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Together We Can: Imagining the Future of Employee Pensions

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TOGETHER WE CAN:* IMAGINING THE FUTURE OF EMPLOYEE PENSIONS

Reviewing Teresa Ghilarducci & Christian E. Weller, Eds. *Employee Pensions: Policies, Problems & Possibilities* (LERA 2007)

BY
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I. INTRODUCTION

A little over thirty years ago Congress enacted the Employee Retirement Income Security Act (ERISA),[1] a comprehensive reform of the existing system of pension regulation.[2] Solidly into its fourth decade, ERISA has been the object of much commentary as the various federal courts have struggled to infuse its complicated and sometimes imprecise pieces with coherent meaning.[3] Some have suggested that ERISA's

* With apologies to Governor Deval Patrick and President Barack Obama. The phrase "Together We Can" was used as Governor Patrick's campaign theme in his run for the Massachusetts Governorship. *See* Associated Press, *Obama Using Parts of Deval Patrick's Campaign*, SEACOASTONLINE, Jan. 13, 2008, <http://www.seacoastonline.com/apps/pbcs.dll/article?AID=/2008 0113/NEWS/801130371&sfad=1>. President Obama used the related phrase "Yes We Can" as his campaign slogan.

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1. Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 & 29 U.S.C. (2000)).

2. *See* JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY 1 (2004) ("ERISA was Congress's attempt to devise a comprehensive regulatory program to protect millions of American workers who looked to private pension plans for financial support in their retirement years.").

3. *See, e.g.*, Varity Corp. v. Howe, 516 U.S. 489 (1996) (defining scope of fiduciary duties); Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995) (resolving procedural issues that arise when employers amend a retirement or welfare plan to alter participant benefits); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992) (defining the term "employee" under ERISA). For critiques of the Court's ERISA decisions *see, e.g.*, Donald T. Bogan, *Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States to Regulate Managed Care?*, 74 TUL. L. REV. 951 (2000); John H.

primary goal of reducing the risk to employees of employer default has largely been achieved.[4] Others believe that almost every aspect of the statute relating to pensions has been at least modestly successful[5] but that those provisions of the statute dealing with health insurance and other welfare plans[6] cry out for significant reform.[7]

In their new book, *Employee Pensions: Policies, Problems & Possibilities*, editors Teresa Ghilarducci and Christian E. Weller have assembled a group of essays which seeks to evaluate and reform existing pension policy. Of the eleven authors whose work Ghilarducci and Weller have collected and edited, only two are trained as lawyers. The others are mostly economists with a few public policy academics and practitioners rounding out the mix. For ERISA lawyers in the audience, the book provides a welcome opportunity to focus on pension benefits issues through a non-legal lens. Rather than parsing various provisions of the statute and relevant cases, the authors in this collection take up the question of the future of employee pensions from the perspective of economics, labor organizing, and simple income security. It is a refreshing read for anyone who is typically limited to legal materials when thinking about

Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russel, Mertens, *and* Great-West, 103 COLUM. L. REV. 1317 (2003); Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3)*, 39 J. MARSHALL L. REV. 827 (2006); Richard Rouco, *Available Remedies Under ERISA Section 502(a)*, 45 ALA. L. REV. 631 (1994).

4. *See, e.g.*, Mertens v. Hewitt Assocs., 508 U.S. 248, 251 (1993) ("ERISA is, we have observed, a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system.") (internal quotation marks omitted); Jensen v. Moore Wallace N. Am., Inc., 249 F. App'x 391, 396 (6th Cir. 2007) (describing ERISA as containing "a highly reticulated, national and exclusive set of rules") (internal quotation marks omitted); Zimmerman v. Sloss Equip., Inc., 72 F.3d 822, 827 (10th Cir. 1995) (noting that the complexity of ERISA indicates its comprehensive nature).

5. *See, e.g.*, Michael S. Sirkin, *The 20 Year History of ERISA*, 68 ST. JOHN'S L. REV. 321, 323-24 (noting that "the labor provisions of ERISA have remained reasonably steady" and ERISA in general as being "remarkably resilient").

6. ERISA covers two types of employee benefit plans: pension benefit plans and welfare benefit plans. A pension benefit plan generally "(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." 29 U.S.C. § 1002(2) (2000). A welfare benefit plan generally provides for medical, unemployment, and certain other non-pension employee benefits. 29 U.S.C. § 1002(1) (2000).

7. *See, e.g.*, John Bronsteen et al., *ERISA, Agency Costs, and the Future of Health Care in the United States*, 76 FORDHAM L. REV. 2297 (2008) (arguing that most of our health care crisis arises from unmitigated ERISA agency cost problems, meaning that the statute encourages employer and insurer-principals to act in ways that are contrary to the interests of their insured employee-agents); Joanne Deschenaux, *ERISA Pre-emption Reaches Congress*, HRMAG., July 2007, at 36 (reporting that state health care reform advocates pressed Congress to act to lessen or remove ERISA limitations on state health care reform); Frank P. Fedor & River Sung, *The Conflict Between ERISA and Local Healthcare Reform*, HEALTHCARE FIN. MGMT., May 2008, at 38 (discussing the need to loosen ERISA's preemption of state and local law to allow for state and local health care reform); Karl Polzer & Patricia A. Butler, *Employee Health Plan Protections Under ERISA*, HEALTH AFF., Sept.-Oct. 1997, at 93, *available at* <http://content.healthaffairs.org/cgi/reprint/16/5/93.pdf> (criticizing ERISA for producing limited or uneven protections for consumer health benefits).

pensions, and each of the essays is accessible enough that students would also benefit from exposure to the book.

Employee Pensions is organized in a way that quickly reveals the policy biases of both the editors and contributors. Each essay is located in one of four major sections: "Justification for the Employer-Based System," "Getting Defined Benefit Plans Ready for the Future," "Ways to Improve Defined Contribution Plans," and "Understanding the Political Dimensions of Pension Reform." In the first essay, the editors make their views about pension reform plain: the Pension Protection Act of 2006 (PPA)[8] fails to deal adequately with "high degrees of inequality in retirement saving accumulations by income and race, high costs of defined contribution plan administration, lack of support for innovative defined benefit pension design, and corporate disincentives to sponsor pensions."[9] The PPA, the editors believe, "discourage[s] firms from continuing [defined benefit] plans."[10] This is because the PPA "goes overboard in the opposite direction by making perfectly sound companies speed up funding for any pension debt, thereby raising the unpredictability of pension contributions."[11] Throughout their essay, indeed throughout Section I, the consistent message is that defined benefit plans are superior to defined contribution plans and, therefore, as much as possible should be done to encourage employers to offer defined benefit plans. However, the PPA discourages defined benefit plans and favors defined contribution arrangements without "addressing the existing shortcomings of [defined contribution] plans."[12] The shortcomings of defined contribution plans include hidden, often high fees that can substantially erode a plan participant's account balance.[13]

II. PREFERENCE FOR DEFINED BENEFIT OVER DEFINED CONTRIBUTION PLANS

Several of the contributors to this volume mention the revitalization of strong labor unions as one tactic for increasing the availability of pensions for U.S. workers,[14] so it is not surprising to find strong support for defined

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

9. EMPLOYEE PENSIONS: POLICIES, PROBLEMS, AND POSSIBILITIES 3 (Teresa Ghilarducci & Christian E. Weller eds., 2007) [hereinafter EMPLOYEE PENSIONS].

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 4.

14. There are a variety of reasons to be dubious about this claim. *See, e.g.*, Daniels-Hall v. Nat'l Educ. Ass'n, -No. C-07-5339RBL, 2008 WL 2179530 (W. D. Wash. May 23, 2008), in which school teachers allege their union promoted and endorsed annuities without revealing that the union received

benefit plans over defined contribution plans, although some of the essays in Section III ("Ways to Improve Defined Contribution Plans") seem to grudgingly acknowledge that defined contribution plans seem likely to continue to enjoy significant growth as defined benefit plans continue to decline.[15] I must confess I've never fully understood organized labor (and its supporters') consistent preference for defined benefit plans over defined contribution plans and nothing in this volume sheds any light on this bias. As all students of ERISA know, a defined benefit plan places the risk of investment failure on the plan (or plan sponsor/employer) itself. That is, the core responsibility of coming up with sufficient dollars to cover future plan liabilities rests with the plan in a defined benefit arrangement.[16] Plan participants (or "workers" in language preferred by many of the book's authors) enjoy an amount of guaranteed pay after a defined number of years of service based on those years of service and the amount of salary. That is, a participant can figure out with a high degree of certainty what his pension will be in advance of retirement.

The most important distinction between defined benefit and defined contribution plans is that in the defined contribution arrangement, investment risk is placed on the plan participant/worker. A participant in a defined contribution plan runs the risk that there may be little or no money available to support a comfortable retirement if the market performs poorly or investment choices prove to be unwise. For this reason, many have written about the need for high quality "investor education" for employees who are participating in defined contribution plans.[17] The reason that a

millions of dollars in payments ("undisclosed commissions") from the underlying insurer in exchange for encouraging teachers to sign up.

15. Over the past few decades, defined benefit and defined contribution plans have gone in opposite directions in their popularity among active-workers. EMPLOYEE BENEFIT RESEARCH INST., FACTS FROM EBRI 1 (2007), <http://www.ebri.org/pdf/publications/facts/0607fact.pdf>. In 1979, active-worker participants enrolled in only defined benefit plans far outweighed participation in only defined contribution plans: 62 percent to 16 percent. *Id.* By 2005, defined benefit and defined contribution plans had effectively switched places with exclusive enrollment in defined benefit plans dropping to 10 percent while exclusive enrollment in defined contribution plans increased to 63 percent. *Id.*

16. The sponsoring employer of a defined benefit plan has an obligation to sufficiently fund the plan so that the value of the plan's assets will cover defined participant benefits that are "typically determined by a formula based on a combination of . . participant[s'] earnings and years of service with the employer." COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 112 (2d ed. 2007). Federal law requires a sponsoring employer to maintain a minimum level of funding, which puts a financing liability on the employer that can drastically change from year to year depending on changes in actuarial assumptions and plan assets' investment performance. *Id.*; Craig Copeland, *Employment-Based Retirement Plan Participation: Geographic Differences and Trends, 2006*, EMP. BENEFIT RES. INST. ISSUE BRIEF NO. 311, Nov. 2007, at 5, *available at* <http://www.ebri.org/pdf/briefspdf/EBRI_IB_11-20074.pdf>.

17. *See, e.g.*, Jayne Elizabeth Zanglein, *Investment Without Education: The Disparate Impact on Women and Minorities in Self-Directed Defined Contribution Plans*, 5 EMP. RTS. & EMP. POL'Y J. 223,

strong, consistent preference for defined benefit plans mystifies me is that, notwithstanding ERISA, no one has yet figured out how to eliminate all default risk for defined benefit plans. In other words, traditional plans fail too, and, as David Madland notes in *The Politics of Pension Cuts*, defined benefit plans can be amended or converted to cash balance plans or terminated as a result of plan sponsor (employer) bankruptcy or by the Pension Benefit Guaranty Corporation (PBGC).[18]

Simply put, a defined benefit plan is *not* an absolute guarantee to an employee of a stream of pension income that will see the employee and his spouse[19] through to the end of their retirement. Defined benefit plans can and do fail as the faithful reader of any newspaper can attest: think about United Airlines, Polaroid, and Bethlehem Steel.[20] Of course, the authors' objections to defined contribution plans are not without merit. It is just that organized labor's consistent advocacy on behalf of defined benefit arrangements is not supported by the economic experience of the past few decades. Madland again: "a reasonable estimate is that over the past five years, more than 10 million workers and retirees have seen their pension or retiree health benefits significantly cut. The 10-million figure counts only people who have had substantial retirement benefit losses and ignores potentially important but relatively minor cuts, such as the elimination of cost-of-living adjustments on pensions"[21]

He notes, "[s]even hundred thousand people had their fully funded pension plans [i.e. defined benefit plans] terminated in the period between 2000 and 2005, according to PBGC[22] data."[23] In addition to plan

268 (2001) ("All participants, including women, men, minorities, low-income workers, part-time employees, youth, and the elderly must be taught the fundamentals of investments.").

18. David Madland, *The Politics of Pension Cuts*, *in* EMPLOYEE PENSIONS, *supra* note 9, at 187, 190-91.

19. *See* 29 U.S.C § 1055 (2000) (mandating that for defined benefit plans "(1) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity, and (2) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a qualified preretirement survivor annuity shall be provided to the surviving spouse of such participant").

20. *See* Albert B. Crenshaw, *Senate Passes Bill to Require Full Funding of Private Pensions*, WASH. POST, Nov. 17, 2005, at D1; Micheline Maynard, *The Basics; If an Airline Fails, Who Would Care?*, N.Y. TIMES, May 15, 2005, § 4, at 2; Mary Williams Walsh, *Whoops! There Goes Another Pension Plan*, N.Y. TIMES, Sept. 18, 2005, § 3, at 1.

21. Madland, *supra* note 18, at 191.

22. The PBGC is a federal corporation that ERISA established to encourage the continuation and maintenance of private pension plans, to make sure plan participants and beneficiaries receive their pension benefits in a timely and uninterrupted manner, and to keep its premiums as low as possible. 29 U.S.C. § 1302(a) (2000). To accomplish these goals, the PBGC oversees the termination of defined benefit plans and charges premiums from defined benefit plan sponsors to insure participants' benefits against the "distress terminations" of underfunded plans. *See* MEDILL, *supra* note 16, at 242-44.

23. Madland, *supra* note 18, at 191.

terminations,

> a safe estimate is that the pension plans of 3 million workers, or 10 percent of workers with a pension, are currently frozen. However, figures are rough: freezes are a relatively new trend that is rapidly increasing . . . . [One study] estimate[s] that when a pension plan is frozen, a typical married 40-year-old male employee loses nearly $5,000 of benefits in each year of retirement, or total of over $95,000 if he has an average life span in retirement.[24]

And remember, this is a discussion about the defined benefit world! It simply is not clear why the systematic risk associated with defined benefit plans, which ERISA has clearly not been able to entirely eliminate, is superior to the up-front risk of defined contribution plans. Indeed, a well informed defined contribution participant no doubt understands that the risk of plan failure will be borne by herself. I would bet that the typical defined benefit participant is stunned to learn that the "guaranteed payout" which was promised is in fact not guaranteed at all. Defined benefit plans, as we all know, can be frozen, terminated (voluntarily or involuntarily),[25] or converted to cash balance plans.

III. THE POST-*LARUE* WORLD

Two of the essays in this volume are collected in Section III under the heading "Ways to Improve Defined Contribution Plans." In the first piece by Eric Rodriguez and Luisa Grilla-Chope entitled "How Can Defined Contribution Plans Meet Worker Needs?" the authors recite Employee Benefits Research Institute data about general pension coverage and participation.[26] It comes as no surprise that many Black and Hispanic employees have relatively low rates of coverage and participation. Although they do not mention it, the lower coverage rates for minority employees appear to correlate with their overrepresentation in the low wage labor force. And, as several other contributors note, pension coverage is greatest in better paying sectors of the economy. Maybe because they are resigned to the decline in defined benefit plans,[27] Rodriguez and Grillo-Chope focus on changes to the existing regulatory regime for defined

24. Madland, *supra* note 18, at 191-92.

25. *See* 29 U.S.C. § 1341 (2000) (providing procedures for voluntary plan terminations of funded and underfunded pension plans by plan administrators); 29 U.S.C. § 1342 (2000) (providing procedures for the PBGC to initiate termination procedures against pension plans).

26. Eric Rodriguez & Luisa Grillo-Chope, *How Can Defined Contribution Plans Meet Workers' Needs?*, *in* EMPLOYEE PENSIONS, *supra* note 9, at 123, 123-24.

27. Rodriguez and Grillo-Chope note "[t]he private employer-sponsored retirement savings market is now dominated by [defined contribution] pension plans. From 1985 to 1999, the number of private [defined benefit] pension plans dropped from 170,000 to 50,000, while the number of private [defined contribution] pension plans increased from 462,000 to 683,000" (citation omitted). *Id.* at 126.

contribution plans which they believe would increase retirement income security. Their prescription for all that ails defined contribution plans includes: enhance savings through automatic features, increase incentives to participate, loosen eligibility criteria so more workers are eligible to participate in 401(k) plans, increase education so workers can make intelligent and informed investment decisions, and address the problem of high expenses associated with many DC accounts. They identify three kinds of risk associated with defined contribution plans: longevity risk (risk that a plan participant will outlive his retirement assets), market risk (risk of improper asset allocation), and investment risk ("workers have to consider the financial market's performance before retirement; in a down market, workers will be forced either to delay retirement or consume less during retirement").[28]

Some of these concerns, especially those associated with market and investment risk, were the object of scrutiny by the U.S. Supreme Court in its recent decision in *LaRue v. DeWolff, Boberg & Associates*.[29] In *LaRue* an unhappy participant in a 401(k) plan sued the plan administrator alleging that failure to follow his investment directions "depleted" his account by about $150,000 and amounted to a breach of fiduciary duty under the statute, for which he was entitled to recover. A unanimous Supreme Court held that §502(a)(2) of ERISA authorizes recovery for fiduciary breaches that "impair the value of plan assets in a participant's individual account."[30]

Some in the legal community were surprised at the result in *LaRue* given the Supreme Court's earlier decision in *Massachusetts Mutual Life Insurance Co. v. Russell*.[31] The *Russell* Court held that a participant in a group disability plan could not sue under §502(a)(2) to recover consequential damages arising from a delay in processing her claim. The Fourth Circuit[32] (and other observers) believed that the holding in *Russell* precluded a decision in Mr. LaRue's (the participant's) favor. Indeed, *Russell* and several subsequent Supreme Court decisions[33] addressing the

28. *Id.* at 127-28.

29. 128 S. Ct. 1020 (2008).

30. *Id.* at 1026.

31. 473 U.S. 134 (1985).

32. LaRue v. DeWolff, Boberg & Assocs., Inc., 450 F. 3d 570, 572-73 (4th Cir. 2006), *vacated*, 128 S. Ct. 1020 (2008).

33. In *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), the Supreme Court ruled that § 502(a)(3) of ERISA did not allow for consequential damages. The Court based its opinion on construing "appropriate equitable relief" to only refer to remedies that were historically available in equity, which does not include consequential damages. *Id.* at 256-58. In *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), the Supreme Court again denied monetary damages, this time stemming from a restitution claim, as being available under § 502(a)(3) of ERISA. The Court distinguished between restitution that was typically available at law and restitution that was available at

ability of ERISA plaintiffs to recover damages have been criticized in various quarters, including members of the Court.[34]

The tone and result in *LaRue* give, I think, hope to the various contributors to *Employee Pensions*, and many others who have watched over more than two decades as *Russell* evolved into a broad prohibition on the ability of ERISA plaintiffs to access meaningful recoveries from plans that caused them harm.[35] (The contributors to this book are uniform in their desire to see secure pensions, in particular defined benefit plans and other ERISA plan benefits, made available to the widest possible audience of American workers.) The tone of *LaRue* is encouraging because although the Court asserts that "the misconduct alleged in *Russell*, by contrast, fell outside this category"[36] (i.e. the list of duties ERISA trustees are charged to uphold), it limits the holding in *Russell*. Like the authors whose work Ghilarducci and Weller have collected and edited, the Court acknowledges that "[the ERISA-regulated] landscape has changed."[37] Indeed, it suggests

equity, holding that restitution arising from supposed contractual duties was not "appropriate equitable relief" as defined in *Mertens*. *Id.* at 212-14. For criticism of these cases and the Supreme Court's treatment of ERISA damages in general, *see* Langbein, *supra* note 3, at 1362 ("The Supreme Court's mishandling of ERISA remedy law has rendered the protections of ERISA illusory in any case in which the victim of ERISA-proscribed wrongdoing needs damages for consequential injury in order to be made whole."); Elaine McClatchey Darroch, Mertens v. Hewitt Associates: *The Supreme Court's Dismantling of Civil Enforcement Under ERISA*, 1994 DET. C.L. REV. 1089 (1994); Dana M. Muir, *Fiduciary Status As an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391, 461 (2000) ("Because of slavish adherence to ill-considered dicta in *Russell*, ERISA jurisprudence has narrowly constrained the availability of remedies in the sphere of benefits administration."); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 256-64 (2003); Maria Linda Cattafesta, Note, Mertens v. Hewitt Associates: *Nonfiduciary Liability for Money Damages Under ERISA*, 43 CATH. U. L. REV. 1165 (1994); Robert A. Kamp, *The Argument for "Extra-Contractual" Damages Under ERISA*, 82 ILL. B.J. 70 (1994).

34. In her concurring opinion in *Aetna Health, Inc. v. Davila*, Justice Ginsburg was stark in her criticism of the state of remedies under ERISA.

> The Court today holds that the claims respondents asserted under Texas law are totally preempted by § 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA or Act). That decision is consistent with our governing case law on ERISA's preemptive scope. I therefore join the Court's opinion. But, with greater enthusiasm, as indicated by my dissenting opinion in *Great-West Life & Annuity Ins. Co. v. Knudson*, I also join "the rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime."

Aetna Health, Inc. v. Davila, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (citations omitted).

35. *See Great-West*, 534 U.S. at 212-14 (removing restitution based in a contractual liability from the equitable remedies available under § 502(a)(3) of ERISA); Varity Corp. v. Howe, 516 U.S. 489 (1996); *Mertens*, 508 U.S. at 256-58 (restricting "appropriate equitable relief" under § 502(a)(3) of ERISA to mean only those equitable remedies that were "typically available at equity"); Watkins v. Westinghouse Hanford Co., 12 F.3d 1517, 1527-28 (9th Cir. 1993) (holding that the only forms of equitable relief available under § 502(a)(3) of ERISA are injunction, mandamus, and restitution). For an excellent critique of the Supreme Court jurisprudence's concerning § 502(a) of ERISA see Langbein, *supra* note 3.

36. LaRue v. DeWolff, Boberg & Assocs. Inc., 128 S. Ct. 1020, 1024 (2008).

37. *Id.* at 1025.

that *Russell* is a bit dated: "*Russell's* emphasis on protecting the 'entire plan' from fiduciary misconduct reflects the *former landscape* of employee benefit plans."[38]

The Court, like the book's editors and contributors, recognizes that the benefits world of the mid-1970s and early 1980s into which ERISA was born is a changed place.

> Defined contribution plans dominate the retirement plan scene today. In contrast, when ERISA was enacted, and when *Russell* was decided, "the [defined benefit] plan was the norm of American pension practice." . . . Unlike the defined contribution plan in this case, the disability plan at issue in *Russell* did not have individual accounts; it paid a fixed benefit based on a percentage of the employee's salary.[39]

In this new world, dominated by the defined contribution model,

> fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive. Whether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to individual accounts, it creates the kind of harm that concerned the draftsmen of §409. Consequently, our references to the "entire plan" in *Russell*, which accurately reflect the operation of §409 in the defined benefit context, *are beside the point* in the defined contribution context.[40]

> *LaRue's* unambiguous support for the right of defined contribution participants to recover for fiduciary breaches that harm the value of the assets in an individual account is, I presume, the kind of policy reform that several of the book's authors call for.[41] Despite the authors' repeated calls for "policy" and "legislative" changes, *LaRue* suggests that it may be the Supreme Court which, after years of inaction on the part of Congress,[42] appears to be willing to

38. *Id.* (emphasis added).

39. *Id.* (citation omitted).

40. *Id.* (emphasis added).

41. *See, e.g.*, Christian Weller & Teresa Chilarducci, *Pension Policy Options: Meeting in the Middle*, *in* EMPLOYEE PENSIONS, *supra* note 9, at 215, 229, in which the editors note: "The loss of traditional pensions and their incumbent features can have serious ramifications for employment relations and the economy at large. To counter these adverse implications, this volume leads with two broad policy goals: strengthen [defined benefit] plans and vastly improve [defined contribution] plans. Addressing these goals would mean to introduce [defined benefit] plan features into [defined contribution] plans and vice versa."

42. Many commentators have called on Congress to amend ERISA to provide broader protections to plan participants and beneficiaries. *See* Ann C. Bertino, *The Need for a Mandatory Award of Attorney's Fees for Prevailing Plaintiffs in ERISA Benefits Cases*, 41 CATH. U. L. REV. 871, 902 (1992) ("In order to adequately protect plan participants under ERISA, Congress should amend section 502(g)(1) so that attorney's fees are mandatorily awarded to a prevailing plaintiff."); Justin Cummins & Meg Luger Nikolai, *ERISA Reform in a Post-Enron World*, 39 J. MARSHALL L. REV. 563, 597 (2006) ("ERISA must be amended to make explicit that corporations shall affirmatively and regularly produce information about pension status in simple terms – that is, the 'plain language' is, in fact, plain

interpret ERISA in light of the new, defined-contribution-dominated pension environment.

IV. CONCLUSION

Several of the book's authors emphasize the need for unions, women's organizations, the American Association of Retired People and other affected groups to articulate and advocate for a political climate that would support changes to defined contribution plans and infuse them with the virtues of defined benefit plans. The idea seems to be that, together, it might be possible to re-make defined contribution plans into something that looks and feels a lot like a defined benefit plan about which some contributors wax nostalgic. Of course, at some point, such a venture might amount to the creation of a "new" defined contribution arrangement which is virtually indistinguishable from a defined benefit plan. I remain skeptical of both the political feasibility and the wisdom of a new defined contribution paradigm. Employers/plan sponsors moved away from defined benefit plans, in part because defined contribution arrangements shifted market and default risk (and, therefore, significant costs) onto employees and because employees liked the flexibility and portability of defined contribution arrangements. Defined benefit plans made sense in an era in which most people worked with one employer for ten to twenty years.[43]

language."); George Lee Flint, Jr., *ERISA: Extracontractual Damages Mandated for Benefit Claims Actions*, 36 ARIZ. L. REV. 611, 665 (1994) (arguing that punitive damages should be available remedies under ERISA in some circumstances); Nicholas J. Brannick, Note, *At the Crossroads of Three Codes: How Employers Are Using ERISA, the Tax Code, and Bankruptcy to Evade their Pension Obligations*, 65 OHIO ST. L.J. 1577, 1626 (2004) ("It is time for Congress to consider legislative change to prevent firms from using Chapter 11 to evade pension obligations.").

43. In 1983, male workers between the ages of fifty-five and sixty-four were, on average, staying with one employer for 15.3 years while younger males between the ages of forty-five and fifty-four had an average tenure of 12.8 years. Craig Copeland, *Employee Tenure, 2006*, EMP. BENEFIT RES. INST. NOTES, Apr. 2007, at 3, *available at* <http://www.ebri.org/pdf/notespdf/EBRI_Notes_04-20071.pdf>. By 2006, however, the average tenures of male workers ages fifty-five to sixty-four had decreased 5.8 years to a tenure of 9.5 years and male workers ages forty-five to fifty-four were down 4.7 years to an average of 8.1 years with a single employer. *Id.* This decrease of tenure among traditional pension participants signals an increase in that group's job mobility as these workers are spending significantly less time with an employer than they were twenty-three years ago. *Id.*

There are three reasons to focus on the tenures of older males as representing those of traditional pension participants. First, when using historical employment data, it is important to remember that women have historically been underrepresented in the workforce. *See* Abraham Mosisa & Steven Hipple, *Trends in Labor Force Participation in the United States*, MONTHLY LAB. REV. Oct. 2006, at 36, *available at* <http://www.bls.gov/opub/mlr/ 2006/10/art3full.pdf>. Second, young workers are subject to inherent mathematical limitations on tenure durations (i.e., a twenty-five year old is extremely unlikely to have worked twelve years for an employer). Third, it is notoriously common for workers to switch jobs frequently while they are young. *See* Audrey Light, *Job Mobility and Wage Growth: Evidence from the NLSY79*, MONTHLY LAB. REV., Feb. 2005, at 38, *available at* <http://www.bls.gov/opub/mlr/2005/02/art5full.pdf > ("[T]he typical worker holds about five jobs in the first 8 years of the career.").

In contrast, the labor market in the U.S. early in the twenty-first century is characterized by substantial mobility.[44] Additionally, a substantial segment of the population seems ill at ease with the paternalistic notions that inform defined benefit plans.[45] In other words, employees want and need retirement vehicles that provide them with the flexibility the current marketplace requires of them.[46] And many (although by no means all) appear to be eager to manage their retirement assets in the same way they are expected to manage their earnings and make innumerable decisions about personal consumption.

In spite of this, the essays in *Employee Pensions* are characterized by a shared, quasi-political view that if only the right mix of interest groups could be assembled (AARP, women's organizations, organized labor, pension advocacy groups etc.) the under-regulated defined contribution

44. *See supra* note 43. An increase in job mobility fits naturally with an employee's preference for defined contribution plans as defined contribution plans are more portable than defined benefit plans. Ann C. Foster, *Portability of Pension Benefits Among Jobs*, MONTHLY LAB. REV., July 1994, at 45, *available at* <http://www.bls.gov/opub/mlr/1994/07/art6full.pdf> ("A worker's ability to maintain and transfer accumulated pension benefits when changing jobs is generally less of a problem in defined contribution plans than in defined benefit plans."). Under a defined contribution plan, "[w]ith comparable contributions and rates of return, a worker who switches jobs (and leaves his or her funds in the plan of each organization) could have the same benefit amount upon retirement as a worker with an identical salary history who worked for only one employer." *Id.*

45. *See* Watson Wyatt Worldwide, *How Do Retirement Plans Affect Employee Behavior?*, WATSON WYATT INSIDER, Apr. 2005, <http://www.watsonwyatt.com/us/pubs/insider/showarticle.asp?ArticleID=14596> ("[R]espondents overall express greater satisfaction with their defined contribution plans [than with their defined benefit plans]."). When defined contribution plan participants were surveyed about eight separate attributes of their plans, the three attributes that were most approved of by participants were the amount a participant can contribute (79.8 percent satisfied), information about balances (74.2 percent satisfied), and availability of investment options (68.7 percent satisfied). *Id.* These three attributes denote aspects of defined contribution plans that reflect individual autonomy over pension benefits, which are unavailable in defined benefit plans. Defined benefit plans do not require a participant to know anything about markets or investing. A worker need only pay attention to his age, salary, and years of service in order to predict his stream of pension income. The plan sponsor, with support from other fiduciaries, makes all decisions about how and where to invest plan assets; the plan participant has no control over investment decisions. In practice, however, plan participants' apparent discomfort with paternalistic aspects of defined benefit plans may fluctuate with the investment performance of their plan assets. *See* Susan J. Stabile, *The Behavior of Defined Contribution Plan Participants*, 77 N.Y.U L. REV. 71, 76 n.18 (2002) ("It very well may be that had the movement from defined benefit plans to defined contribution plans occurred during a down market rather than a robust one, employees may have reacted differently, perceiving the move to defined contribution plans as taking an entitlement away from them.")

46. Michele Varnhagen's discussion of the portability issue, especially as it affects women and others who work erratically or for shorter tenures, is thoughtful and suggests how complex portability can be. Michelle Vanhagen, *U.S. Federal Pension Policy: Its Potential and Pitfalls*, in EMPLOYEE PENSIONS, *supra* note 9, at 163. She notes, for example, that "some unions, whose collective bargaining agreements assume that a certain percent of participant contributions will default and be used to bolster the retirement benefits of long-service employees." *Id.* at 166. This kind of cross subsidy, from short tenure to long tenure employees is, of course, absent in the defined contribution context. One can readily imagine strong objections to this subsidy from women, (and others who tend to have more flexible attachment to the work force) to this feature of defined benefit plans, assuming they were informed of its existence.

world could, in effect, be re-made to look like the defined benefit plans we knew and loved.[47] I am not suggesting that the shortcomings many of the authors attribute to defined contribution plans are fantastical. On the contrary, many of the critiques are valid and troubling.

What remains mysterious, even after reading the essays in *Employee Pensions*, is why the "together we can" coalition has failed to come together. Could it be that most participants in 401(k) plans are willing to bear the market risk in exchange for simplicity and portability? Maybe employees old enough to recall and savvy enough to pay attention know that defined benefit arrangements were never a sure thing. ERISA anticipates underfunding, bankruptcy, and other financial catastrophes in Title IV[48] in which it creates the PBGC. Voluntary and involuntary plan terminations, the PBGC's own well publicized financial problems,[49] and

47. Michele Varnhagen says: "[a]s it has become clear that 401(k) plans have eclipsed [defined benefit] plans, many are pointing fingers of blame or trying to understand why [defined benefit] plans lost the retirement vehicle race. Some are undertaking this inquiry in hopes of proposing changes to revitalize [defined benefit] plans." *Id.* at 166.

48. Title IV of ERISA is codified at 29 U.S.C §§ 1301-1461 (2000). For the establishment of the PBGC, *see* 29 U.S.C. § 1302(a) (2000) ("There is established within the Department of Labor a body corporate to be known as the Pension Benefit Guaranty Corporation.").

49. As of September 30, 2007, the PBGC is "guarantee[ing] payment of basic pension benefits earned by 44 million American workers and retirees participating in 30,460 private-sector defined benefit pension plans." PENSION BENEFIT GUAR. CORP., 2007 ANNUAL MANAGEMENT REPORT 1 (2007), *available at* <http://www.pbgc.gov/docs/2007AMR.pdf>. To date, the PBGC is actually responsible for paying the current and future pensions benefits of about 1,305,000 people whose underfunded pension funds have already failed and been terminated. *Id.* at 6. This huge burden has left the PBGC with a $14 billion equity deficit as of the end of its fiscal year 2007. *Id.*

This deficit is the result of a string of large corporations (led by many major airlines) going bankrupt and dumping their underfunded pension plans onto the PBGC during the early part of this decade. *See* Adam E. Cearley, Comment, *The PBGC: Why the Retiree's Traditional Life Raft is Sinking and How to Bail it Out*, 23 EMORY BANKR. DEV. J. 181 (2006); Michael Barbanell Landres, Note, *Smoke, Mirrors, and ERISA: The False Illusion of Retirement Income Security*, 40 LOY. L.A. L. REV. 1169, 1170-71 (2007); Crenshaw, *supra* note 20; Mary Williams Walsh, *Deficit Soars at Agency that Insures Pension Plans*, N.Y. TIMES, Nov. 16, 2004, § C, at 1. In 2001, the PBGC had an equity surplus of $7.8 billion. PENSION BENEFIT GUAR. CORP., *supra*, at 76-77. In 2002, after the failure of a couple major corporations, most notably United Airlines with its $7 billion in unfunded pensions, Cearley, *supra*, at 188-89, the PBGC ended its year with a $3.5 billion equity deficit, PENSION BENEFIT GUAR. CORP., *supra*, at 76-77. By 2004, the PBGC's equity deficit peaked at $23.5 billion and has been declining since. *Id.*

Congress passed the Deficit Reduction Act of 2005 (DRA), Pub. L. No. 109-171, 120 Stat. 4 (2006) (codified as amended in scattered sections of 20 and 42 U.S.C.), and the Pension Protection Act of 2006 (PPA), Pub. L. No. 109-280, 120 Stat. 780 (codified as amended in scattered sections of 26 and 29 U.S.C.), to help deal with the PBGC's equity deficit and underfunded pensions in general. The DRA adjusted the premiums that the PBGC could charge plan sponsors of defined benefit pension plans. PENSION BENEFIT GUAR. CORP., *supra*, at 8. The PPA made "a number of changes to the pension insurance system, including premiums, guarantee rules, reporting and disclosure, multiemployer plan withdrawal liability, and the missing participants program." *Id.*

However, despite these acts and the reduction of the PBCG's equity deficit in the past couple of years, the future outlook for the PBGC is still uncertain. Troubled companies now have a proven means to help them shed unwieldy underfunded defined benefit pension plans by transferring their obligations to the PBGC, which leaves the PCBG in a precarious financial position. *See* Cearley, *supra*, the very public failures of prominent plans[50] could rightly cause an employee to conclude that the self-directed investing required of a DC plan participant is a reasonable option.

Political activity, as David Madland argues[51] in chapter 10, depends upon three things: "the means to be able to protest, such as skills, resources, and organization; a motive to be involved; and opportunities to take action."[52] Maybe it is true, as Madland suggests, that declining union density and dogmatic American individualism account for the absence of a sustained effort to change the laws regulating employee pensions. Or maybe, instead, the vast majority of plan participants reject the need to "come together" to return to a pension vehicle (the defined benefit plan), which was never entirely secure and fails to offer features that make it useful in the modern workplace.

If, with *LaRue*, the Supreme Court is signaling a willingness to reform ERISA so that its protections reflect workplace reality of the increasing prevalence of defined contribution plans, the political coalition some of the contributors dream of may not be needed. "Together we can" might be true but unnecessary.

at 181 ("By taking advantage of the deficiencies in the bankruptcy statutes . . . and . . . ERISA. . . , companies entering bankruptcy are able to shed significant pension obligations that were never intended to be borne by the PBGC."); Landres, *supra*, at 1170 ("[T]he bankruptcy of airlines with underfunded pension plans has the potential to create a vicious cycle of bankruptcies and plan terminations within the airline industry . . . . More disturbing yet, this cycle appears to have spread beyond the airline industry.") (internal quotation marks omitted). For an excellent overview of the current problems still facing the PBGC see Landres, *supra*.

50. *See supra* note 20.

51. Madland, *supra* note 18, at 187.

52. *Id.* at 193-94.