Article

Regulating Employment-Based Anything

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INTRODUCTION

Benefit regulation has been called "the most consequential subject to which no one pays enough attention."[1] It exhausts judges, intimidates legislators, and scares off theorists.[2] That need not be so. The reality is less complicated than advertised.

Governments often consider intervention if markets fail to make some socially desirable Good X—such as education, health care, home mortgages, or pensions, for example—sufficiently available. One obvious fix is for the government to provide the good itself. A less obvious intervention is for the government to regulate employment-based (EB) arrangements that provide Good X as a benefit to employees and their families. In the United States, such employment-based interventions are massive: they affect trillions of dollars, billions in tax

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1. On March 22, 2013, the Michigan law, business, and graduate schools held a joint conference entitled "Regulation of Benefit Plans: The Most Consequential Subject to Which No One Pays Enough Attention." *See* Conference Schedule, U. Mich., Regulation of Benefit Plans: The Most Consequential Subject to Which No One Pays Enough Attention (Mar. 22, 2013), http://www.bus.umich.edu/Conferences/US-Benefits-Law-A-Meta-Assessment/GetFile.aspx?paper_ord=635205.

2. Justice Souter apparently retired from the Supreme Court rather than adjudicate more ERISA cases. Jess Bravin & Evan Perez, *Justice Souter To Retire from Court*, WALL ST. J., May 1, 2009, at A1 (noting that one of Justice Souter's reasons for retirement was a desire to be free of "numbingly technical cases involving applications of pension or benefits law").

breaks, and millions of people.[3] They have been written into federal law for decades and generate constant litigation before the United States Supreme Court.[4]

Yet, while other regulatory interventions are well-theorized, employment-based interventions are not. There is no coherent account of employment-based interventions as a concept independent from the peculiarities of Good X or the relevant implementing statutes. This is a significant failure, and

3. The numbers are staggering. At the end of 2013, private pension assets totaled approximately 8 trillion dollars. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., FEDERAL RESERVE STATISTICAL RELEASE Z.1, FINANCIAL ACCOUNTS OF THE UNITED STATES, THIRD QUARTER 2014, 84 tbl.L.117 (2014) (reporting the value of both "defined benefit" and "defined contribution" plan assets). And *annual* funding and paying for all employee benefits (not just retirement) totaled almost 3 trillion dollars in 2010, the last year in which reliable estimates are available. *See* EMP. BENEFIT RESEARCH INST., EBRI DATABOOK ON EMPLOYEE BENEFITS ch.2 (2012) (on file with author) (providing an annual contribution and expenditure estimate of $2.8 trillion for 2010).

Approximately 150 million and 60 million people receive EB health and retirement benefits, respectively. *See* CONG. BUDGET OFFICE, CBO AND JCT'S ESTIMATES OF THE EFFECTS OF THE AFFORDABLE CARE ACT ON THE NUMBER OF PEOPLE OBTAINING EMPLOYMENT-BASED HEALTH INSURANCE tbl.2 (2012), http://www.cbo.gov/publication/43082 (estimating that over 150 million people would receive EB insurance in 2012); Craig Copeland, *Employment-Based Retirement Plan Participation: Geographic Differences and Trends, 2012*, EBRI ISSUE BRIEF, Nov. 2013, at 1, http://www.ebri.org/ pdf/briefspdf/EBRI_IB_011-13.No392.Particip.pdf (indicating that there were 61.6 million beneficiaries of EB retirement benefits in 2012). Because many EB arrangements are tax-favored, the tax expenditure associated with them is very high: projected to be almost 3% of the nation's GDP over the 2013–2022 period. *See Tax Expenditures Have a Major Impact on the Federal Budget*, CBO BLOG (Feb. 3, 2012), http://www.cbo.gov/publication/42919 (estimating tax revenue loss for EB retirement and insurance plans).

4. The seminal statute is the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 & 29 U.S.C.). Legal recognition of EB approaches occurred before that, of course, but ERISA is the landmark statute. *See, e.g.*, PRIVATE PENSIONS AND PUBLIC POLICIES vii (William G. Gale et al. eds., 2004) ("Tax incentives for employer-based pensions originated in 1921.").

Since 2004 alone, the Supreme Court has decided fourteen ERISA cases. *See* Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014); Heimeshoff v. Hartford Life & Accident Ins. Co., 134 S. Ct. 604 (2013); US Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013); CIGNA Corp. v. Amara, 563 U.S. 421 (2011); Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242 (2010); Conkright v. Frommert, 559 U.S. 506 (2010); Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 555 U.S. 285 (2009); Metro. Life Ins. v. Glenn, 554 U.S. 105 (2008); LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248 (2008); Beck v. Pace Int'l Union, 551 U.S. 96 (2007); Sereboff v. Mid Atlantic Med. Servs., Inc., 547 U.S. 356 (2006); Aetna Health Inc. v. Davila, 542 U.S. 200 (2004); Cent. Laborers' Pension Fund v. Heinz, 541 U.S. 739 (2004); Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1 (2004).

one that has obscured clear thinking on the subject for decades. This Article offers a simple theory of employment-based interventions that (1) explains the common conceit of all such interventions and (2) provides a non-technical framework for evaluating any particular intervention, regardless of Good X.

The gist of the theory (which for convenience I call "EB theory") is easily stated. Regulatory interventions occur because the government concludes there is a problem with the quantity, quality, or distribution of Good X; employment-based interventions occur because the government believes regulating the labor deal is an attractive way to fix it. EB theory offers a systematic way for observers to determine whether the government is right. In so doing, EB theory makes the relative appeal (or insufficiency) of employment-based interventions vastly easier to understand. It also brings order and lucidity to a famously untidy subject. By gathering under the same tent observations made across eras and disciplines, by laying bare assumptions about the "right" way to provide certain goods, and by suggesting promising paths for reform, EB theory promotes clarity in the national conversation.

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Part I provides some brief but necessary background. It supplies a short history of EB interventions in the United States, and considers the relevant features of the two most important federal EB statutes: the Employee Retirement Income Security Act of 1974 (ERISA) and the Patient Protection and Affordable Care Act of 2010 (ACA).[5]

Even though employment-based interventions can include a variety of socially desirable goods, the original Good X, as Part I explains, was pensions. Abstract thinking was largely trained on questions peculiar to pensions, rather than on the inherent consequences of conscripting the employment bargain to convey some socially desirable Good X beyond wages. No organized attempt to theorize the latter appears in the literature. That pattern repeated for the second great Good X: health care. Intense criticism has been leveled at EB health care approaches, but with little consideration that such problems could be predictable manifestations of EB interventions generally. The

5. The Affordable Care Act is actually two pieces of legislation: the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. I follow custom by referring to them both as the "ACA."

ACA, while signaling continuing legislative fascination with EB interventions, has prompted little general theorizing on EB interventions beyond their role in health care.

Part II pivots from the historical to the conceptual to offer a theory of EB interventions. The theory identifies the essential characteristics of EB interventions and builds a vocabulary to describe their advantages and disadvantages. The theory next evaluates in depth those advantages and disadvantages.

Part II.A offers a simple conceptualization: an EB intervention is a legislative decision to improve Good X by use of the labor deal. This conceptualization incorporates two key premises: first, that the market has failed to optimize the quality, quantity, or distribution of Good X, and second, that it is desirable to improve Good X through regulation of the employment relationship. Part II.A also describes common variations in the implementation of EB interventions.

Part II.B considers why EB approaches might be justified. It builds the preliminary case for EB interventions by asking what Good X would look like in "the baseline world," i.e., an unregulated market, and imagining how an EB intervention might improve things. Compared to the baseline, EB interventions admit of three potential advantages: (1) the use of sophisticated parties to aid employees in obtaining Good X; (2) the power of groups in purchasing Good X; and (3) use of the compensation deal as a natural decision point to promote Good X acquisition and planning.

Comparison of EB interventions with other regulatory solutions is more difficult, because a conclusive comparison depends on the details of those competing options. One can, however, identify intuitive advantages EB interventions might have over other families of regulatory solutions. Part II.B identifies two. First, the labor deal seems a robust regulatory target. People need to make these deals and will have trouble abandoning them merely because of some additional regulatory burden. Employers, moreover, are familiar with serving as compliance bureaucrats. Second, EB interventions are regulatory solutions that preserve a meaningful role for market forces, and thus arouse less skepticism in many stakeholders than more invasive approaches.

Part II.C builds the general case against EB interventions. Rarely will any seriously considered EB intervention make matters worse than the baseline world. Instead, the relevant brief against EB interventions consists of two strains of argument. The first is that the purported advantages of EB interventions are weaker than they appear. The second is that there are good reasons to be skeptical of EB interventions compared to other regulatory alternatives designed to solve the problems of Good X.

Stated briefly, little is to be gained from using employers and the labor deal as a regulatory nexus. Employers are not, on matters of Good X, meaningfully sophisticated; their expertise lies elsewhere. Extensive regulation will likely be necessary to prevent employers from making unwise decisions regarding Good X, particularly when non-expert employers engage truly sophisticated third-party providers of Good X, as they often will. To the extent employers are more sophisticated on Good X than workers, extensive regulation will be needed to prevent employers from taking advantages of employees, with whom they have, on the matter of compensation, an adversarial and unbalanced relationship. The likely quantum of regulation needed to mitigate potential employer incompetence or exploitation suggests that a more direct solution—cutting out employers and directly regulating the providers of Good X—may be preferable to an EB intervention.

EB interventions also suffer from two more subtle negatives. The first, regulatory fragility, comes from the strategic advantage employers have by being able to deliver a Good X marginally better than the baseline world. Regulatory efforts to improve Good X will be bound by employer threats to no longer offer Good X, a threat that increases in magnitude the worse the baseline world is. Given that an EB intervention is justified in the first instance by some problem with Good X in the baseline world, this threat will virtually always have currency. It gains further power still when employers remind regulators that they are not, generally speaking, in the business of providing Good X. Such incidental providers of Good X are those we would most expect to abandon doing so if the going gets rough.

The second subtle negative, opacity, operates to confuse stakeholders about who, precisely, is paying for Good X (and at what cost), and thus impedes accurate consideration of alternative solutions that are more transparent about the cost of Good X. EB interventions also promote the mistaken belief that Good X is an employment issue, rather than a social issue. EB interventions, however, are simply ways to solve problems with Good X. They signify no deeper relationship between employment and Good X.

Part III demonstrates the utility of EB theory. The theory establishes and explains EB interventions as a distinct species of regulatory intervention, with identifiable traits. It therefore immediately makes coherent the inquiry into the merits of any proposed EB intervention. What is the problem with Good X that demands action? How will regulating the labor deal ameliorate the problem? Is the ameliorative rationale based on employer sophistication, group advantage, the behavioral effects of tweaking the compensation bargain, or some combination thereof? Will an EB approach lead to a deteriorating equilibrium, i.e., where the alternative world of Good X is so undesirable that regulators have little leverage? How tolerable is the opacity that plagues many EB interventions?

Not only does the theory promote fruitful comparison of EB solutions to other regulatory approaches, it distinguishes among possible EB interventions. For example, ERISA might be undesirable, but perhaps some other version of an EB retirement intervention is superior to both ERISA and its non-EB regulatory competitors. EB theory provides a roadmap for both types of inquiry.

Importantly, the answers to the questions EB theory poses are not pre-ordained. They depend on the empirical judgment and priorities of those doing the asking. That important caveat aside, in Parts III.A, III.B, and III.C, I briefly consider some specific implications of EB theory.

Part III.A uses EB theory to identify a potentially promising path for reform. A perhaps under-appreciated strength of EB interventions is their ability to promote "segregative pushes." Segregative pushes segregate a portion of wages and commit employees to spending those funds on Good X. A segregative push combined with a particular style of regulation—a "conduit" approach—might be the breed of EB intervention most likely to capture the attention of sincere reformers. A conduit system is one in which the primary role of the employer is to transparently withhold and transfer some amount of the employee's pay to an account that the employee can only spend in a regulated, non-EB market for Good X. Conduit systems combine the attractive front-end aspects of EB approaches with a regulated but private non-EB market on the back end. Further study by scholars is warranted.

Part III.B uses EB theory to shed light on ERISA and the ACA, suggesting comprehensible narratives for two infamously complex statutes. ERISA is a statute that underestimated the dangers of conscripting the labor deal as a regulatory nexus, and fell victim to regulatory fragility. The ACA is a statute that attempted to create a non-EB market for health insurance while simultaneously choosing, perhaps for political reasons, to perpetuate an EB approach. The latter decision is certain to be reexamined in the not-distant future.

Part III.C uses EB theory to offer a very short thought experiment about why education is a good provided outside of employment, and what it may say about the degree to which our views of EB interventions are colored by hidden assumptions, which may or may not survive more considered analysis.

Part III.D shifts from the specific to the general and explains the broad value—to scholars, decision-makers, and stakeholders—in having an accessible EB theory. One pleasing side effect of EB theory is that it organizes a great mass of seemingly unrelated scholarship (on pensions, health care, insurance, disability, and so on) that stretches back over a century. It is also a crucial first step in dispelling the fog that impairs mainstream understanding and discussion of EB approaches. Rarely has a mechanism so central to the processes of everyday life been shrouded in mystery and obscurity for so long. Understanding is valuable in and of itself, but particularly so when the subject is something that touches so many dollars and so many lives.

I. HISTORY AND BACKGROUND

The story of EB interventions in the United States can be told in three parts. The first part traces the organic, unregulated rise of employment-based retirement and health care approaches. The second part is the enactment of ERISA, which governs most private EB arrangements. The third part is the enactment of the ACA, which regulates EB health arrangements. Missing from the story is any overarching theory about EB interventions.

I should offer an important clarification. Other goods beyond health care and retirement income have been, could be, or are provided through EB arrangements. For example, one very important good provided in significant part through an EB model is disability insurance, i.e., wage replacement for those who cannot work because of a disability. And one good that could conceivably be provided through an EB approach, but is not, is unemployment insurance, i.e., temporary wage replacement for involuntary loss of employment.[6] Retirement and health care, however, are the two most important EB goods in America, as well as the ones that best convey the necessary background in advance of the theoretical analysis offered in Parts II and III.

A. HISTORY (PRE-1974)

The history of EB interventions orbits around two familiar things: retirement and health care. While today those subjects are on the minds of every aging voter and ambitious politician, in historical terms they are relatively recent problems. The EB story begins with retirement.

Retirement. Retirement income, broadly, includes any income one relies upon after aging out of the workforce. Originally, however, the conception of retirement income was narrower: the pension. A pension is a fixed stipend paid by the government or one's former employer. Pensions assumed social significance during the late 19th century.[7] Prior to that, most workers were farmers or artisans who participated in family businesses; if they lived long enough, they relied on younger relatives to continue the business and provide for them in senescence. As people began to work for enterprises they did not own (and began to live long enough to survive their careers), the need for post-employment income became apparent.[8]

Pensions—a temporal transfer of wages—were a market reaction to a workforce with a post-employment need. As workers realized the need for retirement income, the promise of a pension advantaged employers in the labor market. Pensions also appealed to employers for their own benefit, because pensions encouraged employees to make firm-specific investments of human capital that benefited employers.[9] Pension arrange-

6. *See infra* note 184.

7. Civil War veterans received government pensions for service, and in 1875, American Express offered the first private pension. *See* Peter Blanck & Chen Song, *"Never Forget What They Did Here": Civil War Pensions for Gettysburg Union Army Veterans and Disability in Nineteenth-Century America*, 44 WM. & MARY L. REV. 1109, 1116 (2003) (describing the Civil War pension intervention); STEVEN A. SASS, THE PROMISE OF PRIVATE PENSIONS: THE FIRST HUNDRED YEARS 23 (1997) (describing the American Express pension).

8. *See* SASS, *supra* note 7, at 10–25; *see also* DAN M. MCGILL ET AL., FUNDAMENTALS OF PRIVATE PENSIONS 4–6 (9th ed. 2010) (discussing the transformation of the American labor force in the late nineteenth century).

9. MCGILL ET AL., *supra* note 8, at 23; *see also* JONATHAN BARRY FORMAN, MAKING AMERICA WORK 225 (2006) (explaining that a pension plan will typically "provide large financial incentives for workers to stay with a firm

ments, moreover, helped increase voluntary departure when the employee's productivity declined due to age.[10] Voluntary departure is for employers preferable to termination because the former furthers amicable relations with the workforce.

It soon became clear that unregulated private pensions were insufficient to provide adequate retirement security for workers or, obviously, for the citizenry as a whole.[11] The pre-World War II solution to the problem was to sidestep EB interventions entirely; the passage of the Social Security Act in 1935 provided broad-based government support for retired and disabled Americans.[12]

The passage of the Social Security Act, however, did not obviate the need or desire for workplace pensions. Other factors, such as the steady increase of income tax rates, as well as the wage and price controls of World War II, increased the appeal of EB pensions. Indeed, employee (and union) realization of the tax benefits and inherent value of occupational pensions contributed to their sharp rise in the 1950s and 1960s.[13] By 1974, almost thirty million workers (approximately forty-four

at least until they are eligible for early retirement").

10. MCGILL ET AL., *supra* note 8, at 6; *see* LOUIS D. BRANDEIS, *Our New Peonage: Discretionary Pensions*, *in* BUSINESS—A PROFESSION 65, 67 (Small, Maynard & Co. 1914) (explaining the desire of employers to use pensions to amicably hasten departure of aged employees from the workforce).

11. *See, e.g.*, *Economic Security Act of 1935: Hearing on H.R. 4120 Before the H. Comm. on Ways & Means*, 74th Cong. 219–21 (1935) (statement of Murray Latimer, Chairman, Railroad Retirement Board), http://www.ssa.gov/history/pdf/hr35latimer.pdf (testifying as to the inadequacy of the private pension intervention and the pressing need for enactment of what would become Social Security). *See generally* MURRAY W. LATIMER, INDUSTRIAL PENSION SYSTEMS IN THE UNITED STATES AND CANADA (1932) (examining and criticizing the private pension system).

12. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. ch. 7). Social Security was amended in 1939 to resemble more closely what it is today. *See* Kathryn L. Moore, *An Overview of the U.S. Retirement Income Security System and the Principles and Values It Reflects*, 33 COMP. LAB. L. & POL'Y J. 5, 8 (2011) (explaining the Social Security Act Amendments of 1939). Interestingly, a rarely discussed historical fact is that an EB "opt-out" was rejected by the 74th Congress. *See* Tamela D. Jerrell, *A History of Legally Required Employee Benefits: 1900–1950*, 3 J. MGMT. HIST. 193, 199–200 (1997) (discussing the failed Clark Amendment, a proposed amendment to the Social Security Act allowing companies who provided comparable retirement benefits to opt out of the federal system).

13. *See* Alfred M. Skolnik, *Private Pension Plans, 1950–74*, 39 SOC. SECURITY BULL. 3, 4 (1976), http://www.socialsecurity.gov/policy/docs/ssb/v39n6/v39n6p3.pdf (reporting that the percentage of private sector workers covered by pension plans grew from 22% in 1950 to 44% in 1974).

percent of the private sector workforce) were covered by pension plans.[14]

By the 1960s, however, the uniformly good economic news of post-World War II America began to change for the worse, and pensions became a source of concern. Knowledgeable observers warned of an emerging pension crisis, in which difficult economic circumstances would undermine promises made in headier times. Congressional study of the problem began in earnest and would reach fruition the following decade with the passage of ERISA in 1974.[15]

Health care. The other key subject in the history of EB interventions is health care. The relative sophistication of modern medicine makes it difficult to forget how recently medicine was a primitive enterprise. The germ theory of sickness was not widely accepted until the later stages of nineteenth century; more Civil War soldiers, for example, perished from disease and illness than enemy weaponry.[16] Subsequent advancement of medical knowledge, however, led to confidence that purchasing medical services was worthwhile.[17]

In the 1860s, several companies experimented with providing "sickness funds" for injured workers.[18] In the 1870s, other companies that required physically demanding and dangerous work—such as railroads, mines, and manufacturers—began providing company physicians to workers (for deducted wages).[19] Successful direct maintenance of these programs proved challenging.[20]

14. *Id.* at 4 tbl.1 (reporting data on the number of private pension participants).

15. *See infra* Part I.B.

16. *See, e.g.*, Amir Attaran & Kumanan Wilson, *A Legal and Epidemiological Justification for Federal Authority in Public Health Emergencies*, 52 MCGILL L.J. 381, 400 n.65 (2007) ("[I]t was not until the nineteenth century that scholars such [as] John Snow, Louis Pasteur, and Robert Koch established the precepts of epidemiology, vaccinology, and germ theory—and that is where the scientific understanding begins."). Numerous casualty estimates of the Civil War rank disease as a killer of more people than battle. *See, e.g.*, William H. Neinast, *United States Use of Biological Warfare*, 24 MIL. L. REV. 1, 11 (1964) (estimating a disease to battle death ratio of 1.45 to 1).

17. *See* PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 259–60 (1982) (discussing the improving effectiveness of, and confidence in, medical services in the early twentieth century).

18. *See* JOHN E. MURRAY, ORIGINS OF AMERICAN HEALTH INSURANCE: A HISTORY OF INDUSTRIAL SICKNESS FUNDS 74–76 (2007). Several of the employers, interestingly, hoped to make a profit on the funds. *Id.* at 75.

19. *See* STARR, *supra* note 17, at 200.

20. One reason may have been the primitive state of risk classification at

Employers ultimately turned to insurance. In 1910, retailer Montgomery Ward engaged an insurance company to provide a group policy covering its employees for lost income associated with illness, which is considered the first employment-based policy of that kind.[21] In Dallas in the 1920s, a group of schoolteachers contracted with Baylor University hospital to provide medical services to them at a fixed cost per member.[22] This arrangement, significantly, targeted and covered the provision of necessary care, rather than the replacement of lost income.[23]

Although famously successful elsewhere, 1930s reformers were unable to enact national health care legislation.[24] That failure heightened the importance of the wage freezes instantiated during World War II several years later. During the war years, employment-based health insurance was considered compensation not subject to wage controls.[25]

After the war, organized labor began to demand health benefits as a matter of routine.[26] Moreover, whereas early versions of medical insurance were tied to medical expenses that occurred because of accidents, in the post-war period insurers began to offer "major medical" insurance that covered all ailments, whatever their cause.[27] Such was a particularly attractive benefit for labor.[28] By the time ERISA was enacted in 1974,

the time; firms may have lacked the actuarial sophistication to properly price contributions. *See* MURRAY, *supra* note 18, at 75–76 (considering the failure of some early sickness funds).

21. *See* Laura A. Scofea, *The Development and Growth of Employer-Provided Health Insurance*, 117 MONTHLY LAB. REV. 3, 4 (1994).

22. *See id.* at 5.

23. *See id.*; *see also* STARR, *supra* note 17, at 295.

24. Those efforts were, for political reasons, more tepid than the unsuccessful efforts of Progressives some two decades earlier. *Compare* STARR, *supra* note 17, at 243–52 (describing Progressive era proposals), *with id.* at 266–69 (describing New Deal era proposals). Indeed, "[a] provision in the original Social Security bill calling merely for further study of the health insurance problem provoked so much controversy that it was deleted." COMM. ON EMPLOYER-BASED HEALTH BENEFITS, INST. OF MED., EMPLOYMENT AND HEALTH BENEFITS: A CONNECTION AT RISK 64 (Marilyn J. Field & Harold T. Shapiro eds., 1993).

25. *See* Clark C. Havighurst, *American Health Care and the Law*, *in* THE PRIVATIZATION OF HEALTH CARE REFORM: LEGAL AND REGULATORY PERSPECTIVES 3–4 (M. Gregg Bloche ed., 2002) (explaining the relevance of wartime wage controls).

26. *See* Scofea, *supra* note 21.

27. *Id.* at 3–4.

28. *See* Kathryn L. Moore, *The Future of Employment-Based Health Insurance After the Patient Protection and Affordable Care Act*, 89 NEB. L. REV.

a significant percentage of workers were beneficiaries of EB health plans.[29] Health care costs had also begun to rise, but the scale of the problem was not evident to those legislators who would draft ERISA.[30]

B. ERISA

As its name—the Employee Retirement Income Security Act of 1974—suggests, ERISA's central aim was to address the pension crisis of the 1960s and early 1970s.[31] Pension promises were too frequently underfunded or broken, with workers left in the cold. ERISA was the congressional reaction.[32] Although it preserved the voluntary nature of pension promises—an employer could choose to not offer a pension at all, or could choose to offer a pension modest in amount—ERISA otherwise extensively regulated pension promises that were made so as to ensure they were kept.

Central to ERISA was and is the idea of an employee benefit "plan." As the statute has it, an employer who wishes to offer Good X in the labor deal must do so via a plan.[33] A plan is both an entity and the sum of the terms governing the promised benefit. Employers need to appoint a "named fiduciary" to operate the plan and observe demanding ERISA-imposed duties designed to ensure loyalty, care, and candor.[34] Those fiduciary

885, 891 (2011) (describing unions' aggressive seeking of health benefits after World War II).

29. *See* Walter W. Kolodrubetz, *Two Decades of Employee-Benefit Plans, 1950–70: A Review*, 35 SOC. SECURITY BULL. 10, 12 tbl.1 (1972) (reporting the number of beneficiaries for different varieties of EB health plans, including those covering hospitalization, surgery, and major medical expenses).

30. In the minds of the 93rd Congress, "there was no crisis in health plans in 1974." Michael S. Gordon, *Introduction to the Second Edition: ERISA in the 21st Century*, *in* EMPLOYEE BENEFITS LAW lxiii, lxviii (Steven J. Sacher et al. eds., 2d ed. 2000). When ERISA was enacted, however, health costs were entering a phase of rapid growth. *See, e.g.*, HENRY J. KAISER FAMILY FOUND., HEALTH CARE COSTS: A PRIMER 4–5 (2012), http://kaiserfamilyfoundation.files.wordpress.com/2013/01/7670-03.pdf (showing the rise in health care costs between 1960 and 2010); Kolodrubetz, *supra* note 29, at 15 (reporting that by 1970 "[t]he inflation of medical costs . . . left its imprint on the rapidly increasing [EB] expenditures for health care benefits").

31. *See generally* JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY (2004). Wooten's work is the definitive political history of ERISA.

32. *See, e.g.*, Brendan S. Maher & Peter K. Stris, *ERISA & Uncertainty*, 88 WASH. U. L. REV. 433, 451 (2010) (explaining that "the overwhelming focus of ERISA" was pension reform).

33. 29 U.S.C. § 1002(1)–(3) (2012).

34. *Id.* § 1102(a)(1)–(2) (describing the requirement for and definition of a

duties extend beyond the named fiduciary; they extend to any additional party who performs certain broadly defined acts with respect to the plan.[35]

Importantly, ERISA contemplated two types of plans: "pension plans" and "welfare plans." Pension plans provide for retirement income.[36] Welfare plans are those plans that provide for anything else ERISA covers, including health care, disability compensation, and long term care insurance.[37]

Pension plans come in two varieties: "defined benefit"[38] and "defined contribution."[39] A defined benefit plan is what most people think of as a traditional pension, i.e., where the worker is entitled to a fixed periodic (usually monthly) payment based upon tenure and average pay. Defined contribution plans are those plans that provide for the employer and/or employee to "contribute" some amount to an account the employee may only use for retirement income, e.g., a 401(k) plan. When ERISA was enacted in 1974, defined benefit plans—i.e., traditional pensions—dominated the retirement landscape.[40] Defined contribution plans existed but were far less popular than they are today.[41]

named fiduciary); *id.* § 1104 (detailing the fiduciary duties).

35. *Id.* § 1002(21)(A). The term "fiduciary" is defined in functional terms; it includes any party who "has any discretionary authority or discretionary responsibility in the administration" of a plan. *Id.*

36. *Id.* § 1002(2)(A) (defining "pension plan" as "any plan, fund, or program which . . . (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond").

37. *Id.* § 1002(1) (defining "welfare plan" as one providing "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services").

38. *Id.* § 1002(35).

39. *Id.* § 1002(34).

40. *See* U.S. DEP'T OF LABOR, EMP. BENEFITS SECURITY ADMIN., PRIVATE PENSION PLAN BULLETIN HISTORICAL TABLES AND GRAPHS 1975–2013, at 14 tbl.E11g (2014), http://www.dol.gov/ebsa/pdf/historicaltables.pdf (graphing the amount of assets in defined benefit versus defined contribution plans from 1975 to 2013).

41. *See id.*; *cf.* Richard A. Ippolito, *Bankruptcy and Workers: Risks, Compensation and Pension Contracts*, 82 WASH. U. L.Q. 1251, 1252 (2004) ("401k plans have dominated pension growth for the past twenty years . . . ."). Indeed, in the common vernacular today, the word "pension" generally *only* means a defined benefit plan; a "retirement account" is the term commonly used for defined contribution plans. Few would describe their 401(k) accounts as their "pension." To be clear, however, ERISA considers *both* of them "pensions."

This small bit of ERISA jargon is necessary to appreciate the tenor of ERISA's regulatory scheme. ERISA *very* carefully conceived of and regulated "defined benefit" pensions.[42] A pension is an annuity, i.e., a promise of a periodic payment beginning in the future. If that annuity promise is unfunded, underfunded, or funded via reserves an employer can withdraw at its discretion, the security of the pension is compromised. ERISA accordingly requires that "defined benefit" pension promises be backed by funds segregated in a trust, and specifically regulates who can touch those funds, how they can be used, and what need or can be said about them.[43] Questions not addressed by such specific rules are resolved with reference to the fiduciary duties of plan fiduciaries. Finally, defined benefit plans are (partially) insured by the Pension Benefit Guaranty Corporation (PBGC).[44]

For employee benefits *other* than traditional pensions, i.e., for defined contribution retirement plans and welfare plans, ERISA regulation is of a more modest character. It consists of fewer specific rules (compared to those for pensions), with significant if not most regulatory work to be done by the fiduciary duties the statute imposes upon those operating plans. If we imagine a spectrum, defined contribution plans are subject to fewer rules than defined benefit plans, with welfare plans (which includes health plans) subject to even fewer rules than are defined contribution plans.

Observers have long focused on how well ERISA regulates a particular type of benefit arrangement. For example, ERISA generally gets good marks for its regulation of traditional pensions; mixed marks for its regulation of retirement accounts; and terrible marks for its regulation of health and disability insurance.[45] The conventional explanation for this divergence of

42. *See, e.g.*, PETER J. WIEDENBECK, ERISA: PRINCIPLES OF EMPLOYEE BENEFIT LAW 12 (2010) (remarking that the "most stringent regulation is reserved for defined benefit pension plans").

43. Specific provisions require, for example, that a certain amount of money be in the trust at all times, 29 U.S.C. §§ 1082–1085; that benefits must accrue and vest on a certain schedule, *id.* §§ 1055, 1056(d)(1)–(3); that pension beneficiaries cannot have their pensions retroactively reduced, *id.* § 1054(g); that pension beneficiaries must be informed of funding and entitlement information, *id.* §§ 1021(f), 1023, 1025; and so on.

44. Plan sponsors must pay premiums into the PBGC fund that protects workers if an underfunded plan collapses. *See* WIEDENBECK, *supra* note 42, at 13.

45. *See, e.g.*, Donald T. Bogan, *Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States To Regulate Managed Care?*, 74 TUL. L.

outcomes is that Congress, when it possessed the will to act in 1974, focused on a then-significant pension problem and did not foresee the problems that would arise in the latter two areas. When those problems became apparent, the story goes, Congress lacked the will to act. Few believe that Congress made a considered choice in 1974 to weakly regulate employee benefits other than pensions.[46]

Because of ERISA's checkered record—success on pensions, failure on health and disability—commentators have questioned whether it made (or makes) sense to regulate subjects so different in the same statute at all.[47] And perhaps ERISA bit off more than it could chew. But there remains a basic intuition that ERISA's architects got mostly right: namely, that EB arrangements should be regulated, whatever the subject Good X.[48] That intuition rests upon an assumption that EB bargains have some set of commonalities that transcend the specific na-

REV. 951, 953 (2000) (arguing that ERISA has completely failed as a consumer protection statute for welfare plan participants); Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 36 (1996) (sharply criticizing ERISA's effect on health care reform efforts); Maher & Stris, *supra* note 32, at 451–52 (praising ERISA for its regulation of defined benefit pensions); David A. Pratt, *Nor Rhyme Nor Reason: Simplifying Defined Contribution Plans*, 49 BUFF. L. REV. 741, 761 (2001) (suggesting the need for but criticizing the complexity of ERISA rules governing defined contribution plans); Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 522–23 (2004) (expressing concerns about ERISA's regulation of retirement accounts but also suggesting advantages). Obviously I refer to what I perceive to be trends in the literature, not unanimity.

46. *See, e.g.*, Larry J. Pittman, *ERISA's Preemption Clause and the Health Care Industry: An Abdication of Judicial Law-Creating Authority*, 46 FLA. L. REV. 355, 358–60 (1994) (explaining that the primary purpose of ERISA was to protect all benefit beneficiaries).

47. *See, e.g.*, Maher & Stris, *supra* note 32, at 473–74 (claiming ERISA is a "statutory conglomerate" that wrongfully uses a one-size-fits-all approach for different types of benefit promises).

48. To be clear, there are EB arrangements ERISA does not regulate. *See* WIEDENBECK, *supra* note 42, at 42–43. The statute nonetheless regulates such a broad swath of arrangements that the point is still valid. It is also possible that Congress, in essence, had no appreciation of any commonality between EB approaches and simply hashed together ERISA based on a shallow view of the past. *See* Peter J. Wiedenbeck, *ERISA's Curious Coverage*, 76 WASH. U. L.Q. 311, 315 (1998) (speculating that Congress's decision as to what to include in ERISA was more accident than considered intent). Whether Congress realized it or not, the point remains: there are commonalities in EB interventions that suggest a simple unified framework for how they should be evaluated.

ture of the goods provided and demand regulatory intervention.[49]

No coherent explanation has ever been offered, however, as to what those EB commonalities are. The 93rd Congress, for its part, appeared motivated by a general sense that benefit promises made to employees should be kept, whatever the subject of the promise.[50] That, while commendable, provides little help in methodically considering the pluses and minuses of deploying EB interventions across different settings. And it made it virtually impossible for Congress to predict the serious problems that would arise in connection with defined contribution retirement accounts or employment-based health care.

C. ACA

The two dominant models for paying for health care in the United States are the public "Medi-" model and the private insurance model.[51] The poor and elderly use Medicaid or Medicare; most others use insurance to finance care. The insurance model has posed numerous problems of accessibility, affordability, and comprehensibility.

By largely barring risk underwriting by insurers while requiring everyone to obtain insurance, the ACA reduced the adverse selection problem that had distorted individual markets for health insurance.[52] Whereas in the past some individuals with pre-existing conditions could not obtain insurance at any price, the ACA ensures access to insurance. Of course, because

49. This does not assume, however, that the *content* of the regulatory intervention need be the same with respect to all goods. That was one of ERISA's many failures. *See, e.g.*, Maher & Stris, *supra* note 32, at 460 (explaining ERISA's failure to sufficiently distinguish between welfare and pension plans).

50. *See, e.g.*, WOOTEN, *supra* note 31, at 3–4 (describing Congress as adopting a "worker-security" rationale in enacting ERISA).

51. *See* Brendan S. Maher & Radha A. Pathak, *Enough About the Constitution: How States Can Regulate Health Insurance Under the ACA*, 31 YALE L. & POL'Y REV. 275, 282 (2013) (explaining and noting the prevalence of the "Medi-" and private insurance models).

52. One of Congress's enumerated findings in enacting the ACA was that the individual mandate was "essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." 42 U.S.C. § 18091(2)(I) (2012); *cf.* Amitabh Chandra, Jonathan Gruber & Robin McKnight, *The Importance of the Individual Mandate—Evidence from Massachusetts*, 364 NEW ENG. J. MED. 293, 293–95 (2011) (explaining the reduction in premiums in Massachusetts after implementing the purchase mandate there).

health insurance (even without adverse selection distortions) is expensive, the ACA extends purchase subsidies to poor individuals.[53] Finally, because the purchase of health insurance can be a difficult task, the ACA created "exchanges" in which potential insureds could meaningfully comparison shop among regulated alternatives and choose the policy that matched their preferences.[54]

Whatever the shortcomings in the ACA's execution, the intent of the Act was clear: it aimed to create an accessible, affordable, and stable market for individuals seeking health insurance. That created an interesting tension with the ERISA-inspired EB health insurance system in place at the time of the ACA's enactment. In the past, because of the failures of the individual market, many employees who wanted insurance could only reasonably obtain it if offered as an employee benefit.[55] Not offering health insurance could damage employers by driving away employees who wanted it; in that sense, employers were compelled, because of labor market pressures, to offer health insurance as a benefit. However, to the extent that the ACA created an alternative place to obtain health insurance benefits—namely, the ACA's regulated individual market—would employers stop offering health benefits?

The ACA presumes so, although its treatment of the subject is uneven. As written, it provides obstacles to certain employers wishing to cease offering health insurance.[56] Employers with less than fifty employees may, without penalty, decline to

53. *See, e.g.*, Amy B. Monahan & Daniel Schwarcz, *Saving Small-Employer Health Insurance*, 98 IOWA L. REV. 1935, 1947–48 (2013) (explaining ACA purchase subsidies).

54. *See, e.g.*, Brendan S. Maher, *Some Thoughts on Health Care Exchanges: Choice, Defaults, and the Unconnected*, 44 CONN. L. REV. 1099, 1101 (2012) (stating that one aim of the ACA exchanges was to make insurance purchases "simple and transparent"); *cf.* Daniel Schwarcz, *Transparently Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection*, 61 UCLA L. REV. 394, 407 (2014) ("[E]mpirical evidence suggests that exchanges can be quite effective at promoting transparent markets.").

55. *See, e.g.*, Jonathan Gruber, *Covering the Uninsured in the United States*, 46 J. ECON. LITERATURE 571, 574–77 (2008) (noting that the non-group insurance market "has not provided a very hospitable environment" and that the high cost of health insurance is a large reason for uninsurance).

56. I say "as written" because, at the time of this writing, regulatory officials have suspended various portions of the Act. *See, e.g.*, Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8543 (Feb. 12, 2014) (delaying in part the application of the ACA's "shared responsibility provision" for employers).

offer health insurance.[57] Employers with fifty employees or more, however, face a penalty if they do not offer health insurance to employees.[58] Wisely or not, the ACA contemplates keeping some portion of the EB health insurance intervention intact. It also regulates the substance of some EB health insurance policies differently and less invasively than non-EB policies.[59]

A careful theoretical justification of why—absent political convenience—the ACA *should* do what it ultimately *did* never appeared in the run-up to reform. And many of the criticisms of EB health insurance made preceding the passage of the ACA turn out, in significant part, to be predictable manifestations of EB theory.[60]

D. A LACK OF THEORY

In spite of the existence of two massive federal statutes regulating EB arrangements, neither has prompted the articulation of any general theory about the construct they regulate.

Its broad coverage of EB activities notwithstanding, ERISA did not address itself, either in enactment or the run-up thereto, to advancing a more general theory of EB interventions. Indeed, at the time of its passing, ERISA's effects on Goods X beyond retirement income were only barely appreciated.[61] Even

57. 26 U.S.C. § 4980H(c)(2) (2012).

58. *Id.* § 4980H(a) (detailing the "shared responsibility" provision). The size of the penalty varies. *See* Moore, *supra* note 28, at 903–06 (explaining operation of the penalty). The ACA also continues to provide tax advantages to EB health insurance that it does not provide to the individual purchase of insurance. *See* Stephen Utz, *The Affordable Care Act and Tax Policy*, 44 CONN. L. REV. 1213, 1233–34 (2012) (explaining disparate tax treatment of EB health insurance and individual health insurance).

59. For example, large employers do not need to offer policies that contain "essential health benefits," the statute's central substantive effort to regulate the content of health insurance policies. 42 U.S.C. § 300gg-6(a) (2012) (providing that only individual and small group plans must provide "essential health benefits"). *See also* Amy Monahan & Daniel Schwarcz, *Will Employers Undermine Health Care Reform by Dumping Sick Employees?*, 97 VA. L. REV. 125, 147–48 (2011) ("[N]either large group insurance plans nor self-insured employers are required by ACA to offer essential health benefits to their policyholders.").

60. *See infra* Part II.B and accompanying notes.

61. This is one reason why scholars have described ERISA's treatment of health insurance as an "afterthought." *See* David A. Hyman & Mark Hall, *Two Cheers for Employment-Based Health Insurance*, 2 YALE J. HEALTH POL'Y L. & ETHICS 23, 29 (2001) ("Health benefits were included in ERISA as an afterthought . . . ."); *cf.* Catherine L. Fisk, Lochner *Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO

with respect to retirement income, the statute's conceptualizing was, given the realities of today, incomplete.[62] The ACA demonstrates a similar inchoateness with respect to any coherent theory of EB interventions. It acknowledges and relies upon EB health insurance, but little more.

Certainly many observers, across eras and disciplines, have criticized many aspects of EB approaches.[63] There is virtually no aspect of pensions, retirement accounts, health care, disability wage replacement, long term care insurance, or other plausible EB goods that has not been discussed, praised, or criticized. Yet no effort has been made to cast those evaluations (whether criticism or praise) as part of a unifying EB framework accessible across disciplines. In Part II, I develop one. In Part III, I consider its utility.

II. THEORIZING EB INTERVENTIONS

In this Part II, I offer a conceptualization of EB interventions that both defines what they are and crystallizes important questions about their use. In so doing, I identify and develop the rationales for and hazards of using EB interventions, drawing upon real-world examples to illustrate the principles at work. The enumerated justifications and hazards commonly recur across EB interventions but apply with varying intensity to different goods and across different statutory schemes. Accordingly, EB theory renders much more disciplined the consideration of any proposed EB intervention.

A. CONCEPTUALIZING EB INTERVENTIONS

Simply stated, EB interventions are (1) government interventions that (2) regulate the inclusion of socially desirable

ST. L.J. 153, 165–66 (1995) (explaining that Congress gave "relatively little thought" to welfare benefits).

62. Congress did not foresee the explosive growth of defined contribution plans. Indeed, Congress did not even clarify their tax treatment until 1978. *See* Archie Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360, 1385 n.70 (1980) (explaining the uncertain tax status of "salary reduction plans" until the addition of section 401(k) to the IRC in 1978).

63. *See infra* Part II.C and accompanying notes. Treatments outside law often focus on the political motivations of different constituencies in addressing Good X problems through EB approaches (as opposed to other solutions). *See, e.g.*, STUART D. BRANDES, AMERICAN WELFARE CAPITALISM 188–94 (1976).

goods (3) in the labor deal struck between employees and employers.[64]

By socially desirable goods, I refer to those goods for which there is broad agreement that society is better off if most individuals have or are able to obtain them. Education, health care, home mortgages, pensions, and life insurance are classic examples, although others can be readily imagined. Such goods are commonly held to have special significance because of supra-economic concerns such as fairness, opportunity, dignity, compassion, and so on.

The nature of the government intervention in the labor deal varies, but often includes both incentives and prohibitions. For example, employers and employees might be incented to bargain for pensions because doing so secures a tax advantage to one or both of them.[65] The terms of the deals they strike, on the other hand, might be directly limited by substantive rule or indirectly limited by conditioning the tax break.

Although both the mechanism and magnitude of regulatory intrusion will vary across EB interventions, the key point is that EB interventions rest upon government intervention in the labor deal. Interventions in markets are only sensible when there is some cognizable shortcoming with the market result.[66] I do not mean for this to be a controversial point. Markets ei-

64. A word about vocabulary. If a good is provided incident to the labor deal but not regulated, we might think of that as an EB arrangement or bargain (as opposed to an intervention). I think that should be obvious from context, but I make the point in an abundance of caution.

65. The incentive to offer the social good in the labor deal does not have to be tax-based; it can come in other forms. But use of tax incentives is popular, and prompts a separate question. Assuming a given EB intervention (1) improves Good X and (2) uses tax incentives, is the lost revenue associated with the tax incentive too high a comparative price to pay to obtain the alleged improvement of Good X? That is, might some *other* regulatory approach, i.e., direct government provision of Good X, result in the same improvement of Good X with fewer tax dollars?

I do *not* here try to answer the question of whether EB interventions get the most bang for the tax buck. In this Article, I merely attempt to determine how we might evaluate whether and how much Good X is in fact being improved by a specific EB intervention. How high a tax price we should "pay" for obtaining that improvement is a question that requires a separate treatment (and comparison of the alternatives). I do think, however, that EB tax costs are—like other workings of EB interventions—often not clearly understood by stakeholders. *Cf. infra* Part III.C.3.d (discussing the undesirable opacity of EB interventions). I thank Joseph Bankman for his thoughtful comments on this point.

66. By "open market" I mean the unregulated buying and selling of goods by parties according to their means and preference.

ther get the right result—whatever one means by "right"—or they do not. Interventions only make sense in the latter case.

Accordingly, for an EB intervention to be warranted, there must be some type of market inadequacy concerning Good X, i.e., the "normal" market must have in some way failed to optimize Good X. Sub-optimal outcomes can occur in a variety of ways, but it is conceptually convenient to think about them as happening with respect to the quantity, distribution, or quality of Good X.[67] An EB intervention is therefore only sensible if use of the labor deal to regulate Good X will somehow "improve" the quantity, distribution, or quality of X.

Thus, the necessary second step in thinking about any EB intervention—after we have identified a problem (or problems) with Good X—is to ask: why might the government believe Good X will be improved by regulating its inclusion in the labor deal?

B. RATIONALIZING EB INTERVENTIONS

1. The Baseline: Open Market Transactions for X

First some table-setting. The notion that one might "improve" a situation is comparative; one must be improving some situation relative to something else. Real world discussion of EB interventions is complicated (and often confused) by the status quo, which reflects a variety of preexisting regulatory interventions that are both explicit and implicit. For now let us assume, for ease of analysis, that the baseline world is one in which individuals who want Good X obtain it through individual, open market transactions with providers of Good X.

Problems in such a world are not hard to imagine.[68] Some people may not purchase Good X because they misunderstand its value. Some might be priced out of the Good X market. Some might purchase undesirable versions of Good X because they lack the sophistication to properly negotiate with Good X providers. Others might be discriminated against in their attempts to purchase Good X. And so on. The first order case for EB in-

67. Quantity refers to the amount of Good X; distribution refers to the distribution of Good X throughout society; quality refers to the features of Good X.

68. Whether something is a problem depends on antecedent principles. But whatever the reason one believes there is a problem, for an EB intervention to make even *prima facie* sense, it must do something to address that problem.

terventions revolves around their potential ability to address these inadequacies.

2. The First Order Case for EB Interventions

Three rationales comprise the prima facie case for EB interventions: (1) the use of sophisticated actors; (2) the power of group leverage regarding Good X; or (3) the value of the labor deal as a "decision point" for Good X purchasing and planning. The rationales, of course, apply with different force depending on the nature of Good X and the contours of the relevant EB statute.

a. Sophisticated Actors

For some goods, market problems might directly result from the complicated nature of their particulars. Individuals might indefinitely delay purchasing Good X because the task is unpleasant or they are uncertain they can strike an appealing deal.[69] Individuals might be unable or unwilling to invest the time to identify and compare Good X options.[70] Individuals might purchase Good X but be exploited by more sophisticated providers such that they end up with a Good X of poor quality.[71]

EB arrangements can address this problem by supplying sophisticated actors to aid employees in acquiring Good X, namely employers. The comparative sophistication of employers over employees is a generalization subject to innumerable qualifications (as I will discuss below).[72] But in spelling out the base rationale here—that EB interventions are attractive on

69. *See, e.g.*, George A. Akerlof, *Procrastination and Obedience*, 81 AM. ECON. REV. 1, 1–19 (1991) (noting the frequency of procrastination with respect to certain types of decisions, including saving for retirement); Brian Galle, *Hidden Taxes*, 87 WASH. U. L. REV. 59, 83 (2009) ("[T]here is now extensive evidence that most people are disproportionately sensitive to small, immediate costs; that is one of the reasons we procrastinate even essential tasks."); Piers Steel, *The Nature of Procrastination: A Meta-Analytic and Theoretical Review of Quintessential Self-Regulatory Failure*, 133 PSYCHOL. BULL. 65, 66 (2007) (surveying explanations, models, and studies of procrastination).

70. *Cf.* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1095–100 (2000) (explaining difficulties in making health insurance selection decisions).

71. *Cf.* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 47 (2008) (arguing that in the consumer credit context "sellers design their products to exploit consumers' imperfect information and imperfect rationality").

72. *See infra* Part II.C.

the grounds that they organically engage more sophisticated actors to purchase Good X on employees' behalf—let us assume the term "employer" means "a firm of considerable size." Compared to an individual worker, we would expect such firms to have lower information costs regarding obtaining, understanding, and acting on information related to Good X.[73]

Employer resources are more flexible, and deeper, than that of individuals. Managers of the employer will often be more educated and better trained than non-managerial employees. The firm can devote a small percentage of its overall capacity to developing a familiarity with (if not a specialty) in Good X; in comparison an individual employee would need to devote a considerably larger percentage of his time.[74] Employers have more capital and greater access to capital markets, which provides them with greater leverage and more credibility in dealing with the counterparties who wish to provide Good X. Employers are likely to be repeat players (with counterparties providing Good X) of significant size and secure associated transaction cost advantages.[75] Employers, as institutional actors acting in a commercial capacity, may be less subject to cognitive biases than individuals attempting to acquire Good X on the side and in their spare time.[76]

73. This is one of ERISA's beginning presumptions. *See supra* note 34. A plan sponsor—the employer—is originally the "named fiduciary" of the plan unless it designates someone else. It makes little sense to designate an actor a fiduciary relative to another unless the former has at least a peppercorn more capability than the latter.

74. *Cf.* Hyman & Hall, *supra* note 61, at 30 (arguing that, with respect to health insurance decisions, employers have superior personnel resources).

75. *Cf.* Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining* Alexander v. Gardner-Denver *in the Wake of* Gilmer v. Interstate/Johnson Lane Corp., 1997 BYU L. REV. 591, 619–24 (discussing the advantages of repeat-players in negotiating contracts and in dispute resolution settings).

76. Certainly employers and institutions are subject to cognitive biases. The argument is that in comparison to individual employees operating outside of an EB intervention (who are in essence consumers), employers acting institutionally are less subject to cognitive biases. *See* Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1515 (1998) ("Because corporations and other business associations are so subject to market constraints, there have been long-standing doubts as to whether psychological biases, even if robust at the individual level, are likely to have much impact on organized economic behavior."); *see also* Chip Heath et al., *Cognitive Repairs: How Organizational Practices Can Compensate for Individual Shortcomings*, 20 RES. ORGANIZATIONAL BEHAV. 1 (1998).

Assuming the employer is appropriately incented, we can imagine two ways in which their comparative sophistication might improve Good X. The first is direct agency: the employer will strike more or better deals for Good X with providers of Good X than employees would have on their own. The second is indirect agency: the employer will use its sophistication to guide employee acquisition of Good X such that the employee is a wiser purchaser. Either represents an improvement compared to the baseline.

b. Group Leverage

A common market problem is that a good is too expensive for some who need it. EB approaches can address part of this problem by leveraging the advantages that attach to group deals for certain goods. These group advantages come in two basic forms: (1) bulk purchasing and (2) group correctives.

i. Bulk Purchasing

Bulk purchasing is straightforward. Purchases in larger lots can occur at lower unit cost, and employers would be purchasing more of Good X at a given time than would individual workers on the open market. An employer of size would be able to obtain Good X at a lower cost than an equivalent number of employees purchasing Good X individually. The value and appeal of bulk purchasing obviously varies depending on Good X and the size of the employer. But the principle is simple.[77]

ii. Group Correctives

Group correctives are less straightforward. Some goods are subject to market infirmities that make non-group purchases highly expensive or impossible (because the necessary price would be so high that Good X providers do not even offer it). Use of a group as a purchasing or deal unit can "correct" some of these problems.

Adverse selection. The most obvious and important salutary grouping function EB interventions serve is in minimizing adverse selection. Adverse selection can occur in any situation in which, because of asymmetric information, one party assumes

77. The downside is equally simple: bulk purchasing reduces choice. Thus, the more important a choice is with respect to a particular Good X, the less of an advantage bulk purchasing will be.

more risk than she was able to price.[78] That party will be the target of counterparties trying to get a favorable risk deal.

Consider adverse selection in the insurance context. To be economically worthwhile for an insurance company, the expected payout on a policy must be less than the premiums due in the covered term (by an amount large enough to cover the insurance company's overhead and generate a profit). If an insurer cannot adequately price the risk a potential insured presents, it will underprice the insurance policy, which will attract the highest risk customers. When the insurer raises prices to account for that possibility, insureds who pose the least risk (and thus who rationally wish to pay a small premium) will no longer buy insurance, leaving the insurer with a worse risk pool. Adverse selection can cripple unregulated insurance markets.[79]

Adverse selection is more than an insurance problem. In the retirement context, for example, adverse selection may afflict the annuity market. A simple annuity promises monthly payments, commencing at some T_0, to the recipient for life.[80] The recipient trades a lump sum (the cost of the annuity) in return for a promise of lifelong monthly payments; whether that

78. *See generally* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970) (providing the first formal treatment of adverse selection). Insurers had been using the term informally for decades. *See, e.g.*, G.E. CURRIE, THE UNITED STATES INSURANCE GAZETTE AND MAGAZINE OF USEFUL KNOWLEDGE 132 (1869) (discussing adverse selection in life insurance policies). Professors Michael Rothschild and Joseph Stiglitz were the first to offer a formal model of how adverse selection would work in insurance markets. Michael Rothschild & Joseph Stiglitz, *Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information*, 90 Q.J. ECON. 629 (1976).

79. The threat adverse selection poses to insurance markets varies and in many cases may be overstated. *See generally* Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE L.J. 1223 (2004) (concluding that propitious selection—an alternative method of selection—is at least as common as adverse selection). "Underwriting" is the process by which an insurer attempts to assess the risk of potential insureds and appropriately price policies, and underwriting is easier in some areas than others. Adverse selection in health insurance is assumed to be a more serious challenge than elsewhere because of difficulties in underwriting medical and treatment risk. *Cf.* Jayanta Bhattacharya & William B. Vogt, *Employment and Adverse Selection in Health Insurance* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 12430, 2006) (acknowledging a widespread belief by economists that employment "ameliorates the adverse selection problem in health insurance provision").

80. *See, e.g.*, Lawrence A. Frolik, *Protecting Our Aging Retirees: Converting 401(k) Accounts into Federally Guaranteed Lifetime Annuities*, 47 SAN DIEGO L. REV. 277, 278 (2010) (explaining annuities).

is a happy deal for the issuer depends in part on the life expectancy of the annuitant. Adverse selection can arise because annuitants who expect to live a long time perceive annuities to be more attractive than annuitants who do not, and it is difficult for the annuity seller to adequately price the annuity to reflect differences in this underlying risk.[81]

EB approaches address adverse selection by assembling the deal unit according to a factor that sorts independently of risk, i.e., a group of people that chose to work for the same employer. When an employer purchases Good X on behalf of a group—a group that exists independently of the desire of its members to purchase Good X—adverse selection is minimized because the larger the group, the more likely the group's risk characteristics will correspond to the overall community's risk characteristics (and thus be amenable to proper pricing).[82]

Affordable averaging. EB interventions can also address the problem of "optimal but undesirable selection." A simple example will suffice. Imagine ten persons who can afford to pay $100 for an insurance policy. Imagine further that the expected payout by the insurance company, on this group of persons, is $900. The insurer can write that group policy, collect $1000 in premiums, and make $100 to cover its overhead and earn some profit.

Now imagine the same ten persons, except that the first five have ascertainable (to the insurance company) traits that make the expected payout on them $45 each (for a total of $225), whereas the second five have ascertainable (to the insurance company) traits that make the expected payout on them $135 each (for a total of $675). Assuming the insurance company needs a 10% margin above expected payout, it would be indifferent between writing the group policy in which each of the ten beneficiaries is charged $100, or ten individual policies

81. *See* Agar Brugiavini, *Uncertainty Resolution and the Timing of Annuity Purchases*, 50 J. PUB. ECON. 31, 50 (1993) (offering an argument about adverse selection in annuity markets); Martin Feldstein, *Rethinking Social Insurance* 8 (Nat'l Bureau of Econ. Research, Working Paper No. 11250, 2005) (considering adverse selection in annuity markets); *cf.* Michael D. Hurd, James P. Smith & Julie M. Zissimopoulos, *The Effects of Subjective Survival on Retirement and Social Security Claiming* (Nat'l Bureau of Econ. Research, Working Paper No. 9140, 2002) (investigating choices made by retirees regarding when to accept Social Security).

82. *See* Hyman & Hall, *supra* note 61; *see also* Allison Hoffman, *Oil and Water: Mixing Individual Mandates, Fragmented Markets, and Health Reform*, 36 AM. J.L. & MED. 7, 28 (2010) (noting that there is "little concern of adverse selection with respect to large, employer-sponsored group insurance").

in which the first five people are charged $55 and the second five are charged $145. The latter result is (for some observers) undesirable, however, because it now means that five people cannot afford insurance.

EB interventions can resolve this problem by making, via regulation, the insurable unit the employee group and prohibiting insurers from doing individual underwriting within the group.[83] Thus, to insure the group (and get the business) insurers must take the bad with good: the group rate insurers charge each group member is not enough to cover the bad risks in the group but it is too much to cover the good risks. The good risks "subsidize" the bad, which makes it feasible for the insurer to write a policy for the group that is affordable for all employees.

This feature of EB interventions can be attractive even outside of insurance arrangements. Insurance settings often increase the likelihood that employees will be pleased to participate (because they are unsure if or when they will become the bad risk that needs group averaging), but principles of solidarity could justify voluntary cooperation in non-insurance settings.[84]

c. Natural Decision Point

For some goods, market problems may be related to the contingent or long-term nature of the good. People may be so busy dealing with immediate needs and demands that they lack the time to consider whether they have suitably planned for the future (or possible futures). And to the extent a good that addresses a contingent or distant need is complicated in its particulars, that might fuel additional procrastination.[85] Such familiar quirks of human decision-making might describe why, in the baseline world, even cognitively and economically capable people have declined to acquire Good X on the open market.

83. *See* Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22, 27–28 (1971) (explaining in general terms why internal subsidization will not survive in competitive markets absent regulation); *see also* Joseph P. Newhouse, *Is Competition the Answer?*, 1 J. HEALTH ECON. 110, 113 (1982) (explaining how groups may disaggregate in the absence of constraining regulation).

84. *See* Moore, *supra* note 12, at 40–41 (discussing solidarity as a value).

85. *See* John Beshears et al., *The Importance of Default Options for Retirement Saving Outcomes: Evidence from the USA*, *in* LESSONS FROM PENSION REFORMS IN THE AMERICAS 59, 74–75 (Stephen Kay & Tapen Sinha eds., 2008) (invoking the complexity of making a retirement savings decision as an explanation for undersaving).

EB interventions that encourage the appending of Good X to the labor deal seem a good way to promote engagement by individuals on the matter of Good X; the government is essentially saying, "When thinking about your wages, also think about Good X."[86] More people are likely to think more often, and with more care, about a good connected to a deal (the compensation deal with their employer) that they are reminded of every pay period. The baseline world provides no such consistent reminder. Obviously the value of such a reminder is modest if people have little ability to make and execute an advantageous deal for Good X, but it would be missing something to overlook the general value of reminders in improving outcomes.

This rather old and simple intuition—that people think more about issues put before them and vastly less about equally important issues not put before them—is today a part of a much larger literature on how people behave (or misbehave) when making decisions.[87] The teachings of behavioral economics, although only widely known well after the rise of EB interventions, provide additional warrant for their use. EB interventions plausibly can, in fairly seamless ways, help correct cognitive biases that would undermine optimal decision-making in the baseline world (and beyond simply reminding otherwise capable people to think about Good X).[88]

As many might know from disappointing personal experience, people have trouble keeping promises to themselves, even

86. Obviously this depends on the degree to which the EB intervention in practice makes salient the Good X decision or choice it hopes to direct the employee's attention to; clearly, some EB interventions will in their particulars be better than others at focusing the attention of employees on Good X. The general point is that the paycheck is a thing people naturally pay some attention to.

87. *See generally* DANIEL ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008) (arguing that a greater understanding of the emotions and social norms that influence economic behavior improves our ability to examine motivation and consumer choice, as well as economic and educational policy); DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (exploring what influences thought).

88. A cognitive bias is a habitual error in thinking made in certain circumstances that results in choices which fail to maximize a person's welfare. *See* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477 (1998) ("Actual judgments [of human beings] show systematic departures from models of unbiased forecasts, and actual decisions often violate the axioms of expected utility theory."). Behavioral economists have spent much of the last three decades identifying and defining the catalogue of biases that afflict us, as well as the circumstances in which such biases are likely to play significant roles. *See supra* text accompanying note 87.

when they know doing so will improve their welfare.[89] Relying on others to help ourselves keep our promises is an ancient notion—Odysseus used his crew to prevent himself from falling victim to the sirens—but is more valuable than ever today, when numerous desirable outcomes, e.g., losing weight or quitting smoking, depend on performing promises to oneself. An EB intervention that segregates and blocks wages from being used for anything other than Good X is the modern version of Odysseus' crew.[90]

As a final example, consider how the cognitive biases of default bias and hyperbolic discounting might stand as arguments in favor of using an EB intervention. Default bias is a label for the phenomenon that most persons attribute too much weight to a default choice, meaning they select it over competing choices more often than they should.[91] Hyperbolic discounting refers to overly discounting the future in favor of the present; we are naturally grasshoppers rather than ants.[92] To the extent that an EB intervention can provide, as part of the labor deal, a desirable default—such as a retirement investment option that engages in rational discounting with respect to retirement income—the policy appeal is that enormous numbers of employees will be more likely to avoid hyperbolic discounting mistakes they would have made in the baseline open market world.[93] Other salutary implementations of behavioral economics through EB interventions are readily imaginable.[94]

89. *See generally* Ted O'Donoghue & Matthew Rabin, *Doing It Now or Later*, 89 AM. ECON. REV. 103 (1999) (examining self-control problems and commitment devices).

90. The Odysseus metaphor is common. *See, e.g.*, Angela Littwin, *Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers*, 86 TEX. L. REV. 451, 470 (2008) (discussing commitment devices using the Odysseus crew metaphor).

91. *See* JONATHAN BARON, THINKING AND DECIDING 300 (4th ed. 2008).

92. *See* George Ainslie & John Monterosso, *Will As Intertemporal Bargaining: Implications for Rationality*, 151 U. PA. L. REV. 825, 830–31 (2003) (discussing hyperbolic discounting and noting that such decision-making is regularly demonstrated across contexts); Mario J. Rizzo & Douglas Glen Whitman, *The Knowledge Problem of New Paternalism*, 2009 BYU L. REV. 905, 913–14 (describing hyperbolic discounting and providing examples of the phenomenon). For those not familiar with Aesop's fable: during good times, the ant saves while the grasshopper parties. When winter comes, the ant prospers and the grasshopper starves. Aesop's treatment does not discuss what happens to gadflies.

93. Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1196 (2003) ("[T]he more complex the decision, the less attractive it will be to force people to choose for themselves, as opposed to having the option of . . . receiving a default option that has been

3. The Second Order Case for EB Interventions

a. Modifying the Baseline: Regulatory Alternatives

Concluding that a certain regulatory intervention is preferable to doing nothing—although analytically valuable because it distinguishes salutary actions from harmless or worthless ones—does not tell the whole story. Regulatory options are not binary; one can do more than "nothing" or "use an EB intervention."[95]

A common and fruitful way to categorize regulatory alternatives is to divide them into "market" or "government" alternatives. Along these lines, four options present themselves.[96] Option one is the baseline option: an unregulated market. Option two is the EB option: regulating the inclusion of Good X in the labor deal. Option three is regulation of the non-EB market, the best example of which is directly regulating the providers of Good X. Option four is government provision of Good X (of which there are both budget-neutral and non-budget neutral varieties).[97]

selected with some care."). Thinking along these lines motivated the passage of the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified as amended in scattered sections of 26 and 29 of the United States Code). *See A Nudge and a Wink: How To Persuade Employees To Provide for Their Old Age*, ECONOMIST (Apr. 7, 2011), http://www.economist.com/node/18433194 (observing that the PPA, which permits employers to automatically enroll employees in 401(k) plans so long as the employee is allowed to opt out, combats the problem of hyperbolic discounting).

94. *See, e.g.*, Dana M. Muir, *Choice Architecture and the Locus of Fiduciary Obligation in Defined Contribution Plans*, 99 IOWA L. REV. 1, 11–12, 15 (2013) (describing and providing an example of how changes to default settings can drastically alter decisions).

95. There are innumerable regulatory alternatives to doing nothing: technically, one option for fixing a market problem with Good X is for the government to summarily threaten to imprison the family members of the providers of Good X unless they offer Good X to anyone who asks at some specified price. Any EB intervention would be better than that, but it is not particularly noteworthy to point that out.

96. One can, of course, combine these options. In the United States, retirement income is addressed through an employment-based intervention (ERISA), regulation of individuals (IRAs), and through government provision (Social Security). And motivations for adopting different interventions might be non-economic: if a certain group is disadvantaged, the way to remediate that group might be by government provision of Good X, even though the government prefers a market approach to all other parties. But the utility of the classification still stands.

97. A budget-neutral approach is one in which the government simulates a market provider of a good (in that it does not want its costs to forever exceed its revenues) but (1) does not need to earn a profit and (2) is willing to tolerate

The appeal of an EB intervention depends not only on its ability to improve things relative to option one, but also its ability to improve things relative to options three and four. The magnitude of an EB intervention's comparative appeal depends on a variety of factors, consideration and valuation of which are not amenable to an article-length treatment. However, a useful theoretical framework for EB interventions would be incomplete if it did not address what we might call their intuitive comparative advantages. By intuitive comparative advantages, I mean identifiable but non-strict formulations of an EB intervention's comparative appeal (relative to options three and four) that may populate the consciousness of policymakers and reformers.

b. Regulatory Amenability

The first second-order rationale justifying EB interventions can be concisely stated: the employment relationship is a convenient nexus for regulatory intervention, and employers are convenient subjects.

For regulatory interventions to be effective they must attach to some set of acts and impose compliance obligation on some party or parties.[98] For example, if the government wants to intervene directly in the market by transferring money to members of specified groups, it still needs a channel or contact point by which it can transfer resources to the desired recipients. One common way to do this is by running the intervention

volatility in revenues and liabilities that no private provider could handle. Non-budget-neutral varieties of government provision condition eligibility on need (or something similar, like membership in a protected class) rather than willingness to pay and thus lack pretensions of budget neutrality. A government program could combine both approaches, attempting to be somewhat budget neutral with respect to persons who can afford Good X, and willing to subsidize people who cannot. Federal education loans with Pay-As-You-Earn payback are (in principle) a combination approach. *See FACTSHEET: Making Student Loans More Affordable*, WHITEHOUSE.GOV (June 9, 2014), https://www.whitehouse.gov/the-press-office/2014/06/09/factsheet-making-student-loans-more-affordable.

98. A government rule that all Americans need to eat healthy meals, for example, has no effective regulatory nexus. A government rule that regulates what restaurants may serve or what grocery stores may sell, on the other hand, does have an effective regulatory nexus: restaurant and grocery store purchases. Certainly one can imagine the first rule being coupled with the creation of a regulatory nexus, as in, all Americans must eat healthy *and* report monthly to the government their food consumption. In essence, however, the government has created millions of new acts (reporting) as the attachment point for its power.

through the tax system; another common way is to create an agency to serve as an administrative contact point between the government and market participants. Compliance responsibility, i.e., showing eligibility for the money, rests largely with the individual, although the government may attempt to simplify compliance obligations to ensure the target populations participate.

EB interventions use the labor bargain as the nexus of regulation and employers as the nexus of compliance. The intuitive appeal is at least two-fold. First, employers and employees strike labor bargains every day, millions of times over, and they do so for reasons that conceptually antecede the presence of an EB intervention: employers need workers and workers need wages. The labor bargain is a robust regulatory target because people are not easily able to abandon labor bargains, and thus the chance that a significant segment of the population will undermine the government's efforts to intervene by not engaging in the bargain is small. Other bargains (or mere acts), in contrast, if burdened with interventionist regulation, might be more readily abandoned.

Second, EB interventions may require less affirmative work from the government than more direct interventions because EB interventions conscript employers as quasi-administrators and assume employers can handle more complicated compliance obligations than, say, individuals. Indeed, employers have been conscripted as private bureaucrats on tax matters (and others) for years.[99] EB interventions simply expand on an existing regulatory relationship between the government and employers.

Obviously, the persuasiveness of this justification depends on the specifics of a given EB intervention and what alternative to which one is comparing it. But the foregoing represents a

99. *See, e.g.*, Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U. L. REV. 655, 677 (2006) (concluding that the tax-collecting structure of the United States, which heavily involves employers, has been an "unqualified success" in terms of compliance); Richard L. Doernberg, *The Case Against Withholding*, 61 TEX. L. REV. 595, 595 (1982) (observing that "government in effect deputizes segments of the private sector to" collect and verify taxes). Scholars have extensively criticized use of employers in this way, a subject I revisit in Part II.C. A more recent example of a bureaucratic compliance duty tacked onto employers has been on the question of immigration status. *See, e.g.*, Raquel Aldana, *Of* Katz *and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1095–96 (2008) (explaining employer reporting and verification obligations regarding employee work eligibility).

natural if rebuttable assumption about the appeal of EB interventions within the universe of regulatory solutions. They do not build from scratch; they drape a regulatory lattice over an existing network of robust bargains and familiar parties.

c. What-It-Is-Not Appeal and "Invisible Fingers"

The second set of second-order justifications is more nebulous than regulatory amenability and consists of residual reservations about regulatory interventions. Some meaningful percentage of the American populace and decision-making community has a preference for market resolutions.[100] EB interventions speak to that preference, and accordingly begin with a stronger intuitive "lead" in reform debates than is widely acknowledged. This is both because of what they are and what they are not.

The brief in favor of markets for those who support reliance on them is well known.[101] Market resolutions are allegedly desirable because they are efficient; because they accommodate heterogeneous preference and involve choice, a good unto itself; and because they encourage planning and care. Pure private markets, however, rarely suffice in producing the desired distribution of goods American stakeholders prefer. At the other pole, government provision of goods and/or pricing by central fiat has always been hostile to the United States' conception of itself. Some middle ground between pure government and pure market is imagined and professed to be the ideal, although there is no agreement on the details.[102]

EB interventions occupy a pleasing (to some) compromise between market and government. All EB interventions regulate the labor bargain with respect to some Good X. Although not logically necessary, as a practical matter many EB interventions will offer some "market" discretion to the employer or em-

100. Obviously EB interventions will also please opportunists who believe such interventions will, in practice, be easy to exploit for personal or political gain. I consider that quite a different category than persons who, motivated by a sincere desire to improve the nation's welfare, have chosen to favor market resolutions absent fairly clear evidence that they lead to undesirable results. I leave consideration of that first category to political scientists.

101. *See generally* MILTON FRIEDMAN, CAPITALISM & FREEDOM (1962) (laying out an expansive case for the desirability of markets).

102. Compared to European countries, there is no serious economic left in the United States. It might be only a slight overstatement to say that mainstream Americans presume markets work and differ primarily in how rebuttable that presumption is. I mean this descriptively, without implying praise or criticism.

ployee as to the terms of Good X. That discretionary component permits some element of Good X to be subject to market treatment (and, one would hope, the part of Good X that did not need regulatory intervention). Put differently, EB interventions can be readily incremental: with respect to those dimensions of Good X that do not suffer from market infirmity, the market can resolve matters itself. Not an invisible hand, but at least some invisible fingers.

The invisible fingers appeal of EB interventions will charm stakeholders persuaded the market is imperfect but worried about excessive government intrusion. It is a seductive compromise position for those open to the idea of government regulation but as yet unpersuaded either that (1) the market failure regarding Good X is as bad as critics assert or that (2) proposals for more extensive government regulation are workable in practice. Because assuring oneself of either the former or the latter requires effort and possibly expertise, EB interventions serve as a nice default solution for stakeholders inclined to accept the general "centrist" proposition that "some but not too much" intervention is necessary.

Obviously this set of rationales will not advantage EB interventions over other "middle ground" solutions. And its importance, in practical terms, will wax and wane with the American polity's taste for both markets and compromise.

C. CRITICIZING EB INTERVENTIONS

Having set forth the reasons that might be offered in favor of EB interventions, in this Part II.C. I articulate and categorize arguments against their use. As I emphasized in Part II.A., the operative feature of an EB intervention is government conscription of the labor deal to remedy a market failure as to the quantity, distribution, or quality of Good X. Using the labor deal in such a way, however, poses inherent challenges that, taken together, comprise a systematic criticism of EB approaches. Before articulating the case against EB interventions, I set the stage by explaining the relevant points of reference, as well as offering an explanation of how EB bargains should be understood.

1. Blended Baselines

Setting forth a comprehensive account of the limits and disadvantages of EB interventions requires periodic shifting of the point of comparison. The inappropriateness of EB interventions for many goods is easy to see: they are not needed because the market for the good is satisfactory or because the problems are not problems readily remediable by an EB approach. Those are the easy cases, where use of an EB intervention would be useless or harmful.

For the hard cases—for the set of goods whose problems are such that an EB solution seems like it could work—rarely will any seriously considered EB intervention make matters worse than the baseline world. Practically useful EB criticism is instead best conceived of as suggesting two things. The first is that while an EB intervention might be superior to the baseline world, it is less so than it seems at first glance. The second is that while an EB intervention might be substantially better than the baseline world, when compared to other regulatory approaches it has significant (if not immediately apparent) negatives. The below analysis blends both arguments together.

2. Understanding EB Bargains for X

Virtually all economists agree that, when Good X is called an employee benefit, it is paid for with foregone employee wages.[103] Given that, we can readily think of two ways an employer might deliver X to its employees. Way one is that the employer actually provides the good itself. In the case of disability insurance, an example would be an employer promising to and then paying out disability benefits itself. Way two is for the employer to finance Good X by paying (using foregone employer wages) a third party to provide Good X, e.g., a disability insurance policy, to its employees. In either case the employer is acting as an administrative financing channel by passing along foregone employee wages; but in the former case it is compensating *itself*

103. *See* Sherwin Rosen, *The Theory of Equalizing Differences*, *in* HANDBOOK OF LABOR ECONOMICS 641 (Orley C. Ashenfelter & Richard Layard eds., 1986) (explaining wage differential theory); *see also* Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL'Y & L. 303, 321 n.86–89 (2014) (surveying empirical studies on the subject).

If the employer benefits from providing Good X, then some of the cost of Good X should come from the employer's pocket rather than employee wages. But that benefit is generally so small that we can think of benefits as being paid for essentially entirely by foregone wages. It is also unlikely, incidentally, that the employees will be able to assess the value to the employer of providing Good X to its employees, and negotiate effectively to ensure their wage reduction corresponds only to the net loss to the employer. *Cf.* David Charny, *The Employee Welfare State in Transition*, 74 TEX. L. REV. 1601, 1608 n.16 (1996) (describing the complexity of the problem).

to provide Good X, and in the latter case it is compensating a *third party* to do so.

Keeping in mind the distinction between the administrative-financing of Good X (which employers necessarily do in an EB model) and the providing of Good X (which employers may do), there are three possibilities available to an employer on the question of delivering to employees any promised Good X. Possibility one is pure employer: the employer finances and provides Good X in-house, in effect retaining the entirety of the Good X transaction. Possibility two is pure outsource: the employer serves as a mere administrative-financier, writing a check to a third party who actually provides Good X to the employees. Possibility three is an in-between approach, with the employer serving as an administrative-financier but also retaining some role in providing Good X, along with a third party.[104] I will return to the challenges and difficulties with these approaches throughout Part II.C.3.

3. The Case Against EB Interventions

a. Self-Evident EB Constraints

A few self-evident constraints on the utility of EB interventions require brief mention. The first is the most obvious: EB interventions can only remediate Good X with respect to the employed and their dependents. To the extent people outside of that population face Good X problems, EB interventions cannot address them. Relatedly, non-mandatory EB interventions face the problem of some employers offering Good X while others do not. Not only does that not help workers in the latter group, it also likely impedes labor mobility.[105]

EB approaches are also limited by the relationship between a worker's wage and the cost of Good X. Obviously, if Good X costs more than a worker's wage, an EB intervention cannot provide Good X without some additional subsidy (whether from the government or a cross-subsidy from other higher wage workers). If Good X would cost a significant portion of a worker's wage, then there will be a tension between EB approaches and minimum wage laws unless minimum wage

104. In many cases, that role will be choosing the version of Good X employees will be buying with their foregone wages.

105. *Cf.* William M. Sage, *Putting Insurance Reform in the ACA's Rear-View Mirror*, 51 HOUS. L. REV. 1081, 1097 (2014) (discussing the "job lock" associated with non-universal health care).

requirements take into account the value of the provided Good X. In an intervention where an employer has a choice to not participate, employers with workers whose wages cannot be reduced to sufficiently pay for Good X either need to (1) not hire such workers; (2) not offer Good X to such workers; (3) increase their compensation; (4) not offer Good X to any employee; or (5) collect a government subsidy. Although the particular choice employers will make depends on the circumstances, the point is the same: EB interventions not only do not reach non-employees, but they are also likely to fail to reach a subset of the employed, and may affect overall employment.[106]

Another straightforward constraint pertains to those EB interventions where group leverage is a central attraction. In those cases, the natural disaggregation of the group that would occur in the baseline world (and render Good X more expensive or unaffordable to some) is stopped via the expedient of using the employee group as a unit. But doing that necessarily limits the choice employees have in Good X (beyond choosing among employers who provide different versions of Good X). If employees have too much choice within the employment group—to opt out, or pick different features—then the group will separate into subgroups that might fail to capture the advantages of group dealing.[107] Group leverage necessarily limits choice to only those features that, if selected, will not destroy the integrity of the group.

To the extent an EB intervention involves a good that benefits little from group treatment—that is, where the bulk purchasing or group corrective advantage is small, and the negative utility associated with the loss of choice is large—it will face natural resistance. For example, EB interventions can be appealing because they facilitate affordable averaging, i.e., subsidization of some group members by others.[108] But if Good X is one for which most people believe they are unlikely to need affordable averaging, they will be less willing to pay the "pri-

106. Employment effects will of course vary depending on the particulars of the EB scheme. For an analysis of mandated benefits, see Lawrence Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. 177 (1989); *cf.* Joseph Bankman, *The Effect of Anti-Discrimination Provisions on Rank-and-File Compensation*, 72 WASH. U. L.Q. 597 (1994) (discussing compensation and employment effects of legal requirement that benefits for highly compensated employees also be provided to non-highly compensated employees).

107. *See supra* Part II.B and accompanying notes.

108. *See supra* Part II.B.2 and note 83.

vate tax" associated with being a member of the group unit.[109] And for all goods, certain employees might be unhappy with an employer paternalistically making choices regarding Good X that—while perhaps appealing for many employees—are inconsistent with that employee's own individual preference.

b. Myopic Actors

Compared to employees acting on their own in individual pursuit of Good X, EB interventions are held attractive because they leverage the comparative sophistication of employers. The critique of this argument is two-fold. First, employers are not particularly sophisticated regarding Good X. Second, employers have adverse interests to employees. They are not, in short, good agents, and relying on their sophistication to remediate problems with Good X is a poor bet, absent extensive interventionist regulation. Systemic agency cost both reduces the degree to which an EB intervention can improve Good X and significantly increases the amount of regulation necessary to accomplish that improvement.

i. Questioning Sophistication

The inconvenient fact about employers is that the task of delivering an optimal Good X is quite far removed from the employer's "core competency,"[110] which is to produce and market whatever good or service the employer's business sells.[111] Generally Good X—annuities, insurance, etc.—is a distinct business specialty all its own. Indeed, if the selling of Good X were a fairly simple business, it is unlikely for there to be a market failure that justifies use of an EB intervention in the first place.

In Part II.C.2 above, I sketched three possible ways for an employer to deliver Good X: internally, via outsourcing, or by

109. Solidarity, as well as confusion about the existence or extent of the subsidy, are countervailing forces. *See* Moore, *supra* note 12, at 40–41 (discussing solidarity).

110. *See, e.g.*, Russ Banham, *The Great Pension Derisking*, 29 CFO MAG. 40, 40 (2013), http://ww2.cfo.com/retirement-plans/2013/04/the-great-pension-derisking/view-all (quoting the vice president of finance at General Motors as explaining that making cars, not offering pensions, is the company's core competency).

111. Striking a wage deal is fairly simple because it is short term and has few operative terms; it is also a necessary predicate for having a business in the first instance. Striking a Good X deal is not necessary in the first instance, and is much more complicated, because the underlying transactions and terms of the deal are more complicated.

some combination of the two. Because most employers' core competencies do not extend to Good X transactions, internal provision is of limited appeal. It involves a non-expert attempting to perform an expert function. It is unlikely that a trucking company, for example, can create a better pension arrangement than a third party firm that specializes in retirement annuities.[112] Few employers will completely internalize the delivery of Good X. But some will.

Of the group that does, some will internalize Good X without realizing they will be poor providers of Good X. For example, an employer might make a pension promise but have insufficient skill in saving and managing the money necessary to make good on the promise. To prevent employers from trying to poorly provide Good X on their own, the government will need to (1) bar them from doing so or (2) heavily regulate employer provision of Good X.[113]

Other employers will realize they lack the capability to completely internalize the provision of Good X, and therefore engage third parties (either in part or for the whole deal) to handle or advise them on the particulars of Good X that the employer lacks sufficient expertise in. In both cases, significant regulation will be needed. The immediate risk is the possibility that expert third parties will take advantage of the employer with respect to the provision of Good X. The third party is an expert; the employer is not. EB interventions are motivated in part by the concern that individual employees, on their own in the open market, will strike poor deals (or no deals) for Good X. A more subtle species of precisely that concern arises when non-expert employers seek to outsource the provision of Good X to expert third party providers. To prevent the third parties

112. Now, admittedly, some employers are likely capable of *developing* sufficient expertise in Good X to handle it completely in-house. Those players still need to be regulated during their learning phase. Once they are experts they can easily take advantage of employees and will need to be regulated. What is gained in that instance—as opposed to directly regulating Good X providers, and never asking employers to develop new expertise in the first place—is not clear.

113. There are different ways such regulation could occur. One is a regulation such that the expertise needed to comply with a limiting regulation is modest. If the government, for example, specifies that employers providing pensions need to set aside three percent of an employee's wages in trust accounts and invest the proceeds in treasury bills, then many employers could reliably perform that function. I am not suggesting that is a good idea,merely that it is easy to do.

from exploiting employers, the government will need to regulate the terms of deals with third party provision of Good X.[114]

ii. Questioning Adversarial Paternalism

Above I questioned the relevant sophistication of employers. In this Part, I assume as a given that some employers are meaningfully more sophisticated than employees on matters pertinent to Good X. As I explain below, we should be skeptical that employers' comparative sophistication will, without considerable regulatory intervention, be used to benefit employees in a way that tends to optimize Good X. The assumption otherwise depends on some version of "adversarial paternalism"—where an economic adversary places his opponent's interest above his own.[115] Such is extremely unlikely.

Complex goods. Some goods, and the transactions to acquire them, are more complicated than others. Buying a pencil is simpler than buying a house. The Goods X of EB interventions will tend to be goods that are complicated in their particulars. We might say generally that the more complicated Good X is, the larger the number of material characteristics it will have. In an EB intervention, the government will either regulate all these characteristics or will regulate some. The remainder will be left to negotiation between employee and employers.

As to those negotiable characteristics, the difficulty is that when the terms of the Good X bargain are being negotiated, the employer is presumptively the employee's adversary. The sophistication held to justify an EB intervention may, if actually present, be deployed to stick employees with unfavorable terms on matters employers but not employees understand. If on their own workers might make poor choices because they do not know better, that same weakness can be exploited in labor negotiations.[116] If there is room to negotiate, then employers will

114. And this is assuming the employer is acting as an honest agent. There will be innumerable opportunities for the employer to strike deals with a third party that benefit the employer and the third party at the cost of the employee. I consider that possibility in more detail below.

115. Indeed, market behavior may be driven by an employer's *non-economic* preferences regarding Good X. Precisely such a preference resulted in the Hobby Lobby dispute. *See infra* notes 133–37 and accompanying text.

116. One regulatory approach—to align management and labor by forcing management to be subject to whatever terms govern workers' benefits—has proven astonishingly difficult to operationalize. ERISA and the tax code's attempt to partially accomplish this, through a set of rules known as "nondiscrimination requirements," has resulted "in a notoriously technical regulatory scheme" understood poorly even by experts. COLLEEN MEDILL, INTRODUCTION

dominate in nonunion settings. To the extent employers are negotiating with a third party provider of Good X (allegedly on the employees' behalf), employer indifference to third party opportunism, if not outright collusion, is a significant risk.[117]

Labor scholars have long recognized the imbalance in power between management and workers in real world markets.[118] That general proposition is even more true when the negotiated subject is something as non-intuitive as the set of material characteristics for complex Goods X, such as annuities, retirement accounts, or insurance.

Let me pause here to consider one frequent response to the problem of exploitation of employees by employers—that nonlegal forces will operate to limit exploitation. Traditional versions of this class of arguments are (1) that exploitation will eventually be discovered by labor and punished; (2) that exploitation will actually hurt management because it will make their workforce less productive; or (3) that management will not exploit labor because it is morally offensive.[119] Certainly

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117. *Cf.* Ian Ayres & Curtis Quinn, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans*, 124 YALE L.J. 1476 (2015) (detailing the frequency of poor-performing, high-cost funds in 401(k) plans); Dayna Bowen Matthew, *Controlling the Reverse Agency Costs of Employment-Based Health Insurance: Of Markets, Courts, and a Regulatory Quagmire*, 31 WAKE FOREST L. REV. 1037 (1996) (examining in detail the reasons why employers may be poor agents when it comes to selecting health insurance for employees); Jessica L. Roberts, *An Alternate Theory of* Hobby Lobby v. Burwell, 22 CONN. INS. L.J. (forthcoming 2016) (spelling out numerous strategies practiced by employers to minimize the provision of promised care); Gretchen Morgenson, *A Lone Ranger of the 401(k)'s*, N.Y. TIMES, Mar. 30, 2014, at B1 (detailing a series of lawsuits against retirement plans relating to excessive fees charged by asset managers managing EB retirement monies).

118. Adam Smith himself wrote that management held the upper hand over labor. ADAM SMITH, THE WEALTH OF NATIONS 74 (Edward Cannan ed., 1904) (1776) ("It is not, however, difficult to foresee [that management] must, upon all ordinary occasions, have the advantage in the dispute [with labor], and force the other into a compliance with their terms."); *see also* LLOYD G. REYNOLDS, LABOR ECONOMICS AND LABOR RELATIONS 76–77 (8th ed. 1982) (explaining reasons why in imperfect markets individual laborers will be at a bargaining disadvantage); Richard T. Ely, *Economic Theory and Labor Legislation*, 9 AM. ECON. ASSOC. Q. 124, 139–46 (1908) (arguing that freedom of contract alone cannot and will not protect laborers); Douglas L. Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353, 360–64 (1984) (describing role of unions in levelling bargaining power in imperfect markets); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 487 (1909) (describing unequal bargaining conditions between industry and labor).

119. *See, e.g.*, Daniel R. Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U. CHI. L. REV. 1061, 1063–68 (1984) (discussing some examples of possible market limits on power of firms

those arguments, in any context, depend on complicated questions of first principles and empirical evidence. But there is good reason to doubt, with respect to EB goods, that nonlegal forces will satisfactorily curb employer exploitation, let alone promote paternalism; more likely, it seems, significant government intervention will be necessary.

Limited market constraint on exploitation. In the EB context employee ability to police exploitation is minimal. Policing exploitation requires (1) awareness that it will or has occurred and (2) the leverage to act on that awareness.

EB interventions are justified in part on the comparative lack of sophistication of employees relative to employers. If that is true, then employees are unlikely to appreciate ex ante (during the negotiation of deal terms) the many ways in which a superficially appealing promise of Good X could be undermined ex post; if they can, this imputes to employees more ability than they were probably assumed to have in justifying the EB intervention in the first instance.[120] Even ex post, when some employees may have learned the deal for Good X contained some unpleasant provisions, employees lack a mechanism to take corrective action. Most employees are not unionized, and thus do not share or possess the ability to act on information that would improve their lot.[121] Moreover, the standard channel for employee leverage—leaving for another job because one is displeased with the terms of the bargain with the original employer—is more limited than usual with respect to Goods X, for several reasons.

First, the labor bargain does not organically specify what part of the compensation deal is for wages and what part is for Good X (or Good X and Good Y, if the labor bargain includes, as it often does, more than one benefit). Absent some simple information on the amount of his compensation that goes to Good X or Good Y, the employee has little hope of comparatively valuing the Good X terms he is getting from Employer A against the Good X terms he could get from Employer B.

Second, even if all employers were to provide (or be required to provide) a simple breakdown of how compensation

to exploit labor).

120. There are other reasons to justify EB interventions beyond lack of employee sophistication and positional disadvantage, of course. *See supra* Part II.B. But the force of this point should still be clear.

121. *See, e.g.*, Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 2–3 (2008) (discussing decline of unions).

was divided into wages and Good X benefits, the actual terms of Good X benefits are difficult to obtain, understand, and compare. Consider an insurance and retirement example.

To value an insurance policy, one needs more than the price; one needs to understand the scope of coverage, which is set forth in the terms of the policy. It is difficult to imagine how a prospective employee could, as a candidate, secure for review the terms of the health insurance offered to employees, without the new employer being concerned that the employee is seeking to change jobs for "the wrong reasons" (or otherwise presents a hidden characteristic that makes hiring the employee undesirable).[122]

Consider also the recent comments of AOL CEO Tim Armstrong. Armstrong complained that AOL's benefit costs were too high, and cited the example of two workers whose infants required expensive care.[123] Even though Armstrong later apologized,[124] one imagines prospective employees could easily worry that to ask for sufficient details about AOL's health coverage (so as to assess the comparative worth of it) might implicitly but negatively impact their chances of being hired. More generally, demanding as a part of the hiring process to see the underlying documents regarding health insurance is unlikely to cut in favor of the job candidate. Many will choose not to do so.

Similar concerns arise when Good X is a retirement arrangement. Retirement arrangement terms are generally so complicated that the current law requires the employer to supply employees with a summary document, written in plain English, that permits the employee to understand the basic contours of the arrangement.[125] That an employee would, in a

122. This is one reason scholars have proposed as to why employees do not seek more "just cause" termination provisions—because seeking that protection suggests to the employer the existence of an undesirable quality in the candidate employee. *See* David I. Levine, *Just-Cause Employment Policies in the Presence of Worker Adverse Selection*, 9 J. LAB. ECON. 294, 294–305 (1991). As recent scholarship has demonstrated, insurance terms are not easy to obtain in general, and the will-I-be-hired overlay will make doing so doubly difficult. *See, e.g.*, Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263, 1319–37 (2011) (reporting significant difficulty obtaining, in casualty insurance markets, actual insurance policies before purchase).

123. *See* Leslie Kaufman, *Facing Criticism After Remarks, AOL Chief Reverses 401(k) Changes*, N.Y. TIMES, Feb. 10, 2014, at B3.

124. *Id.*

125. 29 U.S.C. § 1022 (2012) (requiring the furnishing of a "summary plan description" explaining benefit terms in a way comprehensible to "the average

natural market, be readily capable of securing documentation on the numerous terms of the retirement arrangement at the new company is an unrealistic assumption.

Even if we assume that candidate employees could obtain the documentation that would allow an expert to value Good X, employees are not experts. On the question of health insurance, for example, valuing the promised coverage is an exceedingly complicated endeavor, one that depends on likelihoods (of suffering from a particular malady) and costs (of paying for treatment of that particular malady) that employees simply do not have access to or an ability to reliably evaluate.[126] As many scholars have explained, expecting nonexperts to optimally value contracts with multiple variables is unrealistic.[127] Most people will engage in shortcut strategies that are suboptimal.[128] Such errors will be compounded when the employee is not only attempting to value Good X from the prospective employer, but compare it to the Good X offered by the original employer.

Even assuming employees can obtain, value, and compare the terms of Good X across job opportunities, their ability to use that information to police employers is minimal.[129] Their most powerful tool—taking a job elsewhere—is profoundly limited in weak labor markets. Even in strong labor markets, switching jobs is a monumental event; one cannot easily move to a new position as easily as one could, say, choose a new movie theater to the extent the old theater was too air-conditioned for one's liking. Employees are similar to consumers in that they may lack sophistication regarding the deal to be struck, but employees (particularly unskilled employees) have even less exit power. And in the EB context, employees will often be suffering under an additional burden. Many Goods X are most valuable (and their terms most salient) to people who are in a weakened position, such as: they are near-elderly; they are sick or have a

plan participant").

126. *See* Maher & Stris, *supra* note 32, at 462 (explaining difficulty consumers will have in valuing health insurance).

127. *See*, *e.g.*, Korobkin & Ulen, *supra* note 70, at 1082; *see also* Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663, 1713 (2003) (explaining that "[b]ehavioral considerations, rather than efficient bargaining, explain why consumers" accept one-sided contracts).

128. *See* Korobkin & Ulen, *supra* note 70, at 1082.

129. *Cf.* Bruce E. Kaufman, *Labor Law and Employment Regulation: Institutional and Neoclassical Perspectives*, *in* LABOR AND EMPLOYMENT LAW AND ECONOMICS 3, 30–34 (Kenneth G. Dau-Schmidt et al. eds., 2009) (discussing limited ability of workers to negotiate compensation or conditions).

sick family member; or they are disabled. Those candidates, however the law may protect them, will in real terms face limited lateral opportunities.

I need be careful not to overstate the case. Certainly labor markets provide enough competitive pressure such that broad features of the employment condition—wages, hours, the existence of a pension or health insurance—can play an actual real world role in employee decisions. But one doubts that the more narrow and obscure terms of Good X will, even if grossly pro-employer (or pro-third-party-provider), burden employers with a competitive loss, certainly in the short term. Put more formally, one doubts the degree to which the operative terms of Good X will (1) be variables employees are cognizant of; (2) be variables employees can value; or (3) be the dominant variables, in the job-taking decision. That reality weakens the constraint a natural market might impose on employer-employee exploitation.[130]

Limited self-interested constraint on exploitation. A second commonly invoked non-legal constraint is the notion that exploitation will only hurt employers, because for a given group of employees, those without Good X will underperform.[131] There is, of course, some truth to this observation; after all, most EB interventions follow employers organically—i.e., with no government incentive—offering Good X as a part of the labor deal.[132]

The chief problem with this point is that the set of terms that makes Good X ideal in quantity, distribution, and quality for society will virtually never correspond to the set of terms that makes Good X ideal for a given business. So, for example, in some businesses health insurance is extremely valuable; in others less so. In some businesses health insurance for particular maladies is extremely valuable, in others, less so. If the check on exploitation is that employers will not wish to exploit employees via the terms Good X because Good X is needed to maximize performance, employers will only be inclined to offer

130. *Cf.* Daniel J. Chepaitis, *The National Labor Relations Act, Non-Paralleled Competition, and Market Power*, 85 CALIF. L. REV. 769, 782 (1997) (arguing that the fact "that some workers will exit tells us nothing about whether labor markets are competitive").

131. *Cf.* Paul B. Ginsburg, *Employment-Based Health Benefits Under Universal Coverage*, 27 HEALTH AFF. 675, 677 (2008) (suggesting that employees with health insurance will have superior performance). The empirical data on this assertion is mixed. *See* Moore, *supra* note 28, at 898–99 (surveying the empirical literature).

132. *See supra* Part I.

a Good X tailored to their needs, rather than an ideal Good X. And employers collectively seem likely to negotiate Good X in the direction of sub-optimality, because they are unlikely to internalize the same broad set of concerns that drives society's conception of an optimal Good X.

The recent *Hobby Lobby* dispute is illustrative of the unexpected ways that employer preference can frustrate the provision of a socially optimal Good X.[133] Much has been written about the case but here the basics of the dispute should suffice.[134] The ACA requires that certain health insurance policies include coverage for contraception.[135] The petitioner companies provided health insurance to their employees that was subject to this requirement. Those companies' owners, as devout Christians who opposed contraception, contended the ACA contraception coverage requirement (and the corresponding penalty for failing to comply) violated their religious freedom.[136]

In EB theory terms, *Hobby Lobby* involved a clash between an employer's view of what Good X should be and society's view (as expressed in legislation) of what Good X should be. While normally an employer's view is trumped by legislative mandate, in *Hobby Lobby* the plaintiffs invoked religious freedom to protect the employer's view, and called upon the Supreme Court to resolve the conflict between religious freedom and the ACA.[137] But that should not obscure the larger takeaway, which is that when employers have either legal or market freedom to define Good X, they are likely to do so, and employer-specific definitions of Good X may often diverge from what society believes is the ideal version of Good X.

Limited moral constraint on exploitation. The third point—that business owners and managers are moral beings who find the suffering of employees distasteful and are therefore disinclined to exploit advantages they have in deal-making over

133. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

134. *See infra* Part II.C.3.d for a different way in which the Hobby Lobby dispute is consonant with EB theory.

135. 42 U.S.C § 300gg-13(a)(4) (2012). *See generally* Marty Lederman, *Compendium of Posts on* Hobby Lobby *and Related Cases*, BALKINIZATION (July 19, 2014, 3:16 AM), http://balkin.blogspot.com/2014/02/compendium-of-posts-on-hobby-lobby-and.html. As a scholar intimately familiar with the mind-numbing details of various benefits statutes, I must say that Professor Lederman's ACA posts are a thing of beauty.

136. *Hobby Lobby*, 134 S. Ct. at 2759.

137. The Court ruled in favor of the companies and their owners. *Id.*

Good X—is one commonly invoked by industry advocates.[138] Of course, employee advocates may believe such expressions of concern for worker well-being are little more than insincere public relations efforts. And casual observation suggests that some employers do indeed subscribe to the notion that profit maximization, absent illegality, is the only moral of the market. While for some that may be true, however, for many others it is probably not: employers often do *feel* some form of moral obligation to their workers. The challenge is that that moral feeling needs to be matched by moral action. In a commercial environment, there are significant pressures on businesses to make profit-maximizing decisions that are at odds with vague moral intuitions and concomitant assurances that they will treat workers "right."

Sometimes the argument is made that the market values morality and fair play, and that actors who behave that way will reap financial rewards.[139] If the market always rewards a gentle moral solicitude for workers, then profit maximization and compassion will not diverge. But the reality is that virtually no one accepts this to be the case; in some set of cases, the correct "business" decision will be to do something different than that which is the least exploitative or most compassionate toward employees. This is not to impugn business decisions as immoral—not at all—but merely to make the uncontroversial point that humanistic warmth toward others is routinely, in commercial settings, deprioritized or set aside. If that is true, the morals of the marketplace will serve as an insufficient check against exploitation of employees.

c. Regulatory Fragility

One of the rationales for EB interventions—that the labor bargain, and in particular employers, are attractive regulatory

138. Indeed, in the late nineteenth and early twentieth centuries, there was a movement by certain industrialists to promote benefits "for the comfort or improvement of employees [that were] neither a necessity of the industry nor required by law." *See* BRANDES, *supra* note 63, at 5–6. A key motivation in this movement was the perceived moral obligation of an employer to improve the lives of its workers. All manner of benefits were provided, including health care, dietary counseling, child care, schools, lodging, recreational facilities, and pensions. *Id.* at 5–110.

139. *Cf.* Maurice E. Stucke, *Is Intent Relevant?*, 8 J.L. ECON. & POL'Y 801, 837–38 (2012) (discussing the market and social appeal of fair play and good faith in relations between companies, employees, consumers, and competitors).

targets—has a flip side. EB interventions are regulatorily fragile and invite opportunism.

Regulatory flight occurs when the regulated party abandons the thing being regulated or replaces it with a substitute that is subject to less regulation. Because Goods X are often complicated, government efforts to regulate some version of Good X will create immediate pressure on employers to offer a version of Good X that is less regulated. Given the limitations on employee power to check employer movement from a heavily regulated Good X to a less regulated substitute, one need always be mindful of the unintended consequences of strict regulation. And even if one believes that existing or proposed regulation appropriately regulates all substitutes, employers still retain the power in voluntary EB interventions to simply not offer Good X.

This first order effect is relatively uncontroversial. Many believe, for example, that such regulatory flight explains in part the transition from defined benefit to defined contribution plans that has occurred in the United States since ERISA was enacted.[140] Defined benefit plans are subject to extremely restrictive regulations, with little employer discretion on important terms such as funding and vesting, and much liability regarding investment of the plan's assets. Defined contribution plans, on the other hand, are subject to significantly less regulation, particularly the variety of defined contribution plan that permits participants to make their own investment decisions.[141] All other things being equal, many employers will prefer the greater flexibility associated with the latter. Whether the better form of retirement income is to draw on a pension or from a participant-managed investment account has been intensely debated by scholars.[142] If the fact is, as many scholars believe, that pensions are more desirable, then ERISA's intense regulation of pensions and comparatively light regulations of retirement accounts provided a powerful regulatory incentive for employers to make the wrong choice.

140. *See, e.g.*, Karen C. Burke & Grayson M.P. McCouch, *Social Security Reform: Lessons from Private Pensions*, 92 CORNELL L. REV. 297, 308 (2007) (offering reasons for the rise of defined contribution plans and the decline of defined benefit plans).

141. *See supra* Part I.B; *see also* 29 U.S.C. § 1104(c) (2012) (limiting fiduciary liability in the case of participant-directed plans).

142. *See generally* ALICIA H. MUNNELL & ANNIKA SUNDÉN, COMING UP SHORT: THE CHALLENGE OF 401(K) PLANS (2004).

A second consequence is more hidden. Economic fortunes wax and wane. In prosperity employers may be more willing to engage in activities outside of their core competencies. In gloomier times, employers will be inclined to streamline their operations, and retreat to those things they do best, of which providing Good X is unlikely to be one. We can expect, then, that tough times will lead to maximum resistance from employers to continue providing Good X, or to comply with regulations necessary to ensure that the Good X provided resembles Good X of sufficient quality that motivated the regulatory intervention in the first place. Those times are precisely when people are most needy of robust versions of Good X.

While regulatory opportunism—whether in lean times or not—might be expected from all private providers of Good X (whether by employers or third party specialists), it has a different valence coming from employers. Employers, as incidental providers of Good X, face a different calculus than does a third party provider who specializes in Good X. Both will dislike rules constraining what they can do, but the former has a more credible threat that it will wash its hands of the whole Good X business. Given that an EB intervention is justified in the first instance by some problem with Good X in the baseline world, this threat will virtually always have enhanced currency; no one is eager to return to the baseline. When attempting to promulgate or construe the meaning of a given EB intervention's rules regarding employer freedom on Good X, regulators will be, whether willingly or not, dragged into balancing the threats of employers to abandon Good X against the unpleasantness of the baseline world.[143] And they will be strongly pressured to be solicitous of employers.

d. Opacity

A final flaw with EB interventions is their tendency to obfuscate the relevant problem and the comparative value of alternative solutions. Above I considered how EB arrangements might make it difficult for employees to compare job opportunities. Something similar happens on a societal scale.

143. Engaging in such balancing seems a difficult task in particular for judges, absent careful instruction from the legislature and administrative agencies. It invites judges to play a role that, without carefully considered guidance, they may be unable to effectively perform. And few judges, whatever their professed theory of statutory interpretation, interpret the language of any statute in a vacuum. Reality affects adjudication.

EB interventions regulate (and generally promote) the inclusion of social goods in labor deal as nonwage compensation. Absent regulation requiring the value of Good X to be specified, there is likely to be confusion about what Good X costs, not only among workers, but among stakeholders at large. Consider an EB intervention. Now consider a regulatory world in which the Good X is purchased unbundled from the labor bargain. Pricing information in the latter case is more transparent to buyers and society at large, because there is a transparent market for Good X.

In addition to confusion on the price of Good X, EB interventions also lead numerous stakeholders to misunderstand the fundamental nature of *who* is parting with money to obtain EB goods. When, in an EB setting, an employer provides Good X without an explicit price, people frequently assume the provision of Good X is akin to a gratuity rather than a bargain. As an economic matter, that is not so. Good X is a portion of compensation, and "paid for" by employees via foregone wages.[144] Economists have held this view for over a century.[145] Courts lagged behind for some time; in 1940, for example, the *Harvard Law Review* chided the New York courts for holding otherwise.[146]

In some quarters this misunderstanding lives still, although in muted form. The much-followed *Hobby Lobby* case involved a dispute over whether the ACA's contraception coverage requirements violated the religious freedom of business owners opposed to contraception.[147] The Supreme Court ultimately ruled in favor of the business owners.[148] I am not interested in evaluating the hair-splitting particulars (or wisdom) of the Court's ruling.[149] Of illuminative interest is the way in which the lawsuit was *perceived.*

144. *See supra* note 103 and accompanying text.

145. *See* Albert de Roode, *Pensions As Wages*, 3 AM. ECON. REV. 287, 287 (1913) ("A pension system . . . is really paid by the employee, not perhaps in money, but in the foregoing of an increase in wages which he might obtain except for the establishment of a pension system."); *see also supra* note 103 and accompanying text (discussing wage benefit tradeoff).

146. Note, *Legal Status of Private Industrial Pension Plans*, 53 HARV. L. REV. 1375, 1377 (1940) ("[The gratuity] view would hardly be worthy of attention were it not for the fact that the courts of New York seem steadfastly to have adhered to it.").

147. *See* 42 U.S.C § 300gg-13(a)(4) (2012).

148. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

149. Some have suggested that the Supreme Court itself was insufficiently appreciative of the economic reality of who pays for benefits. *See, e.g.*, Uwe

Press accounts framed the dispute as follows: does forcing corporations or their owners to *pay* for contraception violate the religious freedom of the corporations and their owners? As the *Los Angeles Times* put it, the issue before the Court was "whether a company must pay for birth control drugs that conflict with its owner's religious beliefs."[150] The *Times*' description was representative of much mainstream coverage. The problem with that formulation is that—for reasons having nothing to do with freedom of religion—it obscures the real issue. Employers are not paying for contraception in the sense that many accounts of the dispute assumed; they are administering a plan that passes employee money along to an insurer who provides coverage that includes contraception.[151]

Admittedly, the word "pay" has many different meanings. It *can* describe the administrative act of handing over money, even if that money does not belong to the party handing it over. If I have a bank account and use a bank's "Online Bill Pay" feature, then although the money is obviously mine, we could easily describe the bank as having performed the functional act of paying those bills that I direct the bank to pay. But that type of "paying" is very different than using the word "pay" to mean "relinquish money that was otherwise mine to do as I pleased with." Accordingly, to be compelled to serve as an administrator is quite different than to be compelled to relinquish money that

Reinhardt, *The Illogic of Employer-Sponsored Health Insurance*, N.Y. TIMES (July 1, 2014), http://www.nytimes.com/2014/07/03/upshot/the-illogic-of-employer-sponsored-health-insurance.html (arguing that the Supreme Court failed to understand that employees, not employers, pay for benefits). Professor Reinhardt's characterization may very well be correct, but to analyze such a claim here would require a lengthy and nuanced treatment of the *Hobby Lobby* opinion better suited to a separate article.

150. David G. Savage, *The Supreme Court To Hear Cases on Obamacare and Birth Control*, L.A. TIMES (Nov. 26, 2013), http://www.latimes.com/nation/la-na-court-contraceptives-20131127-story.html ("The Supreme Court agreed Tuesday to jump into a growing legal dispute between the Obama administration and businesses run by conservative Christians over whether a company must pay for birth control drugs that conflict with its owner's religious beliefs.").

151. *See supra* Part II.C.2 (explaining the nature of EB bargains). With regard to *Hobby Lobby*, many scholarly observers made precisely this point. *See, e.g.*, Sepper, *supra* note 103; Reinhardt, *supra* note 149 (explaining who pays for health insurance in EB settings). Low-income workers admittedly complicate the analysis. If laws require they receive benefits larger than their wages (or large enough to make their wages less than minimum wage laws require), then the employer must either pay other employees less or pay out of its own pocket.

was otherwise mine.[152] My (admittedly unscientific) sense is that many observers perceived the *Hobby Lobby* case to be about the latter when it is conceptually about the former. The opaque nature of EB interventions is surely partially responsible for confusion along those lines.

Hobby Lobby aside, confusion over EB realities seems likely to generally obstruct a sensible discussion of alternatives. If one believes under an EB intervention that one is getting health insurance for free (or at any price lower than the actual amount of wages foregone), then one will react badly to alternatives that expose that fiction.[153]

Finally, EB interventions have an odd distortionary effect on how the problem of Good X is perceived. If the baseline world is particularly bad, and most people receive their Goods X in connection with employment, the resulting prominence of the *practical* connection between employment and Good X will lead many to impute a *logical* connection, i.e., that Good X has some inextricable link to employment, when in fact it does not.

Social goods are generally social goods because we perceive them to be important irrespective of one's job status. This is not to say that people should receive social goods free of charge; we may very well believe as a society that social goods should incorporate some requirement that able people contribute to the cost of providing them. But, for example, people need income when they cannot work because of age or disability, and they need health care when they are sick.[154] That is true regardless of someone's past employment status.[155]

Providing Good X through the labor bargain is simply a regulatory solution to the social problems associated with Good X. An EB intervention should be exactly as appealing as how well it solves the Good X problem it purports to solve; there is

152. The ACA does not literally require that employers serve as administrators; rather, it subjects them to a penalty for not doing so. *See* Lederman, *supra* note 135. That matters not at all for my point.

153. Ironically enough, this is one of the complaints that critics of government-provided health care interventions often make—that those who benefit do not know the cost of the goods being received and therefore have an unrealistic view of what can and cannot be provided.

154. The existence of a need does not necessarily imply a right to the needed good, of course.

155. Put differently, employment is not a reliable proxy for either desert or need. Consider stay-at-home spouses and independent contractors who worked for a lifetime but can never be said to have been "employees" under the common law. They do not need old-age income any less than those who were traditionally employed.

no inherent benefit or necessity in providing social goods through employment. EB interventions define the solution, not the problem.

III. THE POWER OF EB THEORY

EB theory is flexible and powerful. Thinkers can differ, for example, about why or whether there is a problem with Good X, about whether and how the regulated inclusion of Good X in the labor deal will help the problem, or about the comparative merits of non-EB regulatory approaches. EB theory will still be useful.

Indeed, as Part III.D explains, there is good reason to think that EB theory will provide significant value to decision-makers, reformers, scholars, and perhaps, in some later iteration, to the public at large. Before considering the general value of EB theory, however, I note some specific implications of the theory regarding reform (Part III.A), ERISA and ACA (Part III.B), and unexamined assumptions we might make about current EB and non-EB goods (Part III.C). Consideration of those implications is necessarily preliminary rather than comprehensive.

A. THINKING ABOUT REFORM

1. Segregative Pushes

An EB intervention is justified in the first instance only if there is some problem with Good X. What qualifies as a problem with Good X depends on one's point of view. Most observers would probably agree, however, that if people are not saving enough for retirement, that is a problem.

Let us assume for the sake of argument that the retirement arrangements of many people will replace only a small percentage of their pre-retirement income. We could say that such a state of affairs reflects a considered James Dean-like attitude to highly prioritize the pleasures of today, in which case retirement planning patterns represent a choice and not a problem.[156] We could also say that some people are not making enough today to put aside for tomorrow; if they must buy necessities today and have nothing left for tomorrow, an EB in-

156. *See, e.g.*, Brendan S. Maher, *The Benefits of Opt-In Federalism*, 52 B.C. L. REV. 1733, 1741 (2011) (explaining reasons individuals might not save enough for the future).

tervention is not going to help.[157] But one possible explanation about widespread under-saving for retirement is that people are poor at making retirement decisions until it is too late.

Consider now EB interventions in which Good X is retirement income. The three primary rationales offered for using EB interventions over the baseline market were (1) the drafting of employers as sophisticated agents; (2) the advantage of using the employee group as a purchasing unit; and (3) the positive behavioral effects of using the labor deal as an attention-focuser and commitment mechanism. Which seems the strongest point in favor of EB retirement interventions?

Many retirement scholars believe the central problem with retirement income is that many people do not devote enough resources (whether through savings or annuity purchases) to fund their retirement income, as compared to their likely future needs.[158] Concerns that individuals in the retirement income market will get taken advantage of, or that they will pay a higher price for retirement income solutions than they would if they were part of a group—those are problems, but they pale in comparison to the fact that people simply do not save enough to provide for a likely set of possible post-employment futures.

A strong argument in favor of EB retirement interventions, accordingly, is that they alter people's behavior with respect to retirement, promoting a higher level of resource commitment than in their absence, because, at a minimum, they remind people of the issue and provide administrative structures for committing resources to the "purchase" of retirement income. EB interventions also generally block the committed resources in question from being used by beneficiaries prior to retirement, which, because of people's inability to stick to promises they make only to themselves, ultimately increases the amount of money people have for retirement.

157. *Id.*

158. *See* Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1607 (2014) ("Federal government policy since the 1930s has reflected the judgment that many people do not save enough for retirement."); Teresa Ghilarducci, Opinion, *Our Ridiculous Approach to Retirement*, N.Y. TIMES, July 22, 2012, at SR5 (noting the insufficient retirement savings of most American workers); *see also* MUNNELL & SUNDÉN, *supra* note 142 (describing retirement saving shortcomings in the United States); James M. Poterba, *Retirement Security in an Aging Population*, 104 AM. ECON. REV. 1 (2014) (identifying the various segments of the population that are risk).

Indeed, these decisional and administrative aspects of EB retirement intervention (which correspond to the "natural decision point" set of rationales offered in Part II.B.2.c) seem much stronger than the other rationales. The comparative sophistication of employers on the substantive matters of Good X relative to employees provides minimal justification for an EB retirement intervention. Employers are no more sophisticated in funding annuities or investing in the market than they are in, say, writing real estate mortgages. They will accordingly need to be heavily regulated to ensure they can and actually do keep retirement promises they make. Nor is there strong evidence that employers are striking particularly good deals with third-party providers regarding retirement funds; whether that is because of incompetence or collusion is unclear.[159] In any event, most employers rely heavily on outside parties to perform retirement functions, and those parties also need to be regulated heavily.

Consider a slightly odd counterfactual. Imagine if we lived in a world where individuals *would* appropriately commit, without prompting, a sufficient amount to provide for their retirement, and our main worry is that such individuals would be exploited by providers of retirement solutions. Let's call these individuals "Retirement-Focused Naifs."

The answer to the problem of Retirement-Focused Naifs (RFNs) would be to directly regulate those advisors who managed the investment of their retirement monies; the answer would patently *not* be to ask RFNs to hand their retirement money over to their employers so that their employers could then interface with third-party investment managers. Not only is that—in terms of the overall regulation needed and the number of parties regulated—a more complicated solution, it increases the likelihood that RFNs would then be exploited by their employers or disserved because their employers would be incompetent agents. No one thinks involving employers as purchasing agents in the acquisition of things such as cars or houses will reliably improve outcomes. That does not fundamentally change when the good is "retirement income."

Of course, most observers do *not* believe we live in a world of RFNs—they believe that individuals are unsophisticated about retirement and *also* unfocused.[160] The employer link in

159. *See supra* note 117 (citing sources questioning the cost and performance of EB retirement plans).

160. *See supra* note 156 and accompanying text.

the chain can be a nontrivial part of pushing people to properly focus, i.e., to be sufficiently retirement-interested.

The RFN example helps narrow down what EB interventions may be good for: the segregative push.[161] A segregative push is when, in an EB world, the employer segregates wages that can *only* be used by the employee for Good X. Segregative pushes may, generally speaking, capture the appeal of EB interventions while limiting their downsides. They are, of course, not complete solutions, because they do not solve the problem of the employee making bad choices with respect to Good X.

2. EB Conduit Systems

Only in rare circumstances will segregated pushes be enough, because they are incomplete solutions to a Good X market that has other infirmities. Good X may be too complicated for individuals to reliably obtain desirable deals, or the Good X individual market may be too expensive for many individuals to reliably participate in; segregative pushes do not remediate those problems. A segregated push needs a back-end, i.e., a regulated market in which employees can obtain Good X. Option one, of course, is for that regulated market to be an EB market. Option two is for that regulated market to be a non-EB market.

Option one is problematic for the reasons articulated above: when employers are involved in the delivery of Good X, either as agents or providers, employees are subject to increased risk of incompetence or exploitation. EB interventions also lead to opacity problems. More subtly, the inclusion of employers in this way leads to regulatory fragility and opportunism. But let us also assume that the regulatory value of an EB segregative push is high, because it is difficult to replicate its salutary commitment effects in a non-EB market and because other objections disqualify the regulatory solution of simply providing Good X through governmental program.[162] How might

161. Several years ago, Cass Sunstein and Richard Thaler wrote a book entitled *Nudge*. Most contemporary readers will have heard of it. The book defined nudges as "any aspect of the choice architecture that alters people's behavior . . . without forbidding any options or significantly changing their economic incentives . . . . Nudges are not mandates." RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE 6 (2008). That is somewhat different than the concept I describe here as a segregative push. A segregative push can be coercive, and it could be a mandate. It can also be accompanied on the back-end by a nudge, i.e., an easily alterable default choice, but it does not have to be.

162. I am not saying I believe (or do not believe) that; I am assuming it to

we preserve the value of segregative pushes without the less desirable aspects of EB interventions?

The answer is what we might call an EB "conduit" system. An EB conduit system is simple in concept. It is an EB intervention where the primary role of the employer is to transparently withhold and transfer some amount of wages to an account that the employee can only spend in a regulated non-EB market for Good X.[163]

EB conduit systems use the employer as an administrative convenience to require purchases of Good X but otherwise rely on a regulated non-EB market to address the market imperfections that bedevil Good X.[164] Such interventions would dispel the opacity that surrounds more complicated EB interventions and make employees aware of how much they are paying for Good X. They also tie the provision of Good X to wages, which imposes an indirect market constraint on the unsubsidized price people can pay for Good X. Subsidies may be necessary for Good X purchases, although they would be more transparent in the conduit context.

EB conduit systems do not require employers to be sophisticated about Good X or provide them with opportunities to exploit employees. Much of the mischief attributable to EB interventions arises from complexity, discretion, and regulatory fragility.[165] Conduit systems avoid these problems by limiting employer discretion to the contribution question (with contribution mandates eliminating employer discretion on even that question).[166]

be the case for clarity of discussion.

163. One could also imagine a government-conduit system, i.e., a segregative push into a quasi-market essentially run by the government, such as the United Kingdom's NEST program. *See Who Runs NEST*, NAT'L EMP. SAVINGS TR., https://www.nestpensions.org.uk/schemeweb/NestWeb/public/aboutnestcorporation/contents/who-runs-nest.html (last visited Mar. 10, 2016) (explaining how the NEST retirement program works). Whether such a scheme is politically palatable here is a separate question.

164. Another advantage of the conduit model is comparative. One worry with relying on the direct government provision of Good X is that government can change its mind (by engaging in "entitlement reform") about providing X. In contrast, if X is privately funded, that money belongs to the beneficiary.

165. Who determines the *amount* of monies to be segregated depends in part upon whether the employer, as influenced by employees, will make decisions that are optimal or near optimal for the average person. Because the amount is a simpler decision, it may be more suited to employer discretion than other Good X decisions.

166. Ten years ago, Professor Edward Zelinsky described a paradigm shift in American thinking about social goods associated with employee benefits

And conduit systems suggest one legal feature that employers should very much like: if the employer role is simply to withhold and transfer some amount into an account the employee can spend in a regulated, non-EB market for Good X, an employer should have no liability beyond having to successfully transfer the promised amount. If the employer has some role in selecting the default version of Good X that will be bought with the transferred funds, then some residual liability for the employer could be appropriate.

B. THINKING ABOUT ERISA & ACA

ERISA. When an idea is instantiated, other versions of it become counterfactual. The instantiated version can exert undue influence on abstract thinking about the general. Some versions of ideas, in other words, dominate by being. Something like this has happened with ERISA. EB interventions encompass vastly more than ERISA, but the latter has come to shape mainstream and scholarly considerations of what EB interventions generally are.[167]

This is somewhat understandable. The statute's particulars are so technical and arid that only an intrepid few have dared consider the legislation at length, let alone familiarize themselves with its history or embark on a theoretic treatment of statutory counterfactuals. Nonetheless, one immediate advantage of EB theory is that it denies the ERISA-EB equivalence, and provides a nontechnical framework for (1) distinguishing the concept of an EB intervention from ERISA; (2) cataloguing ERISA's successes and shortcomings; and (3) imagining counterfactual EB interventions that might work better.

EB theory also suggests the outlines of a unifying story about the statute's surprisingly turbulent life: how the absence

and government programs. He explained that the country was undergoing a move from "defined benefit" approaches (where the entitlement is defined in terms of the Good X to be received) to "defined contribution" approaches (where the entitlement is defined in terms of the funds contributed to pay for Good X). Zelinsky, *supra* note 45, at 455–58. The wisdom of such a move has since been debated extensively. For those who like segregative pushes, the "defined contribution paradigm" is appealing, but it leaves unanswered the question of whether the market that beneficiaries are being pushed into *will be regulated enough* to solve the problems of Good X. Conduit systems are the answer for observers who think not.

167. Commentators, including thoughtful judges, struggled mightily to make sense of ERISA, in essence attempting to explain the statute rather than develop an antecedent explanation of what an EB intervention is, could be, or should be.

of a satisfactory alternative channel for Good X exerted a powerful deflationary pressure on the statute's ability to protect employees. Because of the moral and financial importance of the things it regulates—retirement, health care, disability compensation, etc.—ERISA has been litigated before the Supreme Court routinely, and has also been the subject of extensive scholarly consideration and controversy.[168]

ERISA, for all its infamous enormity and sprawl, was a wildly incomplete solution to the problems of the Goods X it hoped to regulate. It made no meaningful effort to regulate non-EB versions of pensions, retirement accounts, or health insurance, yet it imposed a substantial burden on employers with regard to those subjects.

As such, those charged with interpreting and applying ERISA essentially always faced a choice between ERISA world and the baseline world. Efforts to improve ERISA were regulatorily fragile because of the implicit threat by employers that they would move to the next worse option if regulated too heavily, i.e., from pensions to retirement accounts to no retirement benefits at all. The situation was even worse for health care. Because there essentially was no functional individual market for health insurance, and because the nature of the health insurance promise is volatile, regulatory action disfavoring employers—had it led to a reduction in the offering of EB health insurance—would have left large numbers of people uninsured.

EB theory makes plain and develops the untold portion of the oft-invoked tale about ERISA's tension between promoting voluntary benefit plans and protecting employees,[169] namely: that those urging the importance of the former are going to win most battles when the non-EB alternative for Good X is awful. An "ERISA world" only one peppercorn better than the baseline world is still, after all, a better outcome than the baseline world. For judges and agencies to not take heed of this reality would have been naïve. And Congress's failure to realize the

168. *See supra* note 4 (citing ERISA cases the Supreme Court has decided in the last ten years). ERISA scholarship is rich and expansive. A good starting point is Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105 (1988), which is a classic in the literature.

169. Aetna Health, Inc. v. Davila, 542 U.S. 200, 215 (2004) (noting ERISA's "careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans" (internal quotation marks omitted)).

tilted playing field it was creating made ERISA's broad preemptive language a rolling calamity, because it limited the set of legislative actors who could fix the problem to one: Congress.[170]

Had there been a robust, alternative market for Good X beyond an EB market, the resolution of ERISA's controversies could have taken a very different shape.[171] The absence of a palatable alternative for Goods X is a necessary and common theme of any story of ERISA.

ACA. From an EB perspective, the ACA's conceptual motivation was simple, however tortured its execution. For those not covered by EB health insurance, the ACA aimed to create another Good X option: the expansion of Medicaid for the poor, and a stable, subsidized, comprehensible individual market for health insurance for everyone else.[172] Put slightly differently, it solved the problem of Good X (where Good X = health insurance) by providing, as an alternative to an EB intervention, either (1) government provision of Good X or (2) a regulated non-EB market for Good X. That is a straightforward application of EB theory.

If the ACA created a regulated non-EB market for Good X, why would it attempt to *preserve* the EB intervention? And by "preserve," I mean more than "not prohibit," I mean "take some affirmative steps to perpetuate." Imagine two alternatives: first, a regulatory regime that offers both a regulated EB market and a regulated non-EB market, but regulatorily favors neither. Imagine, second, a regulatory regime that offers both a regulated EB market and a regulated non-EB market, but provides some regulatory advantage to EB market participants. The ACA resembles the second (with the most prominent examples being the requirement that large employers pay a tax if they do not offer EB health insurance and the lack of preferen-

170. ERISA's preemptive scope—both formally and in its indirect effects—is extremely broad. *See* Maher & Pathak, *supra* note 51, at 284–91 (explaining the breadth of ERISA preemption).

171. Admittedly, the results may not have changed, because some judges may have negative views about additional legal rules in virtually any setting. *See generally* Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006) (explaining and defining the hostility of the Rehnquist Court to litigation in a wide variety of substantive contexts).

172. *See supra* Part I.C ("[T]he intent of the Act was clear: it aimed to create an accessible, affordable, and stable market for individuals seeking health insurance.").

tial tax treatment for non-poor employees who purchase their own health insurance).[173] Why did the ACA promote, to some degree, the continued existence of EB health insurance?

Various explanations for the ACA's preservation and preference for EB interventions have been offered, usually on political or tax grounds. One political argument was that *not* advantaging EB interventions would lead to employers dropping plans, which would anger voters who wanted assurances that health reform would allow them to keep their current plan.[174] Another is that those who seek to change EB health insurance need tread carefully to avoid being tarred (and politically isolated) as a radical.[175] The tax argument is that the ACA's subsidy scheme is constructed such that a failure to preserve EB interventions would drive many people onto the subsidized exchanges, thus increasing the cost of reform to the federal government.[176]

173. *See supra* Part I.C and accompanying notes (explaining features of the ACA).

174. This argument recently played out in the political flap over President Obama's "promise" that people could keep their plans, which was not literally true, and caused a flurry of news coverage about people unhappy with the President. *See, e.g.*, Lisa Myers & Hannah Rappleye, *White House Knew Millions Could Not Keep Plans Under Obamacare*, CNBC (Oct. 29, 2013), http://www.cnbc.com/id/101150855# (discussing political fallout over the cancellation of certain policies that failed to comply with the ACA).

175. *See* Ross Douthat, Opinion, *A Hidden Consensus on Health Care*, N.Y. TIMES, July 7, 2013, at SR12 (suggesting a consensus that EB health insurance is not a good idea, but that political calculations favor its continued existence).

176. *See, e.g.*, Peter Ubel, *The Problem with Obamacare's 50 Employee Cutoff*, FORBES, (Mar. 24 2013), http://www.forbes.com/sites/peterubel/2013/05/24/the-problem-with-obamacares-50-employee-cutoff ("[T]he subsidy fixes one problem, but creates another: because the government is going to help people pay for private insurance, that gives employers an even greater incentive to pull out of the health insurance market while relying upon the government to pick up the slack.").

Assertions such as this need to be appropriately qualified. Currently all employer-based health insurance is not taxed, which deprives the government of revenue equal to the cost of the health insurance times the effective marginal tax rate of the recipients. Assume employment-based health insurance is abolished tomorrow. If employers did not offer health insurance, in the long run wages would need to rise to offset that reduction in compensation, and those wages would be subject to taxation. Alternatively, if employers did not raise wages but simply increased profits, *that* would be taxed. Only if the subsidies available to people participating in the exchange exceeded one of those numbers would the elimination of EB health insurance be a net revenue loss.

Some observers are careful to qualify their statements on the issue. *See, e.g.*, David Gamage, *Perverse Incentives Arising from the Tax Provisions of Healthcare Reform: Why Further Reforms Are Needed To Prevent Avoidable*

Non-political and non-tax explanations for the ACA's pro-EB character have been less forthcoming. That is not surprising, because the legislation's pro-EB bias was a questionable (although not indefensible) policy choice.[177]

In insurance terms, there is little to recommend a collection of group markets (corresponding to employers) over a mandated, no-underwriting individual market. The former requires some underwriting for groups—not underwriting *within* the group, but underwriting *for* the group, because groups vary in their risk profile. A group of accountants present different risks than a group of truckers, and small groups are more volatile than large ones.[178] A unified individual market requires the insurer to simply issue a community policy to all.[179] An ideal version of the ACA market (one unified insurance market) serves as a better group corrective than an ideal version of the EB market (a collection of groups with varying risk characteristics). Why did ACA perpetuate the arguably worse market?

It is not because of a worry that insureds will be unable to navigate the health insurance market outside the EB setting; the exchanges were intended to make that choice simple and transparent. Nor is it because EB policies are necessarily better than the policies to be had on the individual exchanges. Indeed, one particularly puzzling feature of the ACA is that it did not, and does not, require large employers to offer the statutorily-required "essential health benefits" required of small group and individual policies.[180] So large employers may offer narrower coverage—and some do.[181] Put differently: it may now be easier to be exploited in the EB market than in the non-EB market.

Costs to Low- and Moderate-Income Workers, 65 TAX L. REV. 669, 692–93 (2012) ("Maintaining the previous system of employer-sponsored coverage for lower-income taxpayers was considered important for realizing the ACA's deficit-reducing potential because additional lower-income employees qualifying for the Exchange subsidies would drive up the budgetary cost of the Exchange subsidies."). Others are not.

177. Some of the EB-bias predates the ACA, e.g., the preferential tax treatment of EB health purchases. *See* Utz, *supra* note 58, at 1232–33. But the ACA could have altered that scheme.

178. *See* Monahan & Schwarcz, *supra* note 53, at 1943 (discussing the higher risk-volatility of small groups).

179. The ACA permits premium variation based on a small set of factors, including age and tobacco use. 42 U.S.C. § 300gg(a)(1)(A) (2012).

180. *Id.* § 300gg-6(a) (providing that only individual and small group plans must provide "essential health benefits").

181. *See supra* note 59 (explaining how the ACA permits the issuance of narrow policies).

Given the above, regulatorily favoring the EB market—whether through the spectacularly cumbersome "employer mandate," by tax-disadvantaging non-EB purchases, or via the application of some other regulatory wrinkle—is under EB theory presumptively *un*justified, or at least highly debatable. Perhaps one can argue that the government was unsure of the quality of the non-EB market it was creating, and wanted to ensure it was desirable before undoing regulatory features that unnaturally preserved the imperfect but more stable EB market. That may very well be so; the inclusion of reinsurance and risk adjustment provisions in the ACA suggests some concern about precisely this issue.[182] That raises the question: if the non-EB market proves stable, can we expect pressure from future reformers to eliminate the pro-EB features of existing law?

The answer: almost certainly. And so one hopes that during future reform discussions hysteria will play less of a role than it did the first time around. Perhaps—given certain statutory particulars of the ACA—the non-EB market it creates *is* going to be worse than the EB market, and Congress was wise to favor the latter. The point is that it makes little sense to *assume* that conclusion, absent a detailed consideration of *which* parts of the ACA undermine the comparative appeal of the non-EB market it creates. An extensive analysis of the statute's key implementation features, so as to conduct a sober comparison between ACA EB and ACA non-EB, is not a simple matter, but it is a necessary one, and a task we should hope occurs before the next generation of health reform discussions.[183]

C. THINKING ABOUT NON-EB GOODS

An interesting future application of EB theory will be to use it to explain why certain socially desirable goods about which individuals frequently make poor decisions have *not* been widely offered as EB goods. Thorough treatments of this type—as to certain goods, or classes of goods—are articles of their own, but let me suggest here a modest thought experiment. It may bring into sharper focus hidden assumptions

182. *See generally* Mark A. Hall, *The Three Types of Reinsurance Created by Federal Health Reform*, 29 HEALTH AFF. 1168 (2010) (explaining the ACA's various reinsurance mechanisms).

183. And we should hope so even if politics means the right answer will never be translated into policy. Truth unenacted is preferable to truth unrecognized.

many of us may have regarding EB interventions for certain goods.

Imagine that there is no public system of primary education, but instead an employment-based primary education system, where employers, using the foregone wages of their employees, pay an education "premium" to a local school, which obtains its revenues based largely on tuition (supplemented by perhaps a very modest government subsidy). Employees without children can opt-out of the system.

Such an approach seems, to modern tastes, unpalatable. Among the many reasons why: society believes education is too important a good to provide only to the children of the employed. Put in EB theory terms, an EB education approach fails because it does not provide universal education, and society has concluded universal education is a precondition for a prosperous and fair society. Moreover, even with respect to those whom an EB education system would educate, we would have profound concerns about the influence of employers on the terms of the education bargain. Education should be provided on terms consistent with the public good, not on terms that match employer preference. Now query the degree to which the same arguments against EB education apply to EB retirement, health care, or disability compensation.[184]

D. THINKING ABOUT TOMORROW

EB theory asks an organized set of questions about the appeal of any EB intervention. Obviously answering those questions involves judgments or priors on which observers can disagree. But EB theory is applicable to all Goods X, can fairly easily disaggregate questions on which persons do and do not agree, and can resolve comparisons both among EB interventions and between EB and non-EB regulatory approaches.

184. It is not a perfect analogy, of course. But it is an interesting way to think about the question. Unemployment insurance (UI) is also an interesting case. UI is a specific version of wage replacement income, namely, wage replacement for a job lost involuntarily. It is not overly difficult to imagine an EB intervention for UI. *Cf.* Michael B. Rappaport, *The Private Provision of Unemployment Insurance*, 1992 WIS. L. REV. 61 (imagining a private system for UI). The group corrective and behavioral case for EB UI is, at the very least, colorable. But it seems that concerns about employers (or the insurers they retain) negotiating or administering UI in a socially undesirable way are sufficiently acute to constitute a very strong case for the current governmental, non-EB provision of UI.

From a scholarly and policymaking perspective, the appeal of a common framework requires little elaboration. It eliminates the need to reinvent the wheel every time society considers a proposed EB intervention or a change thereto. It better situates decision-makers to determine which particular regulatory features an EB intervention for Good X should have, which should in turn facilitate the crafting (or debate over the crafting) of the implementing statute or regulations.[185] It also, at least for purposivist judges, can help resolve doctrinal and interpretative disputes that arise after the fact.

It is far from clear how and why the national conversation develops as it does. But some ideas are better developed, and more succinctly expressed, than others. For example, Americans are today well familiar with stripped down versions of the debates between market and government solutions. EB interventions, on the other hand, occupy a very strange place in the national consciousness. They are familiar to so many but only vaguely understood as nebulous arrangements involving some unspecified nexus between a job and Good X. One explanation for such fuzzy popular treatment is that no coherent account exists even at the scholarly level.

Long overdue is an accessible framework for understanding a crucial tool of American social policy—the EB intervention. Admittedly, this Article offers a comprehensive theoretical account of EB interventions, not a catchy vocabulary ready to penetrate the national conversation. But the task must start somewhere.

CONCLUSION

Existing scholarship concerning EB interventions has been largely good-centric or statute-centric, avoiding the task of antecedent inquiry. Those approaches, while of considerable usefulness, are incomplete and possess limited potential to transcend the technical. This Article argues that EB interventions have important recurring characteristics that, when recognized, permit disciplined thinking about their pitfalls and potential across goods and statutes. Nor, importantly, does the unifying theory offered here conflict with the rich existing

185. For example, supporting a particular EB intervention because one believes a particular Good X needs a group corrective is a very different matter than supporting an EB intervention because of one's faith in the sophistication and agency of employers. One believing the former will conclude a different set of EB regulations is necessary than one believing the latter.

scholarship on the many specific issues it subsumes—quite the opposite. EB theory situates that work within a larger, more powerful frame, one that has important implications for questions of research, policy, and narrative.

EB theory is sui generis; it deliberately does not use the "as" expedient of describing EB interventions as a manifestation of some other recognized concept. Indeed, EB interventions are likely under-theorized and misunderstood in part because they cannot be usefully described as the manifestation of some pre-existing unitary principle. But that does not mean their theoretical skeletons should remain forever obscure.