

## ARTICLES

### WHAT ERISA MEANS BY “EQUITABLE”: THE SUPREME COURT’S TRAIL OF ERROR IN *RUSSELL*, *MERTENS*, AND *GREAT-WEST*

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*In a pair of cases decided by 5-4 majorities (Mertens, 1993; Great-West, 2002) interpreting the scope of remedy for wrongdoing under ERISA, the Supreme Court construed the statute’s grant of “appropriate equitable relief” to prevent the victims of ERISA-prohibited conduct from being compensated for consequential injury. The Court read ERISA’s authorization of “appropriate equitable relief” to have disinterred the law/equity division from the era before the two systems were fused in the 1930s, and the Court treated equity as not having awarded monetary relief. As a consequence, lower courts have held ERISA to preclude remedy in a host of situations in which wrongful plan administration (almost always in violation of ERISA’s fiduciary rules) has caused expense, physical harm, or other suffering. This Article explains why and how the Court’s interpretation of ERISA remedy law went wrong, beginning with the Court’s earlier encounter with the field in Russell (1985). The main theme is that the reach of trust-law principles in ERISA is far deeper and more controlling than the opinions in Mertens and Great-West allow. When federalizing the administration of pension and employee benefit plans in ERISA, Congress made a deliberate choice to subject these plans to the pre-existing regime of trust law rather than to invent a new regulatory structure. In this dimension, ERISA is federal trust law. Congress intended ERISA remedy law to replicate the core principles of trust remedy law in the regulation of pension and benefit plans, including the long-familiar make-whole standard of trust remedy law.*

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## INTRODUCTION

Does ERISA<sup>1</sup> remedy law intend that the victim of a breach of ERISA-proscribed wrongdoing should be made whole? In three 5-4 opinions, the Supreme Court has held not. In *Massachusetts Mutual Life Insurance Co. v. Russell*, the Court cast doubt on whether victims of ERISA-prohibited conduct may be compensated for consequential injury.<sup>2</sup> In *Mertens v. Hewitt Associates*, the Court read ERISA’s authorization of “appropriate

1. Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461 (2000).

2. 473 U.S. 134, 138 (1985).

equitable relief"<sup>3</sup> to have disinterred the law/equity division from the era before the two systems were fused in the 1930s, and the Court mistakenly treated the term as excluding monetary relief.<sup>4</sup> In 2002 in *Great-West Life & Annuity Insurance Co. v. Knudson*, the Court continued this antiquarian vein of interpretation, holding that Congress's authorization of "equitable relief" in ERISA was meant to decompose the American law of restitution into its archaic origins in quasi-contract and constructive trust.<sup>5</sup> The result was to allow the beneficiary of an employer-sponsored health plan to dishonor the plan's subrogation clause, which obliged her, in the event she recovered in tort, to reimburse the plan's outlays for the medical expenses arising from her injury. Attempting to obey the Supreme Court, lower courts have read ERISA to preclude remedy in situations in which wrongful plan administration (almost always in violation of ERISA's fiduciary rules) has caused expense, physical harm, or other suffering.<sup>6</sup>

This Article explains how the Court's interpretation of ERISA remedy law has gone wrong. My main theme is that the reach of trust-law principles in ERISA is far deeper and more controlling than the opinions in *Russell*, *Mertens*, and *Great-West* allow. When federalizing the administration of pension and employee benefit plans in ERISA, Congress made a deliberate choice to subject these plans to the pre-existing regime of trust law rather than to invent a new regulatory structure.

ERISA is, in its most important dimension, federal trust law. Substantively, the statute imposes a requirement of mandatory trusteeship on pension and employee benefit plans;<sup>7</sup> it absorbs the core fiduciary duties of loyalty and prudence from trust law and extends them to govern all aspects of plan administration.<sup>8</sup>

Congress also intended ERISA to replicate the core principles of trust remedy law, including the make-whole standard of relief. The three remedy provisions of ERISA that allow participants and beneficiaries to recover for ERISA violations, section 502(a), parts (1)–(3), track trust remedy law, which provides just the sort of make-whole compensatory relief for consequential injury that the Court refused in *Mertens* and *Great-West* on the ground that monetary relief was not "equitable."<sup>9</sup> Contrast Bogert's treatise, which explains "the general rule" of law "that the object of damages is to make the injured party whole . . . [and that b]oth direct

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3. ERISA § 502(a)(3).

4. 508 U.S. 248, 258 (1993).

5. 534 U.S. 204, 217 (2002).

6. E.g., *Bast v. Prudential Ins. Corp. of Am.*, 150 F.3d 1003, 1010–11 (9th Cir. 1998) (holding that ERISA section 502(a)(3) prevents recovery of damages as "appropriate equitable relief" where culpable delay in authorizing particular medical treatment allowed cancer to metastasize from lung to brain, killing patient); see also cases cited *infra* note 105.

7. ERISA § 403(a).

8. *Infra* text accompanying notes 41–42 (discussing ERISA §§ 3(21)(A), 402(a)).

9. *Great-West*, 534 U.S. at 217; *Mertens*, 508 U.S. at 258.

and consequential damages may be awarded.”<sup>10</sup> The trust remedy tradition grew up in equity and remains, in the words of the *Restatement of Trusts*, “exclusively equitable.”<sup>11</sup>

When transposing trust remedy law to the sphere of pension and benefit plans, the drafters of ERISA were evoking the relief routinely obtainable for breach of trust. By authorizing “appropriate equitable relief . . . to redress . . . violations”<sup>12</sup> of ERISA, Congress meant relief “appropriate” to the trust-based principles of ERISA substantive law. Justice Scalia, the author of the Court’s opinions in *Mertens* and *Great-West*, candidly admitted that he was unable to explain why Congress would have wanted in the remedy sections of the statute to undermine the very fiduciary duties that Congress was creating in ERISA’s substantive law.<sup>13</sup>

The decisions in *Russell*, *Mertens*, and *Great-West* were issued over strong dissents,<sup>14</sup> signaling that the outcome in these cases is not stable. The cases have been greeted with despair in the scholarly and practitioner literature.<sup>15</sup> As the toll of injustice worked under these rulings mounts, and as the membership of the Court changes, the question of the proper construction of Congress’s grant of “equitable relief” in ERISA section 502(a)(3)(B) will return to the Court’s agenda. This Article explains why “equitable relief” should be correctly interpreted to include money damages. *Mertens* rested its prohibition against recompense for consequential injury on an implausible reading of the word, “equitable,”

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10. George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 701, at 198 (rev. 2d ed. 1982) (discussing cases that remedy breaches of trust investment law); see *infra* text accompanying notes 110–112.

11. Section 197 says: “Except as stated in § 198, the remedies of the beneficiary against the trustee are exclusively equitable.” *Restatement (Second) of Trusts* § 197 (1959). The exception in section 198 allows the beneficiary a concurrent right to maintain an action at law in a case in which the trustee is under a duty to the beneficiary to pay money or to transfer a chattel immediately and unconditionally. *Id.* § 198. In such a case the formerly equitable right has become a matured legal obligation, that is, simply a collection case that no longer involves issues of trust law.

12. ERISA § 502(a)(3)(B).

13. See *infra* text accompanying note 215.

14. As explained *infra* text accompanying note 130, Justice Brennan’s opinion in *Russell*, although styled as a concurrence, was functionally a dissent. He and the three Justices who joined him supported the majority’s holding on a narrow ground but opposed the dicta that have made *Russell* important. See *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 151 (1985) (Brennan, J., concurring).

15. See, e.g., Randall J. Gingiss, *The ERISA Foxtrot: Current Jurisprudence Takes One Step Forward and One Step Back in Protecting Participants’ Rights*, 18 *Va. Tax Rev.* 417, 426 (1998); Dana M. Muir, *Fiduciary Status as an Employer’s Shield: The Perversity of ERISA Fiduciary Law*, 2 *U. Pa. J. Lab. & Emp. L.* 391, 439 (2000); Paul O’Neil, *Protecting ERISA Health Care Claimants: Practical Assessment of a Neglected Issue in Health Care Reform*, 55 *Ohio St. L.J.* 723, 742 (1994); Larry J. Pittman, *ERISA’s Preemption Clause and the Health Care Industry: An Abdication of Judicial Law-Creating Authority*, 46 *Fla. L. Rev.* 355, 384 (1994); Karl J. Stoecker, *ERISA Remedies After Varsity Corp. v. Howe*, 9 *DePaul Bus. L.J.* 237, 243 (1997); Jayne Elizabeth Zanglein, *Closing the Gap: Safeguarding Participants’ Rights by Expanding the Federal Common Law of ERISA*, 72 *Wash. U. L.Q.* 671, 673–74 (1994).

as Congress used it in a single provision of a 110,000-word statute.<sup>16</sup> Section 502(a)(3) of ERISA authorizes a plan participant or beneficiary<sup>17</sup> to "obtain . . . appropriate equitable relief . . . to redress . . . violations . . . [of ERISA] or . . . to enforce . . . the terms of the plan."<sup>18</sup> Justice Scalia's opinion for the Court in *Mertens* held that Congress used the word "equitable" in this provision to intend a contrast between equity and common law as the two had been practiced before fusion occurred in the 1930s, hence to "refer to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."<sup>19</sup> He dismissed—as "vague notions of [the] statute's 'basic purpose'"<sup>20</sup>—the trust law context in which ERISA's authorization of "appropriate equitable relief" is embedded. For anyone sensitive to the tradition of equity, it is particularly ironic that the term that the Court interpreted to deny routine make-whole relief to the victims of ERISA-proscribed wrongdoing is "equitable." Equity has long been associated with an opposite policy, the maxim "Equity suffers not a Right to be without a Remedy."<sup>21</sup>

Exhuming dead law can be an unruly exercise, as Justice Scalia would discover in *Great-West*, where he had to extricate the law of restitution from the category of "typically" equitable in which he had placed it in *Mertens*.<sup>22</sup> Mandamus, another of his asserted examples of "typically" equitable remedies, was exclusively legal and never known in the equity courts.<sup>23</sup> The contrary assertion is a gaping historical error.

Part I of this Article examines the purposes and main features of ERISA, including the remedy provisions, with particular attention to the pervasiveness of the trust model in the congressional design. I then turn to the three Supreme Court decisions that have contorted ERISA remedy law. Much of the mischief in *Mertens* and *Great-West* traces to dicta in *Russell*. I examine *Russell* in Part II, *Mertens* in Part III, and *Great-West* in Part IV.

## I. ERISA'S REGIME OF FEDERAL TRUST LAW

The enactment of the Employee Retirement Income Security Act in 1974<sup>24</sup> was the culmination of more than a decade of investigations into

16. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (2000)).

17. In ERISA parlance the covered worker is the participant; his spouse or other covered dependent or successor is a beneficiary. See ERISA § 3(7)-(8).

18. *Id.* § 502(a)(3)(B). The full text of ERISA section 502(a)(1)-(3), codified at 29 U.S.C. § 1132(a)(1)-(3), is reprinted *infra* note 94.

19. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993).

20. *Id.* at 261.

21. Richard Francis, *Maxims of Equity* 24 (London, Bernard Lintot 1728).

22. See *infra* text accompanying notes 234-246.

23. See *infra* text accompanying note 213.

24. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (2000)).

the affairs of pension and employee benefit plans conducted by Congress, presidential commissions, and the Departments of Labor, Justice, and Treasury.<sup>25</sup> ERISA was primarily designed to protect pension plan participants and beneficiaries against two hazards, *default risk* and *administration risk*, that had revealed themselves in pre-ERISA practice.

Default risk is the danger that the employer (or other plan sponsor) might dishonor the pension promise. Default risk inheres in the structure of a defined benefit pension plan,<sup>26</sup> because the plan promises today's worker to pay benefits far in the future. Across that interval, the plan can become insolvent, or it can renege in other ways on the pension promise. The movement that led to ERISA effectively commenced in 1963, when the financially troubled automaker, Studebaker, defaulted on its pension plan,<sup>27</sup> frustrating the support expectations of several thousand workers and retirees.

Congress responded by devising in ERISA a set of measures that has largely eliminated default risk. Funding rules require the sponsor to contribute enough to pay for the plan's promises on an actuarially sound basis.<sup>28</sup> Vesting and anti-reduction rules restrict the ability of a plan to impose benefit forfeitures.<sup>29</sup> Most importantly, Title IV of ERISA institutes a system of plan termination insurance (modeled to some extent on the federal deposit insurance program that had rescued the banking sys-

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25. For a succinct account of the origins of ERISA, see Michael S. Gordon, Overview: Why Was ERISA Enacted?, in U.S. Senate Special Comm. on Aging, 98th Cong., The Employee Retirement Income Security Act of 1974: The First Decade 1, 6-24 (Comm. Print 1984). For exceptional detail on the enactment process, with particular attention to the role of organized labor, see James A. Wooten, The Employee Retirement Income Security Act of 1974: A Political History (forthcoming 2004). For a political science perspective on the enactment of ERISA, emphasizing the relationship between the private pension system and Social Security, see Jacob S. Hacker, The Divided Welfare State: The Battle over Public and Private Social Benefits in the United States 124-73 (2002).

26. A defined benefit plan promises to pay a fixed ("defined") retirement benefit, usually monthly, for the lives of the participant and his or her spouse. The benefit is usually expressed as a formula taking into account years of service and compensation. See Employee Benefit Research Inst., Fundamentals of Employee Benefit Programs 56 (5th ed. 1997) (describing defined benefit plans); Dan M. McGill et al., Fundamentals of Private Pensions 27, 201-46 (7th ed. 1996) (discussing varieties and features of defined benefit plans); Peter T. Scott, A National Retirement Income Policy, 44 Tax Notes 913, 919 (1989) (same).

27. The events and the issues are succinctly recounted in Michael Allen, The Studebaker Incident and Its Influence on the Private Pension Plan Reform Movement (1985), in John H. Langbein & Bruce Wolk, Pension and Employee Benefit Law 68, 68-72 (3d ed. 2000). The United Auto Workers negotiated the fragile Studebaker plan, then treated the plan's failure as ground for legislative intervention, launching a political campaign that culminated in the enactment of ERISA's plan termination insurance system. The saga is explored in James A. Wooten, "The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA, 49 Buff. L. Rev. 683 (2001).

28. ERISA §§ 302-305; see generally McGill, *supra* note 26, at 27-28, 201-46.

29. ERISA §§ 203-204, discussed in Langbein & Wolk, *supra* note 27, at 132-40, 160-69.

tem in the 1930s). All defined benefit plans must pay a premium per covered participant into a fund administered by an ERISA-created government agency, the Pension Benefit Guarantee Corporation, which guarantees the payment of most benefits promised under defined benefit plans.<sup>30</sup>

The other source of hazard in pension and employee benefit plans, administration risk, refers to the danger that the persons responsible for managing and investing plan assets and paying claims may abuse their authority: They may do the job badly,<sup>31</sup> or misuse plan assets for personal gain,<sup>32</sup> or improperly refuse to pay promised benefits.<sup>33</sup> Default risk is mostly associated with the defined benefit pension plan, on account of the potentially decades-long gap between earning and receiving the benefits promised under the plan.<sup>34</sup> Administration risk, by contrast, is common to all employee benefit plans, including nonpension plans (so-called welfare benefit plans)<sup>35</sup> that provide benefits other than retirement income, such as health care, disability and severance income, life and accident insurance, education programs, child care, and the like. Especially when such a plan takes the form of a multiemployer plan, into which many employers pay contributions that are administered by union-dominated trustees, the assets in a nonpension plan are as exposed to abuse as those of a pension fund. Accordingly, the main reason that Congress determined to bring nonpension plans under ERISA's coverage was to subject them to ERISA fiduciary law. ERISA excused them from its other

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30. ERISA §§ 4001-4402. Regarding the law and practice under this regime, see generally E. Thomas Veal & Edward R. Mackiewicz, *Pension Plan Terminations* (2d ed. 1998). For an important scholarly examination, see generally Richard A. Ippolito, *The Economics of Pension Insurance* (1989).

31. Hence ERISA's duty of prudence. See ERISA § 404(a)(1)(B).

32. Proscribed by ERISA's noninurement and loyalty rules, ERISA sections 403(c)(1) and 404(a)(1)(A), and by the prohibited transaction regime of ERISA subsections 406(a)-(b).

33. ERISA section 404(a)(1)(D) requires plan fiduciaries to act "in accordance with the documents and instruments governing the plan." Section 503, discussed *infra* text accompanying note 71, requires the plan to institute written claims procedures, to give reasons for benefit denials, and to provide for review of benefit denials "by the appropriate named fiduciary."

34. One type of nonpension plan, the so-called retiree health plan, also entails significant default risk, because of the long-term nature of the prospective benefits (typically, health care benefits for life). Because, however, such plans are classified as welfare benefit plans, they fall outside both the plan termination insurance system of ERISA's Title IV, and the vesting and associated anti-reduction rules of ERISA sections 203-204. For discussion, see Langbein & Wolk, *supra* note 27, at 176-77, 187-88, 210-12.

35. Cf. ERISA § 3(1) (defining "employee welfare benefit plan" to include plans that provide medical, accident, disability, death, unemployment, child care, training, and vacation benefits, among others). See generally Langbein & Wolk, *supra* note 27, at 175-218.

substantive rules, that is, from the vesting, anti-reduction, and funding rules, and from the plan termination insurance program.<sup>36</sup>

### A. *Congress Adopts the Trust Model*

In the late 1950s and 1960s congressional committees conducted repeated investigations into the affairs of pension and benefit plans dominated by corrupt labor unions, especially the Teamsters. These investigations, most notably that of the Senate's McClellan Committee, led by its chief counsel, Robert F. Kennedy,<sup>37</sup> found widespread looting of plan funds through sweetheart deals, kickbacks, and various forms of cronyism.<sup>38</sup>

Congress responded to these discoveries with the enactment of ERISA fiduciary and remedy law. When combating default risk, Congress had been forced to devise a new regulatory regime, embodied in ERISA's vesting, anti-reduction, funding, and termination insurance provisions. By contrast, when confronting abuse in plan administration, Congress was able to adapt the long-familiar trust model as the regulatory regime, by subjecting ERISA-covered<sup>39</sup> plans to a double dose of trust law. First, the statute imposes a rule of mandatory trusteeship, requiring that "all assets of an employee benefit plan shall be held in trust by one or more trustees,"<sup>40</sup> who are subject to the strict fiduciary duties discussed below. Second, ERISA extends the ambit of fiduciary duty far beyond the plan's trustees. ERISA requires every plan to "provide for one or more named fiduciaries" who are empowered "to control and manage the operation and administration of the plan."<sup>41</sup> The statute treats anyone as a fiduciary to the extent that person exercises material discretion over the plan

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36. ERISA §§ 201(1), 301(a)(1), 4021(a)(1).

37. See generally Robert F. Kennedy, *The Enemy Within* (1960) (describing Kennedy's work with the McClellan Committee); other works discussing the point include James W. Hilty, *Robert Kennedy: Brother Protector* 99-132 (1997) and Arthur M. Schlesinger, Jr., *Robert Kennedy and His Times* 143-89 (1978). The McClellan Committee investigation attracted wide coverage in the popular media across the years from 1955 to 1958. See generally, e.g., Edward Maher, *Those Union-Welfare Scandals*, *Saturday Evening Post*, Apr. 2, 1955, at 36; *Labor Rackets Report: The \$10 Million Grab*, *Newsweek*, Mar. 24, 1958, at 33; *More Scandals Turning Up in Union Welfare Funds*, *U.S. News & World Rep.*, Apr. 15, 1955, at 108; *Racketeers in Unions? What Senators Are Hearing*, *U.S. News & World Rep.*, Aug. 9, 1957, at 96. For McClellan's account, see John L. McClellan & Beverly Smith, Jr., *What We Learned About Labor Gangsters*, *Saturday Evening Post*, May 3, 1958, at 22; John L. McClellan & Beverly Smith, Jr., *What We Learned About Labor Gangsters: How to Crack Down on the Crooks*, *Saturday Evening Post*, May 10, 1958, at 35.

38. See Gordon, *supra* note 25, at 10-11.

39. See ERISA § 4(a) (covering plans operated by employers or unions in interstate commerce). But see *id.* § 4(b) (exempting a few categories, most importantly, governmental and church plans).

40. *Id.* § 403(a). A proviso to the quoted language excuses a few sorts of plans regulated in other ways, such as those funded with insurance policies. See *id.* § 403(b).

41. *Id.* § 402(a).



or its assets.<sup>42</sup> Accordingly, ERISA subjects all significant aspects of plan administration to fiduciary duties and remedies derived from trust law, and hence exclusively from equity.<sup>43</sup>

1. *Loyalty and Prudence.* — There are two great principles of trust fiduciary law, the rules of loyalty and of prudence. ERISA codifies both. ERISA's version of the loyalty rule, patterned on the *Restatement of Trusts*,<sup>44</sup> requires that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries."<sup>45</sup> The loyalty rule thus forbids self-dealing and other self-serving behavior.<sup>46</sup>

The prudence rule of trust law specifies the standard of care. It resembles the reasonable person rule of tort law. A trustee is held to an objective standard of care,<sup>47</sup> the standard expected of a similarly situated

42. Id. § 3(21)(A). Regarding the case law and regulations interpreting this standard to the panoply of service providers who have contact with ERISA plans, see Langbein & Wolk, *supra* note 27, at 648–62.

43. See *supra* note 11 on the characterization of trust remedies as "exclusively equitable."

44. "The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary." *Restatement (Second) of Trusts*, *supra* note 11, § 170(1).

45. ERISA § 404(a)(1)(A). Regarding the complexities inherent in transposing the loyalty norm from the model of the private trust to the pension plan, see generally Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. Chi. L. Rev. 1105 (1988); John H. Langbein, *The Conundrum of Fiduciary Investing under ERISA*, in *Proxy Voting of Pension Plan Equity Securities* 128 (Dan M. McGill ed., 1989).

46. ERISA's duty of loyalty is buttressed by the so-called prohibited transaction rules. See ERISA § 406; I.R.C. § 4975 (2000). ERISA's prohibited transaction rules derive not from the common law of trusts, but from a set of prohibitions inserted in the tax code in 1969 to prevent insiders from abusing the assets of charitable foundations. Section 406(a) forbids a range of transactions between an ERISA fiduciary and a "party in interest," defined in ERISA section 3(14) to include fiduciaries, service providers, plan sponsors, and substantial owners of sponsoring firms. Section 406(a) prohibits every sale, loan, or transfer of plan assets to a party in interest and every use of plan assets by a party in interest. A further set of prohibited transaction rules forbids self-dealing by a fiduciary, as distinct from fiduciary transactions with a party in interest. ERISA § 406(b). Because the prohibited transaction rules substantially duplicate or overlap the loyalty rule of ERISA section 404(a)(1)(A), breach of one often entails breach of the other. The prohibitions of ERISA section 406 are so sweeping that they require an elaborate set of exemptions to rescue such innocent transactions as having the plan make a regular benefit payment to someone who is also a fiduciary. Id. § 408(c)(1). In addition to the categorical exemptions, section 408(a) requires the Department of Labor (DoL) to operate a procedure for individual exemptions ("administrative exemptions"). The need for this scheme of prohibitions and exemptions, overlapping ERISA section 404(a)(1)(A), is quite doubtful. For a succinct critique, see Kathleen P. Utgoff & Theodore R. Groom, *The Regulation of Pensions: Twenty Questions After Twenty Years*, 21 J. Pens. Plan. & Compliance 1, 13 (1995).

47. The prudence norm is "relational or comparative. . . . A prudent trustee behaves as other trustees similarly situated would behave. The standard is, therefore, objective rather than subjective." *Unif. Prudent Investor Act* § 1 cmt., 7B U.L.A. 287 (2000).

decisionmaker. ERISA's prudence rule follows the trust-law standard,<sup>48</sup> obliging the ERISA fiduciary to exercise "the care, skill, prudence, and diligence" of a "prudent man acting in a like capacity."<sup>49</sup>

In transposing the trust model as the regulatory regime for this new field of federal law, Congress chose not to replicate much of the detail of traditional trust law.<sup>50</sup> Having propounded the two grand principles of loyalty and prudence, the drafters of ERISA could leave the refinements to be worked out in fiduciary practice under regulatory and judicial oversight. As the Supreme Court said in a pre-*Mertens* case, Congress intended that the courts would look to the settled experience of the common law in giving shape to a "federal common law of rights and obligations under ERISA-regulated plans."<sup>51</sup> Congress also lodged extensive regulatory authority over ERISA fiduciary law in the Department of Labor, which has produced an important body of regulations interpreting the Act.<sup>52</sup>

ERISA could be skeletal in absorbing the subordinate rules of trust fiduciary law, because the core principles of loyalty and prudence would allow the courts to import and to modify whatever else they might need as the field took shape. Across the intervening three decades, the federal courts have read ERISA to import a variety of the subrules of trust administration that Congress did not spell out in the statutory text—for example, the duty to inform beneficiaries about significant aspects of trust administration;<sup>53</sup> the duties to col-

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48. Also derived from the *Restatement* rule: "The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property . . ." *Restatement (Second) of Trusts*, supra note 11, § 174.

49. ERISA § 404(a)(1)(B).

50. Speaking of ERISA's version of the law of trustees' powers, the Supreme Court has noticed that "rather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility." *Cent. States, S.E. & S.W. Areas Pension Fund v. Cent. Transp. Inc.*, 472 U.S. 559, 570 (1985) (citation omitted).

51. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989); see *infra* text accompanying note 73.

52. Both DoL and the Internal Revenue Service (IRS) issue regulations interpreting ERISA. DoL has primary responsibility for ERISA fiduciary law, including prohibited transactions. The IRS oversees ERISA's funding, participation, benefit accrual, and vesting rules, as well as the pension and benefit provisions of the Internal Revenue Code. The Pension Benefit Guarantee Corporation also exercises regulatory authority over Title IV of ERISA. The regulatory law of the three so-called ERISA agencies is conveniently collected in *CCH Pension and Employee Benefits: Code, ERISA, Regulations* (2002) (2 vols.). Regarding the division of authority among the ERISA agencies, see Langbein & Wolk, supra note 27, at 91–92.

53. See *Restatement (Second) of Trusts*, supra note 11, § 173. The duty of disclosure has been adopted and augmented as ERISA fiduciary law with respect to the disclosure of pending benefit enhancements in the leading case of *Fischer v. Phila. Elec. Co.*, 994 F.2d 130 (3d Cir. 1993). For discussion of the expansive disclosure standards that the courts have developed under ERISA, see Langbein & Wolk, supra note 27, at 697–701; Ethan Lipsig & Mary C. Dollarhide, *Downsizing* 310–13 (Supp. 1999).

lect,<sup>54</sup> segregate and earmark,<sup>55</sup> and protect<sup>56</sup> trust property; and the duties to enforce and defend claims.<sup>57</sup>

I do not mean to say that ERISA simply transposes trust law. To the contrary, ERISA omits large swaths of traditional trust law that are inapplicable to pension and employee benefit trusts. For example, having originated as a branch of the law of donative transfers, the law of trusts has been particularly attuned to the problems associated with successive estates (commonly life and remainder interests).<sup>58</sup> By contrast, pension and employee benefit plan trusts are commercial arrangements arising from the employment relationship.<sup>59</sup> Congress had no need in ERISA to carry over doctrines of trust law that speak mainly to intrafamilial wealth transfer. Likewise, structural differences between the private gratuitous trust and the employee benefit plan caused ERISA to depart from trust law in various ways. For example, whereas the rules of trust fiduciary law are default rules that the settlor can alter,<sup>60</sup> ERISA restricts the freedom of the plan sponsor to alter ERISA's fiduciary rules.<sup>61</sup> Another example: In order to encourage employers to sponsor plans, ERISA facilitates the use of employer personnel as plan fiduciaries,<sup>62</sup> in tension with the disin-

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54. Restatement (Second) of Trusts, *supra* note 11, § 175. For application of the duty under ERISA, see, e.g., *Cent. States*, 472 U.S. at 571–72 & n.13; *N.Y. State Teamsters Conference Pension & Ret. Fund v. Boeing Bros. Inc.*, 92 F.3d 127, 132 (2d Cir. 1996).

55. Restatement (Second) of Trusts, *supra* note 11, § 179 & cmt. d. For application of the duty under ERISA, see, e.g., *Rodriguez v. Herman*, 121 F.3d 1352, 1356 (9th Cir. 1997).

56. Restatement (Second) of Trusts, *supra* note 11, § 176. For application of the duty under ERISA, see, e.g., *Oscar A. Samos, M.D., Inc. v. Dean Witter Reynolds, Inc.*, 772 F. Supp. 715, 719 (D.R.I. 1991).

57. Restatement (Second) of Trusts, *supra* note 11, §§ 177–178. For application of the duty to enforce claims under ERISA, see, e.g., *Boeing Bros. Inc.*, 92 F.3d at 132; *Anita Found. Inc. v. Ilgwu Nat'l Ret. Fund*, 902 F.2d 185, 188–90 (2d Cir. 1990).

58. See Restatement (Second) of Trusts, *supra* note 11, §§ 232–241. Although ERISA does not spell out the duty of impartiality to successive beneficiaries, which is codified as Restatement, *id.* § 232, the courts have occasionally derived it from ERISA's duty of loyalty. E.g., *Morse v. Stanley*, 732 F.2d 1139, 1145 (2d Cir. 1984); *Struble v. N.J. Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 333 (3d Cir. 1984).

59. I have discussed the relationship between personal and commercial trusts in John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 *Yale L.J.* 165 (1997) [hereinafter Langbein, *Secret Life*].

60. The Uniform Trust Code provides that, except for a few provisions that do not include fiduciary law, all trust law is default law; accordingly, "[t]he terms of a trust prevail over" the otherwise applicable rules of trust. *Unif. Trust Code* § 105(b) (amended 2001), 7C U.L.A. 139 (Supp. 2003).

61. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (2000), requires plan terms to be "consistent with the provisions of [ERISA]," effectively transforming the default rules of private trust law into mandatory rules in the regulatory regime of ERISA. The Supreme Court has interpreted this section to mean "that trust documents cannot excuse trustees from their duties under ERISA, and that trust documents must generally be construed in light of ERISA's policies." *Cent. States, S.E. & S.W. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 568 (1985). ERISA section 410(a) buttresses section 404(a)(1)(D) by forbidding exculpation clauses.

62. See ERISA § 408(c)(3), discussed in Fischel & Langbein, *supra* note 45, at 1126–28.

terested intermediary who is the prototype in ordinary trust law. In interpreting ERISA fiduciary law, the Supreme Court has been sensitive to the need to adjust trust-law principles to the purposes of ERISA.<sup>63</sup>

It is a measure of the attractiveness of trust fiduciary law and its attendant remedy tradition that Congress chose to base the new regulatory regime for pension and benefit plans on a model that originated in the distant field of family wealth transfer. Borrowing the trust model spared Congress from having to invent and nurture a new regulatory regime, as Congress had been forced to do in the 1930s when, for example, it devised the federal deposit insurance system for banking. By appropriating the trust model, Congress was able to absorb a mature body of preexisting norms and remedies for a new regulatory mission.

To treat ERISA's calculatedly skeletal trust law as evidencing a weakened congressional commitment to the trust model is a serious error. In *Russell*, a plan participant sought recompense for the consequences of the plan's severe delay in paying plan benefits. One justification that Justice Stevens gave for refusing remedy was the argument that the text of ERISA does not explicitly regulate "the possible consequences of delay in the plan administrators' processing of a disputed claim."<sup>64</sup> This observation overlooked the simple truth that untoward delay in making distribution from a trust fund has long been understood to be a breach of trust, and is routinely enforced under ERISA as a breach of the duties of loyalty and prudence.<sup>65</sup> To expect express statutory regulation in ERISA concerning such details of sound fiduciary practice misconceives how Congress con-

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63. In the Court's leading precedent on ERISA fiduciary law it said:

[W]e believe that the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties. In some instances, trust law will offer only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements. And, in doing so, courts may have to take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place.

Variety Corp. v. Howe, 516 U.S. 489, 497 (1996) (citations omitted).

64. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985).

65. See Restatement (Second) of Trusts, *supra* note 11, § 181 cmt. c (trustee liable for unreasonable delay in investing trust funds); *id.* § 209 cmt. b (trustee liable for unreasonable delay in selling trust property); *id.* § 345 cmt. f (trustee liable for unreasonable delay in making distribution); see also *Ward v. Tinkham*, 32 N.W. 901, 902 (Mich. 1887) (stating that trust administrator has no right to delay in administering trust); *In re Jurgensmeier's Estate*, 17 N.W.2d 155, 157 (Neb. 1945) ("It is the duty of an executor to administer the estate promptly and to distribute the property to those entitled thereto without unnecessary delay."). For application of this duty of dispatch under ERISA, see, e.g., *Richard B. Roush, Inc. v. New England Mut. Life Ins. Co.*, 166 F. Supp. 2d 187, 198-99 (M.D. Pa. 2001) (ERISA fiduciary breached duties of loyalty and prudence by failing promptly to allocate plan assets in accordance with participant instructions), *rev'd* on other grounds, 311 F.3d 581 (3d Cir. 2002).

structed ERISA. What Congress did in ERISA was (1) to mandate the trust device for all plan assets;<sup>66</sup> (2) to make every person an ERISA fiduciary who exercises any discretion over plan assets or plan administration;<sup>67</sup> and (3) to prescribe the core principles of trust fiduciary law, loyalty and prudence, to govern all aspects of plan administration.<sup>68</sup> In consequence, Congress had no need to spell out the details, and considerable reason not to do so when legislating for a new field whose contours were not yet fully known.

The Supreme Court's failure to recognize the breadth and inclusiveness of ERISA's loyalty and prudence norms, as well as the intimate functional connection between those rules and the remedy provisions of ERISA, has been a serious error (to some extent remarked by the concurrence in *Russell* and the dissenters in *Mertens*<sup>69</sup>). The consequence has been that the Court has been treating ordinary *applications* of traditional fiduciary and remedy law as impermissible *extensions* of the statute.

2. *Benefit Determinations.* — ERISA also subjects the process of benefit determination, that is, deciding whether benefit claims fall within plan terms, to the trust-based fiduciary model. ERISA plans make millions of such determinations every year. Most are routine matters of administration, easily resolved, but inevitably some denials of claimed benefits become contentious.<sup>70</sup> ERISA section 503 requires covered plans to follow written claims procedures, to give reasons for denials, and to provide for review of denials "by the appropriate named fiduciary,"<sup>71</sup> who is subject to ERISA's duties of loyalty and prudence.

a. *The Standard of Review.* — ERISA did not address the question of what standard of review the courts should apply when a dissatisfied claimant seeks judicial review of the plan's internal decisionmaking. Because pension and employee benefit plans arise from the contract of employment and commonly entail further service contracts with providers such as insurance companies, a contract-based analysis would have been highly

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66. ERISA § 403(a).

67. *Id.* § 3(21)(A).

68. *Id.* § 404(a)(1)(A)–(B).

69. *Russell*, 473 U.S. at 151–53, 155–57 (Brennan, J., concurring); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 264–65, 274 (White, J., dissenting).

70. For example, how blind must a worker be in order to qualify under a disability plan? See *Pokratz v. Jones Dairy Farm*, 771 F.2d 206, 209 (7th Cir. 1985); *LeFebre v. Westinghouse Elec. Corp.*, 747 F.2d 197, 205 (4th Cir. 1984). Does a worker who is injured in the elevator on her way to a scheduled coffee break qualify for disability benefits under a plan that recompenses injury suffered "during and in direct connection with the performance of duties" of employment? See *Recupero v. New England Tel. & Tel. Co.*, 118 F.3d 820, 823 (1st Cir. 1997) (emphasis omitted). When a health care insurance plan excludes coverage for injury incurred in "voluntary participation in a felony," does that justify the plan's refusal to pay medical expenses arising from an automobile collision in which the plan participant was driving drunk and for which he was convicted of involuntary manslaughter for the death of the other driver? See *Baker v. Provident Life & Accident Ins. Co.*, 171 F.3d 939, 941–42 (4th Cir. 1999).

71. ERISA § 503(2).

plausible.<sup>72</sup> Nevertheless, in 1989 in the prominent case of *Firestone Tire & Rubber Co. v. Bruch*, the Supreme Court resolved to be “guided by principles of trust law” in fashioning the standard of judicial review.<sup>73</sup>

The question of what standard of review the courts should apply to such plan decisionmaking when a participant challenges a benefit denial is a matter quite distinguishable in function from the fiduciary rules that govern plan administration. Fiduciary decisionmaking is perforce governed by fiduciary duties, but the standards for judicial review of fiduciary decisionmaking need not have been. The Supreme Court’s determination to be “guided by principles of trust law”<sup>74</sup> even on this question evidences the Court’s understanding of just how suffused with trust law ERISA is. Accordingly, it has been especially puzzling that when interpreting ERISA remedy law in the subsequent opinions in *Mertens* and *Great-West*, the Scalia-led majorities have given so little weight to the principles of trust remedy law that the drafters of ERISA meant to put in place.

b. *Nonpension Plans*. — Pension plans resemble private trusts in that fiduciary wrongdoing mostly works only financial injury, by impairing the value of the fund or by refusing to pay benefits due. In such cases, consequential injury, if any, is also mostly financial. ERISA also covers nonpension (welfare benefit) plans; some, especially health care plans, provide

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72. “Actions challenging an employer’s denial of benefits before the enactment of ERISA were governed by principles of contract law.” *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989). I have elsewhere emphasized that the private trust replicates the functions of contract. See John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 *Yale L.J.* 625 (1995) [hereinafter Langbein, *Contractarian Basis*]. The contractarian aspect of the pension or benefit trust, which originates in the employment contract, is manifest. See Langbein, *Secret Life*, *supra* note 59, at 168–70. Accordingly, in applying ERISA fiduciary law, the courts routinely apply principles of contract in interpreting plan provisions. Prominent examples include the use of contract doctrines in deciding whether retiree health plan coverage can be modified, see, e.g., *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 75 (1995) (explaining that amendment procedure contained in plan terms authorized sponsor to modify or terminate benefits), and in reviewing benefit denial disputes, see, e.g., *Schikore v. Bankamerica Supplemental Ret. Plan*, 269 F.3d 956, 963 (9th Cir. 2001) (holding that in dealing with questions of receipt of required form, common law mailbox rule should have been applied). Even in *Bruch*, the Court allowed contract principles to prevail, by permitting the plan instrument to draft around the supposed trust-law default rule that the Court thought it was adopting. See *Bruch*, 489 U.S. at 111; see also *infra* note 73.

73. 489 U.S. at 111 (citing *Cent. States, S.E. & S.W. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985)). The standard that the Court adopted gives no presumption of correctness to the fiduciary as a matter of default law, but allows the plan instrument to provide for deferential review. The Court thought it was applying “[t]he trust law *de novo* standard of review.” *Id.* at 112; see also *infra* note 121. I have elsewhere explained that I think that the Court misapplied the trust-law rule it purported to apply. See John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 *Sup. Ct. Rev.* 207, 218 (1991). The present point is simply that the Court understood that the congressional intent should incline it to be “guided by principles of trust law” when interpreting ERISA. *Bruch*, 489 U.S. at 111 (citing *Cent. States*, 472 U.S. at 570).

74. *Bruch*, 489 U.S. at 111.

in-kind rather than monetary benefits. In these cases, consequential injury more often takes the form of injury to the person. For example, in the well-known case of *Corcoran v. United Healthcare, Inc.*, involving ERISA preemption questions, the plan administrator's wrongful denial of hospital care during the final weeks of a high-risk pregnancy resulted in the death of the fetus and physical and emotional injury to the mother.<sup>75</sup> Although such harms differ from those characteristic when there has been breach of a pension trust or a conventional private trust, nothing in the text of ERISA would support a different standard for applying ERISA's grant of "appropriate equitable relief" to such cases.<sup>76</sup> Congress deliberately included nonpension plans within ERISA's fiduciary and remedy provisions, and Congress took no distinction within ERISA remedy law between pension and nonpension plans.

### B. Federalizing Trust Remedy Law

Congress not only mandated a regime of fiduciary law based on trust law to govern pension and employee benefit plans, Congress federalized the entire field of employee benefit law, by providing in ERISA a preemption clause of unprecedented breadth, an extensive grant of federal jurisdiction, and the remedy provisions of section 502. The Conference Committee explained that the drafters wanted to "apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries."<sup>77</sup> This linkage of ERISA remedy law to ERISA fiduciary law is what the Supreme Court has lost sight of in *Russell, Mertens, and Great-West*.

1. *ERISA Preemption*. — Through its preemption rule, section 514(a), ERISA "supersede[s] any and all State laws insofar as they . . . relate to any employee benefit plan."<sup>78</sup> This provision "sweeps as broadly as the English language allows."<sup>79</sup> The Supreme Court has produced a tangled preemption case law, which for a decade and a half emphasized literal

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75. 965 F.2d 1321, 1324 (5th Cir. 1992), cert. denied, 506 U.S. 1033 (1992). The Fifth Circuit held the consequential injuries to be beyond remedy. *Id.* at 1321.

76. The Supreme Court has noticed the difference between financial administration and the delivery of medical services in deciding whether a decisionmaker is a fiduciary under ERISA. *Pegram v. Herdrich*, 530 U.S. 211, 232 (2000).

77. H.R. Conf. Rep. No. 93-1280, at 295 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5076 (emphasis added). Similar remarks were made in the House by Congressman Al Ullman, ranking majority member of the Ways and Means Committee. Introducing the Conference Committee Report, he told the House that Title 1 of ERISA provides "rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries." 120 Cong. Rec. 29,198, 29,200 (1974). Explaining the proposed ERISA fiduciary law to the Senate, Senator Harrison A. Williams, Jr., Chair of the Senate Committee on Labor and Public Welfare, said: "The objectives of these provisions are to make applicable the law of trusts . . . and to provide effective remedies for breaches of trust." 120 Cong. Rec. 29,928-29,929, 29,932 (1974).

78. ERISA § 514(a), 29 U.S.C. § 1144(a) (2000).

79. Leon E. Irish & Harrison J. Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. Mich. J.L. Reform 109, 110 (1985).

construction of the key term “relate to,”<sup>80</sup> but finally in 1995 retreated from literalism to a more purposive standard in the landmark case of *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*<sup>81</sup> Oddly, Justice Scalia, whose majority opinions in *Mertens* and *Great-West* stress the importance of supposed fidelity to the congressional language in ERISA section 502(a)(3) even when the result is “unlikely,”<sup>82</sup> has strongly endorsed the Court’s departure in *Travelers* from fidelity to the statutory text of ERISA section 514(a). In a later preemption case, he lamented that *Travelers* had not been emphatic enough in abandoning the literalism of the Court’s prior preemption cases. “[A]pplying the ‘relate to’ provision according to its terms was a project doomed to failure,” he wrote.<sup>83</sup> “The statutory text provides an illusory test, unless the Court is willing to decree a degree of preemption that no sensible person could have intended—which it is not.”<sup>84</sup> I find it a puzzle to understand why Justice Scalia thinks it appropriate to disregard ERISA’s preemption language on purposive grounds, while insisting on a nonintuitive reading of ERISA’s remedy language so destructive of the purposes of the statute that the Justice himself has candidly conceded that it is “unlikely” that Congress intended the result he has ascribed to the statutory text.

Into the state law remedial void left by ERISA preemption, Congress inserted the remedy provisions that the Court has so restricted in *Russell*, *Mertens*, and *Great-West*. In thinking about the proper scope of ERISA remedy law, it is important to bear in mind the devastating effect that ERISA preemption works on preexisting remedies. Because ERISA extinguishes state law in a field in which the dominant purpose of federal intervention is to protect plan participants and beneficiaries,<sup>85</sup> courts that interpret ERISA should be hesitant to conclude that remedies routinely available in pre-ERISA trust law fall outside the meaning of Congress’s authorization of “equitable relief” under ERISA. Dissenting in *Mertens*, Justice White lamented “the anomaly of interpreting ERISA so as to leave those Congress set out to protect—the participants in ERISA-governed plans and their beneficiaries—with ‘less protection . . . than they enjoyed before ERISA was enacted.’”<sup>86</sup> He described it as “perverse” to construe

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80. See, e.g., *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) (emphasizing preemption “even if the [state] law is not specifically designed to affect [ERISA] plans, or the effect is only indirect” (citations omitted)).

81. 514 U.S. 645, 668 (1995).

82. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 257 (1993) (Scalia, J.).

83. *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring).

84. *Id.* at 335–36 (Scalia, J., concurring).

85. ERISA’s preamble repeatedly emphasizes this protective purpose. ERISA § 2(a)–(c), 29 U.S.C. § 1001(a)–(c) (2000). Furthermore, the protective character of the measures ERISA instituted to combat default risk and administrative risk, see *supra* text accompanying notes 25–36, is manifest.

86. 508 U.S. at 267 (White, J., dissenting) (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989)).



"ERISA so as to *deprive* beneficiaries of remedies they enjoyed prior to the statute's enactment."<sup>87</sup>

2. *Federal Jurisdiction.* — Section 502(a) authorizes ERISA participants and beneficiaries to bring civil actions to enforce ERISA rights. Section 502(e)–(f) provides exclusive federal jurisdiction for enforcing ERISA.<sup>88</sup> This jurisdictional grant underscores the congressional concern to construct a federal fiduciary law under ERISA, and to enforce it with a federal remedial structure.<sup>89</sup>

It seems improbable that Congress would have so emphasized the importance of vindicating ERISA fiduciary law in the federal courts while simultaneously working the radical diminution of the trust remedy tradition that Justice Scalia has read into the congressional grant of "appropriate equitable relief" in ERISA section 502(a)(3). It is even more improbable that, had Congress actually intended so significant a departure from the trust tradition that ERISA otherwise absorbed, Congress would have chosen to achieve that objective by stealth—by smuggling the change unannounced under cover of the seemingly benign term "appropriate equitable relief." In the same vein, Michael Gordon, a pivotal figure in the drafting of ERISA, has commented on Justice Scalia's reading of the word "equitable" to evince supposed congressional intent to restore pre-fusion law to the interpretation of ERISA. Gordon "find[s] it preposterous to think that the ERISA conferees or the ERISA Congress intended to repudiate the law-equity fusion in an ERISA context, and yet would never say a word about it."<sup>90</sup>

3. *ERISA Remedy Law Tracks Trust Remedy Law.* — For cases in which trustees breach their fiduciary duties, the law of trusts has long exhibited a three-part remedial system. An aggrieved trust beneficiary may sue, depending upon the circumstances of the case, either in his or her own right or on behalf of the trust. He or she may recover (1) for loss incurred, (2) for any profits that the trustee made in breach of trust, and (3) for any gains that would have accrued but for the breach.<sup>91</sup> Thus, in

87. *Id.* at 274 (White, J., dissenting); see also *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 157 n.17 (1985) (Brennan, J., concurring).

88. Except that section 502(e)(1) allows concurrent jurisdiction in the state courts for benefit claims under section 502(a)(1)(B). Thus, a participant or beneficiary for whom it is more convenient to bring a routine benefit claim in a state court may do so, at least initially, subject however to being trumped by the defendant's exercise of the removal power. "Any suit based on federal law may be removed to federal court. So a suit about pensions is federal litigation at the defendant's option." *Bartholet v. Reishauer A.G. (Zürich)*, 953 F.2d 1073, 1075 (7th Cir. 1992) (Easterbrook, J.) (citations omitted).

89. Congress determined (in the words of the Conference Committee) that "U.S. district courts are to have exclusive jurisdiction with respect to actions involving breach of fiduciary responsibility." H.R. Conf. Rep. No. 93-1280, at 327 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5107.

90. Letter from Michael S. Gordon to the author 1 (June 14, 2002) (on file with the *Columbia Law Review*) (regarding Gordon, see *supra* note 25).

91. Scott summarizes the case law as providing that the beneficiaries "can charge the trustee with any loss that resulted from the breach of trust, or with any profit made

capsule form, trust remedy law allows recovery for loss, restitution of profits, and recovery of foregone gains.

ERISA remedy law absorbs this system.<sup>92</sup> Section 502(a), authorizing civil actions, contains a six-part list of remedies, of which the final three, subsections (4)–(6), are peripheral.<sup>93</sup> Subsections (1)–(3), reproduced in the margin,<sup>94</sup> constitute the three remedy provisions upon which virtually all claims by ERISA participants and beneficiaries are brought.

a. “*Benefits Due.*” — Section 502(a)(1) is the workhorse of ERISA remedy law under which routine benefit denial and other ERISA claims proceed. This provision, which authorizes a participant or beneficiary to bring an action “to recover benefits due” or to enforce or clarify rights under the plan, has been relatively trouble-free.<sup>95</sup>

b. *Relief to the Plan.* — Section 502(a)(2), the measure construed in *Russell* and discussed below in that context, provides for actions invoking fiduciary liability under section 409(a).<sup>96</sup> Section 409(a) provides for recovery by the plan, as opposed to recovery for the participant or beneficiary who brings suit on behalf of the plan. In such a case, the participant or beneficiary would benefit indirectly, by enhancing the value of the plan’s assets. Section 409 authorizes recovery for “any losses” and “any

through the breach of trust, or with any profit that would have accrued if there had been no breach of trust.” 3 Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* § 205, at 237 (4th ed. 1988) (12 vols., 1987–1991). Scott is glossing Restatement (Second) of Trusts, *supra* note 11, § 205, which makes the breaching fiduciary “chargeable with (a) any loss or depreciation in value of the trust estate resulting from the breach of trust; or (b) any profit made by him through the breach of trust; or (c) any profit which would have accrued to the trust estate if there had been no breach of trust.”

92. In addition, the statute provides a distinct, non-trust-law-based system of remedy for violations of the prohibited transaction rules of ERISA § 406, which takes the form of excise taxes imposed under I.R.C. § 4975 (2000); regarding the prohibited transaction system, see *supra* note 46. Another non-trust-law-based remedy is provided in ERISA section 502(l), authorizing DoL to impose civil penalties for fiduciary breaches.

93. Section 502(a)(4) authorizes actions in respect of ERISA’s reporting and disclosure rules; subsections 502(a)(5) and (6) provide the authority for certain enforcement actions by the Secretary of Labor, which do not bear on the present topic of civil actions brought by participants and beneficiaries. ERISA § 502(a)(4)–(6).

94. Section 502(a) provides in relevant part:

A civil action may be brought —

- (1) by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
- (2) by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section 409;
- (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan . . .

95. *Id.* § 502(a)(1).

96. *Id.* § 502(a)(2).

profits," and it further subjects the breaching fiduciary to "such other equitable or remedial relief as the court may deem appropriate."<sup>97</sup>

The remedy structure of the law of trusts, we have seen, provides recovery for loss, recovery of profits, and recovery for foregone gains. In cases in which relief runs to the plan, ERISA section 409(a) replicates the first two of these trust-law remedies and expresses the third as "such other equitable or remedial relief as the court may deem appropriate."<sup>98</sup> The legislative materials do not disclose why the drafters worded this third option for appropriate "equitable or remedial relief" more broadly than the comparable trust standard. The most likely explanation is that they meant to facilitate adaptation to new problems that might be encountered as ERISA transposed trust remedy law to the novel terrain of pension and benefit plans.

c. *Catchall*. — Section 502(a)(3), the measure construed in *Mertens* and *Great-West*, has two subsections. Subsection (A), which has not been problematic, authorizes injunctive relief against "any act or practice which violates any provision [of ERISA's Title I, which contains ERISA fiduciary law] or the terms of the plan."<sup>99</sup> Subsection (B), continuing the same sentence, contains the language whose meaning was disputed in *Mertens* and *Great-West*. It authorizes "other appropriate equitable relief . . . to redress such violations."<sup>100</sup> In another ERISA case, the Supreme Court called this section the "catchall" provision, in the sense that section 502(a)(3) "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that [section] 502 does not elsewhere adequately remedy."<sup>101</sup>

This grant of "other appropriate equitable relief" completes ERISA's absorption of trust remedy law for cases in which a participant or beneficiary seeks an individual recovery, by providing remedy for violations of ERISA not remedied under section 502(a)(1)(B) (benefits due) or section 502(a)(2) (relief to the plan). As with the similar language of section 409(a) (referenced through section 502(a)(2)), this measure is worded more broadly than the comparable standard in trust law—probably, as I have suggested with regard to sections 409(a) and 502(a)(2), to enhance the adaptability of trust remedy law to any novelties of pension and benefit plans. So understood, the catchall provision vindicates the core principle of trust remedy law, the make-whole standard, which restores the victim to the position that he or she would have had "if there had been no breach of trust."<sup>102</sup> This language should have been suffi-

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97. *Id.* § 409(a).

98. *Id.*

99. *Id.* § 502(a)(3)(A).

100. *Id.* § 502(a)(3)(B).

101. *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996). The term is also used in *Russell* to describe the parallel language about equitable relief in section 409(a). *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 (1985).

102. 3 *Scott & Fratcher*, *supra* note 91, § 205, at 237.

cient to convey to the courts Congress's design to remedy under ERISA wrongs of the sort commonly remedied under trust law, especially foregone gains and other sorts of consequential injury. *Mertens* and *Great-West* missed the message.

4. *Money Damages for Consequential Injury*. — The consequential (or “extracontractual”<sup>103</sup>) damages that *Russell* and *Mertens* have forbidden would sometimes be sought when the loss suffered exceeds “benefits due” under ERISA section 502(a)(1), for example, when a benefit denial causes further physical, emotional, or financial injury.<sup>104</sup> In other cases the Court's reading of section 502(a)(3) prevents recovery for foregone gains, for example, when culpable maladministration causes appropriate investments not to be made.<sup>105</sup>

The Uniform Trust Code of 2000, which is declaratory of the common law,<sup>106</sup> identifies among the remedies appropriate for breach of trust not only the specific and restitutionary relief that Justice Scalia characterized in *Mertens* as “typically equitable,”<sup>107</sup> but also money damages, the make-whole remedy that Justice Scalia treated as precluded when Congress authorized “other appropriate equitable relief” in ERISA section 502(a)(3). Section 1001(b)(3) of the Code says: “[T]he court may . . . compel the trustee to redress a breach of trust by paying money . . . .”<sup>108</sup> Section 1002, titled “Damages for Breach of Trust,”

103. I discuss the origin and pejorative quality of this term in the ERISA remedy cases *infra* text accompanying notes 163–167.

104. See, e.g., *Farr v. U.S.W. Communications*, 151 F.3d 908, 915 (9th Cir. 1998) (holding that although defendant plan sponsor's failure to inform plaintiffs about potential tax consequences of early retirement program was “a breach of . . . fiduciary dut[y], which caused [them] individual harm . . . no remedy is available to [p]laintiffs under ERISA”); *Bast v. Prudential Ins. Co. of Am.*, 150 F.3d 1003, 1006, 1009 (9th Cir. 1998) (no recovery to survivors of cancer patient, who died when plan administrator wrongfully denied authorization for cancer treatment until after patient's window of opportunity for benefiting from such treatment had lapsed); *Armstrong v. Jefferson Smurfit Corp.*, 30 F.3d 11, 12–13 (1st Cir. 1994) (no remedy under ERISA for failure to inform of tax consequences of early retirement plan); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1332, 1336 (5th Cir. 1992) (no recovery to parents, whose fetus died when plan administrator wrongfully denied required hospital stay during final weeks of high-risk pregnancy); *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 50–52, 55–56 (D. Mass. 1997) (no recovery to survivors of decedent who committed suicide after insurer's wrongful denial of inpatient alcohol rehabilitation benefits over period of time during which decedent repeatedly relapsed and attempted suicide and was placed in protective custody due to heavy drinking).

105. E.g., *Helfrich v. PNC Bank, Ky., Inc.*, 267 F.3d 477, 481 (6th Cir. 2001), cert. denied, 535 U.S. 928 (2002), discussed *infra* text accompanying note 114; *Estate of Mattern v. Honeywell Int'l, Inc.*, 241 F. Supp. 2d 540, 544 (D. Md. 2003), discussed in *Jo-el J. Meyer, Estate Has No Remedy for Administrator's Negligent Processing of Rollover Request*, 30 BNA Pension & Benefit Rep. 275 (2003).

106. Accordingly, “[t]he common law of trusts and principles of equity supplement” the Code. Unif. Trust Code § 106 (amended 2001), 7C U.L.A. 141 (Supp. 2003).

107. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (identifying appropriate remedies for breach of trust as those “typically available at equity”) (emphasis omitted).

108. Unif. Trust Code § 1001(b)(3) (amended 2001), 7C U.L.A. 221 (Supp. 2003).

makes a breaching trustee liable "to the beneficiaries affected for . . . the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred."<sup>109</sup> Bogert's treatise summarizes the case law on the matter, which long predates ERISA: "For breach of trust the trustee may be directed by the court to pay damages to the beneficiary."<sup>110</sup> Acts of "negligence or misconduct in the making or retaining of investments . . . may give rise to a right in favor of the beneficiaries to recover money damages from the trustee."<sup>111</sup> In such cases, Bogert remarks, "the general rule [is] that the object of damages is to make the injured party whole . . . . *Both direct and consequential damages may be awarded.*"<sup>112</sup>

In the leading modern case on the duty of loyalty, which arose from the administration of the probate estate of the artist Mark Rothko, the New York Court of Appeals found that two of the executors sold paintings belonging to the estate, hastily and for inadequate sums, in order to curry favor for themselves with the buyer. Following the *Restatement of Trusts*, the court held the executors liable for what it called "appreciation damages," to capture the foregone gain. The court reasoned that "since the paintings cannot be returned, the estate is therefore entitled to their value at the time of the decree,"<sup>113</sup> which was issued years after the loss, when the value of the paintings had materially increased. Compare the result reached under the *Mertens*-driven interpretation of ERISA in a recent case in which a plan administrator wrongfully failed to carry out the participant's investment instructions to transfer money in a defined contribution pension plan account to certain mutual funds, which subsequently performed better than the money market fund into which the administrator placed the funds. The Sixth Circuit held that *Mertens*' prohibition of monetary relief for consequential harm precluded make-whole relief for the foregone gain.<sup>114</sup>

Cases awarding money damages for consequential injury, either to the trust or to the beneficiary, exist in profusion in trust remedy law.<sup>115</sup> Accordingly, money damages were and are as much an equitable remedy

109. Id. § 1002(a)(1), 7C U.L.A. 222 (Supp. 2003). This measure codifies the standard of Restatement (Second) of Trusts, supra note 11, § 205, reaffirmed in Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992).

110. Bogert & Bogert, supra note 10, § 862, at 34.

111. Id. § 862, at 38-39.

112. Id. § 701, at 198 (emphasis added).

113. In re Estate of Rothko, 372 N.E.2d 291, 298 (N.Y. 1977). *Rothko* involved executors rather than trustees, but the law governing executors and trustees is in almost all respects identical, which is why the Court of Appeals relied upon Restatement (Second) of Trusts, supra note 11, §§ 205, 208, and upon trust case law in deciding the appropriate remedy in the case. See Unif. Probate Code § 3-703(a), 8 U.L.A. 138 (1998) ("A personal representative is a fiduciary who shall observe the standards of care applicable to trustees.").

114. Helfrich v. PNC Bank, Ky., Inc., 267 F.3d 477, 481 (6th Cir. 2001), cert. denied, 535 U.S. 928 (2002).

115. See supra notes 10 and 106-113.

as a legal remedy. Justice Scalia was correct to say that “[m]oney damages are . . . the classic form of *legal* relief,”<sup>116</sup> but flatly wrong to assert that money damages are not equally characteristic of equity when it enforces equity-based causes of action such as those arising from breach of trust.

To conclude: I began this discussion of ERISA’s federalized trust remedy law by noticing the Conference Committee’s determination that ERISA should “apply rules *and remedies* similar to those under traditional trust law to govern the conduct of fiduciaries.”<sup>117</sup> Trust remedy law follows a three-part system, allowing recovery for loss, restitution of profits made, and recovery of foregone gains. ERISA’s participant remedy provisions, which are expressed in order of complexity from the simplest (“benefits due”) to the more nuanced (“other appropriate equitable relief”), replicate the three-part remedy scheme of the law of trusts. When authorizing “equitable relief” in ERISA, the drafters presupposed the long familiar practice, which has recently been codified in the Uniform Trust Code, that “the court may . . . compel the trustee to redress a breach of trust by paying money.”<sup>118</sup> Because trust remedy law routinely allows consequential damages,<sup>119</sup> and because Congress meant for ERISA to apply trust remedy law, the grant of “appropriate equitable relief . . . to redress . . . violations” in the sequence in which the drafters placed that provision in section 502(a) of ERISA should have been understood to include make-whole monetary relief for consequential injury as well as specific relief, contrary to the decisions in *Mertens* and *Great-West*.

## II. RUSSELL

The Supreme Court’s engagement with ERISA remedy law got off to a bad start in 1985 on account of unwise dicta in *Massachusetts Mutual Life Insurance Co. v. Russell*.<sup>120</sup> Like several of the Court’s more troubled ERISA opinions, whose facts made them awkward vehicles for certiorari,<sup>121</sup> *Russell* instanced a case whose skewed procedural history made it a

116. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993).

117. H.R. Conf. Rep. No. 93-1280, at 295 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5076 (emphasis added).

118. Unif. Trust Code § 1001(b)(3) (amended 2001), 7C U.L.A. 221 (Supp. 2003).

119. *Supra* text accompanying notes 10 and 106–113.

120. 473 U.S. 134 (1985).

121. For example, in *Firestone Tire & Rubber Co. v. Bruch*, the case in which the Court decided to prefer de novo rather than deferential review of plan decisionmaking, *supra* text accompanying notes 72–74, the plan sponsor had not been aware that the severance pay policies it had been following constituted an ERISA plan, hence did not operate under plan documents that articulated plan procedures worthy of deference. 489 U.S. 101, 105, 115 (1989). *Boggs v. Boggs*, in which the Court held that ERISA preemption defeats state community property law, was a case of bewildering complexity, because the decedent had three different ERISA plans whose attributes the opinions could not keep straight. 520 U.S. 833, 835–36 (1997). And *Mertens* was pleaded in a way that caused the Court not to resolve the circuit split that almost certainly led the Justices to take the case. See *Mertens*, 508 U.S. at 253–55; see *infra* text accompanying notes 184–191. That split centered on the question of whether (as in trust law) an action for fiduciary liability may also be brought

poor choice for giving initial guidance about the field. The plaintiff was a participant in an ERISA-covered disability plan.<sup>122</sup> She suffered a back ailment. The plan paid benefits for some months, then terminated payments on the report of an orthopedic surgeon. The plaintiff demanded internal review of the denial of her benefits. Six months later, after a pair of further medical examinations, the plan administrator reinstated her benefits retroactively to the date of termination. Although this decision caused her scheduled benefits to be paid in full for the period of her disability, the plaintiff alleged that the interruption in payment caused her financial, physical, and emotional injury, for which she sought consequential damages.<sup>123</sup>

Russell claimed that the plan's denial was wrongful because the medical evidence at the time of the denial established her disability, and because the plan deliberately took six months to reinstate her benefits.<sup>124</sup> She sued the plan fiduciaries, seeking both compensatory and punitive damages for these consequential injuries. The federal district court dismissed the case on the defendants' motion for summary judgment, holding that ERISA did not permit claims either for what it called "extra-contractual" damages or for punitive damages.<sup>125</sup> The Ninth Circuit reversed, holding that Russell's complaint stated a cause of action under ERISA for breach of "the fiduciary's obligation to process claims in good

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against an ERISA nonfiduciary who participated in the breach of fiduciary duty. Accordingly, the briefs were largely centered on that question, rather than on the issue on which the Court decided the case. See, e.g., Petition for Cert. at 9, 13–15, 20–25, *Mertens* (No. 91-1671); Brief for the Petitioners at 9–13, *Mertens* (No. 91-1671); Brief of Amicus Curiae United States supporting cert. petition at 5, 8–10, 15–16, *Mertens* (No. 91-1671); Brief of Amicus Curiae United States at 14–15, *Mertens* (No. 91-1671); Brief of Amicus Curiae American Academy of Actuaries at 3–5, *Mertens* (No. 91-1671); Brief of Amicus Curiae American Association of Retired Persons 2–3, *Mertens* (No. 91-1671); Brief of Amicus Curiae American Society of Pension Actuaries at 8–10, *Mertens* (No. 91-1671). Several years later, the Court resolved the question of nonfiduciary liability by adopting the trust-law rule, at least for a violation of the prohibited transaction regime of ERISA § 406(a), 29 U.S.C. § 1106(a) (2000). See *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 245 (2000) (holding that section 502(a)(3) enables civil actions against nonfiduciary "party in interest" for engaging in certain transactions barred by section 406(a)). There is no particular reason for thinking that this holding will not be applied to violations of the core loyalty and prudence standards under ERISA section 404(a).

122. There were in fact two plans, see *Russell*, 473 U.S. at 136, but they were administered as one, see, e.g., *id.* at 137.

123. *Id.* at 136.

124. *Id.* at 137.

125. The case was brought in state court, the defendants removed it to federal district court. In addition to the ERISA claims discussed above, the plaintiff pleaded various state law causes of action. The district court dismissed them as preempted by ERISA, and the Ninth Circuit affirmed. See *id.* The plaintiff did not appeal the preemption ruling in her petition for certiorari. *Id.* at 138, n.4.

faith and in a fair and diligent manner”<sup>126</sup> (a responsibility<sup>127</sup> deriving from ERISA’s duties of prudence and loyalty).

The quirk that makes *Russell* such an awkward precedent is that the Ninth Circuit decided to recognize the cause of action exclusively on the basis of the second of ERISA’s three participant remedial provisions, section 502(a)(2), which is directed to recovering damages that run to the plan rather than to the participant.<sup>128</sup> The plaintiff, in seeking certiorari, limited herself to defending the victory that the Ninth Circuit, using the wrong remedy section, had handed her. Crucially, she did not ask the Supreme Court, as an alternative ground, to rest her case on the more suitable foundation of “appropriate equitable relief” under section 502(a)(3).<sup>129</sup> Accordingly, the case as pleaded did not squarely present the question of whether section 502(a)(3) afforded her a remedy.

The Supreme Court unanimously reversed the Ninth Circuit’s misuse of section 502(a)(2). *Russell* would be a precedent of scant consequence had it stopped there. Instead, Justice Stevens uttered broad dicta that would help mislead the Court in *Mertens* and *Great-West*.<sup>130</sup> These dicta provoked a concurrence by Justice Brennan (joined by Justices White, Marshall, and Blackmun), which is functionally a dissent. Consequently, the important parts of *Russell*, like the holdings in *Mertens* and *Great-West*, rest on the narrowest 5-4 majority.

The Ninth Circuit in *Russell* constructed an individual remedy for the plaintiff under section 502(a)(2) by emphasizing the language about equitable relief contained in the linked section 409(a). We have seen that section 502(a)(2) allows the participant or beneficiary to sue “for appropriate relief under section 409(a).” The latter section, which makes a breaching fiduciary liable to the plan both for losses caused and for any profits made, concludes by subjecting the breaching fiduciary “to such other equitable or remedial relief as the court may deem appropriate.” The Ninth Circuit read this language to allow the plaintiff to obtain individual relief. Justice Stevens, for a unanimous Supreme Court, held this maneuver impermissible, pointing out that the Ninth Circuit opinion

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126. *Id.* at 137 (citing *Russell v. Mass. Mut. Life Ins. Co.*, 722 F.2d 482, 488 (9th Cir. 1983), *rev’d*, 473 U.S. 134 (1985)).

127. Trustees owe a duty of good faith in all aspects of trust administration. See Unif. Trust Code § 801 (amended 2001), 7C U.L.A. 200 (Supp. 2003). But the prohibition on consequential damages arising from *Russell* and *Mertens* has kept the lower courts from imposing liability under ERISA even in egregious cases of willful delay in making benefit payments. See, e.g., *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 948 (8th Cir. 1999); *Harsch v. Eisenberg*, 956 F.2d 651, 652 (7th Cir. 1992). But see *Dunnigan v. Metro. Life Ins. Co.*, 277 F.3d 223, 229–30 (2d Cir. 2002), discussed *infra* text accompanying note 266.

128. *Russell*, 473 U.S. at 138 (citing *Russell*, 722 F.2d at 489–90).

129. *Id.* at 139 n.5.

130. Justice Stevens, who joined the dissenters in both *Mertens* and *Great-West*, has not addressed the tension between his role in *Russell* and his dissents in the later cases. See *id.* at 142–44, 146–48.



"skipp[ed] over" the relevant language of section 502(a)(2), which unambiguously limits relief under section 409(a) solely to the plan.<sup>131</sup>

The dicta in Justice Stevens' opinion that split the Court concerned two topics: He suggested that ERISA was not much interested in providing individual relief, and he argued that remedying consequential injury even under the authorization for "appropriate equitable relief" in section 502(a)(3) would entail the creation of an implied cause of action, contrary to the Court's established constraints on the implication of causes of action under federal statutes.

#### A. *Deprecating Individual Relief*

Justice Stevens asserted that ERISA was not much interested in enforcing the rights of individual plan participants and beneficiaries. ERISA's drafters "were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary."<sup>132</sup> Although Justice Stevens admitted that ERISA fiduciary law explicitly created rights in the participants and beneficiaries, he insisted that "the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest."<sup>133</sup>

This assertion that ERISA meant to protect plans, not participants, is transparently wrong. ERISA's duties of loyalty and prudence are expressed to run "solely in the interest of the participants and beneficiaries,"<sup>134</sup> and ERISA expressly authorizes a participant or beneficiary to bring a civil action for benefits due under section 502(a)(1), and for injunctive or "other appropriate equitable relief" under section 502(a)(3).<sup>135</sup> Justice Brennan pointed to the duties of loyalty and prudence set forth in ERISA section 404(a). Their "legislative history demonstrates that Congress intended . . . to incorporate the fiduciary standards of trust law into ERISA, and it is black-letter trust law that fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits."<sup>136</sup> But Justice Brennan's was the minority opinion. By giving comfort to the idea that ERISA meant to protect only plans, not participants, the majority in *Russell* deemphasized the significance of the federal fiduciary law that lies at the core of ERISA, and made it easier to refuse relief for consequential injury.

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131. *Id.* at 141–42.

132. *Id.* at 142.

133. *Id.* at 142–43.

134. ERISA § 404(a)(1), 29 U.S.C. § 1104 (2000).

135. ERISA § 502(a)(1)–(3). The text of these three sections is set forth at *supra* note 94.

136. *Russell*, 473 U.S. at 152–53 (citations omitted).

In refusing to remedy consequential injury under section 502(a)(2) and the linked section 409(a), the Court in *Russell* disapproved relief under language nearly identical to that in the more suitable remedy provision, section 502(a)(3), which was not before the Court in the case. The language of section 409(a) that the Ninth Circuit wrenched out of its context of plan-only relief (“such other equitable or remedial relief as the court may deem appropriate”) closely resembles the language of section 502(a)(3), authorizing “other appropriate equitable relief . . . to redress . . . violations.”<sup>137</sup> *Russell* would have the effect of predisposing the Court in *Mertens* and *Great-West* to disapprove relief for consequential injury under 502(a)(3), even though the holding in *Russell* rejected the plaintiff’s claim for such relief on account of its inconsistency with the plan-only remedial objective of section 502(a)(2), the provision under which she mistakenly framed it. In the interval between *Russell* (1985) and *Mertens* (1993), the circuits increasingly read *Russell* to have precluded relief for consequential injury under section 502(a)(3).<sup>138</sup>

B. *The “Specificity Myth”*.<sup>139</sup> *Treating Relief for Consequential Injury as an Implied Cause of Action*

The other strand of dicta in Justice Stevens’ opinion in *Russell* that would prove influential in *Mertens* and *Great-West* was the concern to avoid implying a cause of action—in this case a remedy for consequential injury—that Congress may have deliberately omitted.<sup>140</sup> Hostility to implied causes of action has been an important theme in the Supreme Court’s interpretation of a variety of federal regulatory acts across recent decades.<sup>141</sup> Using language that would resurface in Justice Scalia’s opinions in *Mertens* and *Great-West*, Justice Stevens argued that ERISA remedy law was so carefully and comprehensively drafted that if ERISA did not expressly provide a remedy for consequential injury, the omission should be treated as deliberate. “The six carefully integrated civil enforcement provisions found in [section] 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other

137. ERISA §§ 409(a), 502(a)(3).

138. See especially Judge Cudahy’s opinion in *Harsch v. Eisenberg*, reviewing the cases from other circuits, expressing appreciation “for Justice Brennan’s position on grounds of policy and, perhaps, of justice,” but concluding that “the *Russell dicta*, which commanded the majority support in the Supreme Court and have generally carried the day in the courts of appeals, seem to require us to reject extracontractual remedies.” 956 F.2d 651, 658, 659 (7th Cir. 1992).

139. This term, further discussed *infra* text accompanying notes 154–161, 216–223, and 250–254, is from George L. Flint, Jr., ERISA: Extracontractual Damages Mandated for Benefit Claims Actions, 36 Ariz. L. Rev. 611, 638 (1994).

140. *Russell*, 473 U.S. at 145–48.

141. “Since [*Cannon v. University of Chicago*, 441 U.S. 677 (1979)], the [Supreme] Court has generally rejected claims of implied federal remedies.” Richard H. Fallon et al., Hart & Wechsler’s *The Federal Courts and the Federal System* 840 (4th ed. 1996). See generally *id.* at 839–46 (reviewing case law and literature).

remedies that it simply forgot to incorporate expressly."<sup>142</sup> Justice Stevens concluded that "[w]e are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA."<sup>143</sup>

Justice Brennan's concurrence dismissed this line of reasoning as "both unnecessary and to some extent completely erroneous."<sup>144</sup> Pointing to the issue that the Court would confront a decade later in *Mertens*, Justice Brennan observed that in section 502(a)(1) and (2), "Congress already had instructed that beneficiaries could recover benefits, [and] obtain broad injunctive and declaratory relief for their own personal benefit or for the benefit of their plans." Accordingly, section 502(a)(3) "can only be read precisely as authorizing federal courts to 'fine-tune' ERISA's remedial scheme."<sup>145</sup> Generalities about "not find[ing] implied private remedies in ERISA," he said, "have little bearing on how courts are to go about construing the private remedy that Congress explicitly provided in [section] 502(a)(3)."<sup>146</sup>

The message of the Brennan opinion was that when a case better pleaded than *Russell* succeeded in raising the question of the scope of remedy under section 502(a)(3), monetary relief for consequential injury might still be determined to be express (as "appropriate equitable relief") rather than implied. Justice Brennan noticed that "[t]he legislative history demonstrates that Congress intended federal courts to develop federal common law in fashioning the additional 'appropriate equitable relief' under section 502(a)(3)."<sup>147</sup> He pointed to the remarks of Senator Jacob Javits, a main architect of ERISA,<sup>148</sup> when presenting the Conference Committee report to the Senate, that the drafters "intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans."<sup>149</sup> Accordingly, by authorizing "appropriate equitable relief," Congress meant for the courts to work out what was appropriate in the light of the purposes of the statute.

The legislative history to which Justice Brennan referred, anticipating the growth of case law applying ERISA, bears importantly upon the relatively skeletal fiduciary and remedy law that Congress supplied in ERISA. The core fallacy of the majority opinion in *Russell*, which has carried over to *Mertens* and *Great-West*, is to confuse applying with implying. As I have explained above,<sup>150</sup> when enacting ERISA Congress was transposing the trust model into regulatory law for the newly federalized field

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142. *Russell*, 473 U.S. at 146.

143. *Id.* at 147.

144. *Id.* at 155.

145. *Id.*

146. *Id.*

147. *Id.* at 156.

148. Javits' role is discussed in Gordon, *supra* note 25, at 11-25.

149. *Russell*, 473 U.S. at 156 (quoting 120 Cong. Rec. 29,942 (1974) (statement of Sen. Javits)).

150. See *supra* text accompanying notes 91-102.

of pension and employee benefit plans. Both in specifying the fiduciary norms of ERISA section 404(a) (loyalty and prudence) and in the “catch-all” remedy provision of section 502(a)(3) (“other appropriate equitable relief . . . to redress violations”), Congress worked at a level of some generality. Accordingly, interpreting Congress’s term “appropriate equitable relief” to cover so predictable and recurrent a case as fiduciary breach resulting in consequential injury entails applying the cause of action Congress created, not implying a cause of action that Congress omitted.

Justice Brennan’s concurrence did not directly challenge one underlying premise of the majority’s reasoning on this question, the idea that ERISA remedy law is so comprehensive that the Court is justified in inferring that details that Congress left unexpressed must have been deliberately omitted. Justice Stevens argued: “The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA’s interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a ‘comprehensive and reticulated statute.’”<sup>151</sup> Justice Scalia would return to this theme in *Mertens*<sup>152</sup> and *Great-West*.<sup>153</sup>

Professor George Flint has disparaged this argument from ERISA’s supposed comprehensiveness as the “specificity myth.”<sup>154</sup> Flint directed attention to the cumbersome duplication of language in the six subsections of section 502(a).<sup>155</sup> One can point to other evidence that reinforces his point. The Court’s claim in these ERISA remedy cases that ERISA is so perfectly drafted that it already expresses every detail of its intended coverage conflicts with the Court’s incessant complaining about the bad drafting of section 514(a), ERISA’s preemption measure.<sup>156</sup>

151. *Russell*, 473 U.S. at 146 (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980)). This phrase from *Nachman*, that ERISA is a “comprehensive and reticulated statute,” has often been quoted, as in Justice Stevens’ opinion in *Russell*, in support of the idea that ERISA’s remedy provisions are so well drafted that they require no supplementation, especially no use of remedial steps not itemized in the text of ERISA. See, e.g., *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993). In truth, when the Court coined this phrase in *Nachman*, it was referring to the entire substantive agenda of ERISA’s four titles and did not mention the remedy provisions of ERISA section 502(a). *Nachman*, 446 U.S. at 361 & n.1. *Nachman* was the Court’s first ERISA case. It involved transitional matters of “little consequence beyond the resolution of [that] case.” *Id.* at 397 (Powell, J., dissenting).

152. *Mertens*, 508 U.S. at 251. Justice Scalia’s opinion mixed in some public choice theory to buttress the supposedly literalist inference, remarking that ERISA was “an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs.” *Id.* at 262. He concluded, “We will not attempt to adjust the balance between those competing goals that the text adopted by Congress has struck.” *Id.* at 263.

153. *Great-West*, 534 U.S. at 209.

154. Flint, *supra* note 139, at 638.

155. *Id.* at 639.

156. “[T]he Court has suggested on more than one occasion [that] the pre-emption and saving clauses are almost antithetically broad and “are not a model of legislative drafting.”” *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 392 (2002) (quoting John

In truth, ERISA's procedure and remedy provisions suffer from major omissions that the courts have had to supply from context. ERISA's drafters neglected to provide a statute of limitations for most ERISA matters.<sup>157</sup> They did not specify whether or not they wanted jury trial to pertain in ERISA litigation, and if so, to which types of claim.<sup>158</sup> ERISA did not identify the standard for judicial review of plan decisionmaking, causing the Supreme Court to have to supply it in *Bruch*.<sup>159</sup> ERISA provides for the award of attorney fees but does not identify the principles for when to make such awards and in what amounts.<sup>160</sup> ERISA provides no guidance about whether punitive damages would be allowed in ERISA actions (an issue raised in *Russell* and discussed below).<sup>161</sup> Accordingly, the premise is deeply suspect that ERISA is so "comprehensive" that Congress meant to omit any detail not explicitly articulated in the statutory text.

### C. "Extracontractual" and Punitive Damages

I have described the issue in *Russell* as whether the term "equitable relief" as used in ERISA's provisions for relief to the plan (sections 502(a)(2) and 409(a)) authorizes damages for consequential injury, that is, damages for financial loss and for physical and other suffering resulting from ERISA-proscribed conduct. A troubling feature of the opinion is that it does not speak the neutral parlance of consequential damages, but rather uses a pejorative, "extracontractual damages." The first sentence of Justice Stevens' opinion frames "[t]he question presented for decision" as whether the plaintiff plan participant could recover "extracontractual compensatory or punitive damages" under ERISA.<sup>162</sup>

1. "Extracontractual" Damages. — The Supreme Court did not invent the term "extracontractual," which was already in the case at the district court level,<sup>163</sup> but the Supreme Court bears responsibility for giving it

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Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 99 (1993) (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987)); see also Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985) (the two preemption sections being interpreted "perhaps are not a model of legislative drafting"). Justice Stevens, who injected the "specificity myth" into the Court's ERISA remedy cases in *Russell*, complained about ERISA's "opaque" preemption provisions in *De Buono v. NYSA-ILA Med. & Clinical Serv. Fund*, 520 U.S. 806, 808-09 (1997); see also *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990). (I am grateful for the help of Professors Donald T. Bogan (Oklahoma) and J.H. Verkerke (Virginia) in collecting these references.)

157. See Langbein & Wolk, *supra* note 27, at 796-98.

158. See *id.* at 790-96.

159. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108-09 (1989); see *supra* text accompanying notes 72-74.

160. See Langbein & Wolk, *supra* note 27, at 786-90.

161. See *infra* text accompanying notes 162-178.

162. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 136 (1985).

163. The District Court granted summary judgment against the plaintiff on the ground, *inter alia*, "that 'ERISA bars any claims for extra-contractual damages and punitive damages.'" *Id.* at 137 (citation omitted).

broad currency in ERISA case law. Both parts of the word “extracontractual” are misleading. “Extra,” meaning “outside of,” is a word that suggests a bonus, something to which one is not entitled. That attitude infects the Court’s framing of the question in *Russell*: “Although [she] has been paid all benefits to which she is contractually entitled, she claims to have been injured by the improper refusal to pay benefits . . . .”<sup>164</sup> Furthermore, the language of contract in the term “extracontractual” is also a misemphasis in the setting of ERISA remedy law.<sup>165</sup> As I have explained in Part 1 of this Article, ERISA’s central policy decision was to impose a regime of mandatory trusteeship and fiduciary law on pension and employee benefit plans, even though such plans arise from the contract of employment. ERISA subordinates contract to trust<sup>166</sup> by subjecting the process of plan administration, including the investment of plan assets and the payment of plan benefits, to nonwaivable<sup>167</sup> fiduciary duties of loyalty and prudence. As was true of the claim in *Russell*, most ERISA cases brought by a participant or beneficiary for consequential injury (that is, for damages beyond the “benefits due” recoverable under section 502(a)(1)) are based on a claim of breach of fiduciary duty. Characterizing the damages issue in such cases as contractual (in the sense of “extracontractual”) rather than fiduciary further underscores the great failing in the Supreme Court’s handling of ERISA remedy issues in *Russell*, *Mertens*, and *Great-West*: the Court’s neglect of the trust law basis of ERISA remedy law in interpreting the authorizations for equitable relief in section 502(a).

2. *Punitive Damages*. — In addition to consequential damages, the plaintiff in *Russell* also sought punitive damages. The Ninth Circuit held that she might be able to recover punitive damages.<sup>168</sup> Justice Stevens’ opinion linked these radically different kinds of damages in his framing of the case, describing “[t]he question presented for decision” as whether

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164. *Id.* at 136.

165. The term is reported to originate in insurance law, where it is used to describe consequential damages paid for injuries other than the covered perils. See Flint, *supra* note 139, at 613 n.14 (citing 1A Rowland H. Long, *The Law of Liability Insurance* § 5A.26, at 5A-155 (1993)). According to a word search of a computerized database of Supreme Court cases, the term had been used only once before *Russell*, in a case involving the question of whether a provision of the Trading with the Enemy Act allowed an American contract creditor to claim recompense from the German government for the depreciation of the mark in the 1920s hyperinflation. *Hicks v. Guinness*, 269 U.S. 71, 78 (1925).

166. I have elsewhere emphasized that the settlor/trustee relationship in the ordinary private trust has a contractarian character, because most rules of trust law are default rules that the parties can modify when creating the trust. See Langbein, *Contractarian Basis*, *supra* note 72, at 657–60. Pension trusts, by contrast, are what I have called regulatory compliance trusts, in the sense that the trust terms are largely predetermined by the need to comply with ERISA and the Internal Revenue Code, whose provisions drastically restrict the parties’ freedom to alter the default law. See Langbein, *Secret Life*, *supra* note 59, at 174.

167. See *supra* note 61.

168. *Russell*, 473 U.S. at 138, discussing 722 F.2d 482, 492 (9th Cir. 1983).

remedy lay under ERISA "for extracontractual compensatory or punitive damages."<sup>169</sup> This linkage prejudiced the Court's handling of consequential damages. Precisely because punitive damages do not compensate, a claim for punitive damages turns on considerations quite remote from the make-whole basis of recovery for consequential damages.

*Russell* is widely regarded as having rid ERISA remedy law of punitive damages,<sup>170</sup> although the opinion contains no discussion of the traits or merits of punitive damages. The opinion merely observes that "there really is nothing at all in the statutory text [of ERISA section 502(a)(2)] to support the conclusion that [the conduct complained of] gives rise to a private right of action for compensatory or punitive relief."<sup>171</sup> *Russell* reasoned that punitive damages fell with consequential damages.<sup>172</sup>

Although, for the reasons I have explained, the arguments that the Court advanced for treating ERISA as not authorizing consequential damages are deeply problematic, the Court's result may be quite sound as applied to punitive damages. Whereas consequential damages have been an endemic feature of make-whole relief in trust law,<sup>173</sup> punitive damages had no place among the trust-law remedies that Congress meant to emulate in ERISA. To the contrary, equity exhibited a long tradition of hostility to penalties.<sup>174</sup> As Justice Scalia would observe in *Mertens* in 1993, the 1988 edition of Scott's treatise on trusts "cites no pre-ERISA case on the issue of punitive damages," and the 1982 edition of Bogert's treatise cites only two.<sup>175</sup> The *Restatement of Trusts*,<sup>176</sup> the most authoritative source for American trust law at the time of the enactment of ERISA, contains no authorization or recognition of punitive damages. Only in the decades

169. *Id.* at 136 (emphasis added). As indicated at *supra* text accompanying note 163, this linkage originated in the district court's opinion, see *id.* at 137, but the Supreme Court was not obliged to perpetuate it.

170. "The Supreme Court has not addressed whether punitive damages are available to plan participants in actions under other subsections of Section 502 . . . . However, since *Russell* and *Mertens*, the majority of lower courts have confirmed that neither compensatory nor punitive damages are recoverable in any ERISA claim under Section 502." ABA Section of Labor and Employment Law, *Employee Benefits Law* 946 (Steven J. Sacher & James I. Singer eds., 2d ed. 2000) (citing extensive case law).

171. *Russell*, 473 U.S. at 144.

172. *Mertens* is regarded as having confirmed this outcome for actions under section 502(a)(3), on account of its holding, discussed below, that "appropriate equitable relief" under that provision does not include monetary damages but is limited to "typically" equitable remedies. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 253-56 (1993); see also, e.g., *Concha v. London*, 62 F.3d 1493, 1504 (9th Cir. 1995) (citing *Mertens* for proposition that relief under ERISA is limited to equitable remedies).

173. *Supra* text accompanying notes 10, 91, 102, and 106-113.

174. Francis had already formulated it as one of his maxims of equity by 1728. "Equity suffers not Advantage to be taken of a Penalty or Forfeiture, where Compensation can be made." Francis, *supra* note 21, at 44 (maxim no. 12). Justice White refers to the equitable tradition against penalties in his dissent in *Mertens*, 508 U.S. at 272.

175. *Mertens*, 508 U.S. at 257 n.7 (citing 3 Scott & Fratcher, *supra* note 91, § 205, at 239 n.2); Bogert & Bogert, *supra* note 10, § 862, at 39 n.12.

176. *Restatement (Second) of Trusts*, *supra* note 11.

after ERISA did some American states begin to admit punitive damages into trust law.<sup>177</sup> As Justice Scalia pointed out in *Mertens*, “the availability of punitive damages . . . was not [a major issue] in 1974, when ERISA was enacted.”<sup>178</sup> Accordingly, it seems quite sound to think that Congress in 1974 had no reason to think of punitive damages as “appropriate equitable relief.”

By treating make-whole consequential damages as a common category with punitive damages, Justice Stevens’ opinion in *Russell* used the undeveloped but instinctively powerful case against punitive damages under ERISA to help carry his much weaker case against consequential damages under ERISA.

#### D. *Neglecting the Trust-Law Basis of ERISA*

Justice Brennan concluded his concurrence in *Russell* by emphasizing the primacy of the trust law tradition in resolving ERISA remedy questions. The way to decide whether section 503(a)(3) provides a remedy for consequential damages or other relief is to “ascertain[ ] the extent to which trust and pension law as developed by state<sup>179</sup> and federal courts provide for [such relief] . . . given that Congress intended to incorporate trust law into ERISA’s equitable remedies.”<sup>180</sup> Had the Court heeded that advice, it could have spared itself the mistake in *Mertens* and the embarrassment of *Great-West*.

### III. *MERTENS*

In *Mertens v. Hewitt Associates*, decided in 1993, the Supreme Court construed the language of “appropriate equitable relief” in ERISA section 502(a)(3).<sup>181</sup> Justice Scalia’s 5-4 opinion held that this provision excluded “compensatory damages,”<sup>182</sup> even though “money damages were available in [equity] courts against the trustee”<sup>183</sup> in actions to recover for

177. Discussed by Justice White in his dissent in *Mertens*, 508 U.S. at 270–72 & n.6; see also *id.* at 257 n.7 (Scalia, J.). The question whether punitive damages may be awarded in equitable causes of action continues to divide American jurisdictions. The cases are collected in Jay M. Zitter, Annotation, Punitive Damages: Power of Equity Court to Award, 58 A.L.R.4th 844 (1987 Supp. 2002).

178. *Mertens*, 508 U.S. at 257 n.7.

179. As I have noted *supra* text accompanying notes 10, 91, 102, and 106–113, there is abundant evidence for the award of monetary and consequential damages in trust law. Because, however, Congress effectively created modern pension fiduciary law in ERISA, pension trust cases are thinly evidenced in pre-ERISA law. Pension trusts were common before ERISA, see Langbein & Wolk, *supra* note 27, at 647, but it was not until ERISA that the trust form and trustee-like fiduciary status were extended to all aspects of plan administration, made nonwaivable, and imposed on nonpension plans as well. See ERISA §§ 404(a), 410(a), 29 U.S.C. §§ 1104(a), 1110(a) (2000).

180. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 157 (1985) (Brennan, J., concurring) (emphasis added).

181. 508 U.S. at 255–56.

182. *Id.*

183. *Id.* at 256.



breach of trust. Accordingly, the state of the present law regarding recompense for breach of fiduciary duty or other ERISA-proscribed wrongdoing is that the injured plan participant or beneficiary may recover monetarily for "benefits due" under section 502(a)(1), but not for consequential injury under either section 502(a)(2) (per *Russell*) or section 502(a)(3) (per *Mertens*).

*Mertens* arose from a case in which a defined benefit pension plan sponsor became insolvent and defaulted on some promised benefits. The plaintiffs were plan participants whose promised benefit levels were so high that a portion of the benefits were above the amounts guaranteed under ERISA's plan termination insurance program.<sup>184</sup> The plaintiffs brought several suits, including one against Hewitt, an actuarial firm, alleging that Hewitt's deficient actuarial work and concealment of the plan's underfunding facilitated the sponsor's default.<sup>185</sup>

As an external service provider, Hewitt was not a plan fiduciary under ERISA.<sup>186</sup> The issue on certiorari was "whether ERISA authorizes suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty."<sup>187</sup> The circuits had been divided on the question,<sup>188</sup> which produced a lively debate within ERISA circles about whether the statute allowed recovery against a party who was not an ERISA fiduciary but who had assisted or otherwise joined a fiduciary in the commission of a breach of ERISA fiduciary duty. Trust law has long made such a party liable for breach of trust. Observers assumed that the Supreme Court took certiorari on the case to resolve this prominent circuit split. Instead, to the astonishment of the ERISA bar, the Supreme Court avoided deciding the question of nonfiduciary liability. The Court rested its decision on the ground that even if there were such liability, section 502(a)(3)<sup>189</sup> did not authorize the plaintiffs to recover conse-

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184. The program is discussed *supra* text accompanying note 30.

185. *Mertens*, 508 U.S. at 250.

186. The plaintiffs initially asserted otherwise in a portion of their complaint that was dismissed and not preserved for review in the Supreme Court proceedings. *Id.* at 251.

187. *Id.*

188. A prominent early precedent recognizing the liability is *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629 (W.D. Wis. 1979), in which the court found itself "fully empowered to award the relief available in traditional trust law against non-fiduciaries who knowingly participate . . . in a breach of trust." *Id.* at 641-42. This position prevailed into the late 1980s. See, e.g., *Whitfield v. Lindemann*, 853 F.2d 1298, 1303 (5th Cir. 1988); *Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1220 (2d Cir. 1987); *Thornton v. Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982). The split among the circuits arose as a result of *Nieto v. Ecker*, 845 F.2d 868, 871-73 (9th Cir. 1988), in which Judge Kozinski criticized "the reasoning of the seminal case," *Freund*, and relied upon *Russell's* admonition against implying private rights of action under ERISA. *Nieto* was followed in *Useden v. Acker*, 947 F.2d 1563, 1579-81 (11th Cir. 1991), and *Framingham Union Hosp., Inc. v. Travelers Ins. Co.*, 744 F. Supp. 29, 32-33 (D. Mass. 1990), but disapproved in *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 280 (2d Cir. 1992).

189. Because Hewitt was not the plan sponsor, the plaintiffs could not recover from Hewitt for "benefits due" under ERISA section 502(a)(1).

quential damages for Hewitt's conduct. In dicta the Court expressed strong doubt that nonfiduciary liability could lie,<sup>190</sup> but several years later unanimously held in favor of such liability in a case arising under ERISA's prohibited transaction regime.<sup>191</sup>

#### A. *Excluding Money Damages*

Justice Scalia's main contention is that because the plaintiffs sued for compensatory damages, they were necessarily seeking legal as opposed to equitable relief. "[W]hat petitioners in fact seek is nothing other than compensatory *damages*—monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of *legal* relief,"<sup>192</sup> hence not to be allowed as "equitable relief" under ERISA section 502(a)(3). But how could Justice Scalia reconcile that assertion with his recognition that "money damages were available in [equity] courts against the trustee"?<sup>193</sup> His answer rested on the further assertion that in pre-fusion practice *when equity courts awarded money damages, they were awarding legal rather than equitable relief*. Citing the 1941 edition of Pomeroy's treatise on equity, Justice Scalia wrote that "there were many situations—not limited to those involving enforcement of a trust—in which an equity court could 'establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority.'"<sup>194</sup> The passage in Pomeroy cited for this claim actually identifies only one such doctrine, today known as equitable clean-up jurisdiction,<sup>195</sup> under which a court exercising equity jurisdiction can also resolve legal issues that arise in the case. Elsewhere in his treatise Pomeroy flatly contradicts the assertion that Justice Scalia obliquely attributes to him, that is, the implication that money damages are not an equitable remedy. Speaking of the remedies that a court of equity gives for breach of trust, Pomeroy writes that they "depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts cannot administer, but often they

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190. *Mertens*, 508 U.S. at 253–55.

191. See *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 241 (2000); see also *supra* note 121.

192. *Mertens*, 508 U.S. at 255.

193. *Id.* at 256.

194. *Id.* (quoting 1 John Norton Pomeroy, *Equity Jurisprudence* § 181, at 257 (5th ed. Belknap 1941) (1881) (1st ed. San Francisco)). The distinction between equitable jurisdiction and equitable relief was suggested in the defendant's brief. See Brief of Respondent at 25–27, *Mertens* (No. 91-1671). Justice Scalia cites the brief on another point as well. *Mertens*, 508 U.S. at 254.

195. See 1 Dan B. Dobbs, *Law of Remedies: Damages, Equity, Restitution* § 2.7, at 180–81 (2d. ed. 1993) (3 vols.). Pomeroy's full discussion of the doctrine appears in 1 Pomeroy, *supra* note 194, §§ 231–242, where he reviews the application of the same doctrine to a variety of circumstances. Conceivably, these several applications of the one doctrine are what Justice Scalia had in mind when he claimed that "there were many situations . . . in which an equity court could 'establish purely legal rights and grant legal remedies.'" *Mertens*, 508 U.S. at 256.

are of the same general kind as those obtained in legal actions, being mere recoveries of money."<sup>196</sup> Indeed, Pomeroy concludes, "It often happens that the final relief to be obtained by the [beneficiary] consists in the recovery of money."<sup>197</sup>

Justice Scalia's mistaken understanding that money damages awarded in equity always entailed legal relief set up the false contrast that he used to decide the case. He reasoned that there were only two possible meanings to ERISA's term, "equitable relief," although he gave no reason for positing that those two meanings, one overinclusive and the other underinclusive, were the only choices before the Court. Money damages could be awarded if the term "equitable relief" were read to mean "whatever relief a court of equity is empowered to provide in the particular case." The second alternative, and the one that Justice Scalia preferred, was to read the term to "refer to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."<sup>198</sup>

Reasoning that "'[e]quitable' relief must mean *something* less than *all* relief,"<sup>199</sup> Justice Scalia insisted that what Congress meant was relief other than monetary. Under this reading, monetary relief would still be available to a plaintiff participant or beneficiary in a claim for "benefits due" under section 502(a)(1), but not as "equitable relief" under section 502(a)(3), hence not for consequential injury beyond "benefits due." In support of this outcome, Justice Scalia invoked *Russell's* strictures against implying ERISA causes of action.<sup>200</sup> He dismissed the dissenters' emphasis on the importance of ERISA's trust-law prototype,<sup>201</sup> saying that "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text."<sup>202</sup> Justice Scalia did not, however, explain why his severely restrictive reading of "the words of [the] text" ought to be preferred over the more intuitive and inclusive meaning, that "appropriate equitable relief" in pension trust cases meant simply those forms of relief, including make-whole money damages, that are commonly awarded by courts of equity in trust cases.

### B. *How Mertens Erred*

Three connected flaws bedevil the reasoning in *Mertens*: Justice Scalia's premise that pre-fusion courts of equity did not award money damages to remedy equitable causes of action; his attempt to give meaning to the statutory term "appropriate equitable relief" by inventing the novel and unworkable category of "typically" equitable remedies; and his

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196. 1 Pomeroy, *supra* note 194, § 158, at 215.

197. *Id.*

198. *Mertens*, 508 U.S. at 256.

199. *Id.* at 258 n.8.

200. *Id.* at 254.

201. *Id.* at 265, 268 (White, J., dissenting).

202. *Id.* at 261

claim that because ERISA remedy law does not itemize money damages for consequential injury, the Court should infer that Congress intended to exclude such relief, even though such relief was routine in the trust remedy law that ERISA was federalizing.

1. *Money Damages in Equity*. — The premise is wrong that when pre-fusion equity courts awarded money damages they were awarding legal rather than equitable relief. An award of money damages is not only, as Justice Scalia wrote, a “classic form of *legal* relief,”<sup>203</sup> it is also a classic form of equitable relief. In particular, as I have emphasized above,<sup>204</sup> equity courts have constantly awarded money damages to remedy breach of trust, which is why the Uniform Trust Code of 2000 has recently codified the practice.<sup>205</sup> The *Restatement of Trusts* identifies among the “equitable remedies” of a trust beneficiary the power to “maintain a suit . . . to compel the trustee to redress a breach of trust.”<sup>206</sup> Money damages are the routine mode of redress.

Justice Scalia’s error on this point is so palpable that the Department of Labor has effectively dismissed his argument as internally incoherent. In recent litigation arising from the bankruptcy of Enron Corporation, the Department said: “Under the common law [of trusts], monetary relief from a *breaching fiduciary* was traditionally, typically, and *exclusively* available from the courts of equity, and is therefore ‘equitable’ under the reasoning of *Great-West*.”<sup>207</sup>

Part of what may have misled Justice Scalia is a terminological oddity. Damages in equity, especially for breach of trust, are sometimes called “surcharge.” The concept, evoking the days when English lawyers still spoke law French, is that the Chancellor grants monetary relief by a

203. *Id.* at 255.

204. *Supra* text accompanying notes 196–197.

205. “To remedy a breach of trust . . . the court may . . . compel the trustee to redress a breach of trust by paying money . . . .” Unif. Trust Code § 1001(b)(3) (amended 2001), 7C U.L.A. 221 (Supp. 2003).

206. Restatement (Second) of Trusts, *supra* note 11, § 199 (“Equitable Remedies of the Beneficiary”); *id.* § 199(c). The official comment to this subsection cross-references section 205, see text accompanying note 89, which makes the breaching trustee liable for loss caused, profit made, or profit foregone. Restatement (Second) of Trusts, *supra* note 11, § 199 cmt. c.

207. Amended Brief of the Secretary at Labor as Amicus Curiae Opposing the Motions to Dismiss at 51, *In re Enron Corp.*, No. MDL 1446, 2002 WL 32116900 (S.D. Tex. Mar. 28, 2002) [hereinafter Brief of the Secretary of Labor]. (Oddly, the lead signatory on the brief is Justice Scalia’s son, the Solicitor of Labor.) The passage quoted in text continues:

As stated in the Restatement of Trusts (one of the authoritative texts which *Great-West* urges courts to consult in determining whether relief is equitable), monetary relief against breaching fiduciaries is equitable when it restores the beneficiary to “the position [in which] he would have been if the trustee had not committed the breach of trust.”

*Id.* (citing Restatement (Second) of Trusts, *supra* note 11, § 205 cmt. a.) (I should disclose that I have served as an advisor on liability issues for a plaintiff class of 401(k) plan participants in this litigation.)

charge<sup>208</sup> on (*sur*) the account filed by the breaching trustee. Thus, it may once have been technically correct to say that damages were exclusively a common law remedy, but only because damages in equity were called surcharge. The terms are now synonyms for monetary relief.<sup>209</sup> Although the equity parlance has largely (but by no means entirely<sup>210</sup>) fallen into disuse in the United States, equity's ancient practice of awarding money damages to remedy breach of trust and other equitable causes of action abides.<sup>211</sup>

2. *The Concept of "Typically" Equitable is Indeterminate.* — Justice Scalia's notion of identifying certain "typically" equitable remedies that exhaust the congressional meaning has no basis either in the text of ERISA or in its legislative history. Not only was Justice Scalia wrong to exclude money damages from the meaning of "equitable relief," he was also wrong to suggest that the term had a more comprehensible meaning in "those categories of relief that were *typically* available in equity . . . such as injunction, mandamus, and restitution."<sup>212</sup>

In truth, the concept of "typically equitable" has no ascertainable meaning. Mandamus, Justice Scalia's first try at exemplifying the "typically equitable," was a bench writ issued by the court of King's Bench in England and by the equivalent American courts of common law, hence never within the province of courts of equity. "In England at the time of the American Revolution the use of the writ of *mandamus* as a remedy was as much a part of the common law as any other action."<sup>213</sup> Beyond man-

208. This concept finds an echo in the remedy provisions of the *Restatement of Trusts*, which make the breaching trustee "chargeable with" loss caused, profit made, or foregone profit. *Restatement (Second) of Trusts*, supra note 11, § 205.

209. "[T]he trustee is subject to surcharge if in breach of trust he invests trust funds in improper securities . . . . On the other hand, he is not subject to a surcharge for a breach of trust that results in no loss." 3 *Scott & Fratcher*, supra note 91, § 205, at 238-39.

210. The term is still known, both in case law and legislation. See, e.g., *In re Mailman Steam Carpet Cleaning Corp.*, 196 F.3d 1, 7 (1st Cir. 1999) (discussing role of surcharge in equitable remedies); *Kann v. Kann*, 690 A.2d 509, 520 (Md. 1997) (citing "equitable remedies" available to a trust beneficiary); see also 35 *Standard Pennsylvania Practice* 2d § 161:51, §§ 162:5, :35 (1998) ("A surcharge . . . is imposed to compensate beneficiaries for the loss caused by the fiduciary's want of due care. . . . The purpose of a surcharge of trustees is reimbursement for losses, not punishment of a fiduciary guilty of nonfeasance.").

211. Modern English law remains averse to using the term "damages" when awarding monetary compensation for breach of trust, preferring instead to speak of equitable compensation. See, e.g., John Mowbray et al., *Lewin on Trusts* § 39-02, at 1193-94 (17th ed. 2000); Philip H. Pettit, *Equity and the Law of Trusts* 503 (9th ed. 2001). However, the point is understood that equitable compensation "resembles common law damages in that it is awarded by way of compensation to the plaintiff for his loss." Pettit, supra, at 503.

212. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993).

213. [Elizabeth] Glendower Evans, *Jurisdiction in Mandamus in United States Courts*, 19 *Am. L. Rev.* 505, 506 (1885). "The legal right of the party to that which he demands in the writ must be clearly established, and . . . it must appear that there is no other specific *legal remedy* to which he can resort for the enforcement of his right." Horace G. Wood, *A Treatise on the Legal Remedies of Mandamus and Prohibition, Habeas Corpus, Certiorari, and Quo Warranto* 1 (Charles F. Bridge ed., 3d ed., Albany, W.C. Little & Co. 1896).

damus and injunction (for which the term “other appropriate equitable relief” was unneeded because section 502(a)(3) explicitly authorizes injunction earlier in the same sentence) Justice Scalia’s remaining example of a category “typically equitable” was restitution. In *Great-West* he would retreat from that pronouncement and recharacterize some restitution as legal rather than equitable; only an action seeking to fasten a constructive trust upon particular property was truly restitutionary, he would say.<sup>214</sup> Thus, two of the three categories of relief that Justice Scalia initially designated as “typically” equitable turn out to be wholly or partially atypical, and the third, injunction, is surplusage to the statutory language being construed because it is already expressly authorized.

Remarkably, Justice Scalia conceded that his preferred category of “typically equitable” in the pre-fusion sense was “unlikely.” He said: “As memories of the divided bench, and familiarity with its technical refinements, recede further into the past, the [Scalia-preferred meaning of remedies ‘typically’ equitable] becomes, perhaps, increasingly unlikely; but it remains a question of interpretation in each case which meaning is intended.”<sup>215</sup> Justice Scalia then chose the meaning he found “unlikely.”

3. *The “Specificity Myth”: Drawing a Negative Inference from Congress’s Failure to Itemize Details.* — I have discussed how the Court in *Russell* fell victim to what has been called the “specificity myth,” the notion that ERISA is so carefully and comprehensively drafted that details of practice not spelled out in the text should be treated as purposefully excluded by Congress.<sup>216</sup> Justice Scalia returned to this well in *Mertens* (and in *Great-West*, discussed below<sup>217</sup>), emphasizing<sup>218</sup> *Russell*’s depiction of the “six carefully integrated civil enforcement provisions”<sup>219</sup> of ERISA remedy law. From this premise, Justice Scalia then followed *Russell* in confusing the routine work of applying the statute with the suspect activity of implying a cause of action. “In *Russell* we emphasized our unwillingness to infer causes of action in the ERISA context, since that statute’s carefully crafted and detailed enforcement scheme provides ‘strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.’”<sup>220</sup>

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Regarding the origins of mandamus as an exclusively common law remedy in the practice of the court of King’s Bench, see Edith G. Henderson, Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century 46–82 (1963); see also D.C.M. Yardley, The Purpose of Mandamus in English Law, 4 *Jurid. Rev. (N.S.)* 1, 1–6 (1959) (reviewing English case law).

214. That saga is discussed *infra* text accompanying notes 234–246.

215. *Mertens*, 508 U.S. at 256–57.

216. See *supra* text accompanying notes 139 and 154–161.

217. See *infra* text accompanying notes 250–254.

218. He also invoked *Nachman*’s paean to this “‘comprehensive and reticulated statute.’” *Mertens*, 508 U.S. at 251 (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980)); see *supra* note 151 (discussing *Nachman*).

219. *Mertens*, 508 U.S. at 252 (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)).

220. *Id.* at 254 (quoting *Russell*, 473 U.S. at 146–47).

In discussing *Russell's* version of the specificity myth, I have pointed out that ERISA's procedure and remedy sections are riddled with major omissions that the courts have had to fill in, such as whether jury trial pertains, and what statute of limitations to use.<sup>221</sup> The poor drafting of ERISA's remedy provisions (in *Mertens* Justice Scalia called them "artless"<sup>222</sup>) is why the Court has found section 502(a) to pose such a divisive interpretive challenge. Justice Scalia invoked the supposed comprehensiveness of ERISA remedy law to justify his refusal in *Mertens* to confront ERISA's remedial purpose. He maintained that "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration."<sup>223</sup>

By treating relief for consequential injury as an excluded category that Congress must have disapproved by not specifically scheduling it, Justice Scalia closed off the Court from the trust law tradition on which ERISA's drafters relied to give meaning to their grant of "other appropriate equitable relief." Because both the substantive and the remedial provisions of ERISA arise from trust law, the likely meaning of "appropriate equitable relief" in ERISA is the panoply of remedies, specific and monetary, including make-whole damages for consequential injury, which courts of equity have for centuries applied to correct breaches of trust, and which are "other" than the "benefits due" and injunctive relief that the statute expressly authorizes earlier in section 502(a).

#### IV. GREAT-WEST

In *Great-West Life & Annuity Insurance Co. v. Knudson*,<sup>224</sup> decided in 2002, the confessedly "unlikely"<sup>225</sup> category of "typically equitable" that Justice Scalia invented in *Mertens* unraveled in his hands. We have seen that this supposed category was premised on two mistaken notions: (1) that when Congress enacted ERISA remedy law in 1974, it meant to revive the law/equity division that had caused such complexity before the Federal Rules fused the two systems in the 1930s; and (2) that in pre-fusion times there was a determinate category of remedies "that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages),"<sup>226</sup> hence that monetary recovery for consequential injury would fall outside the ambit of ERISA's equitable relief.

*Great-West* confronted Justice Scalia with a claim for a monetary recovery brought as a restitution action under section 502(a)(3). The case

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221. See *supra* text accompanying notes 154–161.

222. *Mertens*, 508 U.S. at 258 n.8.

223. *Id.* at 261–62 (citation omitted).

224. 534 U.S. 204 (2002). The account in text omits some extraneous facts: that *Great-West* unsuccessfully attempted to remove the state court tort action to federal court under ERISA, and that the defendants of record also included Janet Knudson's husband, whose employee health plan coverage entitled her to plan benefits. *Id.* at 207–08.

225. *Mertens*, 508 U.S. at 257 (Scalia, J.).

226. *Id.* at 256.

arose from an ERISA-covered health plan, under which the defendant, Janet Knudson, was a beneficiary. The plan contracted for health insurance with Great-West. The plan, as is common,<sup>227</sup> contained a subrogation clause conditioning the payment of benefits upon the beneficiary's granting to the plan "a first lien upon any recovery"<sup>228</sup> that the beneficiary might obtain from a third party for the sums paid under the plan. The plan assigned its rights under this provision to Great-West (a cost-reduction factor that Great-West would have taken into account when pricing the policy).<sup>229</sup> Knudson suffered severe injuries in an automobile accident, for which the plan paid \$411,157 in expenses.<sup>230</sup> Knudson subsequently settled a tort action arising from the accident for \$650,000, which her attorney negotiated in such a fashion that only \$13,828 was paid to Great-West.<sup>231</sup> Great-West sued under ERISA section 502(a)(3) to enforce the subrogation agreement, seeking injunctive relief to enforce restitution of the \$411,157. The Ninth Circuit,<sup>232</sup> attempting to obey *Mertens*, held that an action to recover benefit payments made under an ERISA plan "is not equitable relief and is not therefore authorized by § 502(a)(3)."<sup>233</sup> The Supreme Court affirmed in a 5-4 opinion by Justice Scalia.

#### A. *Decomposing the Law of Restitution*

Attempting to fit its case within the meaning of "typically equitable" that the Court had given in *Mertens*, Great-West characterized its subrogation claim as "equitable" on the ground<sup>234</sup> that the case was brought in restitution, to remedy the unjust enrichment consequent to Knudson's

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227. For an earlier Supreme Court entanglement with a subrogation clause in an ERISA plan, see *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), holding that ERISA preempted Pennsylvania's antishubrogation statute. State statutes of this sort are a favorite of the plaintiffs' tort bar, because they increase aggregate recoveries, allowing a plaintiff to recover twice for the same injury: once from the health insurer or health plan and again from the tortfeasor or its insurer.

228. *Great-West*, 534 U.S. at 207 (quoting the insurance policy language).

229. "[V]arious amici [in *Great-West*] warned the Court . . . [that] some programs may reduce their benefits if they are unable to enforce subrogation agreements. Others may increase their copayments and deductibles . . . ." Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 Ind. L.J. 223, 262 (2003) (citing briefs filed in *Great-West*).

230. Great-West paid all but the first \$75,000, for which the plan self-insured. *Great-West*, 534 U.S. at 207.

231. *Id.* at 207-08.

232. The District Court granted summary judgment to Knudson on the ground that since only \$13,828 of the settlement was said to be for medical expenses, the plan had recovered all it was entitled to. *Id.* at 208-09.

233. *Id.* at 209 (discussing Ninth Circuit holding).

234. In addition, Great-West contended that its case fell within the category of "equitable relief" because Great-West sought injunctive relief to enforce the subrogation claim, and injunction was a remedy that the Court in *Mertens* had recognized as "typically equitable." Justice Scalia brushed aside this claim, observing that "an injunction to compel the payment of money past due under a contract, or specific performance of a past due



behavior in dishonoring her subrogation obligation. Restitution was one of the three headings of "relief" that Justice Scalia in *Mertens* had itemized as "typically equitable" (the others were injunction and mandamus).

Alas, not all the modern law of restitution derives from equity. The American Law Institute effectively created the law of restitution in the *Restatement of Restitution* (1937), which integrated functionally overlapping rules that had developed as constructive trust in equity and as quasi-contract at common law. The fusion of law and equity made the law of restitution possible. The driving insight was that both quasi-contract and constructive trust rested on a common principle: remedying unjust enrichment. Procedural unification (fusion) animated doctrinal consolidation (restitution).<sup>235</sup> Thus, it was nearly as mistaken for Justice Scalia in *Mertens* to have placed restitution in his category of remedies that were "typically equitable" before fusion as it was for him to include mandamus, which had never pertained to the courts of equity. There was no law of restitution before fusion, only quasi-contract and constructive trust.

Continuing his insistence on denying monetary compensation as equitable relief under ERISA, Justice Scalia in *Great-West* had to backtrack on his position in *Mertens*.<sup>236</sup> He now declared that "not all relief falling under the rubric of restitution is available in equity. In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity."<sup>237</sup> Because *Great-West* was seeking "to impose personal liability on [Knudson] for a contractual obligation to pay money,"<sup>238</sup> its claim was "'quintessentially an action at law.'"<sup>239</sup> Pre-fusion, the claim would have been "considered legal because [it] sought 'to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money.'"<sup>240</sup> Thus, Justice Scalia resurrected the pre-fusion distinction between the sources of restitution, buried since the 1930s, in the name of congressional intent.

There is reason to think that Justice Scalia's disentangling of the legal and equitable strands of restitution may have been not only antiquarian but also wrong as applied to subrogation. The leading English trea-

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monetary obligation, was not typically available in equity." *Id.* at 210–11 (citations omitted).

235. I have recounted these developments in John H. Langbein, *The Later History of Restitution, in Restitution Past, Present and Future: Essays in Honour of Gareth Jones* 57, 57–62 (W.R. Cornish et al. eds., 1998).

236. Justice Scalia described his inconsistent remarks about the typically equitable nature of restitution in *Mertens* as "dicta," arguing: "Admittedly, our cases have not previously drawn this fine distinction between restitution at law and restitution in equity, but neither have they involved an issue to which the distinction was relevant." *Great-West*, 534 U.S. at 214–15.

237. *Id.* at 212.

238. *Id.* at 210.

239. *Id.* (quoting *Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan v. Wells*, 213 F.3d 398, 401 (7th Cir. 2000)).

240. *Id.* at 213 (quoting *Restatement of Restitution* § 160 cmt. a (1937)).

tise on restitution reviews the historic authorities, observing that “subrogation was known to the Chancellor in the seventeenth century” before the development of the law of quasi-contract at common law;<sup>241</sup> and that “the cases establish that subrogation arises independently of, and ‘not by force of,’ contract and will be granted if it is just and equitable to do so.”<sup>242</sup> Speaking of the subrogation rights of a surety who has paid the principal’s debt, the 1941 edition of Pomeroy’s treatise, on which Justice Scalia otherwise relied in *Mertens*,<sup>243</sup> observes: “The remedy of subrogation has been granted to sureties much more favorably and extensively by the American equity jurisprudence than by the English.”<sup>244</sup> The underlying principle, Pomeroy explains, is that “[b]y the fact of payment [on behalf of the principal debtor], the surety becomes an equitable assignee”<sup>245</sup> of the interests obtained by the principal debtor. “If, therefore, the creditor refuses to surrender up . . . securities [derived from the principal debtor], the surety may maintain an equitable suit to compel their assignment and surrender.”<sup>246</sup> Under this analysis, in the case of a health insurer such as Great-West that is subrogated to the insured’s tort recovery, the insurer would be the equitable assignee of the judgment proceeds.

### B. *Promoting Fraud*

Another basis for characterizing relief for subrogation as equitable under a pre-fusion standard is that it is directed to the prevention of fraud. “[I]n cases of fraud, the court of equity has a concurrent jurisdiction with the common law . . . .”<sup>247</sup> Knudson and her lawyer were defrauding the ERISA plan (and its assignee Great-West) when they structured the tort settlement to escape her obligation to reimburse the plan from the tort recovery as required under the plan’s subrogation clause. Justice Scalia did not confront the irony that his interpretation of “equitable” in ERISA section 502(a)(3) allowed Knudson to contravene the ancient maxim that equity will not allow a statute to be used as an instrument of fraud.<sup>248</sup> Because *Great-West* allowed the fraud, the danger for

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241. Robert Goff & Gareth Jones, *The Law of Restitution* § 3-004, at 123 (Gareth Jones ed., 6th ed. 2002).

242. *Id.* (citations omitted).

243. See *supra* text accompanying note 194.

244. 4 Pomeroy, *supra* note 194, § 1419, at 1074.

245. 4 *id.* at 1073.

246. *Id.*

247. *Colt v. Woollaston*, 2 P. Wms. 154, 156, 24 Eng. Rep. 679, 680 (Ch. 1723) (citation omitted). Chancery “has an undoubted jurisdiction to relieve against every species of fraud.” *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 125, 155, 28 Eng. Rep. 82, 100 (Ch. 1750) (Lord Hardwicke).

248. See generally L.A. Sheridan, *Fraud in Equity* 146–47 (1957).

the future is that ERISA remedy law will be treated as providing no relief even against fraud.<sup>249</sup>

### C. Persisting in the "Specificity Myth"

Drawing on the familiar language from *Russell* and his own opinion in *Mertens*, Justice Scalia premised his opinion in *Great-West* on the assertion that ERISA is so comprehensively drafted that the Court should treat the omission to deal with some detail of remedial practice as congressionally intended.<sup>250</sup>

*Great-West* was a particularly weak case in which to employ this line of reasoning, because the subrogation clause at issue, although integral to benefit plan funding and cost assumptions, was so remote from the aspects of pension and benefit plan administration that commanded congressional attention at the time of ERISA's enactment. The Court's suggestion in *Great-West* that ERISA's omission of precise instructions for dealing with the consequences of a subrogation clause in an employee benefit plan should be treated as an intentional omission has been addressed in an article by Professor Daniel Meltzer, who points out: "It is not only plausible but almost certain"<sup>251</sup> that Congress (in the language of *Russell* that Justice Scalia quoted in *Mertens*) "simply forgot to incorporate expressly"<sup>252</sup> provisions for dealing with the enforcement of such clauses. Since there is no evidence from the briefs or other sources that nonenforcement of plan subrogation clauses was a subject of discussion or interest group struggle at the time of the enactment of ERISA, Meltzer notes, there is no reason to think that enforcement of the plan term

249. In *Trustees of the AFTRA Health Fund v. Biondi*, the plan sued to recover against the participant for his fraud in processing substantial claims for his wife after divorcing her (the divorce made her ineligible to participate). 303 F.3d 765, 769–70 (7th Cir. 2002). The Seventh Circuit escaped *Great-West* (which went unmentioned) yet allowed the plan to recover the sums it expended on her by treating the fraud action as a claim under state law. *Id.* at 773–82. To reach that result, the court had to strain to refuse to apply ERISA's expansive preemption language, which suppresses state law that "relate[s] to" an ERISA-covered plan. See ERISA § 514(a), 29 U.S.C. § 1144(a) (2000); *supra* text accompanying notes 78–87. *Biondi* shows the ripple effect of the Supreme Court's unsatisfactory treatment of ERISA remedy law. The Seventh Circuit strained to reach a doubtful result on the preemption question in order to escape condoning fraud under ERISA.

250. Justice Scalia argued:

We have therefore been especially "reluctant to tamper with [the] enforcement scheme" embodied in the statute by extending remedies not specifically authorized by its text. Indeed, we have noted that ERISA's "carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'"

*Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (alteration in original) (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1995) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993))).

251. Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 Sup. Ct. Rev. 343, 350 (2003).

252. *Mertens*, 508 U.S. at 254 (quoting *Russell*, 473 U.S. at 146).

would upset some significant interest-group accommodation embedded in ERISA.<sup>253</sup> Hence, “[i]t is farfetched to claim that [refusing enforcement of the subrogation clause under ERISA] was intended by Congress, or furthers the purposes of Congress when it enacted the remedies it did in ERISA and preempted others; it is equally farfetched to claim that the result is desirable.”<sup>254</sup>

#### D. “Typically Equitable”

What is left of Justice Scalia’s category of “typically equitable” after *Great-West* turns out to be (1) injunction, for which Congress did not need to provide “other appropriate equitable relief” in section 502(a)(3), having already expressly authorized injunction earlier in the same sentence; and (2) restitution for cases that might have been brought as constructive trust actions before fusion. If ERISA’s drafters had meant to say constructive trust, one would think they would have said it directly, rather than calling it “other appropriate equitable relief.”

Another way to give meaning to the category of “typically equitable,” since both constructive trust and injunction are forms of specific remedy, would be to treat the category as authorizing only specific relief. Again the objection arises that if the drafters had meant to authorize only specific relief, they would have used that more precise term rather than “other appropriate equitable relief.”<sup>255</sup> Congress in fact did not limit relief to specific remedies; doing so would have had the counterproductive effect (now achieved as a result of misinterpretation in *Mertens* and *Great-West*) of denying make-whole monetary relief to the victims of ERISA-proscribed wrongdoing. American law across the twentieth century has strongly deemphasized the distinction between damages and specific relief,<sup>256</sup> a further reason for thinking it unlikely that Congress intended to resurrect the distinction, especially by means of language so hazy.

253. Meltzer, *supra* note 251, at 383–84. Justice Scalia had suggested such a “public choice” rationale in *Mertens*, where he wrote that ERISA was “an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests.” *Mertens*, 508 U.S. at 262.

254. Meltzer, *supra* note 251, at 383.

255. One passage in the report of the Senate Finance Committee, discussing the grant of “appropriate equitable relief,” does refer to constructive trust by way of exemplification: “Appropriate equitable relief may be granted in a civil action. For example, injunctions may be granted to prevent a violation of fiduciary duty, and a constructive trust may be imposed on the plan assets . . .” S. Rep. No. 93-383, at 105 (1974), reprinted in 1974 U.S.C.C.A.N. 4890, 4989.

256. Douglas Laycock’s notable work, based on a study of 1,400 cases, has documented that monetary and specific relief have become substitutes routinely available at the option of the prevailing party. He shows that the irreparable injury rule, which used to restrict access to specific remedies to cases in which damages were inadequate, has ceased to bind. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 Harv. L. Rev. 687 (1990); see also Douglas Laycock, *The Death of the Irreparable Injury Rule* (Oxford Univ. Press 1991).

Justice Scalia's reasoning in *Great-West* is at its weakest in defending the disinterring of pre-fusion distinctions. Congress mandated that pension plans take the form of trusts, and Congress intended to "apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries."<sup>257</sup> Yet under Justice Scalia's reasoning, merely by using the term "appropriate equitable relief" Congress devised a remedial law for ERISA that would disallow make-whole monetary relief for consequential injury of the sort characteristic of trust law.

Justice Ginsburg's dissent (in which Justices Breyer, Stevens, and Souter joined) observes that "it is plain that Congress made no such 'choice.'"<sup>258</sup> She points out that the historic law/equity distinctions "were hardly at the fingertips of those who enacted § 502(a)(3)."<sup>259</sup> To the contrary, "By 1974, when ERISA became law, the 'days of the divided bench' were a fading memory, for that era had ended nearly 40 years earlier with the advent of the Federal Rules of Civil Procedure."<sup>260</sup> Justice Scalia's answer was to reiterate his error in *Mertens*, insisting that fidelity to the statutory text requires "adverting to the differences between law and equity to which the statute refers."<sup>261</sup> I have explained above<sup>262</sup> why the statute's reference to "equitable relief" ought not to be read to dictate this "unlikely"<sup>263</sup> result.

Justice Stevens objected in a separate dissent that it was hard to understand why Congress would have wanted to unwind the fusion of law and equity in ERISA remedy matters. Justice Scalia responded with the soldier's lament<sup>264</sup> that the Supreme Court's job was not to wonder why: "It is . . . not our job to find reasons for what Congress has plainly done . . . ."<sup>265</sup> As I have shown in Part I of this Article, what Congress was doing when it authorized "appropriate equitable relief" for a regime of federalized trust law was tracking trust remedy law, which routinely gives the monetary relief for consequential injury that the majority in *Great-West* refused. It was Justice Scalia, or rather, the five-member Supreme Court majority assembled for his opinions, and not Congress, which gave the term the unnatural and dysfunctional meaning propounded in *Mertens* and *Great-West*.

Until *Great-West*, some courts had strained to grant consequential relief despite the holding in *Mertens* by characterizing the relief as restitu-

257. H.R. Conf. Rep. No. 93-1280, at 295 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5076 (emphasis added); see *supra* text accompanying note 77.

258. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 224 (2002).

259. *Id.*

260. *Id.* at 224-25.

261. *Id.* at 217.

262. *Supra* text accompanying notes 203-223.

263. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 257 (1993) (Scalia, J.).

264. Justice Stevens remarked that Justice Scalia's response to his dissent "echoes Tennyson's poem about the Light Brigade—'Theirs not to reason why, Theirs but to do and die.'" *Great-West*, 534 U.S. at 223 n.3 (Stevens, J., dissenting).

265. *Id.* at 217.

tion—for example, by treating as restitutionary the recovery of interest on a benefit payment long delayed.<sup>266</sup> *Great-West* will probably foreclose that sort of labeling exercise, but the newly endorsed distinction between quasi-contract and constructive trust has already begun to invite moves that remind us of the pleading maneuvers of the days before the Federal Rules. For example, in a case much like *Great-West*, the subrogee obtained an injunction directing the participant to hold the settlement proceeds in a separate fund, in order to facilitate equitable tracing and thus a claim for constructive trust.<sup>267</sup> The Fourth Circuit has enforced a subrogation agreement on the ground that it creates an equitable lien.<sup>268</sup> Indeed, it has been suggested that if such maneuvers are successful, *Great-West* may spawn a new and ugly wave of ERISA litigation—by the subrogated plan or its assignee against the injured tort victim. Plan fiduciaries may be advised that ERISA places them under a fiduciary obligation to their plans to bring such lawsuits against their injured members early in the benefits payment process, in order to lay the basis for injunctive or other nominally equitable relief.<sup>269</sup>

#### CONCLUSION

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. Such cases usually involve the wrongdoer's breach of ERISA's trust-based fiduciary law. Consistent with the congressional design to "apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries,"<sup>270</sup> the drafters of ERISA replicated the main principles of trust remedy law in section 502(a)(1)–(3). According to the Scalia-led majorities in *Mertens* and *Great-West*, however, Congress actually wanted to impair the fiduciary law it was creating in ERISA, by disaffirming the principle of make-whole relief that enables trust remedy law to vindicate trust fiduciary law fully. Furthermore, Congress chose to implement this design surreptitiously, by creating a remedy law that authorizes what a normal reader would think to be the opposite of "appropriate equitable relief."

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266. *Dunnigan v. Metro. Life Ins. Co.*, 277 F.3d 223, 229–30 (2d Cir. 2002); accord *Fotta v. Trs. of the United Mine Workers*, 165 F.3d 209, 213 (3d Cir. 1998).

267. *Varco v. Lapsis*, 172 F. Supp. 2d 985 (N.D. Ill. 2001); Robert N. Eccles & David F. Gordon, *Great-West Life—The First 100 Days*, 10 ERISA Litig. Rep., Apr. 2002, at 3 (discussing *Varco*).

268. *Wal-Mart Stores Inc. v. Carpenter*, 36 Fed. Appx. 80, 82 (4th Cir. 2002) (unpublished opinion).

269. Andrea L. Ben-Yosef, 2002 Court Report, 30 BNA Pension & Benefits Rep. 101, 102 (2003) (reporting views of Anthony Shelley, Washington, D.C., benefits counsel).

270. H.R. Conf. Rep. No. 93-1280, at 295 (1974), reprinted in 1974 U.S.C.A.N. 5038, 5076.

In this Article I have explained why this "unlikely"<sup>271</sup> reading of ERISA section 502(a)(3) is mistaken, and why the trust-law principles embodied in ERISA substantive law were also meant to shape ERISA remedy law. I have located the beginnings of the Supreme Court's trail of error in *Russell*, where the Court asserted the premise, reiterated in *Mertens* and *Great-West*, that ERISA's remedy provisions are so comprehensive that any feature of remedy law not expressly detailed in the statutory text should be treated as one that Congress deliberately omitted. This confused line of reasoning treats the normal work of applying statutory terms as though it were an effort to import extrastatutory terms. In contrast to the provisions of ERISA that authorize the precise step of injunction, the authorization in section 502(a)(3) of "other appropriate equitable relief" (the term construed in *Russell*, *Mertens*, and *Great-West*) does not describe a particular remedy. When Congress uses such conceptual language, Congress necessarily intends for the courts to interpret it—to supply the specifics. Interpreting is applying, not implying.

Both Justice Scalia's linguistic interpretation of the word "equitable" in section 502(a)(3) and the purposive interpretation preferred in this article are textualist. The dispute is about how to respect the text—to read one word in isolation from the text or to read that word in functional relation to the text. Justice Scalia was begging the question when he dismissed "vague notions of a statute's 'basic purpose'" as "inadequate to overcome the words of its text."<sup>272</sup> Seeking to understand a statute's purpose is the time-honored technique for deciding what the drafters meant when using a word that can have different meanings.<sup>273</sup> Justice Scalia was wrong to assert in *Great-West*: "It is . . . not [the Court's] job to find reasons for what Congress has plainly done . . ."<sup>274</sup> In contending that the meaning of the word "equitable" in ERISA section 502(a)(3) is "plainly" evident without regard to its context in the rest of the statute, Justice Scalia falls victim to the "plain meaning" fallacy that Wigmore discredited so long ago. Commenting on the interpretation of documents, Wigmore spoke of the "truth . . . that words *always* need interpreta-

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271. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 257 (1993) (Scalia, J.).

272. *Id.* at 261.

273. For example, the Uniform Law Commissioners' Model Statutory Construction Act provides that when a statutory provision admits of more than one meaning, the court "may consider . . . (1) the object sought to be attained; (2) the circumstances under which the statute was enacted; (3) the legislative history; (4) the common law . . . including laws upon the same or similar subjects; [and] (5) the consequences of a particular construction." Unif. Law Comm'rs' Model Statutory Constr. Act § 15, 14 U.L.A. 406 (1990). Regarding the pervasiveness of ambiguity in statutory texts, see 2A Norman J. Singer, *Statutes and Statutory Construction* § 45:02, at 12–14 (6th ed. 2000), cautioning that an opinion insisting that a term is "clear and unambiguous" may conceal an interpretation resting "on the basis of the judge's own uninstructed and unrationalized impression of [the term's] meaning."

274. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217 (2002).

tion,”<sup>275</sup> hence that the plain meaning “is simply the meaning of the people who did *not* write the document.”<sup>276</sup>

The Court’s neglect of the trust principles that should be guiding it is evident in the very language it has used to frame the problem. Beginning with *Russell*, the Court has referred to consequential damages by the pejorative “extracontractual.” This term causes make-whole relief, which is routine in trust law, to sound undeserved (“extra”). Because Congress subjected plan administration to a statutory version of trust fiduciary law, the label of “contract” mischaracterizes the legal relations arising from ERISA, which (as the Court has repeatedly emphasized in other settings<sup>277</sup>) sound in trust.

The main damage to ERISA remedy law was done in the Court’s decision in *Mertens*, which construed “appropriate equitable relief” in section 502(a)(3) to preclude monetary damages for consequential injury on the ground that such relief was not “typical” of pre-fusion equity.<sup>278</sup> I have explained why this holding entails a triple error: (1) make-whole monetary relief always was and remains routine in trust and other fields of equity; (2) there is no support for the suggestion that Congress intended the “unlikely” step of reviving pre-fusion equity practice; and (3) the suggestion that what Congress intended by its language was a category of “typically equitable” remedies is not only without foundation in the text or legislative history, but has unraveled in the application as well.

The blunder that invited these errors was Justice Scalia’s confusion in *Mertens* about the distinction between equitable jurisdiction and equitable relief. He rightly noted that equity courts had jurisdiction in some circumstances to award money damages in common law cases. His mistake was to infer that since “[m]oney damages are . . . the classic form of legal relief,”<sup>279</sup> when equity courts awarded money damages they were always awarding legal relief. That point is flatly wrong. Equity courts also awarded damages (sometimes called surcharge) as equitable relief in cases that were exclusively equitable, above all in breach of trust cases. As the Department of Labor has said, citing the *Restatement of Trusts*, in the pending Enron litigation discussed above, “monetary relief from a *breaching fiduciary* was traditionally, typically, and *exclusively* available from the courts of equity.”<sup>280</sup> The Uniform Trust Code, codifying the *Restatement of Trusts*, confirms this enduring tradition, providing that “the court

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275. 9 John H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* § 2470, at 227 (3d ed. 1940).

276. *Id.* § 2462, at 191.

277. *Varity Corp. v. Howe*, 516 U.S. 489, 496–97 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989); *Cent. States, S.E. & S.W. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985).

278. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256–58 (1993).

279. *Id.* at 255.

280. Brief of the Secretary of Labor, *supra* note 207, at 51; see *supra* text accompanying note 207.



may . . . compel the trustee to redress a breach of trust by paying money."<sup>281</sup>

*Great-West* revealed the futility of Justice Scalia's attempt in *Mertens* to identify a category of "typically equitable" remedies that could be attributed to congressional intent. His list of such remedies consisted of injunction, mandamus, and restitution. Mandamus was wrong from the beginning, and in *Great-West* he had to subject restitution to the judicial equivalent of a manufacturer's recall. For no reason other than fidelity to a confessedly "unlikely" interpretation of Congress's grant of "appropriate equitable relief," he found himself attempting to unravel one of the great American achievements of private law, the unification of the law of unjust enrichment. According to Justice Scalia, Congress meant its grant of "other appropriate equitable relief" to decompose the law of restitution and to revive the vanished distinction between quasi-contract and constructive trust.

This senseless result underscores Justice Scalia's inability to answer the question raised in *Mertens* of why Congress should have wanted to restore the pre-fusion law/equity distinction. In truth, the category of "typically equitable," Justice Scalia's invention in *Mertens*, is neither found in nor fairly derived from the statutory text. To blame Congress, as Justice Scalia did,<sup>282</sup> for interpretive choices that are the work of the Court is disingenuous. The Supreme Court's job is to give reasons for what the Court does, and better reasons than were given in *Russell*, *Mertens*, and *Great-West*.

The Supreme Court needs to confess its error in ERISA remedy law, much as it has recently confronted its mishandling of ERISA preemption,<sup>283</sup> and to realign ERISA remedy law with the trust remedial tradition that Congress intended in the grant of "appropriate equitable relief." It was error to say that mandamus was an equitable remedy; mandamus was always legal and never equitable. It was error to say that money damages never lay for equitable causes of action; our courts award damages for breach of trust and for other equitable causes of action every day. It was error to say that a Congress sitting in 1974 meant to unravel forty years of fusion of law and equity, solely by employing the benign sounding word "equitable" when authorizing "appropriate equitable relief." It was error to confuse the routine judicial work of applying so abstract a term as "appropriate equitable relief" with the forbidden activity of implying omitted statutory provisions. Congress federalized the law of pension and benefit plan administration for the primary purpose of protecting plan participants and beneficiaries through a triple regime of mandatory trusteeship,

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281. Unif. Trust Code § 1001(b)(3) (amended 2001), 7C U.L.A. 221 (Supp. 2003).

282. "It is . . . not our job to find reasons for what Congress has plainly done . . . ." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217 (2002).

283. See *supra* text accompanying notes 81-84.

extensive fiduciary duties, and commensurate remedies. Those remedies, all derived from the make-whole tradition of the law of trusts, sound exclusively in equity and include money damages for consequential injury.