.C.A.N. 5038, 5162. The purpose of the amendment was explained as follows by one of ERISA's sponsors:

Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs.

Congress recognized that such a novel, sweeping provision could generate unexpected results and that those results would have to be evaluated subsequently. Thus, ERISA provides that the Joint Pension Task Force, created by the statute, should study the consequences of the preemption provision. ERISA § 3022(a)(4), 29 U.S.C. § 1222(a)(5). As was explained to the Senate:

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

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For a discussion of congressional intent
on the common law character of benefit plan law is less profound than is often assumed. Certainly ERISA contains meticulously detailed provisions that leave little room for judicial refinement—tax provisions, vesting standards, funding standards, and disclosure requirements, for example—and these provisions have been committed to administrative agencies for any needed elaboration. But these detailed rules and standards are mainly preventive, not remedial. They were not, and never could have been, developed through the common law process. Remove them and what remains is a statute that informs courts, but only in general terms, how they should accommodate the various policies and interests that bear upon plans and employee rights under plans. Subject to any statutory redirection, courts are to proceed largely as they have before.

Thus, even after ERISA, the law of benefit plans remains in substantial part a body of common law. The broadly framed protective provisions, such as the fiduciary and enforcement rules, are now being given increasingly precise meaning through case law development. And in the gaps created by the broad preemption of state law, federal courts have supplied rules and bodies of rules to govern statutorily unaddressed topics such as restitution and liability of nonfiduciaries for participating in a fiduciary's breach.

This developing common law of plans is federal common law. The fact that it is federal common law is analytically significant, because any body of federal common law necessarily is directed common law. Largely because federal courts must take care to respect principles of federalism and separation of powers in their development of rules to supplant state laws, any body of federal common law must be informed and guided by the statute that identifies the subject of lawmaking as a matter of federal concern. In the case of benefit plans, of course, ERISA is the statute that makes the area one of intense (indeed exclusive) federal concern, and so the federal common law of benefit
plans must be a common law that furthers the policies of that act.

II. The Problem

What policies the common law of plans must further can partially be determined from the face of the statute. ERISA clearly instructs courts, in developing plan-related law, to treat as paramount the goal of protecting employee rights and expectations relating to benefits from plans.17 Hence, plan-related common law must further the policy of protecting employee benefit rights and expectations.

Yet this conclusion is of little help in deciding hard cases. There are many ways to protect employee rights and expectations, and many ways to accommodate the policy of protecting them with other policies and interests involved in plans. Courts very often have difficulty determining how to accommodate ERISA’s employee-protective purpose with other policies and provisions found in the Act. For example, they have had substantial difficulty reconciling ERISA’s protective policy with the requirement that employee rights under a plan be specified in writing.18 This difficulty has led to uncertainty about important questions, such as the enforceability of claims to benefits based on oral representations19 and the effect of a plan provision giving a fiduciary discretion in deciding claims.20

Other examples abound of uncertainty as to the proper reconciliation of policies. Many difficulties arise in the effort to accommodate the employees’ interest in protection of their benefit expectations with the employer’s interest in establishing and using a plan to serve its own business needs. Many cases dealing with this problem of accommodation strike the balance almost reflexively in favor of the employees, for example, by holding an employer-fiduciary liable for using a plan to serve its own ends, even if it causes no pecuniary loss to the plan.21 Some commentators have strongly criticized this approach.22

How, then, should a court select the policy or policies to be implemented in any given case? How should courts resolve competing policies and principles so

17. See, e.g., ERISA § 2(a), 29 U.S.C. § 1001(a) (stating Congress’ findings that “many employees with long years of employment are losing anticipated retirement benefits”); ERISA § 2(b), 29 U.S.C. § 1001(b) (stating that the policy of ERISA is “to protect . . . the interests of participants in employee benefit plans”).
as to further the aims of ERISA? These are the problems we address in this Article.

III. THE SOLUTION

To answer them, we propose to take seriously the fact that benefit plan law has been developing since well before ERISA. We propose to treat ERISA as a statute that self-consciously places itself within the course of that development and that aims to guide its further progress. This approach differs from the currently prevailing one. The prevailing approach is ahistorical, and treats both ERISA's guiding principles and the post-ERISA common law of plans as created largely out of a vacuum. ERISA is viewed as a free-standing source of policy and guidance whose common law background is substantially irrelevant. By contrast, the approach taken here will place ERISA in its historical and conceptual context: as a statute, influenced by seventy-five years of common law development, that sought to make the common law more effective as an instrument for protecting employee rights. As we shall emphasize, ERISA neither began nor terminated the judicial development of the law of plans. It simply redirected it.

This Article, then, will proceed as follows. The first part will carefully examine the conceptual evolution of plan common law. We will first ascertain what plans are and what functions they have been developed to perform. We will then determine what problems pre-ERISA common law dealt with, how the problems were treated, and what inadequacies there were in that common law treatment.

The second part will examine the text and legislative history of ERISA. The goal here is to understand the statute's relationship with prior law. We will determine what parts and features of the traditional law of plans ERISA adopts and what parts it rejects; and what general guidance it gives for further development of the law.

Finally, the last part of this Article will show how the conclusions drawn in the first two parts can be used to clarify current questions in the modern law of plans. The two most important topics addressed are foundational: how ERISA permits the accommodation of employer interests in plans and what

23. Our study will focus on the conceptual evolution of pension plan common law because it is the body of common law that most influenced ERISA and the body of law whose inadequacies ERISA was most concerned to rectify. A separate, pre-ERISA common law of welfare plans existed, some of the features of which we shall note as appropriate. However, ERISA largely disregards this body of law. Congress chose simply to have welfare plans governed by the same principles and priorities it chose to govern pension plans. Many think this was a mistake, but it is not our concern here to evaluate its wisdom.

Our study will also be concerned principally with defined benefit plans, see supra note 2 and accompanying text; in particular, noncollectively bargained defined benefit plans. The conclusions reached here are generally applicable to defined contribution plans and to collectively bargained plans. However, when applying these conclusions to problems involving the latter kinds of plans, adjustments may sometimes have to be made to take into account additional factors peculiar to them.
kinds of activities ERISA is designed to regulate.

Among the most important conclusions we reach in this Article are following:

The Nature of Plans. Plans have two aspects: they are both parts of the employer's business and systematic sources of employee expectations.

The Nature of Benefit Plan Law. These two aspects of plans give rise, respectively, to employer and employee interests and rights in plans. Much of the law of private benefit plans is a matter of working out an accommodation between employer and employee rights and interests.

Plans as Contracts. Plans should not be treated by benefit plan law simply as if they were contracts. The history of benefit plan law before ERISA demonstrates the futility of such a treatment, and ERISA itself rejects the contractual model of plans in favor of a *sui generis* approach to protecting employee benefit expectations.

Employer Interests in Plans. Although ERISA is focused almost exclusively on the protection of employee interests in anticipated benefits, it still permits the accommodation of employer interests in their plans. ERISA is not the entirety of benefit plan law, and its rules and principles do not deal with all aspects of plans. Out of the domain of plan-related activity, ERISA carves an area in which employee interests are paramount. However, it leaves other areas for the expression and protection of employer interests in plans; indeed, areas in which employer interests may be paramount.

Pensions as Deferred Compensation. Although the notion of pensions as deferred compensation has long found expression in the law of plans, it is a concept that so far has been of only minor importance for the determination of legal rights and relationships. Before ERISA, it was a wholly empty concept, having no legal significance for any important issue in the common law of benefit plans. ERISA relies on the concept, but only as a secondary factor in justifying and determining the scope of benefit plan regulation.

BACKGROUND TO ERISA

I. THE EMERGENCE OF PLANS AS INDUSTRIAL PROGRAMS

Pensions as isolated grants to individuals are probably as old as civilization, and grants of pensions by governments to favored individuals or classes of individuals have long been part of the American political tradition. How-


25. The most favored group has been war veterans. A 1636 decree of the Plymouth Colony settlers provided that "any man sent forth as a soldier and returned maimed should be maintained by the colony during his life." See SYLVESTER J. SCHIEBER, SOCIAL SECURITY: PERSPECTIVES ON PRESERVING THE SYSTEM 7 (1982). For laws concerning pensions granted to Revolutionary War veterans, see An Act further to Provide for the Payment of the Invalid Pensioners of the United
ever, systematic, employment-based programs for the grant of pensions to old or infirm former employees did not begin to appear until the latter part of the nineteenth century and did not become common until after 1910.\textsuperscript{26} It is easy to understand why. Private pension programs are voluntary on the part of employers and are established to address specific business needs. But until the period around the turn of the century, the character of business enterprises and the structure of the economy were such that a systematic pension program would have fulfilled no useful function for an employer. Until around the turn of the century, few people worked for others long-term,\textsuperscript{27} and fewer still worked long enough to grow old in their jobs.\textsuperscript{28}

If a business owner did choose to provide financial support of some kind to the isolated elderly employee who was no longer able to perform useful work, the owner could provide the employee with a sinecure, without fear of harming the efficiency or profitability of the enterprise.\textsuperscript{29} As one scholar of early pension plans described the relevant features of the pre-pension plan economy:

[B]usiness enterprises were dependent on the life and fortune of one person or at most of a few families. Not many of them appear to have existed over any considerable period of time. Persons who worked for others were relatively few and the relationship frequently was of short duration. While undoubtedly many proprietors maintained a paternalistic attitude toward their employees, and supported them in their old age, the growth of the West and constant migrations probably tended to take out of work in the industrial centers many who in similar circumstances at the present time would be compelled to remain. It is not unreasonable to infer under these circumstances that the proportion of persons in the employment of a single enter-

\textsuperscript{26} WILLIAM GRAEBNER, A HISTORY OF RETIREMENT 133 (1980); 1 LATIMER, supra note 24, at 20-60; Alfred Epstein, The Problem of Old Age Pensions in Industry, in SELECTED ARTICLES ON OLD AGE PENSIONS 56 (Lamar T. Beman ed., 1927). Latimer was able to identify only 66 formal plans established between 1874 and 1910, but 101 were established in the next five years. 1 LATIMER, supra note 24, at 42 (tbl. 4).

\textsuperscript{27} On the general problem of labor turnover in the nineteenth and early twentieth centuries, see Matthew W. Finkin, The Bureaucratization of Work: Employer Policies and Contract Law, 1986 Wis. L. Rev. 733, 737-40. On turnover in the railroad industry before the 1880s, see WALTER LICHT, WORKING FOR THE RAILROAD: THE ORGANIZATION OF WORK IN THE NINETEENTH CENTURY 213 (1983) ("The number of railway workers who survived, succeeded and were promoted, and stuck to railroading was small.").

\textsuperscript{28} LOUIS D. BRANDEIS, Our New Peonage: Discretionary Pensions, in BUSINESS—A PROFESSION 65-66 (1914); Epstein, supra note 26, at 48. One reason was that voluntary withdrawal by the elderly from business life was encouraged by society. W. ANDREW ACHENBAUM, OLD AGE IN THE NEW LAND: THE AMERICAN EXPERIENCE SINCE 1790, at 22-23 (1978); GRAEBNER, supra note 26, at 12-13. Another reason was that families were accustomed to and were commonly able to care for their older nonworking members without financial assistance from others. ACHENBAUM, supra, at 75-80. Many states had laws to make individuals responsible for support of family members. Id. at 76.

\textsuperscript{29} 1 LATIMER, supra note 24, at 19.
prise for a long period was small. The problem of providing for aged employees was, therefore, somewhat exceptional...\(^{30}\)

Why private pension plans emerged when they did, in the form they did, is a complex tale of economic and social development.\(^{31}\) For present purposes, it suffices to emphasize two key points, namely that (a) systematic programs for the grant of pensions developed in association with the newly emerging practice of systematically retiring older employees from business enterprises, and (b) the "older employees" who were systematically being retired and pensioned were employees who were no longer wanted, not because of infirmity, but simply because they had reached a specific age. Let us deal with these points in turn.

A. Retirement and the Expansion of Informal Plans

Plans and retirement evolved toward modern form together. Retirement, of course, is now taken for granted as an integral and inevitable feature of both the management of business and the cycle of working life. Yet it is a new institution, and began to appear only in the late nineteenth century\(^{32}\) in response to deep changes in industrial organization and in the composition of the workforce. One of the changes that unquestionably contributed to the emergence of systematic retirement was the sheer increase in the number of older employees. This increase, though, was not an isolated demographic phenomenon; it was part of the overall increase in the number of persons employed by others—of the fact that, in Brandeis' words, "America had become largely a nation of employees."\(^{33}\)

The increase in number of older workers contributed to the development of retirement plans in a straightforward way. Older workers who could no longer fully perform their assigned tasks had always been a problem for the employer, particularly in cases where the employee had long served the enterprise and had no other means of financial support. So long as the number of such workers in an enterprise remained very small, it was possible for an employer to deal with the problem through informal, unsystematic methods. As noted above, older workers might be assigned lighter or easier work, perhaps moving by stages to progressively less demanding tasks the older and more infirm they

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30. Id. at 17-18.
31. For careful studies of the development of pension plans, see Latimer, supra note 24, passim; Graebner, supra note 26, ch. 5.
32. "No profession, industry, business, craft, or trade organization prior to 1860 required people to leave the labor force because they had reached a predetermined chronological age." Achenbaum, supra note 28, at 22.
33. Brandeis, supra note 28, at 65-66. Many factors contributed to the increase in the workforce. The principal ones were increased immigration, lessened opportunities for self-employment, and expanded opportunities for employment in large enterprises. Demographic factors, such as the increase in the proportion of older persons in the population as a whole, probably were secondary. Cf. Achenbaum, supra note 28, at 89-106 (reviewing old age demographics of workforce and general population).
became. Alternatively, they could be discharged from the enterprise and, in exceptional cases, pensioned on whatever terms the employer deemed appropriate. But as the number of older workers unable to perform their tasks increased, the employer's room for choice diminished. It became infeasible to keep all older workers employed in the enterprise because there were not enough easy jobs to satisfy the increased demand. Discharge for old age thus became increasingly common.

Those employers who were concerned that the workers discharged for old age not face destitution in their remaining days could adopt or expand the practice of granting pensions to retired employees who were considered deserving. But, as expanded, the practice of pensioning retired employees demanded regularization, both for administrative control and for assurance that the retirees were treated fairly and uniformly. There was a natural evolution from the informal practice of occasionally pensioning an older, deserving employee to more structured arrangements for the retirement of older workers with pensions.

Of course, not every business regularized its retirement-and-pension arrangement through just this evolution. Yet many of the early plans did bear unmistakable imprints of having developed from, or of having been influenced by, still earlier informal practices. Among such imprints: an emphasis, in the stated purpose of the plan, on retiring workers who, because of old age, were incapable of useful work; provisions in the plan for discretionary decision making by the employer, at least as to whether an employee had reached the stage where he should be retired; and use of the pension primarily to provide old-age relief to deserving retirees.

B. Retirement Plans and Industrial Efficiency

Yet these were not modern retirement plans, and, indeed, modern retirement plans did not develop as simple elaborations of these kinds of arrangements. The plans just described were structured to deal with problems caused by the inability of individual employees to perform in the business. For modern plans to develop, the programs had to be modified so they could deal with a new and very different industrial problem.

These were the formative years for the evolution of large, professionally

34. See, e.g., Graebner, supra note 26, at 121-22.
35. Id. at 11-12, 121-271; Latimer, supra note 24, at 19.
36. See Graebner, supra note 26, at 124-25.
38. An early railroad retirement plan, for example, provided that "[a]ny male employee who shall have been in continuous service for not less than twenty-five years ... and who, in the opinion of the board of pensions, shall have become unfit for duty, may be retired and pensioned by the board of pensions." Fickling v. Pollard, 179 S.E. 582, 582 (Ga. App. 1935); see also 1 Latimer, supra note 24, at 65-87. For a discussion of some of the early railroad plans that provided pensions only to those too old or infirm to continue work, see Emory R. Johnson, Railway Departments for the Relief and Insurance of Employees, 6 Annals Am. Acad. Pol. & Soc. Sci. 64 (1895).
managed business enterprises. The profitability of these enterprises depended on their ability to achieve and maintain high-speed, high-volume, low-cost operation.\(^{(39)}\) This critical dependence of the success of the enterprise on operational efficiency necessarily transformed relationships between the enterprise itself and those whom it employed. The changes in relationships were profound, for both managerial employees and laborers.\(^{(40)}\)

One such change is important for the present inquiry: There was an increase in demand for those who could work rapidly and efficiently and who could adapt to the new methods and new technologies of the enterprise. Even more important is the converse of this fundamental change: a reduction in demand and lessened tolerance for those persons who did not possess, or who had lost, these now highly valued characteristics. The impact of this latter change was probably slight on employees who, because of age, were genuinely unable to perform any but the easiest work. They were not valuable to the large industrial enterprise, but they had not been valuable to the small shop either. By contrast, the impact of the change was very great on those older workers who, while still able to perform substantial work, were considered as a group to be slow, inefficient, and unable to adapt to the new business methods.\(^{(41)}\) The transformation of business and the increasing importance of industrial efficiency now rendered these older but not infirm workers less valuable to the enterprise than the younger workers, and so, for the sake of profitability and efficiency, it was thought desirable to replace them with younger workers. This transformation of the status of older but not yet infirm workers began with industries—such as railroads, public utilities, steel and oil companies—that

\footnotesize{39. See generally Alfred D. Chandler, Jr., The Visible Hand: The Managerial Revolution in American Business (1977) (discussing the development of the new forms of business organization).

40. At the same time the transformation in the nature of business enterprises was precipitating development of systematic pension plans, it was inducing yet a broader development in industrial relations, of which the emergence of pension plans was only a small part. As noted above, the working class in the late nineteenth and early twentieth centuries expanded enormously. Methods were needed to help ensure that the employees would work productively and efficiently. In addition, methods often had to be devised by the employer to help satisfy basic living needs of employees. A response to the problems was welfare capitalism, which has been described as "any service provided for the comfort or improvement of employees which was neither a necessity of the industry nor required by law." Brandes, supra note 37, at 5-6. Forms of welfare capitalism included not only pension plans but also education programs, company housing, company hospitals and medical care, company sporting teams, and company sponsored YMCAs and churches. Id. passim. The general development and systematization of welfare capitalism in many respects parallels the more particularized development of pension plans, with respect to the industries first affected the underlying business purposes, and the increasing level of systematization with time. For a review of comprehensive programs of nineteenth century railroads that one now would consider benefit plans, see Johnson, supra note 38. One major difference between pension plans and most other forms of welfare capitalism is that the institution of pension plans has survived to the present, whereas most other forms of welfare capitalism, and indeed the welfare capitalism movement itself, have disappeared.

41. Achenbaum, supra note 28, at 47-50; Epstein, supra note 24, at 3, 8-21; Graebner, supra note 26, at 18-35.}
first evolved into the large, professionally administered enterprises that are prototypical business forms today. But the transformation spread rapidly beyond. It soon was taken as "common knowledge that there is an industrial old age . . . an economic human obsolescence, entirely distinct from the evening of life," and that, for the sake of the enterprise, workers who have reached industrial old age must cease to labor in the business.

Observe that the problem created for the new forms of business by this emergent personnel category of "industrial" old age was very different from the problem that physical old age had created for the earlier forms of business enterprise. The new problem was an efficiency problem; it was the problem of how best to prune the workforce of employees thought to be economically obsolete. By contrast, efficiency had been a lesser concern, if a concern at all, for the earlier forms of business enterprise; the problem that older workers had presented was largely the humanitarian one of dealing with persons no longer able to function because of their physical and mental condition. Although the problems differed, the solutions were facially similar: arrangements for retirement with a pension.

Yet it is important to recognize that the solutions were only similar; beneath the surface they differed radically. For while the older arrangements had been designed to solve isolated problems caused by old and infirm individuals, the newer arrangements were designed to treat problems caused by a newly defined group. The fundamental difference was that the older arrangements had been concerned largely with providing pensions in appropriate cases, while the newer arrangements were concerned mainly with retiring those who presumptively were no longer worth their cost. The older and newer arrangements,

42. Sigman v. Rudolph Wurlitzer Co., 11 N.E.2d 878, 879-80 (Ohio Ct. App. 1937); see also LICHT, supra note 27, at 213 ("The real significance of the B. & O. plan lies in its establishing a definite date at which men could retire. For B. & O. employees a new stage of life was thus created, for there now existed a formal distinction between a man's working and postworking life.").

43. One report framed the problem as follows:

What to do with the worn-out workers,—that is the essence of the pension problem. To carry them on the pay roll at their regular employment means waste and disorganization of the working force; to turn them adrift is not humane. In the past, large employers of labor have tried to meet this difficulty in piecemeal fashion, by retiring aged employees in certain cases, or giving them light work, each case being provided for separately, on its own merits; now they are beginning to deal with the problem in a systematic fashion, by adopting a uniform method of retirement with pension.

BRANDEIS, supra note 28, at 67 (quoting MASSACHUSETTS COMMISSION ON OLD AGE PENSIONS, REPORT (1910)).


National Dairy started its plan only in 1942 . . . We have about 37,500 employees. We made a study and found out that we were spending a great deal of money on retirement of superannuated employees. We also found that we had a great number of employees, far beyond 65, still serving, still drawing down salaries, which they had achieved in their best years, and we thought that their services were not measuring up
thus, had very different orientations, and the difference in orientations led to fundamental differences in plan structure. The group orientation permitted, indeed required, the plan and its processes to become highly depersonalized. Case-by-case evaluations of the appropriateness of an individual's retirement were not necessary, and a simple chronological standard could uniformly be applied. Similarly, there was no need for discretionary judgments as to whether an individual was entitled to a pension and, if so, in what amount; formulas based on years of service and salary could be used instead. And since the main purpose of the plan was to eliminate inefficient workers rather than to provide old age relief, the program did not have to be structured to provide pensions for everyone who was retired. Pensions could be made available only to the extent needed to satisfy the employer's needs or concerns. And so the entire process of retiring workers became bureaucratized and transformed into a program for the benefit of the employer rather than for the benefit of the retiring employees. Pension and retirement plans became tools of industrial efficiency.45

It is striking how much even the earliest of the efficiency-oriented plans resemble modern pension plans. These early plans normally were reflected in a document that set forth the purpose of the plan, the formula for calculating benefits, and the conditions that would have to be satisfied by an employee before benefits would be granted. Most also relied on a specified funding procedure by which money to pay the benefits was to be supplied, and they often established a separate fund or trust to hold the contributions and to pay out benefits. Usually the plan was administered by a committee that had responsibility for determining entitlement to benefits and the amount. Very commonly, the determination of the committee was made final.46

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46. See generally LATIMER, supra note 24, passim. For examples in reported decisions, see,
C. The Role of Pensions in Efficiency-Based Plans

A basic aspect of these plans may seem puzzling in light of their purpose. If the problem addressed was that of pruning a class of employees from the workforce, a systematic arrangement for mandatory retirement alone would appear to solve the problem. Why, then, did employers continue to couple retirement with at least the possibility of a pension in their formal plans? Good-heartedness may have been a factor, but it is unlikely that employers who were establishing plans to promote industrial efficiency were altruists, offering pensions only because they provided old-age relief. What is the explanation for the grant of pensions to some retirees?

The explanation lies in the fact that plans were not only granting pensions, they were also making promises and representations about them. The promises and representations might be explicit in the plan document or implicit from the actual operation of the plan. Those promises and representations about pensions, like any promise or representation, tended to create expectations. And those plan-induced expectations about pensions had the power to induce reliance and responsive conduct on the part of the employees. Indeed, the conduct induced could be conduct over a very long term, perhaps over the entirety of an employee's working life.

Just as employers came to realize that retirement-and-pension arrangements could be used to prune the less efficient older workers from the workforce, they also came to realize that the prospect of a pension—of a source of old-age support—might be used to attract the younger and more efficient workers that were preferred in place of older ones. They also realized that, by making the pension conditional on long-term good behavior, dedicated service might be encouraged and turnover might be reduced. 47 Thus, the systematic promise, or

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47. One court quoted the secretary-treasurer of a large pharmaceutical company as follows:

The object of the corporation expending its money for pensions is continuity of service, or increasing the continuity of service, decreasing the turn-over of employees, making it an object for them to stay with us. That does not appeal so much to the younger employee, or the employee that has only been with us a short time, as it does to the employee that reaches the age of 40 years, after which he begins to think of what he is going to do after he is unable to work longer, and he stays with the job. In my opinion it is an economic advantage to the company in providing this pension system for our employees; that is our real reason for setting aside the funds and making the expenditure for the pension. I believe the pension produces greater faithfulness on the part of the employee. The question of labor turn-over is an item of considerable expense to an industrial concern; it is very much to the advantage of the company to have the employees in continuous employment. We look upon the pension as compensation for long service.

Bowler v. Nagel, 200 N.W. 258, 260 (Mich. 1924); see Brandes, supra note 37, at 105-06; Graebner, supra note 26, at 127-30; de Roode, Pensions as Wages, 3 Am. Econ. Rev. 287, 287 (1913). For a contemporary perspective on this function of plans, see generally Dennis E. Logue, Legislative Influences on Corporate Pension Plans (1979).
at least prospect, of a pension could serve as a complement to systematic retirement. While retirement would eliminate the undesirable workers, the prospect of a pension would attract, motivate, and help retain the desirable younger ones. The pension plan, in this way, could be rendered a more complete tool of industrial efficiency. It became an integral component of the employer's business, a feature of the employer's overall program for building an efficient workforce.

II. PRE-ERISA Treatment of Interests in Plans

And so plans developed, not as employee savings programs, not as old age relief programs, but as industrial programs designed to affect employee conduct for the benefit of the enterprise. Yet as such they raised questions about the employees' interest in the plan. In particular, they generated the following questions. Should a plan be understood to give rise to any employee rights to a pension? If so, what should be the scope and character of those pension rights? These were subjects of extensive common law development.

There is a virtually canonical account of how pre-ERISA common law dealt with these questions. According to that account, courts initially answered the questions by treating pensions provided through plans as "gratuities"—as no more than gifts from the employer. As a result, an employee had no enforceable claim to a pension from the plan. However, the account continues, the judicial understanding of plans and pensions evolved; courts eventually at-

48. In the early period of systematic plans, some writers argued that employers who used plans to improve the character of the workforce were engaged in wishful thinking. Latimer argued that the evidence was inconclusive to show that pension plans actually provided the industrial-relations advantages claimed for them. 2 LATIMER, supra note 24, ch. 16. And, as Epstein pointed out, "In view of the [business] considerations, the number of industrial concerns in the United States that have established such systems for their superannuated employee is amazingly small." EPSTEIN, supra note 24, at 148. For judicial doubts, see Cowles v. Morris & Co., 161 N.E. 150, 159 (Ill. 1928).

Recent economic analysis shows that defined benefit plans can reduce labor mobility, at least where vesting requirements are not unduly stringent. However, the same analysis shows that high levels of vested benefits can increase voluntary departure rates of workers who are between 40 and 60 years old. See RICHARD A. IPPOLITO, PENSIONS, ECONOMICS AND PUBLIC POLICY 140-44 (1986); Barry McCormick & Gordon Hughes, The Influence of Pensions on Job Mobility, 23 J. PUB. ECON. 183 (1984); Bradley R. Schiller & Randall D. Weiss, The Impact of Private Pensions on Firm Attachment, 61 REV. ECON. & STAT. 369 (1979).

49. EPSTEIN, supra note 24, at 148-56; GRAEBNER, supra note 26, at 127-32; 2 LATIMER, supra note 24, at 894-902.

Pension plans traditionally have had a wide variety of uses for employers. Among the more commonly cited ones, in addition to facilitating the orderly retirement of superannuated employees: helping to reduce turnover, especially among mature employees; helping to attract desirable employees, especially managers and executives; helping to maintain stability of the workforce in depressions; maintenance of high morale and the promotion of loyalty; helping to make available opportunities for advancement in the organization; inducing desirable characteristics, such as thrift, in employees; and helping to create a favorable public image for the enterprise. See, e.g., DAN M. MCGILL & DONALD S. GRUBBS, FUNDAMENTALS OF PRIVATE PENSIONS 21-23 (6th ed. 1989); JAY V. STRONG, EMPLOYEE BENEFIT PLANS IN OPERATION 1-9 (1951).
tained wisdom and the law came to treat pensions as contractual entitlements. Under this contractual regime, employees might or might not have enforceable rights, depending on the character and terms of the "contractual" plan. Finally, the account continues, the evolution in legal understanding culminated in the recognition of pensions as compensation, over and above wages, given by the employer in exchange for the employees' labor. Yet, it was a peculiar form of compensation, because it was deferred until the employee's retirement. In summary, then, the legal evolution before ERISA supposedly was one that led, by progressive stages, to a theory of pension plans as contracts for deferred compensation.

Though widely accepted, this tale of conceptual evolution is factually oversimplified and heuristically useless. Ultimately, it explains nothing about the judicial treatment of pensions and plans because it fails to account for the industrial and legal problems that courts were addressing. It fails to consider why courts chose to use the words "gratuity," "contract," and "deferred compensation," and it fails to consider even what those terms were supposed to mean. In the end, the received account confuses judicial rhetoric with judicial resolution—or, more often, evasion—of the fundamental problems of pension plan law identified above.

Let us carefully examine the pre-ERISA perspectives on pensions and pension claims, and attempt to understand why courts answered the fundamental questions of pension plan law as they did.

A. The Plan as Employer Property

A pension plan established by an employer could plausibly be viewed as the employer's property—indeed, as property in which the employer alone had a legally cognizable interest. Invariably, there was little if any opportunity for employees to help determine a plan's content, to participate in its administration, or to make use of the plan (as opposed to the pensions that might be


51. Some early businesses established instead of plans so-called "relief departments." A relief department was an employer-sponsored membership organization run as an administrative unit of the employer's business. Relief departments were established primarily to make available disability and death benefits. Some, though, offered pension benefits as well. See Johnson, supra note 38.

52. Except to the extent that some plans, by the grace of the employer, did provide for employee representation on the administrative committee. See 2 Latimer, supra note 24, at 621.
granted under it) for their own ends. Certainly no employee could individually bargain for a plan or bargain over the terms of the employer’s plan. If an individual did bargain for a pension as part of his compensation, the bargain and the pension would be specific to that employee and would form no part of any systematic plan.

Labor organizations might have been able to bargain for plans funded by employers, but for a long time they avoided doing so. Unions were distrustful of employer-sponsored pension plans, recognizing that their purpose often was to induce loyalty and bonding to the employer and, in many cases, to deter union membership and organized employee activity. This distrust of employer-sponsored plans often led unions to oppose them.

Thus, the form and content of employer-sponsored plans were determined wholly by the employer, and the employer was left free to use the plan in whatever way and for whatever purposes it wished. As if to emphasize that the plan should be deemed their exclusive property and completely within their control, employers commonly stated in the governing document that the employees had no rights to a pension, or to anything else with respect to the plan. Some went so far as to characterize the pensions to be provided as gratuities or gifts.

Many courts were receptive to this proprietary outlook and accepted the proposition that a plan established by an employer was the employer’s property, with which the employer could do as it wished. In the very first reported case to deal with (and reject) an employee’s assertion of pension rights under a plan, the court practically begged the question, beginning its analysis with this supposed axiom:

It must be conceded at the outset that a person or a corporation proposing to give a sum for the benefit of any person or any set of persons has the right

53. ACHENBAUM, supra note 28, at 83; BRANDEIS, supra note 28, at 73 (noting that “[t]he system is in effect a form of strike insurance”); GRAEBNER, supra note 26, at 131-32.

54. 2 LATIMER, supra note 24, at 758. Interestingly, some unions, recognizing the power of pension plans to induce loyalty and bonding to the sponsoring entity, themselves established pension plans for their members. EPSTEIN, supra note 24, at 194; GRAEBNER, supra note 26, at 138; WILLIAM C. GREENOUGH & FRANCIS P. KING, PENSION PLANS AND PUBLIC POLICY 40-42 (1976).

55. 2 LATIMER, supra note 24, at 719-21.

56. Menke v. Thompson, 140 F.2d 786, 790 (8th Cir. 1944) (holding that “benefits were, as declared in the plan, gratuities,” and that the company “had the right... to condition its bounty in such manner as it saw fit”); In re Missouri Pac. R.R., 49 F. Supp. 405, 406 (E.D. Mo. 1943) (stating that “it was competent for the company to make its bounty subject to whatever conditions it chose”); Cowles v. Morris & Co., 161 N.E. 150 (Ill. 1928); Fernekes v. CMP Indus., 195 N.E.2d 884 (N.Y. 1963); Dolge v. Dolge, 75 N.Y.S. 386, 387 (App. Div. 1902) (noting that “[i]t was simply a benevolent plan proposed by [the employer], and it was solely within his power and discretion to carry it out or not”); McNevin v. Solvay Process Co., 53 N.Y.S. 98 (App. Div. 1898), aff’d mem., 60 N.E. 1115 (N.Y. 1901); Going v. Southern Mills Employees’ Trust, 281 P.2d 762 (Okla. 1955); Magnolia Petroleum Co. v. Butler, 86 S.W.2d 258 (Tex. Civ. App. 1935); Spiner v. Western Union Tel. Co., 73 S.W.2d 566, 568 (Tex. Civ. App. 1934) (stating that “[t]he fund... constituted a charitable enterprise”); see also Gott v. Prudential Ins. Co. of Am., 192 S.E. 905, 905 (N.C. 1937) (relating to a disability plan).
to fix the terms of his bounty, and provide under what circumstances the gift shall become vested and absolute.\textsuperscript{57}

Other courts, on the basis of the same proprietary rationale, regularly dismissed employee challenges to plan-related decisionmaking by the employer. For example, courts upheld plan provisions that denied employees any enforceable right, even to the continuation of a pension annuity that had begun to be paid, and upheld the right of employers to terminate their plans at will, irrespective of the impact on present or future retirees.\textsuperscript{58}

The courts that reached these conclusions were not just applying old rules to new facts. At bottom, they were applying social and economic policy to the new phenomenon of private pension plans. Yet in making such policy choices, these courts were not concerned with issues of social welfare. Few if any reported decisions before ERISA considered private pension plans to have any bearing on major social problems, such as that of old-age poverty. Rather, the courts had a much different concern—that an individual's property was something over which he should have substantially unlimited discretion and control.\textsuperscript{59} As one court casually but tellingly commented, while upholding the right of an employer to stop paying an annuity to a retired employee, "The Master in the Parable of the laborers quotes the employer as saying: 'Is it not lawful for me to do what I will with mine own?'"\textsuperscript{60}

Unfortunately, what courts actually were doing about pension claims tends to be obscured by what they said they were doing, and it is largely for this

\textsuperscript{58} Cowles v. Morris & Co., 161 N.E. 150 (Ill. 1928); Wallace v. Northern Ohio Traction & Light Co., 13 N.E.2d 139 (Ohio Ct. App. 1937); see Tilbert v. Eagle Lock Co., 165 A. 205 (Conn. 1933).
\textsuperscript{59} On this principle, see, e.g., JAMES W. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 8-9, 23-26 (1956); Roscoe Pound, Liberty of Contract, 18 YALE L.J. 454, 461 (1909).
\textsuperscript{60} Magnolia Petroleum Co. v. Butler, 86 S.W.2d 258, 262 (Tex. Civ. App. 1935).
reason that the conventional history of pension plan law focuses on a supposed evolution from gift to contract. It is true that some courts, accepting the view of plans as employer property, purported to justify their refusal to enforce pension claims by accepting the characterization of the pension as a gift. It is also true that still other courts, again accepting the view of plans as employer property, purported to characterize the pension relation between the employer and employee as a contractual relation, albeit one of a "peculiar nature" because the employer unilaterally selected the terms of the supposed contract, could change its terms at will, and was the arbiter of all disputes arising under its terms; and because the supposed contract frequently specified that the employee had no legal rights in the contract's subject matter. And it is also true that use of contract terminology became more prevalent over time (although it never completely replaced the gratuity terminology). But the labels "gift" and "contract" were simply after-the-fact rationalizations, used to justify in comfortable jargon the prior policy determination not to allow employees to pursue claims for pensions under a plan.

The labels "gift" and "contract" were inappropriate to characterize the practice of offering and granting pensions through plans. This is self-evident for the "gift" characterization. To call pensions "gratuities" is to ignore their context. Plan-based pensions are offered and granted on a systematic basis through a permanent, carefully detailed, and methodically administered program that is intended to serve the employer's business goals. They are generally made available to an indefinite number of people for an indefinite period. It hardly makes sense to characterize something of this kind as legally indistinguishable from a birthday present. It is not surprising that the "gratuity" metaphor for pensions, although it long flourished in New York, never became the predominant way for courts to talk about pensions.

Yet the alternative "contract" metaphor was just as inappropriate. The scope of the legal category of contract is determined by the concerns of con-


64. It is extremely important that the reader not misunderstand what kind of statement we are making when we say that the contract metaphor is inappropriate. Legal literature abounds with debates over whether various institutions, entities, and things are contracts (or contractual). Probably the most vigorous such debate concerns the nature of the corporation. See, e.g., Victor Brudney, Corporate Governance, Agency Costs, and the Rhetoric of Contract, 85 COLUM. L. REV.
tract law, and contract law is primarily concerned with business transactions. The prevailing legal theory in the late nineteenth and early twentieth centuries (and still an important theory today) was that contracts were the atoms of legal and economic activity and were freely entered into by the parties for mutual self-advantage. The law of contract was seen as "roughly coextensive with the free market [and the] parties could be treated as individual economic units which, in theory, enjoyed complete mobility and freedom of decision.


In these debates one can identify at least three distinct meanings to the proposition "X is a contract." One meaning is that, for purposes of economic modeling and analysis, X is of such character that it may be treated as a contract. For example, some recent economic studies treat the employment relationship as if it were governed by implicit bargains between employer and employees, rather than by impersonal market forces alone. See, e.g., Costas Azariadis, Implicit Contracts and Underemployment Equilibria, 83 J. POL. ECON. 1183 (1975); Sherwin Rosen, Implicit Contracts: A Survey, 23 J. ECON. LIT. 1144 (1985); see also Ronald J. Gilson & Robert H. Mnookin, Coming of Age in the Corporate Law Firm: The Economics of Associate Career Patterns, 41 STAN. L. REV. 567, 569, 579 (1989). A second meaning of "X is a contract" is that X is a form of private ordering of the kind that (at least from a libertarian perspective) ought to be left substantially unregulated by government. Most of the debate over whether a corporation is contractual relies on this meaning. Finally, "X is a contract" may mean that X is so much like things governed primarily by contract law that it, too, ought to be governed primarily by contract law.

The three meanings of "X is a contract" are related. For example, many who argue that corporations ought to be substantially unregulated (second meaning) rely, in part, on economic characteristics of corporations (first meaning). See, e.g., Henry N. Butler & Larry E. Ribstein, Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians, 65 WASH. L. REV. 1 (1990); Fred S. McChesney, Contractarianism Without Contracts? Yet Another Critique of Eisenberg, 90 COLUM. L. REV. 1332 (1990). However, the meanings must ultimately be kept distinct, since they are concerned with different kinds of questions to be answered by different methods of analysis. The first meaning is concerned with empirical fact and economic modeling, the second with political and philosophical theory, and the third with categories of legal rules.

Our concern in this article is with "X is a contract" in its third sense. When we say that the contract metaphor for plans is inappropriate, we mean that plans are not the sorts of things that ought to be governed primarily by the law of contracts. For this reason, we will focus on the adequacy of contract law as a primary body for the treatment of legal questions concerning plans. This is not to say that the questions "Can a plan usefully be treated as a contract for purposes of economics?" and "Should plans be left substantially unregulated?" are not interesting or important. Plans have usefully been treated by economists as involving implicit contracts, see, e.g., IPOLITO, supra note 48, and the proper scope of governmental regulation of plans has long been an important topic of discussion—one that regularly emerges in connection with proposals to amend ERISA. But to focus on those other meanings would transform this into a completely different article.


66. LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE
The paradigm was the bilateral executory contract, the negotiated deal between the free economic units. But it is far from clear that a pension plan fits this paradigm. A pension plan is an arrangement in which one supposed party—the employer—may dictate the terms unilaterally, and in which there is no bargaining between it and the other supposed party—the employee or pension recipient. Of course, the carefully detailed plan document may look like a carefully negotiated contract and sway a court in its choice of legal analogy. But to confuse a document with the transaction, practice, or thing that the document reflects is pure fallacy. Putting aside the document reflecting it, a plan does not resemble a negotiated deal.

The obvious response, of course, is that many arrangements other than bilateral executory contracts do fall within the category of "contracts" and have been found to be governed quite well by contract law. Indeed, plans have often been characterized as unilateral rather than bilateral contracts. But a mere change in label does not resolve the question, for the new label still draws a conclusion about the applicability of contract law that needs to be justified. Nonparadigmatic arrangements are categorized as contracts only for good reason. They are properly deemed contracts only when they share with the paradigm material characteristics that justify application of the principles, policies, and rules that make up contract law. Those material characteristics include the limitation of the arrangement to two (or at least a very small number of) parties; temporal and subject matter limitation of the arrangement to a single, defined transaction; a commercial context for the arrangement; the exchange of value between the parties; some degree of bargaining over terms; and some

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STUDY 20-21 (1965); see also Morton J. Horwitz, The Transformation of American Law, 1780-1860 ch. 6 (1977); Hurst, supra note 59, at 11-14.


68. See supra text accompanying notes 52-54; cf. Arthur A. Leff, Contract as Thing, 19 Am. U. L. Rev. 131 (1970) (arguing that so-called contracts of adhesion may best be considered something other than contracts for purposes of legal treatment); Rakoff, supra note 45 (so-called contracts of adhesion should not be governed by contract law because generalizations about parties' interactions that underlie contract law are inapplicable).

The fact that plans are now sometimes established pursuant to the terms of a corporate acquisition, merger, or other transaction, or pursuant to a collective bargaining agreement, does not affect the point made in the text, for a contract to establish a plan is not the same as the plan established. In any event, even today, most pension plans are unilaterally established by the employer. With respect to plans established pursuant to collective bargaining agreements, it also is worth noting that good reasons exist for considering the collective bargaining agreement as itself something very different from the paradigmatic bilateral executory contract, and to understand labor law as something other than a specialized branch of contract law. See, e.g., 6A Arthur L. Corbin, Contracts § 1420, at 343-44 (1962); Robert A. Gorman, Labor Law: Unionization and Collective Bargaining 540-41 (1976); Archibald Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956); David E. Feller, A General Theory of the Collective Bargaining Agreement, 61 Calif. L. Rev. 663 (1973); Harry Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999 (1955).

degree of deliberation by the parties regarding entry into the arrangement.\textsuperscript{70} These characteristics are at best highly attenuated in the case of pension plan arrangements. Pension plans are temporally open-ended and by no means limited to what may be considered a single transaction. They involve a potentially unlimited number of parties—the employer on the one hand, and present and future employees on the other.\textsuperscript{71} They are not bargained for by those parties.\textsuperscript{72} And there is no necessary deliberation on the part of the employees and retirees who purportedly enter into the arrangement.\textsuperscript{73} The prima facie case for classifying a plan as a contract thus appears weak.

In the period when courts first began to label plans as contracts, there was yet a deeper objection. Classical and much of modern contract theory relies on the presence of an express or implied promise as a necessary condition for the existence of a contract.\textsuperscript{74} The Restatement, for example, defines a contract as "a promise or set of promises . . . the performance of which the law in some way recognizes as a duty,"\textsuperscript{75} and a promise itself as a "manifestation of intention to act or refrain from acting in a specified way, so as to justify a promisee in understanding that a commitment has been made."\textsuperscript{76} Similarly, Corbin states that "[t]hat portion of the field of law that is classified as the law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise."\textsuperscript{77} But as we have seen, among the terms included in the plan document by the employer were very commonly terms that expressly limited, even eliminated, employees' and retirees' rights of enforcement, as well as terms that manifested the employer's determination not to promise anything and a determination not to be bound. In this additional way do plans differ materially from the contract paradigm.

The point made here should not be misunderstood. We have shown that the characterization of plans as contracts is not persuasive, but it is unlikely one could ever show the characterization unequivocally to be wrong. Contract law

\textsuperscript{70.} See Atiyah, supra note 67, at 6-7 (describing the central characteristics of contract in classical theory); Leff, supra note 68, at 137-38; Macneil, supra note 65, at 737-41.

\textsuperscript{71.} Cf. Brudney, supra note 64, at 1406 (arguing that dispersed stockholders' relationship to corporation tells against treating corporation as contract). This characteristic has itself led to other conceptual confusions. "The fact that an indefinite number of persons may qualify for benefits under an 'open-end' pension plan (one prescribing qualifications for future participation and not yet terminated or suspended) has led some writers and even judges to refer to the trust created by such a plan as a 'charitable trust.' However, this view is clearly erroneous." Edwin Patterson, Legal Protection of Private Pension Expectations 45 (1960).

\textsuperscript{72.} Cf. Hazen, supra note 64, at 299-301 (reviewing objections to contract treatment of corporations based on shareholders' lack of bargaining and consent).

\textsuperscript{73.} To be sure, some persons may carefully consider the terms of a plan before accepting employment where the plan is offered. But this does not contradict the point made in the text.

\textsuperscript{74.} See 1 Corbin, supra note 68, §§ 1, 193; Charles Fried, Contract as Promise (1981); Farnsworth, supra note 65.

\textsuperscript{75.} RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

\textsuperscript{76.} Id. § 2.

\textsuperscript{77.} 1 Corbin, supra note 68, § 1.
COMMON LAW OF PLANS

is an evolving body of doctrine. Modern law has relaxed the strictures of classical theory, and the meanings of "contract" and "contract law" have changed from what they were under classical doctrine. No doubt some recently developed principles of what is now called "contract law"—promissory estoppel, unconscionability, and the implied covenant of good faith, for example—could be adapted to plans so as to give employee benefit expectations more of the protection we now think they deserve. But even so, the basic question still remains: All things considered, is it worthwhile to consider the law governing enforcement of plan-based expectations a part of contract law? In the next section of this Article, we shall examine the historical results of trying to subject pension plans to the regime of contract law and see why the answer is "no."

A simple example, though, may suggest how far the concept of "contract law" would have to be stretched to yield the results that common sense would want pension plan law to reach. Consider two similarly situated employees of a given company. They join the company on the same day, hold identical jobs at all times, and retire on the same day. Suppose, though, that one employee learned of the company's pension plan and its terms at the time he was hired and remained with the company expecting to receive a pension, while the other never learned of the plan until he was pleasantly surprised to receive his first benefit check. A contract analysis would examine the respective promises and representations made to the employees, the employees' respective expectations about pensions, and other individualized factors, and would probably conclude that the first but not the second employee has an enforceable contractual right to his pension. Yet one's intuition, and the approach of benefit plan law, is that both employees should have enforceable pension rights.

"Gift" and "contract" thus are doubtful metaphors because they disregard fundamental characteristics of plans. The question they purport to resolve is that of employee entitlement to pensions that the employer, through the plan, had led employees to believe they might receive. But by labelling pensions "gifts" or plans "contracts," courts permitted themselves to consider only the relations between employer and individual employees in isolation. The trouble with this approach is that plans are relationships with the workforce as a whole or with substantial parts of it. The expectations on which pension claims are based do not arise from an individualized relationship between each employee and the employer, or from anything the employer specifically said to


79. In fact, a recent article suggests, as the new step in the evolution of contract law, the principle that "[a] promise is enforceable when made in furtherance of an economic activity." Daniel A. Farber & John H. Matheson, Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake," 52 U. Chi. L. Rev. 903, 930 (1985). This principle is similar (although not identical) to the one we urge below as a rationale for protecting plan-based expectations of benefits.

80. Cf. Mark Pettit, Jr., Modern Unilateral Contracts, 63 B.U. L. Rev. 551, 579-83 (1983) (attempting to justify contract-based enforcement as to both employees, but concluding that "the promise principle [must be] supplemented by notions of equity and administrative convenience").
the employee. Rather they arise systematically, and not necessarily in the same way for each employee, through the pension-and-retirement program of the employer. Plans are group oriented, and the plan, as source of the generalized expectations, is the source of the pension-entitlement problem. Yet to solve the problem, courts taking the proprietary perspective simply disregarded this group-oriented, expectation-inducing character of plans.\textsuperscript{81}

Courts may well have suspected that their theories were badly flawed, because it is doubtful that any court completely embraced either the proprietary theory or the view that employees had only such rights concerning pensions as the employer from time to time was willing to allow. To the contrary, from the very earliest cases dealing with pension rights courts unquestioningly accepted the rules that proof of bad faith on the part of the employer might vitiate a decision to deny a pension,\textsuperscript{82} and that an employee might have an equitable claim against an employer who was wasting a pension fund.\textsuperscript{83} These propositions, with their recognition of some employee rights in plans, were inconsistent with the proprietary theory and its attendant gift and contract metaphors.

No court ever tried to explain or justify these latter propositions. No court even suggested that they needed explanation or justification. They were just additional, albeit inconsistent, axioms to be applied in any given case. Yet they constitute the only way in which many courts were willing to give the plan a role in the determination of employer-employee relations concerning pensions. For these courts, if the employer used the plan abusively, the plan had legal significance. But otherwise, for purposes of analyzing employee rights to pensions, the plan might as well not exist.

\section*{B. The Plan as a Source of Employee Expectations}

Yet the plan did not have to be treated only as if it were employer property.

\textsuperscript{81} A contemporary parallel to the problem of employee rights under pension plans is the problem of employee rights under the employment "plan" announced in an employee handbook. An especially important issue in that area is the right of employees to job security, or to security from arbitrary termination, based on retention and dismissal policies as stated in the handbook. Increasingly, courts have been willing to deem the policies set out in the handbook as terms "incorporated" into the employment contract. See, e.g., Leikvold v. Valley Community Hosp., 688 P.2d 170 (Ariz. 1984); Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880 (Mich. 1980). This approach raises the same objection as does the view of pension plans as contracts. Some courts, however, have been careful to note that the relationship between employer and employees to which the manuals give rise, even if contractual in some respects, needs to be distinguished from the individual employment contract relationship. Those courts also note that contract doctrines hostile to the enforcement of the terms of such manuals ought not to be applied. See, e.g., Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257 (N.J.), modified, 499 A.2d 515 (N.J. 1985).


It could instead, or in addition, be treated as a source of employee expectations about the pensions to be granted. This approach potentially had far-reaching consequences.

1. How Plans Constitute Sources of Employee Expectations

To begin, we need to understand more fully what it means to treat plans as sources of employee expectations about pensions.

We have seen that one of the features of a pension plan that made it so valuable to employers was its capacity to induce employees to join the enterprise, work loyally, and remain long term. How does this inducement work? Not simply through the occasional grant of pensions. Rather, the plan induces through the prospect of a pension; a prospect that is systematically held out to the workforce by promises, representations, overt employer conduct, consistent practice, or otherwise. These promises, representations, or courses of conduct create expectations about pensions, expectations that motivate the workers to behave in desired ways. A plan, by its very nature, must be something communicated to the workers whose conduct it is intended to affect. A secret pension plan would be self-contradictory, as it could not be used as a tool to attract and retain an efficient workforce.

The expectation-creating character of pension plans, then, is an essential characteristic. Indeed, because plans are established as employer programs for industrial efficiency rather than as programs for the benefit of employees, this expectation-creating character of plans arguably is more fundamental than the obvious one of conferring pensions. It is conceivable that a plan could create

84. As one book written mainly for business executives advised:

> It would appear that an employer should endeavor to create and maintain employee interest, understanding and appreciation of his entire benefit program by the means best adapted to his organization. If such a course is not pursued, particularly in connection with a retirement plan, that plan will fail in the same degree to exert its possible beneficial influence upon employee morale and efficiency.

Strong, supra note 49, at 124.

85. It is not surprising that no court ever had to deal with the issue of employee rights in a secret pension plan. The closest approach is Molumby v. Shapleigh Hardware Co., 395 S.W.2d 221 (Mo. Ct. App. 1965). In that case, an employer sold the assets of its business and dismissed all its employees. Afterwards, some of the employees discovered that the employer had, years before, taken steps to establish a pension plan. A plan and trust agreement had been executed, a trustee had been engaged, and contributions had been made for several years. However, no committee had been appointed to administer the plan, no notice of the plan had been given to employees, no qualification letter had been sought from the Internal Revenue Service, no pensions had been paid, and, eventually, the employer stopped making contributions. The court held, under an employer property analysis, that the employees had no rights under the plan. The court also suggested that, as a matter of law, an undisclosed plan could not be enforced, but the undisclosed character of the plan in question made no material difference to the outcome or analysis.

The conclusion reached by the court in Molumby seems right, but a sounder basis for the result would be that no plan was established by the employer, that the record showed only preliminary and incomplete steps to establish one. Cf. Rose City Transit Co. v. City of Portland, 525 P.2d 1325, 1348-50 (Or. Ct. App. 1974), modified, 533 P.2d 339 (Or. 1975) (stating that evidence failed to establish that pensions paid pursuant to Board resolution were paid pursuant to a plan).
expectations about pensions, yet never grant one. But a plan would not, and probably could not, grant pensions without leading employees to expect that they might some day receive one.

2. The Potential Impact on the Legal Treatment of Pensions

The treatment of plans as systematic generators of pension expectations makes a great deal of difference for the legal treatment of pensions and of employee rights to them. Consider the employee expectations created by a plan. Expectations, if reasonable (and, especially, if acted upon), may well be enforceable, and disappointed reasonable expectations, if unjustifiably disappointed, may well be remediable. This principle is fundamental to law.

To be sure, not all expectations, and certainly not all expectations created in connection with the employment relationship, are proper subjects of enforcement through the legal process. Principles of fairness, principles of justice, or considerations of social policy must be called on to legitimate enforcement of expectations of a given type and to make them reasonable. But because the expectations with respect to pensions are created systematically, deliberately, and for the benefit of the employer, and because they are designed to induce, and very often succeed in inducing, long-term reliance, the considerations militating in favor of enforcement are extraordinarily strong.

Thus, recognition that pension plans are essentially mechanisms for employee inducement and sources of employee expectations makes possible the treatment of pensions held out through the plan as something to which employees may have enforceable rights. To help frame principles for the enforcement of pension expectations and for the remedy of their disappointment, a number of established bodies of law could be drawn on, even if only by analogy: trust law, property law, bilateral contract law, equitable estoppel and promissory estoppel, law of misrepresentation, and law of unfair competition.


88. Compare the recent explanation given by a court to justify enforcing employee expectations of job security:

While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. . . . It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee.

to name a few. The law is replete with experience in implementing the fundamental goal of protecting expectations.

And so recognizing the plan as a source of employee expectations, and recognizing that there may be enforceable pension rights, demands rejection of a strict proprietary view of plans as unrealistic. As one court explained in rejecting an argument based on a proprietary approach to plans:

It is argued at considerable length by the [employer] that the profit-sharing plan . . . was initiated by means of the passage of a by-law, and that by-laws are made for the internal government and regulation of the corporation and its stockholders, and that third parties can assert no rights thereunder. . . . If corporations desire to have their so-called “by-laws” affect only the corporation and its shareholders, then they should refrain from exploiting them to third persons, for the purpose of inducing such persons to act in reliance thereon.90

This is not to say, however, that courts would have to forgo all recognition of a proprietary interest on the part of employers in the plans they set up. Employers do establish, maintain, and fund plans as parts of their businesses, and their proprietary interests in their own pension plans is an irreducible feature that the law must take into account. Rather, the conclusion is that any view of plans that recognizes a proprietary interest on the part of employers must be tempered by recognition of the intended impact of plans on employee expectations and employee conduct. As a consequence, the law of pension plans must be a body of law that properly accommodates both the employer and employee interests in plans.

3. The Actual Impact on the Legal Treatment of Pensions

Practice, though, did not much conform to theory. Proper accommodation of employer and employee interests was not achieved, because the tendency to treat a plan as employer property was so strong that the inducing character of plans was obscured and the presence of employee expectations disregarded. To be sure, it was common knowledge that plans were used to induce desirable worker behavior, but the insight was largely wasted. Courts for the most part were either unwilling or conceptually unable to enforce pension claims over the objections of an employer.91

89. See, e.g., Stein v. National Bank of Commerce, 181 S.W. 1072 (Mo. Ct. App. 1916) (illustrating an example where employer admitted that “it was in the position of a trustee”); Restatement (Second) of Torts §§ 766-774A (1979) (describing tort of interference with economic expectations of another); Atiyah, supra note 67, ch. 10; Holmes, supra note 67, at 213; de Roode, supra note 47, at 288 (suggesting equitable enforcement); Note, Legal Status, supra note 50, at 1378 (arguing that consideration should have been easy to find).


91. Some employers took a pragmatic approach to the problem of employee pension expectations. One of the earliest plans, that of the Solvay Process Company, was the subject of 25 suits for benefits by employees within a few years of its initiation. The company chose to terminate the plan on the ground that “the class of workmen employed at Solvay are not yet ready to appreciate
Of course some courts were willing, at least in principle, to enforce employee pension expectations in the face of employer resistance. They recognized that a plan was a "daily inducement to continuation of service," and deemed it unfair, as well as bad policy, to permit employees to be led on for years, only to have their expectations defeated in the end. As one court explained:

A retirement program has become a basic part of an employee's remuneration even as his wages are a part thereof . . .

Clearly, under our present economic system, an employer cannot offer a retirement system as an inducement to employment and, after an employee has accepted employment under such circumstances, withdraw or terminate the program after an employee has complied with all the conditions entitling him to retirement rights thereunder. But merely because a court realized that the expectation-creating function of a plan was intrinsic and legally significant, and on that basis admitted the desirability of protecting employee expectations, it does not follow that the court would actually be able to protect and enforce those expectations. The court also had to have a framework within which it could use its insights about plans and pensions to reach satisfactory results in individual cases.

a scheme of this character." 1 Latimer, supra note 24, at 40 (quoting Nicholas P. Gilman, A Dividend to Labor: A Study of Employers' Welfare Institutions 287 (1899).

The Solvay Company, though, may not have intended to give up entirely. The pension plan had not been an isolated program of the company; it was initiated as part of an increasingly comprehensive program of welfare capitalism, Brandes, supra note 37, at 17, that was designed in part to change unsatisfactory worker attitudes. The company is reported to have stated that "our experience has been that the boys of our workmen grow up and take positions of various kinds in our works, and the girls grow up and marry and become the wives, in many cases, of these boys . . . We, therefore, think that if we can train the children in the way that they should go, we will improve our workmen." Id. at 35.


93. Wilson v. Rudolph Wurlitzer Co., 194 N.E. 441, 443 (Ohio Ct. App. 1934); see Heinz v. National Bank of Commerce, 237 F. 942, 953 (8th Cir. 1916) (stating that pensions have "a direct and reasonably necessary bearing upon . . . the class of employee likely to be obtained, upon the character of the service likely to be rendered, and upon the length of such service and the loyalty of the employee").

Courts acted on their insights about the expectation-creating character of plans in two very different ways. One way, the more straightforward, was to enforce pension claims on the ground that it was good social and labor policy to do so. The other way, less straightforward, was analogical: it was to treat pension claims as matters of contractual entitlement, just as was done under the employer-property perspective. The former approach was viable, although not much used; the latter approach, although by far the more common, was an analytical dead end.

The problems with the latter approach can easily be seen in McLemore v. Western Union Telegraph Co., the first reported case of judicial enforcement of a benefit claim over the objections of the employer. In McLemore, the defendant employer had established a comprehensive written plan to provide disability, retirement, and death benefits for employees and their survivors. The plaintiff was the widow of an employee who had died while covered by the plan. The employer had refused to pay the plaintiff any death benefits and in the lawsuit tried to justify its refusal by reference to the plan document. That document, like most plan documents, had been carefully drafted to avoid any express promise of benefits. Under a strict proprietary approach to plans, the employer's refusal should have ended the discussion. The court in McLemore, though, was unreceptive to this approach and rejected the employer's argument out of hand.

In the court's view, the absence of any express promise of benefits in the written plan document was of no consequence. The issue to be decided, as framed by the court, was that of what the parties could reasonably be said to have agreed to. The court found that the employer, notwithstanding the limitations of the plan document, had offered "[i]n effect" that "[i]f you remain in the discharge of your duties, those dependent upon you shall be entitled to benefits in the event of your death, to the extent of the sums specified in this plan." The court also found that the employee had "accepted" the offer and had given "sufficient consideration to support the defendant's promise to pay" by remaining in the employer's service. As a matter of elementary contract law, then, the court concluded that there was an enforceable bargain. The employer's argument that "the plan is a mere benefaction" was rejected in favor of a view of the plan as a contract evidenced by the plan document.

This step alone would have yielded the plaintiff only those rights contained in the employer's "offer," an offer subject to employer-imposed restrictions designed to defeat or limit pension claims. The innovation in the case is that the court proceeded further, ostensibly to construe the contract but in fact to disregard one of the main proprietary restrictions imposed by the employer: a provision limiting the employer's obligation to making payments when "the committee" so ordered. This provision would have been a fatal bar to plaintiff's recovery under the proprietary approach, with its strict enforcement of

95. 171 P. 390 (Or. 1918).
96. Id. at 393. This was the court's inference and not a provision of the plan document.
97. Id. at 392.
the employer's unilaterally imposed terms, since the committee had not acted on the plaintiff's claim and had issued no order to the employer. But according to the court, none of this mattered because the plaintiff's right to a pension "arises by operation of law" and because the material facts relating to the claim (which would have been the basis for the committee's order) were not in dispute. According to the court, once the plaintiff had been found to have a contractual basis for her claim, the only question for anyone to determine was whether, based on the undisputed facts, the courts should enforce it. Committee action, thus, was not needed.

_McLemore_ illustrates how courts willing to enforce pension expectations needlessly placed obstacles in their own path and in the paths of other courts that would follow their decisions. Perhaps because of the increasing dominance of contract law as a fundamental model for all business relations, perhaps because of confusion about the nature of the plan documents, many courts believed that their decisions had to be rationalized using the concepts of consideration, offer and acceptance, and other contract formalities and doctrines. This led to amazing contortions. Even to begin the process of enforcing a pension claim within the framework of contract, courts had to find a contract by somehow finding offer, acceptance, and consideration. Yet this alone achieved very little—indeed, it led to results no different from the proprietary approach—because the putative contract to be enforced very often contained terms limiting, even excluding, employee pension rights. Thus, to enforce pension expectations, courts had to find a way to read those restrictive terms out of the contract that they had so creatively put together. This is a highly unnatural mode of legal analysis, and it is inconceivable that a court would bother with it unless already convinced, on other grounds, that the pension expectations in question ought to be enforced.

That certainly is what happened in _McLemore_. It is clear that the court had antecedently reached a decision to enforce the claim, and that it had done so based on an unexpressed policy determination that benefit expectations like those involved in the case should be enforced. That such a policy determination was the true basis for decision can be seen by comparing the decision with others in which courts less receptive to enforcing employee expectations treated the same, or substantially the same, plan document as conferring few if any enforceable rights to benefits. The straightforward approach for the court in _McLemore_ would have been to acknowledge the policy basis for its

98. _Id._ at 393.

99. _Id._

100. _Cf._ Kessler, _supra_ note 65, at 633 ("Handicapped by the axiom that courts can only interpret but cannot make contracts for the parties, courts had to rely heavily on their prerogative of interpretation to protect a policy holder. . . . [M]any courts have shown a remarkable skill in reaching 'just' decisions by construing ambiguous clauses against the author even in cases where there was no ambiguity.").

decision and use it as a starting point for developing a body of rules to deal with benefit expectations and claims. This, though, it felt constrained not to do.

A few courts that were disposed to enforce pension claims abjured reliance on contract rationalizations and, to varying degrees, openly rested their decisions on considerations of policy. Their decisions show what the common law could have achieved. One instructive case is *Sigman v. Rudolph Wurlitzer Co.*

In *Sigman*, the employer had instituted a retirement plan for its employees and had set out the conditions for the grant of pensions in an employee handbook. The purpose of the handbook was to encourage employees to loyal service. As the booklet urged, "There is something on every page . . . that should be of vital importance to you, that is, of course, if you desire to become successful with the vast amount of opportunities before you." The court, disapprovingly, concluded that "the whole effect is to produce a feeling of confidence in the fairness and sincere concern of the company for the welfare of the employee." The plaintiff had worked for the employer for nearly thirty years. He was dismissed at age fifty-two because his services were no longer wanted. He appeared to have satisfied the plan's years-of-service criteria as stated in the booklet, yet the employer refused to grant a pension. The basis for refusal was an apparent limitation on pension grants to those persons no longer able to work because of old age. The language of the booklet, which used the words "when old age overtakes you" to describe when pensions might be paid, could easily be read to support the employer's decision. The court, however, refused to do so and read the asserted limitation out of the plan.

Ostensibly, the court's approach was like that in *McLemore*, and it too purported to base its decision on a principle of contract interpretation. As the court explained, to adopt the employer's proffered interpretation of the handbook would be to impute fraudulent intent to it, a result that the plan document should be construed so as to avoid. But this contract-based explanation

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102. 11 N.E.2d 878 (Ohio Ct. App. 1937).
103. Id. at 879.
104. Id.
105. It also stated that the plan "constituted a continuing offer . . . which was continuously accepted by the employees who preserved their status with the company." Id. at 878.
106. Other cases relied on a similar principle of interpretation. In *Tilbert v. Eagle Lock Co.*, 165 A. 205, 207-08 (Conn. 1933), the court held that to give effect to a declaration in the plan document that the plan confers no legal rights "would ascribe to the defendant an intention to mislead its employees, to its advantage, by an inducement which was known and intended by it to be entirely nugatory . . . which this record does not require us to attribute to it." Similarly, in *Psutka v. Michigan Alkali Co.*, 264 N.W. 385, 386 (Mich. 1936), the court held that a provision in the plan document specifying that the employees had no legal rights was "intended to exclude claims of inchoate rights under the plan, not to mulct the employees or their dependents of accrued . . . benefits." In *Russell v. Princeton Lab.*, Inc., 231 A.2d 800, 805 (N.J. 1967), the court purported to apply the principle that "[a] contract should not be read to vest a party or his nominee with the power virtually to make his promise illusory [especially] when a forfeiture will
was given almost in passing, and the court ultimately rested its decision on considerations of fairness to the employee and on a labor relations policy that militated in favor of enforcing the employee’s reasonable expectation of a pension. As the court explained:

[T]he particular business carried on by appellant was of such a nature that mature youth would be at a premium, and . . . the appellee had reached a point where a younger man would serve the appellant much more satisfactorily. When it becomes apparent that longer employment will be a detriment to efficient service, and that the alternative is a pension, a discharge is the most effective severance of the Gordian Knot. While effective and most serviceable to the appellant, it results in a complete abrogation of the security upon which appellee for twenty-seven and one-half years relied and had a right to rely.

The appellant has made its election. It has concluded that he has reached the point of industrial old age. It is to its interest to discontinue the payment of the full wage. The employee must bow to the appellant’s opinion and edict. He, however, cannot be in good faith and justice denied the alternative held out as an inducement, for more than a quarter of a century, to continue service with the appellant.1

Such a forthright approach to pension claim enforcement was uncommon. Yet had more courts adopted it, and dispensed with contract-oriented rationalizations, they might have developed a principled and coherent body of common law rules for determining when plan-based expectations of receiving a pension could be judicially enforced.1 But this did not come to pass. Instead, courts that were receptive to employee pension claims increasingly took the contract-oriented approach suggested by McLemore but, in a crucial wrong turn, lost sight of what the contract framework was rationalizing. Those courts took the inquiry into offer, acceptance, and consideration more and more seriously and, in the end, came to believe that the contract principles they were repeating—which were only a rationalization for results reached on other

follow,” and so refused to defer to the plan committee’s decision to deny a pension. The court, in fact, demanded that the plan be read so as to avoid a “forfeiture of something [the employee] has earned” if “any tenable view” would permit it. Id. at 803; see also Wilson v. Rudolph Wurlitzer Co., 194 N.E. 441, 443 (Ohio Ct. App. 1934) (construing plan so as to avoid “conclusion that the [employer] was guilty of gross fraud and deceit”).

107. Sigman, 11 N.E.2d at 880.

108. As noted, established doctrines for enforcing expectations could have been drawn on, but a new area of law still would have to have been developed. Pension expectations are materially different from the expectations dealt with by the other bodies of law. Pension expectations are created impersonally in a large and changing group of persons. They are created through a systematic program that seeks to achieve business advantage from the creation of such expectations. The expectations relate to something economically vital to the affected employee. And the expectations relate to something to be provided many years later. Properly taking into account those features would require development of new doctrines and rules specially adopted to the plan relationship.
grounds—were actually the complete legal explanation for those results. This confusion greatly interfered with the development of a workable plan common law.

The question addressed in *McLemore* was the genuine problem of whether and when expectations of benefits under a plan should be enforced. But as the contract approach to pension claims came to be applied mechanically, courts were diverted to a very different question: that of when the *employer's words concerning pensions* should be enforced. The trouble with changing the basic issue in this way—and the reason it is a change in basic issue—is that expectations of the employees might be at variance with the employer's words. This surely could be the case (as it was in *McLemore*) where the employer had drafted the plan document to try to eliminate employee rights by, for example, stating that the employees have no rights or reserving to the employer substantial discretion over whether to grant a pension. In such cases, as the experience with the proprietary approach demonstrates, contract doctrine would be of little use for enforcing reasonable expectations at variance with the document. *McLemore* itself shows that some other set of principles would be needed to help contract analysis reach the proper result; yet, because judicial attention had been diverted to the supposed contract issues in pension claims, no such body of principles ever was developed.

109. Cf. Kessler, *supra* note 65, at 637-39 (discussing use of contract concepts to rationalize decisions involving contracts of adhesion and thereby obscure principles on which determinations actually were based).

110. A rare pre-ERISA effort to address explicitly the legal problems created by plan-created expectations is *PATTERSON, supra* note 71. The author explains:

> We are concerned here with the expectations reasonably created in the minds of employees (and their prospective dependents) by the terms of private pension plans and, to some extent, the expectations aroused by communications, from employers to employees, regarding the favorable aspects of pension plans. Such expectations are coming to play an important role in employer-employee relations. Many employers have been motivated to establish pension plans by the belief that such a plan would reduce labor turnover. Many young men, in the white-collar group at least, as they inquire of employers about opportunities for employment, ask about the employer's plan. Labor unions are becoming increasingly concerned with the inclusion of pension agreements in the collective bargain. The expectations created by pension plans continue throughout the period of employment. Most employees probably do not fully understand the security behind these pension expectations. Yet if after many years the employee who reaches the prescribed retiring age finds that the expectations of thirty years or more will not or cannot be substantially fulfilled, the bitterness of his disappointment will be lessened only by the extent to which his social security benefits and other resources are sufficient to keep him from starvation. Whether or not he thinks about it, every employee covered by a private pension plan has an interest in the security of anticipated benefit rights under the plan.

*Id.* at 4-5. Yet even this writer often lapsed into the habit of treating plans as contracts and drawing conclusions on the basis of that treatment. *See, e.g., id.* at 63 (stating that "[t]he principle that contracts must be enforced as written is still a basic one and seems a sufficient justification for the decisions [refusing to disregard the vesting terms of a plan in cases of employee discharge]"); *id.* at 74 (stating that "[m]ost of the legal duties arising out of pension plans and their operation are contractual").
Instead, mechanical, contract-based approaches to pension claims proliferated. Courts became obsessed with rules for plan-contract formation, in particular with rules for finding consideration, offer, and acceptance. To most courts, the answer to the supposedly central question of when the employer's words might be enforced was similar to that reached in *McLemore*: the employee's continuation in employment with knowledge of the plan served as consideration binding the employer; it also served as acceptance of the employer's offer. Other courts took a slightly different approach and deemed consideration to have been given and the employer bound only when the employee had completely fulfilled the required term of service and any other preconditions. For still other courts, the employer was bound only when the committee that administered the plan had expressly determined that benefits were to be paid.

And so, unfortunately for employee rights, the perspective on plans as sources of employee expectations was diverted by reliance on contract formalism to yield much the same result as did the view of plans as employer property. The practical difference between the employer-property and expectation-creation perspectives on plans narrowed greatly. “Contract” came to be the preferred metaphor to characterize the pension relationship. Regardless of whether the court emphasized the character of the plan as employer property or as a source of employee expectations, the contract was a “peculiar” one and the rights created remained limited to whatever the employer decided they should be. To choose contract formalism as a vehicle for enforcement of

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111. “The central issue is whether or not consideration can be found for the employer’s promise of a pension plan.” Comment, *Consideration, supra* note 50, at 96-97. For a thorough review of the wooden rules that were developed to handle the issue, see generally Note, *Legal Problems of Private Pension Plans*, 70 Harv. L. Rev. 490 (1957).

112. “Pension plans are offers . . . to employees as an incentive to continuing better service and loyalty. The offer is accepted by the employee remaining in the employment, which is sufficient consideration to support the employer’s promise to pay benefits.” Conner v. Phoenix Steel Corp., 249 A.2d 866, 868 (Del. 1969); see also, e.g., Hunter v. Sparling, 197 P.2d 807, 814 (Cal. Ct. App. 1949); Jacoby v. Grays Harbor Chair & Mfg. Co., 468 P.2d 666, 669 (Wash. 1970).


115. “Whatever rights were acquired by the pensioners . . . were acquired under the [written] rules.” Cowles v. Morris & Co., 161 N.E. 150, 154 (Ill. 1928); see also Hurd v. Illinois Bell Tel. Co., 136 F. Supp. 125, 144 (N.D. Ill. 1955), aff’d, 234 F.2d 942 (7th Cir.), cert. denied, 352 U.S. 918 (1956) (stating that plaintiffs had “not an irrevocable right to a specific sum of money, but a right to receive a pension determined in accordance with the provisions of the Plan”); Hughes v. *Encyclopedia Britannica, Inc.*, 117 N.E.2d 880, 882 (Ill. App. Ct. 1954) (stating that if plan were treated as a contract, “it would be unenforceable by its express terms”); *Molburg v. Hunter Hosiery, Inc.*, 158 A.2d 288, 289 (N.H. 1960) (stating that plaintiff could not “extricate himself from the conditions of employment” . . . ” (quoting *Muir v. Leonard Refrigerator Co.*, 257 N.W. 723, 724 (Mich. 1934))); *Bailey v. Rockwell Spring & Axle Co.*, 175 N.Y.S.2d 104, 106 (Sup. Ct. 1958) (noting that even if plaintiffs continued in service in reliance on benefits provided for in plan, “their rights must be determined by the provisions of the plan”; no obligation to continue plaintiffs’ employment until benefit vested); cf. *Evo v. Jomac, Inc.*, 289 A.2d 551 (1972) (stating
employee pension expectations in effect revised the principle that reasonable employee expectations should be enforced by adding a corollary rule that no expectation of a pension was reasonable unless it was consistent with the written terms of the plan. As one court explained, in rejecting a claim for benefits by employees who were terminated before vesting:

The appellants urge upon us certain equitable considerations, as, for example, their reliance upon the plan, and contend that a court of equity should fashion a remedy to prevent the injustice which it is claimed will result if they are denied participation in the fund. But, as the court below stated, there is no justification for a court "to twist the Plan into something it clearly is not." Whatever reliance the appellants may have placed upon their expectation of future pension rights, the terms of the plan clearly indicate that all interest in the pension fund ceases when the employment relationship is severed.

Thus was the pre-ERISA law of plans institutionally incapable of protecting pension expectations on any but an ad hoc basis.

4. The Failure of the Contract Approach

The contract approach to protecting employee pension expectations did not work because plans are materially different from contracts. The expectations to be protected and enforced do not (as they would in the case of an individual contract for a pension) derive from individualized employer-employee dealings and do not necessarily arise from employer promises. Rather they derive from the plan, from the ongoing and systematized activities of the employer for dealing with pensions and retirement. The rationale for enforcement has nothing to do with the various economic and political theories about promising that underlie the doctrines of consideration, offer, and acceptance. Instead, the rationale lies in the self-serving and systematic character of the process of creating expectations. The contract metaphor obscures the true character and source of pension expectations by focusing attention on a supposedly contract-like plan document—which the employees most likely never see—and on the fictional acceptance of it and the discovery of consideration. The contract approach is simply beside the point.

As the contract mode of treatment became prevalent, the plan document that employer could have reserved unlimited right to amend plan so as to impose forfeiture but failed to do so).

116. See, e.g., Cowles v. Morris & Co., 161 N.E. 150 (Ill. 1928) (stating that since the promise of a pension from a fund does not impose obligation of employer to contribute money sufficient for fund to satisfy promises, employees had no rights other than what was contained in the written plan document); Wallace v. Northern Ohio Traction & Light Co., 13 N.E.2d 139, 143 (Ohio 1937) (noting that although "[e]ach employee of the company knew that the inducement to continued service was a pension," he should have considered the possibility of the "general abandonment of the plan").

117. Schneider v. McKesson & Robbins, Inc., 254 F.2d 827, 830 (2d Cir. 1958) (citation omitted).
came to be confused with the plan. The plan came simply to be treated as a standardized contract,\textsuperscript{118} and courts often framed the issue to be decided as that of whether there had been an \textit{offer of a pension plan} and the acceptance of it by the \textit{individual plaintiff or plaintiffs}.
\textsuperscript{119} In the end, the legal treatment of rights under pension plans came to be little different from what it would be if courts had been dealing with an employer's use of preprinted forms in pension transactions with respective individual employees.

And so reliance on the contract perspective ultimately drove out of law the basic and necessary insight about the purpose and effect of plans. The only vestige of the systematic, group-oriented character of the plan was the uniformity in the schedule of benefits, conditions of eligibility, and other supposed contract terms offered to the respective employees. What was lost by conflating the plan with a contract—indeed by conflating it with a standardized contract—was the opportunity to develop a principled approach to enforcing pension expectations, created systematically by a plan, at variance with the self-serving terms of the plan document. By conflating plans with contracts, the plan was transformed from a source of expectations into a source of terms, into little more than a form contract of adhesion fictitiously "offered" separately to each employee.

\textbf{C. Pensions as Deferred Compensation}

In the period after about 1950, courts increasingly used "deferred compensation" and substantially equivalent phrases to characterize pensions. Since this notion plays a role in pension plan law and policymaking today, it is important to understand what it meant and what problems it purported to resolve.

Surprisingly, in the pre-ERISA common law of private pension plans, the notion of pensions as deferred compensation resolved no problems and meant very little. One reason is that, before ERISA, there never emerged a clear and unequivocal meaning for the notion. The idea of private pensions as deferred compensation remained inchoate. It also had at least five largely independent sources, none of which had anything to do with the key issue of pension plan law, namely employee entitlement to plan-based pensions.

Another reason for the limited value of the concept is that it was incompatible with the prevailing, contract-based way of reasoning about plans. As a result, despite the frequency of references to pensions as deferred compensation, the concept was empty and contributed little to the development of pre-


ERISA plan common law.

1. The Sources of the Notion that Private Pensions Are Deferred Compensation

Let us examine the five sources for the notion of private pensions as deferred compensation.

One was the law of public pensions. Many state constitutions prohibited payment of public money for services not rendered. To uphold pension systems for public employees, courts often had to find that their state constitutional prohibitions were not violated.120 Many of the courts that faced the issue upheld the validity of challenged public pension systems, reasoning that pension annuities granted under them were deferred compensation for services rendered and thus not gratuitous.121 This form of treatment of public pensions had no obvious relevance to any issue concerning private pensions. Nonetheless, some courts relied on these public pension cases as authority for considering private pensions to be forms of deferred compensation.122

A second source for the treatment of pensions as deferred compensation was corporation law. Shareholders sometimes challenged corporate pension or profit-sharing plans on the ground that the grants of benefits involved were ultra vires or waste of corporate assets.123 Generally, challenges of this sort were raised to executive compensation plans, which were very generous, rather than to retirement plans for hourly or mid-level employees. The judicial response to such challenges was similar to the judicial response to attacks on public pension plans: The pensions or other benefits were deemed deferred compensation. They were then tested for validity under the rule of corporation law that executive compensation must bear a reasonable relation to the services rendered. Usually, application of the principle led to a finding of validity;124 occasionally it did not.125

A third source was social and economic literature dealing with labor rela-

120. See Kern v. City of Long Beach, 179 P.2d 799 (Cal. 1947).
123. A hybrid between the public pension cases and the corporation law cases is Ledwith v. Bankers Life Ins. Co., 54 N.W.2d 409 (Neb. 1952). Drawing upon public pension cases and federal labor law cases (described below), the court there characterized an insurance company's retirement plan as one providing a form of "contingent deferred compensation," id. at 417, so as to find the plan authorized by state insurance law.
tions and the economic condition of the elderly. The literature was vast and varied. One leading example is an article, *Pensions as Wages*, that appeared in the *American Economic Review* for 1913. The article analyzed the implications of the view of systematically granted private pensions as "part of the real wages of an employee . . . in the foregoing of an increase in wages which he might obtain except for the establishment of a pension system." The article urged changes in the structure of both public and private pension systems that would take into account their deferred compensation character. After emphasizing that employees had little if any contractual protection for the deferred portion of their compensation, and explaining why such a state of affairs had socially and politically deleterious consequences, the author argued for changes in the funding of plans and in the entitlement of employees to the accrued value of their "deferred compensation" upon departure from employment.

Other social commentators, too, relied on a model of the pension as a deferred wage in order to deal with problems of old-age dependency or conditions of employment. Louis Brandeis, for example, relied on the premise that a pension "is in substance part of the wage" to urge general adoption of mandatory, partially contributory private pension programs. Labor organizations, on the other hand, while also considering pensions to be deferred wages, on this ground long opposed private pension plans as tending to depress current wage scales.

These policy concerns do appear to have worked their way into judicial consciousness. However, as we have seen, courts were not concerned with the social problems addressed or with the use of private pension plans to solve them. Thus, those writings had little direct impact on the development of private

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126. de Roode, *supra* note 47.
128. The author explained:
   
   It seems to me on the whole that most of the pension systems adopted by private employers are merely very shrewd bits of wage bargaining. The absence of any contractual right and the lack of assurance that a pension will be paid upon fulfilling the conditions, give merely the shadow of provision for old age and not the substance.

129. The author further explained:

   Considering pensions as wages . . . it seems that a sound pension plan should be developed on the following principles:

   (1) Pay the sums necessary to maintain the pension fund over and above the present scale of wages of its employees.

   (2) Treat each employee's pension separately.

   (3) Make proper funding provision upon actuarial calculation and set aside year by year the necessary sums.

   (4) Give to each employee, upon separation from the service . . . (a) the accrued value of his pension, or (b) the commutation of such value in the shape of a smaller annual pension.

131. See *1 Latimer, supra* note 24, at 758 & n.19.
The fourth source for the view of pensions as deferred wages is labor law. In Inland Steel Co. v. NLRB,182 the Seventh Circuit Court of Appeals construed the terms "wages" and "conditions of employment" as they are used in the National Labor Relations Act to describe subjects of mandatory collective bargaining. The court in Inland Steel held that pensions and other benefits are "conditions of employment" within the meaning of the Act. It also concluded that, while "a reasonable argument can be made that the benefits flowing from [a pension or retirement] plan are not 'wages', we think the better and more logical argument is on the other side."183 This holding, of course, involved no more than interpretation of a provision in the National Labor Relations Act. Nonetheless, it was extremely influential beyond its limited scope. Probably more than anything else, the Inland Steel decision suggested to courts that pensions of any kind, in any context, should be viewed as a deferred part of the employee's wage. The decision may serve as a point of conceptual demarcation. Prior to it, only one case involving employee rights under a private pension plan had accepted (but still did not rely on) the characterization of private pensions as a form of deferred compensation.184 After the Inland Steel decision, judicial reference to pensions as deferred wages became widespread.

The fifth and final source for the treatment of private pensions as deferred compensation was the body of federal income tax laws. A curious aspect to this source was that the issue of tax policy calling for such treatment of pensions was not one relating to the pensions granted, but one relating to employer contributions to funded pension plans. Consistent with the recognition of pension plans as parts of the employer's business, it was early on recognized that "the fair cost of a real provision for superannuation . . . is one of the current costs of doing business,"185 and so employers, from virtually the first days of income taxation, were permitted to deduct the contributions to pension trusts from current income.186 Thus, the question arose of the proper classification of the deduction.

The conceptual difficulty that made classification uncertain is that any given employee receives no immediate benefit from the employer's expenditure and, absent vesting, may not receive any benefit at all. Thus, there is good reason not to classify employer contributions to plans as a form of payment for com-

133. Id. at 251.
135. Erwin N. Griswold, The Tax Treatment of Employees' Contributions to Pension Plans, 57 Harv. L. Rev. 247, 247 (1943). Thus, when the employer paid pensions to its employees on a current basis from its own assets, it was allowed a deduction for the payments on the ground that they constitute an ordinary and necessary business expense. For the first recognition of this, see T.D. 2090, 16 Treas. Dec. Int. Rev. 281 (1914).
136. See O.D. 110, 1 C.B. 224 (1919).
Nevertheless, employer contributions to pension plans have long been treated as payment of deferred compensation. The rationale is that the classification helps control tax avoidance through excessive deductions. To this end, deductions for contributions to pension plans were treated as deductions for compensation and made subject to the Internal Revenue Code's limitation on deductions for salaries and compensation to a "reasonable allowance" for them.

As a result of these various influences, there emerged a general sense that private pensions really are deferred wages. The notion ultimately became entangled with the other widely held notion that plans really are contracts. And so one finds many a court reciting as obvious truth such statements as, "[W]here an employer has a pension plan and the employees know of it, continued employment constitutes consideration for the promise to pay the pension. . . . A retirement pension is pay withheld to induce faithful service. It amounts to delayed compensation for services rendered."

2. The Sterility of the Notion that Pensions Are Deferred Compensation

What makes statements of the sort just quoted so peculiar is that the characterization of pensions as deferred compensation made absolutely no difference for any issue in pension plan law. When faced with arguments seeking to base employee pension rights on the notion of pensions as deferred compensation, courts invariably rejected them. It is thus difficult to understand why courts persisted in calling pensions "deferred compensation." On the other hand, it is not difficult to understand why courts rejected the arguments. They

137. RAINARD B. ROBBINS, IMPACT OF TAXES ON INDUSTRIAL PENSION PLANS 14-15 (1949); LOGUE, supra note 47, at 19-20. Initially, the contributions were classified as "donations to a charitable institution conducted for the benefit of the corporation's employees." O.D. 110, 1 C.B. 224 (1919).

138. ROBBINS, supra note 137, at 13.

139. Id. In connection with the 1942 revisions to the Code, the Treasury Department also proposed to require vesting of employee interests in pension plans. Initially, the Treasury Department proposed immediate vesting. See 1 Revenue Revision Hearings, supra note 44, at 87. After vehement opposition was expressed, the Treasury Department retreated to a proposal for deferred vesting. 1 Id. at 1004-05. Even this proposal was assailed, and there was much testimony to the effect that pension contributions, while ordinary and necessary expenses, are not payment of compensation. See 1 id. at 879 (testimony of Alger B. Chapman); 2 id. at 2386 (testimony of Denis B. Maduro); 3 id. at 2430 (testimony of Robert S. Gordon); 3 id. at 2439 (statement of H. Walker Forster).

140. For another context in which the deferred compensation model of pensions was applied, see Laffitte v. Laffitte, 232 So. 2d 92 (La. Ct. App. 1970) (discussing community property laws).


did so because an inconsistency would otherwise have entered the law.

There is a straightforward way in which even a vague notion of pensions as deferred compensation could have served as a basis for enforcement of pension claims. The approach is restitutionary.\(^{143}\) Simply put, if the pension truly is a wage differing from normal wages only through being paid years after the corresponding labor has been performed, then an employer who does not pay a pension to a retired or former employee may well be unjustly enriched, just as the employer would be if it failed to pay the employee a salary. In either case, basic principles of restitution would apply and, in appropriate cases, might justify enforcement of the employee’s claim to the accrued value of his pension rights.\(^{144}\) Indeed, enforcement might be justified irrespective of the language of the plan document.

This restitutionary approach to enforcement was soundly rejected by courts at every turn. Its most compelling potential application was to cases in which either an employee had been involuntarily terminated, or the employer had terminated its business or the plan, before a sufficient number of years of service had passed for the pension rights of the claimant or claimants to vest under the terms of the plan. The plausibility of using a restitutionary theory for recovery of pension rights in cases of this sort could even be bolstered by analogy, for there were many cases permitting employees to recover bonuses,\(^{145}\) unused vacation benefits,\(^{146}\) and interests in profit sharing plans,\(^{147}\) in like settings, on a restitutionary theory rooted in a view of the benefit in question as a form of compensation. Remarkably, even courts that accepted a restitutionary theory for welfare benefits refused to extend the theory to pension benefits.\(^{148}\) In every case, courts refused to apply these basic restitutionary principles to pension benefits under plans, because of their view that employee rights were limited to whatever the plan document said they were. If the plan

\(^{143}\) Arguably, the doctrine of substantial performance might also be applicable, see Hadden v. Consolidated Edison Co., 312 N.E.2d 445 (N.Y. 1974), but it has less generality.

\(^{144}\) See Merton Bernstein, Employee Pension Rights When Plants Shut Down: Problems and Some Proposals, 76 Harv. L. Rev. 952 (1963); Heinsz, supra note 50, at 285-90.

\(^{145}\) E.g., George A. Fuller Co. v. Brown, 15 F.2d 672 (4th Cir. 1926); American Sec. Life Ins. Co. v. Moore, 72 So. 2d 132 (Ala. Ct. App. 1954); Roberts v. Mays Mills, 114 S.E. 530 (N.C. 1922).

\(^{146}\) See, e.g., In re Wil-Low Cafeterias, Inc., 111 F.2d 429, 432 (2d Cir. 1940) ("A vacation with pay is in effect additional wages. . . . If the employer had discharged the employee wrongfully after the latter had done the work necessary to earn a vacation he could not be deprived of the benefits due him."); Livestock Feeds, Inc. v. Local Union No. 1634, 73 So. 2d 123 (Miss. 1954), appeal dismissed, 348 U.S. 907 (1955); cf. Division of Labor Law Enforcement v. Ryan Aeronautical Co., 236 P.2d 236 (Cal. App. Dep't Super. Ct. 1951) (granting vacation pay award on grounds of substantial compliance). For criticism of the concept of vacation benefits as deferred compensation, see Joseph R. Wecks, Continuing Liability Under Expired Collective Bargaining Agreements (pt. 2), 15 Okla. City U. L. Rev. 359, 435-45 (1990).

\(^{147}\) E.g., Zwolanek v. Baker Mfg. Co., 137 N.W. 769 (Wis. 1912).

document did not confer a right to a pension until a certain period of service had been completed, then a pension—no matter how one characterized it—could not be granted at any earlier time.\textsuperscript{149}

Prior to ERISA, there was exactly one reported case in which a court permitted pension claimants whose employment had been terminated before vesting to proceed on a restitutioinary theory of pensions as deferred compensation. In \textit{Lucas v. Seagrave Corp.},\textsuperscript{150} the plaintiff class consisted of the thirty employees—approximately fifty percent of the workforce—who had been discharged en masse before their retirement. The employer claimed that all of them, as a result, had lost their rights to pensions under the unambiguous written terms of the plan. The court, however, held otherwise, observing that pensions are well recognized to be a form of compensation, even though "present decisions apparently give no weight or recognition to [that] existing and accepted characteristic."\textsuperscript{151} Because of that characteristic, the court continued, pensions are properly made the subject of the usual rules of restitution. Accordingly, since "the employer retains the full benefit of the employee's past service and secures favorable income tax treatment," and would also "recapture . . . the accumulated pension credits created by forfeitures," restitution in cases of termination before vesting might be appropriate.\textsuperscript{152} Whether it was appropriate in that case, though, was held a matter that had to be determined on the facts.

This holding was rejected (or else read narrowly enough to be distinguished) in every subsequent case in which claimants sought to rely on it.\textsuperscript{153} In each of those cases, the reason for refusing to follow the \textit{Seagrave} conclusion was that the terms of the plan document, and in particular the vesting requirements, were absolutely controlling. Some courts even went so far as to explain that the plan, as a contract, was a consensual means for allocating risk, and it had allocated the risk involved to the employees.\textsuperscript{154}

And so, before ERISA, the notion of pensions as deferred compensation, although widespread, had no relevance to the central issue of enforceability of pension claims. To have permitted it to serve as a basis for enforcement would have subverted the view of plans as contracts. For if pensions really had to be treated as wages by another name, then it would be difficult to justify giving effect to a delayed vesting provision unilaterally imposed by the employer. Such a term would have no greater claim to enforceability than any other unilaterally imposed term that purported to contradict employee rights secured

\textsuperscript{150} 277 F. Supp. 338 (D. Minn. 1967).
\textsuperscript{151} Id. at 344.
\textsuperscript{152} Id. at 345.
\textsuperscript{154} Hardy, 417 F. Supp. at 1182.
independently of the document or contract. That result was conceptually unacceptable.\textsuperscript{155}

III. SUMMARY

Let us summarize the key findings before we proceed to consider the impact of ERISA on pension plan law.

First, the starting point for pension plan law is the fact that plans are programs established by employers, not primarily to benefit employees but to serve the employer's own business needs. Formal pension plans appear to have originated mainly as formal retirement programs, where the purpose was systematically and impersonally to remove so-called "superannuated" workers from the enterprise.\textsuperscript{156} In time, the prospect of a pension came to be recognized as a valuable feature of the plan that could help promote desirable characteristics of the workforce. It permitted plans to be used as tools to attract employees, reduce turnover, and prevent unionization of the workforce. The precise use for a plan might vary from employer to employer. Fundamentally, though, it was a program for labor relations.

Second, the prospect of a pension, held out to employees, gives rise to expectations. Those expectations arise not from individual dealings between employer and employee but from the systematic, self-serving character of the holding out of the prospect of a pension. There is a compelling case for enforcement of these systematically created expectations. Because the expectations are created systematically and on a group-wide basis, different legal principles should apply than those which had been developed to protect individualized, nonsystematic expectations.

Third, a basic problem of pension plan law is to protect and enforce employee expectations while at the same time recognizing the employer's own business interest in its plan. The law prior to ERISA failed to accommodate those two interests and concerns. It greatly overprotected the employer's proprietary interest in plans and failed to protect employee expectations beyond what the employer said those expectations should be.

Fourth, the gift and contract characterizations were misguided meta-

\textsuperscript{155} It was also unacceptable as a matter of policy. If unilaterally imposed delayed-vesting terms in plans were to be held invalid, the utility of plans to employers might be greatly diminished. Since the receipt of a pension would always be a certainty, the employee would forfeit nothing by leaving, and one important method of bonding employees to the firm would be taken away. Very likely this consideration contributed to the judicial reluctance to enforce employee claims to their "deferred compensation."

\textsuperscript{156} A study of private pension plans conducted between 1947 and 1950 disclosed that, even at that date, "[t]he consensus of the executives interviewed . . . was that the greatest value resulting from an effective pension plan was the systematic retirement of employees unable to perform their duties efficiently because of old age or infirmity." Strong, supra note 49, at 1; see also 3 Revenue Revision Hearings, supra note 44, at 2417, 2425 (testimony of Keith S. McHugh) (explaining that the purpose of AT&T pension plan was to provide for orderly retirement of superannuated workers). For a recent example of such use of plans, see IBM Pension Plan Changes Are Expected to Entice Thousands of Workers To Retire, Wall St. J., Feb. 4, 1991, at A7.
phors. Neither provided any framework for protection of employee expectations in their true character as expectations arising from systematic plans. Each presupposed that plan-related legal relations could be analyzed solely in terms of relations—such as contact or gift—between the employer and individual employees.

Fifth, the deferred compensation characterization of pensions was empty. It was also inconsistent with the contract metaphor and, in particular, that metaphor's insistence that all employee rights are conferred by employers through the plan. Thus, it was rejected. Nonetheless, a deferred compensation approach to the protection of employee interests in pensions is possible in principle. Such an approach would protect pensions independent of their connection with a plan and would supplement protection accorded on the basis of protecting expectations.

Thus was the state of the law before ERISA. It is against this background that ERISA must be understood.

**ERISA'S APPROACH TO PLANS AND PENSIONS**

ERISA neither halts the process of developing plan common law nor sets it into motion. The common law of plans has long existed, and one of ERISA's main functions is to redirect its evolution along a more appropriate path. We have examined at some length the pre-ERISA common law of plans. We now turn to ERISA itself to determine the conceptual and policy transformations Congress intended to bring about.

ERISA on its face makes striking changes in benefit plan law. It establishes mandatory minimum standards for key characteristics of pension plans, such as eligibility, vesting, and funding. It announces stringent fiduciary principles to govern the conduct of persons responsible for the operation of plans. And it creates a comprehensive civil enforcement scheme that facilitates judicial protection of participant and beneficiary rights. These rules, along with others, are sources of guidance to be used by courts when filling in statutory gaps or otherwise developing rules of plan common law. Yet these rules only reflect the fundamental principles of ERISA; they are not the fundamental principles themselves. To fill gaps in the statute and to develop plan common law, courts must go behind the rules and identify the principles and concepts on which they are based. Only then can courts fully understand what ERISA seeks to accomplish and what aims and policies common lawmaking should respectively further and avoid.

This is not to say that the text of ERISA is inscrutable. Far from it. It is clear that "Protection of Employee Benefit Rights"—the name given to Title

157. Cf. Wieck, supra note 50, at 114 (arguing on other grounds that contract theories are inappropriate for pension plans).
I—is the overarching purpose of the act. But standing alone, that is too general a statement of purpose to be helpful in the hard cases. It is also incomplete. What are the “benefit rights” that are protected by the statute? What are their sources? How are they protected by ERISA? How does ERISA affect the employer’s rights and interests in the plan? What use, if any, does ERISA have for the metaphor of the plan as a contract? What use, if any, does ERISA have for the notion of pensions as deferred compensation? What new concepts and what new considerations, if any, does ERISA interject into the law of plans? These are questions that must be answered if the further development of law under ERISA is to have a proper foundation. To answer these questions, we must first look at the legislative history.

I. The Legislative History

ERISA had a lengthy path to enactment. It was the product of nearly ten years of study and effort by both Congress and the executive branch to improve the legal protection of employee interests in plan-based pensions. A plethora of hearings and efforts to enact protective legislation had preceded the Ninety-third Congress, the one that produced ERISA. In the Ninety-third Congress itself, ERISA emerged only through a lengthy process of reconciling four independent and sometimes competing bills, two in the House and two in the Senate.

A. The Emergence of Expectation Protection as the Dominant Theme

In each house of Congress, one of the two bills was initially presented as labor legislation and was dealt with by that house’s labor committee; the other was initially presented as tax legislation and was dealt with by that house’s tax-writing committee. Each of the four bills sought mainly to define and protect employees’ pension rights. Each of the bills also proposed to do so, in large part, through imposition of minimum vesting and funding standards for some or all pension plans, which would help ensure the realization of benefit expectations. Each also proposed to do so through implementation of a system of plan termination insurance, which would guarantee at least some part of the benefits promised to employees in the event of a plan termination.

Initially, the labor and tax bills differed in their approaches to the definition and protection of employee pension rights and to the overall structure of regu-

161. For a review of such actions in the period 1965-1972, see Gordon, supra note 7.

162. In fact, bills similar to each of these four bills were also introduced. It is not important, though, to be concerned with the differences in detail between the bills we consider and the other similar ones.


lation. As the legislative progress continued, though, the more comprehensive labor approach to regulation, with its emphasis on a statutory framework that would systematically protect employee benefit expectations, increasingly predominated. We shall describe the progress in the Senate; the House took a similar path.

In the Senate, the starting point was Senate Bill 4.\textsuperscript{165} Described as a bill "[t]o strengthen and improve the protections and interests of beneficiaries of employee pension and welfare benefit plans,"\textsuperscript{166} it was offered as a remedy for the problem, which hearings and studies had shown to be widespread, of plans failing to provide retirement benefits that employees had been led to believe they would get.\textsuperscript{167} The bill was concerned mainly with protecting employee expectations, primarily those concerning pensions and other retirement income but also those concerning welfare benefits.\textsuperscript{168} As the sponsors of the bill explained:

S. 4 is intended to restore the credibility and faith of American working men and women in their pension plans. Simply stated, a pension plan is either a promise which an employer expects to fulfill and which his employees expect to be fulfilled, or a warranted expectation by them that they will receive pensions.

Any failure by the employer to carry out his part of the agreement, or any lack of faith by his employees in the willingness of the employer to pay in full their earned and reasonably expected pension benefit serves to defeat the combined labor, management and social objectives which the pension plan was established to serve. The failure of the pension promise produces irreparable injury to the interdependent relationship which must exist between employee and employer. Thus a major work incentive which is indispensable to the productivity of a sound economy is undermined.

The underlying thrust of S. 4 is to protect workers’ rights in and expectations in private pension benefits . . . .\textsuperscript{169}

\begin{itemize}
  \item \textsuperscript{165} The bill was identical to S. 3598, 92d Cong., 2d Sess. (1972), which had been introduced but not enacted by the prior Congress.
  \item \textsuperscript{166} S. 4, supra note 163, reprinted in 1 LEGISLATIVE HISTORY, supra note 7, at 93.
  \item \textsuperscript{167} 120 CONG. REC. 130 (1973), reprinted in 1 LEGISLATIVE HISTORY, supra note 7, at 90-91 (remarks of Sen. Williams); 120 CONG. REC. 145-47 (1973), reprinted in 1 LEGISLATIVE HISTORY supra note 7, at 203-09 (remarks of Sen. Javits).
  \item \textsuperscript{168} The introductory sections of the proposed statute included the following:
    SEC. 2. (a) The Congress finds that private pension and other employee benefit plans and programs in the United States are intrinsically woven into the working and retirement lives of American men and women: . . . that deficient and inadequate provisions contained in a number of such plans are directly responsible for hardships upon working men and women who are not realizing their expectations of pension benefits upon retirement . . . .
    (b) It is the declared policy of this Act to protect interstate commerce, and the equitable interests of participants in private pension plans and their beneficiaries, by improving the scope, administration, and operation of such plans . . . .
  \item S. 4, supra note 163, § 2, reprinted in 1 LEGISLATIVE HISTORY, supra note 7, at 94-96.
  \item \textsuperscript{169} 2 Private Pension Plan Reform: Hearings before the Subcomm. on Private Pension Plans
Because benefit expectations were being defeated in so many ways, the bill took an expansive approach to their protection. It imposed on pension plans minimum standards for eligibility, vesting, and funding; established a system of mandatory registration for pension plans; established a program of plan termination insurance; established a voluntary system for transfer of vested credits between registered pension plans; strengthened the reporting and disclosure obligations for all benefit plans; imposed stringent fiduciary standards on persons responsible for benefit plans; provided a panoply of enforcement mechanisms; and conferred substantial enforcement and regulatory authority on the Secretary of Labor.

A competing tax-oriented bill to improve pension plan law, Senate Bill 1179; was introduced shortly thereafter. Its stated purposes, with respect to protecting employee expectations, were virtually identical to those of the labor bill. An additional purpose was to encourage retirement savings on the part of persons not covered by pension plans.

As initially proposed, Senate Bill 1179 was much more limited than the competing labor bill. It did not deal with welfare benefit plans or nonqualified pension plans. Its eligibility, vesting, and funding standards were not mandatory but instead were made only conditions for favorable tax treatment. And it did not contain fiduciary or disclosure provisions or rules for their enforcement. Yet in one respect, it was broader than the labor bill: It established a framework for individual retirement accounts. Such accounts are not employee benefit plans but are tax-favored, individualized retirement-savings vehicles for persons not covered by plans. In light of these differences it is fair to say that Senate Bill 1179, in its approach, initially differed from Senate Bill 4 by focusing on pensions and retirement income rather than on the employee benefit plans through which such benefits are provided.

The two bills quickly converged, and the labor approach, with its emphasis on plans as sources of expectations and its comprehensive treatment of plan-based risks, came to predominate. The convergence began with hearings on the bills.

The problems of disappointed employee expectations continued to be urged as fundamental. In addition, witnesses expressed concern with the lim-
ided protection that Internal Revenue Code provisions relating to deductions and taxes alone could provide, and they also expressed concern over Senate Bill 1179’s limitation of its mandatory vesting, funding, and other standards to only qualified pension plans. Many witnesses at the hearings emphasized the need for a more comprehensive approach of the kind taken by Senate Bill 4. After the hearings concluded, the tax bill was amended. Added to it were protective features contained in the labor bill, such as benefit portability provisions, fiduciary standards applicable to all plans, and mechanisms for enforcing the fiduciary provisions.

Subsequently, the committees with jurisdiction over the two bills reconciled their differences. Senate Bill 1179 was set aside while Senate Bill 4 was amended so that it now contained features from both the labor and tax bills. Minimum standards were imposed on all pension plans; a system of plan termination insurance was established; a benefit portability system was established; strong disclosure requirements were imposed; fiduciary and enforcement provisions were included; and provisions for individual retirement accounts were included. In its structure, scope and substance, the final bill strongly resembled its labor-bill progenitor. This was the bill enacted by the Senate and sent to the conference committee.

B. Principles and Policies Underlying the Senate Labor Bill

Because the bill passed by the Senate largely adopted the approach of the labor bill, it is useful to examine the report prepared by the Labor Committee to accompany and explain the penultimate version of Senate Bill 4.

1. Protection of Employee Expectations

The report began by explaining that "[t]he provisions of Senate Bill 4 are addressed to the issue of whether American working men and women shall receive pension benefits which they have been led to believe would be theirs upon retirement from working lives." According to the report, employee benefit expectations were being defeated, both deliberately and otherwise, in a wide variety of ways. Expectations were commonly defeated by overly stringent vesting rules or the lack of any preretirement vesting rule at all. In addition, "courts strictly interpret the plan indenture and are reluctant to disregard technical document word-

173. E.g., 1 id. at 231-40 (statement of Preston C. Bassett); 1 id. at 274-86 (statement of Fred E. Seibert); 1 id. at 453-71 (statement of Leonard Woodcock); 2 id. at 623-24 (statement of Converse Murdock); 2 id. at 624-31, 743-84 (statement of Paul S. Berger); 2 id. at 876-910 (statement of Merton C. Bernstein); 2 id. at 969-1039 (statement of Frank Cummings); 2 id. at 1040-50 (statement of Leonard Lesser).


175. Id. at 8, reprinted in 1 LEGISLATIVE HISTORY, supra note 7, at 594, and in 1974 U.S.C.C.A.N. at 4844-45.
Funding often was inadequate; this threatened to make the promise of a pension "illusory and empty." Employees often lacked knowledge of written plan provisions that affected benefit rights and that specified plan benefit-claim procedures. Fiduciary standards were availing, and enforcement mechanisms were missing. The report concluded that, because of the wide variety of interrelated problems, "it would be unwise and impractical to propose either revisions or new provisions in a patchwork fashion. . . . [T]he nature and extent of the problems determined to exist required one omnibus legislative proposal which would embody essential and indispensable reforms." Thus, Senate Bill 4 was meant to be a systematic and multifaceted approach to protecting employee interests in their anticipated benefits from plans.

2. The Employer's Interest in Its Plan

Although the bill was concerned chiefly with protection of employee expec-

176. Id. at 5, reprinted in 1 LEGISLATIVE HISTORY. supra note 7, at 591, and in 1974 U.S.C.C.A.N. at 4842.
177. Id. at 10, reprinted in 1 LEGISLATIVE HISTORY. supra note 7, at 596, and in 1974 U.S.C.C.A.N. at 4846.
178. Id. at 11, reprinted in 1 LEGISLATIVE HISTORY. supra note 7, at 597, and in 1974 U.S.C.C.A.N. at 4847 (stating that "[i]t is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these conditions were stated in a misleading or incomprehensible manner in plan booklets").
179. Id. at 4, 30-31, reprinted in 1 LEGISLATIVE HISTORY. supra note 7, at 590, 616-17, and in 1974 U.S.C.C.A.N. at 4841, 4866-67.
181. Id. at 13, reprinted in 1 LEGISLATIVE HISTORY. supra note 7, at 599, and in 1974 U.S.C.C.A.N. at 4849.
182. The report accompanying the corresponding House labor bill explained that its purpose was to protect employee expectations from a panoply of threats. "Underlying the provisions of this Act is a recognition of the necessity for a comprehensive program . . . [establishing] minimum standards to which all private pension plans must conform if the private pension promise is to become real rather than illusory." H.R. REP. No. 533, 93d Cong., 1st Sess. 9-10 (1974), reprinted in 2 LEGISLATIVE HISTORY. supra note 7, at 2348, 2356-57, and in 1974 U.S.C.C.A.N. 4639, 4647-48; see also id. at 41, reprinted in 2 LEGISLATIVE HISTORY. supra note 7, at 2387, and in 1974 U.S.C.C.A.N. 4666 (Supplemental Views) ("Our primary consideration in writing pension reform legislation has been to help ensure that workers now covered by pension plans get their expected benefits."). As in the Senate bill, employee expectations were to be protected through vesting standards, funding standards, and disclosure requirements that would close the gap between what the employee is told and what he reasonably might expect. Id. at 6-8, 11, reprinted in 2 LEGISLATIVE HISTORY. supra note 7, at 2353-55, 2358, and in 1974 U.S.C.C.A.N. at 4644-45, 4649.

The Senate Finance Report, S. REP. No. 383, 93d Cong., 1st Sess. (1973), reprinted in 1 LEGISLATIVE HISTORY. supra note 7, at 1063, and in 1974 U.S.C.C.A.N. 4890, nowhere expressly mentions employee expectations or their protection. However, the stated purposes of "improving the effectiveness of qualified retirement plans," of ensuring that participants "actually receive benefits," and of "encouraging the establishment of plans which contain socially desirable provisions," id. at 2, 10-11, reprinted in 1 LEGISLATIVE HISTORY. supra note 7, at 1063, 1070, 1078-79, and in 1974 U.S.C.C.A.N. 4890, 4890, 4898-99, appear to reflect expectation-protective aims substantially the same as those of the labor bill.
tations, it did recognize that plans are employer programs, voluntarily estab-
lished, in which the employer has legally recognized interests. Thus, recog-
nizing the "symbiotic relationship existing between the employer and the plan
covering his employees," the bill permitted an employer (or employer repre-
sentative) to serve as administrator, trustee, or other fiduciary.

However, the bill was greatly concerned with limiting one of the employer's
traditional uses for a plan. Hearings had emphasized the increasing transience
of the labor force and had led Congress to conclude that job mobility was
socially desirable and should be facilitated. Accordingly, through its
mandatory vesting rules and otherwise, the bill gave preference to protecting
job mobility over protecting employer use of plans to retain employees long
term.

The bill also sought to diminish employer control and use of plans in other
ways. It required that plan assets be placed in a trust for "the exclusive pur-
pose of . . . providing benefits to participants and their beneficiaries," and
it required that an employer-fiduciary (and any other fiduciary) administer the
plan for the exclusive purpose of providing benefits to participants and their
beneficiaries. Thus, although the bill treated plans as employer programs, it
sought to place significant limits on employer business uses for them.

3. Social Policy

The bill contained a new and important policy theme that had been absent
from the common law treatment of plans and pensions—that plans are socially
desirable and should be encouraged because they provide retirement income
(itself a highly desirable social good). Pension plans were now imbued with a
public interest. Thus, although the bill contained no direct incentives to plan
formation, the report concluded that it would still have that salutary effect:

[E]xpeditious enactment of S. 4 will institute a program which will achieve

183. "[T]he Committee believes it has designed a bill, which . . . brings the workers' interests
up to parity with those of employers." S. REP. No. 127, supra note 7, at 13-14, reprinted in 1
LEGISLATIVE HISTORY, supra note 7, at 599-600, and in 1974 U.S.C.C.A.N. at 4850.
184. Id. at 33, reprinted in 1 LEGISLATIVE HISTORY, supra note 7, at 619, and in 1974
185. Id. at 7, 11, reprinted in 1 LEGISLATIVE HISTORY, supra note 7, at 593, 597, and in 1974
186. Id. at 9, reprinted in 1 LEGISLATIVE HISTORY, supra note 7, at 595, and in 1974
187. Id. at 46, reprinted in 1 LEGISLATIVE HISTORY, supra note 7, at 632, and in 1974
188. Id. at 30, reprinted in 1 LEGISLATIVE HISTORY, supra note 7, at 616, and in 1974
189. Like the Senate bill, the House bill recognized that plans are employer programs: "The
primary purpose of the bill is the protection of individual pension rights, but the committee has
been constrained to recognize the voluntary nature of private retirement plans." H.R. REP. No.
533, supra note 182, at 1, reprinted in 2 LEGISLATIVE HISTORY, supra note 7, at 2348, and in
a strengthening of the role played by private retirement plans within the fabric of our economic and social structures. Its most important purpose will be to assure American workers that they may look forward with anticipation to a retirement with financial security and dignity, and without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society. The enactment of progressive and effective pension legislation is also certain to increase stability within the framework of our nation's economy, since the tremendous resources and assets of the private pension plan system are an integral part of our economy. It will also serve to restore credibility and faith in the private pension plans designed for American working men and women, and this should serve to encourage rather than diminish efforts by management and industry to expand pension plan coverage and to improve benefits for workers.\footnote{190}

\footnote{190. S. REP. NO. 127, supra note 7, at 13, reprinted in 1 LEGISLATIVE HISTORY, supra note 7, at 599, and in 1974 U.S.C.C.A.N. at 4849.}

The House report summarized the main themes and purposes of the bill as follows:

\[E\]xpeditious enactment of H.R. 2 will institute a program which will achieve a strengthening of the role played by private retirement plans within the fabric of our economic and social structures. Its most important purpose will be to assure American workers that they may look forward with anticipation, to a retirement with financial security and dignity, and without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society. The enactment of progressive and effective pension legislation is also certain to increase stability within the framework of our nation's economy, since the tremendous resources and assets of the private pension plan system are an integral part of our economy. It will also serve to restore credibility and faith in the private pension plans designed for American working men and women, and this should serve to encourage rather than diminish efforts by management and industry to expand pension plan coverage and to improve benefits for workers.

The Committee believes that the legislative approach of establishing minimum standards and safeguards for private pensions is not only consistent with retention of the freedom of decision-making vital to pension plans, but in furtherance of the growth and development of the private pension system. At the same time, the Committee recognizes the absolute need that safeguards for plan participants be sufficiently adequate and effective to prevent the numerous inequities to workers under plans which have resulted in tragic hardship to so many.

The Bill reported by the Committee represents an effort to strike an appropriate balance between the interests of employers and labor organizations in maintaining flexibility in the design and operation of their pension programs, and the need of the workers for a level of protection which will adequately protect their rights and just expectations.

\footnote{H.R. REP. NO. 533, supra note 182, at 8-9, reprinted in 2 LEGISLATIVE HISTORY, supra note 7, at 2355-56, and in 1974 U.S.C.C.A.N. at 4646-47.}

Additional themes were also in the House Labor Report—that employers have a "responsibility for the physical and economic welfare of their employees, even for the years beyond retirement,\" \footnote{id. at 2, reprinted in 2 LEGISLATIVE HISTORY, supra note 7, at 2349, and in 1974 U.S.C.C.A.N. at 4640, and that pension funds which accumulate to pay benefits have a substantial impact on the economy and on capital markets, which demand regulation, id. at 2-3, reprinted in 2 LEGISLATIVE HISTORY, supra note 7, at 2349-50, and in 1974 U.S.C.C.A.N. at 4640-41. Although these themes were sounded, they do not seem to have had any important bearing on the content of any of the proposed rules.}
A final theme was that benefits are a form of compensation. For example, as an additional reason for requiring preretirement vesting of pension benefits, the report stated that "the issue basically resolves itself into whether workers, after many years of labor, whose jobs terminate voluntarily or otherwise, should be denied benefits they have earned as deferred compensation." However, that such perspective on benefits was a secondary consideration can be seen from the fact that the bill permitted as much as fifteen years until full vesting (a period hardly consistent with a strong view of pensions as earned compensation), and that it failed to require that health and other welfare benefits—which had often been viewed at common law as a form of deferred or additional consideration—ever vest.

A deferred compensation perspective may have partially underlain the fiduciary rules. The bill applied its fiduciary rules only to those plans "which leave assets at risk"—to those which use a segregated fund to finance benefit payments—and substantially limited fiduciary obligations to matters of plan asset management. However, the fiduciary rules did not make the principal duty of fiduciaries that of preserving plan assets, as would be expected if the fiduciary rules were mainly concerned with protecting the participants' deferred compensation. Instead, fiduciaries were more broadly obligated to act in accordance with the requirement that the assets of the plan be held exclusively for the expectation-oriented purpose of providing benefits to participants and beneficiaries.

192. Id. at 16, reprinted in 1 LEGISLATIVE HISTORY, supra note 7, at 602, and in 1974 U.S.C.C.A.N. at 4852.
195. S. REP. No. 127, supra note 7, at 30, reprinted in 1 LEGISLATIVE HISTORY, supra note 7, at 616, and in 1974 U.S.C.C.A.N. at 4866. The House bill appears to have placed slightly greater emphasis on the notion of pensions as deferred compensation. The House report referred to pension plans as "deferred compensation schemes," H.R. REP. No. 533, supra note 182, at 2, reprinted in 2 LEGISLATIVE HISTORY, supra note 7, at 2349, and in 1974 U.S.C.C.A.N. at 4640, and explained that "[t]he Act presumes that promised pension benefits are in the form of a conditional deferred wage," id. at 13, reprinted in 2 LEGISLATIVE HISTORY, supra note 7, at 2360, and in 1974 U.S.C.C.A.N. at 4651. While the bill established vesting standards primarily to protect employee expectations, it secondarily based vesting rules on the need to prevent employees from being "denied benefits that have been placed . . . in a fund for retirement purposes." Id. at 6, reprinted in 2 LEGISLATIVE HISTORY, supra note 7, at 2353, and in 1974 U.S.C.C.A.N. at 4645.

The Senate Finance Report made no mention of pensions as deferred compensation. However, such an outlook appears to have underlain the bill, since the report sounded the themes that pensions are something to which employees are entitled by virtue of their "careers in useful and socially productive work," S. REP. No. 383, supra note 182, at 10, reprinted in 1 LEGISLATIVE HISTORY, supra note 7, at 1078, and in 1974 U.S.C.C.A.N. at 4898; that pension rights are something "slowly . . . stockpiled over many years," id. at 45, reprinted in 1 LEGISLATIVE HISTORY, supra note 7, at 1113, and in 1974 U.S.C.C.A.N. at 4930; and that immediate vesting of benefits.
C. Congressional Debate

The bill that emerged from the conference committee was comprehensive and took the plan-oriented, expectation-protecting approach to regulation. It contained one part (Title I) that dealt with “Protection of Employee Benefit Rights” through disclosure rules, eligibility, vesting and funding standards, fiduciary standards, and enforcement rules; tax provisions (Title II) concerned with qualified plans and individual retirement accounts; and a final major part (Title IV) dealing with the plan termination insurance system.

In the final debate on the conference report, members of Congress clearly recognized that, the bill was fundamentally a bill to protect employee benefit rights based on legitimate employee expectations. Horror stories were retold of workers whose retirement benefit expectations had been destroyed, and it was emphasized that

[w]ith the enactment of this legislation we intend to end the problem which so many American workers face when they learn that after working

is preferred as the means to accord employees “maximum protection,” id. at 19, reprinted in 1 LEGISLATIVE HISTORY, supra note 7, at 1087, and in 1974 U.S.C.C.A.N. at 4905. This emphasis on protection of deferred compensation also emerges in the fiduciary provisions' focus on the responsibility of fiduciaries to protect plan assets. See id. at 8, 31, reprinted in 1 LEGISLATIVE HISTORY, supra note 7, at 1076, 1099, and in 1974 U.S.C.C.A.N. at 4896, 4916.

196. The conference report, H.R. CONF. REP. No. 1280, supra note 9, reprinted in 3 LEGISLATIVE HISTORY, supra note 7, at 4277, and in 1974 U.S.C.C.A.N. at 5038, is almost entirely a provision-by-provision discussion of the final bill, with particular attention to how the variations between the House and Senate bills were reconciled. It contains little discussion of policy or background. Thus, while the report is useful to courts for interpreting specific provisions, it contributes little to our understanding of the underpinnings of the law.

197. Part III, labeled “Jurisdiction, Administration, Enforcement; Joint Pension Task Force, Etc.,” dealt with miscellaneous nonsubstantive matters.

198. E.g., 120 CONG. REC. 29,194 (1974), reprinted in 3 LEGISLATIVE HISTORY, supra note 7, at 4660. One House member stated: “H.R. 2, while extremely complex, has one underlying theme. It is a piece of legislation designed to protect and expand the rights of all workers to a pension.” Id. (remarks of Rep. Biaggi); see also 120 CONG. REC. 29,952 (1974), reprinted in 3 LEGISLATIVE HISTORY, supra note 7, at 4798 (stating that this is “legislation with the very simple goal that workers have a right to the pensions they have been promised”) (remarks of Sen. Nelson); 120 CONG. REC. 29,192 (1974), reprinted in 3 LEGISLATIVE HISTORY, supra note 7, at 4657 (stating that “the purpose of this conference report is . . . to reduce sharply the number of people who pay money into private pension plans year after year expecting eventually to receive retirement income only to have their hopes dashed and end up getting nothing”) (remarks of Rep. Perkins); 120 CONG. REC. 29,949 (1974), reprinted in 3 Legislative History, supra note 7, at 4791 (remarks of Sen. Bentsen); 120 CONG. REC. 29,207 (1974), reprinted in 3 LEGISLATIVE HISTORY, supra note 7, at 4698 (stating that “the bill will protect private pension plans and will prevent a recurrence of the too-often repeated story of pensions which unexpectedly vanished when workers reached retirement age”) (remarks of Rep. Minish).

199. E.g., 120 CONG. REC. 29,934-35 (1974), reprinted in 3 LEGISLATIVE HISTORY, supra note 7, at 4749-50 (remarks of Sen. Javits); 120 CONG. REC. 29,93 (1974), reprinted in 3 LEGISLATIVE HISTORY, supra note 7, at 4656-57 (“It has been a source of great regret to me over the years to encounter time after time cases of miners who have been denied benefits which they had every reason to expect.”) (remarks of Rep. Perkins); 120 CONG. REC. 29,949-50 (1974), reprinted in 3 LEGISLATIVE HISTORY, supra note 7, at 4790-94 (remarks of Sen. Bentsen).
for several years the pension benefits to which they thought they were enti-
tled are nonexistent—nonexistent because of inadequate vesting protection,
or poor or negligent administration, because the plan was not properly
funded.\textsuperscript{200}

Illusory promises, deceptively creating long-term expectations, were to be
abolished.\textsuperscript{201}

Congress also recognized that plans are employer-sponsored business pro-
grams, and that legal protection of employee interests and rights should not be
so stringent as to deter employers from creating them.\textsuperscript{202} Indeed, it was gener-
ally agreed that private pension plans should be encouraged through the tax
laws.\textsuperscript{203} Speakers also continued to emphasize that job mobility is a fact of
modern economic life and is a societal good that should be protected against
restraint by pension plans.\textsuperscript{204}

Nor was the policy rationale for protecting benefit expectations forgotten.
As one of the sponsors of the Senate labor bill explained:

Under this bill, the Congress has developed a fair and feasible system of
private pension plan regulation. And under this regulation, private plans will
develop more rapidly than in the past because the Congress will have as-
sured that pension promises are kept and reasonable expectations built upon
those promises are not disappointed.

\begin{itemize}
\item \textsuperscript{200} 120 CONG. REC. 29,212 (1974), reprinted in 3 LEGISLATIVE HISTORY. supra note 7, at
\item \textsuperscript{201} See 120 CONG. REC. 29,214 (1974), reprinted in 3 LEGISLATIVE HISTORY. supra note 7, at
4717. One congressman argued:
\begin{quote}
Until now, the promise of your pension has been this: If you remain in good health
and stay with the same company until you are age 65; and if the company is still in
business; and if your department has not been abolished; and if you had not been laid
off for too long a period; and if there is enough money in the fund; and if that money
has been prudently managed, you may get a pension.
\end{quote}

It is utterly and totally indefensible in an American society as affluent as ours, that
an individual's economic security in his later years should rest on such a flimsy foun-
dation and a phony promise, to be so endangered by such an incredible list of "ifs"
and "maybe's."
\end{quote}
\textit{Id.} (remarks of Rep. Daniels).
\item \textsuperscript{202} \textit{E.g.}, 120 CONG. REC. 29,195 (1974), reprinted in 3 LEGISLATIVE HISTORY. supra note 7, at
4664 (remarks of Rep. Thompson); 120 CONG. REC. 29,210 (1974), reprinted in 3 LEGISLATIVE
HISTORY. supra note 7, at 4706 ("The goal of the legislation was to strengthen the rights of
employees under existing pension systems, while at the same time encouraging the expansion of
these plans and the creation of new ones.") (remarks of Rep. Rostenkowski); 120 CONG. REC.
29,949, 29,951 (1974), reprinted in 3 LEGISLATIVE HISTORY. supra note 7, at 4791, 4797 (re-
marks of Sen. Bentsen).
\item \textsuperscript{203} \textit{E.g.}, 120 CONG. REC. 29,198 (1974), reprinted in 3 LEGISLATIVE HISTORY. supra note 7, at
4673 (remarks of Rep. Ullman); 120 CONG. REC. 29,944 (1974), reprinted in 3 LEGISLATIVE
HISTORY. supra note 7, at 4778 (remarks of Sen. Long).
\item \textsuperscript{204} 120 CONG. REC. 29,214 (1974), reprinted in 3 LEGISLATIVE HISTORY. supra note 7, at
4716 (remarks of Rep. Daniels); see also 120 CONG. REC. 29,930 (1974), reprinted in 3 LEGISLA-
TIVE HISTORY. supra note 7, at 4737-38 (remarks of Sen. Williams) (noting statutory accommo-
dations for highly mobile workers).
Private pension and welfare reform legislation is not a panacea for dealing with the more subtle undercurrents of social unrest; but the enactment of this legislation will clearly establish a more positive climate of respect for, and affirmation of, the worker's contribution to our economic progress. The establishment of this climate is indispensable if we are to maintain our economic growth . . . .

There was virtually no mention of the view that benefits are a form of compensation.206

II. The Statutory Text

Let us now examine the provisions of ERISA to see how the themes found in the legislative history came to be realized in the text.

A. Protection of Employee Expectations

Unsurprisingly, the text of ERISA shows its predominant concern to be protection of employee expectations; in particular, expectations concerning pensions. ERISA's statement of findings emphasizes that the problem to be remedied is that of disappointed employee expectations regarding "anticipated benefits" and "promised benefits."207 We have already seen how the vesting, funding, and plan termination insurance provisions are designed to protect these expectations.

ERISA also contains provisions designed to ensure that employee expectations are well grounded. One is that every plan must be "established and maintained pursuant to a written instrument."208 A purpose of this requirement is to help ensure that employees can determine precisely what rights they have under a plan, so that erroneous but still reasonable expectations about benefits from the plan may be avoided. To the same end, ERISA requires the plan administrator to distribute or otherwise make available to employees written information about the plan, their rights and responsibilities with respect to the plan, and the status of their interests in benefits—all in easily understood form.209

The fiduciary rules are also designed to protect benefit expectations. Unlike the precursor bills, the fundamental concern of the final set of fiduciary provisions is not the safeguarding of assets. Although some of the rules are concerned with asset management and investment, the central fiduciary requirement—that a fiduciary discharge his duties "for the exclusive purpose of . . .

206. For such a view, but expressed only in passing, see 120 CONG. REC. 29,205 (1974), reprinted in 3 LEGISLATIVE HISTORY, supra note 7, at 4690 (remarks of Rep. Brotzman).
providing benefits to participants and their beneficiaries—goes well beyond those functions. It seeks to ensure that the employees’ anticipated benefits are received and that threats to those anticipated benefits are avoided, whether the threats arise from asset handling, plan administration, or plan management.

B. The Plan as Employer Program

In significant ways, ERISA is predicated on a recognition that plans are employer programs. ERISA describes plans as programs established and maintained by employers. Consistently, it permits employers and their officers, employees, and agents to manage and administer the plan; permits employers to designate the named fiduciary; and makes the employer (where it is the plan sponsor) the plan administrator by default in cases where an administrator cannot be identified from the plan document. These provisions clearly recognize the employer’s continuing interest in plans it establishes, as well as the propriety of the employer’s continuing involvement in plan management and administration.

ERISA also permits properly funded pension plans to be terminated by the employer for its own business reasons. It permits welfare benefit plans to be terminated whenever the employer chooses. In so doing, ERISA recognizes that plans are established to serve employer business needs and that plans may cease to satisfy those business needs as circumstances change.

There are still other ways in which ERISA recognizes that plans are employer programs. One is ERISA’s concern with preventing employer interference with the participants’ plan-based rights through dealings with participants in their status as employees. Another is ERISA’s authorization of limited plan investment in employer stock and employer real property, and its authorization of employee stock ownership plans (“ESOPs”), plans designed to invest primarily in stock of the employer. ESOPs are thought to be extremely effective programs for inducing employee dedication to the enterprise, serving this end by providing employees with ownership stakes in the firm.

211. ERISA § 3(1)-(2), 29 U.S.C. § 1002(1)-(2). It also recognizes that labor organizations may establish and maintain plans.
212. ERISA § 408(c)(3), 29 U.S.C. § 1108(c)(3).
C. Benefits as Deferred Compensation

ERISA also treats pensions and other benefits as forms of compensation, but only to a limited extent.

Pension plans are defined so as to include plans that "result[] in a deferral of income by employees for periods extending to the termination of covered employment or beyond."220 Nothing in the definition of "welfare plans" expressly deems a welfare benefit to be a form of compensation. However, the description of welfare benefits has an underlying focus on compensation. With few exceptions, welfare benefits are limited to those that are in the form of money, services, or other items of value, and that are provided to employees on an individual basis. Excluded are generalized benefits and noncompensatory benefits, such as company cafeterias, job security or seniority standards, and shuttle bus service to the employees' parking lot.221 From a pure protection-of-expectations perspective, there is little reason to exclude from ERISA's coverage plans that provide these kinds of benefits. If ERISA is construed to protect forms of compensation, however, the limitation makes sense.

But other provisions of ERISA seem to reject a view of benefits as compensation. For example, although there are maximum periods within which an employee's interest in his pension benefit must vest, his interest still need not vest immediately. Welfare benefits, even for retirees, need never vest at all.222

Other provisions of ERISA inconsistent with a view of benefits as compensation are those permitting retirement benefits and contributions to retirement plans to be integrated with social security. The integration rules permit employers to reduce contributions (in the case of defined contribution plans), or permit the plan to reduce benefits (in the case of defined benefit plans), so as to take into account an employee's entitlement under the Social Security program.223 In either case, an employee's retirement income is decreased because of factors having nothing to do with the quantity of service he provided supposedly in exchange for the retirement income.

These and other inconsistencies224 show that the view of benefits as compen-

221. See 29 C.F.R. § 2510.3-1(c) (1990). The only significant exception in the statute is for day care centers. Plans providing them are deemed by statute to be welfare benefit plans. ERISA § 3(1)(A), 29 U.S.C. § 1002(1)(A).

On the other hand, salary and other forms of basic compensation provided through the payroll are not considered to be welfare benefits. See 29 C.F.R. § 2510.3-1(b).

222. ERISA §§ 201, 203, 29 U.S.C. §§ 1051, 1053. It is not an objection to this reading of ERISA that an exchange of value may involve contingent consideration; for example, option contracts and lottery tickets are quite conventional economic exchanges. We are not using "compensation" here as a synonym for "consideration." Rather we are concerned with the extent to which ERISA treats benefits as materially like wages, salaries, and similar forms of remuneration for labor. To the extent that benefits are contingent, they differ in an obvious way from these paradigmatic forms of compensation. To the extent that ERISA permits benefits to be contingent, it treats them less like compensation.

224. See, e.g., ERISA § 302(b)(2), 29 U.S.C. § 1062(b)(2) (outlining amortization rules for
sation is present in ERISA only in attenuated form.

D. Plans and Contracts

A significant omission from ERISA is any suggestion that plans should be deemed contracts between the establishing employer and its employees. Instead, plans are characterized by ERISA as structured and purposive “funds” or “programs” that may be established unilaterally by the employer, that may enter into business transactions, that have officers, employees, consultants, and decision-makers, and that may be terminated. None of the civil enforcement provisions reflect any view of wrongs with respect to plans as breaches of contract. To the contrary, suits under ERISA are regarded as suits to remedy fiduciary breaches or violations of statute, or to “recover benefits due” or to “enforce” rights under the plan. ERISA is not greatly concerned with the rights and obligations of the employer, the party that, from a contract perspective, would be the promisor. Rather it is concerned with the obligations of the plan itself and its fiduciaries. Even more generally, ERISA is not concerned with plan formation and the enforceability of plan terms, as had been the pre-ERISA law based on the contract metaphor. Contract formation and enforceability of terms are central concerns of contract law.

Thus, there is nothing in the text of ERISA to suggest that it should be viewed as if it were the law of a specific kind of contract in the way, for example, that Article 2 of the Uniform Commercial Code is the law of sales contracts. ERISA, rather, is a scheme for regulation of a unique kind of employer activity.

III. Summary

The key changes made by ERISA are as follows. First, and fundamentally, what ERISA does not change is the premise that plans are employer business programs that employers have a right to establish and use for their own business purposes. Nonetheless, there are some important changes in the details of this premise. One is that pension plans and welfare benefit plans are deemed to have similarities sufficient to make appropriate their treatment by the same statute, in accordance with the same set of policies. This differs from pre-

226. ERISA § 3(1)-(2), 29 U.S.C. § 1002(1)-(2).
227. Id.
231. ERISA § 502(a), 29 U.S.C. § 1132(a); see Weeks, supra note 87, at 143-45 (stating that benefit claims are not contractual claims).
ERISA common law, in which pension plans and welfare plans were subject to different legal rules—for example, those concerning the availability of restitution. Another important change is that some employer uses of plans are restricted in order to advance social policies. For example, a policy favoring job mobility leads to rules that limit the employer’s ability to bind employees to their jobs.

Second, the undisputed main purpose of ERISA is to help ensure the realization of benefit expectations that arise from these employer programs. ERISA’s minimum standards, plan termination insurance provisions, disclosure rules, fiduciary standards, and enforcement provisions are all designed to help protect employee expectations. ERISA inverts the priority of interests in a benefit plan, rejecting the common law’s approach and instead strongly favoring employee interests over those of the employer.

Third, ERISA expands on the common law’s half-hearted treatment of benefits as compensation, but declines to make that the principal regulatory theme. ERISA recognizes that there is a sense in which benefits are forms of compensation (and implicitly uses that characteristic to identify the benefits with which it is concerned), but very little expressly turns on this status, and much of the statute is inconsistent with it. The concept of benefits as compensation remains available as a tool for development of plan common law—as a basis, for example, of a law of restitution. However, any such body of rules must be tempered by recognition of the subordinate role of the concept, as well as the limits that ERISA places on its usage.

Fourth, ERISA implicitly discards the metaphor of plans as contracts. Thus, the post-ERISA common law of plans may not proceed, as did the traditional common law, as a blind elaboration of contract doctrine. If contract law principles are to be used, analogically or otherwise, in the development of the law of plans, that use must be justified on independent grounds, consistent with the principles underlying ERISA.

APPLICATIONS

Our investigation of the foundations of the law of plans has so far yielded some conclusions about the appropriate framework for common law development. We show in this part of the Article how those conclusions may be applied.

I. SOME ILLUSTRATIVE PROBLEMS

Many areas of plan common law are actively being developed. Among the more active are (a) claims not expressly provided for by the text of ERISA,

233. It is thus quite wrong to assert, as some have, that “ERISA . . . implicitly regards the pure deferred wage theory of pensions as correct.” LOGUE, supra note 47, at 62; see also, e.g., BRUCE, supra note 12, at 314-15 (emphasizing significance of statements in legislative history viewing pensions as deferred compensation); Langbein, supra note 22, at 129.
such as claims for indemnity and contribution, nonfiduciary liability for participation in a fiduciary's breach, and liability of fiduciaries to compensate participants and beneficiaries (as opposed to the plan itself) for injuries the fiduciaries cause; (b) benefit claims, in particular, the issues of the kind of review to be performed by courts and the entitlement of participants to benefits on the basis of estoppel; and (c) participant rights in welfare benefit plans (with respect to which ERISA itself imposes very few standards), especially plans providing medical benefits to retirees. These developing areas are also ones in which there is much uncertainty and questionable analysis as to both proposed rules and rationales to support them. Too often, a proposed rule or rationale uncritically reflects the concepts, principles, and modes of analysis regularly used before ERISA, but which now have become obsolete.

Some such errors can easily be detected and cured. For example, many courts have concluded that ERISA's express requirement that plans be established pursuant to a written instrument functions as a sort of statute of frauds that prohibits enforcement of employee benefit expectations arising from conduct or oral representations. The conclusion does not follow. Examination of the purposes of ERISA makes it clear that the writing requirement


241. See, e.g., Cefalu v. B.F. Goodrich Co., 871 F.2d 1290, 1296 (5th Cir. 1989) (stating that the policy of a writing requirement is to "prevent collusive or fraudulent side agreements between employers and employees"); Saret v. Triform Corp., 662 F. Supp. 312, 316 (N.D. Ill. 1986) (stating that ERISA's writing requirement "protects ERISA plans from the sort of corruption fostered by private verbal agreements").
was not intended as a vehicle to impede enforcement of benefit expectations. Rather, it was intended as a device to further the protection of those expectations by controlling the mode of their creation. By prohibiting unwritten plans and oral plan provisions, ERISA seeks to prevent vague or unsystematic expectations that have a high risk of being defeated, and to promote clarity and definiteness in pension promises. To use this preventative provision as a means to defeat employee expectations is to contravene its purpose. Indeed, it is to return to the contract-oriented view that no benefit expectation is reasonable or enforceable unless it is based on the language of the plan document.²⁴² There may well be good reasons for not permitting estoppel-based actions for benefits, but the writing requirement cannot plausibly be treated as one of them.

Another example is restitution. Several courts have refused to allow actions for restitution on the ground that "[q]uasi-contractual remedies have no place where there is a contract between the parties."²⁴³ This is a non sequitur. The rule barring restitution where an existing contract governs the subject matter is based on the principle that a negotiated bargain fixes the parties' entitlements and risks, and that consensual arrangements should not lightly be over-turned.²⁴⁴ The principle cannot simplistically be applied to plans. Again, there may be reasons for denying restitution in some,²⁴⁵ or even all, cases involving plans, but the supposition that a plan is essentially a deal cannot be one of them.

Another example is the standard of review for benefit claims. Current law provides that, where the plan document grants decision-making discretion to the fiduciary responsible for benefit claims, any denial of a claim by that fiduciary is presumptively to be reviewed by courts under an extremely deferential "abuse of discretion" standard.²⁴⁶ This is a doubtful rule. Deferential review

²⁴². Some courts have recognized that the purpose of the writing requirement is to protect expectations. For example, in Adams v. Avondale Industries, Inc., 905 F.2d 943 (6th Cir.), cert. denied, 111 S. Ct. 517 (1990), the court considered the purpose of the subsidiary requirement that the written document specify a procedure for amending it, ERISA § 402(b)(3), 29 U.S.C. § 1103(b)(3). The court concluded: "The provision serves the important purpose of insuring 'against the possibility that the employee's expectation of the benefit would be defeated' by an unanticipated amendment of a welfare plan, whose benefits employees may come to take for granted." Adams, 905 F.2d at 949 (citation omitted).


²⁴⁴. RESTATEMENT OF RESTITUTION § 107 & cmt. (1937).

²⁴⁵. For example, the presence of a collective bargaining agreement pursuant to which a plan is established may be a factor bearing on the availability of restitution as to some matters addressed by the agreement.

²⁴⁶. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989). If the fiduciary is subject to a conflict of interest, less deference will be accorded its decision. Brown v. Blue Cross & Blue
has its origins in the strict employer-property view of plans, where it served as an ad hoc device to afford employees limited protection from employer abuse. Thus, it was originally an employee-protection rule. But it was protective of employees only in its original context. Because contemporary benefit plan law is now so overwhelmingly protective of employee benefit expectations, abuse-of-discretion review has been transformed, through change of context, into a vehicle to defeat the employee expectations otherwise so strongly protected. It is quite astonishing to find courts concluding, as if contract law were the touchstone of legitimacy, that a plan sponsor can unilaterally insert magic language into the plan document, and thereby evade the fundamental purpose of ERISA. There may be circumstances where such mode of review is appropriate. However, it is difficult to see what considerations could justify allowing employers to impose it substantially at will.

A final example relates to suits to remedy fiduciary breaches in connection with unfunded welfare benefit plans. Some have suggested that it is erroneous, indeed incoherent, to allow actions for breach of fiduciary duty with respect to these plans, because there are no lost assets to restore to a fund. This argument misconstrues the purpose of ERISA's fiduciary rules. Their purpose is not simply to protect plan assets; rather they have the broader purpose of protecting employee benefit expectations by ensuring that fiduciary conduct, no matter what it relates to, does not jeopardize the integrity of the benefit payment program that is the plan. The integrity of that program can, of course, be threatened by the misuse of plan assets, and such misuse may even be the greatest threat to the plan. But the integrity of the program can also be threatened in many other ways: for example, by a fiduciary's refusal to follow plan documents, by a pattern of illegitimate denials of benefit claims, or by the imprudent hiring of incompetent service providers to the plan. All of these are wrongs to the plan, remediable under the fiduciary and enforcement provisions; they make benefit expectations less secure, and thereby cause injury to the ongoing program of affording benefits to employees. The remedy for any breach of fiduciary duty is to remove the source of unacceptable risk. In cases where there is a funded plan, the remedy may be the conventional one of

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248. See, e.g., Weeks, supra note 87, at 163-80.

an order compelling the wrongdoing fiduciary to compensate the plan for its monetary losses. But in cases not involving misuse of plan assets, the proper remedy may be an order, for example, that the provisions of the plan be followed, that an untrustworthy fiduciary be removed from his position of responsibility, or that some other threat to the realization of benefit expectations be eliminated.

These examples show how the conclusions reached in the first two parts of the Article can straightforwardly be applied to current issues in plan common law. Additional examples could be provided, and the analyses given above pushed to greater depth. To do so, however, would not greatly contribute to development of a general framework for plan common law—the principal aim of this Article. Thus, we shall turn once again to more fundamental issues and see how the conclusions so far reached can be applied to other structural issues that the text of ERISA leaves unresolved. These issues are ones that must be addressed if we are to have a complete framework for analysis of problems such as the ones just discussed. Thus we turn to the important foundational questions: What is the employer's relation to its plan? What is a plan?

II. THE EMPLOYER'S LEGAL RELATION TO ITS PLAN

ERISA recalibrates the balance of interests in a plan. That is one of its purposes. Before ERISA, case law treated the employer's interest in a pension plan as essentially proprietary, and the plan itself as employer property not to be meddled with by the courts. Correspondingly, employees were deemed not to have any pension rights arising from the expectation-creating mechanism of the plan; their rights were substantially limited to those that the employer had voluntarily granted in the putative plan contract. ERISA rejects this calculus. It recognizes that employee rights may exist irrespective of the employer's wishes and irrespective of any putative contract, and it makes the employees' interest in receiving anticipated benefits the paramount interest to be furthered.

A. The Status of Employer Interests Under ERISA

But the statute itself tells only half the story. ERISA deals with employee rights and their elevation to preeminence at great length. But what of the employer's interests and rights with respect to plans? ERISA certainly does not intend to nullify them. Employers still may use plans for most of their traditional purposes. Yet, by contrast with its treatment of employee interests, ERISA has little expressly to say about employer interests and the extent to which they may be furthered and protected. How, then, are we to understand the status of the employer's interest under the law of benefit plans?

Statutory silence is not the only obstacle. ERISA's central fiduciary requirement, the so-called "exclusive benefit" rule, requires that any plan fiduciary "discharge his duties with respect to a plan solely in the interest of participants and their beneficiaries and... for the exclusive purpose of providing
benefits to participants and their beneficiaries.\textsuperscript{250} Because the fiduciaries are the persons who manage and administer the plan,\textsuperscript{251} the rule, in effect, requires that employee benefit plans be managed and administered "solely in the interest of participants and their beneficiaries and . . . for the exclusive purpose of providing benefits to participants and their beneficiaries." No allowance is permitted for employer interests.\textsuperscript{252} Some have argued that the exclusive benefit rule undermines legal recognition of employer interests in their plans.\textsuperscript{253}

But that is not the result the statute demands. Our discussion of ERISA's structure and legislative history shows that Congress did recognize and did intend to protect an employer's continuing interest in its plan. And so the question then becomes one of how, in light of the exclusive benefit rule, the common law of plans should accommodate employer interests.

The key to understanding the legal status of employer interest in plans is to recognize that ERISA, with its exclusive benefit rule, does not encompass the whole of benefit plan law. The potential scope of benefit plan law is determined by the potential field of plan-related activity: roughly speaking, by what plans can do and by what can be done to them. Employee benefit plans are ongoing activities, established by employers for their own business purposes. They are not inert retirement savings programs or trust accounts. There is an enormous variety of things that plans, as enterprises, can do and that can be done to or with respect to them\textsuperscript{254} and that, accordingly, may be the subject of

\textsuperscript{250} ERISA \S 404(a), 29 U.S.C. \S 1104(a) (1988).

\textsuperscript{251} ERISA \S 3(21)(A), 29 U.S.C. \S 1002(21)(A).

\textsuperscript{252} This is not the only such statutory restriction. A supplement to the exclusive benefit rule provides that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." ERISA \S 403(c)(1), 29 U.S.C. \S 1103(c)(1). Other fiduciary provisions, in particular the prohibited transaction rules, reinforce the principle that the fiduciaries' obligations are to focus singlemindedly on the interest of the participants and beneficiaries in receiving anticipated benefits. ERISA \S 406(b)(1), 29 U.S.C. \S 1106(b)(1).


Because . . . the employer and the employee both benefit from the pension or welfare benefit plan, there is an obvious difficulty in interpreting the exclusive benefit rule. The plans are established for the mutual advantage of employer and employee, not for the exclusive benefit of one. The exclusive benefit rule on its face is inconsistent with the economic realities of plans.

\textit{Id.}

\textsuperscript{254} Under ERISA, a plan is a legal entity, entirely distinct from both the employer of the participants and the union (if any) to which the participants belong. Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 373 (1990) (stating plan and union sponsor were "distinct entities," and wrong by plan fiduciary to union sponsor was not wrong to the plan remediable under ERISA). As an autonomous legal entity, a plan may sue or be sued, ERISA \S 502(d)(1), 29 U.S.C. \S 1132(d)(1), engage its own legal counsel, enter into contracts, own property, make loans and investments, hire employees, and otherwise transact business, ERISA \S\S 406(a), 408(b), 29 U.S.C. \S\S 1106(a), 1108(b). Plans can also be established, amended, terminated, collectively bargained over, and used in a myriad of ways for purposes of improving employee rela-
rules and principles of benefit plan law.

But the scope of ERISA is limited. ERISA deals mainly with the ongoing operation of the plan— with its character as a program for providing benefits to employees. So, too, does the exclusive benefit rule. It is concerned with the integrity of the ongoing program of providing benefits for employees and requires only that plans and their assets be managed and administered according to its strictures.\textsuperscript{6}\textsuperscript{6} It does not require, for example, that plans be established solely in the interest of, and for the exclusive purpose of providing benefits to, participants and beneficiaries.\textsuperscript{6}\textsuperscript{6} By its silence, the exclusive-benefit rule leaves an entire domain of plan-related activity—roughly that which is not part of plan management and administration—outside its scope. That part includes plan establishment, amendment, and termination, as well as employer business activity having an impact on the plan. That other domain of plan-related activity is the domain in which employer interests may properly be taken into account (unless other laws provide to the contrary). Indeed, it is the domain in which employer interests might prevail over employee interests. Thus the key to understanding how employer interests can be accommodated under benefit plan law is to recognize that ERISA is part, but far from all, of it.

\textbf{B. Ramifications for the Common Law of Plans}

This observation is not entirely new. Courts have had little difficulty recognizing that the exclusive-benefit rule, and ERISA's other fiduciary requirements, are not all-encompassing. It is well recognized, for example, that the fiduciary standards do not govern the establishment of a plan and selection of

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256. Consider what the exclusive benefit rule could have provided and how it could have subjected a broader class of activity to its “exclusive benefit” mandate. Consider I.R.C. § 401(a) (1988), which is contained in Title II of ERISA. Section 401(a) requires that, to qualify for favorable tax treatment, a pension trust must be part of a plan that is “for the exclusive benefit of . . . employees or their beneficiaries.” I.R.C. § 401(a). This rule has been construed by the Treasury Department, consistent with its broad language, to impose an “exclusive benefit” requirement on both the establishment and the operation of the plan. Treas. Reg. §§ 1.401-1(a)(3)(ii), 1.401-1(b)(3) (1991). There is no inconsistency between the Code exclusive benefit rule and the Title I exclusive benefit rule, because the Code provision antedates ERISA and imposes substantive requirements different from those imposed under Title I. The Code requirement is concerned mainly with prohibiting discrimination among classes of employees and preventing use of plans as subterfuges to avoid income tax.
its terms, the termination of a plan, the amendment of a plan, the sale of the business with which the plan is associated, or the personnel activities of an employer. Courts have recognized that the employer is largely free to pursue its own interests in these circumstances, without automatically exposing itself to liability for breach of fiduciary duty. Yet there are important, and generally unappreciated, ramifications for plan common law of this mode of accommodating employer interests.

To begin, these areas of plan-related activity beyond the scope of the exclusive-benefit rule are areas for development of plan common law. ERISA's relative inattention to them is no bar to further legal development. ERISA preempts all state laws relating to plan establishment, amendment, and termination—subjects that are expressly dealt with by the statute. It also preempts many other areas of state law that deal with the employer's relationship to its plan and that accordingly "relate to" a plan within the meaning of ERISA's preemption provision. But to the extent that ERISA itself fails to supply the replacement rules, a domain is left where federal common lawmaking must fill in the gaps.

Courts do not always appreciate this. For example, in *Berlin v. Michigan*...
Bell Telephone Co., the issue for decision was the appropriate rule of liability, if any, for certain representations made by the employer-administrator. In that case, the employer had established a special early retirement program to help prune the workforce of a superabundance of managers. Initially, the plan was offered for only two months. Subsequently, employees approaching retirement age began to ask the employer whether there would be a reactivation of the plan. To discourage these and other employees from delaying retirement because of the prospect of benefits under the plan, company officers stated that reactivation would be unlikely. They allegedly continued to say this even after "serious consideration" had been given to reactivation. After the employer again offered early retirement benefits under the plan, employees who had not delayed their retirement in reliance on the representations sued. All parties agreed that the employer's decision to reactivate the plan was a business decision not subject to ERISA's fiduciary rules. They disagreed, however, as to whether the employer's representations about the reactivation of the plan were nonetheless governed by ERISA's rules of fiduciary conduct. Apparently believing that there could be no liability imposed on the employer unless the representations were found to be governed by ERISA's fiduciary standards, the court strained to conclude (without any plausible justification) that the representations were made as part of plan administration. On this basis, it permitted a suit for breach of fiduciary duty to proceed. But such contortions were not needed to justify the sensible result that the representations could be a basis for liability. For even if the representations had been made in the course of the employer's plan-related business conduct, and thus not governed by ERISA's fiduciary rules, there still might be liability under plan common law. Indeed, because the conduct in question was a course of employer representations about benefits that was designed to affect employee conduct through creation of expectations, the practice invoked a central concern of ERISA. A common-law rule to protect employees' expectations here would seem highly appropriate.

266. 858 F.2d 1154 (6th Cir. 1988).

267. To the extent the court offered any rationale, it was that a fiduciary may not mislead plan participants. Id. at 1163. But this rationale proves too much. The basic question before the court was whether ERISA's fiduciary duties forbid fiduciaries from misleading participants; if so, then from misleading participants about what. The court's rationale would impose liability under the fiduciary provisions for any misrepresentation, regardless of whether it had any bearing on plan management or administration.

In Payonk v. HMW Industries, 883 F.2d 221 (3d Cir. 1989), the Third Circuit Court of Appeals purported to distinguish Berlin, and held that the failure to disclose an impending plan termination was not governed by ERISA's fiduciary rules. The basis for distinction was sheer ipse dixit—a flat assertion that there was a difference between misrepresentation and nondisclosure. Id. at 226.

268. Courts have had similar trouble dealing with alleged misrepresentations by employers regarding the formation of a plan. The difficulty commonly arises when courts must determine whether state-law claims based on the alleged misrepresentations are preempted. Apparently because of their belief that preemption of state law would leave the employees without a remedy, some courts have refused to find the state claims to be preempted, even though on their face they
This common law of employer nonfiduciary activity should be no mere collection of isolated rules or groups of rules. Even some who understand that the exclusive-benefit rule is not all-encompassing lapse into a view of plan establishment, plan termination, and other areas outside its purview as limited "exceptions" to the rule. But that is an erroneous view of the relationship between the exclusive-benefit rule and these areas of employer plan-related activity. To view these areas as if they were enclaves carved out of the exclusive-benefit rule is to assume that the exclusive-benefit rule presumptively applies to all plan-related activity and that special considerations must exist to take a matter out of its scope. But ERISA limits the scope of the exclusive-benefit rule and does not intend it to be the fundamental axiom for all of benefit plan law. The exclusive-benefit rule acts on the preexisting background of benefit plan law by reversing the priority of interests within its delimited scope. It is just as proper to view the exclusive-benefit rule as an "exception" to the whole of benefit plan law as it is to view the rest of benefit plan law as an exception to the exclusive-benefit rule.

What does result, though, is heterogeneity in benefit plan law. Employer and employee rights with respect to plans derive from very different sources. Employer rights derive from the status of the plan as a business program of the employer, and the employer interest arguably is proprietary. On the other hand, the employees' rights and interests in a plan derive from the plan's creation of group expectations concerning benefits. Traditional plan common law did not appreciate the differing sources and characters of these interests and did not understand how to accommodate them. Thus, it proceeded mechanically by presuming that employer rights and interests were paramount and that they could be limited to favor employees only through application of contract principles. This was the approach taken for all aspects of benefit plan law. For example, the employer's right to terminate its plan was determined in substantially the same way as was its right to terminate an individual employee's right to benefits. And substantially the same rule emerged in the two cases.

ERISA changes this. It recognizes that employer and employee interests have different natures and that they relate to different aspects of plans. It does not impose an artificial homogeneity on the law. The exclusive-benefit rule deals with the employee interest in expected benefits, and it makes protection of such interest the dominant principle in the part of plan common law where it is appropriate—the part concerned with ongoing plan operation. Necessa-

relate to a plan. See, e.g., Perry v. P*I*E Nationwide, Inc., 872 F.2d 157, 162 (6th Cir. 1989), cert. denied, 110 S. Ct. 1166 (1990) (holding that state law action for rescission of plan was not preempted).


rily, this part of plan common law will be very different from the corresponding part of plan common law before ERISA. But in the remainder of plan common law, there is no exclusive-benefit rule to determine the priority of interests. Instead, the interests of the employer and the employees, and the potentially applicable policies, must be weighed and resolved on a case-by-case basis. Appropriate rules must be advanced, tested, and refined through ordinary caselaw development. In this area, pre-ERISA common law need not be rejected out of hand. Indeed, although its rules may not be adopted uncritically, they still may be starting points for common law development.\textsuperscript{271}

Of course, this part of the law of plans cannot be as stringently protective of employer interests as was pre-ERISA common law. Several factors preclude this. First, as we have seen, the traditional common law of plans is conceptually unsound, and its rules would have to be rethought even if ERISA had never been enacted. Second, ERISA demonstrates some concern with protecting employee benefit interests in this area. For example, ERISA makes it unlawful for employers (and others) to "discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan [or ERISA]."\textsuperscript{272} This prohibition, as well as the more general principles it reflects, must be taken into account in developing common law rules to govern employer business conduct relating to plans. Finally, ERISA's core protective policies may properly be extended (although, perhaps, in an attenuated form) into the realm of employer nonfiduciary conduct. For example, the employer conduct in \textit{Berlin} is so similar to ERISA's main regulatory concern that a strong case can be made for regulating it through a common law, expectation-protecting rule.

As a result of the division of benefit plan law into heterogeneous realms, it is important to be able to determine just where the line of demarcation should be drawn. In a sense, it is easy to do this. The exclusive-benefit rule is itself the reason for the difference, and so the line of demarcation should be the line dividing fiduciary from nonfiduciary functions, that between plan management, administration, and asset management on the one side, and everything else on the other. Unfortunately, as the example of \textit{Berlin} shows, it is not always clear whether or not employer conduct constitutes plan management or administration. ERISA itself does not define those terms. It provides a few examples but no other express guidance. Ultimately, the problem of demarcation must be resolved by reference to congressional intent regarding the appropriate scope of the exclusive-benefit rule. A few courts have recognized this.\textsuperscript{278} Most, however, have not recognized the importance of congressional intent and so differentiate the two parts of benefit-plan law on a purely impressionistic

\textsuperscript{271} Cf. Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (stating that although rules of commercial law developed pursuant to Swift v. Tyson, 41 U.S. 1 (1842), have no continuing independent validity, they may be "a convenient source of reference for fashioning federal rules").

\textsuperscript{272} ERISA § 510, 29 U.S.C. § 1140.

\textsuperscript{273} See, e.g., Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155 (3d Cir. 1990).
basis. To delimit the scope of the exclusive-benefit rule, thus, is an essential structural task for the common law of plans.

C. The End of Contract Analysis

Understanding the heterogeneous structure of plan common law can help one appreciate why contract metaphors are not needed—and are indeed inappropriate—to describe plans and plan relationships. Consider, for example, the contractual theory of plans and the employer's relation with its plan that has recently been urged by Professors Fischel and Langbein.274

Professors Fischel and Langbein begin with the important insight that, as a matter of "economic realities," both employers and employees have interests in plans. With this one can fully agree. But in trying to provide a framework for accommodating these interests, they minimize the fact that plans are employer business programs275 and, instead, treat plans as essentially contracts for deferred compensation. It is axiomatic, they say, that "employee benefit plans are part of a total compensation package agreed upon by employer and employee";276 they are bargained-for agreements.277 As Fischel and Langbein explain:

Employees pay for pensions in the form of lower wages. Thus, employees will bargain for plans only if the benefits anticipated exceed the income foregone. . . .

Pension and other benefit plans will not be established unless they are in the mutual interest of employers and employees. Plans are strictly voluntary arrangements.278

But this contractual reconciliation of interests, they assert, immediately leads to a "fundamental contradiction." If plans are established and administered in the interests of both employers and employees,279 then the exclusive-

274. Fischel & Langbein, supra note 253; see also Langbein, supra note 22.
275. Of course, they realize that plans may have business uses, Fischel & Langbein, supra note 253, at 1118, but make this feature a secondary consideration for purposes of analysis.
276. Id. at 1117.
277. It is not wholly clear how one should understand their discussion of the bargaining and agreement supposedly involved in benefit plans. Sometimes they appear to have in mind the economic construct of implied contract that is sometimes used in econometric modeling of the employment relationship and the labor market. See supra note 65. For example, they assert that legal rules should "approximate the bargain the parties would have struck had they been able to anticipate and resolve all . . . problems," Fischel & Langbein, supra note 253, at 1116, and so appear to have in mind hypothetical bargains. Yet in other places they appear to have in mind real agreements and real bargains. For example, they reject economic evidence of an implied contract term that defined benefit plans should not be terminated (absent business necessity), see IPPOLITO, supra note 48, ch. 3, because "[t]he persistent failure to spell out the term suggests that it does not exist." Fischel & Langbein, supra note 253, at 1152 n.164. The argument presupposes a real agreement in which the term might be included.
278. Id. at 1117 (footnote omitted).
279. Plans, they say, "are established for the mutual advantage of the employer and employee, not for the exclusive benefit of one." Id. at 1118.
benefit rule, by compelling plan fiduciaries to disregard legitimate employer interests, meddles and serves to defeat the employer-employee bargain.280 Either the contractual view of plans or the exclusive-benefit rule must yield. Professors Fischel and Langbein opt for the latter alternative. They argue that the exclusive-benefit rule must be modified or construed so as to take into account all contractual interests in the plan, including the employer’s. As a solution, they urge that the exclusive-benefit rule be applied so that employers are treated as beneficiaries for some applications of the rule.

But this analysis is based on incorrect premises.282 It fails to recognize that plans are ongoing employer programs and that, while employers and employees do both have interests in the plan, their interests center on, and derive from, different features and aspects of it. The theory fails to recognize that the program itself gives rise to employer rights in the business aspects of the program and employee rights in anticipated benefits—all without the need for any supposed bargain to justify or explain those rights. Failure to recognize this interferes with recognition that the exclusive-benefit rule governs only a part of plan law and plan-related activity. The supposed “fundamental contradiction” of the exclusive-benefit rule disappears once one recognizes the contract metaphor has been displaced by ERISA.

III. WHAT IS A PLAN?

ERISA takes plans and plan formation as given.283 The statute contains no

280. Some economists also make this point. One, for example, writes:

The wide variety of pension arrangements [before the enactment of ERISA] presumably reflected differences among firms and employees in the goals and preferences of pension plans. The particular set of pension arrangements that prevailed between a firm and its employees was probably the “best” set of features that could be agreed upon after explicit or implicit bargaining. The package of features, such as vesting requirements and funding policies, reflected a bargained solution. To the extent that ERISA alters the package of features, it disturbs a noncoercively determined pension arrangement. ERISA forces recontracting....

LOGUE, supra note 47, at 63.

281. Fischel & Langbein, supra note 253, at 1128 (citation omitted). Under this theory, protection of employee expectations is no longer so central a part of ERISA’s regulatory scheme. An example of the change can be seen in the treatment by Professors Fischel and Langbein of employer use of plan assets to help acquire other companies or defend against hostile takeover bids. In their view, there is no necessary risk to the participants and beneficiaries from such employer use of plan assets, particularly if the plan is well funded, because the company will have to make up any losses. Id. at 1139-40, 1142-43; see also Langbein, supra note 22, at 131. But this conclusion misconstrues the purpose of ERISA’s fiduciary rules, which is to minimize the risk that employee pension expectations are disappointed. ERISA takes a belt-and-suspenders approach to protecting employee expectations. Part of the protection is safeguarding plan assets, mainly through funding rules, plan termination insurance, and fiduciary rules. But it does not follow from the fact that the funding rules and plan termination insurance themselves do a good job of insuring sufficient assets to pay benefits that the fiduciary rules designed to provide the same protection are superfluous.

282. For a different criticism of the proposal, see Stein, supra note 269, at 36-38.

283. As the congressional findings in ERISA begin:
definition of "plan" or clarification of the concept, and it provides no rules or tests to help determine when a plan has been established. Instead, it imposes its regulatory structure as if there were no uncertainty over what a plan is. This silence means that the subject matter of ERISA must be worked out through common law development.

At the outset, it is vital to emphasize one important point: The ultimate function of any test purporting to define the concept "plan," as used by ERISA, is to determine whether ERISA governs a given situation. ERISA is about plans and only plans, and little elsewhere in the law turns on whether or not something is a plan. Virtually the only reason to ask the question, Is this a plan? is to ascertain whether ERISA applies.

In recent years two common law theories have emerged that try to delineate the meaning of "plan" under ERISA. One approach originated with the decision of the Eleventh Circuit Court of Appeals in Donovan v. Dillingham, and has been adopted by several other courts. The other approach has been used by the Supreme Court but thus far has had little influence. We shall consider the Dillingham approach first.

A. The Dillingham Test

The Dillingham court framed its definition of "plan" as a test for the existence (or establishment) of a plan in circumstances where no comprehensive plan document is to be found. The court explained that "a ‘plan, fund, or program’ under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and the procedures for receiving benefits." Thus, the test ultimately serves to limit ERISA's coverage to those situations where "a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and the procedures for receiving benefits."

The Dillingham court did not give any reasons for its choice of factors.

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans. . . .


284. "Plan" is defined by ERISA only as a shorthand term for "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both . . . ." ERISA § 3(3), 29 U.S.C. § 1002(3).

285. This statement is subject to the limited exception that some portions of ERISA included in the Code deal with retirement vehicles that are not necessarily plans under Title I. See I.R.C. §§ 401(c), (d), 408(a) (1988).

286. 688 F.2d 1367 (11th Cir. 1982).


288. Dillingham, 688 F.2d at 1373.
Nonetheless, they have a superficial plausibility, since a plan surely must involve beneficiaries, benefits, financing, and a means to obtain benefits. Yet despite this superficial plausibility, the test is inappropriate and inconsistent with the purposes of ERISA.

To begin, the test is misguided in its emphasis on ascertainability of plan terms. In this emphasis, the test appears to reflect a contract orientation, because definiteness of terms is an essential condition for the existence of a legally enforceable contract. This is false analogizing. Contract law is an idiosyncratic branch of law in that it is not primarily concerned with regulating anything. Instead, it is principally concerned with the structural issue of when certain formal categories of promises may be judicially enforced. For purposes of contract law, to ask whether a contract exists in a given circumstance is to ask whether the promises made in that circumstance should be enforced, solely on the basis of contract formation rules.

Contract law thus deals with enforcement of promises irrespective of the promise's content. Since it is not limited to any special area of promising or any special kind of economic activity, from its perspective there is an endless variety of kinds of terms a contract might contain. As a result, the general law of contracts must condition enforceability of a contract (that is to say, the existence of a contract) on definiteness of the contract's terms. Otherwise, there could be no rational basis, within the framework of contract law, to determine what terms or promises should be enforced. Contract law alone, because it is subject-matter indifferent, would have no way to fill in missing details. By contrast, in well-defined areas of contracting—for example, in the law of sales or employment contracts—gap-fillers have emerged, from custom or through judicial development, to supply missing terms or to clarify indefinite ones. In these specialized areas, the requirement of definiteness has accordingly been reduced.

But ERISA is not like contract law. ERISA is a body of regulatory law, and unlike contract law, the key question is not whether a plan should be "enforced." Rather, as even the Dillingham court recognizes, to ask whether an arrangement is a plan is to ask whether it should be subject to ERISA's scheme of regulation. Thus, the Dillingham test, by implicitly addressing the contract-oriented issue of enforcement, addresses the wrong question.

289. 1 CORBIN, supra note 68, § 95, at 394-95.
290. Indeed, contract law is often thought of as the law of unregulated business activity. See, e.g., FRIEDMAN, supra note 66, at 23 (stating that "the law of contracts concerns and provides support for the residue of economic behavior left unregulated (the free market)").
291. See generally 1 CORBIN, supra note 68, § 1, at 2-3.
292. Of course, there may be occasions where the reason one needs to determine whether a practice is subject to ERISA is that an individual is seeking to enforce a benefit claim. See, e.g., James v. National Business Sys., 721 F. Supp. 169 (N.D. Ind. 1989); Molyneux v. Arthur Guinness & Sons, P.L.C., 616 F. Supp. 240 (S.D.N.Y. 1985). But even then, the issue is whether the individual's claim is enforceable under ERISA, and so there still remains the threshold question of whether the practice as a whole is governed by ERISA.

A further flaw in Dillingham's contract-oriented requirement of definiteness is that ERISA
A deeper problem with the Dillingham test is that it begs the question. The question to be answered is that of what employer activities ERISA regulates. But why should it be thought to follow, from the mere informality or sloppiness of an employer’s activities, that they are not ones ERISA seeks to regulate? If a source of financing cannot be identified for an employer program relating to payment of benefits, then either the program is not a plan or it is a plan in violation of ERISA. The Dillingham test, without any attempt at justification, simply assumes the former. But just as the failure of a benefit program to be established pursuant to a document does not prevent it from being an ERISA plan, and may mean only that it is a plan subject to but in violation of ERISA, the failure of a practice to satisfy one or more of the Dillingham criteria may simply mean that it is a plan, but one that fails to comply with ERISA.

The upshot of accepting Dillingham, then, is that ERISA would not protect employee expectations created by programs or practices in which the terms are indefinite. This is not even a remotely tenable proposition. Where an employer constantly assures employees, for example, only that they will be taken care of by the company upon retirement, the employer presumably is making the assurances for its own self-interest—to promote contentment among the

...itself contains a plethora of gap fillers and other means to supply missing details. For example, in a suit to recover pension benefits under an indefinite plan, it is not necessarily a fatal objection that the employer never specified what the amount of pension benefits would be. One solution is a restitutio
workforce, for example—and is creating expectations among the employees to further that goal. Such an informal employer practice generates precisely the same concerns as does a large, systematically administered plan, the terms of which can be ascertained from "the surrounding circumstances." Indeed, it may present even greater risks of defeating employee expectations, precisely because the terms cannot be ascertained and because of the lack of reasonably definite mechanisms for ensuring that expectations are fulfilled.

This consideration points to a still deeper fallacy that underlies the Dillingham test—the focus on activity relating to benefit payment as the kind of activity to which the criteria for the existence of a plan relate. The Dillingham test really seeks to determine whether the activity in question is benefit payment activity. But as the legislative history of ERISA makes clear, the focus of regulatory concern is benefit representation activity, because that is the source of risk and harm. Whether a plan exists—whether ERISA regulation is necessary and appropriate—must be made to depend on employer representations and employee expectations, not on the benefits that may or may not be provided. A properly operating plan, of course, involves both benefits and benefit expectations, but it is the expectations, not the benefits, that serve as the primary trigger for ERISA regulation.

Of course, where programs are highly informal, practical difficulties may arise when an employee seeks benefits. It is here that the Dillingham approach, which implicitly is concerned with problems of enforcement, has a point: The terms of an unwritten plan may have to be ascertained circumstantially by examining the employer's practice and other material features of the surrounding circumstances. But use of this approach is appropriate only after a prior determination, on other grounds, that a plan does exist.285

B. The Functional Approach

A sounder approach to the question, What is a plan? has been taken by the Supreme Court in two recent cases.286 The approach is functional. Rather

285. It is also important to recognize that the Dillingham approach, even when used in this evidentiary way, has its limits. There may be times when the terms of a plan cannot be ascertained with any specificity, not even from the surrounding circumstances. But this does not mean that there is no plan and it does not mean that an employee cannot recover expected benefits. To so hold would again permit employer disregard of ERISA to justify defeat of employee expectations. All that the unascertainability of terms from surrounding circumstances means is that other methods must be relied upon to fill in the missing terms. ERISA itself may sometimes supply them, at least for pension plans, through its minimum standards. Cf. Nedrow v. McFarlane & Hays Co. Employees' Profit Sharing Plan & Trust, 476 F. Supp. 934 (E.D. Mich. 1979) (supplying terms through minimum vesting standards where plan's stated vesting schedule violated ERISA); see also supra note 292. In other cases, a different approach may be necessary. For pension plans, if the key term—level of benefits—must be supplied, a restitutionary measure may be appropriate based on ERISA's recognition of the pension in some respects as deferred compensation.

than listing mechanical criteria, it straightforwardly considers whether the employer practice in question is of a kind that reasonably calls for the type of regulation provided by ERISA.

*Massachusetts v. Morash*\(^\text{297}\) is one example of this approach. There, the Supreme Court was presented with the question of whether a company's policy of paying discharged employees for their unused vacation time from the general assets of the employer constituted a benefit plan subject to ERISA. The Court held that it did not. Although it agreed that the policy probably would have been held subject to ERISA had the benefits been paid from a separate fund, it concluded that the program as structured did not create any of the risks that ERISA was enacted to reduce. In particular, the plan did not present any risk of defeated employee expectations of the kind with which ERISA was concerned:

In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds. To that end, it established extensive reporting, disclosure, and fiduciary duty requirements to insure against the possibility that the employee's expectation of the benefit would be defeated through poor management by the plan administrator. Because ordinary vacation payments are typically fixed, due at known times, and do not depend on contingencies outside the employee's control, they present none of the risks that ERISA is intended to address. If there is a danger of defeated expectations, it is no different from the danger of defeated expectations of wages for services performed—a danger Congress chose not to regulate in ERISA.\(^\text{298}\)

Thus, because the question of what a plan is really is the question of what kinds of activity ERISA should govern, a functional approach that closely considers ERISA's purposes and policies is required.

Because ERISA is based on several purposes and policies, a functional approach to coverage likely would lead to a large and heterogeneous class of activities being deemed plans. But that is precisely what should result: ERISA on its face intends to deal with a large and heterogeneous class of programs, ranging from informal severance pay arrangements to highly structured, multibillion dollar pension plans. Indeed, in light of this diversity, there is no reason to suppose that a single black-letter definition or a single list of factors could ever hope to capture the many varieties of employer activity that are of concern for ERISA.\(^\text{299}\)

It also follows that one cannot provide much refinement for such a test *in vacuo*. Common law development is essential. Still, it is possible to sketch some basic considerations that can help clarify the test and make it more

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298. *Id.* at 115 (citations omitted).
1. An Employment-Based Practice that Relates to Benefits for Employees

As a purely descriptive matter, there is no plan unless there is an employment-based practice or course of conduct that relates to benefits for employees. This basic requirement has three components: that there be a practice, that it relate to benefits, and that it be employment-based. The third requirement is reasonably straightforward, but the first two demand some elaboration. Let us take them in turn.

a. A practice

For there to be a plan, there must be a practice. In particular, there must be some employer activity that can potentially give rise to employee expectations about pensions or other benefits. "Practice" here means expectation-generating activity. Some courts, following Dillingham, have treated the requirement of a practice as a requirement that "the decision to extend benefits has become a reality," but this is clearly improper. Whether there is a practice should not depend on the concreteness of the employer's intention to extend benefits through the activity. Rather, the focus should be on the employees' understanding of the employers' activity as a holding out of the prospect of benefits. A program or practice exists where there is activity creating expectations that may be disappointed.

To require a practice, in this sense, is also to require something other than an employment contract or a series of employment contracts. There are fundamental differences between plans and contracts, which the law of plans must recognize. This is not to say that a plan cannot be established pursuant to a contract; however, as an employer business program, it must also be something else.

Finally, the practice must be one addressed to a group of employees, not just to a single employee in isolation. The benefit expectations to be protected under ERISA are group expectations, ones arising from programs that make use of the prospect of a benefit to induce conduct beneficial to the enterprise. An isolated representation about benefits made to an employee is not a practice and it does not invoke the group-expectation concerns of ERISA. Of course there are bases for enforcing individualized representations under the common law of plans, but the rationale for enforcement is different from the

rationale for ERISA regulation.

b. Benefits

Not only must there be a practice; the practice must relate to benefits. Two points merit attention here. First, as explained above, this cannot be treated as a requirement that the practice ever result in the actual payment of benefits. The relevant concern is employee expectations of benefits.

Second, ERISA is affected by a view of benefits as compensation. It mainly seeks to protect employee rights to benefits that have a monetary or compensatory character and that are payable on an individualized basis. Thus, for example, an employer's regular practice of extending to employees protection against arbitrary dismissals after one year of service would not constitute an employee benefit plan for purposes of ERISA because of the noncompensatory character of the benefits offered. Of course, in a more generalized sense of the term "plan" there may well be plans that offer such benefits to employees. But while some of the principles and rules governing ERISA plans might sensibly be applied to such programs, those rules would have to be made applicable as part of a more general, not exclusively ERISA-based, plan common law.

2. The Regulatory Concerns of ERISA

A second, more substantive, set of considerations to be taken into account in determining whether something is a plan are functional considerations. For an employment-based practice relating to benefits to constitute a plan, it must not only satisfy the descriptive criteria just discussed, it must also present some of the risks and concerns that Congress intended ERISA to address.

To a great extent, the test has already taken into account these risks and concerns. Both the requirement that the practice be of a kind giving rise to group expectations and the requirement that the benefits in question be of a compensatory character do just that. Yet, as Morash demonstrates, even if a practice satisfies these descriptive criteria, there still may be reasons not to deem it a plan. There is an independent, exclusionary role for this functional requirement to play, particularly with respect to practices and programs relating to employee welfare benefits.

It is easy to see why this requirement is more important in dealing with putative welfare benefit plans. The concerns of ERISA differ greatly, depending on whether a plan is a pension plan or a welfare benefit plan. Pension plans are the primary interest of ERISA, because disappointed pension expectations can wreak the greatest private and public harm. Pension expectations usually operate over a very long time and require complex mechanisms to ensure their fulfillment. Threats to the realization of those expectations abound, both because of the multiplicity of ways in which they may be defeated and the long period in which they may be at risk. Programs creating pension ex-

304. See supra note 2 explaining pension plans and welfare plans.
pectations normally invoke the full panoply of risks and concerns addressed by ERISA, and most of ERISA's provisions apply to any pension plan. It would thus be reasonable for the law of plans to presume that any employment-based practice (in the sense just described) relating to retirement benefits is a plan subject to ERISA.

But the situation is otherwise with welfare benefit plans. For welfare benefits, the harm from defeated expectations ordinarily is less severe than in the case of pension benefits and, absent a fund for the plan, there is less opportunity for abuse and mismanagement. As a result, ERISA regulates welfare benefit plans less extensively than it does pension plans. A presumption such as the one suggested for pension plans would be highly inappropriate. For a putative welfare benefit plan, careful evaluation may be necessary to confirm that the practice, even though it systematically creates benefit expectations, is one with which ERISA is genuinely concerned. As Morash makes clear, it may make a difference for one's conclusion about the existence of a welfare benefit plan whether the plan is funded or unfunded. It might also make a difference, for example, whether the welfare benefits are benefits for current employees or retirees.

CONCLUSION

This Article has proposed a framework of basic concepts and guiding principles for courts to use in developing plan common law. The key parts of that framework are as follows.

First, the factual premise of both ERISA and plan common law is that employee benefit plans are employer business programs. Different employers may have different uses for their plans, but the common material characteristic is that the plans are of value to the employers because of their effect on employees.

Second, these programs generate both employer interest and employee interest in them—employer interest in business uses of the plan and employee interest in having the plan-induced expectations of benefits fulfilled. There are legal bases for the protection of these interests, but the respective bases are different. The employer interest may be protected on proprietary grounds while the employee interest may be protected on grounds of public policy and the basic principle that reasonable expectations ought to be enforced.

Third, contract principles are not needed to explain or describe the employers' and employees' respective rights in plans. The existence and scope of the rights do not depend on the existence of a bargain or even on the existence of a promise. Furthermore, there is nothing to be gained by treating plans as contracts. Plans should be treated as the unique kinds of entities that they are rather than as analogies of some more familiar kind of legal thing. Indeed, ERISA compels one to treat plans as unique, functionally defined entities—as precisely those kinds of programs with which the statute is concerned.

Fourth, plan common law is necessarily heterogeneous. In that part of it subject to the exclusive-benefit rule, which commands that employee interests
exclusively be advanced, plan common law must rigorously advance employee interests in receiving benefits. In this part of the law, care must be taken not to undermine that purpose through importation of pre-ERISA rules and concepts that ERISA has rejected. But in the part of plan common law not subject to the exclusive-benefit rule, courts may work out rules that balance employer and employee interests. Here, parts of pre-ERISA law may well be appropriate, at least as starting points for the process of common law development.

Fifth, ERISA treats benefits as compensation-like, but only to a limited extent. ERISA is concerned almost exclusively with benefits that are similar to wages and other forms of individual remuneration and limits its scope accordingly. However, it makes little further use of the concept of benefits as compensation. ERISA's recognition of benefits as compensation-like is a change from pre-ERISA pension plan law, and it permits adoption of rules—such as rules of restitution—that pre-ERISA law did not. However, reliance on this view of benefits for purposes of common law development must be constrained by recognition that ERISA's main purpose is protection of employee benefit expectations, not just protection of employee benefits.

This framework emerges from the factual and historical bases of benefit plans; from an understanding of the basic legal problems to which plans give rise; from recognition of the failures of the pre-ERISA framework; and from appreciation of ERISA as a source of direction for the ongoing historical process of developing plan common law. This Article supplies only the framework for benefit plan law. It is for courts to use in developing the substance.