The Limits of Textualism: *Cooper v IBM Personal Pension Plan*

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INTRODUCTION

Few judges are as self-conscious of, or as open about, their view of statutory interpretation as Frank Easterbrook. He is a leading proponent of the view that judges should apply statutes in accordance with their terms, without giving in to the temptation to surreptitiously amend those statutes to better accord with their alleged "purpose."[1] Such "boosting the level of generality—switching from rules to results," he contends, oversteps the bounds of the judicial role.[2] This theory of statutory interpretation stems in part from Judge Easterbrook's belief that it is impossible to discern the "intent" of a collective body such as a legislature,[3] and in part from his conviction that most legislation results from compromises, and "compromises lack purposes."[4] Thus, he exalts the Supreme Court's decision in *Guidry v Sheet Metal Workers National Pension Fund*,[5] finding that the anti-alienation clause of Employee Retirement Income Security Act of 1974[6] (ERISA) protected the pension rights of a pension fund trustee against monetary claims made by victims of his embezzlement.[7] And indeed, many of his opinions resound with the rhetoric of "textualism." Yet, determined as Judge Easterbrook is to make his decisions seem so straightforward as to be beneath him, they sometimes depend more than he is willing to admit on nontextual "purposive" analysis. A case in point is his opinion in *Cooper v IBM Personal Pension Plan*,[8]

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1 See Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 Okla L Rev 1, 13 (2004).

2 See id ("The result can't be called interpretation at all, and if there was no delegation to the judiciary then the result can't be called legitimate.").

3 See id ("The [legislative] body differs from the sponsors, and the body as a whole just votes.").

4 Id.

5 493 US 365 (1990).

6 Employee Retirement Income Security Act of 1974, Pub L No 93-406, 88 Stat 829, codified as amended at 29 USC § 1001 et seq.

7 See Easterbrook, 57 Okla L Rev at 14 (cited in note 1) (applauding the Court's decision "to enforce the rule and to rebuff efforts at generalization and reconstruction").

8 457 F3d 636 (7th Cir 2006), cert denied, 549 US 1175 (2007).

dealing with cash balance pension plans. An examination of his opinion in that case illustrates one limitation of textual analysis.

It is impossible to understand what Judge Easterbrook did (and did not do) in *Cooper* without a basic understanding of the legal framework surrounding qualified pension plans. Part I provides a brief history of ERISA and the role played by cash balance plans in that history. Part II lays out the interpretive dispute at issue in *Cooper*. Part III critiques Judge Easterbrook's opinion in the case, showing how his decision strayed into his forbidden territory of "purposive" analysis. Part IV explains the dysfunctional agency and legislative background of the statutory provision at issue in the case. Part V concludes with a discussion of the implications of such dysfunction for a believer in textualism.

I. The Origins of the Cash Balance Controversy: The Move Away from Traditional Pensions

ERISA was Congress's response to a series of pension scandals. ERISA included statutes codified under Title 29 of the US Code, relating to labor, and Title 26, relating to taxes. Many of ERISA's substantive provisions appear under both titles, as most ERISA-qualified plans also qualify for substantial tax benefits. Interpretation of the statute, and the many amendments made to it, falls within the ambit of three regulatory authorities: the Secretary of Labor, the Equal Opportunity Employment Commission (EEOC), and the Secretary of the Treasury. These authorities have worked together to produce a single set of regulations and rulings for each topic, though the issuing agency may differ depending on the topic.

ERISA establishes two general types of employer-sponsored plans: defined benefit plans and defined contribution plans.[9] The two types of plans are subject to similar, but by no means identical, restrictions.[10] For example, funds set aside under defined benefit plans are subject to much more extensive investment regulation than are those set aside under defined contribution plans.[11] Opportunities for pre-retirement

9 See John H. Langbein, Susan J. Stabile, and Bruce A. Wolk, *Pension and Employee Benefit Law* 40 (Foundation 4th ed 2006). Another term for "defined contribution plans" is "individual account plans." 29 USC § 1002(34).

10 See Langbein, Stabile, and Wolk, *Pension and Employee Benefit Law* at 44 (cited in note 9) ("Neither the funding rules of ERISA Title 1, Part 3, nor the plan insurance scheme of Title 4 apply to DC plans.").

11 See Regina T. Jefferson, *Rethinking the Risk of Defined Contribution Plans*, 4 Fla Tax Rev 607, 614–15 (2000) (describing the differences).

distributions differ.[12] Some, but not all, of the differences found in the statutory regime flow from the different characteristics of the plans.

Defined benefit plans guarantee participating employees a specified benefit at retirement.[13] The archetypal defined benefit plan is the "final pay plan,"[14] which promises participants a retirement annuity equal to a certain percentage of their final cash salary.[15] Although an employer sponsoring such a plan must set aside money during its employees' working years in a pension trust for payment of such benefits, if the trust's assets prove insufficient to pay the promised benefits, the employer remains liable for the shortfall; it is required to add the additional funds necessary to pay the promised benefits out of current earnings or accumulated assets.[16] The employer, rather than its employees, thus bears the investment risk under a defined benefit plan.[17]

Defined contribution plans, by contrast, require employers only to contribute specific amounts of money to the retirement account maintained on behalf of each participating employee;[18] an employee becomes entitled to the balance contained in his or her account upon retirement.[19] This balance consists of accumulated employer contributions and any investment earnings (minus the investment losses) earned with respect to those contributions.[20] Employees may have some control over how to invest the funds contained in their retire-

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12 See id at 615.

13 See Langbein, Stabile, and Wolk, *Pension and Employee Benefit Law* at 43 (cited in note 9).

14 There are, however, many other types of defined benefit plans. See, for example, id.

15 The percentage typically is tied to the number of years the employee worked for the employer prior to retirement. See Edward A. Zelinsky, *The Cash Balance Controversy*, 19 Va Tax Rev 683, 687 (2000). Although it was by far the most popular plan at the time ERISA was enacted, most private employers have since moved to other types of pension plans. See Ed Emerman and Steve Arnoff, *Large Employers Slow Changes to Retirement Plans, Watson Wyatt Finds* (2008), online at http://www.watsonwyatt.com/us/news/press.asp?ID=19101 (visited Mar 16, 2010) (noting that in 1985, eighty-nine of Fortune 100 companies maintained a traditional defined benefit plan but by 2007, only fifty-four maintained any type of defined benefit plan, twenty-eight maintained traditional plans, and twenty-six maintained hybrid plans); Richard A. Ippolito, *Tenuous Property Rights: The Unraveling of Defined Benefit Contracts in the US*, in Onorato Castellino and Elsa Fornero, eds, *Pension Policy in an Integrating Europe* 175, 175 (Edward Elgar 2003) (reporting that defined benefit plans covered 85 percent of private sector employees in the early 1980s but that percentage dropped to less than 40 percent by 2000).

16 See Langbein, Stabile, and Wolk, *Pension and Employee Benefit Law* at 43 (cited in note 9).

17 See id. The government also bears some of the investment risk, as sponsors of defined benefit plans are required to purchase insurance from the quasi-governmental Pension Benefit Guarantee Corporation to guarantee participants' benefits. Id at 224–27 (explaining the "coverage and characteristics of the plan termination insurance program," guaranteeing payment of "all nonforfeitable benefits" up to an inflation-indexed cap).

18 Zelinsky, 19 Va Tax Rev at 691–92 (cited in note 15).

19 See id at 692.

20 See id (explaining that an employee receiving a $2,000 employer contribution "is not guaranteed the ultimate amount to which this $2,000 contribution will grow by retirement via investment earnings nor is there any limit to which this contribution may burgeon via such earnings").

ment accounts, so defined contribution arrangements often closely resemble Individual Retirement Accounts (IRAs), with employers playing a supportive, administrative role.[21] Employees rather than employers bear investment risks under defined contribution plans.[22] Employers sponsoring defined contribution plans do not have to make up for any unexpected shortfall in investment earnings on contributed assets, even if that shortfall leaves the participant financially unprepared for retirement.[23] The archetypal defined contribution plan is the 401(k) plan, under which employees direct (within limits) both the percentage of their cash salary to be diverted to the retirement account and the investment strategy for the funds so diverted. Although most employer-provided pensions at the time ERISA was enacted in 1974 were defined benefit plans, the overwhelming majority of plans created from the 1980s onward were varieties of defined contribution plans.[24]

Cash balance pension plans, the plans at issue in the *Cooper* case, are "hybrid" plans that combine features of both categories of tax-qualified pension plans.[25] Technically, cash balance plans are "defined benefit plans," because the sponsoring employer guarantees payment of a determinable retirement benefit and sets aside funds for the pay-

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21 This supportive role involves limited fiduciary responsibilities. The sponsoring employer must provide employees with "an opportunity to choose, from a broad range of investment alternatives," as defined in Department of Labor regulations. See 29 CFR § 2550.404c-1(b). The exact contours of employers' duties with respect to the initial choice and continued oversight of such investment options remain to be fleshed out by litigation or further regulatory action. For those interested in the topic, which is beyond the scope of this Essay, see, for example, *Braden v Wal-Mart Stores, Inc*, 588 F3d 585, 589 (8th Cir 2009); *Hecker v Deere & Co*, 556 F3d 575, 584–87 (7th Cir 2009), rehearing denied, 569 F3d 708 (7th Cir 2009), cert denied, 130 S Ct 1141 (2010); Paul J. Donahue, *Plan Sponsor Fiduciary Duty for the Selection of Options in Participant-Directed Contribution Plans and the Choice between Stable Value and Money Market*, 39 Akron L Rev 9, 13 (2009) (arguing that defined contribution plan sponsors must offer a stable value option to satisfy their fiduciary duties); Debra A. Davis, *How Much Is Enough? Giving Fiduciaries and Participants Adequate Information about Plan Expenses*, 41 John Marshall L Rev 1005, 1034–35 (2008); Jonathan Barry Forman, *The Future of 401(k) Plan Fees* (2007), available at http://ssrn.com/abstract=1092156 (visited Mar 16, 2010); Debra A. Davis, *Do-It-Yourself Retirement: Allowing Employees to Direct the Investment of Their Retirement Savings*, 8 U Pa J Labor & Empl L 353, 377–79 (2006) (describing fiduciary duties of employers for employee-directed plans).

22 See Zelinsky, 19 Va Tax Rev at 692 (cited in note 15).

23 See id.

24 See David Rajnes, *An Evolving Pension System: Trends in Defined Benefit and Defined Contribution Plans* 12–14 (Employee Benefit Research Institute 2002) (interpreting trends in plan formation and termination); Douglas L. Kruse, *Pension Substitution in the 1980s: Why the Shift toward Defined Contribution?*, 34 Indust Rel 218, 223 (1995) ("Over twice as many companies adopted D[efined] C[ontribution] plans . . . as adopted D[efined] B[enefit] plans" during the study period).

25 There are many different types of "hybrid plans." While cash balance plans are defined benefit plans that mimic, in some respects, defined contribution plans, "age-weighted" and "new comparability" plans are defined contribution plans that mimic, in many respects, defined benefit plans. See Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 Yale L J 451, 502–03 (2004) (describing age-weighted and new comparability plans).

ment of that benefit in a single, employer-managed pension trust. However, the benefit so defined largely mimics the retirement benefit provided under a defined contribution plan. Specifically, instead of promising a benefit in the form of an annuity based on the retiree's final salary, cash balance plans promise each participant a benefit equal to the "balance" "contained" in his or her "hypothetical account."[26] This "balance" consists of the sum of "pay credits," generally determined as a percentage of the participant's yearly wages, and of "interest credits," which are an imputed return (at a rate specified in advance) on the hypothetical account balance.[27] Suppose, for example, Acme Inc sponsors a cash balance plan under which it agrees to provide employees with credits equal to 5 percent of their yearly wages and interest credits of 3 percent per year. Jane Smith, an Acme employee and a participant in the cash balance plan, earns $50,000 in Year 1 and $60,000 in Year 2. In the simplest case, Jane would receive a pay credit of $2,500 at the end of Year 1, and at the end of Year 2, a pay credit of $3,000 plus an interest credit of $75.[28] Her hypothetical account balance at the end of Year 2 would be $5,575; this (or the annuity that she would be able to purchase with this amount) would be her retirement benefit if she retired at the end of Year 2. If she continued to work for Acme, earning another $60,000 in Year 3, her hypothetical account balance would grow to $8,742.25.[29] In either case, Jane's retirement benefit would resemble the benefit she would have received had Acme maintained a defined contribution plan with a 5 percent contribution rate and had she invested the funds in a bond generating 3 percent interest, compounded annually.

Though the benefits provided under cash balance plans resemble those provided under defined contribution plans, they are not identical. For one, employees participating in a cash balance plan are guaranteed to receive at retirement the amount determined under the plan docu-

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26 These hypothetical accounts are mere bookkeeping entries and confer no rights to particular trust assets, unlike the individual accounts created for participants in defined contribution plans.

27 See Zelinsky, 114 Yale L J at 500 (cited in note 25) (describing the operation of a cash benefit pension plan).

28 Three percent of $2,500, the amount contained in her hypothetical account during Year 2, is $75. In the interest of transparency, this example assumes that hypothetical account contributions are made once a year, on the last day of the year. As a result, no interest credits are awarded in Year 1 with respect to Year 1's wage credits. In actuality, wage and interest credits may be accrued at regular intervals over the course of a year.

29 In Year 3, $3,000 in additional pay credits and $167.25 (3 percent of her preexisting balance of $5,575) in hypothetical investment returns would be added to her account. If Jane left Acme at the end of Year 2 (and did not cash out her pension rights), her hypothetical account balance at the end of Year 3 would be $5,742.25. If she chose to receive a lump sum payment at the time she left employment, she would have been entitled to receive $5,575.

ments to be in their account at that time.[30] Actual investment returns on the assets placed in the retirement trust by the employer are irrelevant. As under any defined benefit plan, the employer not only handles the technical aspects of investing the designated retirement funds, but also absorbs the associated investment risks.[31] Perhaps most importantly, the benefits provided under a cash balance plan, unlike those provided under a defined contribution plan, are guaranteed by the Pension Benefit Guaranty Corporation (PBGC).[32] These differences may have significant consequences, particularly in times of economic distress.

Employees may be better off under a cash balance plan than under a defined contribution plan such as a 401(k), but they are not necessarily better off than they would be under an equally expensive,[33] traditional defined benefit plan. In general, short-term workers[34] fare better under cash balance plans while longer-term employees fare better under more traditional defined benefit plans. This is because final pay plans deliver the bulk of their benefits to long-term employees.[35] Cash balance plans, like defined contribution plans, distribute their benefits more evenly among long- and short-term employees with the gains enjoyed by the short-term employees coming at the expense of the long-term employees (assuming a revenue neutral plan). Employees at the beginning of their careers may not know whether to prefer coverage under a final pay plan or a cash balance plan. Workers at the end of their careers, though, typically derive more—and often substantially more—benefits from traditional defined benefit plans if they have spent their careers with one employer.[36]

From a political standpoint, cash balance plans have been controversial because most cash balance plans were adopted by employers to replace preexisting traditional defined benefit plans.[37] These em-

30 See Zelinsky, 114 Yale L J at 501 (cited in note 25).

31 See id.

32 This guaranty comes into play whenever an employer (plan sponsor) lacks sufficient assets to make good on its retirement promises. See Eric D. Chason, *Outlawing Pension-Funding Shortfalls*, 26 Va Tax Rev 519, 524–25 (2007) (describing the PBGC guaranty). Plan sponsors pay annual premiums to the PBGC for this "insurance." See id at 525–27 (describing the systematic underpricing of these "premiums").

33 That is, a plan design imposing equal financial burdens on the sponsoring employer.

34 "Short-term" does not include very short-term employees. No benefits are earned by participants whose employment period falls short of that required to "vest" benefits under the terms of the plan. See IRC § 411 (describing permissible vesting rules).

35 See Richard C. Shea, Michael J. Francese, and Robert S. Newman, *Age Discrimination in Cash Balance Plans: Another View*, 19 Va Tax Rev 763, 763–64 (2000).

36 Zelinsky, 19 Va Tax Rev at 696–97 (cited in note 15) (providing a numerical example).

37 Bank of America, in 1985, was the first employer to adopt a cash balance pension plan. See Regina T. Jefferson, *Striking a Balance in the Cash Balance Plan Debate*, 49 Buff L Rev 513, 522 & n 39 (2001) (describing the reasons for the adoption of Bank of America's plan). For a description of the political furor that accompanied the development of such plans, see id at 543–44 ("[M]ost

ployers had an identifiable group of employees likely to be hurt by the adoption of cash benefit programs[38]—though these employees generally were not worse off than they would have been had their employers instead adopted defined contribution plans. An initial question is why employers did not elect the latter option and switch to defined contribution plans. After all, the reasons employers gave for preferring cash balance plans to traditional final pay plans—their desire to increase benefits for shorter-term employees[39] and the greater transparency of pension benefits[40]—could have been achieved just as easily by switching to defined contribution plans.

The answer often turned on the funding level of a given preexisting defined benefit plan. Though most press accounts focus on under-

cash balance plans are established as converted traditional defined benefit plans"); Coleman J.F. Cannon, *Cashing in on Older Workers: Age Discrimination Claims in Cash-Balance Pension Plans*, 19 L & Ineq 31, 55 (2001) ("From labor unions to Congress, academics to lawyers, high-profile opinions that employers' moves to convert to cash-balance plans create injustice are not hard to find."). Consider Zelinsky, 19 Va Tax Rev at 695, 754–57 (cited in note 15) ("The creation of cash balance plans *ab initio* is relatively noncontroversial.").

38 See Zelinsky, 19 Va Tax Rev at 707–08 (cited in note 15) (providing a numerical example). The example assumes that the affected employees would remain with the same employer until retirement.

39 Cash balance plans deliver more benefits to "mobile" workers than do final pay plans. See Alvin D. Lurie, *Help from the Hill for Cash Balance Plans—More, Please*, 109 Tax Notes 115, 116 (2005) (attributing cash balance plans' popularity to their being "well-adapted to the new mobility of the workforce"); Cannon, 19 L & Ineq at 42 (cited in note 37) ("[T]he plans allow short-tenure employees to quickly accrue valuable benefits[,] . . . [a] feature [ ] particularly important to employers with a mobile and global workforce."); Zelinsky, 19 Va Tax Rev at 707–08 (cited in note 15) (discussing the ways a cash balance plan can advance an employer's workforce preferences). In theory, cash balance plans allow workers working for a succession of different employers to build up retirement accounts as substantial as those accumulated by workers spending their lives at a single employer, something that is virtually impossible under traditional final pay plans. In practice, however, many workers "cash out" and spend their pension accounts when switching jobs instead of moving them to another retirement account. Thus, by retirement, they may have less set aside than even short-tenure workers working for an employer offering a traditional defined benefit plan. See Jefferson, 49 Buff L Rev at 534–35 (cited in note 37) (describing rollover possibilities and practices).

40 See Lurie, 109 Tax Notes at 116 (cited in note 39) ("[B]enefit amounts were transparent at all times."); Jefferson, 49 Buff L Rev at 541 (cited in note 37) ("[T]he reason given most frequently by employers for their conversions is that the benefits in cash balance plans are easier to understand than those in traditional defined benefit plans."); Cannon, 19 L & Ineq at 42 (cited in note 37) ("The existence of the fictional account makes it easier for employers to communicate the plan provisions and personalized benefit calculations to their employees."). But see Zelinsky, 19 Va Tax Rev at 753–54 (cited in note 15) (arguing that employers could translate traditional annuity entitlements into present values to convey their value to employees). Traditional defined benefit plans also insure participants against longevity risks, through payment of a lifetime annuity. Workers covered by cash balance plans, by contrast, generally opt to receive the balance of their account at retirement rather than an annuity. See Jefferson, 49 Buff L Rev at 536–37 (cited in note 37) (noting that although cash balance plans must offer an annuity payout option, an "overwhelming" majority of participants opt for the one-time payout).

funded plans and the consequent perilous state of the PBGC,[41] not all defined benefit plans' trusts were (or are) underfunded relative to accrued pension liabilities. Some, either because of a booming stock market or because of their sponsors' use of accelerated funding formulas, were overfunded. Moving from a defined benefit plan to a defined contribution plan necessarily involves the "termination" of the original plan.[42] Termination of existing pension plans imposes significant costs on plan sponsors. For example, unvested benefits become vested upon plan termination.[43] Termination of a plan thus causes employers to be responsible for paying pension benefits to participants who ordinarily would have forfeited their pension rights.[44] In addition, in the event of a plan termination, employers with overfunded trusts are not allowed to use the trusts' excess funds to defray future pension contributions. Instead, those excess funds have to be divided among plan participants and the government pursuant to the reversion tax provisions of § 4980 of the Internal Revenue Code.[45] However, switching from one defined benefit plan to another defined benefit plan constitutes an "amendment" or a "modification" of the original plan rather than a "termination" of that plan.[46] By continuing to maintain a defined benefit plan, plan sponsors could continue to benefit from the departure of unvested participants and from the use of the excess assets to fund future pension liabilities.[47] Further, from an accounting

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41 See, for example, Mary Williams Walsh, *U.S. Investigates Pension Fund at Northwest Air*, NY Times C1 (Mar 15, 2006).

42 See Zelinsky, 19 Va Tax Rev at 710 (cited in note 15).

43 See id.

44 Under the terms of some pension plans, benefits did not "vest" until the participant completed five years of employment with the plan sponsor. An employee leaving after four years thus forfeited any retirement benefits "accrued" under the plan; funds contributed to the plan on his or her behalf could be reallocated to finance the benefits payable to other participants. See id at 710. Employers may count on a substantial number of such forfeitures to hold down the costs of maintaining their plans. See id.

45 See Zelinsky, 19 Va Tax Rev at 711–13 (cited in note 15) (describing the operation of IRC § 4980).

46 See id at 710. The Pension Protection Act of 2006, discussed in notes 119–22 and accompanying text, imposed restrictions on conversions taking place after June 29, 2005, see Pub L No 109-280, 120 Stat 780, 981–84, codified at 29 USC § 1054(b). The 1999 conversion of the IBM pension plan at issue in *Cooper* preceded this cutoff date.

47 To a large extent, the cash balance phenomenon was "Reversion: Part II"—a replay of the fight over who "owned" the excess assets in overfunded pension plans, a fight that employers lost with the enactment of IRC § 4980 in 1985 and its further strengthening in 1988 and 1990. For a description of the reversion phenomenon and the legislative response to it, see Langbein, Stabile, and Wolk, *Pension and Employee Benefit Law* at 255 (cited in note 9) (detailing the "political struggle in the mid–1980's" resulting from the "boom in terminating plans for the asset reversion"). Cash balance plans provided a partial end run around the statutory regime encapsulated in IRC § 4980. As the excess funds eventually benefited plan participants rather than being distributed directly to corporate coffers, and as participants continued to enjoy greater protection against investment risks than they would have under a defined contribution plan, it is far

standpoint, by continuing to maintain a defined benefit pension plan, plan sponsors retained the right to report "assumed" (as opposed to actual) returns on pension assets as income on their financial statements, thereby smoothing income fluctuations in a volatile economy.[48] Though there was a price to be paid for these privileges, namely the continued acceptance of investment risks and payment of government insurance premiums, many employers must have believed this tradeoff worthwhile or they would have opted to switch to defined contribution plans, such as 401(k) plans.

Transitioning to a cash balance plan (rather than a defined contribution plan) benefited sponsors of some underfunded plans as well. Not only did these sponsors avoid vesting previously unvested employees, but they avoided triggering an obligation to make up immediately for the shortfall in the assets of their pension trust.[49] They instead retained the obligation to make up that shortfall over a period of years.

Though some of the cash balance plans were not designed to cut employer costs, many were designed to reduce their sponsors' total pension expenditures, and thus were the economic equivalent of a pay cut.[50] Disappointed employees brought lawsuits[51] and lobbied Congress[52] in an effort to force employers to allow current employees to continue receiving benefits under the terms of the original plans.[53] As

from clear that cash balance plan conversions defeated the purpose of the antireversion legislation and deserved to be punished on that account.

48 See Mary Williams Walsh, *New Scrutiny on Auditing of Pensions*, NY Times C1 (June 23, 2005) (describing the "smoothing" allowed under current pension rules). The accounting rules were amended in 2006 to require employers to reflect actual values of plan assets and pension liabilities on their balance sheets, but the gains and losses accrued on pension assets do not have to be incorporated into the annual profit and loss statement of plan sponsors. See Denise Lugo, *FASB Issues Standard on Reporting for Defined Benefit Pensions, OPEBs*, BNA Daily Rep for Execs G7 (Oct 2, 2006) (describing the effect of FASB Statement of Financial Accounting Standards No 158).

49 See Zelinsky, 19 Va Tax Rev at 710–11 (cited in note 15).

50 See Jefferson, 49 Buff L Rev at 542–43 (cited in note 37) ("[I]t would seem that employers and consultants who suggest that plan cost was not considered in their decisions to convert their traditional defined benefit plans to cash balance plans are either uninformed or insincere.").

51 For a concise description of the various lawsuits and the claims made therein, see Michael A. Rosenhouse, *Validity and Operation of Cash Balance Pension Plans under ERISA and Internal Revenue Code*, 19 ALR 2d 241 §§ 12–18 (2007) (cataloguing cases).

52 See Cannon, 19 L & Ineq at 62–63 (cited in note 37) (describing legislative initiatives in 1999). For the specifics of some of the legislative interventions, see Part IV.B.

53 ERISA protects benefits already accrued under the terms of an existing pension plan, but it neither requires employers to establish pension plans nor prevents employers from terminating existing plans. The plaintiffs in these lawsuits assumed that, if the plan amendments were ruled illegal, employees would be deemed to have continued to accrue benefits under the terms of the original plans unless and until those plans were terminated; the plaintiffs further may have hoped that, faced with the choice between continuing the existing plan and replacing it with a defined contribution plan, employers would just continue the preexisting plan. For employees nearing retirement, delaying the changeover in plans would be enough to make them "whole,"

explained below, some of the claims in those lawsuits would have invalidated not just conversions to cash balance plans, but also newly created cash balance plans.

II. THE AGE DISCRIMINATION DISPUTE: ERISA § 204(B)(1)(H)(I)

Cooper was a class action suit brought by employees and former employees of IBM. In district court, the plaintiffs challenged the legality of the design not only of IBM's cash balance pension plan[54] but also of the plan that preceded it, and of how IBM measured participants' accrued benefits when moving from one plan to another.[55] Together, the parties filed a total of ten motions for summary judgment. On July 31, 2003, the district court judge granted all three of the plaintiffs' motions, denied all seven of IBM's motions, and ordered the parties to develop the issues that remained to be tried.[56] The parties subsequently settled all aspects of the case save one: IBM reserved the right to appeal Judge Patrick Murphy's decision that the design of its cash balance plan violated ERISA's rule against age discrimination.[57] Thus, the only issue to be decided by Judge Easterbrook and the rest of the panel in the Seventh Circuit was this age discrimination claim. It was a claim that, if upheld, would have disqualified all cash balance plans, even those sponsored by employers who had never sponsored other types of pension plans.

The statutory prohibition against age discrimination in defined benefit plans is contained in § 204(b)(1)(H)(i) of ERISA.[58] This sec-

but of course, delay would leave another set of employees nearing retirement to be hurt by any subsequent changeover.

54 IBM amended its defined benefit plan, adopting a cash balance design, in 1999. This was the second amendment of its original final pay plan. See *Cooper v IBM Personal Pension Plan*, 274 F Supp 2d 1010, 1012–13 (SD Ill 2003).

55 IBM first amended its defined benefit plan in 1995, creating a pension equity plan it called the "Pension Credit Formula," or "PCF." Id at 1012 (explaining how the 1995 plan allowed IBM employees to accrue points for their years of service, which were used to calculate the employee's monthly retirement benefit at age sixty-five).

56 See id at 1022–23.

57 See Brief of Appellants and Required Short Appendix, *Cooper v IBM Personal Pension Plan*, No 05-3588, *17–18 (7th Cir filed Oct 27, 2005) (available on Westlaw at 2005 WL 3738660) ("Initial IBM Brief"); *Cooper*, 457 F3d at 638.

58 As amended by the Omnibus Budget Reconciliation Act of 1986 (OBRA), Pub L No 99-509, 100 Stat 1874, 1975, codified at 29 USC § 1054(b)(1)(H)(i). Identical language is found in IRC § 411(b)(1)(H)(i), and similar language is found in the Age Discrimination in Employment Act of 1967 (ADEA), 29 USC § 623(i)(1)(A) (making it unlawful for an employer to maintain a defined benefit plan that provides for "the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age"). A similar, but not identical, age discrimination prohibition applies to defined contribution plans. See 29 USC § 1054(b)(2)(A) (providing that a defined contribution plan satisfies ERISA "if, under the plan, allocations to the employee's account are not ceased, and the rate at which amounts are allocated to the employee's account is not reduced, because of the attainment of any age"); IRC § 411(b)(2)(A) (same); 29 USC § 623(i)(1)(B) (making it unlawful for an employer to maintain a defined contribution plan that

tion provides that defined benefit plans "shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age."[59] The parties disagreed as to how that statutory command should be interpreted.

Originally, § 204(b)(1)(H)(i) did not define "the rate of an employee's benefit accrual."[60] However, the preexisting statute contained a definition of the term "accrued benefit." In the context of a defined benefit plan, "accrued benefit" means "the individual's accrued benefit determined under the plan . . . expressed in the form of an annual benefit commencing at normal retirement age."[61] The question raised in *Cooper* was how, or whether, this definition should be incorporated into the definition of "the rate of an employee's benefit accrual."

According to the plaintiffs, "the rate of benefit accrual" should be defined by incorporating the statutory definition of accrued benefit so that that the "rate of benefit accrual" would be the rate of growth in the individual employee's accrued benefit expressed in the form of an annual benefit commencing at normal retirement age.[62] Calculating the rate of benefit accrual in accordance with this definition of the term required several steps:

> [T]he accrued benefit earned each year must be calculated by first adding together the annual pay credit and the value of all future in-

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provides for "the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age"). As discussed in notes 66–76 and accompanying text, the importance of the linguistic discrepancies between the two antidiscrimination statutes became a point of dispute in *Cooper*.

59 29 USC § 1054(b)(1)(H).

60 As discussed in more detail in notes 119–21 and accompanying text, the statutes now contain such a definition. See 29 USC § 1054(b)(5); IRC § 411(b)(5); 29 USC § 623(i)(10). This definition was added to the various statutes by the Pension Protection Act of 2006, which was signed by the President ten days after the *Cooper* decision was announced. See § 701(a)–(c), 120 Stat at 981. These statutory definitions, however, are applicable only to "periods beginning on or after June 29, 2005." See § 701(d), 120 Stat at 991 (providing that the "amendments made by this section shall apply to periods beginning on or after June 29, 2005"). See also Joint Committee on Taxation, *Technical Explanation of H.R. 4, the "Pension Protection Act of 2006," as Passed by the House on July 28, 2006, and as Considered by the Senate on August 3, 2006*, JCX-38-06 157 (Aug 3, 2006), online at http://www.dol.gov/ebsa/pdf/x-38-06.pdf (visited Mar 16, 2010) ("Nothing in the provision is to be construed to infer the treatment of applicable defined benefit plans or conversions to such plans under the rules in ERISA, ADEA and the Code prohibiting age discrimination as in effect before the provision is effective.").

61 29 USC § 1002(23)(A). A different definition is provided for "accrued benefits" under "individual account plans," or defined contribution plans; there the term "accrued benefit" means "the balance of the individual's account." 29 USC § 1002(23)(B).

62 Brief of Plaintiffs-Appellees, *Cooper v IBM Personal Pension Plan*, No 05-3588, *13 (7th Cir filed Dec 2, 2005) (available on Westlaw at 2005 WL 3749755) ("Initial Cooper Brief") ("Once the focus correctly returns to the accrued benefit—the annuity at normal retirement age—it is indisputable that participants' rate of benefit accrual decreases with age.").

> terest credits to normal retirement age. This amount is then divided by an annuity factor to determine the annuity at normal retirement age . . . [and then] divided by the employee's salary for the year.[63]

The plaintiffs argued that IBM's cash balance plan violated the age discrimination requirement because the amount of the benefit earned each year, as computed under this definition, decreased as an employee grew older. To take an example drawn from the plaintiffs' brief, the pension benefit earned by a twenty-five-year-old employee with a $50,000 salary under a cash balance plan providing for a 5 percent pay credit and a 5 percent interest credit would be economically equivalent to an annuity of $1,760 (equal to 3.52 percent of current salary), while an employee earning the same amount at age sixty-four would accrue a benefit equivalent to an annuity of only $262 (0.53 percent of current salary).[64] This difference results because, although each employee would receive the same pay credit for the year in which he or she is employed ($2,500), the twenty-five-year-old would receive forty years' of interest credits, or $17,350, with respect to that pay credit prior to the annuity starting date, while the sixty-four-year-old would earn only one year's worth of interest credits, or $125, prior to attaining retirement age.[65] One can buy a larger annuity with $19,850 than with $2,625.

The plaintiffs supported their interpretation of the statutory command by pointing to the discrepancy between the language used to prohibit age discrimination in defined benefit plans and the language used to prohibit age discrimination in defined contribution plans.[66] The statute applicable to defined contribution plans specifically spoke of "the rate at which amounts are allocated to the employee's account";[67] by using different language, "the rate of an employee's

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63 Id at *3–4 (citations omitted).

64 Id at *4–5. It is unclear why the plaintiffs went the last step and argued that the annuity increase must be proportional to salary, as opposed to simply increasing by the same dollar amount. The latter would be more consistent with the examples found in the legislative history, and would have been enough to doom the IBM plan. For a discussion of the legislative history, see Providing for Reconciliation Pursuant to Section 2 of the Concurrent Resolution on the Budget for Fiscal Year 1987, HR Rep No 99-1012, 99th Cong, 2d Sess 381 (1986).

65 *Initial Cooper Brief* at *4–5 (cited in note 62).

66 See id at *23:

> This contention—that when applied to cash balance plans Subparagraph (H)(i) should be read to mean the same thing as Subparagraph (b)(2)(A)—violates the very principle of statutory construction that IBM purports to espouse: "[where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully . . . ."

67 See 29 USC § 1054(b)(2)(A).

benefit accrual,"[68] in the statute covering defined benefit plans, they contended, Congress must have meant the test for age discrimination to be different in the two different contexts.[69]

IBM argued that neither the amount nor the rate of an employee's benefit accrual should be measured by the nominal amount of the annuity earned as a result of each year's service.[70] Rather, it argued that a plan satisfied the statutory requirement as long as "the rate of benefit accrual *specified in the plan's benefit formula* is [not] reduced because of the attainment of any age."[71] It noted that under the IBM cash balance plan, "[p]ay credits are always provided at a rate of five percent of pay, and interest credits are always provided at a uniform rate."[72] Thus, from a present value perspective, both young and old employees received the same addition to their hypothetical accounts on a yearly basis.

IBM countered the plaintiffs' statutory argument by pointing out that "accrued benefit" and "benefit accrual" do not mean the same thing; one refers to a static amount and the other to an action or process.[73] As an undefined term, "benefit accrual" should be given its ordinary meaning, and that ordinary meaning is more consonant with IBM's interpretation than the plaintiffs'.[74] At the very least, it argued, the translation from one term to the other is sufficiently uncertain that deference should be granted to regulatory interpretations of the term, and the only extant interpretations conformed to IBM's interpretation of the statute.[75] Finally, it argued that the plaintiffs' interpretation of "benefit accrual" would lead to "absurd and unreasonable results" by turning compensation for the passage of time into age discrimination.[76]

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68 See 29 USC § 1054(b)(1)(H)(i).

69 See *Initial Cooper Brief* at *25 (cited in note 62).

70 *Initial IBM Brief* at *24 (cited in note 57) ("The ordinary meaning of the terms in § 204(b)(1)(H) is very different from the district court's interpretation of those terms.").

71 Reply Brief of Appellants, *Cooper v IBM Personal Pension Plan*, No 05-3588, *6 (7th Cir filed Dec 20, 2005) (available on Westlaw at 2005 WL 3749757) ("IBM Reply Brief").

72 See id. IBM also argued that, even if plaintiffs prevailed in their definition of "benefit accrual," the difference in benefit accruals would not constitute age discrimination because it did not occur "because of the attainment of any age." See *Initial IBM Brie*f at *21 (cited in note 57). Judge Easterbrook accepted this argument, relying on the distinction drawn by the Supreme Court in *Arizona v Norris*, 463 US 1073 (1983), between variations "on account of age" and variations "correlated with age." See *Cooper*, 457 F3d at 641–42. However, it should be considered dicta as it was unnecessary to the outcome of the *Cooper* case. See id.

73 See *Initial IBM Brief* at *24–25 (cited in note 57) (arguing that the term "benefit" refers to a lump sum while "'accrual' ordinarily means 'the action or process of accruing'").

74 See id at *30.

75 See id at *44–45.

76 Id at *39–40 (arguing that the plaintiffs' interpretation "would transform § 204(b)(1)(H) from a provision that prohibits age discrimination into one that mandates *reverse* age discrimination on a massive scale").

As a technical matter, then, the question raised in *Cooper* was what the "rate of benefit accrual" meant for purposes of § 204(b)(1)(H)(i) of ERISA. Was the accrual rate meant to be measured by comparing each year's growth in the amount of benefits payable at the time of retirement with the future (or in the case of the sixty-four-year-old employee, not-so-future) value of those pension rights (as contended by the plaintiffs), or was it meant to be measured by looking at the formula set forth in the plan for accruing benefits and seeing if it differed according to the age of the participant (as contended by the defendant)?

III. JUDGE EASTERBROOK'S DECISION: FUTURE VALUE, PRESENT VALUE, AND ACCRUED BENEFITS

Judge Easterbrook, unlike the district court, decided that the rate of benefit accrual could be determined by comparing the present values of the benefits earned by younger and older employees, rather than the additions to the annuities they could receive on retirement. As a statutory matter, he determined, "'benefit accrual' means something other than 'accrued benefit.'"[77] And because the term, "benefit accrual," was not defined in the statute or regulations, he was allowed to use the definition he regarded as "most natural[]"[78] rather than the one proffered by plaintiffs, which he found "not sensible."[79] The most natural reading of "benefit accrual," Judge Easterbrook wrote, was "as a reference to what the employer puts in (either in absolute terms or as a rate of change)."[80] Benefit accrual, he continued, referred to "what the employer imputes to the account,"[81] "the annual addition to the pot, not to the final payout."[82] And that amount, that annual addition, was the "actuarial equivalent" of the additional pension the participant would have enjoyed at age sixty-five as a result of the year's service and salary. Calculating that actuarial equivalent required "(a) add[ing] all interest that would accrue through age 65, [and] then (b) discount[ing] the resulting sum to its present value."[83] The plaintiffs' claim "ignore[d] step (b)."[84] Since "[a]ll terms of IBM's plan are age-

77 *Cooper*, 457 F3d at 641.

78 Id at 639.

79 Id ("Treating the time value of money as a form of discrimination is not sensible.").

80 Id.

81 *Cooper*, 457 F3d at 639.

82 Id at 641.

83 Id at 640 (utilizing a formula employed to derive the amount due when "any beneficiary (young or old) elects to take a cash distribution or roll the account into an annuity before reaching age 65").

84 Id.

neutral,"[85] Judge Easterbrook concluded that the annual additions were also age-neutral, and no claim of age discrimination could be sustained.

In essence, Judge Easterbrook decided that the definition of "age discrimination" should be the same for defined benefit and defined contribution plans[86] despite the obvious differences in the particular statutory language applicable to the different types of plans as well as in their overall regulatory schemes. In his view, the differences in language between ERISA § 204(b)(1)(H)(i) and ERISA § 204(b)(2)(A), and the similarity in language between "accrued benefit" and "rate of benefit accrual," were of no substantive import. This was hardly an obvious conclusion. It is unclear that such differentiation would have been more ill-advised or less likely the product of some strange political compromise than ERISA's protection of the pension of the pension fund trustee against monetary claims made by victims of his embezzlement, a statutory interpretation Judge Easterbrook championed.[87] Though it may have been ill-advised for Congress to have radically different definitions of age discrimination for different types of benefit plans, the fact is that the regulation of the two types of plans is different in many ways, not all of them sensible. The most thoughtful commentator on the issue found the plaintiffs' statutory argument persuasive.[88] The decisions of lower courts were split.[89] Nor were the

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85 *Cooper*, 457 F3d at 638.

86 See id ("Yet if the 5%-plus-interest formula is non-discriminatory when used in a defined-contribution plan, why should it become unlawful because the account balances are book entries rather than cash?").

87 See Easterbrook, 57 Okla L Rev at 14 (cited in note 1) (approving the Supreme Court's unanimous reversal of *Guidry v Sheet Metal Workers National Pension Fund*, 856 F2d 1457 (10th Cir 1988), revd, 493 US 365 (1990), because it asked "What is the value served by *rules*, in general?" rather than, as the Tenth Circuit had, "What is the value served by this particular rule?"). In both cases, of course, what probably happened is that Congress never envisioned the issue. Certainly, Congress did not have cash balance plans in mind when enacting OBRA in 1986; the first such plan had been adopted in 1985 and few people knew about it or predicted the subsequent popularity of such plans.

88 See Zelinsky, 19 Va Tax Rev at 735–36 (cited in note 15) (explaining the "literal noncompliance of most cash balance arrangements with the current statutory prohibitions on age discrimination in the defined benefit setting").

89 Cash balance plans were held age discriminatory in *Richards v FleetBoston Financial Corp*, 427 F Supp 2d 150, 167 (D Conn 2006):

> ERISA itself requires the court to compare annual benefits commencing at normal retirement age when considering age discrimination in a cash balance plan under section 204(b)(1)(H). The court may not pick a different outcome, even one that may appear more sensible to some, when Congress has not chosen that course.

They were also held age discriminatory by the district court hearing the *Cooper* case itself. See *Cooper v IBM Personal Pension Plan*, 274 F Supp 2d 1010, 1021 (SD Ill 2003). Even in the months following the issuance of the Seventh Circuit's *Cooper* opinion, two cases heard in the Southern District of New York held for the plaintiff employees, specifically disagreeing with Judge Easterbrook's definition of "benefit accrual." See *In re Citigroup Pension Plan ERISA* agency interpretations relied on in the opinion very authoritative.[90] On the whole, though Judge Easterbrook grounds his decision in the statutory text, most of the opinion consists of an elaborate discussion of why it is "not sensible" to treat "the time value of money as a form of discrimination,"[91] making it clear that his interpretation of the statutory text is driven by his view of what the appropriate antidiscrimination policy should be. The question, therefore, is why such a renowned textualist would adopt this approach.[92]

IV. PASSING THE BUCK

Section 204(b)(1)(H)(i) was enacted in 1986, as part of the Omnibus Budget Reconciliation Act of 1986 (OBRA).[93] Its immediate target seemed to be any pension plan that discontinued accruals for employees who continued to work after reaching the plan's "normal retirement age,"[94] and most of the discussion in the conference report is about the sort of post-retirement age accruals that would be required under the new rules.[95] However, the statutory language adopted

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Litigation, 470 F Supp 2d 323, 344–45 (SDNY 2006); *In re J.P. Morgan Chase Cash Balance Litigation*, 460 F Supp 2d 479, 488–89 (SDNY 2006). The one Southern District of New York case holding in favor of the employers was decided before the Seventh Circuit released its opinion in *Cooper*. See *Hirt v Equitable Retirement Plan for Employees, Managers and Agents*, 441 F Supp 2d 516, 543–52 (SDNY 2006). As time passed, more of the Second Circuit's district court judges accepted the Seventh Circuit's *Cooper* outcome, even before the Second Circuit decided to follow Judge Easterbrook's lead when faced with a cash balance case. See *Hirt v Verizon Communications, Inc*, 533 F3d 102, 104 (2d Cir 2008). Prior to the issuance of the Seventh Circuit's opinion in *Cooper*, two district courts from outside the Second Circuit upheld cash balance plans against age discrimination claims. See *Register v PNC Financial Services Group, Inc*, 2005 WL 3120268, *4–8 (ED Pa); *Eaton v Onan Corp*, 117 F Supp 2d 812, 825–26 (SD Ind 2000). The interesting thing about these opinions is that the decisions favoring employees stress the literal language of the statute, while those favoring cash balance plan sponsors stress legislative intent.

90 See Part IV.A.

91 *Cooper*, 457 F3d at 639.

92 See Easterbrook, 57 Okla L Rev at 13 (cited in note 1). By contrast, Judge Murphy's opinion in the district court seems a model of textualism, with lines such as, "There may be policy reasons why Congress should specifically authorize [Cash Balance Formulas] in the context of defined benefit plans. But the narrow question here is whether the 1999 Plan comports with the literal and unambiguous provisions of ERISA § 204(b)(1)(H) . . . ." *Cooper*, 274 F Supp 2d at 1022.

93 Omnibus Budget Reconciliation Act of 1986 (OBRA), Pub L No 99-509, 100 Stat 1874, 1975, codified at 29 USC § 1054(b)(1)(H)(i). OBRA also added parallel provisions to the Internal Revenue Code, see IRC § 411(b)(1)(H)(i), and similar language to the ADEA, see 29 USC § 623(i)(1). See also note 58 and accompanying text.

94 See Omnibus Budget Reconciliation Act of 1986: Joint Explanatory Statement of the Committee of Conference, HR Conf Rep 99-1012, 99th Cong, 2d Sess 377–79 (1986) (describing interagency conflict over whether prior law allowed employers to cease benefit accruals and allocations to an employee's account with respect to employees working beyond the normal retirement age under the plan).

95 See id at 381 (discussing acceptable adjustments in payment schemes for employees working beyond normal retirement age). See also Edward A. Zelinsky, *The Cash Balance Controversy Revisited: Age Discrimination and Fidelity to Statutory Text*, 20 Va Tax Rev 557, 570–71

as part of OBRA failed to limit the application of the nondiscrimination rule to workers working past "normal retirement age."[96]

It did not take long for ERISA practitioners to realize that OBRA's age discrimination rule constituted a potential threat to the development of cash balance plans.[97] ERISA professionals debated among themselves whether such plans violated this statutory requirement. They agreed on one point: the debate could be settled either by guidance provided by the relevant administrative agencies or by Congress's provision of a legislative "fix."[98] However, as detailed below, neither the agencies nor Congress took definitive action for more than a generation.[99] And even then, the action was equivocal at best.

A. Agency Indecision

Statutory ambiguities can be bridged through agency rulemaking, and OBRA tasked the Secretaries of Labor and Treasury with jointly promulgating regulations to implement the new nondiscrimination rule as well as to coordinate its demands with preexisting plan requirements.[100] ERISA practitioners made their concerns about the un-

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(2001) (discussing difficulties in the congressional analysis). None of the examples discussed in the conference report dealt with plans similar to cash balance plans, a fact that is hardly surprising given their novelty at the time the statute was passed.

96 The language in all of the statutes affected by OBRA states that "benefit accruals cannot stop or decline because of the attainment of '*any* age,' not on account of an age specified in the plan text." Zelinsky, 20 Va Tax Rev at 573 (cited in note 95). See also *Richards v FleetBoston Financial Corp*, 427 F Supp 2d 150, 157–62 (D Conn 2006) (containing extended discussion of the post-retirement accruals argument). But see *Eaton v Onan Corp*, 117 F Supp 2d 812, 825–29 (SD Ind 2000) (holding that ERISA § 204(b)(1)(H)'s prohibition against age discrimination did not apply to benefit accruals earned prior to age sixty-five).

97 See *Initial Cooper Brief* at *6 (cited in note 62), quoting Hubert V. Forcier and Douglas J. Heffernan, *A Practitioner Discussion Memorandum* *2 (Oct 1990):

> As early as October 1990, a consortium of pension professionals known as the cash balance practitioners group concluded that while "we believe arguments can be made supporting the conclusion that Code § 411(b)(1)(H) is not violated [by a typical cash balance formula], a number of practitioners quite strongly believe that this type of plan does not comply with a literal reading of this provision."

98 See, for example, Lurie, 109 Tax Notes at 117 (cited in note 39) (criticizing a bill providing prospective regulation only); Alvin D. Lurie, *Murphy's Law Strikes Again: Twilight for Cash Balance Design?*, 101 Tax Notes 393, 398 (2003) ("Congress might be the only refuge of cash balance devotees if the courts continue on their present course."); Zelinsky, 19 Va Tax Rev at 759 (cited in note 15) ("[I]f we lived in the best of all worlds, Congress would retroactively amend section 411(b)(1)(H), ERISA section 204(b)(1)(H), and ADEA section 4(i)(1)(A) ... to measure cash balance plan accruals for age discrimination purposes by looking at contributions ....").

99 See Part IV.A. See also *Initial Cooper Brief* at *8–9 (cited in note 62) (detailing the failure of Congress and administrative agencies to provide a "fix").

100 See OBRA § 9204(d), 100 Stat at 1980:

> Interagency Coordination.—The regulations and rulings issued by the Secretary of Labor, the regulations and rulings issued by the Secretary of the Treasury, and the regulations and

certain status of cash balance plans known to Treasury and the other relevant agencies both formally and informally at least from the early 1990s onward.[101] These agencies were slow, even glacially slow, to provide definitive guidance.

At first, it appeared that definitive agency action would come quickly. In 1991, in the preamble to a document finalizing regulations for the application of a different nondiscrimination rule applicable to defined benefit pension plans, § 401(a) of the Internal Revenue Code, Treasury wrote: "The fact that interest adjustments through normal retirement age are accrued in the year of the related hypothetical allocation will not cause a cash balance plan to fail to satisfy the requirements of section 411(b)(1)(H), relating to age-based reductions in the rate at which benefits accrue under a plan."[102] Many employers took that sentence as a "green light,"[103] and the widespread adoption of cash balance plans began.[104]

The text of the 1991 regulations, however, did not contain any language bearing on the proper interpretation of the term "rate of benefit accrual" for purposes of § 411(b)(1)(H).[105] Further, it was revealed that the sentence in the preamble had been inserted by Treasury without first clearing it with the other affected agencies, the Department of Labor, the EEOC, and the PBGC.[106] Those agencies, which

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rulings issued by the Equal Employment Opportunity Commission pursuant to the amendments made by this subtitle shall each be consistent with the others.

101 See Letter from Anthony H. Gamboa, General Counsel, General Accounting Office, to Senator Tom Harkin *3 (Mar 21, 2001) ("Gamboa Letter"), online at http://gao.gov/new.items/d01511r.pdf (visited Mar 16, 2010) (describing a "working group, consisting of Treasury and IRS employees" that had recognized discrimination issues under cash balance plans were of concern to practitioners and government officials).

102 Internal Revenue Service, Nondiscrimination Requirements for Qualified Plans, 56 Fed Reg 47524, 47528 (1991).

103 See *Gamboa Letter* at *3 (cited in note 101) (interpreting a statement in the preamble to mean "[i]n essence . . . that cash balance plans are not age discriminatory").

104 See Rajnes, *An Evolving Pension System* at 28–29 (cited in note 24) (citing surveys showing increases in the adoption of cash balance plans in the 1990s).

105 The 1991 regulations interpreted § 401(a)(4), which prohibits discrimination in favor of highly compensated employees. The 1991 regulations provided a mechanism for testing cash balance plans' conformity with that antidiscrimination rule. See 56 Fed Reg at 47526–27 (cited in note 102). Once certain conditions are satisfied, these regulations allow cash balance plans to be tested for discrimination in favor of highly paid employees based on hypothetical account allocations rather than actual benefits. See id. Though it may seem peculiar to promulgate rules allowing cash balance plans to survive one antidiscrimination test if they will violate another antidiscrimination rule, Treasury did not—and as a legal matter could not—promulgate regulations covering the statutory bar against age discrimination without, for example, offering a public notice and comment period as well as coordinating its stance with the other affected agencies. See *Gamboa Letter* at *4–6 (cited in note 101).

106 See *Gamboa Letter* at *4–5 (cited in note 101).

were still "studying" the issue, were less than pleased with Treasury's unilateral action.[107]

It remains unclear whether their displeasure reflected substantive disagreement or a turf battle.[108] Certainly, the other agencies took no definitive action on this issue for the following decade, while complaining about Treasury's publication of the offending statement.[109] They merely continued to study the issues. Meanwhile, Treasury continued to issue favorable determination letters regarding the tax qualification of cash benefit plans[110] with provisions similar to those found in the IBM plan. In 1999, Treasury agreed that it would cease issuing determination letters for pension plan conversions while the agencies worked out a common approach to cash balance issues.[111]

In 2002, Treasury, with the approval of the other agencies, issued proposed regulations covering a variety of cash benefit issues, includ-

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107 See id at *6. Among the reasons for this displeasure was that the other agencies feared that by signaling its approval, Treasury would encourage creation of additional cash balance plans making it harder (as a political matter) for them to come to a contrary conclusion. See id ("[T]he statement may have limited the other agencies' policy options on this issue."). See also Rajnes, *An Evolving Pension System* at 28 (cited in note 24) (noting that cash balance conversions increased after 1991); General Accounting Office, *Cash Balance Plans: Implications for Retirement Income—Report to the Chairman, Special Committee on Aging, United States Senate* 15 (Sept 2000), online at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=gao&docid=f:he00207.pdf (visited Mar 16, 2010) (containing a graph illustrating a pattern of cash balance plan adoption by Fortune 1000 companies). As a partial response to this interagency displeasure, Treasury's preamble to its rescission of the 1991 proposed regulations and issuance of the final § 401(a) regulations in 1993 stated that it was reconsidering the safe-harbor tests for cash balance plans contained in the proposed regulations, and would issue amended regulations at a later date for those situations. See Nondiscrimination Requirements for Qualified Plans, TD 8485, 1993-2 Cumulative Bull 126, 129 (noting that it was still evaluating the "significant commentary" it had received).

108 The EEOC appears to have been internally conflicted on the issue. See Dana M. Muir, *Counting the Cash: Disclosure and Cash Balance Plans*, 37 John Marshall L Rev 849, 874 (2004).

109 See Barry Kozak, *The Cash Balance Plan: An Integral Component of the Defined Benefit Plan Renaissance*, 37 John Marshall L Rev 753, 796–99 (2004).

110 See id at 797.

111 See Age-Discrimination Regulations, Announcement 2004-57, 2004-2 Cumulative Bull 15, 15 & n 1:

> Beginning September 15, 1999, cases in which an application for a determination letter or a plan under examination involved a cash balance conversion were required to be submitted to the Washington, D.C. office of the IRS for technical advice . . . . Treasury and the IRS do not intend to process these technical advice cases while cash balance plan and cash balance conversion issues are under consideration by Congress.

See also Ryan J. Donmoyer, *IRS National Office Takes Charge of Cash Balance Plan Approvals*, 84 Tax Notes 1571, 1571 (1999) (describing an IRS announcement of the "national office prerogative" over cash balance plan determinations). Treasury continued to issue determination letters for new cash balance plans throughout this period. See Kozak, 37 John Marshall L Rev at 797 (cited in note 109) (noting that "the IRS has routinely issued favorable determination letters for new cash balance plans").

ing the age discrimination rule.[112] These proposed regulations were consistent with Treasury's stance in the 1991 preamble; the proposed regulation defined "rate of benefit accrual" in "eligible cash benefit pension plans" as "the addition to Participant A's hypothetical account for the plan year, disregarding interest credits" (that is, the amount of the pay credit) for purposes of applying the age nondiscrimination rule.[113] Under these regulations, as long as the pay credits granted under a plan remained constant across age groups, the plan would not violate the terms of § 411(b)(1)(H).[114] IBM's cash balance plan would have passed muster under these regulations.

However, Congress took exception to these proposed regulations, and prevented their implementation by providing in the Consolidated Appropriations Act of 2004[115] that "none of the funds made available

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112 See Internal Revenue Service, Reductions of Accruals and Allocations Because of the Attainment of Any Age; Application of Nondiscrimination Cross-Testing Rules to Cash Balance Plans, 67 Fed Reg 76123, 76124 (2002) ("These proposed regulations provide guidance on the requirements of section 411(b)(1)(H), under which a defined benefit plan fails to be a qualified plan . . . .").

113 See id at 76133.

114 The proposed regulations applied only to "eligible" cash balance plans. Interest credits had to be provided at a "reasonable rate" for a cash balance plan to be an "eligible cash balance plan." See id at 76131:

> [T]he participant has accrued the right to annual (or more frequent) interest credits to be added to the hypothetical account for all future periods without regard to future service at a reasonable rate of interest that is not reduced . . . because of the participant's attainment of any age.

The proposed regulations did not contain a definition of a "reasonable rate" of interest. It is inconceivable that IBM's rate of interest crediting would have fallen outside the "reasonable" range, however, since the rate had been chosen to comply with the safe harbor established in Cash Balance Pension Plans, Notice 96-8, 1996-1 Cumulative Bull 359, 362–63 (detailing interest rate formulas that would not cause cash balance plans to violate statutory prohibitions against backloading or benefit forfeiture). Utilization of this safe harbor guarantees that participants' "hypothetical account balances" match their "accrued benefits" at all times, and avoids the possibility that early termination of the employment relationship will lead to "whipsaw." See *Berger v Xerox Corp Retirement Income Guarantee Plan*, 338 F3d 755, 762–63 (7th Cir 2003) (describing the "whipsaw" created by excessive interest credit); *Esden v Bank of Boston*, 229 F3d 154, 165–66 (2d Cir 2000) (same). If IBM's plan had fallen outside this safe harbor, its plan would have been age discriminatory even under Judge Easterbrook's definition of the term. Under *Esden* and *Berger*, as well as Notice 96-8, participants' accrued benefits under a cash balance plan are measured by projecting the year's pay credit forward, which involves adding interest credits for all years prior to retirement to the pay credit amount, and then discounting the resulting sum to present value using a discount rate established by statute. See, for example, 29 USC § 417(e)(3). When the statutory discount rate is less than the rate of interest credit, this present value (the "accrued benefit") is greater than the account's "hypothetical value" because it includes the present value of the spread between the two interest rates. This excess present value decreases as an employee ages, so that younger employees earn benefits with a present value slightly (or not so slightly) in excess of those earned by an older employee with the same salary. Judge Easterbrook expressed surprise at one point in the opinion at the IBM plan's low rate of interest credits, but this rate apparently resulted from IBM's desire to conform to the dictates of Notice 96-8. See *Cooper*, 457 F3d at 640.

115 Consolidated Appropriations Act of 2004, Pub L No 108-199, 118 Stat 3.

in this Act may be used . . . to issue any rule or regulation which implements the proposed [age-discrimination regulations] or any amendments reaching [similar results]."[116] The same piece of legislation directed the secretary of the Treasury to propose legislation providing "transition relief for older and longer-service participants affected by [cash balance] conversions."[117] In response, Treasury and the IRS withdrew the proposed regulations in their entirety to "provide Congress an opportunity . . . to address cash balance and other hybrid plan issues through legislation."[118]

B. Legislative (In)Action

After years of inaction with respect to cash balance plan issues, Congress enacted legislation dealing with all of the outstanding cash balance issues as part of the Pension Protection Act of 2006.[119] This statute provides that cash balance plans will satisfy the rule against age discrimination as long as the interest credit is "a rate that is not less than zero and is not greater than a market rate of return."[120] In addition, a plan may have a "reasonable minimum guaranteed rate of return or [ ] a rate of return that is equal to the greater of a fixed or variable rate of return."[121] In short, this legislation, like the proposed and then retracted Treasury regulations, effectively takes only the pay credit into account for purposes of testing age discrimination, as long as the interest credits fall within a reasonable range. IBM's cash balance plan would have survived muster had it been testable under this statutory regime.

But Congress explicitly made the new rules applicable only to "periods beginning on or after June 29, 2005,"[122] leaving the question of the status of cash balance plans established prior to that date unresolved. Indeed, the Joint Committee staff's technical explanation for the bill that became the Pension Protection Act of 2006 states that "[n]othing in the provision is to be construed to infer the treatment of applicable defined benefit plans or conversions to such plans under the rules in ERISA, ADEA and the Code prohibiting age discrimina-

116 118 Stat at 319.

117 118 Stat at 319.

118 See Age-Discrimination Regulations, 2004-2 Cumulative Bull at 15 (cited in note 111).

119 Pension Protection Act of 2006, Pub L No 109-280, 120 Stat 780. This law was signed ten days after Judge Easterbrook handed down the panel's decision in *Cooper*. See note 60.

120 See Joint Committee on Taxation, JCX-38-06 at 155 (cited in note 60) (describing the rule); IRC § 411(b)(5)(B)(i)(1).

121 See Joint Committee on Taxation, JCX-38-06 at 155 (cited in note 60) (describing the rule); IRC § 411(b)(5)(B)(i)(1); 29 USC § 623(i)(10); 29 USC § 1054(b)(5).

122 See IRC § 411(a)(13)(C) (providing a timetable for the statute's applicability).

tion as in effect before the provision is effective."[123] Thus, even after all the delay, Congress punted the matter (with its attendant political pressures) to the courts.[124]

V. THE BUCK STOPS

Judge Easterbrook, unlike Congress, did not have the option of avoiding the question posed by *Cooper*. He had to choose between a wooden interpretation of statutory language leading to ridiculous results and one that treated two linguistically different statutes as meaning the same thing, albeit with reasonable results. If cash balance plans were not age discriminatory after June 29, 2005, why should they be thought age discriminatory before that date? What sense is there in treating the compensation for time value of money as "age discrimination"? Would employees really be better off if their employers were forced to choose between traditional defined benefit plans and defined contribution plans? As Judge Easterbrook noted in *Cooper*, the plaintiffs' lower court victory spurred IBM to replace its cash balance plan with a defined contribution plan, leaving its workers even less well off.[125]

Straight-faced adherence to statutory language, of the kind in *Guidry*, lauded by Judge Easterbrook,[126] is a more attractive option when one believes that a legislative backstop exists, so that there is reason to think that the legislature will correct, or reassert, its preferred policy. But as Judge Easterbrook must have known by the time he issued his decision in *Cooper*, no such backstop existed when it came to cash balance plans. Congress had long made clear that it preferred to avoid the issues associated with cash balance plans.[127] Though it is surely the job of the legislature to weigh policy considerations, it may simply be impossible for courts to avoid filling these "gaps" when the legislative branch insists, for years and years, on leaving them open.

Judge Easterbrook surely reached the "right" result in *Cooper*. Indeed, the opinion has been followed in all the other circuits that

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123 Joint Committee on Taxation, JCX-38-06 at 155 (cited in note 60).

124 At the time, some regarded the failure to bring old cash balance plans under the protection of the statute as a signal that such plans violated the age discrimination requirements of prior law. See, for example, Lurie, 109 Tax Notes at 117 (cited in note 39).

125 457 F3d at 642 (describing pension litigation as "mak[ing] everyone worse off").

126 See notes 5–7 and accompanying text.

127 After the lower court's decision in *Cooper*, conversions to cash balance pension plans all but stopped, while conversions to defined contribution plans accelerated. See Emerman and Arnoff, *Large Employers Slow Changes* (cited in note 15) (showing that the number of Fortune 100 companies maintaining hybrid plans peaked in 2004, at thirty-four, declining to twenty-six by 2007, while those maintaining only defined contribution plans rose from twenty-six to forty-six).

have heard cash balance cases.[128] Easterbrook is, after all, one of our great judges and insightful academics. A legal system could not ask for a better agent when it comes to sorting out a financial and labor relations mess, created by Congress and allowed to fester for decades. But it is ironic that the person who finally brought the matter to the right result was one who abhorred such a task for an unelected official.

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128 See *Hirt v Verizon Communications, Inc*, 533 F3d 102, 107 (2d Cir 2008); *Drutis v Rand McNally & Co*, 499 F3d 608, 614–15 (6th Cir 2007), cert denied, *Drutis v Quebecor World*, 129 S Ct 68 (2008); *Register v PNC Financial Services Group, Inc*, 477 F3d 56, 68 (3d Cir 2007). Two of the three opinions extensively cite *Cooper*. See *Drutis*, 499 F3d at 613–15; *Register*, 477 F3d at 68–69.

Hirt altered the course of several of the district court cases discussed in note 89. In *In re Citigroup Pension Plan ERISA Litigation*, 470 F Supp 2d 323 (SDNY 2006), the judge reserved judgment on the issue of age discrimination in light of the *Hirt* appeal. See *In re Citigroup Pension Plan ERISA Litigation*, 2007 US Dist LEXIS 86145, *11–12 (SDNY). In *In re J.P. Morgan Chase Cash Balance Litigation*, 460 F Supp 2d 479 (SDNY 2006), the defendants were successful in getting an age discrimination claim dismissed under *Hirt*. See *In re J.P. Morgan Chase Cash Balance Litigation*, 2008 US Dist LEXIS 106274, *3–4 (SDNY).