Georgia Law Review

Fall, 1999

34 Ga. L. Rev. 195

LENGTH: 40458 words

ARTICLE: From YUPPIES to GUPPIES: Unfunded Mandates and Benefit Plan Regulation

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LEXISNEXIS SUMMARY:
... One of the many factors that contributes to the concern over the adequacy of health care plans and retirement income is that significant numbers of workers do not have any employer-sponsored retiree health care coverage or any pension coverage other than Social Security. ... More generally, both the scholarly and political debates on unfunded mandates bear on private sector benefit plan regulation in two ways. ... B. MUPS--THE "FAILED" LEGISLATION MANDATING PENSION PLAN SPONSORSHIP ... Conclusion. One way to approach the question of whether regulation of private sector benefit plans constitutes an unfunded mandate would be to look to one's instincts. ... The question becomes whether evaluating new plan content regulation as a private-sector mandate and subjecting it to process constraints such as those in UMRA would increase the normative quality of that legislation. ... When appended to unrelated and fast-track legislation, changes in plan content regulation may not receive the scrutiny necessary to avoid poor policy choices, especially given the complexity of ERISA, the issues associated with cumulative regulation, and the interrelationships with other components of the tripartite retirement system. ... But plan content regulation shares no significant characteristics with unfunded intergovernmental mandates, and it was that category of regulation that gave notoriety to the term unfunded mandate. ...

HIGHLIGHT: *"Beneath his hat the strangeness lies*

Take it off, he's got three eyes

Truth is false and logic lost

Now the fourth dimension is crossed."

--Rush n3

TEXT:
[*195] I. INTRODUCTION

Throughout its life cycle, the sheer size of the baby-boom generation n4 has enabled it to command attention for its needs. n5 The **[*196]** baby boomers have imposed one challenge after another on the economic and social institutions of this country. n6 Now concern is turning to the support costs associated with the aging of that population. n7 One of the many factors that contributes to the concern over the adequacy of health care plans and retirement income is that significant numbers of workers do not have any employer-sponsored retiree health care coverage or any pension coverage other than Social Security. n8 Periodically, the nation has debated whether to require employers to provide benefits coverage to their workers. n9 To date, though, efforts to mandate employer sponsorship of pension plans and health care plans have been unsuccessful. n10 As a result, employers retain discretion over whether to sponsor plans as well as over the types of plans they choose to sponsor. The **[*197]** failure of initiatives calling for nationally mandated plan sponsorship has not meant the end of reform legislation though. Instead, legislative change in the almost twenty-five years that have elapsed since the enactment of the Employee Retirement Income Security Act (ERISA) of 1974 n11 has been incremental but frequent. n12 In addition, there are those who argue that, at least on the health care side of the benefits equation, incremental regulation has amounted to the stealth implementation of mandated coverage. n13

On a seemingly separate front, unfunded intergovernmental mandates became one of the most heated political issues of the early-to-mid 1990s. n14 Critics derided intergovernmental mandates in areas such as environmental regulation, n15 health and safety, n16 and social welfare. n17 After gaining a majority of both houses of Congress in 1995, the Republican Party, in one of its earliest legislative initiatives, n18 imposed procedural restrictions on the enactment of unfunded mandates via the Unfunded Mandates Reform Act of 1995 (UMRA). n19 An extensive body of scholarly literature has developed and helped to shape the debate on these issues. n20 So, perhaps it **[*198]** should not be surprising that commentators have taken a variety of positions on unfunded mandates generally and UMRA specifically. Professor Zelinsky, for example, remains an ardent critic of unfunded mandates and argues that UMRA does not go nearly far enough in preventing unfunded mandates. n21 Others disagree and believe that UMRA imposes unnecessary and inappropriate limitations on the enactment of unfunded mandates. n22 Finally, a third group contends that unfunded federal mandates do not impose net costs on subordinate levels of government. n23

The dialogue on benefit issues often includes implicit and explicit references to mandated coverage. But that dialogue now intersects with the unfunded intergovernmental mandates debate in more than just the use of the pejorative term "mandates." In this Article, I evaluate whether concepts developed in the unfunded mandates literature help to explain the existing patterns of benefit regulation. In addition, I consider whether increased procedural controls on unfunded private sector mandates, such as those proposed as part of the expansion of UMRA, would result in a normative improvement in regulation. To date, scholars have focused on the question of unfunded intergovernmental mandates without giving equal attention to whether the concepts are relevant to private-sector **[*199]** regulation. n24 Further, no one has addressed how unfunded mandates legislation or the concepts developed in the literature apply to the regulation of employee benefit plans.

The field of employee benefits regulation, where cost burdens associated with legislation may be enormous, n25 regulatory change has been frequent, n26 and significant concerns exist about the sufficiency of the domestic retirement support system, provides a logical place to begin this analysis. Policymakers, n27 commentators, n28 and interest groups n29 have issued predictions of disaster based upon concerns with each component of the retirement income and health care system: Social Security, n30 employer-sponsored benefit plans, n31 **[*200]** and the rate of individual savings. n32 While most people seem to have some passing familiarity with these potential problems, n33 the complexity of having to confront possible impending crises on the multiple fronts of Social Security, health care, private sector retirement plans, and individual savings tends to result in glazed eyes and a Scarlet O'Hara-like sentiment of "I'll think about it tomorrow." n34

In some ways, the situation is ironic. After all, the baby-boom generation is the demographic group whose professional success, wealth, and spending habits gave rise to the moniker YUPPIES. n35 The question is, will an incoherent and unstable framework of federal regulation cause this group to end their lives as GUPPIES--Grossly Under Prepared Persons? n36 Also, consider those boomers who, through choice or circumstance, experienced less financial success during their middle years. Although they did not become **[*201]** YUPPIES, will they finally share the same fate as their generational peers, only to find the fate an unpleasant one?

I use the concepts developed in the unfunded mandates literature to consider these questions and begin, in Part II, by providing a brief discussion of the existing status of the debate over unfunded mandates and UMRA. Part III turns to the fundamental theory underlying the United States approach to benefit plan regulation and explores the domestic policy determination that decision-making regarding the adoption of employer-sponsored benefit plans should be left to the private sector and should be voluntary. Attempts to mandate private sector benefit plan sponsorship, which I term efforts to institute "plan sponsorship regulation," have been unsuccessful. But those failed regulatory efforts have been followed by incremental regulatory changes that have increased the burdens on voluntarily sponsored plans. I designate those incremental changes as "plan content regulation." A more detailed analysis of incremental regulation, however, is necessary before applying the principles developed in the unfunded mandates literature to benefit plan regulation. Therefore, in Part III, I also categorize the plan content regulation according to its expressed protective functions and consider its scope and effectiveness.

Part IV integrates the unfunded mandates and benefits discussions. I begin by addressing the definitional question and considering whether there is any principled reason to treat federal regulation of benefit plans as an unfunded mandate. I also consider how the concepts developed in the unfunded intergovernmental mandates debate apply in the benefits context. I conclude that the concerns articulated by the critics of unfunded mandates do not provide particularly robust explanations for the dichotomy that has developed between plan sponsorship regulation and plan content regulation. Furthermore, I argue that, though it is a counter-intuitive result, increasing the attention paid to the incremental costs associated with proposed regulation would pose a significant threat to the stability, cohesiveness, and long-range policy objectives of the domestic system of retirement and health care support. As an alternative, in Part V I offer three criteria for use in evaluating proposed plan content regulation. After all, neither the baby-boom generation, nor the generations that will follow and bear the **[*202]** increased cost burdens imposed by an incoherent and unstable regulatory framework, can afford an ill-conceived, mechanical approach to legislative decisionmaking and the resulting likelihood that important policy considerations will be ignored.

II. THE UNFUNDED MANDATES DEBATE

During the 1990s, many commentators, scholars, and politicians voiced objections to unfunded federal mandates. The rhetoric may have reached its zenith in the mid-1990s. Professor David A. Dana compared the notoriety of unfunded mandates to "the status of Soviet Communism during the heyday of the McCarthy era." n37 Another scholar indicted mandates "as a form of hidden taxation imposed by poorly monitored, opportunistic legislators." n38 Four local governmental organizations, including the powerful United States Conference of Mayors, organized a "National Unfunded Mandates Day" for the purpose of ending unfunded federal mandates. n39

One line of argument n40 used to attack unfunded intergovernmental mandates rests on the theory that unfunded mandates are the result of nonaccountability in the political process. Professor Edward Zelinsky, one of the more vociferous and continuing critics, derides unfunded federal mandates as mechanisms "by which legislators advancing their own political interests opportunistically dispense public largesse to importuning constituencies while deflecting to officeholders at lower levels of government the political costs of taxing to pay for that largesse." n41 This attack on unfunded mandates tends to attribute mandates to asymmetrical information between service-receiving interest group constituencies and rank-and-file **[*203]** voters. n42 Theorists argue that these information imbalances reinforce the collective action problems of large cohorts with small individual stakes and the comparative advantage enjoyed by well-organized interest groups that reap the benefits of mandated services. n43 The attacks, then, tend to focus on two normative concerns. The first concern is that unfunded mandates result from a lack of political accountability, and the second concern is that they impose federal priorities over those of subordinate governments. n44 On the first point, scholars argue that self-interested legislators opportunistically maximize their political support by enacting unfunded legislation to meet the goals of interest groups while devolving to subordinate governments the implementation or enforcement costs. n45 Thus, the subordinate governmental actors bear the direct political costs associated with raising or redirecting revenue to pay for the programs. n46 The second argument is that federal mandates shift resources from programs highly valued at the local level to less valued programs that are required by the federal mandates. n47

Yet, the commentators are not unanimous in indicting unfunded mandates. For example, Professor Dana has presented cogent arguments that unfunded mandates may be consistent with political accountability. In the context of environmental regulation, he offers the following alternative explanations for the use of unfunded mandates: differentials in state capabilities; the ability to capture the efficiencies of both central regulation and local control; and real monetary savings. n48 Furthermore, he argues that the possibility of unfunded mandates may counterbalance disincentives for state inaction, and, thus, unfunded mandates have a positive normative effect. n49

[*204] Congress responded to the unfunded mandates controversy by enacting UMRA. Contrary to the understanding of some observers, however, UMRA does not prohibit new unfunded mandates, nor does it require the repeal of existing mandates. n50 Instead of barring legislation that mandates action by subordinate levels of government, UMRA imposes informational requirements on the relevant congressional committee reports. n51 And, if the mandate's annual cost exceeds $ 50 million, with some exceptions, n52 UMRA modifies congressional procedural standards by specifying that the bill will be out of order. n53 It also charges regulatory agencies with taking certain informational and procedural measures before proposing any regulation that would result in annual costs of $ 100 million or more. n54

Thus, UMRA takes a two-pronged approach to meeting the objections to unfunded mandates. First, by improving, expanding, and highlighting the available data regarding the cost of proposed mandates, UMRA attempts to ensure that legislators receive more **[*205]** information than in the past regarding the burdens that would be imposed by legislative changes. n55 The availability of this additional cost data and its clear association with the federal legislation may also decrease the informational imbalance between organized interest groups and rank-and-file taxpayers. Second, the procedural modifications permit an unfunded mandate to be raised as a point of order. n56 If so raised, a majority must vote to waive the point of order prior to any discussion of the proposed legislation's substantive merits. n57 Thus, the theory of UMRA's limitations, which are based on increased information and procedural hoops, relies upon the belief that subordinate levels of government exercise power and are able to protect themselves through their congressional representatives. n58

UMRA also applies to private sector mandates, but in a more limited manner than it does to public sector mandates. When a legislative measure would establish a private sector mandate with annual costs in excess of $ 100 million during the year of implementation or during any of the next four years, the Congressional Budget Office (CBO) must estimate the direct costs of compliance. n59 The committee report accompanying any reported bill or joint resolution must contain this cost information. n60 Similarly, as with intergovernmental mandates, administrative agencies must prepare and issue written information including estimates of compliance costs and anticipated benefits before issuing any proposed rulemaking that would impose more than $ 100 million in annual costs upon the private sector. n61 There are some important differences, however, between UMRA's provisions governing unfunded private sector mandates and those covering unfunded intergovernmental mandates. The threshold for required reporting of private **[*206]** sector mandates is double the threshold of intergovernmental mandates. n62 And, currently, the point of order provisions apply only to intergovernmental mandates, so no separate vote is required in recognition of the mandate when the mandate incides upon the private sector. n63

In spite of the passage of UMRA, the issue of federal mandates has continued to engender political and scholarly debate. Professor Zelinsky criticizes UMRA for failing to remedy what he views as the basic evils of unfunded federal mandates. n64 In contrast, Professors Adler and Dana argue that unfunded mandates have their virtues, and they each object to legislative measures that prohibit or discourage such mandates. n65

To date, the concept of unfunded mandates and the application of UMRA have generated far less scholarly commentary in the context of private sector regulation than with respect to intergovernmental mandates. n66 But, in the political arena, attention increasingly has begun to focus on private sector regulation that, in the view of some, suffers from the same defects as unfunded public sector mandates. Legislators, n67 conservative groups, n68 and business entities n69 have strongly supported efforts to increase the scrutiny given to such regulation. In two consecutive legislative sessions, the House has passed bills that would extend point of order provisions, **[*207]** like those existing in UMRA for public sector legislation, to much private sector regulation. n70

More generally, both the scholarly and political debates on unfunded mandates bear on private sector benefit plan regulation in two ways. First, the literature's focus on political process issues may help to explain existing patterns of benefit plan regulation. Second, increased procedural controls on the development of new benefit plan regulation might result in a normative improvement in that regulation. Alternatively, increased procedural controls might, as I argue in Part V, pose an affirmative danger to the development of a coherent and efficient framework of benefit plan regulation.

III. THE CHANGING FRAMEWORK OF PLAN REGULATION

To evaluate the implications of unfunded mandates concepts for plan regulation, it is necessary to understand the structure of the existing regulation and to identify patterns in the legislation that has been enacted compared to proposed legislation that has been successfully challenged. This Part explains the voluntary nature of the domestic system of private sector benefit plan sponsorship and the lack of success experienced by those who have advocated mandatory plan sponsorship in the pension and health care areas. I compare this defeat of what I define as plan sponsorship regulation with the incremental regulatory changes that have been frequent and sometimes extensive.

Congress enacted the first major amendment to ERISA in 1980. n71 ERISA has been amended nearly every year since, sometimes more than once. n72 To distinguish these amendments from plan sponsor **[*208]** ship regulation, I refer to these incremental changes as plan content regulation. I categorize much of the benefit level legislation into four areas--efforts to increase gender equity, initiatives focused on the integrity and levels of plan assets, and two stages of legislation addressing the accessibility of health care. In order to explore in Part IV the application of unfunded mandates concepts to these categories of legislation, I identify the purported goals of the **[*209]** legislation and discuss the criticisms directed at these accretions to ERISA.

A. THE VOLUNTARY NATURE OF PLAN SPONSORSHIP

Unlike most Western European nations, the United States historically has not relied on socialized programs to provide workers and their dependents with health care or retirement income beyond the limited benefits funded through the Social Security program. n73 Instead, in the absence of more extensive federally sponsored programs, the private sector stepped into the void. n74 As early as the late 1800s, some domestic employers began to establish pension and health care programs for employees and their dependents. In fact, voluntary employer sponsorship of a formal pension plan can be traced back to 1875 when the American Express Company established such a plan for its workers. n75

Disputes regarding these early benefit plans were resolved through the application of state common law concepts of trust or contract. n76 Eventually though, as plans and the disputes they engendered became more complex, federal regulation entered the **[*210]** field. n77 Perceived inequities, n78 instances of fraud and self-dealing, n79 the under-funding of some plans, n80 and oppressive entitlement criteria n81 led to approximately ten years of congressional hearings on issues of retirement security and, ultimately, the enactment of ERISA in 1974. n82

Some controversy exists as to whether Congress hoped ERISA would encourage the formation of privately sponsored benefit plans n83 or whether the statute resulted from lobbying efforts aimed at providing federal protection for at-risk plans sponsored by declining industrial groups. n84 But, what is certain is that employers retained **[*211]** the right under ERISA to choose whether to provide benefit plans for their employees. n85 In addition, as enacted, ERISA impinged only in a relatively limited way upon employers' abilities to determine the types and levels of benefits provided by the plans that they chose to sponsor. n86

This emphasis on voluntary sponsorship and flexibility in plan terms may appear inconsistent with an asserted goal of expanding the availability of benefit plan coverage. One obvious explanation, though, for the continuation of a voluntary system of plan sponsorship under ERISA is that such voluntariness may have been necessary to make the legislation palatable to employers. This would be consistent with the effective battles employers subsequently waged to defeat proposed mandatory sponsorship of pension and health care plans. n87 But other reasons also supported the continued status of employment-based plans as discretionary plans. Coverage by private pension plans expanded rapidly during the two decades prior to the enactment of ERISA. n88 Perhaps the expectation was that coverage would continue to grow, as in the past, under a regime of private plan sponsorship. Indeed, the focus of the legislative hearings was on the need for enforcement of voluntary pension promises, as opposed to the absence of such promises. n89 Thus, mandated sponsorship may have seemed less important than instituting some level of participant protection for existing plans.

[*212] In addition, at the time of ERISA's enactment, Social Security replacement rates were approaching all time highs. n90 In fact, the replacement rates of income n91 provided by Social Security were raised through rate increases in the early 1970s and, in 1972, the initiation of automatic cost-of-living adjustments. n92 The cost-of-living adjustments turned out to be so generous that they threatened the fiscal integrity of the Social Security system. As a result, the formulae were redrawn in 1977, a few years following ERISA's enactment. n93 The availability of relatively generous and increasing Social Security benefits may have restrained the pressure for mandatory private plans.

Regardless of the explanation, Congress's concern with maintaining the private nature of benefit plans appears throughout the course of ERISA's legislative history. The legislative hearings did not neglect the complaints of elderly Americans who had ended up destitute after a lifetime of employment. While introducing the initial Senate version of the bill, Senator Williams explained that the Senate Subcommittee on Labor had "listened to one heartbreaking story after another of dashed hopes, broken promises, and the bleak despair of a poverty-stricken old age." n94 At the same time though, Senator Williams repeatedly emphasized that the proposed legislation was intended to regulate "private pension plans" n95 and, in fact, stated that "this legislation is not intended as an indictment of the private pension system in this country." n96

Similarly, floor debate in both chambers during the consideration of ERISA recognized the need to balance protections for plan participants against a goal of encouraging employers to sponsor **[*213]** benefit plans voluntarily. n97 The 1974 House Report acknowledged the tug-of-war at work by stating: "The primary purpose of [ERISA] is the protection of individual pension rights, but the committee has been constrained to recognize the voluntary nature of private retirement plans. The relative improvements required by this Act have been weighed against the additional burdens to be placed on the system." n98 In addition, upon signing ERISA into law, President Ford remarked: "I am signing into law a landmark measure that may finally give the American worker solid protection," n99 but added that the law's requirements did not "harm[] the dynamics of our free enterprise system." n100

B. MUPS--THE "FAILED" LEGISLATION MANDATING PENSION PLAN SPONSORSHIP

Although ERISA maintained the voluntary nature of private sector benefit plan sponsorship, that decision has not gone unquestioned. The best known challenge to the voluntary pension system came from the President's Commission on Pension Policy (President's Commission), formed in 1979 by President Carter. n101 When **[*214]** the President's Commission issued its final report, it recommended implementation of what it termed the Minimum Universal Pension System (MUPS). n102 MUPS would have required employers to contribute the equivalent of three percent of each employee's compensation to a retirement plan voluntarily sponsored by the employer or to a centralized fund. The Social Security Administration would have acted as a clearinghouse for contributions to the fund. n103 All benefits would have been vested, portable, and employees would not be able to access benefits other than very small amounts prior to reaching retirement age. n104

There is no evidence indicating that MUPS ever had any widespread political support. By the time the President's Commission issued its report, administrations had changed. It appeared unlikely from the start that either the Reagan administration or the Republican controlled Senate would support MUPS. n105 And, in fact, proposed legislation n106 that contained many of the provisions developed by the President's Commission was never enacted. In recent years, however, some pension experts, such as Leon E. Irish, have offered MUPS-style proposals as the answer to changing workforce demographics, concerns over adequacy of benefits for baby boomers and subsequent generations, and questions regarding the viability of the Social Security system. n107

[*215] While, in the early 1980s, advocates of MUPS lost the battle, it appears they continued the war by pursuing the goals of increased coverage through the enactment of plan content regulation. By increasing the stringency of the minimum standards imposed upon voluntarily sponsored private sector benefit plans, incremental legislation enacted in the years shortly following the 1981 President's Commission report addressed many of the concerns raised by that Commission. The next subparts expand upon some of the perceived problems, categorize incremental legislation according to its purported function, and outline the criticisms of that legislation.

1. Gender Equity. Gender disparity in the pensions provided by private sector plans formed the basis for many of the provisions of the Retirement Equity Act (REA) of 1984, n108 which amended ERISA. Supporters argued that REA's requirements would play an important role in bringing some measure of gender equity to private pension plans n109 and, on that basis, the legislation received over-whelming bipartisan support in both houses of Congress. n110 By requiring pension plans to offer more extensive spousal benefits and giving spouses increased power over the election of those benefits, legislators hoped to increase the income support that women realize from private sector employer pension plans. n111 Other provisions of **[*216]** REA were intended to increase the benefit entitlement of women who participate in the paid workforce. n112

Specifically, REA imposed substantive and procedural requirements related to the variety of benefit payment options that plans must offer and the methods plans use to determine the form in which benefits are paid. n113 Plans now must provide pre-retirement survivor annuities for spouses of workers who have vested benefits but die prior to retirement. n114 REA also requires certain plans to offer retiring workers the right to receive their pension benefits as a joint and survivor annuity n115 in case the retiree predeceases the spouse, and prohibits the retiring worker from waiving that annuity except with spousal consent. n116

In addition to expanding benefit entitlements for surviving spouses, REA amended ERISA in a number of ways that were intended to enhance the retirement income prospects of women who work outside the home. Statutory changes decreased the minimum age for participation in a pension plan from twenty-five to twenty-one, n117 and required that plans begin considering years of service for vesting purposes at age eighteen instead of twenty-one. n118 By increasing the likelihood that younger people would be covered by pension plans, the amendments made it more probable that the early years of a woman's participation in the paid labor force would result in retirement income. n119 Another modification narrowed the **[*217]** circumstances under which breaks in periods of work for a single employer would cause a worker to forfeit benefits. n120 Thus, after REA, a new parent who takes a few years off from paid employment is more likely than under the prior rules to retain any pension benefit that the parent accrued prior to the leave of absence. n121

REA also included provisions aimed at increasing the pension rights of divorced women. Because ERISA contains an antialienation provision that protects plan benefits from the reach of creditors, courts had struggled with the question of whether those benefits could be subjected to spousal and child support orders or marital property settlements. n122 REA resolved the issue by requiring plans to divide retirement plan assets and make payments to former spouses upon the presentation to the plan supervisor of a Qualified Domestic Relations Order (QDRO). n123 The QDRO may require the plan to treat the former spouse as the surviving spouse for purposes of the pre-retirement as well as the joint and survivor annuities. n124 While facially gender-neutral, all of these provisions were intended to enhance the entitlement of women to benefits from employment-based benefit plans. n125

Commentators have identified a variety of problems related to the scope and application of the distribution rules. The joint and survivor annuity provisions operate as though all family units consist of a primary income earner and a largely dependent spouse. But, of course, that is not the only family paradigm, and the current regulation leaves many couples and individuals without **[*218]** protection. n126 Also, under certain circumstances, REA permits a plan to exclude from annuity entitlement those spouses who have been married for less than one year at the time of the retiree-spouse's death. n127 This provision prevents the spouse in a short-term marriage from receiving a windfall and avoids the moral hazard implicit in strategic deathbed marriages entered into for the purposes of granting plan benefits to the survivor. n128 But the provision also has the effect of leaving one category of spouses, those who happen to have been married within one year of the employee's death, without protection. Professor Watson argues that this ignores the probable preference of the employee-spouse to provide for the survivor, the level of financial need of the surviving spouse, and the potential expectation and the reliance interests of the surviving spouse. n129 While facially gender-neutral, because of the demographics of participation in the private pension system, longevity data, and marriage patterns, Professor Watson also argues that the one-year marriage requirement disparately burdens female **[*219]** spouses. n130 Similarly, plans are not required to offer joint and survivor annuities to individuals who marry after the plan participant retires. The regulation does not require spousal consent for cash-outs of benefits with a present value of $ 5000 or less. n131 Thus, the regulation is somewhat selective in its protection of spousal benefit entitlements.

Some commentators have criticized the jurisprudence for failing to reflect the principles of gender equity, n132 which captured so much attention and support at the time of REA's enactment. As with any reticulated legislation, REA has provided interpretative challenges for the courts, and the associated litigation has imposed costs and uncertainty on plans and participants. Currently, for example, the circuits are split over the application of certain REA provisions to welfare benefit plans. n133 Some courts have been extremely particular in the types of expert testimony they will accept to determine the value of future pension benefits for QDRO purposes. n134 REA's concerns for surviving spouse protection have posed difficult questions of overlap with state community property law, n135 the enforceability of antenuptual agreements, n136 and the use of traditional **[*220]** beneficiary designations. n137 In addition, REA's requirements engendered new, ongoing administrative burdens on private sector plans. Data indicate that the passage of time has not eliminated the costs associated with those burdens. n138

REA's extensive regulation does appear to have had some significant positive effect. n139 Women, however, still are substantially less likely than men to be covered by a workplace pension plan. Recent estimates indicate that thirty-nine percent of females who work full-time have such coverage, compared to the fourty-six percent of full-time male workers who are covered by private sector pension plans. n140 A variety of factors, other than overt discrimination, help to explain the phenomenon of lower pension coverage for women. First, though this differential appears to be decreasing, women tend to have higher job turnover rates than do men. n141 Given the service-related vesting requirements found in most pension plans, n142 shorter periods of job tenure translate into lower rates of pension coverage. n143 Second, women are more likely than **[*221]** men to work in sectors of the economy, such as service or retail, n144 which have lower rates of pension plan sponsorship than do many other sectors. n145 Third, women are less likely than men to participate in the paid workforce, n146 and, thus, have less opportunity to participate in a private-sector plan.

Looking only at coverage rates, however, ignores other factors that contribute to the comparatively disadvantaged financial position of older women. The Department of Labor estimates that, at the median, new female retirees receive less than half the pension benefits received by new male retirees. n147 The lower levels of private sector pension plan coverage undoubtedly contribute to the gender disparity in plan benefits, but so do the lower rates of cash compensation earned by women over their years of employment. This is so because, typically, the value of a pension plan benefit is tied to an employee's earnings. n148 The effect is magnified in plans that integrate benefits with Social Security because the effect of integration is to decrease the benefits of the lower paid employees by a larger proportion than the benefits of the more highly paid employees. n149 Since women tend to earn less than men, they also are more likely to experience disproportionately large **[*222]** reductions in their private sector pension plan benefits as a result of integration. n150

The studies that focus only on full-time workers miss yet another factor contributing to the poverty of many older women: women are more likely than men to work part-time. n151 The part-time work translates into lower pension benefits because few part-time employees are covered by employer-sponsored pension plans, n152 and those who are covered tend to receive relatively low benefits because of their lower earnings. n153

Even if both compensation rates and hours of work were equal across the genders, the tendency of women to have shorter job tenures than men still would negatively affect their pension benefits in a defined benefit plan because those plans reward long service with a single employer. n154 Furthermore, the tripartite system of retirement income support n155 magnifies the income effect of the relatively low pension plan benefits earned by women. The same factors of lower compensation, more part-time work, and more breaks in work history that contribute to gender disparities in private pension plans also cause women, on average, to accumulate fewer personal assets n156 and to have lower Social Security entitlements than men. n157 Finally, women tend to have significantly **[*223]** longer life expectancies than men, n158 which generates the need for longer streams of retirement income and increases inflationary pressures on women. n159 Perhaps it should come of little surprise that, among those age sixty-five and older, women are twice as likely as men to subsist below the poverty level. n160 In fact, the United States is said to have the greatest percentage of elderly women in poverty of all the major industrialized nations. n161

In sum, REA increased women's access to retirement income from private sector pension plans, but the continuing gender disparities in retirement income and in poverty during older age illustrate that equality has yet to be achieved. n162 Commentators have criticized REA on a number of other grounds. They argue that REA's protections have accrued primarily to limited segments of the population and left others outside its scope. Even as amended, ERISA fails to provide survivor protection to nontraditional households and contains technical limitations that exclude some spouses from protection. n163 Finally, REA's administrative burdens and interpretative ambiguities continue to impose significant costs on benefit plans. n164

[*224] *2. Integrity of Plan Assets*. During the pre-ERISA period, numerous instances occurred where employers promised pension benefits to their employees but could not afford to fulfill those promises when it came time to pay the benefits. n165 As a result, ERISA typically requires employers to establish a trust to pay defined pension plan benefits and to fund the trust sufficiently to pay promised benefits. n166 This provision, however, has subjected pension plan participants to a new risk. The accumulation of approximately $ 7 trillion in assets is a temptation to plan participants and to federal regulators. n167

[*225] *a. Early Access to Plan Funds*. Consider, for example, the Unemployment Compensation Amendments Act of 1992 (UCA), n168 which extended unemployment benefits. At the time he signed the UCA, President Bush was embroiled in a heated presidential campaign and confronted an ailing economy and rising unemployment. n169 In addition to its unemployment compensation provisions the UCA also amended the Internal Revenue Code (I.R.C.) to impose additional qualification requirements on retirement plans. n170 The changes require plans to transfer, at the option of the individual plan participants, many types of plan distributions directly to an Individual Retirement Account (IRA) or to another qualified employee benefits plan. n171 If, instead, the distribution is made directly to the participant, the plan must withhold income taxes, at the rate of twenty percent, from the distribution. n172 If the individual then wishes to roll over the entire distribution, the individual must make up the withheld taxes from other sources. n173 In an attempt to ensure that the participants understand their options, the UCA also imposed significant disclosure obligations on plans. n174

Supporters of the UCA's modified rollover rules have offered two explanations that are consistent with national pension policy for these provisions. First, for an individual who opts to receive and spend a distribution, mandatory withholding ensures she can meet **[*226]** her tax obligations at the end of the tax year. n175 The alleged intent of the legislation, however, was to discourage those distributions and retain the integrity of retirement plan benefits in some type of tax-qualified account. n176

Supporters of the UCA argue that the existence of mandatory withholding should encourage individuals to opt for the second option, direct transfers of their benefits to an IRA or another qualified plan in order to avoid the withholding. n177 Once an individual has a plan distribution "in hand," that individual may be tempted to spend some or all of the funds. In contrast, if the old plan directly transfers funds to an IRA or new qualified plan, there is no ability, let alone temptation, to spend the funds.

It is questionable, however, whether the changes provide effective incentives to the lowest paid and least educated workers, who are most unlikely to have sufficient retirement income, to leave their plan funds in a tax-qualified account. n178 They may have the most difficulty in understanding the explanatory material provided by the distributing benefit plan. They also may be the most unlikely to identify or establish a tax qualified vehicle to receive a direct distribution and to receive sophisticated tax planning advice. Thus, it is reasonable to speculate that the lowest paid and least educated workers are the ones most likely to receive lump sum distributions, if for no other reason than through default. n179

Assume, for example, that Participant A had a $ 4,800 benefit in the old plan and failed to comply with all of the requirements necessary to cause that plan to make a direct transfer. As a result, the plan distributed the benefit to her. On August 15, she received a check in the gross amount of $ 4,800. After assessment of the **[*227]** statutory twenty percent withholding, the net amount was $ 3,840. Participant A has sixty days to roll over up to $ 4,800. But, in order to roll over the full $ 4,800 she will have to add $ 960 of funds from some other source. n180

It is true that at the end of the tax year, if Participant A had rolled over the entire $ 4,800, the excess withholding of $ 960 would be credited to taxes owed or would be refunded. Given the theory that lower income workers are the most likely group to receive plan distributions, however, it is legitimate to wonder how many of those workers are in a financial position to contribute funds to a retirement plan and not receive the offsetting tax benefit for as long as a year or more. Given the low levels of personal savings in this country, n181 however, it is unrealistic to expect individuals to replace, even on a temporary basis, the assets lost to tax withholding. Many of the pre-retirement distributions occur because of a job change, a time of financial vulnerability for many people, so this adds to the cash flow problem.

The increase in defined contribution plans n182 and substantial job volatility mean that, long before they reach retirement age, many people receive automatic or elective distributions of the type subjected to the UCA's rollover provisions. If there is one thing that pension commentators appear to agree upon, it is that this "leakage"--the tendency of people to spend these assets--represents a threat to retirement security. n183 The data support these concerns. A large percentage of all workers who receive pre-retirement distributions from 401(k) accounts when they change jobs ends up spending the money. n184 Plus, small distributions are far more likely than large distributions to be spent. n185 One might assume that this failure to roll over small distributions represents less of a threat to **[*228]** retirement savings than if large distributions were not being rolled over. Recall, however, that lower paid and more transitory workers are less likely to accumulate large benefit account balances at any one employer. To the extent it is those workers who are not rolling over their small distributions, the rollover rules make it increasingly likely they will end up financially unprepared for retirement.

Thus, legislation purportedly intended to preserve retirement assets may be having the opposite effect on the cohort of workers who are most likely to be financially vulnerable in retirement. In fact, Congress arguably intended exactly that result. The reason it included the rollover amendments in the UCA is that it needed the additional tax revenues to pay for the extension of unemployment benefits. n186 It is true that one component of the additional revenue derives from the interest-free loan that flows to the government when a plan withholds taxes and an individual, who rolls over the entire amount of her gross distribution, does not recoup the withholding until the end of the tax year. n187 The fisc benefits even more, however, when individuals do not roll over the full amount of a distribution. In such a case, the fisc collects personal income tax on the money not rolled over and a ten percent penalty. n188 Finally, comparing the costs of implementation with the expected additional tax revenues further highlights the burdens imposed upon retirement plan assets. Even if one assumes the federal treasury's optimistic revenue forecast of $ 2.147 billion over the five-year period following enactment, that compares to an estimated cost to employers and plans of approximately $ 4.55 billion. n189

[*229] *b. Tax incentives*. In 1914 the Treasury Department first confirmed the deductibility of pension payments made by employers. n190 Currently, tax-qualified retirement plans constitute one of the few employment-related opportunities for bifurcation of tax deductibility and recognition of income. Employers may take current deductions for plan contributions, but employees need not recognize income until they actually receive benefit payments. n191 Furthermore, earnings on assets held in a qualified plan are not subject to taxation. n192 Generally, this favorable tax treatment of pension plans, and the similar treatment accorded to savings vehicles such as IRAs, is justified as good social policy that promotes long-term savings and the sponsorship of retirement plans. n193

The favorable tax status of the plans and the progressive nature of the federal income tax, however, mean that employees who earn higher rates of compensation and find themselves in higher income tax brackets generally place greater value on deferred income than do those employees who earn lower rates of compensation and are taxed at lower rates. n194 Lower income employees also tend to have a greater need to receive all or most of their compensation as **[*230]** current income in order to support minimum consumptive needs. n195 In the absence of regulation then, a benefit plan sponsor would be expected to minimize compensation costs by structuring its plan to provide significant pension benefits for highly paid employees but no pension benefits, or low levels of benefits, for its lower paid employees. n196 The use of a federal tax subsidy n197 for plans that provide benefits only or primarily for highly paid employees, however, typically is criticized as unfair, n198 as wasted to the extent that the same savings or plan sponsorship would have resulted even in the absence of a tax subsidy, n199 and as having an inappropriate redistributive effect. n200

The issue is not negligible. The annual federal tax expenditure attributable to tax-favored retirement savings is the largest such expenditure, and even exceeds the tax expenditure for home mortgage interest. n201 The Office of Management and Budget estimates the 1999 revenue loss from tax-favored retirement savings will reach $ 86.9 billion. n202 This excludes the estimated $ 76.2 billion in foregone revenues attributable to the exclusion for employer-paid **[*231]** health care and related insurance premiums. n203 Nor is this a new phenomenon. Professor Wolk traces the concern over fair use of the tax incentives for private pension plans to the mid-1930s. That concern culminated in 1942 with the enactment of the first nondiscrimination rules targeted at minimizing perceived abuses. n204 Simply stated, the notion of fair use of tax expenditures typically focuses on requiring pension plans to cover an appropriate range of employees, not just the top executives, and to distribute benefits equitably among the covered employees. n205

The tax code provisions of ERISA incorporated the general proscription on discrimination in tax qualified pension plans. n206 ERISA added limitations on the maximum contributions that may be made to a defined contribution plan and a cap on the amount of benefits a defined benefit plan may pay. n207 Over time, Congress and the IRS have continued to augment the regulation in this area. For example, the Tax Reform Act of 1986 (TRA '86) made slight changes to the I.R.C.'s provisions, and, as a result, the IRS produced the first comprehensive regulations on nondiscrimination. n208 The nature of those regulations may best be described by the commentator who wrote: "a thorough explanation of [the nondiscrimination] provisions might run hundreds of pages." n209 That statement gives a fair indication of both the complexity of the requirements and the expense plans face in complying with them. n210

[*232] The nondiscrimination requirements aim to prevent employers from utilizing the tax benefits provided to qualified plans in order to subsidize plans that disproportionately benefit top-level employees. In general, the statute limits a plan's ability to exclude low-paid employees from a pension plan that provides benefits to high-paid employees n211 and requires plans to allocate contributions or benefits according to the statute's notion of equity. n212 The tests for compliance with the nondiscrimination requirements vary by plan type. n213 These tests contain numerous exceptions that exclude certain employees from the calculations n214 and special rules for specific situations such as: controlled groups; n215 integration with Social Security; n216 top-heavy plans; n217 and employers with separate lines of business. n218

The theory of the nondiscrimination provision's requirement of broad plan coverage is based on the perceived fair use of the tax incentives. But, as with the other legislative amendments to ERISA analyzed in this Part, a careful examination of the nondiscrimination **[*233]** provisions reveals how those measures may be counterproductive if the goal is to enhance the retirement prospects of low paid workers. Professor Wolk argues that because the tax incentives provided to private sector plans are valued only by highly paid employees, nondiscrimination rules are doomed to fail. n219 If forced to extend benefits to lower-paid employees who do not value the benefits, employers will find the plans too expensive, will decide not to sponsor new plans, and will terminate existing plans. n220 This obviously operates to the detriment of the more highly paid employees who lose benefit entitlement they otherwise may have enjoyed. But it also may operate to the detriment of lower paid employees, whose employers may no longer sponsor a limited plan for those employees. Instead, employers are forced to choose between including the lower paid employees in the expensive plan sponsored for, and valued by, highly paid employees or sponsoring no pension plan at all. n221

A second issue complicates the analysis of ERISA's nondiscrimination provisions. In addition to concern with the fair use of the tax expenditure, a number of statutory limitations reflect the need to control the amount of that expenditure. Thus, the Code restricts the amount that can be contributed annually to a defined contribution **[*234]** plan on behalf of each employee and the amount of benefits that a defined benefit plan may provide. n222 Furthermore, other provisions prohibit an employer from deducting plan contributions made to a pension plan to the extent the contributions exceed a specified percentage of employee compensation or a factor of the statutorily established requirements for defined benefit plan funding. n223 The Code also limits the amount of an employee's compensation that may be considered for these and other purposes, n224 known in ERISA parlance as the limitation on includable compensation. For example, amendments effective in 1994 reduced the cap on the amount of includable compensation from $ 235,840 to $ 150,000 as indexed for inflation. n225

Purportedly, the general purpose of these limitations is to reinforce the nondiscrimination provisions. By restricting employer contributions, particularly those for highly paid employees, the regulations attempt to make increased funds available for benefits for lower paid employees. n226 But, in fact, the stated reason for the 1994 reduction in includable compensation was a congressional concern with the size of the tax expenditure. n227 By limiting contributions and benefits, Congress trimmed the size of the tax expenditure and helped to address the then-existing budget deficit. n228

As mechanisms to limit lost tax revenues, restrictions such as the cap on includable compensation have effects that illustrate the tension in developing a coherent and long term national pension policy. Like the basic nondiscrimination provisions, the limitations **[*235]** on includable compensation, benefits, and contributions reduce the value of qualified plans to highly paid employees. Concomitantly, they reduce the likelihood that employers will find it cost effective to sponsor pension plans. It is questionable whether the limitations even have substantial effect in limiting benefits to the more highly paid employees because an array of alternative approaches permit employers to continue to provide valuable non-cash compensation to those employees. n229

In sum, to the extent that regulation modifies the tax incentives for plan sponsorship, participation, contributions, and funding, that regulation affects plan asset levels. Certainly, it lies within the role of Congress to make the fiscal choices necessary to implement its overall legislative agenda. To the extent that the benefit plan regulation purports to further national benefit policy, but either does not do so or creates the negative effects seen in the UCA, one at least must question the transparency of legislative action. Similarly, the basic nondiscrimination provisions that govern plan participation and benefit distribution, and the provisions that limit contributions and deductions, appear to be necessary to prevent the benefits of plans from accruing only to highly paid workers and to limit an already massive federal tax expenditure. But, in operation, the provisions may be counterproductive in that they actually may decrease both plan coverage and employment rates of rank-and-file workers. Furthermore, compliance with the array of regulations and frequent changes in the regulations imposes additional costs on the sponsorship of plans.

C. HSA--THE HEALTH CARE PARALLEL

While the 1980s saw efforts to achieve universal pension plan coverage, during the early 1990s the debate turned to universal health care coverage. President Clinton made national health care reform a key plank in his 1992 campaign for office n230 and followed **[*236]** through by proposing the Health Security Act (HSA). n231 Generally stated, one of the key provisions of the HSA would have required employers to make health care coverage accessible to their employees and to pay approximately eighty percent of the cost of the coverage. n232 The package of benefits to be provided by the mandatory health care plans was termed "generous, comprehensive, and universal." n233

The Clinton proposal, of course, failed. Commentators have attributed that failure to everything from dissonance in the Clintons' "public performance" while developing and supporting the legislation, n234 to the incorporation in the proposal of inconsistent objectives that divided the Democrats. n235 But, as had occurred earlier in the pension arena, losing the battle did not appear to discourage unduly those who were at war for an expansion in the scope of employer responsibility for health care coverage.

Reformers simply turned their efforts to incremental changes aimed at broadening the substantive requirements imposed upon voluntarily sponsored health care plans. Their success at the benefits level is reflected in three new pieces of legislation passed in 1996, each of which imposed minimum substantive terms on voluntarily sponsored health care plans. Subpart C.*2* below briefly explains those obligations and considers the extent to which the statutory provisions are effective in accomplishing their goals of providing improved health care coverage to plan participants and beneficiaries. First, though, the next subpart addresses the first stage of incremental health care coverage legislation.

1. Accessibility of Health Care-The First Stage. Earlier subparts categorized a number of the substantive obligations that legislative amendments to ERISA have imposed upon pension plans. But no exploration of the regulation of private sector benefit plans **[*237]** is complete without also considering the regulation of health care plans. The first extensive ERISA amendment to target health care plans was the Consolidated Omnibus Budget Reconciliation Act of 1985. n236 While the entire act contains a variety of provisions regulating medical care and is cited as "COBRA," n237 to ERISA initiates the term "COBRA" refers to the rules regarding continuing eligibility for participation in employment-based health care plans. As amended, n238 COBRA requires any employer that sponsors a health care plan to offer many of its former employees, and dependents who lose coverage for a variety of reasons including divorce, the option of remaining covered under the employer's health care plan for a significant period of time after coverage otherwise would have ended, sometimes up to thirty-six months. n239 Among other things, **[*238]** the legislation specifies that eligibility notices be sent to separating employees, n240 the nature of the continuation coverage, n241 the time period for which coverage may be elected, n242 and penalties for failure to comply. n243

There are some parallels here with REA because the stated genesis for COBRA was a concern with the loss of private sector health insurance plans for women and their children upon divorce, the death of a working spouse, or the loss of a job. n244 The legislative focus then expanded to include the health care coverage problems experienced by employees who terminate employment. n245 At least superficially, it is difficult to quibble with a policy intended to ensure that individuals who divorce, cease working, or change jobs have at least the temporary opportunity to obtain continuing health care coverage for themselves and their families. The legislation even seems to avoid burdening plans because it explicitly permits employers to charge participants who elect COBRA coverage up to 102% of the applicable premium costs experienced across all plan participants. n246 These premiums, however, do not come close to compensating employers for the additional costs of covering this group of plan participants. Notification costs alone far exceed the two percent allowed as administrative expense. n247 In addition, where, as here, health care coverage is offered on a voluntary basis to individuals who must bear the cost of significant premiums, the individuals most likely to choose the coverage are those who are ill and expect to incur medical costs that exceed the premium expense. Thus, the population that enrolls for COBRA coverage tends to be a self-selecting group. n248

[*239] This self-selection problem is exacerbated by the time windows built into the regulation. First, it may take up to forty-four days for the qualified beneficiary (the statutory term for someone entitled to make a COBRA election) to receive a notice of eligibility. n249 Second, qualified beneficiaries have at least sixty days following notification to elect coverage. n250 Finally, even after making an election in favor of coverage, the qualified beneficiary has forty-five days to make the initial payment. n251 This framework enables many individuals to make an ex post decision on coverage. Frequently, by the end of this extended period for election and payment of the first premium, a qualified beneficiary will be covered by the plan of a new employer. If, during this extended period for election, the individual does not incur any medical expenses or her expenses does not exceed the cost of the COBRA premiums, the individual will have no reason to elect COBRA and pay the premium. An individual who incurs substantial medical costs within the period, however, may pay the COBRA premiums retroactively and require the employer-sponsored health care plan to pay her medical costs. Given the hindsight information and the significant cost of COBRA premiums, one would expect the selection bias to be substantial.

Statistics confirm the high costs employers incur for COBRA compliance. During 1991 the average cost ratio for those employers able to track their COBRA experience was 121% of COBRA premiums. n252 A full thirty-nine percent of employers reported loss ratios of 150% or higher. n253 Twenty-five percent of all multiemployer plans responding to a recent survey reported that their costs exceed twice the value of the COBRA premiums received. n254 Yet, even given the substantial costs, COBRA also bears comparison to REA in that it leaves significant population segments outside its scope. The requirements of health care continuation **[*240]** exempt certain kinds of terminations of employment, n255 extend only for specified periods of time, and rely upon employer notices and periodic premium payments. n256

In addition, as with both the REA provisions and the nondiscrimination regulations, the ambiguities inherent in COBRA have created significant administrative problems for employers. By failing to confront difficult decisions during the legislative process, Congress may intentionally have avoided highlighting measures that would increase plan costs. Perhaps it believed employers would be less likely to mobilize against impending changes where the increase in costs or decrease in flexibility initially was left unclear. n257 Similarly, politically charged provisions may have been left to administrative or judicial determination in order to minimize costs of compromise in Congress. n258 For whatever reason, this is one instance where Congress left much interpretation to the responsible agencies. n259

The agencies, however, have also avoided some of the difficult issues. Shortly after COBRA's enactment, a representative of the IRS stated that, instead of addressing the many open COBRA issues through regulations, the Service would leave a number of those issues to the courts for resolution. n260 Later the IRS canceled at least one regulatory project on COBRA when it could not reach an internal decision on the issue. n261 Finally, almost thirteen years after

COBRA's enactment, the IRS published one long-awaited set of proposed COBRA regulations. n262 Left to interpret the scope of the COBRA provisions in the absence of either agency direction or a **[*241]** cohesive federal policy on health care, the courts have sometimes struggled. n263 For example, one court determined that a health insurance administrator complied with COBRA's notice requirements by mailing benefits information together with a premium statement to a comatose beneficiary. n264 The court upheld the administrator's termination of the beneficiary's coverage when the beneficiary failed to make the premium payments. n265 As a result, employers, benefit plans, and those seeking COBRA coverage have borne the cost of litigation to clarify rights and responsibilities. The chairman of one small company raised the following complaint that may capture the view of employers: "It is difficult enough these days to comply with the wealth of laws affecting business when you know what they require. It is almost impossible to do so when you do not know and cannot find out what they ultimately require." n266

2. Accessibility of Health Care--The Second Stage. Continuing problems in health care access led to extensive reform efforts in the early 1990s. Although plan sponsorship legislation was defeated, three new acts were enacted in 1996. Each at least purports to extend the obligations of employer-sponsored private sector health care plans. The Health Insurance Portability and Accountability Act (HIPAA) of 1996 limits the extent to which plans may use preexisting conditions as a basis for excluding someone from coverage and prohibits plans from discriminating on the basis of health status. n267 The Newborns' and Mothers' Health Protection Act (NMHPA) of 1996 sets minimum standards for hospital stays **[*242]** provided in connection with the birth of a child. n268 Similarly, the Mental Health Parity Act (MHPA) also sets minimum standards for health care plans vis-a-vis a specific type of health coverage. n269 It generally requires health care plans that provide mental health coverage to set dollar limits on those benefits that are not less than the limits established for medical and surgical benefits. n270 But the "swiss cheese" nature of that requirement is remarkable. Plans remain able to offer no mental health coverage at all, or to limit mental health coverage in any way other than by dollar value, thus opening the way for limitations on days of treatment, mandatory implementation of managed care principles, or even institution of higher deductibles and co-pays than that apply to medical and surgical benefits. n271

In this fifth and final category of regulatory intervention into the realm of private sector employee benefit plans, once again we see reasonable, and even widely supported and idealistic, social policy goals offered as the explanation for that intervention. While certainly the health care legislation, from COBRA to MHPA, has extended the entitlement of some, each of the enactments has left substantial groups outside its protective scope, with MHPA being the most egregious example. At the same time, the acts have limited the flexibility of employers to determine the appropriate mix of benefits for their workforces and have burdened plans with significant compliance costs.

[*243] D. PATTERNS IN INCREMENTAL REGULATION

To summarize, the foregoing analysis of regulation shows that the scope of regulatory requirements imposed upon private sector benefit plans has increased dramatically since the enactment of ERISA almost twenty-five years ago. And, with the defeat of plan sponsorship regulation, all of those increased requirements have taken the form of plan content regulation. The stated goals of the benefit level legislation uniformly focus on important and valid policy concerns. Yet, commentators have identified defects across every categorization, regardless of whether the lines are drawn between pension plans and health care plans, whether one distinguishes provisions concerned with atomistic protections for individuals from those that focus on aggregate matters such as the security of plan assets, or whether the focus is on issues of fairness--issues that range from gender equity to appropriate use of the tax incentives. In each case, regulation burdens plans with significant additional costs, n272 commentators decry serious inefficiencies and criticize the provisions for failing to achieve their stated goals, n273 and perverse effects are observable or expected. n274

But these prior commentators tend to concentrate on identifying numerous specific problems within a given area, such as gender equity or the nondiscrimination rules, and suggesting narrowly targeted solutions. n275 Improving the efficiency and effectiveness of existing individual regulatory provisions is a valuable goal. With the aging of the baby-boom population and the potential of shortfalls in both pension and health care coverage, however, it also is useful to consider the established patterns of benefit plan regulation from a more systemic standpoint and the implications of those patterns for future regulation. Prior commentators have not effectively explained why legislation that they deride as burdensome, ineffective, **[*244]** and sometimes even counterproductive, has been so frequent and extensive given that opponents of plan level mandates have been successful in defeating those efforts in both the pension and the health care arenas. Reasonable questions, almost completely ignored in the scholarly literature, n276 are whether the debate over unfunded mandates might explain the legislative patterns I have identified and whether statutory mechanisms to increase scrutiny of new regulation can be expected to result in a more stable, cohesive, and efficient regulatory framework.

IV. MANDATES BY ANY OTHER NAME? n277

Any discussion of unfunded mandates in the context of private actors is somewhat incongruous. In this Part, I first confront that incongruity by considering whether the regulation of benefit plans shares any of the defining characteristics of unfunded intergovernmental mandates. I then analyze the normative objections made against unfunded intergovernmental mandates and consider whether those objections have any explanatory power in the context of benefits plan regulation. I conclude by showing that increased process controls of the type contained in UMRA pose an affirmative threat to the goal of a cohesive and efficient national benefit regulatory scheme.

A. PRIVATE SECTOR MANDATES--TAKING OFF THE HAT

Private sector legislation received little attention during the policy debates on unfunded mandates in the early 1990s. Even the initial versions of UMRA applied only to intergovernmental **[*245]** regulation. n278 During the legislative process, though, Congress extended some of UMRA's provisions to private sector regulation. n279 But, the extension did not occur because of structural or theoretical similarities between unfunded intergovernmental mandates and unfunded private sector mandates. No consideration was given to whether such similarities exist. Instead, concerns were raised that, if it were effective in limiting unfunded intergovernmental mandates, UMRA would confer competitive advantages on subordinate governmental units. n280 In the provision of services, such as garbage collection, where both compete, minimizing the regulatory burden imposed upon states and localities would come at the expense of the private sector. The drafters of UMRA, however, did not limit the statutory definition of a private sector mandate to situations where governmental entities compete with the private sector.

In this subpart, I consider how the definitions of unfunded intergovernmental mandates, which have been developed by the commentators, might apply to benefit plan regulation. Given the various definitions used to identify unfunded intergovernmental federal mandates, n281 it would be overly optimistic to expect the process to be a simple one in an area as complex as employee benefit plans. The analysis, however, does reveal the very limited extent to which principled reasons exist to treat federal regulation of private sector employee benefit plans as the equivalent of unfunded intergovernmental mandates.

1. Direct Order Regulation. As part of its study of mandates, the United States Advisory Commission on Intergovernmental Relations (ACIR) n282 developed a broad definition of what constitutes an unfunded intergovernmental mandate. Its definition includes any **[*246]** federal action that increases the financial burdens on subordinate governments or limits their sources of revenue. n283 ACIR then categorized legislative initiatives and other federal actions into six groupings, according to the effect the initiatives have on subordinate governments. n284 The first category consists of "direct orders"--the class of regulation that most obviously falls within the definition of a mandate. n285 Within this category are: legislation of general applicability; n286 requirements that subordinate government actions meet certain standards; n287 and directives that subordinate governments regulate private parties. n288

In comparison, Professor Adler advocates the use of a two-part test, which results in a much narrower definition, to evaluate whether governmental actions constitute mandates. The Adler test requires both that (1) "the issuer [has] legal authority to impose" n289 and (2) "the recipient bears a legal duty to obey. . . the dictates of the mandate. . . ." n290 The first prong, requiring legal authority to regulate, may have some limiting effect on public sector legislation. There, the pendulum may be swinging toward increased recognition of constitutional protection of state rights. n291 But given the very broad scope of the federal government's authority to regulate private actors, the "authority to regulate" prong is unlikely to exclude any regulation that foreseeably might be imposed upon private sector employee benefit plans. In fact, there have been relatively few challenges to Congress's authority to impose the types of regulation **[*247]** it has enacted in ERISA and subsequent amendments, and none of those challenges have been successful. n292

Conceptually, Adler's "legal duty to obey" appears to be the unifying concept underlying ACIR's grouping of actions that constitute "direct orders." While not stated explicitly, each of the regulatory approaches grouped together as a direct order is one where the states have no discretion whatsoever in whether to comply. Not all commentators would agree that the diverse range of federal regulations in this rather broad categorization clearly constitute unfunded intergovernmental mandates. n293 But, even conceding that point, the definition does not sweep in any benefits regulation.

The current regulation of private sector benefit plans contains no counterpart to direct orders that require compliance of lower governmental entities. Here, the analytical value of the distinction I have drawn between plan sponsorship regulation and plan content regulation becomes clear. Plan level reform efforts, such as those undertaken as part of President Clinton's national health care plan or by President Carter's Commission on Pension Policy, that would have required employers to offer benefit coverage have been soundly defeated. n294 Those types of legislation would have had the same effect, in the sense of requiring compliance, on private employers as direct orders have on lower levels of government. But, in the absence of plan sponsorship regulation, no federal legislation directly imposes a "legally enforceable requirement[]" n295 that employers sponsor pension or health care plans. In other words, federal law does not impose any plan level mandates on the private sector.

[*248] Yet, the discussion in Part III proves that plan content regulation does impose significant obligations upon employers vis-a-vis the benefit plans they voluntarily offer. If an employer chooses to sponsor a pension plan, that plan must meet REA's requirements regarding the notification, limited waiver, and availability of spousal annuities. n296 Nearly every employer-sponsored health care plan n297 must meet the COBRA continuation requirements, is subject to HIPAA's limitations on the exclusion of coverage for pre-existing conditions, and must provide the benefits prescribed by NMBPA and MHPA. n298 And, if an employer seeks the favorable federal tax treatment accorded to qualified plans, the employer's plans must meet the extensive requirements of the I.R.C., including the nondiscrimination requirements n299 and the withholding and informational obligations imposed on certain types of plan distributions. n300

It is these types of regulatory provisions that might be condemned as unfunded federal mandates imposed upon the private sector and that appear to fall within the terms of UMRA as well as the proposed extension of UMRA. n301 But none of these regulatory provisions require employers to offer benefit plans, and employers may avoid the regulation entirely by choosing not to sponsor any benefit plans. Therefore, none of the existing plan content regulation would constitute a direct order mandate within ACIR's **[*249]** framework of analysis. n302 Plan content regulation also fails the Adler two-prong test because it does not impose an unavoidable legal duty to obey upon private sector employers. n303

2. Benefit Level Tax Incentives and Unfunded Mandates. Three of ACIR's remaining five categorical definitions of mandates are worth considering because there are some similarities between the types of legislation encompassed by those categories and the benefit level tax incentives and related compliance legislation that occurs in the employee benefits context. n304 Those three categories are: (1) conditions of aid; (2) tax policy provisions; and (3) "incidental and implied federal policy impacts." n305 The first category, conditions of federal aid, includes federal programs such as Medicaid, in which the states may decline to participate. n306 But, if subordinate governmental entities do choose to participate in those programs, their receipt of federal aid for the programs is conditioned upon compliance with the programs' requirements. n307 Some critics of unfunded intergovernmental mandates agree with ACIR and argue that at least some conditions of aid should be considered mandates. n308

The second category, federal tax policy provisions, has generated some controversy in the definitional arena. n309 ACIR's argument in favor of treating federal tax policy provisions as unfunded intergovernmental mandates rests upon the premise that, by preempting **[*250]** some sources of taxation, imposing limits on the use of tax-favored borrowing instruments, or modifying the federal deductibility of taxes imposed by subordinate governmental units, federal tax legislation affects the revenue-raising alternatives available to state and local governments. n310 The resulting negative, direct financial impact has the same effect in reducing the financial resources available for use by a subordinate governmental entity in pursuing its own priorities as a direct order requiring the entity to use its resources for a program it would not undertake on its own initiative.

The third relevant category is the most general and extends to "incidental and implied federal policy impacts." n311 ACIR includes in this class of regulation those measures that "impose[] additional financial burdens on states and localities." n312 Recall that ACIR's definition of an unfunded intergovernmental mandate extends to any federal action that increases the financial burdens on subordinate governments or limits their sources of revenue. n313 Therefore, this category of policy impacts, which is actually the last of ACIR's six categories, sweeps in legislation that imposes costs on subordinate governmental actors but does not fall within any of the more specific categories. Its breadth then is almost as wide as is the scope of intergovernmental regulation. This arguably encompasses everything from immigration regulation, to food stamp programs, to costs attributable to delays in the promulgation of administrative regulation. n314

Professor Adler rejects all three categories on the basis that none of the regulation embraced by these categories meets the second prong of his test. In no case does the regulation impose an unavoidable legal duty upon subordinate government entities. In the case of conditions of aid, lower levels of government always retain some discretion over whether to participate in these types of federal programs. n315 Similarly, in the federal tax policy category, he argues that treating preemption of revenue sources as an unfunded **[*251]** mandate is inappropriate because such preemption imposes no duties upon subordinate governments. n316 The remaining tax policy provisions simply function to reduce existing or expected federal subsidies. n317 Again, because the tax policy provisions do not require states or localities to take specific actions, Professor Adler rejects ACIR's categorization of those provisions as unfunded mandates even though they have a direct financial impact upon the governmental entities. n318 Finally, he dismisses the policy effects as being involuntary or deriving from the basic obligations of subordinate governments. n319

To begin with the first of these three ACIR categories, some parallels superficially exist between conditions of aid and the regulation of private sector employee benefit plans. At one level, some of the programs are similar because, for example, both Medicaid and employment-based health care plans provide coverage for health care services. On a more structural level, the nature of the regulation in the two areas is somewhat alike. Medicaid regulation essentially says to the states: "If you want to provide Medicaid benefits to your constituents, you must meet the following requirements." In the private sector, ERISA says to employers: "If you want to provide health care benefits to your employees, you must meet the following requirements." Once one looks beyond these superficial similarities, though, it becomes obvious that, even if one accepts that conditions of aid constitute unfunded intergovernmental mandates, no parallel principled reasons call for equivalent categorization of ERISA's requirements. Under ACIR's categorization, conditions of aid share coercive characteristics based in the partial federal funding of the programs that form the basis for the conditions of aid. But the unfunded plan content regulation in Title I of ERISA does not share those coercive characteristics. Unlike the conditions of aid provided to the states, employers receive no direct funding for their sponsorship of employee benefit plans. Under ERISA's plan content regulation, there are no grants **[*252]** to decline, no baits to draw employers into a bait-and-switch program, and no coercive crossover sanctions. n320 The ERISA regulation simply sets minimum standards of conduct for private sector benefit plans. Thus, whether one accepts Professor Adler's position that conditions of federal aid do not constitute unfunded mandates, or distinguishes between programs that impose conditions of federal aid and private sector benefit programs, ERISA's provisions do not qualify as unfunded mandates under this category.

Turning to the I.R.C. regulation of employee benefit plans, there is also a very real sense in which the dozens of requirements that a plan must meet in order to qualify for favorable tax treatment n321 simply "feel" like mandates. This is particularly true if one agrees with Shakespeare and reads his comment about roses and names to mean that terminology matters less than one's instinctive ability to recognize similarities. n322 After all, the positive nature of the benefit level I.R.C. regulation requires plans to take actions or offer benefits they otherwise would not. As discussed in Part III, REA requires plans to grant spousal annuities, to limit waivers of those annuities, and to provide information about them. n323 The UCA requires plans to withhold taxes, meet informational requirements, and make asset transfers. n324 The nondiscrimination requirements require plans to cover classes of employees such that the plan is not too favorable to **[*253]** highly paid employees. n325 Those requirements also set standards for the allocation of benefits among employees who participate in a benefit plan. n326 COBRA requires plans to permit people who are no longer employees or dependents of employees to maintain their plan coverage for minimum periods, and the three 1996 health care acts require plans to provide specific benefits. n327 Looking to the ACIR principles, the almost $ 87 billion in federal tax expenditures for tax-favored retirement savings and the $ 76 billion devoted to health care n328 provide the basis for some of the more compelling arguments that plan content regulation shares some characteristics with unfunded intergovernmental mandates. If one believes, when federal grant programs containing conditions of aid "are so large and so entrenched that it is fiscally and politically impossible to turn them down," n329 that those programs should be classified as unfunded mandates, the rationale may stretch to I.R.C. plan content regulation. Again, using the Medicaid parallel, it might be just as difficult for General Motors to forfeit the tax incentives provided to qualified benefit plans as it would be for a state to forfeit federal grants under Medicaid. n330 Commentators are in universal agreement that the elimination of the tax subsidy for qualified pension and health care plans would have a significant effect on the sponsorship of those plans, particularly of pension plans. n331

Similarly, ACIR believes that "bait and switch" programs constitute mandates. n332 The theory is that by providing incentives, such as funding or low levels of regulation, federal legislation baits lower governmental units into taking part in programs they otherwise would not join. n333 Once the cities or states have devoted **[*254]** resources to the program and terminated their own parallel programs, Congress decreases the funding or increases the regulatory burden associated with the program. n334 At that point, the cities or states are locked into participating. n335

Compare the plan content regulation imposed through the mechanism of the nondiscrimination requirements. n336 Regulatory changes imposed after TRA '86 significantly increased the potential burdens of complying with the I.R.C.'s nondiscrimination requirement. n337 A number of caps, such as the ones on includable compensation, on permitted benefits, and on maximum funding, reduce the incentives for employers to sponsor qualified benefit plans. n338 Arguably, by offering generous tax incentives to employers for voluntarily establishing employee benefit plans, and then later increasing the regulatory burden and decreasing the value of the tax incentives, Congress has baited and switched employers. Thus, the switch leaves affected employers with little choice but to continue offering the plans--in effect, imposing a mandate on employers. n339

Another argument that the benefits-related tax regulation creates an unfunded mandate relies on ACIR's view that a variety of tax policy provisions constitute unfunded intergovernmental mandates. If a benefit plan fails to comply with the extensive plan content regulations that impose minimum plan terms, n340 the plan forfeits the valuable tax incentives and is far more costly for the employer to sponsor. Thus, the tax regulation directly affects the financial status of plans. This is similar to the way in which federal **[*255]** deductibility of state and local taxes affects the financial status of those subordinate governmental entities.

Finally, the application of the policy-effects argument to benefit plan regulation is similar to that just discussed with respect to tax policy. If federal policies with incidental and implied financial impacts on subordinate governmental actors constitute unfunded mandates, then terminology and instinct could lead one to believe that plan content regulation imposes unfunded mandates on private employers. After all, Part III of this Article easily supports the argument that the array of regulation, from REA to COBRA, "imposes additional financial burdens on [private employers and the benefit plans they sponsor.]" n341

Therefore, there are a variety of ways in which the tax incentives for benefit plan sponsorship give rise to circumstances that ACIR would categorize as an unfunded mandate, where the mandate arises as a result of regulation applied to subordinate governmental entities. Yet, under the Adler test, which requires that a regulatory action must impose a legal duty to obey, none of the intergovernmental regulations displaying these effects would constitute mandates. Similarly, the noncompulsory nature of the tax regulation in the benefits area is inconsistent with his belief that mandates only exist where legislation imposes a legal duty to take action. The real question then is the extent to which the parallels between the effects of plan content regulation and intergovernmental regulation, which are highlighted by the ACIR categorizations, actually provide principled reasons for treating plan content regulation of employee benefit plans as unfunded mandates.

First, return to the basic definition of an unfunded intergovernmental mandate used by ACIR. That definition includes any federal action that increases the financial burdens on subordinate governments or limits their sources of revenue. n342 And, it is only that very broad definition that permits the sweep of the three later categorizations. Perhaps such a broad definition makes sense for intergovernmental regulation where the real argument is between unfunded or partially funded regulation on the one hand and fully funded **[*256]** regulation on the other. n343 But when applied to private sector employee benefits legislation, the definition has no such limiting effect. All such private sector regulation, whether at the benefit level or the plan level, imposes financial burdens on employers and the benefit plans they sponsor. The definition fails to limit in any way the subset of regulation to which it applies. The concept of what is an unfunded mandate becomes coextensive with the concept of governmental regulation, and viewing benefits regulation as an unfunded mandate adds nothing new to the equation. If one argues that unfunded mandates in the benefits arena are normatively problematic, the argument seems almost Epsteinian in its breadth. n344 If there is a specific subset of plan content regulation that shares the problematic characteristics of unfunded intergovernmental mandates, a far more finely tuned definition than that of ACIR is required to identify that particular subset.

But, in the end, the most compelling argument against viewing the federal tax subsidy as an unfunded mandate is a practical argument. Every basic definition of an unfunded intergovernmental mandate, even the ACIR definition, encompasses only regulation that "imposes *additional financial burdens on states and localities*." n345 It is those cost burdens that gave rise to the vehement objections to unfunded intergovernmental mandates expressed by leaders of the burdened governmental units. n346 Commentators have criticized UMRA and the entire unfunded mandates debate on the basis of some data that indicate federal mandates do not impose net costs on subordinate governmental units. n347 Similarly, in the benefits arena, it would turn the concept of an unfunded mandate on its head to suggest that tax incentives, which lower the cost of providing employee benefit plans, constitute unfunded mandates.

3. The Compliance and Implementation Approach. Writing in the context of environmental regulation, Professor Dana takes quite **[*257]** a different approach to the question of what constitutes an unfunded mandate. He focuses on legislation that requires subordinate levels of government (1) to comply with minimum standards (compliance mandates) or (2) to implement federal regulatory programs (implementation mandates). n348 The distinction is useful in the environmental arena because it mirrors the approach taken recently by the Supreme Court in considering the constitutionality of federal directives. n349 According to Professor Dana's analysis, although unfunded federal compliance mandates probably are safe from a Tenth Amendment challenge, some unfunded implementation mandates may so impinge upon notions of federalism as to be unconstitutional. n350

Obviously, neither the concept of implementation legislation nor the constitutional analysis has any application to regulation of private sector employee benefit plans. n351 And, while benefits regulation does require plans to comply with minimum standards, the same can be said of nearly every regulation imposed on the private sector. Therefore, while Professor Dana's analysis may be useful in evaluating the constitutionality of intergovernmental regulation, it does not contribute to an understanding of which types of governmental regulation of the private sector should be considered unfunded mandates and which should not.

4. Conclusion. One way to approach the question of whether regulation of private sector benefit plans constitutes an unfunded mandate would be to look to one's instincts. But one's instincts **[*258]** might lead one to either end of the definitional spectrum. From one perspective, the vast array of regulatory provisions impose an equally vast array of requirements upon benefit plans. Benefit plans must meet all the terms of the I.R.C. in order to realize the advantage of the tax preferences granted to qualified benefit plans. And, nearly every employment-based plan that provides any type of benefits for a broad spectrum of employees must meet the standards set forth in Title I of ERISA. If "mandates" are burdensome requirements, then plans are reasonable in viewing ERISA and the I.R.C. as imposing mandates. Yet, while resort to the pejorative term, "mandate," to describe private sector regulation may be of rhetorical value to those who oppose all federal regulation, it adds nothing of substance to the debate.

On the other end of the spectrum, the notion of designating as mandates those regulatory requirements that incide upon the private sector seems downright silly. Almost by definition, regulation of nongovernmental actors imposes costs and requires or provides incentives for efforts those actors would prefer to avoid. Otherwise there would be little need for such legislation. Yet, outright dismissal of the premise that private sector regulation bears some similarity to unfunded intergovernmental mandates might be a bit hasty.

A more useful analytic approach, which I engaged in above, is to determine whether federal regulation of private sector benefit plans shares any of the characteristics of unfunded intergovernmental mandates. This analysis is complicated by the varied definitions offered by commentators. One sorting principle that has unique application in the benefits area, though, is the distinction between plan sponsorship regulation and plan content regulation. One may question the extent to which the analytical work regarding intergovernmental unfunded federal mandates should be extended to regulation of the private sector. n352 But the quality of plan sponsorship regulation as a mandate--an absolute requirement that employers offer benefit plans they otherwise might choose not to provide--is not terribly problematic. Yet, currently such regulation **[*259]** simply does not exist in either the health care or the pension field. Whenever such regulation has been proposed, it has been soundly defeated. n353

In contrast, the existing regulation of benefit plans incides at the benefit level. Part III categorized and critiqued much of that regulation, particularly as it has been expanded since the enactment of ERISA. As part of the critique, I demonstrated that regulation does impose significant compliance burdens and related costs upon private sector benefit plans. I also discussed the tax advantages that flow to qualified benefit plans. But in this section, I have shown that none of the characteristics of plan content regulation are similar enough to the problematic characteristics of regulation that imposes unfunded intergovernmental mandates to justify categorizing the two types of regulation together.

In sum, I have "taken the hat off" the rhetoric and evaluated the efforts directed at plan level and plan content regulation. My analysis reveals that the voluntary nature of plan sponsorship should act as a gating criteria for the definition of what constitutes an unfunded mandate. Thus, there simply is no principled definitional reason to treat benefit level requirements as unfunded mandates.

B. MANDATES AND "VOLUNTARY" PLAN SPONSORSHIP--THE TRUTH IS FALSE AND LOGIC LOST

This subpart begins by considering the political choice theory explanations for why unfunded intergovernmental mandates are enacted and the related normative objections to those mandates. I then evaluate whether the concepts developed in the unfunded mandates literature explain the existing patterns of benefit regulation.

1. The Standard Criticisms of Unfunded Mandates. As noted above, n354 commentators who are troubled by the structural problems **[*260]** they see in unfunded intergovernmental mandates tend to focus on two primary concerns. First, they worry about political accountability, or more precisely the lack thereof, of legislators who enact unfunded mandates. Second, they are troubled by the inefficiencies inherent in interfering with local preferences.

a. Political Accountability. The normative argument that legislators who enact unfunded mandates are not held politically accountable for the mandates depends upon the ability of legislators to separate the political benefits and costs of the legislation. With respect to the political benefits, public choice theory posits that federal legislators support unfunded mandates in response to the preferences of organized interest groups who stand to benefit from the mandates. n355 The interest groups recognize the responsiveness of the legislators and confer political benefits in return. n356 The break in the linkage between political costs and benefits exists because the enacting legislators do not have to raise taxes or cut other programs in order to fund the mandated program. Instead, that responsibility is left to the subordinate governmental entity that also is charged with implementation of the mandate. n357

On the cost side of the equation, public choice theory assumes that rank-and-file voters, who will bear a significant portion of the costs of the mandate, will not have the economic incentive to understand or to investigate the true source of the tax increase or the reduction in alternate programs used to fund the mandated program. n358 Instead, informational disparities between the interest group members and the rank-and-file voters cause the rank-and-file voters to hold representatives of the subordinate governmental entity responsible for the tax increase or program reduction. n359 In the end then, the federal legislators reap the political benefits of **[*261]** enacting the mandate, and, at the same time, avoid the political costs associated with funding the mandate. n360

If one accepts the implicit assumption that political accountability serves as a standard for determining the normative desirability of regulation, then the foregoing public choice model states a strong case against unfunded intergovernmental mandates. n361 The next question, though, is how the concepts apply in the benefits context. One might expect that when regulation imposes substantial costs upon the private sector, instead of upon uninformed rank-and-file voters, the private sector frequently would have sufficient incentive to inform itself about the costs associated with the regulation and engage in effective monitoring of political agents. This would preclude problems of political unaccountability.

In the benefits area, for example, one logical assumption to begin with is that benefit plans and sponsoring employers bear the costs of the types of regulation discussed in Part III. Consider first the situation of large employers, who are more likely to sponsor plans than are small employers. n362 It is reasonable to assume that those large employers have effective lobbyists and have both the ability and economic incentive to overcome any agency and informational problems. While small employers are less likely than large employers to sponsor benefit plans, the sheer number of small employers means they too constitute an important category of plan sponsors. n363 Even among small employers, though, one would expect to see effective lobbying through industry and other associations. Therefore, it is reasonable to believe that employers and plan representatives recognize the costs associated with regulation and hold enacting legislators politically accountable.

The patterns I identified in Part III, however, appear inconsistent with these expectations. Employers have been effective in avoiding plan sponsorship regulation. But, as I showed above, plan content **[*262]** regulation carries with it significant costs. Therefore, one would expect employers to oppose plan content regulation as well as plan sponsorship regulation. The problems of inefficiency, ineffectiveness, and even counter-productivity, which the commentators have identified, reinforce this expectation. The reality, though, is that extensive plan content regulation has been enacted on a regular basis. n364

One explanation for this dichotomy between the enactment of plan sponsorship regulation and plan content regulation, which is consistent with the political unaccountability explanation, lies with who ultimately bears the cost of regulation. And, the assumption that benefit plans and sponsoring employers bear the cost of plan content regulation is probably incorrect. Instead, it is likely that benefit plans and employers who sponsor plans bear a relatively small portion of the costs associated with plan content regulation. According to some studies, employers shift an average of more than eighty percent of the government-mandated benefit taxes to employees by reducing cash compensation. n365

Because of that cost shifting, it is useful to separately consider the effects of plan sponsorship regulation and plan content regulation. In the absence of plan sponsorship regulation, the scope of benefit plan offerings depends in significant part upon the extent to which employees wish to trade cash compensation for some form of deferred or other non-cash compensation. n366 Plan sponsorship regulation removes the element of choice from the employees. For example, assume the simplest case of a mandate requiring employers to provide coverage under a basic health care plan.

Employers have indicated, consistent with theorists' expectations, that they would shift a significant portion of the costs of such coverage to employees by reducing cash compensation or by decreasing or even **[*263]** terminating an employer-sponsored pension plan. n367 But when faced with expensive plan level mandates, such as the provision of basic health care coverage, employers may be unable to pass all of those costs on to workers. Alternatives are for the employers to absorb temporarily some or all of the costs, or to shift them to customers in the form of higher prices. Where the economics do not permit complete shifting of the costs, however, the final result may be a reduction in employment levels, especially among low-wage workers.

In essence, this is a variation of the argument that divides economists regarding the effect of increases in the minimum wage. On one side is the theory that raising the cost of low-wage, low-skilled workers results in reductions in the current employment of those workers, inhibits job growth in entry-level jobs, and causes employers to shift to more productive, higher skilled workers. n368 Controversy exists though because some empirical work contradicts the theory. The most contentious recent study is that conducted by economists David Card and Alan Krueger. n369 Though others have strongly criticized their methodology, Card and Krueger conclude that minimum wage increases do not negatively affect employment levels in any systematic way. n370 A similar controversy erupted during the national debate over President Clinton's proposed Health Security Act. While there was significant disagreement over the scope of the expected loss of jobs, economists seemed to be in general agreement that requiring employers to provide health care coverage would result in some decrease in employment. n371

[*264] Another possibility is that, because of the high costs associated with plan level mandates, employers might expect it to be far more difficult than in the context of incremental benefit regulation to pass the costs on to employees or customers or to absorb those costs even temporarily. Although given enough time employers may be successful in shifting the costs, the disruption in terms of adjustments in the composition of the workforce and other business relationships might be significant. Finally, when regulation incides at the benefit level, employers retain the right, should it become impossible to shift the cost burdens, to avoid the regulation altogether by terminating benefit plans or shifting to a type of plan subject to a lower level of regulation. n372 No such possibility exists with plan sponsorship regulation. Thus, employers probably have a far stronger interest in monitoring and objecting to legislation imposing plan sponsorship regulation as compared to plan content regulation.

In contrast, employers may have a much easier time shifting to employees the significant, but much lower, cost of incremental plan content regulation. Assume, for example, that an organized interest group desires enactment of a measure requiring employers to provide a certain benefit under voluntarily sponsored plans. Examples might include mental health benefits n373 in the health care area or a pre-retirement survivor annuity n374 in the pension area. One possible explanation for enactment of such requirements is that legislators enjoy the political benefits that flow from responding to the interest group. While one might expect the plans, employers, and interest groups to bear the costs associated with providing the required benefits, in actuality, the employees who participate in the regulated plans bear the costs.

[*265] As with the basic public choice model, it is reasonable to assume that significant informational disparities exist between the interest group and the broader employee population. Data indicates that employees do not even understand the basic terms of their employer-sponsored benefit plans. n375 It is rational then to postulate that employees generally do not recognize that they bear the costs, through reductions in wages or other benefits, of benefits enjoyed by small groups of their peers. n376 The result, of course, would be that federal legislators avoid political accountability by providing benefits to the organized interest group without being held responsible for the costs borne by the broad employee population.

REA's gender equity amendments offer an interesting opportunity to consider another application of this theory. First, REA's spousal annuity provisions, which might be viewed as requirements for and increased protection of benefits for non-employees, were justified on the basis that they recognized the economic value that employers and employees derive from domestic partnerships. n377 Even to the extent this is a valid justification, however, the gender **[*266]** equity provisions only require plans to recognize the economic value of a rather narrowly defined and socially favored subset of domestic partnerships--those represented by traditional marriages that have lasted at least one year, and, even then, only where the couple was married at the time the employee retired. n378 The provision of survivor benefits to unmarried partners, to newly married spouses, and to other survivors exists only if a plan sponsor chooses to include those benefits or if employees are willing and able to demand them. As such, perhaps REA does reflect a legislative response to an organized constituency where significant portions of the costs are spread in an indirect and unrecognized way among the general employee population. n379

Furthermore, to the extent that REA has had only limited success in addressing gender equity concerns among retired women, one also might argue that REA largely is a symbolic law, n380 and a costly one at that. Elderly women continue to suffer economic hardships during their retirement years in significantly greater numbers than elderly men. Yet, Congress can point to REA as evidence of its concern with issues of gender equity in employment and aging. Thus, Congress justifies inaction in addressing the underlying problems of gendered earning disparities among the employed and the relative lack of retirement planning options for women who do not participate in the paid workforce or who experience substantial breaks in employment. Finally, consider the cohort actually protected by REA--those relatively advantaged spouses who are married to someone with an employment-based retirement plan and who are wealthy enough to be able to elect lower current retirement benefits in exchange for survivor protection. By addressing the needs of that particular group through REA, Congress may effectively have silenced the less politically **[*267]** powerful cohorts who have no such access to private sector retirement benefits through a spouse and who continue to struggle against disparities in income and employment opportunity.

The political accountability arguments, then, offer one explanation for the divergence in success between benefit level and plan sponsorship regulation. Employers, who one would expect to have both the ability and the incentive to inform themselves about benefit plan regulation and to oppose it where it is contrary to their interests, arguably do just that. But they only have strong economic incentives to engage in this type of monitoring vis-a-vis plan sponsorship regulation. In contrast, employers are able to shift the costs associated with plan content regulation to their employees and have little or no incentive to monitor or oppose it. Thus, the very type of regulation for which legislators are least likely to avoid political accountability is the type of regulation that does not get enacted.

The final contribution of the political accountability analysis in terms of benefit plan regulation is in providing a potential explanation for the vagueness often found in the legislative enactments. Each of the substantive amendments discussed in Part III left interpretative problems to be resolved through time-consuming, frustrating, and costly litigation. It would be extraordinarily naive to think that statutory provisions could be drafted clearly enough to preclude all litigation. As noted above, n381 however, the benefits arena is one where Congress has explicitly chosen to write ambiguous legislation and to delegate significant responsibility for developing standards to administrative agencies. Critics charge that the agencies themselves have been slow to provide guidance and have avoided altogether some important and controversial questions. n382

Proffered explanations for such legislative behavior run the gamut from an intent to leave technical guidance to the expertise of administrative agencies n383 to the use of ambiguities to avoid political **[*268]** accountability. n384 In the benefits context, a desire to avoid political accountability may indeed be a factor that contributes to the pattern of ambiguity. Legislators might be able to satisfy the demands of an organized interest group by appearing to meet its needs through, for example, regulation requiring plans to permit terminated employees to continue their health care coverage for a period of time. By leaving ambiguities in the regulation, legislators may be able to increase the political benefits they receive from the interest group because interest group members may not realize that the provisions fail to meet some of their goals. n385 At the same time, the ambiguities might increase the informational disparities between the interest group and the broader employee population that ultimately bears the cost burden.

b. Imposition on Priorities. Another objection commentators bring to bear against unfunded mandates is that the unwanted requirements interfere with local preferences. n386 In the context of intergovernmental mandates, the dialogue reflects concerns with federalism by speaking in terms of the impairment of "the choice value of autonomy" n387 and a "regime of commandeering authority." n388 By imposing uniform national standards, an unfunded federal mandate both diverts resources from programs with stronger local support and reduces the variety of state-level programs. n389 In addition to impinging upon political autonomy, critics allege that unfunded mandates may decrease social welfare by displacing highly valued local programs with less-valued mandated programs. n390 Similarly, inefficiencies allegedly result because the federal legislators who enact mandates are not held accountable for **[*269]** the cost of the mandates, n391 and subordinate governments have little enthusiasm for implementing programs they view as having low priority. n392 These criticisms are undermined, though, to the extent that the mandates reflect the preferences of local constituencies. n393

Professor Zelinsky argues that the mandated programs do not reflect the priorities of lower governmental entities and their constituents. n394 If local support is strong enough to cause the lower governmental units voluntarily to provide the service in question, interest groups have no reason to seek relief at a higher governmental level. n395 A corollary of this reasoning is the admission that unfunded federally imposed programs only divert local resources if the subordinate governmental unit would not have provided the service in the absence of the mandate. n396 The effect of the mandate is superfluous n397 unless, by imposing threshold or administrative requirements not in accordance with local preferences, the mandate increases the cost of providing the service. n398

In comparison, regulation of private-sector benefit plans obviously does not implicate the expectations of political autonomy that flow from federalism. The dialogue about efficiency concerns might provide some insight into benefits regulation. In critiquing the argument that the lack of market constraints may permit the enactment of inefficient unfunded intergovernmental mandates, Professor Adler states that the "argument proves too much." n399 His **[*270]** view is that equivalent inefficiencies exist in any regulation imposed upon the private sector because such regulation is usually unfunded. n400 He concludes that the generality of the indictment means that the efficiency analysis has no particular power in explaining the problems associated with unfunded mandates except with respect to public funds spent on public goods and services. n401

Integrating the efficiency argument with the political accountability concerns, however, has some potential explanatory power for the observed normative problems with plan content regulation. In the absence of regulation, an employer would be expected to provide a benefit plan tailored to the preferences of its employees. As in the case of intergovernmental mandates, one can hardly imagine interest groups mobilizing to seek benefits already widely available from private sector plans. But, where the costs are shifted to employees in the form of reductions in other benefits, plan content regulation simply displaces benefits more highly valued by employees with less valued benefits. The inefficiencies that result from the imposition of mandates in place of employee priorities are those that Professor Adler recognizes as resulting from all unfunded regulation. n402 An absence of political accountability, however, may permit the imposition of additional inefficiencies.

Assume a legislator is confronted with an organized interest group that is seeking the extension of mental health benefits or a prohibition on exclusions based upon a pre-existing condition for maternity benefits. Based upon the expectations developed above, n403 the legislator may act opportunistically. She can capture the political benefit of responding to the interest group, and she will not bear any political costs because the financial burden of the regulation will fall on the broader employee population, who will not hold her accountable. The political accountability argument finds this outcome problematic because it results in regulation that may be inconsistent with notions of representative government.

[*271] At the same time, though, it is reasonable to posit that such regulation is more likely to be inefficient than regulation where effective monitoring of the political agents takes place. After all, the interest group has an incentive to maximize the scope of the desired coverage. But, because it expects to bear a relatively small proportion of the costs, the interest group has less incentive to monitor the substantive and administrative costs. Similarly, to the extent they expect to pass along the costs of benefit level mandates to the employees, employers and plan administrators have little incentive to monitor the efficiency of those mandates. The same informational disparities that prevent the general employee group from holding legislators politically accountable for plan content regulation also will prevent them from monitoring the efficiency of that regulation.

2. Alternative Explanations for Legislative Patterns. Not all scholars accept that unfunded intergovernmental mandates are structurally unsound. Some commentators question the public choice theory's expectations regarding monitoring and informational problems n404 as well as the notion that legislators will tend to act opportunistically. n405 After eliminating the factors that result in an absence of political accountability, these critics then offer alternative explanations for the enactment of unfunded intergovernmental mandates. This subpart examines the alternatives suggested by a commentator in the environmental arena and considers how those alternatives might translate into the arena of benefits regulation. It also suggests two other explanations for the observed legislative patterns in benefits regulation.

a. Environmental Regulation as a Model. Professor Dana offers three alternative explanations, all of which are consistent with political accountability, for the use of unfunded intergovernmental mandates. He argues that unfunded mandates may result from (1) differentials in resources and needs among subordinate governments, (2) the need to address both (i) the desire of interest groups for uniform standards and (ii) the preference of regulated entities to retain control in the regulated area, and (3) economic **[*272]** efficiencies that result from locating fiscal and implementation responsibility with a single actor. n406 The first argument is the one with the least obvious application to private sector regulation and I will leave it for last.

To begin with Professor Dana's second argument in the environmental arena, he claims that the demand for uniform national regulation tends to come from environmental groups. n407 In contrast, business entities prefer regulatory responsibility be located with subordinate governmental units that traditionally have been more responsive to the preferences of industry. n408 Professor Dana believes that unfunded mandates may reflect a compromise among the two preferences. n409

In comparison, for benefits regulation, the conflict is between federal regulation and private sector plan autonomy. Employees and plan beneficiaries can be expected to prefer national uniformity in the mandatory availability of benefits, such as health care coverage for those who have changed jobs, or in the entitlement of surviving spouses to preretirement surviving spouse annuities. The interests of employers, however, are congruent with employee interests only in part. Employers do exhibit a strong preference for federal regulation of benefit plans rather than state regulation. But the employers that sponsor regulated benefit plans also prefer to retain as much control as possible over the plans. This remains true even if one accepts the argument that plans and employers are able to pass along the costs of benefit level mandates, and thus, have a limited interest in monitoring the enactment of such regulation. Retention of decisionmaking power over nonmandatory plan terms may enable an employer to shape plan benefits or administration in a way that gives the employer a competitive advantage. More important, siting plan administration and basic decisionmaking at the employer level may be perceived by employers as critical to avoiding plan sponsorship regulation. Therefore, the existing structure of private sector benefit plan regulation might represent **[*273]** a reasonable compromise, consistent with political accountability, between interest groups seeking minimum plan terms through the enactment of plan content regulation and the desire of employers to avoid plan sponsorship regulation.

Even the substance of much of the existing plan content regulation might be explained by the simple notion of this sort of political compromise. Part III of this Article considered many of the amendments made to ERISA over the almost twenty-five years since its enactment. For each category of legislation, I showed that commentators have raised objections based on concerns with inefficiency, ineffectiveness, and even perverse effects. Public choice theorists might point to the consistency of these types of identified problems to support their claim that the legislative patterns result from political unaccountability, which in turn contributes to inefficiencies and related problems.

An alternative explanation, consistent with political accountability, for much of the legislation is a simple one. Amendments to ERISA have addressed important issues. REA's gender equity provisions are one good example, while, the health care coverage extensions and the excise taxes on reversions provide others. It is true that none of the statutory provisions operate perfectly or completely to solve the problems for which they are targeted. Careful commentators, however, can identify similar types of issues with almost any existing legislative provision. The complexity and tension inherent in a flexible benefit plan system make it particularly unlikely that any legislative provision will operate perfectly across all categories of plans, participants, and employers. Many of the complaints raised by commentators simply do not rise to a level that would force the conclusion that this legislation, which has been effective in enhancing gender equity, expanding access to health care, and protecting the integrity of plan assets, is attributable to a normatively undesirable system of political unaccountability. But, even to the extent that employers recognize ex ante that plan content regulation imposes inefficiencies, those employers may accept the regulation because of the risk of plan sponsorship regulation if the perceived problem goes unaddressed.

This leads to Professor Dana's third explanation, efficiency considerations, which also may aid in explaining the current **[*274]** structure of benefit plan regulation. Professor Skocpol has argued that the United States failed to develop European-style centralized social welfare programs because of a domestic skepticism over the ability of government to administer such programs efficiently. n410 In unfunded environmental mandates, Professor Dana argues that one would expect subordinate governmental units to utilize the most cost-effective method of administering mandates if they also have to raise the cost of funding the programs. n411 Similarly, one might expect benefit plans and employers to have a greater incentive and ability to implement benefit level mandates efficiently than if the federal government provided health care or pension coverage. Additionally, so long as regulation occurs only at the level of plan content and not at the sponsorship level, individual employers remain free to choose plan types that most effectively meet the needs of their particular workforce or to avoid plan sponsorship altogether. The robustness of this hypothesis, however, depends on the extent to which either the plans and employers bear the costs of inefficiencies or the employees effectively monitor the efficient operation of plans in providing benefits. n412

An alternative way in which regulation of plan terms may actually create efficiencies is the establishment of minimum contract terms. To the extent such regulation simply reflects the outcome the parties would have reached had they negotiated plan terms, regulation reduces the transaction costs associated with establishing a benefit plan. After all, the plan content regulation is imposed in the context of one of the most complex of all federal statutes. n413 Some portion of the complexity is due to the inherently reticulated nature of the plans themselves. Assume, for example, that each new pension plan participant individually had to negotiate all of the details of his benefit plans. Not only would the negotiation have to address the level of the employee's benefits, but also it **[*275]** would encompass all the related details, many of which are reflected in the discussion in Part III. To take a single example, a careful planner would consider whether his benefits would include preretirement survivor annuities and the opportunity to elect a similar annuity upon retirement. n414 In addition to the potential for perceived unfair differences in benefit terms, such detailed negotiations and documentation of the benefits could be expected to create significant transaction costs. n415

Similarly, nondiscrimination requirements may reduce the costs of transacting with newly hired employees or those newly eligible for plans, by making their participation automatic. To the extent disparities in bargaining power between employees and employers, or the repeat player status of employers, create concerns about adhesion contracts, regulation may be an efficient mechanism to set minimum standards. For example, even as originally enacted, ERISA set minimum standards in numerous areas such as plan vesting, accrual of benefits, and nonforfeiture. These areas of regulation tended to reflect perceived problems with the pre-ERISA plans where, for example, employers often had established such onerous vesting terms that few employees ever qualified for benefits. n416

Finally, to return to Professor Dana's first theory, he argues that the ability of wealthy and powerful states to shift costs to less fortunate states, the unequal effects from changes in federal program funding, and the differences in local needs may help to explain why unfunded intergovernmental mandates may occur even in a fully accountable political system. n417 Similarly, his theory that unfunded mandates represent the least costly regulatory alternative for some states is grounded upon the diversity among regulated subordinate governmental entities. n418 These explanations of why **[*276]** federal intergovernmental mandates are enacted also may have power in the context of private sector benefit plan regulation.

In theory, employers that sponsor benefit plans with generous terms might support legislation that requires competitors to offer equally costly plans. In that way, the employers with high benefits costs avoid the competitive disadvantage associated with their expensive benefit plans. In an efficient marketplace, however, those generous plans should reflect workers' preferences. Thus, the employers who sponsor the plans should gain a competitive advantage from them. If so, regulation not only would be unnecessary, it would be counter to the best interest of the employers who sponsor plans.

Professor Dana's diversity argument, however, is not without some power. As discussed above, significant informational problems mean that employees do not understand and do not appropriately value their benefit plans. n419 Thus, employers might seek benefit level legislation requiring competitors to sponsor plans with minimum terms equivalent to their plans. n420 More generally, legislation that prevents employers from acting opportunistically by defaulting on or evading benefit promises will operate to the benefit of employers that do not seek to act opportunistically or who face constraints, such as long-term relationships with their employees, against doing so.

b. Mandates and Raiders. There are two additional, but not unproblematic, explanations for some of the observable patterns in plan content regulation. Because of the tremendous value of the assets held in private sector benefit plans, the regulation of those plans offers a unique opportunity to utilize benefit plan regulation to meet short-term political demands.

First, the size of the tax expenditure associated with employer-sponsored benefit plans makes that expenditure a natural target for adjustment when the national debate focuses on deficit spending. In contrast to the powerful and successful lobbying efforts brought to bear each time someone raises the possibility of eliminating or **[*277]** capping the deduction for home mortgages, the regulatory pattern is one of frequent change in the benefit plan context. Evidence for this phenomenon can be seen in the repeated modifications made to the amount of includable compensation, n421 limitations on contributions and plan funding, n422 and other factors that determine the size of the tax expenditure. n423 The informational problems that prevent employees from understanding the detailed terms of their benefit plans also provide a reasonable explanation for this legislative pattern of adjusting the tax expenditure for reasons unrelated to national benefits policy. In this context, the informational problems may be exacerbated by the complexities of plan calculations and the delay in the effects experienced by plan participants. Unlike the premise undergirding the criticism of unfunded mandates, though, there is no specific interest group being served here, unless one counts the federal fisc as an interest group.

Second, at times legislators utilize benefit plan regulation to fund the costs of unrelated regulation. In one sense, this is just a more specific variant of the prior argument. But, in a subcategory of cases, the changes in plan content regulation are made to fund specific and unrelated programs rather than to achieve general changes in the level of the tax expenditure or federal deficit. By funding regulatory programs, Congress can avoid the application of UMRA to intergovernmental and other mandates. One method of funding other programs is to modify benefit program regulation to increase tax revenues or decrease anticipated federal expenditures, as occurred with the UCA amendments discussed above.

I began by asking whether the principles developed in the unfunded mandates literature could explain the existing patterns of benefit plan regulation. But a thorough and careful consideration of even the broadest definition of unfunded intergovernmental mandates shows that the problematic characteristics of those mandates do not exist in plan content regulation. I have identified **[*278]** numerous differences between benefit plan regulation and the types of unfunded intergovernmental mandates that gave rise to the scholarship. Obviously the controversy about whether unfunded intergovernmental mandates impinge upon federalism has no application to regulation of the private sector. Further, I have shown that explanations other than political unaccountability at least help to account for the observed legislative patterns.

V. LEGISLATIVE DECISIONMAKING--THE FOURTH DIMENSION CROSSED

One of the key issues Congress always confronts when it considers broad-based benefit reform is whether to continue the voluntary character of private sector plans. The opposition that employers brought to bear against proposed programs for universal health care and MUPS shows their interest in defeating future plan sponsorship mandates. One alternative that may be politically appealing to legislators is to retain the appearance of a voluntary system, and, at the same time, respond to employee interest groups by enacting additional plan content requirements. The patterns of legislation that followed the defeat of each MUPS and HSA arguably reflect such an approach. The question becomes whether evaluating new plan content regulation as a private-sector mandate and subjecting it to process constraints such as those in UMRA would increase the normative quality of that legislation.

The political forces leading the criticisms of unfunded private sector mandates make none of the distinctions drawn here but simply advocate an expansion of UMRA's applicability to the legislative consideration of what they call private sector mandates. Their concern is with ensuring that full information exists about the costs of mandates and that the cost information receives careful consideration. n424 Data support the need to be concerned with the costs of plan content regulation. Some research indicates that between 1981 and 1995, the administrative expenses of a mid-sized defined benefit plan increased from eight percent to thirty-three **[*279]** percent of total plan costs. n425 One particularly aggressive study by the PBGC showed that for every $ 1400 an employer spends to fund defined benefit plan benefits, the employer will incur $ 800 in administrative costs. n426 Other studies find far smaller effects. For example, a study by Hay Group estimated that administrative costs range from $ 68 per employee for plans covering ten thousand employees to $ 287 per employee for plans covering fifteen employees. n427

Regardless of the size of the burden associated with a specific regulatory proposal, though, given the complexities of benefit plans and the potential trade-offs among different types of cash compensation, one can reasonably question the ability of the CBO to identify and calculate the extent to which cost shifting will occur. More importantly, there are other policy criteria that should be used in evaluating plan content regulation. The CBO analysis mandated by UMRA does not require consideration of any criteria beyond an evaluation of the cost impact of the proposed regulation. Thus, because it may provide an illusion that appropriate scrutiny was given to proposed legislation, UMRA may cause affirmative harm by making it even less likely that decisionmakers will give appropriate consideration to other important criteria. Here, I identify three specific criteria that should be part of any legislative evaluation of employee benefit plan regulation.

A. DEVOLVING RESPONSIBILITY TO INDIVIDUALS

Evidence indicates that plan content regulation has caused a significant shift in responsibility from plan sponsors to individual plan participants and beneficiaries. The reallocation of responsibility from employers to employees derives from a significant change in the type of pension plans that employers choose to sponsor. In a trend that began during the 1970s n428 and has continued to the **[*280]** present, n429 employers, particularly small employers, have terminated defined benefit plans and instituted defined contribution plans as their primary pension plans. n430 Similarly, during the 1980s new and growing companies tended to provide defined contribution rather than defined benefit plans. n431 Others commentators have criticized this shift for various reasons, n432 but critics have not focused on the broad implications for individual responsibility. Defined contribution plans devolve responsibility to individuals in a multitude of ways. They typically permit employees to determine whether to participate in plans, n433 to set their own contribution levels, and to access plan assets before retirement. In addition, defined contribution plans typically shift the burden of investment decisionmaking from the plan, where it resides in defined benefit plans, to employees.

Some pension experts have speculated that structural changes in the economy might account for the change in employer preferences regarding the types of benefit plans they choose to sponsor. n434 Recent data, however, indicate that government regulation is more likely to be responsible, at least in substantial part, for this trend. n435 Professors Robert Clark and Ann McDermed have performed detailed empirical studies on employer sponsorship of qualified **[*281]** benefit plans. Their work indicates that regulatory changes constitute the primary causes for the shift in employer preferences from defined benefit plans to defined contribution plans. n436 A recent update of the Clark and McDermed analysis continued to find an increasing predilection on the part of employers to select defined contribution plans over defined benefit plans. n437

This increase in individual responsibility might be viewed, consistently with the discussion above of studies indicating that employees are likely to bear the ultimate burden of regulation, as one more indication that the costs of regulation ultimately incide upon employees. In addition, though, the increasing responsibility assigned to employees changes the dynamics of the tripartite system of retirement income support. By concurrently utilizing three sources of support--Social Security, individual saving, and private sector pension plans--the system is structured to divide responsibility for decisions on participation, contribution levels, the extent to which retirement funds may be alienated before retirement, and investment returns. As employers modify the types of plans and, thus, shift responsibility for these matters to employees, they alter the balance struck by the current system.

The ultimate effects of the trend to increased individual responsibility are unknown and must be left to empirical work. Some factors in defined benefit plans, such as increased portability of benefits, may enhance the retirement security of participants in those plans. It is reasonable to expect, however, that a decrease in the division of responsibility for retirement planning and investment return will increase the risk that some individual participants will be less financially prepared for retirement than they would have been under a more paternalistic system. For example, an individual may prefer present consumption during her working years over saving for retirement. Another individual may choose to participate in a **[*282]** defined contribution plan but may make poor investment decisions and, thus, accumulate little wealth in such a plan. n438

More subtle effects also may result. For example, defined contribution plans tend to resemble traditional savings accounts because they frequently give individuals the ability to decide whether and how much to contribute to such plans, the access to plan assets in limited circumstances even prior to retirement, the authority to determine how assets are invested, and the account valuations reported as a lump sum value. Defined benefit plans share none of these characteristics. Because the defined contribution plans so resemble traditional savings accounts, some individuals may view all of the assets in their savings accounts and employer-sponsored defined contribution plans as being fungible. This might be expected to lead risk takers to save less than they otherwise would, to give an illusory sense of well being to people who look at seemingly large lump sum values without an understanding of inflationary effects or the actual dollar amount needed to support a lengthy period of retirement, or to encourage people otherwise to confuse pension plans with short term savings vehicles.

The point is that governmental regulation has cumulative effects on benefit plan sponsorship and the allocation of responsibility for retirement planning. Regardless of the normative position one takes on the existing trends in plan sponsorship and the shift to individual responsibility, proposed regulation should be evaluated for the systemic effect it will have. A UMRA-style focus on the cost of proposed regulation is unlikely to incorporate these criteria. n439 **[*283]** And, by deflecting the attention of legislators from the systemic implications of regulation, a narrow, cost-based evaluation may in fact be counterproductive to the consideration of the complex policy issues inherent in plan content regulation. After all, the goal of highlighting the CBO's cost analysis of proposed legislation is to increase the attention paid to the costs associated with the specific piece of legislation at issue. The net result may be that legislators become even less likely to recognize the cumulative effect of incremental regulatory changes on the basic framework of retirement income support.

B. ASSET SUFFICIENCY

When Congress enacts plan content regulation to fund specific programs or to address general federal budgetary concerns, a special risk is posed to benefit plans. Further, as with the foregoing policy criteria, the CBO cost estimates simply do not provide any information regarding that risk. For example, when Congress modifies I.R.C. provisions in order to raise revenue, it is a given that a cost will be imposed upon private sector benefit plans. The CBO cost estimates of the private sector burden associated with the provision will reflect that cost. But, by looking to plan content regulation as a source of revenue in the first place, Congress has implicitly accepted the direct cost effect on the plans. Thus, the CBO estimate is not likely to act as any impediment to enactment of the proposed change.

Revenue raising provisions, however, are likely to have negative cumulative effects on plan sponsorship, as identified in the next criteria. After all, if the tax incentives that flow to plans are modified on a frequent basis, it becomes even more difficult than it already is for employees to value those plans. Frequent changes in provisions that affect the tax expenditure also create administrative burdens for the plans themselves and frustration for plan sponsors saddled with ever-changing, and often increasing, compliance requirements.

Plan content regulation enacted for the purpose of raising revenue also can be expected frequently to have implications for the types of plans an employer may choose to sponsor and for the **[*284]** allocation of individual responsibility. By modifying the limitation imposed on benefits that may be granted under a defined benefit plan, for example, Congress may effectively modify the incentives for sponsorship of defined benefit plans vis-a-vis defined contribution plans. More subtle changes, such as a change in the limitation on includable compensation, also might modify the incentives across plan types, depending upon the demographics of any given employer's workforce.

Finally, revenue-driven provisions create the specific risk that no consideration will be given to the relationship between the level of the cap or limitation being imposed and optimal replacement rates of income. After all, Social Security was intended to provide a basic benefit. But the expectation was that other components would contribute to retirement income and that together all sources of retirement income would aggregate to provide an appropriate level of support for retirees. The Presidential Commission that ultimately proposed MUPS advocated total replacement rate goals that ranged from fifty-one percent to seventy-nine percent, depending on pre-retirement wage rates. n440 More recent materials distributed in association with the National Summit on Retirement Savings indicate that replacement rates of between sixty and eighty percent are needed in order to maintain preretirement lifestyles. n441 Regardless of the specific target established, plan content regulation that sets caps and limitations on plan benefits, employer deductions, and plan contributions, with an eye only on the revenue effects of the regulation, ignores this most fundamental of long-term policy criteria. Of course there is no natural "best" level for the tax expenditure devoted to benefit plans and calculations of optimal levels can be expected to depend upon an array of changing priorities and circumstances. Two criticisms, however, can be made of the past pattern of regulation in this area. First, it is unclear whether legislators give any consideration to the effect the caps have on such long-term benefit policy concerns as the level of asset accumulation necessary to provide desired income replacement **[*285]** rates. n442 Second, repeated changes intended to affect the level of the tax expenditure impose burdens upon benefit plans by requiring plans to modify administrative mechanisms used to calculate such items as plan benefits, contributions, and funding requirements. These burdens ultimately may be shifted to employees in the form of lower cash or noncash compensation, may affect plan sponsorship levels, and may cause changes in the types of plans that employers choose to sponsor. If so, the enactment of these types of plan content regulation has serious implications for the entire system of retirement plan support. Furthermore, while the pattern of legislative tinkering with the factors that determine the benefits-related tax expenditure gives rise to concern, proposals for more sweeping change may reappear when the current federal budget surpluses end. During the early 1990s, the respected economist, Professor Alicia Munnell, went that next step and advocated not only the taxation of contributions and plan earnings but also the imposition of a one-time, fifteen percent tax on assets held by qualified plans. n443 Her ideas were widely criticized n444 and may not even reflect her current beliefs regarding the appropriate direction **[*286]** of tax policy. n445 Past proposals, however, may have paved the way for future change. n446

C. CUMULATIVE EFFECTS

Frequent modification of plan content regulation creates both costs and tensions within the structure of private sector employee benefit plans. The current system of voluntary plan sponsorship permits employers to curtail or eliminate benefit programs when the price tag for sponsorship becomes too high. And the cumulative costs of plan content regulation are two-fold. First, when plan content regulation requires plans to offer more extensive benefits, such as has occurred with HIPAA, NMHPA, and MHPA, the cost of providing benefits increases. Second, even if plan content regulation might superficially appear to decrease plan costs by limiting plan benefits, such as has occurred with some of the I.R.C. regulation, plans still face the expenses associated with plan amendments, administrative changes, and communicating modifications to employees. At some point, then, the imposition of regulation within such a system is likely to result in decreases in plan coverage. While legislative scrutiny of the direct and indirect costs associated with plan content regulation might recognize the first type of costs, it is unclear whether the second type of costs can accurately be estimated. And, to the extent that the effects of periodic modifications in plan content regulation are cumulative, rather than incremental, cost estimates that are limited to the terms of the proposal at issue will not include those cumulative costs.

The dangers posed by the cumulative costs of regulation exist whether or not one accepts the notion that employers are able to shift many costs of plan sponsorship to employees. To the extent that employers bear the costs of cumulative regulation, they may offset benefits in order to keep their overall compensation costs constant. Thus, at some point plan costs may escalate to the point **[*287]** where the sponsor decides to terminate the plan. If employers shift the cost of regulation to employees, those employees will experience a decrease in their overall compensation. During the floor debate on ERISA, one congressman asked whether the bill's regulation would cause constituents to raise the following question: "How come you helped us so much that now we have no [benefits] plan at all because our employer has decided he cannot afford it any longer under the new rules?" n447 Excessive incremental plan content regulation imposes the same risk.

In one narrow category of instances, highlighting the incremental cost of plan content regulation might avoid the enactment of problematic legislation. To go back to the legislative changes discussed above, if Congress had been aware of the incremental costs, the UCA provisions might have generated more controversy than actually occurred. Had the CBO agreed with private estimates that the costs of compliance imposed upon private sector benefit plans would be more than double the anticipated revenues from the UCA, n448 perhaps Congress would have sought another source of funding for the unemployment amendments. On the other hand, it still is possible that Congress would view the direct costs to benefit plans as a peripheral matter given that the main focus of the legislation was to fund extended unemployment benefits during an election year.

The UCA amendments are only representative of a class of regulation to the extent that Congress looked to benefit plan regulation as a source of revenue. The UCA's gross disparity between the administrative costs imposed upon plan sponsorship and the resulting revenue effect probably is unmatched. But, even where the revenue effect exceeds the administrative or other burden on plan sponsorship, looking only at the costs of the specific regulatory proposal under consideration ignores the cumulative costs of annual, or more frequent, legislative change.

Whatever the advantages of the changes in the rollover rules made as part of the UCA, the process of enacting ERISA amendments **[*288]** as a way of funding unrelated legislative programs poses threats similar to those identified in the foregoing discussion of asset security. When appended to unrelated and fast-track legislation, changes in plan content regulation may not receive the scrutiny necessary to avoid poor policy choices, especially given the complexity of ERISA, the issues associated with cumulative regulation, and the interrelationships with other components of the tripartite retirement system.

VI. CONCLUSION

Objections to unfunded private sector mandates appear to be increasing at a time when the issue of retirement security for the baby-boom generation also is entering the national consciousness. But plan content regulation shares no significant characteristics with unfunded intergovernmental mandates, and it was that category of regulation that gave notoriety to the term unfunded mandate. Nor do descriptions based upon concepts of political unaccountability provide particularly robust explanations for the existing patterns of benefit plan regulation. Instead, other explanations, consistent with political accountability, help explain the dichotomy between the success of plan content regulation and the consistent defeat of plan sponsorship regulation.

The complexity of benefit plans, the ability of parties to the employment bargain to trade off cash and non-cash compensation, and the voluntary nature of plan sponsorship all complicate the application of unfunded intergovernmental mandate concepts to benefit plan regulation. A narrow focus on the incremental costs of legislative proposals will not illuminate the most important effects of incremental regulation. Regulatory patterns already appear to have caused, or at least have contributed to, a change in employer preferences in the types of benefit plans they choose to sponsor. The result is a significant shift in responsibility for retirement planning, a shift that dramatically modifies the traditional dynamics of the tripartite structure of the domestic system for providing retirement income support.

At the same time, in a trend that is inconsistent with the development of a cohesive long-term national benefits policy, the **[*289]** trillions of dollars held as retirement plan assets and the billions of dollars devoted annually to the tax support of private sector retirement plans, have led to frequent legislative tinkering with the tax rules that govern plans. Further tinkering has nothing at all to do with considerations such as appropriate post-retirement income replacement rates that would contribute to an effective and cohesive long-term national benefits policy. In addition, the cumulative effects of plan content regulation may negatively affect levels of plan sponsorship and the benefits provided by plans where voluntary sponsorship is maintained.

Evaluation of future benefit plan regulation should not focus on simplified cost estimates of incremental legislative proposals. Appropriate analysis, instead, should take into account the complexities posed by the distinctions between plan sponsorship regulation and plan content regulation, the voluntary nature of plan sponsorship, and the role of private sector plans as one of the three components of the tripartite system of retirement support. Only by ensuring that the regulatory structure supports cohesive and long-term policy goals will we avoid the risk of YUPPIES and other baby boomers spending their golden years as GUPPIES.

Legal Topics:

For related research and practice materials, see the following legal topics:
Pensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Plan AmendmentWorkers' Compensation & SSDISocial Security Disability InsuranceBurdens of ProofClaimants

FOOTNOTES:

n1 YUPPIES: Young Urban Professional Persons. WEBSTER'S NEW WORLD DICTIONARY & THESAURUS 716 (Michael Agnes ed., 1996).

n2 GUPPIES: Grossly Under Prepared Persons. The acronym is one I created and is meant to reflect the baby boomers' failure to adequately prepare for their retirement. Other variations have been suggested, including Green Urban Professionals, children of YUPPIES, Greedy Upwardly Mobile Professionals, Greying Urban Professionals, Gay Urban Professionals, Grown-Up Professionals, Genuine Upfront Persons Interested in Extramarital Sex, and Geriatric Urban Professionals. And, this author's personal favorite, the term also is used to refer to novice SCUBA divers. Given, however, that none of these usages have entered the popular lexicon or even gained a listing in Webster's, I offer "Grossly Under Prepared Persons."

n3 RUSH, *The Twilight Zone, on* 2112 (Mercury Records 1976).

n4 LOUISE B. RUSSELL, THE BABY BOOM GENERATION AND THE ECONOMY 1 (1982) (noting that typical definition of baby-boom generation includes those born between 1946 and 1964). Many demographers consider the baby-boom generation to be the largest demographic group in the United States, though universal agreement does not exist on this point. *Compare id.* at 2 (noting boomers outnumber other population subgroups categorized by age) *with* NEIL HOWE & WILLIAM STRAUSS, GENERATIONS: THE HISTORY OF AMERICA'S FUTURE 36, 395-96 (1991) (arguing that generational counting method is more accurate and that those born between 1961 and 1981 outnumber those born between 1943 and 1960).

n5 *Demographic Changes in the United States: The Economic and Social Consequences into the 21st Century: Hearings Before the Subcomm. on Econ. Resources, Competitiveness and Sec. Econ. of the Joint Econ. Comm.*, 99th Cong. 22-40 (1986) (statement of John G. Keane, Director, Bureau of the Census); *see also* J. WALKER SMITH & ANN CLURMAN, ROCKING THE AGES 45 (1997) ("Boomers are the generational cohort active in the consumer marketplace today *that grew up with the expectations, life skills, and values created by the unbridled economic growth of their formative years*." (emphasis added)); Shari Caudron, *Boomers Rock the System*, WORKFORCE, Dec. 1997, at 42 ("Thanks to the sheer number of them, baby boomers have profoundly affected American life at every step along the age continuum."); Matthew Miller, *Rebuilding Retirement: A Dramatic Shift in Generational Politics Sets the Stage for Major Social Security Changes*, U.S. NEWS & WORLD REP., Apr. 20, 1998, at 20, 22 ("The baby boom . . . has bent American culture and politics to its concerns through every phase of life.").

n6 *Learning from European Pension Plan Revisions: Hearings Before the Senate Budget Comm.*, 105th Cong. 9-10 (1997) (statement of Richard C. Leone, President, Twentieth Century Fund) (listing effects of baby boomers on school systems, culture, and labor market); *Workers of Baby-Boom Generation Approach Most*

Productive Years, New Study Reports, 3 Daily Lab. Rep. (BNA), at A-5 (Jan. 6, 1992) (noting that large numbers of baby boomers seeking employment may have increased jobless rates during 1970s).

n7 Estimates of the scope of the costs vary widely. On the high side, one governmental commission stated that after taking into account the costs of Social Security, Medicare, and other retirement programs, "there will not be one cent left over for education, children's programs, highways, national defense or any other discretionary program." CRAIG S. KARPEL, THE RETIREMENT MYTH 7-8 (1995).

n8 GARY HENDRICKS, AMERICAN ACADEMY OF ACTUARIES, FINANCING THE RETIREMENT OF FUTURE GENERATIONS 10-13, 20-21 (1998).

n9 *See* discussion *infra* Parts III.B, III.C (detailing debate about whether employers should be required to provide benefits to employees).

n10 *See* discussion *infra* Parts III.B, III.C (discussing proposed legislation mandating employer sponsorship of pension plans and health care plans).

n11 Employee Retirement Income Security Act (ERISA) of 1974 §§ 1-4402, *29 U.S.C. §§ 1001*-1461 (1994).

n12 *See infra* note 72 (citing incremental legislation that has amended ERISA).

n13 *See* Angela Antonelli, *Regulation: Demanding Accountability and Common Sense*, HERITAGE FOUNDATION REP. (1998) (referring to "the stealth implementation of Clinton-Care").

n14 *See infra* text accompanying notes 37-39 (discussing political opposition to unfunded intergovernmental mandates).

n15 David A. Dana, *The Case for Unfunded Environmental Mandates*, *69 S. CAL. L. REV. 1, 1 (1995).*

n16 Eileen M. Luna, Note, *The Impact of the Unfunded Mandates Reform Act of 1995 on Tribal Governments*, *22 AM. INDIAN L. REV. 445, 445-46 (1998).*

n17 *See* Rena I. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?*, *81 MINN. L. REV. 97, 99 (1996)* (recognizing that unfunded mandates debate has application for intergovernmental division of responsibility for social programs).

n18 *Id. at 98-100.*

n19 Unfunded Mandates Reform Act (UMRA) of 1995, Pub. L. No. 104-4, *109 Stat. 48* (codified as amended in scattered sections of 2 U.S.C.).

n20 *See, e.g.*, Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, *50 VAND. L. REV. 1137 (1997)* (critiquing fiscal, legal, and policy arguments against federal mandates); Daniel H. Cole & Carol S. Comer, *Rhetoric, Reality, and the Law of Unfunded Federal Mandates*, *8 STAN. L. & POL'Y REV. 103 (1997)* (criticizing position that federal mandates are imposing net costs on state and local governments); Dana, *supra* note 15 (developing arguments in favor of unfunded federal mandates); Steinzor, *supra* note 17 (suggesting UMRA and other procedural solutions will be unsuccessful in resolving problems); Edward A. Zelinsky, *Un-*

funded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services, 46 VAND. L. REV. 1355 (1993) [hereinafter Zelinsky, *Unfunded Mandates*] (concluding that unfunded mandates raise basic structural issues about the nature of government); Edward A. Zelinsky, *The Unsolved Problem of the Unfunded Mandate, 23 OHIO N.U. L. REV. 741 (1997)* [hereinafter Zelinsky, *The Unsolved Problem*] (arguing that underlying factors surrounding problem of unfunded mandates remain intact); Makram B. Jaber, Note, *Unfunded Federal Mandates: An Issue of Federalism or a "Brilliant Sound Bite"?, 45 EMORY L.J. 281 (1996)* (suggesting outright prohibition on unfunded mandates would be undesirable); Susan E. Leckrone, Note, *Turning Back the Clock: The Unfunded Mandates Reform Act of 1995 and Its Effective Repeal of Environmental Legislation, 71 IND. L.J. 1029 (1996)* (arguing that UMRA should not apply to environmental regulations); Luna, *supra* note 16 (advocating enactment of UMRA can be helpful in Indian nations' argument against assertion of federal plenary power); Paul S. Weiland, Note, *Unfunded Environmental Mandates: Causes, Burdens, and Benefits, 22 HARV. ENVTL. L. REV. 283 (1998)* (exploring causes, burdens, and benefits of unfunded environmental mandates and evolution of environmental protection).

n21 Zelinsky, *The Unsolved Problem, supra* note 20, at 742.

n22 Adler, *supra* note 20, at 1254-55; *see also* Dana, *supra* note 15, at 45 (concluding that unfunded mandates serve useful purposes and should not be unduly restricted).

n23 Cole & Comer, *supra* note 20, at 104.

n24 Professor Steinzor recognizes the potential importance of the unfunded mandates question as applied to the private sector but promptly sets aside the question as beyond the scope of her article, which concentrates on establishing sorting principles for allocating regulatory responsibility among various levels of government. Steinzor, *supra* note 17, at 133 n.118.

n25 *See, e.g., infra* text accompanying note 189 (comparing cost burdens imposed upon retirement plan assets).

n26 *See infra* note 72 (listing regulatory amendments to ERISA since its 1974 enactment).

n27 In fact, in June 1998, the President and congressional leadership convened the first of three national summits on retirement savings. One of the goals of the summit was "to advance the public's knowledge and understanding of retirement savings and its critical importance to the future well-being of American workers and their families . . . ." Savings are Vital to Everyone's Retirement Act of 1997, Pub. L. No. 105-92, § 2(b)(1), *111 Stat. 2139* (codified at *29 U.S.C. § 1001* (1994)). I was a delegate to the 1998 summit and am grateful for all of the information and inspiration provided by the dialogue, addresses, and working-group meetings. *See Fawell Calls on Clinton to Form National Retirement Summit*, 24 Pens. & Ben. Rep. (BNA), at 424 (Feb. 17, 1997) (quoting Rep. Harris W. Fawell as stating "with the coming retirement of baby boomers, we face a demographic time bomb that is going to explode and hurt a lot of people if we do not begin defusing it now").

n28 *E.g.*, KAREN FERGUSON & KATE BLACKWELL, PENSIONS IN CRISIS x (1995) ("A crisis is before us. It is time to confront and overcome it."); KARPEL, *supra* note 7, at 171 ("We are about to see the decline and fall of the Retirement State.").

n29 American Association of Retired People, *Statement of John Rother, AARP Director of Legislation and Public Policy on the Social Security Trustees' Report* (visited Oct. 26, 1999) <http://www.aarp.org/whatnew/statements/st050198.html>; AFL-CIO, *The Future of Social Security* (visited Oct. 13, 1999) <http://www.aflcio.org/publ/estatements/feb99/cssocial.html>; The Concord Coalition, *Latest Social Security Trustees Report Highlights Urgent Need for Reform* (visited Oct. 25, 1999) <http://www.concordcoalition.org/news/releases/980428_trustrep.html>.

n30 Given the burdens expected to be imposed by the baby-boom generation, the continuing viability of the Social Security program has been the subject of extensive concern, commentary, and proposals for reform. *E.g.*, C. EUGENE STEURELE & JON M. BAKIJA, RETOOLING SOCIAL SECURITY FOR THE 21ST CENTURY: RIGHT AND WRONG APPROACHES TO REFORM (1994); William G. Dauster, *Protecting Social Security and Medicare, 33 HARV. J. ON LEGIS. 461 (1996)* (discussing in detail efforts to protect Social Security). This Article generally uses the term "Social Security" in its popular sense, as referring to the federally sponsored post-retirement income program. Most inclusively, Social Security is known as the Federal Old Age, Survivors, Disability and Hospital Insurance Program (OASDHI). The non-Medicare portion is codified at *42 U.S.C. §§ 401*-432, and the Medicare portion is at *42 U.S.C. §§ 1395*-1396v. The Social Security Act of 1935 was a key component of the New Deal legislative agenda. For a general history of the Social Security program, see Wilbur J. Cohen, *The Development of the Social Security Act of 1935: Reflection Some Fifty Years Later, 68 MINN. L. REV. 379, 379-83 (1983).*

n31 For a discussion of the role of private sector pension plans in supporting the retirement prospects of baby boomers, see, e.g., HENDRICKS, *supra* note 8, at 22-25. For a discussion of the role private sector health care plans play in covering retired workers, see *id.* at 20-21. *See also* Arti Kaur Rai, *Rationing Through Choice: A New Approach to Cost-Effectiveness Analysis in Health Care, 72 IND. L.J. 1015, 1015 n.1 (1997)* (noting established belief that United States could devote 100% of its Gross National Product to beneficial health care interventions).

n32 The average percentage of personal savings as a factor of disposable personal income is very low, at least if one excludes housing wealth from the statistics. Furthermore, data from both the Commerce Department and the Federal Reserve show that personal savings rates have been dropping steadily over the past fifteen years, even as baby boomers have entered their peak earnings and savings years. CHRISTOPHER CONTE, THE NATIONAL SUMMIT ON RETIREMENT SAVINGS 10-11 (1998); HENDRICKS, *supra* note 8, at 16.

n33 *See* CONTE, *supra* note 32, at 8 (noting that participants in focus groups sponsored by the Department of Labor represented "a public that is troubled and hungry for reliable information, but unsure where to seek help").

n34 Scarlet O'Hara's famous last lines actually were: "Tomorrow, I'll think of some way to get him back. After all, tomorrow is another day." MARGARET MITCHELL, GONE WITH THE WIND 1037 (MacMillan 1964) (1936).

n35 *See supra* note 1 (defining YUPPIES).

n36 *See supra* note 2 (defining GUPPIES).

n37 Dana, *supra* note 15, at 1.

n38 Zelinsky, *Unfunded Mandates, supra* note 20, at 1356.

n39 Jaber, *supra* note 20, at 28.

n40 A separate line of argument used to attack unfunded intergovernmental mandates is grounded in the Tenth Amendment and any limitations inherent in the federal commerce and spending powers. Adler, *supra* note 20, at 1193-1231; Dana, *supra* note 15, at 7-10; Zelinsky, *Unfunded Mandates, supra* note 20, at 1411-14; Jaber, *supra* note 20, at 298-321; *see also* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?, 95 COLUM. L. REV. 1001, 1008-22 (1995)* (discussing history of congressional commandeering). Because this Article focuses on private sector regulation, I do no more than note those constitutional objections.

n41 Zelinsky, *The Unsolved Problem, supra* note 20, at 742.

n42 *See, e.g., id.* at 747-54 (giving examples of asymmetrical information problem).

n43 *See id.* at 744-45 (presenting discrepancy between large, well-organized interest groups and rank-and-file voters).

n44 *See* Adler, *supra* note 20, at 1232-44 (discussing negative implications of unfunded federal mandates on state and local autonomy and political accountability).

n45 Zelinsky, *The Unsolved Problem, supra* note 20, at 745.

n46 *Id.* at 745-46.

n47 Jaber, *supra* note 20, at 296.

n48 Dana, *supra* note 15, at 25-37.

n49 *Id.* at 38-45.

n50 Adler, *supra* note 20, at 1152.

n51 *2 U.S.C. § 658b*(a) (Supp. 1997). Section 658(5) defines what constitutes a "Federal intergovernmental mandate." Further, sections 658(6) and (7) read:

> (6) Federal mandate
>
> The term "Federal mandate" means a Federal intergovernmental mandate or a Federal private sector mandate, as defined in paragraphs (5) and (7).
>
> (7) Federal private sector mandate
>
> The term "Federal private sector mandate" means any provision in legislation, statute, or regulation that--
>
> (A) would impose an enforceable duty upon the private sector except--
>
> (i) a condition of Federal assistance; or
> (ii) a duty arising from participation in a voluntary
>
> Federal program; or
>
> (B) would reduce or eliminate the amount of authorization of appropriations for Federal financial assistance that will be provided to the private sector for the purposes of ensuring compliance with such duty.

Id. § 658(6)-(7).

n52 *Id.* § 658. UMRA excludes from its coverage regulation that (1) compels recognition of individuals' constitutional rights, (2) prohibits discrimination against currently protected categories of individuals, (3) establishes auditing procedures for receipt of federal funds, (4) allocates specified emergency aid, (5) is required for national security or treaty commitments, (6) involves certain designated emergency legislation, or (7) relates to OASDI. *Id.* § 658a.

n53 *Id.* § 658d.

n54 *Id.* § 1532.

n55 Zelinsky, *The Unsolved Problem, supra* note 20, at 772.

n56 Adler, *supra* note 20, at 1152.

n57 *Id.* at 1152-53.

n58 *Id.* at 1153 n.58. For a brief but reasonably thorough explanation of UMRA, see Recent Legislation, *Federalism--Intergovernmental Relations--Congress Requires a Separate, Recorded Vote for Any Provision Establishing an Unfunded Mandate, 109 HARV. L. REV. 1469 (1996).*

n59 *2 U.S.C. § 658c*(b)(1) (Supp. 1997).

n60 *Id.* § 658b(c).

n61 *Id.* § 1532(a).

n62 *Compare id.* § 658c(a)(1) (establishing threshold of $ 50 million) *with id.* § 658c(b)(1) (establishing threshold of $ 100 million).

n63 *Id.* § 658d(a)(2).

n64 Zelinsky, *The Unsolved Problem, supra* note 20, at 780-81.

n65 Adler, *supra* note 20, at 1254-55; Dana, *supra* note 15, at 45.

n66 *See* Steinzor, *supra* note 17, at 133 n.118 (acknowledging potential importance of UMRA provisions as applied to private sector but setting them aside as beyond scope of Article); *see also* Adler, *supra* note 20, at 1246-47 (making only limited reference to private sector considerations); Cole & Comer, *supra* note 20, at 104, 112, 117 (noting factual application of UMRA to private sector mandates); Leckrone, *supra* note 20, at 1046-47 (including limited discussion of differential treatment of intergovernmental and private sector mandates).

n67 Senator Spencer Abraham (R-Mich.) and Representative Gary Condit (D-Cal.) were the sponsors of the Mandates Information Act of 1998. Editorial, *Abraham's Truth-in-Mandates Bill*, DET. NEWS, Mar. 31, 1997, at A10.

n68 *See, e.g., Antonelli, supra* note 13 (writing for Heritage Foundation).

n69 *Unfunded Mandates Reform: Hearings on S. 389 Before the Senate Comm. on Governmental Affairs*, 105th Cong. (1998) (statement of R. Bruce Josten, Executive Vice President, U.S. Chamber of Commerce).

n70 Mandates Information Act of 1999, H.R. 350, 106th Cong. (1999); Mandates Information Act of 1998, H.R. 3534, 105th Cong. (1998); *see also* S. 427, 106th Cong. (1999) (setting out proposed Senate version).

n71 Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, *94 Stat. 1208* (codified as amended in scattered sections of 29 U.S.C.).

n72 Balanced Budget Act of 1997, Pub. L. No. 105-33, §§ 5611-5613, *111 Stat. 647, 648* (codified as amended at *29 U.S.C. § 1169* (1994)); Taxpayer Relief Act of 1997, Pub. L. No. 105-134, §§ 1071(b), 1502(a), 1503(a)-(d), 1506(b)(2), 1521(b), (c)(2), (3)(B), 1524(a), 1601(d)(5), 1604(b)(2)(B), *111 Stat. 948, 1058, 1061, 1062, 1066, 1069-71, 1089, 1097* (codified as amended in scattered sections of 29 U.S.C.); Savings Are Vital to Everyone's Retirement Act of 1997, Pub. L. No. 105-92, §§ 3(a), 4(a), *111 Stat. 2139, 2141* (codified as amended at *29 U.S.C. §§ 1146*-1147); National Securities Markets Improvements Act of 1996, Pub. L. No. 104-290, § 308(b), *110 Stat. 3416, 3440* (codified as amended at *29 U.S.C. § 1002* (38)(B)); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 104-204, §§ 603(a), 702(a), (b), *110 Stat. 2874, 2944, 2947 (1996)* (implementing Newborns' and Mothers' Health Protection Act (NMHPA) of 1996 as Title VI and Mental Health Parity Act (MHPA) of 1996 as Title VII); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 381(a), *110 Stat. 2105, 2257* (codified as amended at *29 U.S.C. § 1169*(a)(2)(B)); Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. No. 104-191, §§ 101(a)-(f), 321(d)(2), 421(b), *110 Stat. 1936, 1939-1953, 2058, 2088* (codified as amended at *29 U.S.C. §§ 1181*-1183, 1191); Small Business Job Protection Act (SBJPA) of 1996, Pub. L. No. 104-188, §§ 1421(d)(1), (2), 1451(b), *110 Stat. 1755, 1799, 1815* (codified as amended at *29 U.S.C. §§ 1021,* 1055(c)); Uruguay Round Agreements Act (GATT), Pub. L. No. 103-465, §§ 750-78, *108 Stat. 4809, 5012-50 (1994)* (enacting Retirement Protection Act); Omnibus Budget Reconciliation Act (OBRA '93) of 1993, Pub. L. No. 103-66, *107 Stat. 312* (codified as amended in scattered sections of 29 U.S.C.); Unemployment Compensation Amendments (UCA) of 1992, Pub. L. No. 102-318, *106 Stat. 290;* Dire Emergency Supplemental Appropriations and Transfers for Relief from the Effects of Natural Disasters, for Other Urgent Needs, and for Incremental Cost of "Operation Desert Shield/Desert Storm" Act of 1992, Pub. L. No. 102-229, § 214, *105 Stat. 1701, 1718 (1991)* (codified as amended at *29 U.S.C. 1301*(a)(14)); Tax Extension Act of 1991, Pub. L. No. 102-227, *105 Stat. 1686;* Rural Telephone Cooperative Associations ERISA Amendments Act of 1991, Pub. L. No. 102-89, §§ 2-3, *105 Stat. 446* (codified as amended at *29 U.S.C. § 1002*(40)); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 12002(b), 12012(a)-(e), *104 Stat. 1388, 1388-565* to 1388-566, 1388-571 to 1388-573 (codified as amended in scattered sections of 29 U.S.C.); Debt Limit Extension Act, Pub. L. No. 101-140, *103 Stat. 830 (1989);* Technical and Miscellaneous Revenue Act (TAMRA) of 1988, Pub. L. No. 100-647, § 3011(b)(6), *102 Stat. 3342, 3025* (codified as amended at *29 U.S.C. § 1167);* Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, §§ 9301-9346, *101 Stat. 1330-331* to 1330-374 (codified as amended in scattered sections of 29 U.S.C.); Tax Reform Act (TRA '86) of 1986, Pub. L. No. 99-514, §§ 1145(b), 1879(a)(1), (2), 1895(d)(1)-(9), 1898(a)(1)(b), 1898(b)-(j), *100 Stat. 2085, 2491, 2913, 2936-40, 2942, 2944-57* (codified as amended in scattered sections of 29 U.S.C.); Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9501, *100 Stat. 1874, 2075* (codified as amended in scattered sections of 29 U.S.C.); Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985, Pub. L. No. 99-272, *100 Stat. 82 (1986)* (codified as amended in scattered sections of 29 U.S.C.); Retirement Equity Act (REA) of 1984, Pub. L. No. 98-397, *98 Stat. 1426* (codified as amended in scattered sections of 29 U.S.C.); Deficit Reduction Act, Pub. L. No. 98-369, *98 Stat. 494 (1984)* (codified as amended in scattered sections of 29 U.S.C.); Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, *96 Stat. 324* (codified as amended in scattered sections 29 U.S.C.); Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, *95 Stat. 172* (codified as amended in scattered sections of 29 U.S.C.).

n73 *See* Dana M. Muir, *Contemporary Social Policy Analysis and Employee Benefit Programs: Boomers, Benefits, and Bargains, 54 WASH. & LEE L. REV. 1351, 1357-62 (1997)* (noting this divergence and utilizing the work of Professor Theda Skocpol to help explain reason for domestic reliance on employer-sponsored benefit plans).

n74 Commentators have identified a variety of factors explaining why private employers chose to fill these gaps in social welfare coverage. *See id. at 1360-62* (noting that demographic, sociological, and regulatory factors converged to explain this rapid growth).

n75 NATIONAL PLANNING ASSOCIATION, 82D CONG., PENSIONS IN THE UNITED STATES 11 (Jt. Comm. Print 1952). For a summary of the growth of pension plan sponsorship over time and factors contributing to that growth, see Muir, *supra* note 73, at 1360-62.

n76 *See* Muir, *supra* note 73, at 1362-64 (noting that sometimes courts saw elements of unilateral and bilateral contracts in plans developed and funded solely by employers).

n77 Welfare and Pension Plans Disclosure Act (WPPDA) of 1958, *72 Stat. 997, 997-1003, repealed by* ERISA § 111(a)(1), *29 U.S.C. § 1031* (1994).

n78 119 CONG. REC. 30,007 (1973) (statement of Sen. Ribicoff) (stating that some of his constituents had been left without pensions when their employers closed plants); 119 CONG. REC. 130 (1973) (statement of Sen. Williams) ("For too many years, workers have seen life-long dreams of retirement security disappear into thin air. The changes envisioned in this bill are long, long overdue.").

n79 120 CONG. REC. 29,932 (1974) (statement of Sen. Williams) (arguing that reporting and disclosure obligations provided too little protection from "such abuses as self-dealing, imprudent investing, and misappropriation of plan funds"); 120 CONG. REC. 4277 (1974) (statement of Rep. Perkins) ("In America today the loss of pension benefits, the frustration of workers' reasonable expectations, occurs in wholesale fashion. It happens because of breaches of faith and self-dealing on the part of fund trustees and administrators; because of bad investments on the part of managers of pension plans; and because of inadequate funding.").

n80 120 CONG. REC. 4446 (1974) (statement of Rep. Boland) (referring to two major plant closings in his district, both of which left underfunded pension plans).

n81 H.R. REP. NO. 93-779, at 52 (1974) ("As a general rule, employees do not acquire vested rights until they have been employed for a fairly long period with a firm or are relatively mature."), *reprinted in* STAFF OF SENATE SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUB. WELFARE, 94TH CONG., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 2641 (1976) [hereinafter HISTORY].

n82 *See, e.g.*, Dana M. Muir, *Plant Closings and ERISA's Noninterference Provision, 36 B.C.L. REV. 201, 203-04 (1995)* (discussing closing of Studebaker automotive plant and other events presaging enactment of ERISA).

n83 H.R. REP. NO. 93-533, at 2 (1974) (stating that one goal of ERISA was to "promote a renewed expansion of private retirement plans and increase the number of participants receiving private retirement benefits"), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4640; S. REP. NO. 93-383, at 1 (1973) (discussing that Congress hoped ERISA would "increase the number of individuals participating in retirement plans"), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4890; 119 CONG. REC. 30,006 (1973) (statement of Sen. Javits) (noting that "number [of workers covered by private pension plans] will be expanded by the provisions of [ERISA] to at least 10 to 20 million more"), *reprinted in* HISTORY, *supra* note 81, at 1606.

n84 Frank Cummings, 65 TAX NOTES, Nov. 14, 1994, at 880 ("ERISA was not designed to increase pension coverage.") (Mr. Cummings was chief of staff to Sen. Javits until 1972); *see also* G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, *68 TEX. L. REV. 509, 561 (1990)* (stating that ERISA may be a "special-interest law passed to subsidize one segment of the labor market--union workers in dying firms" (citing Richard A. Ippolito, *A Study of the Regulatory Effect of the Employee Retirement Income Security Act*, *31 J.L. & ECON. 85, 120 (1988))).* Mr. Cummings appears to agree with Professor Shell and Mr. Ippolito to the limited extent that Title IV of ERISA dealt with "the destruction or severe weakening of whole industries" but not necessarily with respect to the more generalized protective goals of the other Titles. Cummings, *supra*, at 881.

n85 *Lockhead Corp. v. Spink*, *517 U.S. 882, 887 (1996).*

n86 *Id.*

n87 *See infra* Parts III.B, III.C (discussing employer opposition to proposed legislation mandating sponsorship of pension and health care plans).

n88 HENDRICKS, *supra* note 8, at 10.

n89 Dana M. Muir, *Fiduciary Status as an Employer's Shield: The Perversity of ERISA Fiduciary Law*, U. PA. J. LAB. & EMPLOYMENT L. (forthcoming 1999) (manuscript at 14-20, on file with author).

n90 HENRY J. AARON ET AL., CAN AMERICA AFFORD TO GROW OLD? 19, 28 (1989); *see also* DENNIS E. LOGUE, LEGISLATIVE INFLUENCE ON CORPORATE PENSION PLANS 6-8 (1979) (detailing replacement ratios in 1970s).

n91 In this context, replacement rates refer to "the percentages of immediate preretirement earnings replaced by the Social Security benefit." William H. Simon, *Rights and Redistribution in the Welfare System*, *38 STAN. L. REV. 1431, 1457 n.65 (1986).*

n92 Public Debt Limitation, Pub. L. No. 92-336, § 202, *86 Stat. 406, 412 (1972)* (codified as amended at *42 U.S.C. § 415* (1994)).

n93 Social Security Amendments of 1977, Pub. L. No. 95-216, §§ 103(d), 201(a)-(g), *91 Stat. 1509, 1513-24* (codified as amended at *42 U.S.C. § 430).*

n94 119 CONG. REC. 130 (1973), *reprinted in* HISTORY, *supra* note 81, at 90.

n95 *Id.* at 91-92.

n96 *Id.* at 91.

n97 *See* 120 CONG. REC. 4295 (1974) (statement of Rep. Ullman, Chairman of the Ways and Means Committee) ("Generally, it would appear that the wider or more comprehensive the coverage, vesting, and funding, the more desirable it is from the standpoint of national policy. However, since these plans are voluntary on the part of the employer and both the institution of new pension plans and increases in benefits depend upon employer willingness to establish or expand a plan, it is necessary to take into account additional costs from the standpoint of the employer."), *reprinted in* HISTORY, *supra* note 81, at 3415; 120 CONG. REC. 4278 (1974) (statement of Rep. Perkins, Chairman of the Comm. on Educ. and Lab.) ("It has not been easy to draft a law which protects individual pension rights, and at the same time, recognizes the voluntary nature of pension plans."), *reprinted in* HISTORY, *supra* note 81, at 3369; 119 CONG. REC. 146 (1973) (statement of Sen. Javits) ("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."), *reprinted in* HISTORY, *supra* note 81, at 204; 119 CONG. REC. 130 (1973) (statement of Sen. Williams) (stating that Congress minimized "anticipated cost burdens to the plans" because higher costs would "work against the best interests of all parties"), *reprinted in* HISTORY, *supra* note 81, at 90.

n98 H.R. REP. NO. 93-533, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639.

n99 HISTORY, *supra* note 81, at 5321, 5322.

n100 *Id.*

n101 Spencer Rich, *All Employers Are Asked to Set Up Pension Plans*, WASH. POST, Feb. 27, 1981, at D1.

n102 PRESIDENT'S COMMISSION ON PENSION POLICY, COMING OF AGE: TOWARD A NATIONAL RETIREMENT INCOME POLICY 42-43 (1981) [hereinafter COMING OF AGE].

n103 *Id.* at 43.

n104 *Id.* at 42-43, 45; *see also* JOHN B. WILLIAMSON ET AL., AGING & PUBLIC POLICY: SOCIAL CONTROL OR SOCIAL JUSTICE? 85-87 (1985) (discussing MUPS and contrasting it with Swedish system of old-age support); Samuel C. Cantor, *Legislative and Judicial Developments in Pension Law*, *17 FORUM 166 (1981)* (explaining purpose of limitation on cash-outs above $ 500 was to retain plan assets for retirement purposes).

n105 *See, e.g.*, Cantor, *supra* note 104; *Pension Policy Group Recommends a "MUPS," 12 TAX NOTES 533, 533 (1981)* (noting enactment of commission's MUPS proposal "unlikely"); Rich, *supra* note 101 (recording negative positions of the U.S. Chamber of Commerce and National Association of Manufacturers); Merrill Sheils, *The Turmoil in Pension Plans*, NEWSWEEK, June 1, 1981, at 28, 34 (listing ideological conservatives, small business generally, National Small Business Association, and Citizens' Commission on Pension Policy as opponents of MUPS).

n106 H.R. 3396, 97th Cong. (1981) (proposing mandatory contribution of 4% calculated on Social Security wage base, vesting after one year, and institution of portability clearinghouse).

n107 Leon E. Irish, *Mending the Frayed Pension Safety Net*, CONN. L. TRIB., July 4, 1994, at 30; *see* Donald S. Grubbs Jr., *Solving the Coverage Problem Under Private Pension Plans*, 22 TAX MGMT. COMPENSATION PLAN. J. 82 (1994) (advocating institution of MUPS-style system) (Mr. Grubbs was a member of the President's Commission on Pension Policy); Vineeta Anand, *Mandatory System Gives Benefits to All*, PENSION & INVESTMENTS, Aug. 22, 1994, at 24 (discussing increasing pressure for universal pension coverage); *see also* Joseph Bankman, *Tax Policy and Retirement Income: Are Pension Plan Anti-Discrimination Provisions Desirable?, 55 U. CHI. L. REV. 790, 825-26 (1988)* (discussing support within scholarly community for MUPS).

n108 Pub. L. No. 98-397, *98 Stat. 1426.*

n109 *See MacKey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 838 (1988)* ("[REA] included several changes in ERISA which Congress felt were necessary to guarantee that the Nation's private retirement-income system provided fair treatment for women."); Camilla E. Watson, *The Pension Game: Age- and Gender-Based Inequities in the Retirement System, 25 GA. L. REV. 1, 31-40 (1990)* [hereinafter Watson, *The Pension Game*] (stating that REA greatly expanded rights of secondary recipients).

n110 An early version of the bill passed the House unanimously. CONG. Q., May 1984, at 48H; *see also* 129 CONG. REC. 34,353 (1983) (statement of Sen. Dole) ("I might say that [REA] has widespread support on both sides of the aisle. I know of no objection to the bill at all."). Both chambers passed the final Act by voice vote. 1983-84 Cong. Index (CCH) P34,526.

n111 Anne Moss, *Women's Pension Reform: Congress Inches Toward Equity, 19 U. MICH. J.L. REF. 165, 168-69 (1985).*

n112 David J. Guin, Note, *The Retirement Equity Act of 1984: One Step Forward, Two Steps Back, 37 ALA. L. REV. 163, 164-67 (1985).*

n113 This Article provides a very simplified summary of REA's provisions. For a detailed review of REA's requirements, see Thomas D. Terry & Carolyn E. Smith, *Guide to the Retirement Equity Act of 1984, 24 TAX NOTES 1195 (1984).*

n114 ERISA § 205, *29 U.S.C. § 1055* (1994); *I.R.C. § 401(a)(11)* (1994). Plans may charge participants for the cost of the pre-retirement survivor benefit. If a charge is imposed, participants have the right, with the consent of their spouses, to waive the benefit. *26 C.F.R. § 1.401(a)-20* Q&A-21 (1988).

n115 In an unsubsidized joint and survivor annuity, the benefit otherwise payable to the retiree is reduced by an actuarially appropriate amount. If the retiree pre-deceases the spouse, the spouse continues to receive a reduced benefit for the remainder of the spouse's lifetime. For more information on joint and survivor annuities and the detailed REA requirements, see STEPHEN R. BRUCE, PENSION CLAIMS: RIGHTS AND OBLIGATIONS 260-64 (2d ed. 1993).

n116 ERISA § 205, *29 U.S.C. § 1055; I.R.C. § 401(a)(11)*.

n117 ERISA § 202(a)(1)(A), *29 U.S.C. § 1052*(a)(1)(A); *I.R.C. § 410(a)(1)(A)*.

n118 ERISA § 203(b)(1)(A), *29 U.S.C. § 1053*(b)(1)(A); *I.R.C. § 411(a)(4)*.

n119 Moss, *supra* note 111, at 171.

n120 *See* ERISA § 203(b)(3)(D), *29 U.S.C. § 1053*(b)(3)(D); *I.R.C. § 411(b)(3)(D)* (establishing 5-year floor before rule of parity becomes applicable).

n121 Moss, *supra* note 111, at 172.

n122 JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 428-34 (2d ed. 1995).

n123 ERISA § 206(d)(3), *29 U.S.C. § 1056*(d)(3); *I.R.C. § 401(a)(13)(B)*. New requirements, enacted in 1993, require health care plans to provide coverage for participant's children even if the plan's own provisions would exclude the children from eligibility. ERISA § 609(a), *29 U.S.C. § 1169*(a).

n124 ERISA § 206(d)(3), *29 U.S.C. § 1056*(d)(3); *I.R.C. § 401(a)(13)(B)*.

n125 Moss, *supra* note 111, at 171-72; Camilla E. Watson, *Broken Promises Revisited: The Window of Vulnerability for Surviving Spouses Under ERISA*, *76 IOWA L. REV. 431, 435 (1991)* [hereinafter Watson, *Broken Promises*]; Watson, *The Pension Game, supra* note 109, at 2-3.

n126 In some cases it even operates to the detriment of female workers. For example, when the retiree-spouse is female, the difference in life expectancy between males and females may cause it to be in her best interest to elect a single-life annuity. The REA amendments prohibit her from doing so without her spouse's consent. Guin, *supra* note 112, at 176. This is of particular concern when the male spouse of a female retiree is absent or otherwise uncooperative both in providing support to the retiree and in waiving the joint and survivor annuity. Anna M. Rappaport, Improving the Financial Status of Elderly Women: Issues in Savings, Pension Plans and Social Security 12 (1998) (unpublished manuscript on file with author).

n127 It is incorrect to say that employers may deny annuities to a surviving spouse in a long-term marriage if the couple was married less than a year on the starting date of the employee's annuity. Watson, *Broken Promises*, *supra* note 125, at 494-95. In such a situation, the statute actually requires that the couple be treated as fulfilling the one-year requirement. ERISA § 205(f)(2), *29 U.S.C. § 1055*(f)(2); *I.R.C. § 417(d)(2)*. Also, ERISA does not prohibit plans from offering joint-and-survivor benefits to any individuals. Thus, plans may, at their option, provide joint-and-survivor benefits to retiring participants and their partners even though they are unmarried or have been married less than one year.

n128 There are at least two potential ways a plan might experience increased costs in such a situation. First, assume a participant in a defined benefit plan is very ill. If the participant dies while single and employed, the plan has no obligation to pay benefits. If the participant marries, and dies while still employed, the plan now has an obligation to pay a spousal annuity. Second, if the participant marries on day one, retires on day two, and dies on day three, there is cost to the plan. Without the marriage, there would have been no retirement at all and no survivor annuity. If the plan bears the direct costs of annuities (rather than purchasing them from an insurance company), the cost to the plan is the full cost of the annuity payments made over time to the deathbed spouse.

n129 Watson, *Broken Promises*, *supra* note 125, at 495-96.

n130 *Id.* at 497. The effect noted, however, is decreased by the requirement that certain marriages be treated as fulfilling the one-year requirement. *See supra* note 127 (detailing instances when couple fulfills one-year requirement).

n131 *I.R.C. § 411(a)(11)*.

n132 *See* Vicki Gottlich, *Retirement Equity Act Update*, CLEARINGHOUSE REV., Feb. 1988, at 1077, 1079-81 (indicating variations in state law perpetuating gender inequity); Sherwin P. Simmons, *The Quandary of the Plan Administrator in Light of* In re Hopkins Estate, *55 TAX NOTES 587, 588 (1991)* (criticizing case as contrary to mandates of REA); Watson, *The Pension Game, supra* note 109, at 35-36, 38-40 (arguing that treating retirement benefits as being earned by worker deprives family of benefits); Watson, *Broken Promises, supra* note 125, at 492-501 (detailing inequities of short-term coverage provision).

n133 *Compare Metropolitan Life Ins. Co. v. Wheaton, 42 F.3d 1080, 1084 (7th Cir. 1994)* (holding QDRO provisions apply to life insurance) *with United States v. Crysler, 66 F.3d 944, 948 (8th Cir. 1995)* (determining that QDRO provisions do not apply to life insurance).

n134 *See, e.g.,* Gottlich, *supra* note 132, at 1077, 1080-81 (indicating that courts have rejected valuation testimony). Of course, courts might be equally uncomfortable with actuarial testimony in a non-ERISA regime of asset distribution upon marital dissolution.

n135 *See Boggs v. Boggs, 520 U.S. 833, 835 (1997)* (determining that ERISA pre-empts state law claim brought by sons of decedent first spouse).

n136 *See In re Estate of Hopkins, 574 N.E.2d 230, 236-39 (Ill. App. Ct. 1991)* (holding that antenuptual agreement was valid although signor was not participant's spouse at time of signing).

n137 *See Donohue v. Shell Provident Fund, 656 F. Supp. 905, 908 (S.D. Tex. 1987)* (holding that beneficiary designations in favor of participant's children and grandchildren were ineffective where spouse did not sign waiver).

n138 A survey taken ten years after REA's enactment found that more than three-quarters of the pension plan administrators who participated in the survey described the QDRO requirements as "burdensome." *QDROs: Administrators Find it Burdensome to Deal with QDROs, IFEBP Survey Says*, Pens. & Ben. Daily (BNA), at D-17 (Sept. 9, 1994). Furthermore, twenty-six percent of the survey participants reported that between seventy-six and one hundred percent of the orders initially submitted to them fail to comply with the statutory requirements. *Id.*

n139 LANGBEIN & WOLK, *supra* note 122, at 550 (citing research finding that larger percentage of benefits were paid as joint and survivor annuities after REA than before).

n140 CONTE, *supra* note 32, at 15.

n141 Among employed individuals aged twenty-five years and older, in 1996 the median years of tenure with the current employer were 5.3 for men and 4.7 for women. The comparable median tenures for 1983 were 5.9 for men and 4.2 for women. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, LEAFLET NO. 97-25, EMPLOYEE TENURE IN THE MID-1990S tbl. 1 (1997).

n142 ERISA currently requires that pension plan benefits vest after a minimum of five years of service. Alternatively, plans may begin vesting benefits at the rate of twenty percent per year after three years of employment and continue vesting through the seventh year. ERISA § 203, *29 U.S.C. § 1053* (1994). The current standards require vesting more quickly than was required by ERISA as enacted in 1974.

n143 Moss, *supra* note 111, at 170-71 (listing women's tendency to change jobs more frequently than men as factor contributing to lower pension entitlement).

n144 BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPL. & EARNINGS 26, tbl. A-19 (1998).

n145 *See, e.g.*, KPMG, RETIREMENT BENEFITS IN THE 1990S: 1997 SURVEY DATA 17, 33 (1997) (finding retail and services to have among lowest defined benefit participation rates of 10 sectors surveyed and those sectors to have even lower participation rates for 401(k) plans).

n146 BUREAU OF LAB. STAT., U.S. DEP'T OF LABOR, EMPL. & EARNINGS 7, tbl. A-3 (Apr. 1998).

n147 *See Retirement Planning: Labor Secretary Unveils Campaign Targeting Women*, 23 Pens. & Ben. Rep. (BNA), at 1912 (Aug. 2, 1996) ("Of those retired women who do receive pension benefits other than Social Security, the average amount of their benefit is less than half that of the pension benefits of retired men . . . ."); OLDER WOMEN'S LEAGUE, WOMEN, WORK, AND PENSION: IMPROVING THE ODDS FOR A SECURE RETIREMENT 13 (1998) (finding women's median benefits to be $ 4,200 compared to $ 7,800 received by men).

n148 This is true in a defined benefit plan because those plans typically calculate benefits according to a formula dependent upon factors including years of service and average compensation over some time period, such as five years, immediately preceding retirement. In a defined contribution plan, contributions often are based upon or allocated according to compensation. For more information regarding the differences between defined benefit and defined contribution pension plans, see Muir, *supra* note 82, at 205.

n149 Moss, *supra* note 111, at 173-75. Subsequent to the Moss article, Congress limited plans' ability to integrate benefits.

n150 *Id.* at 174.

n151 *Congress May Debate Pension Policy Next Year, Following Health Care Focus*, 21 Pens. & Ben. Rep. (BNA), at 1119 (June 6, 1994) ("One-fourth of all female workers are employed part-time compared to 11 percent of male workers . . . .").

n152 Ann C. Foster, *Employee Benefits in the United States, 1994-95* (visited Nov. 4, 1999) <http://stats.bls.gov/opub/ cwc/Spring/brief3.htm> ("Retirement benefits . . . were available to 66 percent of full-time employees compared to 23 percent of part-time employees.").

n153 *See supra* text accompanying note 143 (discussing that shorter periods of job tenure translate into lower rates of pension courage).

n154 *See* Michael Falivena, *Pension Portability: No Easy Solution*, PENSIONS & INVESTMENTS, Feb. 5, 1990, at 15, *reprinted in* LANGBEIN & WOLK, *supra* note 122, at 85-87 (showing negative effect job changes have on defined benefit plan benefits).

n155 *See supra* text accompanying notes 30-32 (noting that three components of retirement income support system are Social Security, employer-sponsored benefit plans, and rate of individual saving).

n156 T.J. ELHER & WALLACE FRASER, ASSET OWNERSHIP OF HOUSEHOLDS: 1993, at 10, tbl. G (U.S. Dep't of Commerce ed., 1995).

n157 Karen C. Burke & Grayson M.P. McCouch, *Women, Fairness, and Social Security, 82 IOWA L. REV. 1209, 1217-18 (1997).* On the other hand, the redistributive nature of Social Security's progressive benefit structure replaces a higher percentage of income for lower wage earners than for higher wage earners. This redistributive effect benefits women on a relative basis. *Id. at 1212.* The Social Security program's provisions for derivative benefits may also disproportionately benefit women because women have longer life expectancies than men and are likely, for all the reasons discussed in the text, to earn lower Social Security entitlements than similarly situated men. *Id. at 1214.*

n158 *See* Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, *42 HASTINGS L.J. 683, 689 (1991)* (discussing gender differences in life expectancies); *see also* Kenneth S. Abraham, *Efficiency and Fairness in Insurance Risk Classification*, *71 VA. L. REV. 403, 434-36 (1985)* (discussing some of challenges to using life expectancies for risk classification); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law, 146 U. PA. L. REV. 463, 481 (1998)* (comparing work-life expectancies and life expectancies).

n159 Plans that annuitize benefits address the need of women for a longer stream of income. Because the monthly payment under an annuity typically is fixed at the starting date of the annuity, this approach leaves the recipient fully exposed to the effects of inflation.

n160 *Access to Pension Plans: Hearing Before the Subcomm. on Oversight of the House Ways and Means Comm.*, 105th Cong. (1998) (statement of Gail S. Shaffer, Executive Director, Business and Professional Women/USA).

n161 144 CONG. REC. H1421 (daily ed. Mar. 24, 1998) (statement of Rep. Maloney).

n162 *See supra* text accompanying notes 139-161 (discussing concerns with gender equity in retirement).

n163 *See supra* text accompanying notes 126-132 (detailing criticisms and concerns with REA amendments to ERISA).

n164 *See supra* note 138 (listing survey results reqarding costs of benefit plan regulations).

n165 *See supra* text accompanying notes 79-81 (detailing abuses of pension system that prompted enactment of ERISA).

n166 ERISA §§ 302, 403, *29 U.S.C. §§ 1082*, 1103 (1994). A trust need not be established if benefits are funded through the purchase of insurance contracts and in certain other limited circumstances. ERISA § 403(b), *29 U.S.C. 1103.*

n167 Plan sponsors were the first group to find a way, consistent with ERISA, to "raid" pension plan trusts. The reference to "raids" and "raiders" in this context was widespread during the 1980s. *See, e.g.*, Norman P. Stein, *Raiders of the Corporate Pension Plan: The Reversion of Excess Plan Assets to the Employer*, *5 AM. J. TAX POL'Y 117 (1986)* (describing employers as "raiders" of corporate pension plans); Harry Bernstein, *Putting a Ban on Corporate Raids of Pension Funds*, L.A. TIMES, Dec. 26, 1989, at D3 (using term "raids" to describe versions that allow employers to use money put in pension plans); Karen Friedman, *Fulfilling the Pension Promise; Raiding Retirement Funds is Piracy*, N.Y. TIMES, Sept. 28, 1986, at C2 (using term "raiding" to describe practice of using pension plan funds for activities other than for employees' retirement). By the 1980s numerous defined benefit pension plans had accumulated assets in excess of what was projected to be necessary to pay anticipated future benefit obligations. Mark Daniels, *Pensions in Peril: Single Employer Pension Plan Terminations in the Context of Corporate Bankruptcies*, *9 HOFSTRA LAB. L.J. 25, 37-38 (1991);* Kris Wehrmeister, Note, *Early Retirement Benefits and* Gillis v. Hoechst Celanese Corp.: *Same Desk, Same Job, So What?*, *28 U.C. DAVIS L. REV. 475, 510 n.317 (1995).* An employer could, while acting within the bounds of ERISA, recapture those excess plan assets by terminating its pension plan or engaging in similar maneuvers. In such a termination, the plan was required to purchase annuities to pay participants their accrued benefits. The employer then could recoup the excess assets remaining in the plan trust. Thus, with billions of dollars in excess plan assets, many employers chose to do exactly that during the 1980s. Between 1980 and 1987, looking only at reversions of $ 1 million or more, employers recovered more than $ 18 billion, or more than forty-five percent of the total assets of the 1,635 affected plans. Dana M. Muir, Note, *Changing the Rules of the Game: Pension Plan Terminations and Early Retirement Benefits, 87 MICH. L. REV. 1034, 1036 (1989).* Ultimately, Congress responded to the concern that plan assets should be preserved. Between the mid-1980s and 1990 Congress imposed and then repeatedly increased a tax penalty on reversions. Reversion activity began to decline in 1988 and has stayed significantly below the level of the early-and mid-eighties, as has the rate of voluntary defined benefit plan terminations. Jeffrey N. Gordon, *Employees, Pensions, and The New Economic Order, 97 COLUM. L. REV. 1519, 1543-44 (1997);* Lee G. Knight et al., *An Application of the Analytic Hierarchy Process to Tax Policy Decisions: The Termination of Overfunded Pension Plans, 12 AM. J. TAX POL'Y 101, 111 (1995);* Pension Benefit Guaranty Corporation, *1995 Annual Report* (1996). *But see* Regina T. Jefferson, *Defined Benefit Plan Funding: How Much Is Too Much?, 44 CASE W. RES. L. REV. 1, 18 (1993)* (arguing that business considerations, not availability of reversions, are responsible for most voluntary plan terminations). Yet, the imposition of significant excise taxes is not without controversy. By merging overfunded and underfunded plans, plan sponsors remain able to capture surplus assets. Gordon, *supra*, at 1544. More seriously, the unavailability of the surplus combined with contemporaneous limitations imposed on plan funding tend to discourage employers from advance funding and may result in plans being unable to meet their benefit obligations. Jefferson, *supra*, at 3; Knight et al., *supra*, at 111-12.

n168 Pub. L. No. 102-318, *106 Stat. 290 (1992).*

n169 *See* Carl T. Hall, *An Unsatisfying Recovery*, S.F. CHRON., June 29, 1992, at B1. ("The official tally of unemployed Americans jumped to 7.5 percent, the worst in eight years . . . .").

n170 Those benefit plans that qualify for favored tax treatment are known in benefits parlance as "qualified plans." LANGBEIN & WOLK, *supra* note 122, at 149. The primary qualification requirements are codified in *I.R.C. § 401(a)*. For a discussion of the relationship between ERISA and the I.R.C., see *infra* note 320.

n171 *I.R.C. § 401(a)(31)*.

n172 *Id.* § 3405(c).

n173 *IRS Notice 92-48, 1992-2 C.B. 377.*

n174 *I.R.C. § 402(f)*.

n175 LANGBEIN & WOLK, *supra* note 122, at 224.

n176 *See* Mala Narayanan, Note, *The Feds Want Your Retirement Savings: The Direct Rollover and Unfair Mandatory Income Tax Provisions of the Unemployment Compensation Amendments Act of 1992, 27 RUTGERS L.J. 205, 231-32 & nn. 157-58 (1995)* (discussing regulatory goals of UCA amendments).

n177 *See id. at 231-32* (arguing that direct transfers are commendable because UCA has broadened variety of plan distributions that may be rolled over as tax-free and has eliminated rollover pitfalls).

n178 *Id. at 223.*

n179 *See* Louise Kertesz, *New Pension Rollover Rules Will Add to Paperwork Load*, BUS. INS., Sept. 7, 1992, at 3 (explaining new tax penalties uninformed workers may be hit with when obtaining distributions).

n180 Narayanan, *supra* note 176, at 222-23.

n181 *See supra* note 32 and accompanying text (discussing low level of personal saving in United States).

n182 Except for perhaps small benefits, defined benefit plans typically do not make lump sum distributions when participants change employment.

n183 *See, e.g.*, FERGUSON & BLACKWELL, *supra* note 28, at 174-75 (discussing similar problems with 401(k)s).

n184 *See id.* at 175 (citing Labor Department statistics suggesting that as many as four-fifths of workers under 55 spend their distribution).

n185 LANGBEIN & WOLK, *supra* note 122, at 83.

n186 Narayanan, *supra* note 176, at 224.

n187 *Id.*

n188 *Id.* at 210-11.

n189 One estimate indicated that this enactment would raise only $ 86 million in revenue compared to the Joint Committee on Taxation's estimate of $ 2.147 billion. *Withholding, Direct Transfer Amendments Could Cost Employers More Than $ 4 Billion*, 19 Pens. & Ben. Rep. (BNA), at 1398 (Aug. 3, 1992). The perspective that benefit plan regulation provides an appropriate way to fund unrelated bills continues to exist. For example, even the Uruguay Round Agreements Act of the General Agreement on Tariffs and Trade (GATT) contained benefit plan regulation. GATT, Pub. L. No. 103-465, § 751-781, *108 Stat. 4809, 5012-53 (1994)* (codified as amended at *26 U.S.C. § 412* (1994)). The presence of the ERISA amendments was due neither to a relationship in the substantive content of the provisions nor to happenstance. Instead, in casting about for ways to pay for the estimated $ 11.5 billion loss to the treasury resulting over five years from the reduction in tariffs, Congress once again looked to private sector benefit plans as a source of funding. H.R. REP. NO. 103-826(I), at 236 (1994); *see also* Elizabeth A. Kundin & Deborah Walker, *Current Developments in Employee Benefits (Part 1)*, 26 TAX ADVISER 683, 683 (1995) ("The GATT financing legislation adopted [changes to ERISA.]"); *Congress Passes GATT, Includes Pension Reform Measures*, WGL EMPLOYEE BEN. ALERT, Dec. 6, 1994, at 5 ("The financing portion of [GATT] . . . contains a number of pension funding reforms . . . ."); Jeffrey R. Houle, *How GATT Changes American Pension Plans*, LEGAL TIMES, Jan. 16, 1995, at 20 ("GATT's tax and retirement provisions will help to offset [lower federal revenues resulting from lower tariffs] by increasing other sources of revenue."). This time, among other changes, some of which strongly solidified plan funding, Congress imposed incremental indexing rules that reduce the cost-of-living adjustments for certain plan calculations of compensation and maximum deferrals. *I.R.C. § 415(d)* (1994).

n190 ROBERT L. CLARK & ANN A. McDERMED, THE CHOICE OF PENSION PLANSIN A CHANGING REGULATORY ENVIRONMENT 67 (1990).

n191 LANGBEIN & WOLK, *supra* note 122, at 156-59; Bruce Wolk, *Discrimination Rules for Qualified Retirement Plans: good Intentions Confront Economic Reality, 70 VA. L. REV. 419, 421 (1984)* [hereinafter Wolk, *Discrimination Rules*].

n192 LANGBEIN & WOLK, *supra* note 122, at 156-59; Wolk, *Discrimination Rules, supra* note 191, at 421.

n193 *See, e.g.*, Barry J. Bidjarano, *Coping with the Reduced Limitation on "Compensation" Used Under Qualified Retirement Plans, 68 ST. JOHN'S L. REV. 357, 360 (1994)* (stating that justification for tax incentives furthers policy of giving "fair and meaningful retirement savings" to employees).

n194 Bankman, *supra* note 107, at 602-03; Wolk, *Discrimination Rules, supra* note 191, at 429-32.

n195 Wolk, *Discrimination Rules, supra* note 191, at 430-31.

n196 *Id.* at 430.

n197 Commentators and federal officials tend to regard the tax treatment of qualified pension plans as a tax subsidy or tax expenditure. I accept that view for purposes of this article. Critical commentary, however, does exist. *See* Wolk, *Discrimination Rules, supra* note 191, at 421-25 (discussing both sides of this controversy).

n198 *See* Bidjarano, *supra* note 193, at 358 (discussing how restrictive participation standards undermine nondiscrimination legislation). The extent to which high earners continue to be well off in retirement is a subject of some dispute among labor economists. Some research shows that, contrary to the projections of the economic models, retirees who had the highest pre-retirement incomes enjoy high replacement rates in retirement. Emily S. Andrews, *Gaps in Retirement Income Adequacy, in* THE FUTURE OF PENSIONS IN THE UNITED STATES 1, 11-12 (Ray Schmitt ed., 1993). The difficulties in defining and measuring living standards and the replacement rates needed to maintain pre-retirement living standards may account for at least part of the difference. *Id.* at 5.

n199 *See* Wolk, *Discrimination Rules, supra* note 191, at 420 (arguing that lower subsidies would create the same behavior).

n200 *See* Alicia H. Munnell, *Current Taxation of Qualified Pension Plans: Has the Time Come?*, NEW ENG. ECON. REV., Mar./Apr. 1992, at 16-19 (explaining that pension coverage and distribution of benefits proves that private retirement income across classes has not been achieved).

n201 LANGBEIN & WOLK, *supra* note 122, at 160; Peter J. Wiedenbeck, *Implementing ERISA: Of Policies and "Plans," 72 WASH. U. L.Q. 559, 561 (1994).*

n202 OFFICE OF MANAGEMENT AND BUDGET, ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOV'T, FISCAL YEAR 1999, at 98-99, tbl. 5-3 (1998) (detailing amounts attributable to employer-sponsored plans, Keoghs, and IRAs).

n203 *Id.*

n204 Bruce Wolk, *Nondiscrimination in Contributions and Benefits: The New Regulations, 25 GA. L. REV. 71, 72-73 (1990)* [hereinafter Wolk, *Nondiscrimination*].

n205 *See infra* text accompanying notes 211-218 (discussing nondiscrimination requirements imposed on pension plans).

n206 Wolk, *Nondiscrimination*, *supra* note 204, at 75.

n207 *Id.*

n208 *Id.* at 74.

n209 Bankman, *supra* note 107, at 599. In *Pension and Employee Benefit Law*, one of the two leading legal text books on employee benefits, the explanation of the anti-discrimination requirements runs sixty-two pages. LANGBEIN & WOLK, *supra* note 122, at 199-261; *see also* PETER J. WIEDENBECK & RUSSELL K. OSGOOD, CASES AND MATERIALS ON EMPLOYEE BENEFITS 181-252 (1996) (devoting in excess of 70 pages to what authors term "Participation").

n210 There have been efforts in recent years to simplify some of the requirements particularly as they apply to the plans of small businesses. One primary example is the Small Business Job Project Act (SBJPA) of 1996, which simplified the definition of highly compensated employees and repealed the family aggregation rules. Small Business Job Project Act (SBJPA) of 1996, Pub. L. No. 104-188, § 1431, *110 Stat. 1755, 1802-03.* SBJPA also streamlined the nondiscrimination calculations. Jerry Geisel, *Tax Bill Simplifies Pensions*, BUS. INS., Aug. 5, 1996, at 2, 46. Finally, SBJPA created the "Savings Incentive Match Plans For Employees," better known as "SIMPLE" plans. § 1421, *110 Stat. at 1792.* SIMPLE plans are subject to simplified reporting requirements and are totally exempt from the nondiscrimination provisions. § 1421, *110 Stat. at 1802-03.* Early on, many commentators argued that the hefty contributions SIMPLE plans require of employers would make them a rarely used innovation. *See, e.g.*, Timothy Middleton, *Early Rejection Slips for a New Pension Plan*, N.Y. TIMES, Oct. 13, 1996, at 3-6 (quoting several top financial advisers who suggested their clients not use SIMPLE 401(k) because it would cost them more than compliance with current plan requirements). Others criticized SIMPLEs for permitting employees to make early withdrawals, thus potentially compromising the retirement savings goal of the plans. Anita Cosgrove, *SIMPLE Plans Not Answer to Increase Retirement Savings, Practitioner Says*, Pens. & Ben. Daily (BNA), at D-2 (Sept. 12, 1996) (explaining that advantages of submission of pension plans to IRS early are limited).

n211 *See, e.g., I.R.C. § 410(b)(1)* (1994) (employing ratio percentage test); *id.* § 410(b)(2) (detailing average benefits test).

n212 *Id.* § 401(a)(4); *id.* § 410(b).

n213 *Compare Treas. Reg. § 1.401(a)(4)-2(b)* (as amended in 1993) (listing testing formulae for defined contribution plans) *with Treas. Reg. § 1.401(a)(4)-3* (as amended in 1993) (detailing test formulae for defined benefit plans).

n214 *I.R.C. § 410(b)(3)(A)*.

n215 *Id.* § 414(b).

n216 *Id.* § 401(a)(5)(F).

n217 *Id.* § 401(a)(10)(B).

n218 *Id.* § 401(a)(26)(G). In another example of the complexity of ERISA's nondiscrimination requirements, the regulations interpreting the qualified separate line of business provisions take up forty-two pages as printed in the *Code of Federal Regulations*. 26 C.F.R. § 1.414(r) (1999).

n219 Wolk, *Discrimination Rules, supra* note 191, at 420; Wolk, *Nondiscrimination, supra* note 204, at 73.

n220 Wolk, *Discrimination Rules, supra* note 191, at 432-33; Wolk, *Nondiscrimination, supra* note 204, at 73.

n221 Wolk, *Discrimination Rules, supra* note 191, at 433. One admittedly simplified and theoretical model analyzes the effect of appending nondiscrimination provisions to an existing tax structure that provides subsidies for benefit plans. The model forecasts, among other possible effects, that in some circumstances the nondiscrimination provisions may cause employers to replace rank-and-file employees with highly paid employees who place a higher value on the tax favored benefits (the substitution effect). Bankman, *supra* note 107, at 606-08. Furthermore, nondiscrimination provisions will tend to increase labor costs, reduce demand for labor, and, thus, decrease the perceived compensation paid to rank-and-file employees (the output effect). *Id.* at 612-13. In the end, rank-and-file employees, intended as the beneficiaries of the nondiscrimination provisions but who lose their jobs due to substitution or see their compensation decrease, very well may prefer to maintain the status quo and forego pension benefits. This is a twist on the concern voiced during legislative debate on ERISA. *See infra* text accompanying note 447 (voicing concern that ERISA would prompt employers to opt not to sponsor pension programs). In contrast, arguably the real beneficiaries of the nondiscrimination regulations are highly paid employees whose compensation is subsidized by the tax incentives and who are likely to benefit from both the substitution effect and the output effect. Bankman, *supra* note 107, at 606.

n222 *I.R.C. § 415*.

n223 *Id.* § 404(a)(3)(A).

n224 *Id.* § 401(a)(17).

n225 Bidjarano, *supra* note 193, at 357. The limitation for 1998 is $ 160,000. IRS News Release IR-97-41 (Oct. 22, 1997).

n226 H.R. REP. NO. 103-111, at 650-51 (1993).

n227 Omnibus Budget Reconciliation Act (OBRA '93) of 1993, Pub. L. No. 103-66, § 13,212, *107 Stat. 312, 471; see also* LANGBEIN & WOLK, *supra* note 122, at 236 (discussing that purpose behind reduction was to raise revenue).

n228 The committee report adopted the estimates of the CBO and indicated that the federal government stood to realize $ 2.4 billion as a result of the limitation. H.R. REP. NO. 103-111, at 813 (1993). Benefits specialists have recognized these changes as part of an attempt by Congress to limit the growth in the federal deficit by decreasing the tax incentives realized by qualified benefit plans. *See, e.g., Extended Reliance has Limitations as Well as Benefits, Practitioners Say*, Pens. & Ben. Daily (BNA), at D-5 (June 28, 1994) (explaining that advantages of early submission of pension plans to IRS are limited).

n229 *See, e.g.*, Bidjarano, *supra* note 193, at 382-407 (surveying approaches to minimize effect of limitation on includable compensation).

n230 W. John Thomas, *The Clinton Health Care Reform Plan: A Failed Dramatic Presentation*, *7 STAN. L. & POL'Y REV. 83, 83 (1995).*

n231 Health Security Act (HSA), H.R. 3600, 103d Cong. (1993); S. 1757, 103d Cong. (1993).

n232 H. Richard Beresford, *The Health Security Act: Coercion and Distrust for the Market*, *79 CORNELL L. REV. 1405, 1411 (1994).*

n233 James Cordone, *Health Care Reform in the 1990's From the Clinton Plan to Kassebaum-Kennedy*, *3 CONN. INS. L.J. 193, 195 (1996); see also* Beresford, *supra* note 232, at 1410 (calling benefit package "truly comprehensive").

n234 Thomas, *supra* note 230, at 96.

n235 Manish C. Shah & Judith M. Rosenberg, Essay, *Health Care Reform in the 103d Congress--A Congressional Analysis*, *33 HARV. J. ON LEGIS. 585, 586 (1996).*

n236 Pub. L. No. 99-272, *100 Stat. 82 (1986).*

n237 *See, e.g.*, *Medicare Costs Relating to Home Health and Skilled Nursing Facility Care Before the Health Subcomm. of the House of Representatives Ways and Means Comm.*, 104th Cong. (1995) (statement of Eugene Lehrmann, President, American Association of Retired Persons) *reprinted in* FED. NEWS SERV. WASH. PKG., Feb. 6, 1995 (using term COBRA to refer to modifications in DGME payment calculations); David Stern, *Employers Paying VA Too Much: Reduce Payment to the Amount that Medicare Would Pay*, BUS. INS., Mar. 14, 1994, at 15 (using term COBRA to refer to veterans administration cost recovery from private health plans); Anne Rochell, *Hospital is Target of State Probe: Pregnant Woman Allegedly Sent Away*, ATLANTA J. & CONST., Jan. 20, 1993, at J1 (using term COBRA in context of rules forbidding patient dumping).

n238 COBRA itself has been the subject of extensive amendments. Miscellaneous Trade and Technical Corrections Act of 1996, Pub. L. No. 104-295, §§ 4(a), 6, 21(a)(1), 38(a)-(c), *110 Stat. 3514, 3516-17, 3529, 3539-40* (codified as amended in scattered sections of 19 U.S.C.); Act of Oct. 8, 1996, Pub. L. No. 104-240, § 1(a), *110 Stat. 3140* (codified as amended at *42 U.S.C. § 1396b* (1994)); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 381(a), *110 Stat. 2105, 2257* (codified as amended at *29 U.S.C. § 1169* (1994)); Health Insurance Portability and Accountability Act (HIPAA), Pub. L. No. 104-191, §§ 321(d)(2), 421(b)(1)-(b)(3), *110 Stat. 1936, 2058, 2088 (1996)* (codified as amended in scattered sections of 29 U.S.C.); SBJPA, Pub. L. No. 104-188, § 1704(g)(1)(B), *110 Stat. 1755, 1880 (1996)* (codified as amended at *29 U.S.C. § 1162);* Omnibus Budget Reconciliation Act (OBRA '93) of 1993, Pub. L. No. 103-66, § 4301(a), *107 Stat. 312, 371* (codified as amended at *29 U.S.C. § 1169);* Omnibus Budget Reconciliation Act (OBRA '89) of 1989, Pub. L. No. 101-239, §§ 6703(a), (b), 7862(c)(1)(B), (c)(6), 7891(a)(1), (d)(2)(B)(i), *103 Stat. 2106, 2296, 2432-33, 2445-47* (codified as amended in scattered sections of 29 U.S.C.); Technical and Miscellaneous Revenue Act (TAMRA) of 1988, Pub. L. No. 100-647, § 3011(b)(6), *102 Stat. 3342, 3625* (codified as amended at *29 U.S.C. 1167);* Tax Reform Act (TRA '86) of 1986, Pub. L. No. 99-514, §§ 1893(a)-(e), 1895(a), 1896, *100 Stat. 2085, 2927-30, 2940-41 (1986)* (codified as amended in scattered sections of 19 U.S.C.); Omnibus Budget Reconciliation Act (OBRA '86) of 1986, Pub. L. No. 99-509, § 9501(a), (c)(2), *100 Stat. 1874, 2075-77* (codified as amended at *29 U.S.C. §§ 1163*, 1167(3)).

n239 ERISA §§ 602-603, *29 U.S.C. §§ 1162*-1163; *I.R.C. § 4980B(f)(2)(B)* & (f)(3) (1994).

n240 ERISA § 606, *29 U.S.C. § 1166; I.R.C. § 4980B(f)(6)*.

n241 ERISA § 602(1), *29 U.S.C. § 1162*(1); *I.R.C. § 4980B(f)(2)(A)*.

n242 ERISA § 602(2), *29 U.S.C. § 1162*(2); *I.R.C. § 4980B(f)(2)(B)*.

n243 *I.R.C. § 4980B(a)*-(e).

n244 Nora Fitzgerald, *You're Sick? You're Fired! The Case for Eliminating COBRA's Gross Misconduct Exception, 80 MINN. L. REV. 197, 209-10 (1995).*

n245 *Id.*

n246 ERISA § 602(3)(A), *29 U.S.C. § 1162*(3)(A); *I.R.C. § 4980B(f)(2)(c)(i)*.

n247 *See Nearly One-Third of Plans Call Notification Most Costly COBRA Expense,* Pens. & Ben. Daily (BNA), at D-5 (Oct. 7, 1992) (citing survey in which 32% of multiemployer plans said their most costly expense involved notification).

n248 *See* Editorial, *Ira's Revenge?*, WALL ST. J., Apr. 23, 1996, at A22.

n249 ERISA § 606(a)(1), (4), *29 U.S.C. § 1166*(a)(1), (4).

n250 ERISA § 605(1), *29 U.S.C. § 1165*(1).

n251 ERISA § 602(3), *29 U.S.C. § 1162*(3).

n252 *Medical Coverage Costs Rose 13 Percent in 1991, Survey Finds*, Pens. & Ben. Daily (BNA) (Jan. 29, 1992).

n253 *Id.*

n254 *Nearly One-Third of Plans Call Notification Most Costly COBRA Expense,* Pens. & Ben. Daily (BNA) (Oct. 7, 1992).

n255 *See, e.g.*, Fitzgerald, *supra* note 244 (criticizing COBRA's exclusion of employees who are fired for gross misconduct).

n256 *See supra* text accompanying note 240 (detailing notification requirements).

n257 WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 830-31 (2d ed. 1988).

n258 *Id.* at 53-55.

n259 *See infra* text accompanying notes 383-384 (giving possible reasons for leaving decisions to agencies).

n260 *IRS Opens Three New Rules Projects to Bring EP/EO Backlog to 67 in April*, Pens. & Ben. Daily (BNA) (May 31, 1988).

n261 Meegan M. Reilly, *IRS Not Likely to Issue Guidance on COBRA and Family Medical Leave Act*, *62 TAX NOTES 1719, 1719 (1994).* The Family and Medical Leave Act of 1993 can be found at *29 U.S.C. §§ 2601*-2654 (1994).

n262 26 C.F.R. § 54.4980B (1999).

n263 For a fairly comprehensive survey of COBRA case law, see Melanie S. Lapidus and Laura A. Erbs, *Recent COBRA Developments in the Courts*, 17 EMPLOYEE BENEFITS J. 8 (1992).

n264 *Lincoln Gen. Hosp. v. Blue Cross/Blue Shield, 963 F.2d 1136, 1139-40 (8th Cir. 1992).* The hospital brought the suit seeking payment from the insurer on alternative theories of: (i) failure to provide required COBRA notice or (ii) inaccurate verification of the patient's coverage at a time when the premiums were overdue. *Id. at 1138; see also Gaskell v. Harvard Coop. Soc'y, 3 F.3d 495, 499 (1st Cir. 1993)* (discussing that COBRA entitlement began, not with actual termination of insurance coverage, but with event triggering that loss). *But see Meadows v. Cagle's, Inc., 954 F.2d 686, 692 (11th Cir. 1992)* (holding that COBRA notice sent to husband of comatose participant was insufficient because it did not contain necessary information).

n265 *Lincoln Gen. Hosp., 963 F.2d at 1140.*

n266 *Kastler on Delegation of Authority to IRS*, Pens. & Ben. Daily (BNA) (Nov. 26, 1984).

n267 The Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. No. 104-191, §§ 101(a)-(f), 321 (d)(2), 421(b), *110 Stat. 1936, 1939-53, 2058, 2088.*

n268 Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997, Pub. L. No. 104-204, § 603(a), *110 Stat. 2874, 2935-36 (1996)* (implementing NMHPA as Title VI).

n269 *Id.* §§ 701-702, *110 Stat. at 2944-2947* (implementing MHPA as Title VII).

n270 *Id.* § 702, *110 Stat. at 2945.*

n271 *See* Brian D. Shannon, *Paving the Path to Parity in Health Insurance Coverage for Mental Illness: New Law or Merely Good Intentions*, *68 U. COLO. L. REV. 63, 101-03 (1997)* (calling MHPA "just a start toward insurance equality"); Christopher Aaron Jones, Note, *Legislative "Subterfuge"?: Failing to Insure Persons with Mental Illness Under the Mental Health Parity Act and the Americans with Disabilities Act*, *50 VAND. L. REV. 753, 757, 758-71 (1997)* (calling MHPA "a common phenomenon in health care legislation: broad, idealistic access goals severely undercut by cost containment concerns" and going on to thoroughly discuss Act's limitations).

n272 *See supra* Parts III.B, III.C (discussing cost of regulatory burdens on benefit plans).

n273 *See supra* Parts III.B, III.C (detailing unintended impact of benefit plan regulation).

n274 *See supra* Parts III.B, III.C (describing impact of benefit plan regulations).

n275 *See, e.g.*, Watson, *The Pension Game, supra* note 109 (identifying problems regarding gender equity); Watson, *Broken Promises, supra* note 125 (describing same); Wolk, *Nondiscrimination, supra* note 204 (discussing problems regarding nondiscrimination rules); Wolk, *Discrimination Rules, supra* note 191 (detailing same).

n276 Only one major benefits article even mentions the issue of unfunded mandates. That author concentrates on evaluating the operation of various then-proposed health care reform measures and offering an alternative. Katherine Pratt, *Funding Health Care with an Employer Mandate: Efficiency and Equity Concerns, 39 ST. LOUIS U. L.J. 155, 157 n.5 (1994)* (acknowledging in footnote that employees do not understand they ultimately would bear cost burden of mandated employment-based health care coverage and citing some of unfunded mandates literature).

n277 *See* WILLIAM SHAKESPEARE, ROMEO & JULIET act 2, sc. 2, lines 43-44 (H.R. Hoppe ed., Appleton-Century-Crofts, Inc. 1947) ("What's in a name? That which we call a rose / By any other name would smell as sweet. . . .").

n278 Steinzor, *supra* note 17, at 133.

n279 *Id.*

n280 *See id.* (noting serious challenge raised against UMRA legislation by garbage collection, recycling, and disposal companies).

n281 *See infra* Part IV.A.*1-4* (defining and categorizing numerous versions of unfunded intergovernmental federal mandates).

n282 The ACIR is a federally funded entity that focuses on the preservation of federalist principles. Steinzor, *supra* note 17, at 104. ACIR published its definition of what constitutes an unfunded mandate and its categorization of mandates in a 1994 report addressing the federalism implications of unfunded mandates. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, FEDERALLY INDUCED COSTS AFFECTING STATE AND LOCAL GOVERNMENTS 3 (1994) [hereinafter FEDERALLY INDUCED COSTS].

n283 FEDERALLY INDUCED COSTS, *supra* note 282, at 2-3.

n284 *Id.* at 3.

n285 Adler, *supra* note 20, at 1157.

n286 At least one commentator excludes generally applicable regulation from his definition of direct orders. Jaber, *supra* note 20, at 289.

n287 In contrast, Professor Dana denominates this type of regulation as compliance regulation and distinguishes it from implementation legislation. Dana, *supra* note 15, at 5-7. Professor Adler includes at least some forms of implementation legislation in his analysis of direct orders. Adler, *supra* note 20, at 1157.

n288 Adler, *supra* note 20, at 1156-57.

n289 *Id.* at 1155.

n290 *Id.*

n291 *See Printz v. United States, 521 U.S. 898, 933 (1997)* (invalidating portions of Brady Bill); *New York v. United States, 505 U.S. 144, 149 (1992)* (invalidating portions of Low-Level Radioactive Waste Policy Act).

n292 *See, e.g., Concrete Pipe & Prod. of Cal., Inc. v. Laborers Pension Trust for So. Cal., 508 U.S. 602, 628-46 (1993)* (rejecting challenge based upon retroactivity liability); *Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 223 (1986)* (rejecting challenge based upon interference with contract); *Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 728-32 (1984)* (rejecting challenges based upon retroactivity and interference with contract). *But see Eastern Enters. v. Apfel, 522 U.S. 498, 529-39 (1998)* (finding provisions of Coal Industry Retiree Health Benefit Act unconstitutional as applied).

n293 *See* sources cited *supra* notes 286-287 (discussing limited approaches to the definition of a mandate).

n294 *See supra* Parts III.B, III.C (discussing variety of plan level reform efforts).

n295 Adler, *supra* note 20, at 1156.

n296 *See supra* Part III.B.*1* (detailing substantive requirements of REA on employers providing benefit plans voluntarily).

n297 Although most ERISA regulation applies to employers regardless of the number of employees they have or the number of plan participants, COBRA contains an exemption for plans sponsored by employers with fewer than twenty employees. ERISA § 601(b), *29 U.S.C. § 1161*(b) (1994); *I.R.C. § 4980B(d)(1)* (1994).

n298 *See supra* Part III.C.*2* (explaining obligations imposed on employers by COBRA, HIPAA, NMHPA, and MHPA). HIPAA applies to plans that cover two or more current employees. ERISA § 732(a), *29 U.S.C. § 1191a* (Supp. 1997); *I.R.C. § 9831* (Supp. 1997). NMHPA applies to all group health plans. ERISA § 711, *29 U.S.C. § 1181; I.R.C. § 9811*. MHPA only applies to employers with at least fifty-one employees. ERISA § 712(c)(1), 29 U.S.C. § (1); *I.R.C. § 9812(c)(1)*.

n299 *See supra* Part III.B.*2.b* (detailing nondiscrimination requirements).

n300 *See supra* Part III.B.*2* (discussing integrity of plan assets).

n301 Steve France, *House Rules Committee Approves Bill to Curb Unfunded Mandates on Business*, Pens. & Ben. Daily (BNA), at D-9 (May 11, 1998).

n302 Taking the argument to its natural extension, there is a sense in which no federal regulation of the private sector truly mandates action by private sector business. Logically, business entities always may make the choice to avoid the regulated field, or simply to close.

n303 *See supra* text accompanying notes 288-292 (outlining Professor Adler's two prong test).

n304 ACIR also utilizes full and partial preemption and federal statutory liabilities as sorting principles. Adler, *supra* note 20, at 1160-62, 1165-67. The controversial notion of preemption as a negative mandate has no application in the private sector questions of benefit plan regulation. And, while both Title I of ERISA and the I.R.C. contain liability provisions as enforcement mechanisms, I have generally excluded those provisions from the scope of the regulation considered in this Article. I have, however, previously addressed the deficiencies of Title I's remedial scheme. Dana M. Muir, *ERISA Remedies, Chimera or Congressional Compromise?, 81 IOWA L. REV. 1 (1995).*

n305 Adler, *supra* note 20, at 1164.

n306 FEDERALLY INDUCED COSTS, *supra* note 282, at 20-21.

n307 Adler, *supra* note 20, at 1157-60.

n308 *Id.* at 1157.

n309 *See infra* text accompanying note 440 (discussing inappropriateness of treating preemption of revenue sources as unfunded mandate).

n310 Adler, *supra* note 20, at 1162-64.

n311 *Id.* at 1164.

n312 *Id.* (*quoting* FEDERALLY INDUCED COSTS, *supra* note 282, at 2).

n313 FEDERALLY INDUCED COSTS, *supra* note 282, at 2.

n314 Adler, *supra* note 20, at 1164-65.

n315 *Id.* at 1160.

n316 *Id.* at 1163.

n317 *Id.*

n318 *Id.*

n319 *Id.* at 1165.

n320 *Id.* at 1158-59. Here it is important to distinguish between the tax code regulation of benefit plans and the labor code regulation. Frequently, it is the labor code regulation that people think of when they think of ERISA. As enacted, however, ERISA included both labor and tax regulation. Muir, *supra* note 82, at 204-05. Much of the regulation is duplicated in both titles of the United States Code. For example, most of the regulatory provisions traceable to REA can be found both in the labor title regulation and in the I.R.C. For purposes of tax qualification requirements, plans must meet the I.R.C. requirements. But a plan that is willing to forfeit favorable tax treatment may opt not to comply with many of the I.R.C. requirements. In contrast, unless an exclusion is available, the ERISA requirements apply to every employee benefit plan covered by ERISA's very broad definition of employee benefit plan. For a brief explanation of the coverage of Title I of ERISA, see Muir, *supra* note 82, at 204. For present purposes, I am referring only to those requirements found in Title I of ERISA. In the next paragraph and subsequently, I consider the relevant provisions of the I.R.C.

n321 *See* discussion *supra* note 320 (regarding difference between regulation found in Title I of ERISA and sometimes overlapping regulation found in the I.R.C.).

n322 *See* SHAKESPEARE, *supra* note 277 ("What's in a name? That which we call a rose / By any other name would smell as sweet. . . .").

n323 *See supra* Part III.B.*1* (discussing REA requlations).

n324 *See supra* Part III.B.*2.a* (discussing UCA plan requirements).

n325 *See supra* Part III.B.*2.b* (discussing effect of nondiscrimination requirements on pension plans).

n326 *See id.* (discussing nondiscrimination requirements for pension plans).

n327 *See supra* Part III.C.*1* (detailing COBRA requirements regarding health care coverage for former employees).

n328 *See supra* text accompanying notes 190-191 (describing 1999 revenue loss estimates made by Office of Management and Budget regarding tax-favored retirement savings).

n329 Adler, *supra* note 20, at 1158.

n330 *See id.* (using Medicaid example for federal grants in aid).

n331 *See supra* text accompanying notes 197-200 (describing impact of tax subsidy on decision to establish benefit plans).

n332 FEDERALLY INDUCED COSTS, *supra* note 282, at 20-21.

n333 *Id.*

n334 *Id.*

n335 *Id.*

n336 *See supra* Part III.B.*2.b* (discussing aims and effects of nondiscrimination requirements).

n337 *See supra* text accompanying notes 209-210 (describing complexity and expense of compliance with first comprehensive regulations on nondiscrimination).

n338 *See supra* text accompanying note 211 (noting expectation that benefit plan sponsors would minimize compensation costs by structuring plan to provide more significant benefits to highly paid employees as compared to those given to lower-paid employees).

n339 The problem with this argument is that, at least to a certain point, employers will be able to shift the increased costs of regulation to employees. *See infra* text accompanying note 365 (stating that, according to some studies, employers shift average of 80% of government-mandated benefit takes to employees by reducing cash compensation).

n340 *See supra* text accompanying notes 323-327 (describing requirements of various plan content regulations).

n341 FEDERALLY INDUCED COSTS, *supra* note 282, at 2.

n342 *Id.*

n343 The analysis required to reach such a conclusion is beyond the scope of this Article.

n344 *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 41-47 (1992) (arguing that market will adequately address concerns with employment discrimination).

n345 FEDERALLY INDUCED COSTS, *supra* note 282, at 2 (emphasis added).

n346 Adler, *supra* note 20, at 1150-51.

n347 Cole & Comer, *supra* note 20, at 108-10.

n348 Dana, *supra* note 15, at 5-6.

n349 *Id.* at 7.

n350 *Id.*

n351 The potential for application, of course, would exist regarding the regulation of benefit plans for state and local workers, and such plans are of sufficient magnitude to be worthy of consideration. Public pension systems are estimated to hold approximately $ 3 trillion. *Industry Approach to Large-Case Exams Outlined in Report on IRS Reorganization*, Pens. & Ben. Daily (BNA), at D-3 (July 7, 1998). ERISA, however, exempts all governmental plans from Titles I and IV. ERISA §§ 4(b)(1), 4021(b)(2), *29 U.S.C. §§ 1003*(b), 1321(b)(2) (1994). In this Article I have excluded governmental plans from my analysis. Of course, questions regarding the constitutionality of federal regulation that impinges upon the relationship of subordinate governmental entities and their employees have given rise to some of the foundational constitutional decisions regarding limitations on the power of the federal government vis-a-vis the states. *See, e.g.*, *Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)* (upholding application of federal minimum wage and hour standards to state and local employees).

n352 *See supra* text accompanying notes 278-280 (discussing rationale for extending UMRA to private sector).

n353 *See supra* Part III.B, Part III.C (discussing, in turn, unsuccessful legislative efforts to institute mandatory employer-sponsored pension health care programs).

n354 *See supra* text accompanying notes 44-47 (discussing concerns about imposition of unfunded federal mandates).

n355 Zelinsky, *Unfunded Mandates, supra* note 20, at 1369; Zelinsky, *The Unsolved Problem, supra* note 20, at 744-45.

n356 Zelinsky, *Unfunded Mandates, supra* note 20, at 1375-77; Zelinsky, *The Unsolved Problem, supra* note 20, at 744-45.

n357 Zelinsky, *Unfunded Mandates, supra* note 20, at 1374-75; Zelinsky, *The Unsolved Problem, supra* note 20, at 744-45.

n358 Zelinsky, *The Unsolved Problem, supra* note 20, at 750-51.

n359 Zelinsky, *Unfunded Mandates, supra* note 20, at 1374-75; Zelinsky, *The Unsolved Problem, supra* note 20, at 751.

n360 Zelinsky, *Unfunded Mandates, supra* note 20, at 1375; Zelinsky, *The Unsolved Problem, supra* note 20, at 745.

n361 *See* Dana, *supra* note 15, at 10-37 (recognizing implicit assumption, questioning public choice model, and offering alternative explanations for existence of unfunded mandates).

n362 HENDRICKS, *supra* note 8, at 10.

n363 *See* U.S. CHAMBER OF COMMERCE, EMPLOYEE BENEFITS 1997 EDITION 5 (1997) (noting that 60% of firms employ less than five people).

n364 *See supra* note 72 (demonstrating periodic enactment of employee benefit plan legislation).

n365 *See* Angela Antonelli & Mark Wilson, *Senator Abraham's Mandates Information Act: The Way to Help Congress Work Smarter*, HERITAGE FOUNDATION REP. (1997) (citing variety of studies regarding shifting of employment taxes); *see also supra* text accompanying notes 194-196 (discussing willingness of employers to shift payment among various forms of cash and non-cash compensation).

n366 *See supra* text accompanying notes 194-196 (discussing how progressive income tax affects these decisions).

n367 *See, e.g., The Mandates Information Act: Hearings on S. 389 Before the Senate Comm. on Governmental Affairs*, 105th Cong. 32 (1998) (statement of Mary Ann Cricchio, owner, Da Mimmo Italian Restaurant) (testifying that restaurant could be forced to terminate its profit-sharing pension plan if government mandated health care benefits).

n368 Harry Hutchinson, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy, and Hierarchy*, *34 HARV. J. ON LEGIS. 93, 108-18 (1997);* Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, *64 U. CHI. L. REV. 405, 436-38 (1997).*

n369 DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE (1995).

n370 *See* Hutchinson, *supra* note 368, at 112-18 (explaining and critiquing the Card-Krueger studies); Shaviro, *supra* note 368, at 438-59 (analyzing same).

n371 Pratt, *supra* note 276, at 171-72 n.72 (discussing predictions ranging from minimal job loss up to loss of 3.1 million jobs); Ronald F. Wilson, *Federal Tax Policy: The Political Influence of American Small Business*, *37 S. TEX. L. REV. 15, 45 (1996)* (citing estimates ranging from 350,000 to 3.8 million lost jobs); Sen. Spencer Abraham & Rep. Gary Condit, *Make Congress Think Before it Mandates*, THE HILL, Apr. 30, 1997, at 23 (citing estimate that Clinton plan would result in net loss of from 200,000 to 500,000 jobs).

n372 *See infra* text accompanying notes 428-431 (discussing studies that indicate regulatory burdens imposed on defined benefit plans have contributed to increasing tendency of employers to sponsor defined contribution plans instead).

n373 *See supra* text accompanying note 269 (discussing standards imposed by Mental Health Party Act).

n374 *See supra* Part III.B.*1* (discussing efforts of organized interest groups in enacting legislation requiring employers to provide certain health care benefits or annuities).

n375 Stephen D. Sugarman, *Short Term Paid Leave: A New Approach to Social Insurance and Employee Benefits*, *75 CAL. L. REV. 465, 468 (1987)* ("Most employees probably do not well understand their eligibility for many of their benefits and cannot value the overall package of benefits that comes with any particular job they hold or might be considering."); Watson, *The Pension Game, supra* note 109, at 36 (citing congressional hearings on lack of employees' understanding of pension plans); Scott V. Rozmus, Note, *Insurers Beware: General Account Activities May Subject Insurance Companies to ERISA's Fiduciary Obligations*, *88 NW. U. L. REV. 803, 811 n.52 (1994)* ("Defined benefit plans tend to be quite complex and thus employees often fail to appreciate or understand their pension programs."). Survey data tends to support the commentators. *Fifteen Tips for Raising the Impact of Benefits Communications*, IOMA, Dec. 1997, at 3 ("This year's Workplace Pulse survey found that a whopping 98% of American workers say it's important that their employers help them understand their benefits packages."); *Scudder: Plan Terms Lost on Participants*, INST. INV., Jan. 12, 1998, at 11 ("Many qualified-plan participants do not understand some of the basic terms used to describe their plans, according to a survey conducted by Scudder, Stevens & Clark and the AARP Investment Program from Scudder."); *Survey Finds Employees Lack Understanding in Retirement Preparation*, Pens. & Ben. Daily (BNA), at D-5 (July 17, 1997) ("Benefits managers in the survey report that less than 40 percent of employees have a good understanding of important factors that affect retirement and savings plans . . . ."). It is not necessary to the model that all employees fail to understand the costs of the mandate and hold legislators responsible. The informational disparity needs only be significant enough to permit the legislators to act opportunistically. Zelinsky, *The Unsolved Problem, supra* note 20, at 751.

n376 *See* Pratt, *supra* note 276, at 157 n.5 (making this assumption in context of costs of mandated employer-sponsored health care plans).

n377 Watson, *The Pension Game, supra* note 125, at 494.

n378 *See supra* text accompanying notes 125-131 (discussing impact of REA amendments).

n379 ERISA and the I.R.C. explicitly permit plans to make an actuarial reduction in the benefits of those who do not waive the survivor annuity. ERISA § 205(d), *29 U.S.C. § 1055*(d) (1994); *I.R.C. § 417(b)* (1994). So, those costs are borne directly by the couple who elects the annuity protection. Not all plans, however, make an actuarial reduction. In every plan the costs associated with administering the survivorship provisions and meeting the informational requirements are spread among the participants.

n380 *See* Steinzor, *supra* note 17, at 135 (describing REA as a "symbolic law . . . representing a defeat for those who care whether the problem is actually solved").

n381 *See supra* text accompanying notes 257-259 (discussing rationales for congressional choice in writing ambiguous legislation).

n382 *See supra* text accompanying notes 260-261 (noting administrative agencies' refusal to confront specific interpretative problems).

n383 STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 61-62 (1993).

n384 William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, *74 VA. L. REV. 275, 288-89 (1988).*

n385 *See id.* (arguing that legislatures will support ambiguous statutes to satisfy conflicting positions).

n386 Adler, *supra* note 20, at 1234-36; Caminker, *supra* note 40, at 1080-81; Zelinsky, *The Unsolved Problem, supra* note 20, at 766-67 (arguing that when local or state governments have to fund federal mandates they have to direct funds from local or state programs).

n387 Adler, *supra* note 20, at 1234.

n388 Caminker, *supra* note 40, at 1081.

n389 Adler, *supra* note 20, at 1234; Caminker, *supra* note 40, at 1080-81.

n390 *See* Adler, *supra* note 20, at 1234 (noting that it is possible that paying for unfunded federal mandates means that revenues are not applied to other programs where they are needed).

n391 *See* Adler, *supra* note 20, at 1246 (arguing that Congress is not subject to market restraints because its members do not pay for unfunded federal mandates).

n392 Zelinsky, *The Unsolved Problem, supra* note 20, at 766. Another way to approach the efficiency issues is to assume the existence of a substantive problem that needs to be addressed and to ask which governmental unit is best suited to address the problem. Adler, *supra* note 20, at 1250-51; Steinzor, *supra* note 17, at 131. Professor Steinzor suggests that governmental regulatory authority be allocated according to sorting principles that would vary according to the area of public policy at issue. Steinzor, *supra* note 17, at 165-66. Professor Adler advocates allocating authority based upon categorization of regulation as redistributive or developmental. Adler, *supra* note 20, at 1250-51.

n393 Mark Tushnet, *Why the Supreme Court Overruled* National League of Cities, *47 VAND. L. REV. 1623, 1637-38 (1994)* (questioning whether unfunded mandates are, in fact, locally unpopular).

n394 Zelinsky, *The Unsolved Problem, supra* note 20, at 753-54.

n395 *Id.* at 754.

n396 *Id.* at 754-55.

n397 *Id.* at 753-54.

n398 Adler, *supra* note 20, at 1234-35.

n399 *Id.* at 1246-47.

n400 *Id.*

n401 *Id.*

n402 *Id.*

n403 *See supra* text accompanying notes 355-360 (discussing public choice theory that federal legislators support unfunded mandates in response to pressure from interest groups).

n404 Dana, *supra* note 15, at 18-21; Tushnet, *supra* note 393, at 1637.

n405 Caminker, *supra* note 40, at 1085-86 n.320; Dana, *supra* note 15, at 17-18.

n406 Dana, *supra* note 15, at 25.

n407 *Id.* at 34.

n408 *Id.* at 33-35.

n409 *Id.* at 34.

n410 *See* Muir, *supra* note 73, at 1357-60 (summarizing Professor Skocpol's theory and applying it in context of current benefits regulation).

n411 Dana, *supra* note 15, at 36-37.

n412 *See supra* text accompanying notes 364, 375-376 (questioning whether plans and employers bear regulatory costs and ability of employees to engage in effective monitoring).

n413 *See* Watson, *Broken Promises, supra* note 125, at 431 n.2 (quoting Sen. Chafee as calling "pension field an esoteric and abstruse one, bordering on the mysterious or the occult").

n414 It is important that the plan restricts the election of such annuities to specific times in order to limit self-selection bias and the resulting higher costs.

n415 *See* Wiedenbeck, *supra* note 201, at 568-70 (discussing efficiencies accruing to labor market).

n416 H.R. REP. NO. 93-779, at 52 (1974) ("At present, only one out of every three employees participating in employer-financed plans has a 50-percent or greater vested right to his accrued pension benefits."), *reprinted in* HISTORY, *supra* note 81, at 2641.

n417 Dana, *supra* note 15, at 26-31.

n418 *Id.* at 26.

n419 *See supra* text accompanying note 375 (discussing lack of employee knowledge about terms of employer-sponsored benefit plans).

n420 This may be particularly true in unionized settings.

n421 *See supra* text accompanying note 225 (discussing 1994 amendments to ERISA that reduced the cap on the amount of includable compensation).

n422 *See supra* text accompanying notes 222-223 (detailing I.R.C. restrictions on contributions to defined contribution plans and deductions of plan contributions).

n423 *See supra* text accompanying notes 214-218 (delineating exemptions from ERISA's nondiscrimination requirements).

n424 Abraham & Condit, *supra* note 371, at 23.

n425 KARPEL, *supra* note 7, at 212 (noting that actual plan size studied included 75 participants).

n426 *Id.* at 41-42.

n427 CONTE, *supra* note 32, at 20.

n428 Robert L. Clark et al., *Firm Choice of Type of Pension Plan: Trends and Determinants*, *in* THE FUTURE OF PENSIONS IN THE UNITED STATES 115, 115-16 (Ray Schmitt ed., 1993).

n429 PWBA Advisory Council Working Group Reports For 1997, *Working Group on the Merits of Defined Contribution vs. Defined Benefit Plasn With an Emphasis on Small Business Concerns* (presented Nov. 13, 1997) <http://www.dol.gov/dol/pwba/public/adcoun/dbvsdc.htm> [hereinafter D.C. VS. D.B. PLANS].

n430 *Id.*

n431 *Roundtable Discussion, in THE FUTURE OF PENSIONS IN THE UNITED STATES, supra* note 428, at 102, 105 (comments of Robert L. Clark).

n432 D.C. VS. D.B. PLANS, *supra* note 429, at 26-28 (summarizing testimony of representatives from AFL-CIO and United Auto Workers). A complete evaluation of the relative merits of defined benefit plans and defined contribution plans is beyond the scope of this Article.

n433 Not every plan classified as a defined contribution plan gives employees the ability to decide whether they wish to participate in the plan. Participation options depend both upon the type of defined contribution plan sponsored by a given employer and, potentially, upon the terms of the plan. The same is true for contribution levels, the ability to access plan assets prior to retirement, and investment authority. For an explanation of the various types of defined contribution plans and some discussion of the variety of possible plan terms in each, see LANGBEIN & WOLK, *supra* note 122, at 41-51.

n434 *See* Angela Chang, *The Trend Away from Defined Benefit Pension Plans, in THE FUTURE OF PENSIONS IN THE UNITED STATES, supra* note 428, at 111-13 (discussing work of Alan Gustman, Thomas Steinmeier, and Richard Ippolito).

n435 *Id.*

n436 CLARK & McDERMED, *supra* note 190, at 91-106; *see also* D.C. VS. D.B. PLANS, *supra* note 429, at 7-8 (accepting argument that "regulatory trends since 1982 have played a significant role" in "the movement away from defined benefit plans").

n437 Clark, *supra* note 428, at 117-21.

n438 The ability of individuals to maximize their personal preferences may be viewed as a positive effect of defined contribution plans. One also might consider, however, the long-term attribute of permitting such flexibility in the expression of personal preferences and the potential burden on the social welfare system. In any case, a discussion of the appropriate level of paternalism in the retirement income system is beyond the scope of this Article. For present purposes, the point is simply that giving individuals more responsibility for retirement planning will result in some of them having fewer financial resources in old age than they otherwise would have had. Of course, the opposite also is true. Some individuals will save more, invest wisely or luckily, and so forth.

n439 It is true that the proposed extension of the UMRA specifically requires the CBO to make "an analysis of the effect of the Federal private sector mandates in the bill or joint resolution on worker wages, worker benefits, and employment opportunities . . . ." Mandates Information Act of 1999, H.R. 350, 106th Cong. § 4(a)(1) (1999). The point remains, however, that such analysis will take place in the narrow perspective of the proposed regulatory change.

n440 COMING OF AGE, *supra* note 102, at 42-43.

n441 CONTE, *supra* note 32, at 6.

n442 *See* Nancy J. Altman, *Rethinking Retirement Income Policies: Nondiscrimination, Integration, and the Quest for Worker Security*, *42 TAX L. REV. 435, 495-96 (1987)* ("The government specifies no absolute level of benefits toward which its policies are aimed.").

n443 Munnell, *supra* note 200, at 21-23.

n444 *See* Edward A. Zelinsky, *Tax Policy v. Revenue Policy: Qualified Plans, Tax Expenditures, and the Flat, Plan Level Tax*, *13 VA. TAX. REV. 591, 592-94 (1994)* (characterizing Munnell's proposal to tax pension plan contributions and earnings as more mundane than ideal); Scott Burns, *Employee Benefit Tax is One Idea Bound to Fail*, DALLAS MORN. NEWS, Sept. 7, 1995, at 1D (protesting Munnell's proposal to place tax on retirement accounts); Dean Foust & Mike McNamee, *Who is Alicia Munnell? And Why is She Drawing Fire?*, BUS. WEEK, May 29, 1995, at 34 (enumerating Republican reasons for opposing Munnell's pending appointment to Federal Reserve Board); David A. Vise, *Treasury Choice Raises Pension Fund Tax Fears; Industry Experts Cite Alicia Munnell's Writings*, WASH. POST, Feb. 6, 1993, at A11 (listing fears of pension industry experts regarding Munnell's position). In fact, Professor Munnell's positions in this area appear to have played a role in costing her a seat on the Federal Reserve Board in 1995. Keith H. Hammonds, *Clinton Loses a Fed Fight*, BUS. WEEK, July 10, 1995, at 44; Kimberly Blanton, *Munnell Nominated as Advisor*, BOSTON GLOBE, June 29, 1995, at 64.

n445 Zelinsky, *supra* note 444, at 591 n.2.; Vineeta Anand, *No Pension Fund Tax Needed, Munnell Says*, PENSIONS & INVESTMENTS, May 17, 1993, at 94.

n446 *See* FERGUSON & BLACKWELL, *supra* note 28, at 208 (implying that Karen Ferguson, director of Pension Rights Center, would find acceptable tax equal to one-half of one percent of assets held by qualified plans).

n447 120 CONG. REC. 4, 4308 (1974), *reprinted in* HISTORY, *supra* note 81, at 3451.

n448 *See supra* note 189 (listing various estimates the cost of compliance imposed upon private sector by HLA amendments).