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Some Thoughts on "Healthism" and Employee Benefits in the Age of Trump

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SOME THOUGHTS ON “HEALTHISM” AND EMPLOYEE BENEFITS IN THE AGE OF TRUMP

Brendan S. Maher*

TABLE OF CONTENTS

I. INTRODUCTION	296
II. HIDDEN DANGERS IN THE AGE OF PRESIDENT TRUMP	296
III. HEALTHISM AND EMPLOYEE BENEFITS	301
<i>A. Fragility</i>	309
<i>B. Opacity</i>	311

* Professor, Robert D. Paul Scholar, and Director of Insurance Law Center, University of Connecticut School of Law; J.D., Harvard Law School; A.B., Stanford University.

I. INTRODUCTION

I look forward to the publication of *HEALTHISM: HEALTH STATUS DISCRIMINATION AND THE LAW* (hereinafter *Healthism*), by Jessica L. Roberts of the University of Houston Law Center and Elizabeth Weeks Leonard of the University of Georgia Law School.

On November 4, 2016, at the invitation of Professors Roberts and Weeks, I participated in a conference in which the discussants commented on Roberts and Weeks' forthcoming book and shared thoughts about the relevance of that work to various related fields. What follows here is somewhat different than those comments—although the general themes are the same—and is so in part because, four days after the conference, Donald J. Trump was, contrary to the predictions of virtually all knowledgeable observers,¹ elected the 45th president of the United States.

As I explain in more detail below, I am concerned that the Trump Administration will distract scholars from continuing important work they have begun, and, relatedly, from fully engaging with the works of other scholars that deserve attention. Roberts and Weeks' novel is such a work, and one that has already, through the process of scholarly engagement, evolved in promising directions that should continue, even after the book's publication. Although I cannot say I agree with every argument the book makes, I would be incredibly disappointed and discouraged if this provocative and conversation-starting book did not receive the attention, praise, and criticism it clearly deserves merely because the nation elected to its highest office a person as singularly outlandish and attention-consuming as our 45th president.²

II. HIDDEN DANGERS IN THE AGE OF PRESIDENT TRUMP

The election of Donald J. Trump—and the tumultuous

1. Maya Rhodan & David Johnson, *Here are 7 Electoral College Predictions for Tuesday*, *TIME* (Nov. 8, 2016), <http://time.com/4561625/electoral-college-predictions/> [<https://perma.cc/QNY9-3GDM>].

2. I do not consider myself particularly political and am not a political expert. But the election of President Trump was so system-jarring that ignoring it seems a strange choice. While Donald Trump was not the person I had hoped would become President, now that he is, I continue to hope that my worst fears about President Trump will turn out to be wrong, and that he will use his considerable talents to improve, rather than ruin, our great but imperfect nation.

beginnings of his Administration—seems to have overshadowed everything else in the room. Little about his campaign or conduct gave any of the nearly 66 million citizens who voted for his opponent³ any confidence that he would act in the interests of all Americans, or even within the traditional bounds of presidential propriety. The first days of the Trump Administration aggravated, rather than assuaged, those concerns.

President Trump opened his term with a bizarre falsehood and tantrum: he lied about the size of his inauguration crowd, an assertion easily disprovable by publicly available photographs, which the press quickly pointed out.⁴ President Trump, infuriated, ordered his then Press Secretary, Sean Spicer, to conduct an impromptu press conference during which Spicer (1) took no questions, (2) berated the press for reporting the truth, and (3) repeated the demonstrably falsity about crowd size in response to the press's coverage.⁵ Still unhappy about his popular vote defeat, President Trump also continued to insist that the three to five million votes cast for Hillary Clinton to win her the majority were fraudulent or otherwise illegal, an assertion that is completely unsubstantiated and for which there is no colorable evidence.⁶ A few days later, President Trump insulted the Mexican administration enough that the Mexican president, Enrique Peña Nieto, cancelled a previously planned

3. President Trump lost the popular vote by nearly three million votes, a fact which has prompted him “to falsely claim that millions of unauthorized immigrants had robbed him of a popular vote majority.” Michael D. Shear & Emmarie Huettelman, *Trump Repeats Lie About Popular Vote in Meeting With Lawmakers*, N.Y. TIMES, A1 (Jan. 24, 2017).

4. Elle Hunt, *Trump's Inauguration Crowd: Sean Spicer's Claims Versus the Evidence*, THE GUARDIAN (Jan. 22, 2017), <https://www.theguardian.com/us-news/2017/jan/22/trump-inauguration-crowd-sean-spicers-claims-versus-the-evidence> [<https://perma.cc/5LS9-KCRF>].

5. *Id.* See also Chris Cilliza, *Sean Spicer Held a Press Conference. He Didn't Take Questions. Or Tell The Whole Truth*, WASH. POST, (Jan. 21, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/21/sean-spicer-held-a-press-conference-he-didnt-take-questions-or-tell-the-whole-truth> [<https://perma.cc/B633-5P67>] (describing the conference and Spicer's refusal to take questions). Of course, President Trump's general obsession with size is well-known. As a candidate, he bristled at sniggering remarks about his small hands, which urban legend holds is a proxy for the size of a man's genitals. Stung by a primary rival's joke about his hands (and thus his penis), Trump felt compelled to “guarantee” the audience, in a nationally televised presidential debate, that he there was “no problem” with the size of his sexual organ. Gregory Krieg, *Donald Trump Defends Size of His Penis*, CNN (Mar. 4, 2016), <http://www.cnn.com/2016/03/03/politics/donald-trump-small-hands-marco-rubio/> [<https://perma.cc/N8VV-HD7M>].

6. See Shear & Huettelman, *supra* note 3.

trip,⁷ shouted at and hung up on the Prime Minister of Australia,⁸ and appeared to express the belief that Frederick Douglass—the former slave and abolitionist titan who died in 1895—was still alive.⁹

While the president spoke favorably of Mr. Douglass,¹⁰ his solicitude for activism did not extend to today’s protesters, who the president referred to as “[p]rofessional anarchists, thugs[,] and paid protesters.”¹¹ In addition to virtually every other thing that President Trump has done, including alleged housing discrimination in the 1970s¹² and disparaging civil rights hero John Lewis,¹³ his recent actions suggest that Douglass, were he alive, would not welcome the President’s endorsement. Nor is the President’s assertion that the protesters are paid true.¹⁴ Rather, it is a canard invented and promoted by various fringe sites.¹⁵

The new President’s actions were, for many, even more discouraging than his words. Most infamously, President Trump

7. Daniella Diaz, *Mexican President Cancels Meeting with Trump*, CNN (Jan. 27, 2017), <http://www.cnn.com/2017/01/25/politics/mexico-president-donald-trump-enrique-pena-nieto-border-wall/> [<https://perma.cc/B4Z6-EHJY>].

8. Joe Tacopino, *Trump Blasted Australian Prime Minister During ‘Worst Call By Far’*, N.Y. POST (Feb. 1, 2017), <http://nypost.com/2017/02/01/trump-blasted-australian-prime-minister-during-worst-call-by-far/> [<https://perma.cc/3EEK-8888>].

9. *Question of the Day: Does Trump Think Frederick Douglass is Still Alive?*, PASTE MAGAZINE (Feb. 1, 2017) <https://www.pastemagazine.com/articles/2017/02/question-of-the-day-does-trump-think-frederick-dou.html> [<https://perma.cc/S4Z7-J6NY>].

10. *Id.*

11. @realDonaldTrump, TWITTER (Feb. 3, 2017, 3:48 AM) <https://twitter.com/realDonaldTrump/status/827483841589891073> [<https://perma.cc/BN2P-3BDU>].

12. In 1973, the Justice Department sued Donald Trump for violating the Fair Housing Act in connection with Trump’s refusing to rent dwellings and negotiate for the rental of dwellings with persons because of race and color. Michael Kranish and Robert O’Harrow Jr., *Inside the Government’s Racial Bias Case Against Donald Trump’s Company, and How He Fought It*, WASH. POST (Jan. 23, 2016), https://www.washingtonpost.com/politics/inside-the-governments-racial-bias-case-against-donald-trumps-company-and-how-he-fought-it/2016/01/23/fb90163e-bf11e5-bcda-62a36b394160_story.html [<https://perma.cc/S6HX-684E>]. Donald Trump settled the case without an admission of guilt. *Id.*

13. Cleve R. Wootson, Jr., *In Feud With John Lewis, Donald Trump Attacked ‘One of the Most Respected People in America’*, WASH. POST (Jan. 15, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/15/in-feud-with-john-lewis-donald-trump-attacked-one-of-the-most-respected-people-in-america/> [<https://perma.cc/T8TV-KDNN>].

14. Dan Evon, *Demand Protest*, SNOPE (Jan. 18, 2017), <http://www.snopes.com/paid-protesters-donald-trumps-inauguration/> [<https://perma.cc/8YLD-FBGG>].

15. *Id.*

issued an executive order targeting immigrants from seven Muslim-majority nations¹⁶ that (1) apparently resulted from a phone call to former New York City mayor Rudy Giuliani about how the Trump Administration might implement a “Muslim Ban,”¹⁷ (2) led to his acting Attorney General refusing to enforce it,¹⁸ (3) resulted in spontaneous nationwide protests,¹⁹ (4) inexplicably barred green-card holders from entering the United States,²⁰ and (5) resulted in the one-hour detention of the former Prime Minister of Norway because he had visited Iran, one of the banned countries.²¹ The Executive Order was immediately (and at least temporarily) successfully challenged in Federal Court,²² after which the President directly attacked the legitimacy of the judge who enjoined the ban, James L. Robart—a Republican nominated judge who was unanimously confirmed by the Senate.²³

The above instances are only a sampling of the preposterous things President Trump did in the first month of his presidency; it does not even reach policy decisions that are wrong within

16. Exec. Order No.13, 769, Protecting the Nation From Foreign Terrorist Entry Into the United States, 83 Fed. Reg. 8,977 (Feb. 1, 2017).

17. Amy Wang, *Trump Asked For a ‘Muslim Ban,’ Giuliani Says — and Ordered A Commission to Do It ‘Legally’*, WASH. POST (Jan. 29, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/> [<https://perma.cc/4WDL-P3WH>].

18. Jordan Fabian, *Trump Fires Acting AG for Refusing to Defend Travel Ban*, THE HILL (Jan. 30, 2017) <http://thehill.com/homenews/administration/317018-trump-fires-acting-ag-for-refusing-to-defend-travel-ban> [<https://perma.cc/2JCV-4ZCK>].

19. Emanuella Grinberg & Madison Park, *2nd Day of Protests Over Trump’s Immigration Policies*, CNN (Jan. 30, 2017, 1:42 AM) <http://www.cnn.com/2017/01/29/politics/us-immigration-protests/> [<https://perma.cc/78W7-WFYW>].

20. Dan Merica, *How Trump’s Travel Ban Affects Green Card Holders and Dual Citizens*, CNN (Jan. 29, 2017), <http://www.cnn.com/2017/01/29/politics/donald-trump-travel-ban-green-card-dual-citizens/> [<https://perma.cc/PUQ6-GAW8>].

21. Nadia Khomani, *Former Norway PM Held at Washington Airport Over 2014 Visit to Iran*, THE GUARDIAN (Feb. 3, 2017, 8:36 PM), <https://www.theguardian.com/us-news/2017/feb/03/former-norway-pm-bondevik-held-washington-dulles-airport-2014-visit-iran> [<https://perma.cc/8DS2-M7QU>].

22. *State of Washington v. Donald J. Trump, et al.*, Case No. C17-0141JLR, Doc. 52 (W.D. Wash. 2017). The court issued a TRO, which was immediately appealed to the Ninth Circuit Court of appeals. By the time this essay is published, surely the case will have been resolved, and the Trump Administration may very well prevail.

23. On Twitter, President Trump “denigrated Judge Robart as a ‘so-called judge’ and described the judge’s order as ‘ridiculous.’” Thomas Fuller, *‘So-Called’ Judge Criticized by Trump Is Known as a Mainstream Republican*, N.Y. TIMES (Feb. 5, 2017), <https://www.nytimes.com/2017/02/04/us/james-robart-judge-trump-ban-seattle.html> [<https://perma.cc/MR96-LNML>]. Robart was nominated by George W. Bush and confirmed 99-0 by the Senate. *Id.*

normal parameters. Bad decisions unaccompanied by a media frenzy or that do not pose a direct threat to the Republic have received only modest attention. An early example of this is President Trump's delay in implementing a federal regulation that required financial investment advisors to act in the best interests of their clients, rather than themselves.²⁴ This rule—which the Department of Labor (DOL) had worked on for over six years—was intended to ensure that financial advisors could not take advantage of their customers.²⁵ It is one that Democrats and Republicans certainly may, in the normal course, disagree over. However, the rule affects the management of trillions of dollars, and given the nation's use of 401(k) accounts as the primary mechanism for funding retirement,²⁶ is a rule of massive long-term consequence. Nonetheless, the distinct feeling I get is that the issue has gotten vastly less coverage than it would have gotten in a “normal” administration, such as, for example, a Kasich or Rubio administration.

Now, certainly the primary danger is that the President and his Administration will take actions that will either permanently damage the country or undermine the rule of law and democracy itself.²⁷ That is true of any administration, but the Trump Administration in particular presents the most acute risk in modern American history. As a result, even the most somber of observers are right to watch carefully for catastrophe or creeping autocracy. At present, the saying, “when there is a fire in the room, the first priority must be ensuring that it does not burn everything down,” seems particularly relevant.

That said, it would be truly terrible if yet another negative consequence of “Trumpism” was that careful, difficult, and nuanced scholarly work might get much less attention than it would in calmer times. Scholars often have important ideas that take years, if not decades, before some version of that idea

24. DONALD J. TRUMP, PRESIDENTIAL MEMORANDUM ON FIDUCIARY DUTY RULE (Feb. 3, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule> [https://perma.cc/9YUQ-NBB5].

25. Kevin Liptak, *Trump to take steps rolling back financial regulations*, CNN (Feb. 3, 2017, 2:36 PM), <http://www.cnn.com/2017/02/03/politics/trump-financial-executive-actions/> [https://perma.cc/FNB8-WZWF].

26. *DOL Fiduciary Rule Explained As Of July 5th, 2017*, INVESTOPEDIA (July 5, 2017, 10:45 AM), <http://www.investopedia.com/updates/dol-fiduciary-rule/> [https://perma.cc/MAF3-CDSF].

27. David Frum, *How to Build an Autocracy*, THE ATLANTIC (March 2017), <https://www.theatlantic.com/magazine/archive/2017/03/how-to-build-an-autocracy/513872/> [https://perma.cc/L3D2-EJJA]. Frum is a former speechwriter of President George W. Bush.

becomes regularly accepted by the public. Those ideas are less likely to be ready for mainstream consumption if they have not been vigorously developed through natural scholarly processes—which require time, attention, engagement, critique, and iteration.

Roberts and Weeks' *Healthism* is a book that advances and develops an interesting and subtle idea: that we should be mindful, in writing and in applying laws, about discriminating against people based on their health status.²⁸ Not all discrimination is bad, but clearly some is, and our notions of justice and optimality will look different if we understand and internalize that idea. Roberts and Weeks have already evolved the idea of “healthism” in their respective writings, and it will continue to evolve as the coming book exposes more individuals to the core set of principles that animates the theory.²⁹ However, it will only do so if people are free to pay attention and engage in constructive debate. I hope, in spite of the Trump Administration, that they do.

III. HEALTHISM AND EMPLOYEE BENEFITS

Health statuses vary amongst people. Sometimes those with certain health statuses are discriminated against, and such health discrimination is either justified or it is not.³⁰ Roberts and Weeks' theory of “healthism” identifies health discrimination as a commonly occurring practice throughout modern society and modern law (including, in reference to employment, insurance, health-care access, reproductive technology, and the judicial system).³¹ Beyond cataloguing its pervasiveness, Roberts and Weeks offer an approach for determining when health status discrimination is undesirable,³² such as when it results in a systematic, normative wrong.³³ Determining what types of health discrimination result in

28. JESSICA ROBERTS & ELIZABETH WEEKS, *HEALTHISM: HEALTH STATUS DISCRIMINATION AND THE LAW* (Cambridge U. Press, forthcoming 2017).

29. See Jessica L. Roberts, *Healthism and the Law of Employment Discrimination*, 99 IOWA L. REV. 571 (2014); Jessica L. Roberts & Elizabeth Weeks Leonard, *What Is (and Isn't) Healthism?*, 50 GA. L. REV. 833, 850 (2016).

30. Julianne Cheek, *Healthism: A New Conservatism?*, 18 QUALITATIVE HEALTH RESEARCH 974, 974 (2008).

31. ROBERTS & WEEKS, *supra* note 28.

32. *Id.*

33. *Id.*

normative wrongs and what types do not is,³⁴ as Roberts and Weeks acknowledge, a challenging task and one that will continue to evolve.³⁵ In fact, Roberts and Weeks readily concede that some health discrimination is salutary.³⁶

Whatever the conceptual challenges of defining unambiguously and comprehensively the elements of undesirable healthism, Roberts and Weeks' book shows how pervasive health discrimination is generally,³⁷ how frequently health discrimination leads to normative wrongs,³⁸ and how much of the latter conduct nonetheless escapes legal sanction.³⁹ Put slightly differently, if we imagine health discrimination as either justified or unjustified, for far too long people have assumed that the former category dwarfs the latter. Roberts and Weeks upend this assumption and propose how the law might respond.⁴⁰

The classic example of healthism, advanced by Roberts several years ago, is obesity.⁴¹ Obesity is a health status that "tends to correlate with poor health" and may affect an employer's group premium or a worker's productivity.⁴² Yet permitting employers to discriminate on the basis of obesity in connection with employment decisions is likely to have meaningful undesirable consequences, such as disparately impacting already disadvantaged groups, perpetuating existing socioeconomic health disparities, and contributing to social stigmas directed at heavier people.⁴³

Roberts and Weeks point out in their book that people who have medical conditions, such as diabetes, that highly correlate with, and sometimes are the result of obesity,⁴⁴ *are* protected by the Americans with Disabilities Act (ADA).⁴⁵ A disability is a mental or physical impairment that must substantially limit the ability to perform one major life activity.⁴⁶ Diabetes qualifies,

34. *Id.*

35. *Id.*

36. *Id.*

37. ROBERTS & WEEKS, *supra* note 28.

38. *Id.*

39. *Id.*

40. *Id.*

41. *See generally* Roberts, *supra* note 29.

42. ROBERTS & WEEKS, *supra* note 28.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

and thus, one cannot refuse to hire or fire a person merely because they have diabetes.⁴⁷ Being obese, however, is generally not protected under the ADA because “courts have been reluctant to hold that obesity meets the legal definition of disability.”⁴⁸ In turn, this leads to an odd result: an individual can be fired for having a pre-condition, like obesity, that could, but has not yet, lead to a disability like diabetes, however, one cannot be fired once the disability has manifested itself.⁴⁹

While there are other ways to explain this curious result, Roberts and Weeks’ work reminds us that we should not be so quick to accept the consequences without scrutiny.⁵⁰ There is demonstrable judicial reluctance to interpret the ADA and other federal statutes to protect against obesity—either by refusing to categorize it as a disability or otherwise.⁵¹ This may be because few have thought carefully about the presumption that obesity or another health status is a “bad” characteristic that does not deserve protection unless it is *conjoined* with some other characteristic the law already protects.⁵² The contrary notion, that health status *alone* should deserve protection unless there is a very good reason not to protect it against discriminatory conduct,⁵³ is a keen insight and one that, while not persuasive in every instance, has opened up fertile ground for scholars and reformers to engage and debate for social and legal reform.⁵⁴

One of my own areas of expertise is employee benefits, and Roberts and Weeks’ work shares important commonalities that intersect with both benefit scholarship and the themes that animate reform discussions therein.⁵⁵ The field of employee benefits is not particularly accessible to outsiders.⁵⁶ The technicalities and jargon particular in the field are described below.

The central statute in the world of employee benefits is the Employee Retirement Income Security Act of 1974 (ERISA).⁵⁷

47. See Roberts & Weeks, *supra* note 29, at 858-59.

48. ROBERTS & WEEKS, *supra* note 28.

49. Roberts & Weeks, *supra* note 29, at 852.

50. Roberts, *supra* note 29, at 594.

51. See Roberts & Weeks, *supra* note 29, at 858-59.

52. *Id.*

53. *Id.* at 861-62.

54. *Id.* at 855-59.

55. *Id.* at 844.

56. *Id.* at 906-07.

57. *Health Plans & Benefits: ERISA*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/topic/health-plans/erisa> [https://perma.cc/Y6BB-6CCA]

The enduring perspicacity of Greek myths, which continue to offer insight almost three millennia after they were first uttered by itinerant storytellers seeking hot meals on a breezy archipelago, draw on similar parallels as ERISA. Apposite are the Gorgons, who were terrifying creatures feared by all sensible persons.⁵⁸ Medusa, the most famous Gorgon, was particularly fearsome.⁵⁹ She was part snake and part human, and had poisonous blood and a gaze that could petrify those who dared stare upon her.⁶⁰ ERISA has a similar terrifying reputation.⁶¹ Most avoid the law because there are significant casualties, and the successful ones try not to directly contemplate its depth.⁶² Our engagement here will be mercifully brief.

ERISA was enacted because of Congressional concern about something *other* than health insurance—pensions.⁶³ Indeed, Congress spent years studying the failures of the private pension system and considered ERISA to primarily be a “pension bill of rights.”⁶⁴ That said, while pensions were the primary focus of its attention, the statute was written to be all-encompassing in two important ways.

First, ERISA covers all manners of employee benefits.⁶⁵

(last visited May 2, 2017).

58. *Medusa in Myth and Literary History*, MOD. AM. POETRY, http://www.english.illinois.edu/maps/poets/a_fbogan/medusamyth.htm [<https://perma.cc/Q2L6-P9BN>] (last visited Feb. 27, 2017).

59. *Id.*

60. *Id.*

61. *Once an ERISA Plan, Always an ERISA Plan?*, AM. B. ASS'N SEC. OF LAB. & EMP. L., http://www.americanbar.org/content/newsletter/groups/labor_law/ebc_newsletter/14_sum_ebc_news/erisa.html [<https://perma.cc/JH8C-BMK8>] (last visited Feb. 27, 2017).

62. As I never tire of telling my students or the unlucky few who read my articles, ERISA is so boring that it contributed to Justice Souter's decision to retire from the Supreme Court. Jess Bravin & Greg Hitt, *Justice Souter to Retire from Court*, WALL STREET J. (May 1, 2009), <https://www.wsj.com/articles/SB124114676548376235> [<https://perma.cc/22RZ-P9M7>] (noting that one Justice Souter preferred retirement over having to adjudicate “numbingly technical cases involving applications of pension or benefits law”). Roberts and Leonard thus cheekily, but rightly, describe ERISA as “striking fear in the hearts of lawyers and putting judges to sleep for over forty years.” ROBERTS & WEEKS, *supra* note 28.

63. *History of EBSA and ERISA*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa> [<https://perma.cc/YG6H-N9C5>] (last visited May 2, 2017).

64. 120 Cong. Rec. S1537, S15743 (1974) (statement of Sen. Javits); Dana M. Muir, *Plant Closings and ERISA's Noninterference Provision*, 36 BOS. C. L. REV. 201, 231-33 (1995).

65. Patrick Purcell & Jennifer Staman, *CRS Report for Congress: Summary of the Employee Retirement Income Security Act (ERISA)*, CONG. RES. SERV. (April 10,

Benefits are simply a form of deferred compensation the employer promises the employee; the benefit bargain is the deal the employer and the employee strike concerning the terms of the benefit.⁶⁶ In ERISA parlance, all benefit bargains must be embodied in the form of a “plan,” which is both the sum of bargain terms and an entity that can sue or be sued.⁶⁷ Plans are either pension plans or welfare plans.⁶⁸ Welfare plans include all plans that provide, *among others*, health insurance.⁶⁹

In contrast to pension plans, which Congress regulated in great detail, Congress engaged very little in substantive regulation of welfare plans.⁷⁰ Thus, while all ERISA plans, including welfare plans, are subject to important procedural rules,⁷¹ all those managing the plan’s affairs are subject to strict duties.⁷² However, the *content* of welfare plans is largely unregulated,⁷³ and, like all ERISA plans, no employer is required to offer a plan at all.⁷⁴ Congress did not highly regulate health benefit plans because there did not seem to be a pressing need to do so in 1974 when ERISA was enacted. That pressing need arose later, and no one has ever accused Congress of having great foresight.

Second, ERISA includes one of the broadest preemption provisions written into a federal statute.⁷⁵ Although the moving parts of ERISA preemption have proved challenging in practice, they can be summarized into a basic structure. As an initial matter, Congress provided that “any and all State laws insofar as they may now or hereafter relate to any employee benefit

2008), <https://digital.library.unt.edu/ark:/67531/metadc822611/m1/1/> [<https://perma.cc/T428-PWBU>].

66. See Brendan S. Maher, *The Benefits of Opt-in Federalism*, 52 B.C. L. REV. 1733, 1742-43 (2011) (explaining the benefit bargain).

67. Purcell & Staman, *supra* note 65.

68. 29 U.S.C. § 1002(1)-(2)(A) (2012) (defining pension plans and welfare plans).

69. Welfare plans are those plans “established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services[.]” *Id.*

70. PETER WIEDENBECK, *ERISA: PRINCIPLES OF EMPLOYEE BENEFIT LAW* 12-13 (Oxford U. Press 2010).

71. Purcell & Staman, *supra* note 65.

72. *Id.*

73. WIEDENBECK, *supra* note 70, at 12-13.

74. Purcell & Staman, *supra* note 65.

75. *Id.*

plan” were preempted.⁷⁶ That clause is restricted by ERISA’s savings clause, which exempts state insurance, securities, and banking laws from preemption protection.⁷⁷ However, to avoid states labeling benefit plans as insurers and regulating them through the savings clause, ERISA includes a “deemer clause,” which bars states from directly regulating employee benefit plans.⁷⁸ In addition to preemption under Section 1144, some state laws are preempted under conflict preemption, namely, laws that are incompatible with ERISA or its objectives.⁷⁹

The result of this unusual statutory confluence—broad preemption and little content regulation—means the states’ authority to impose salutary content regulation of health insurance is quite limited.⁸⁰ While many states used ERISA’s savings clause to enact mandated benefits laws that applied to insurance companies that sold policies to plans,⁸¹ even that approach faced a limit. Large plans, and even small plans using stop-loss insurance, are able to self-insure by promising to pay employees medical benefits themselves.⁸² Because of the “deemer clause,” even state laws cannot regulate such self-insured plans.⁸³

The healthism consequence is that, with respect to the provision of benefits, the states’ ability to protect against discrimination on health-status grounds is profoundly limited.⁸⁴ The state must find a prohibition against the discrimination under ERISA itself or under some other federal law.⁸⁵ While ERISA does have a section aimed at barring interference with the attainment of any right one has under an ERISA plan or

76. 29 U.S.C. § 1144(a) (2012).

77. 29 U.S.C. § 1144(b)(2)(A) (2012).

78. Edward Alburo Morrissey, *Deem and Deemer: ERISA Preemption under the Deemer Clause as Applied to Employer Health Care Plans with Stop-Loss Insurance*, 23 J. LEGIS. 307, 316 (1997).

79. *Rush Prudential HMO Inc. v. Moran*, 536 U.S. 355, 387 (2002) (explaining that even saved laws would fall to ERISA conflict preemption).

80. Morrissey, *supra* note 78, at 316.

81. Robert S. McDonough, *ERISA Preemption of State Mandated-Provider Laws*, 1985 DUKE L. J. 1194, 1216 (1985).

82. Brendan S. Maher & Radha A. Pathak, *Enough About the Constitution: How States Can Regulate Health Insurance Under the ACA*, 31 YALE L. & POL’Y REV. 275, 289-90 (2013) (explaining self-insurance limit on state power).

83. 29 U.S.C. § 1144(b)(2)(A) (2012).

84. O’Neill Institute, *Insurance Discrimination on the Basis of Health Status: An Overview of Discrimination Practices, Federal Law, and Federal Reform Options - Executive Summary*, 37 J. L. MED. & ETHICS 101, 120 (2009).

85. 29 C.F.R. 2590.702(b)(1) (2012).

ERISA generally,⁸⁶ that provision has proved difficult for plaintiffs to obtain relief.⁸⁷ The general rule is that the alleged discrimination by the employer must have been taken with the “specific intent” of interfering with a beneficiary’s ERISA benefits.⁸⁸ No relief is available where “the loss of pension benefits was a mere consequence of, but not a motivating factor behind, the termination of benefits.”⁸⁹

Proving an intentional discrimination claim under ERISA is difficult in practice. Virtually all such claims depend on circumstantial evidence, as opposed to direct statements, that courts evaluate under a three-part test set forth in *McDonnell Douglas Corp. v. Green*.⁹⁰ First, the plaintiff makes a prima facie case, showing that her discharge was intentional to interfere with the attainment of benefits.⁹¹ In the face of such a showing, the defendant has the burden of showing there was a valid, nondiscriminatory reason for the plaintiff’s dismissal.⁹² If the defendant satisfies this burden, the plaintiff must show by a preponderance of evidence that the legitimate reasons offered by the defendant were merely pre-textual.⁹³ In other words, as the law of ERISA is currently understood, dismissal for being overweight is only actionable incidentally because ERISA would only protect an employee’s health status if it inextricably connected to an employer’s termination decision. An employer’s decision to fire someone would have to be motivated by the desire to deny an employee some or all the benefits the employee otherwise was entitled to receive.⁹⁴ Indeed, if being overweight or some other health status had some arguably negative effect on productivity or performance, it could serve as grounds for concluding that Section 510 was *not* violated. Any effort of

86. 29 U.S.C. §1140 (2012).

87. *See, e.g.*, *Teutscher v. Woodson*, 835 F.3d 936, 957 (9th Cir. 2016).

88. *See, e.g.*, *Barbour v. Dynamics Research Group*, 63 F.3d 32 (1st Cir. 1995) (holding the relevant question is whether an employment action was taken with “specific intent” to interfere with benefits); *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir. 1987) (same).

89. *Ethridge v. Harbor House Rest.*, 861 F.2d 1389 (9th Cir. 1988).

90. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (This was not an ERISA case, but the test is used in connection with Section 1140 claims).

91. *Id.*

92. *Id.*

93. *Id.*

94. *See, e.g.*, Emily Seymour Costin, *Interference with Protected Rights, in ERISA LITIGATION*, n. 91 (5th ed. 2014) (eds. Zanglien, Frolic, and Stabile) (citing cases holding that dismissal for poor performance is legitimate grounds for firing that does not run afoul of section 1140).

states to change this would likely be explicitly preempted by Section 1144 or conflict preempted.

The current law of employee benefits is thus not particularly welcoming to Roberts and Weeks' project. Moreover, given the pitched battles that routinely occur at the Supreme Court over even the smallest interpretative issue concerning ERISA,⁹⁵ as a practical matter, benefit law may be a latecomer to any healthist revolution. That said, Roberts and Leonards' work implicates some more general themes about the wisdom of employment-based systems—implications that may not be a necessary consequence of their work. Like much valuable scholarship, the healthist argument makes more readily apparent fault lines in thinking in other fields.⁹⁶

Although Americans are intimately familiar with receiving important benefits—namely retirement plans and health insurance⁹⁷—through the workplace, the theoretical underpinnings of employment benefits mechanisms are rarely discussed explicitly. In recent work, I have explained that employment benefits mechanisms should be conceived of as a species of regulatory intervention with identifiable qualities.⁹⁸ A

95. Since 2004 alone, the Supreme Court has decided seventeen ERISA cases. See *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936 (2016); *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016); *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015); *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014); *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604 (2013); *U.S. Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013); *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011); *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242 (2010); *Conkright v. Frommert*, 559 U.S. 506 (2010); *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285 (2009); *Metro. Life Ins. v. Glenn*, 554 U.S. 105 (2008); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008); *Beck v. Pace Int'l Union*, 551 U.S. 96 (2007); *Sereboff v. Mid Atlantic Med. Servs., Inc.*, 547 U.S. 356 (2006); *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004); *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004); and *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1 (2004).

96. Roberts & Weeks, *supra* note 29, at 908.

97. Roughly 150 million and 60 million people receive EB health and retirement benefits, respectively. See CONG. BUDGET OFFICE, CBO AND JCT'S ESTIMATES OF THE EFFECTS OF THE AFFORDABLE CARE ACT ON THE NUMBER OF PEOPLE OBTAINING EMPLOYMENT-BASED HEALTH INSURANCE tbl.2 (2012), https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/03-15-ACA_and_Insurance_2.pdf [<https://perma.cc/XK5C-599C>] (estimating that over 150 million people would receive EB insurance in 2012); Craig Copeland, *Employment-Based Retirement Plan Participation: Geographic Differences and Trends*, 2012, EMP. BENEFIT RES. INST. 1 (Nov. 2013), http://www.ebri.org/pdf/briefspdf/EBRI_IB_011-13.No392.Particip.pdf [<https://perma.cc/5MKL-ETMV>] (indicating that there were 61.6 million beneficiaries of EB retirement benefits in 2012).

98. See generally Brendan S. Maher, *Regulating Employment-Based Anything*, 100 MINN. L. REV. 1257 (2016) [hereinafter *REBA*].

rough sketch of a portion of that view follows.

Some goods are widely believed to be socially desirable, which include “those goods for which there is broad agreement that society is better off if most individuals have or are able to obtain them.”⁹⁹ For those goods, prevention of market failures is of particular concern to the government.¹⁰⁰ If, for example, the market fails to make a sufficient amount of that good available at an affordable price, fails to produce that good at sufficient quality, or fails to distribute that good equitably, the government may consider intervening in the market to make things right.¹⁰¹ One form of intervention—an employment benefits intervention—is to regulate, through both regulatory incentives and prohibitions, labor deals involving the good.¹⁰²

Importantly, when considering whether an employment benefits intervention makes sense, an individual must be mindful of two comparisons: (1) whether it improves the world relative to no intervention, and (2) whether it improves the world relative to some other form of intervention.¹⁰³ Frequently, employment benefits interventions are defended on the grounds that they improve the world relative to no intervention,¹⁰⁴ and while that is often true, it avoids the question of whether the government has a less intrusive alternative.¹⁰⁵ Moreover, with respect to employment benefits interventions, although the force of the justifications vary depending on the particular good, certain advantages and disadvantages will recur across goods and implementing statutes.¹⁰⁶ I will discuss two of those recurring features here: (1) fragility and (2) opacity.

A. Fragility

First, employment benefits systems can be regulatorily fragile.¹⁰⁷ Employers are not generally in the business of providing benefits,¹⁰⁸ although many have started doing so to

99. Examples include “[e]ducation, health care, home mortgages, pensions, and life insurance.” *Id.*

100. *Id.*

101. *Id.* at 1276-77.

102. *Id.*

103. *Id.* at 1286.

104. Maher, *supra* note 98, at 1286.

105. *Id.*

106. *Id.* at 1287.

107. *Id.* at 1303-05.

108. *Id.* at 1261.

please labor markets and attract or keep valuable workers. However, the more burdensome or costly it is to provide benefits, the more likely it is that employers will stop offering that benefit.¹⁰⁹ Regulation more protective of beneficiaries is, almost by definition, more costly to the employer, and thus, regulators seeking to enact more protective legislation will face a countervailing threat from employers, namely that employers will refuse to provide benefits if they are regulated too strictly.¹¹⁰ Not only is the threat credible—because employers exist to sell goods and services, not to serve as a platform for benefit distribution—but it becomes more credible as the unregulated market *worsens*.

Consider ERISA and health insurance. Insurance markets are different than regular service markets. Insurance is a risk contract, and to properly price a risk contract the insurer must accurately assess the probability and size of expected payouts for a given insured person.¹¹¹ However, asymmetric information and adverse selection make this process difficult. First, there is often a difference between the true risk an insured person poses and the risk the insurer can ascertain based on the insured's observable qualities.¹¹² Second, the people most likely to seek health insurance are those who have a higher probability of needing it.¹¹³ In such circumstances, the chance that an insurer will underprice policies is high, which leads either to the insurer not offering policies in the future or raising prices. Raising prices, however, drives away the better risks, for whom a higher premium is not justified, and makes the insurer's pool smaller.¹¹⁴ The ultimate consequence could be no insurance

109. Cf. Paul M. Secunda & Brendan S. Maher, *Pension De-Risking*, 93 WASH. U. L. REV. 733, 754 (2016) (making the argument in the pension setting).

110. *Id.*

111. Ari Mwachofi & Assaf F. Al-Assaf, *Health Care Market Deviations from the Ideal Market*, 11 SQU MED. J. 328 (2011).

112. Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE L. J. 1223, 1223-24 (2004) (explaining asymmetric information in insurance markets). As Siegelman's famous article points out, however, sometimes informational asymmetries and information processing disparities can help insurers, in the form of "propitious selection." *Id.* at 1226.

113. *Id.* at 1226 n. 9 (citing *EEOC: Interim Guidance on Application of ADA to Health Insurance*, 8 LAB. REL. REP. (BNA) No. 724, at 405:7121 (June 8, 1993), which defines adverse selection as the "tendency of people who represent poorer-than-average health risks to apply for and/or retain health insurance to a greater extent than people who represent average or above average health risks.").

114. Siegelman, *supra* note 112, at 1254.

market at all—the “death spiral”¹¹⁵—or one in which affordable policies are offered to only a small number of people who are clearly good risks.¹¹⁶

Compared to individual policies, group policies fare much better.¹¹⁷ Insurance offered through the workplace—in which the insurable unit is the group—is a means to provide insurance to group members who, on their own, would be unable to obtain affordable insurance.¹¹⁸ Thus, in the United States, unless one is poor (Medicaid) or elderly (Medicare), employment benefits insurance is essentially the only way to reliably obtain health insurance.¹¹⁹ The reality is that employers, regulators, and judges are aware this problem. Correspondingly, legal rules, such as those that protect employees or beneficiaries, that make it more costly or burdensome for employers to offer health insurance put regulators and judges in a bind.¹²⁰ Strong rules that lead to employers dropping health insurance could result in many employees being unable to obtain insurance at all.¹²¹ Therefore, I predict that legal rules concerning employment benefits health insurance would be particularly solicitous to employers. Consequently, under ERISA, they have been.

B. Opacity

Another problem with employment benefits systems is the confusion about who is paying for what, and who deserves socially desirable goods.¹²² First, as economists have long explained, employees in the form of foregone wages pay for benefits.¹²³ An employer who provides benefits is not paying for them out of his own pocket as a gratuity; the employer is offering

115. *Id.*

116. *Id.* at 1236 (explaining how “normal theoretical conclusions about the optimality—and even the existence—of a competitive market equilibrium can fail in the presence of asymmetric information.”). See also Jonathan Gruber, *Covering the Uninsured in the United States*, 46 J. ECON. LITERATURE 571, 574-77 (2008) (describing flaws in individual markets).

117. “Adverse selection risks decline to the extent an insurer can insure a group bound together by some commonality other than an interest in obtaining health insurance—for example, the same employer, the same geographical region, or the same church.” Maher, *supra* note 66, at 1770.

118. *Id.* at 1767-68.

119. Gruber, *supra* note 116, at 573.

120. Secunda & Maher *supra* note 109, at 754.

121. *Id.*

122. See REBA, *supra* note 98, at 1305-07.

123. *Id.* at 1306.

them as non-wage compensation, in return for labor.¹²⁴ Yet the public often appears to believe benefits are paid for by the employer and gifted to the employee. This sort of confusion makes honest reform discussions very difficult. Second, the nation relies so heavily on employment benefits systems that it may have led some to believe that an individual only *deserves* health insurance if that individual has a job that offers it. While that is not true—as readily apparent once the assumption is examined—to the extent that employment benefits approaches spread soft moral indictments like the foregoing, that is a reason to be concerned about their use.

I do not think that the problems of fragility and opacity are ones that receive sufficient attention when considering employment benefits systems.¹²⁵ Others, such as the fact that employment benefits systems do not reach the unemployed¹²⁶ or are subject to employer manipulation,¹²⁷ receive more attention. That is not to say fragility and opacity are more concerning than all other employment benefits problems, but merely that in the normal course they are often not considered to be problems worthy of discussion at all. Perhaps, in the myopic nature of many scholars, I cannot help but see a commonality in Roberts and Leonards' work.

We can all agree that certain types of discrimination—such as discrimination based on race or disability—are particularly pernicious and must be dealt with first. It may very well be that some health statuses intersect with other protected classes with sufficient frequency that people with those health statuses are protected against discrimination. But—even assuming that is true, and it does not seem to be, it still seems like something is being overlooked. Discriminating against those with a certain health status, even if there is no overlap with another already protected characteristic or class, can have undesirable consequences that, like fragility and opacity in employment benefits systems, observers often discount or ignore. At a

124. *Id.*

125. One way to avoid both problems is to cut employers out of the picture and simply regulate the relationship between consumers and the providers of a given socially desirable good. Directly regulating the provider is in effect, is what the ACA's exchanges do: the socially desirable good, health insurance, is sold in a regulated, subsidized market, which includes regulations not just about the content of the good, but also regulations that make the purchase of such goods intelligible to regular consumers. *See generally id.* at 1316-19.

126. *Id.* at 1320.

127. *Id.* at 1313.

minimum, permitting discrimination on health status leads to social stigmatization that, merely by the operation of subconscious bias, could result in an individual's indisputably good qualities—such as being diligent and capable at their jobs—being overlooked. Admittedly, legal rules that prohibit discrimination may impose high costs that encourage us to forego the laws and risk stigmatizing groups of people. However, that argument is weakened if carefully-crafted legal rules can easily avoid the undesirable consequences stemming from laws that prohibit discrimination based on health status.¹²⁸

To be sure, I do not claim a necessary connection between the flaws of employment benefits systems and healthism, and I realize that much scholarly work adduces previously unrecognized shortcomings in our thinking. That said, in this commentary I am not only sharing general thoughts on Roberts and Leonards' book, but I am sharing thoughts that reading their work prompted me, an employee benefits theorist,¹²⁹ to have.

It is with great interest that I look forward to the publication of *Healthism*, and to Roberts and Leonards' continuing work on the subject.

128. For example, with respect to smoking, Roberts and Weeks acknowledge the possibility that smokers might have higher rates of absenteeism or other undesirable job performance effects. See Roberts, *supra* note 29, at 898. But they point out that such evidence is mixed, and that discriminating against smokers in the job market could have larger effects society deems undesirable, including reducing the likelihood that smokers will get access to the care they need, and disparately disfavoring historically disadvantaged groups. *Id.* Legal rules that can reduce the incidence of nicotine use without those negatives are more attractive and worthy of scholarly attention.

129. I prefer to describe myself as an "employee benefits theorist." Many of my colleagues prefer to describe me as an "employee benefits nerd." But I am assured they do so out of love, which is why I send them, as a holiday gift, whatever scholarship on employee benefits I have completed in the previous year.