

COMMENT

Life during (and after) Wartime: Enforceability of Waivers under USERRA

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INTRODUCTION

The Uniformed Services Employment and Reemployment Rights Act of 1994¹ (USERRA) guarantees returning members of the military reinstatement to the same jobs they enjoyed before service interrupted their private lives. This includes the benefits, pay, and seniority they would be entitled to if the interruption had not occurred.²

When George Wysocki returned to the United States in 2008 after serving a tour of duty in Afghanistan, he understandably expected to regain his position at the computing firm IBM. The company, however, was displeased with what it considered a deterioration in Wysocki's skills and decided to terminate him after only a few months. IBM offered Wysocki a severance package worth a shade over \$6,000 on the condition that he release his USERRA discrimination claims against the company.³ He signed the agreement but sued IBM anyway, alleging that his USERRA rights had been violated. Wysocki's suit relied on a provision in USERRA that renders private agreements reducing reemployment rights unenforceable unless the provisions of the private agreement are "more beneficial" for the veteran than those provided by the Act.⁴

The Sixth Circuit found that the severance agreement was "more beneficial" under the meaning of this provision, 38 USC § 4302, than Wysocki's USERRA rights. It was sufficient, the court held, that the agreement was supported by consideration and accordingly that Wysocki believed at the time that the rights in the agreement were "more beneficial." The court then enforced the

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¹ Pub L No 103-353, 108 Stat 3149, codified at 38 USC § 4301 et seq.

² USERRA § 2(a), 38 USC §§ 4303, 4312.

³ *Wysocki v International Business Machines Corp.*, 607 F3d 1102, 1104 (6th Cir 2010), cert denied 131 S Ct 945 (2011).

⁴ *Wysocki*, 607 F3d at 1106, quoting USERRA § 2(a), 38 USC § 4302.

release because Wysocki could provide no evidence of duress, mistake, or other unfair dealing.⁵ Wysocki was entitled to his \$6,000 but not his job at IBM.

Wysocki's story is similar to that of many veterans returning from Afghanistan and Iraq. Though Congress enacted USERRA to secure civilian work for returning veterans, it did not anticipate that the number of activated military reservists would swell to 793,447 soldiers over the span of a decade.⁶ The strain on private employers in the economic downturn has encouraged some to resort to tactics similar to IBM's; the Pentagon has reported that over 10 percent of returning servicemembers face difficulties returning to work and asserting their rights under USERRA.⁷

Even given this strain, the result in *Wysocki* seems intuitively wrong. It is difficult to see how \$6,000 is "more beneficial" than eight months' salary at any job, let alone one at IBM. But because the *Wysocki* decision was the first by the federal appellate courts to interpret the meaning of "more beneficial,"⁸ *Wysocki*'s holding—that any contract supported by consideration is per se "more beneficial" to veterans—is the first step in establishing a precedent that could become settled federal law. Employers might thereafter be able to extract unfair, ultimately harmful releases and waivers from veterans, contrary to the spirit of USERRA's sweeping protection. On the other hand, competing interpretations of "more beneficial" effectively eliminate the possibility for *any* waiver or release, perhaps chilling opportunities for mutually advantageous severance deals.

Much, then, hinges on the meaning of "more beneficial" in 38 USC § 4302 and when this section applies. One interpretative difficulty is whether "more beneficial" applies only when agreements

⁵ *Wysocki*, 607 F3d at 1108.

⁶ See Department of Defense, *Reserve Components: Noble Eagle / Enduring Freedom / New Dawn* *1 (Dec 21, 2010), online at <http://www.defense.gov/news/d20101221ngr.pdf> (visited Nov 2, 2011).

⁷ Lesley Stahl, *Reservists' Rocky Return to Job Market* *1 (CBS News, Feb 11, 2009), online at <http://www.cbsnews.com/stories/2008/10/30/60minutes/main4558315.shtml> (visited Nov 2, 2011).

There is reason to think that such occurrences between employers and returning servicemembers will rise in the near future, as troops return home due to recent withdrawals from Iraq and Europe. See Joseph Logan, *Last Troops Leave U.S., Ending War*, Reuters (Dec 18, 2011), online at <http://www.reuters.com/article/2011/12/18/us-iraq-withdrawal-idUSTRE7BH03320111218> (visited Feb 7, 2012); Elisabeth Bumiller and Steven Erlanger, *Panetta and Clinton Seek to Reassure Europe on Defense*, NY Times (Feb 4, 2012), online at <http://www.nytimes.com/2012/02/05/world/europe/panetta-clinton-troops-europe.html> (visited Feb 7, 2012).

⁸ See *Wysocki*, 607 F3d at 1109 (Martin concurring) (characterizing the issue as "a question of first impression in the federal courts").

augment USERRA benefits, or if it still applies when agreements reduce these benefits but are nonetheless net beneficial to the veteran. If the latter, courts face yet another difficult choice: Should they determine whether an agreement is “more beneficial” than USERRA based on objective valuations or the subjective beliefs of the parties at the time of contract formation? Further, is it true that § 4302 is the only source of law that limits the enforceability of private agreements reducing USERRA benefits?

This Comment answers these questions, offering an interpretation of “more beneficial” that accords with both the text and spirit of USERRA. Part I discusses the background of “more beneficial” in § 4302, USERRA’s relation-to-other-laws provision. It further shows that existing rules cannot be reconciled. The Sixth Circuit’s *Wysocki* rule, in practice, makes nearly any waiver “more beneficial,” while other lower court rulings and Department of Labor (DOL) regulations disallow waivers entirely. Part I also delves into USERRA’s legislative history, which suggests Congress intended to retain common law protections that would further limit, but not eliminate, USERRA waivers.

Part II exposes flaws in existing interpretations of USERRA’s “more beneficial” provision. Part III advocates an intermediate position not yet proposed by any court or commentator: that “more beneficial” in § 4302 allows only retrospective, individually bargained-for waivers that make the veteran objectively better off. This Comment argues that this rule is the only one consistent with Congress’s express intent in drafting the provision, established canons of statutory construction, and the interpretation of similar provisions in other areas of law.

I. TENTATIVE DECISIONS: CASES, REGULATIONS, AND REPORTS ON THE RELATION OF USERRA TO OTHER LAWS

A. Predecessors and Purposes of USERRA

The United States has offered veterans some form of federal reemployment rights since 1940 under the Selective Training and Service Act.⁹ Coverage remained roughly the same until Congress dramatically expanded benefits in 1974 with the Veterans’ Reemployment Rights Act¹⁰ (VRRRA). The VRRRA allowed a veteran

⁹ See Selective Training and Service Act of 1940 § 8, Pub L No 76-783, 54 Stat 885, 890 (guaranteeing reemployment rights for federal employees).

¹⁰ Veterans’ Reemployment Rights Act of 1974, Pub L No 93-508, 88 Stat 1578, codified as amended at 38 USC §§ 2021–27 (1992) (intending “to increase vocational rehabilitation

to ask for a leave of absence from her private employer to go on active duty and guaranteed her the same position upon return, with the same “seniority, status, pay, and vacation” as if she “had not been absent for such purposes.”¹¹ Though Congress believed the VRRRA “effectively served the interests of veterans, members of the Reserve Components, the Armed Forces and employers,” it was concerned that the statute was “complex and sometimes ambiguous[,] . . . allowing for misinterpretations.”¹² Congress began drafting USERRA to reform these protections to “clarify, simplify, and where necessary, strengthen the existing veterans’ employment and reemployment rights.”¹³ However, USERRA’s drafters stressed that “the extensive body of [VRRRA] case law that has evolved . . . to the extent that it is consistent with the provisions of [the proposed USERRA legislation], remains in full force and effect in interpreting [USERRA’s] provisions.”¹⁴

Congress finally enacted USERRA in 1994 “to encourage noncareer service in the uniformed services by . . . minimizing the disadvantages to civilian careers and employment,”¹⁵ as well as others in servicemembers’ “communities, by providing for the prompt reemployment of” servicemembers¹⁶ “to prohibit discrimination.”¹⁷ The statute accomplishes these goals by offering three types of protection. It prohibits discrimination and retaliation against prospective and returning servicemembers, preserves employee benefits while they fulfill their duties, and mandates their reemployment and retraining upon their return.¹⁸ To facilitate this protective role, courts “construe USERRA’s provisions liberally, in favor of the service member.”¹⁹

Unfortunately, USERRA has not proven immune to conflicting interpretations. USERRA includes a murky relation-to-other-laws

subsistence allowances . . . paid to eligible veterans” and “to promote the employment of veterans . . . [by] codify[ing] and expand[ing] veterans reemployment rights”).

¹¹ *Woodman v Office of Personnel Management*, 258 F3d 1372, 1376 (Fed Cir 2001), quoting 38 USC § 2024(d) (West 1988).

¹² *Uniformed Services Employment and Reemployment Rights Act of 1993*, HR Rep No 103-65, 103d Cong, 1st Sess 18, reprinted in 1994 USCCAN 2449–92, 2451.

¹³ *Id.*

¹⁴ *Id.* at 19.

¹⁵ USERRA § 2(a), 38 USC § 4301(a)(1).

¹⁶ USERRA § 2(a), 38 USC § 4301(a)(2).

¹⁷ USERRA § 2(a), 38 USC § 4301(a)(3).

¹⁸ See Aloysius F. Rohmeyer and Bruce D. Schrimpf, *Employment Law and How the Uniformed Services Employment and Reemployment Rights Act Protects Servicemembers*, 43 Clearinghouse Rev: J Poverty L & Pol 282, 286 (2009).

¹⁹ *Gordon v Wawa, Inc.*, 388 F3d 78, 81 (3d Cir 2004).

provision, which has been difficult for courts to apply.²⁰ Section 4302(a), referred to henceforth as the “more beneficial” provision, provides:

Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

Section 4302(b), or the “reduces” provision, however,

supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

Thus, § 4302(a) (that is, the “more beneficial” provision) appears to permit agreements and laws that make veterans better off, while § 4302(b) (that is, the “reduces” provision) prohibits agreements that make veterans worse off. What is not clear is how to apply these commands to agreements or laws that make veterans better off in some ways and worse off in others. In other words, the statute does not speak clearly to situations where contracts or laws are on *net* “more beneficial” than USERRA benefits.²¹

Courts and agencies have reached conflicting decisions as to whether “more beneficial” permits net beneficial agreements.²² Part I.B discusses state and federal district court decisions holding

²⁰ The VRRRA did not explicitly address how it related to private agreements, plans, or policies. It did, however, provide that “[t]he rights granted by [VRRRA] to persons who left the employ of a State . . . and were inducted into the Armed Forces shall not diminish any rights such persons may have pursuant to any statute or ordinance of such State or political subdivision establishing greater or additional rights or protections.” VRRRA § 404(a), 88 Stat at 1596. The sweep of this provision is clearly far more limited than USERRA’s—it applies only to former state and city government employees, does not mention private agreements, and does not separate benefits from reductions as does the current 38 USC § 4302. Most importantly for our purposes, it did not include the “more beneficial” language interpreted here. This at least suggests that Congress may have intended a different relation to other laws and agreements in USERRA than was created by the “greater or additional rights” not superseded by the VRRRA.

²¹ Though “net beneficial” technically describes both situations, this Comment refers to agreements that increase rights in some ways but reduces them in others as “net beneficial agreements,” as opposed to agreements that augment rights without reducing them in other areas.

²² Compare *Wysocki v International Business Machines Corp.*, 607 F3d 1102, 1108 (6th Cir 2010), with 20 CFR § 1002.7.

that § 4302 prohibits net beneficial bargains. It further discusses Department of Labor (DOL) regulations interpreting “more beneficial” and concludes that DOL also prohibits net beneficial agreements. Part I.C analyzes in depth the meaning of the *Wysocki* decision and its accompanying concurrence, which both depart from DOL’s approach. Finally, Part I.D explores the legislative history found both in House committee and Senate reports, suggesting additional considerations the institutions yet to interpret “more beneficial” might unduly ignore.

B. Initial Interpretations and Agency Regulations

In the initial case to address the meaning of § 4302, *Perez v Uline, Inc.*,²³ a California appellate court refused to enforce a severance agreement paying the veteran plaintiff six weeks of his salary in exchange for a release operating as a “waiver of all claims.”²⁴ It held that § 4302 “plainly states that a contract may not limit the protections of USERRA” and refused to sustain the employer’s “assertion that the agreement waived the protections” it affords.²⁵ The court did not consider the impact this interpretation would have on the “more beneficial” provision, nor did it consider the legislative history of the bill in coming to its conclusion.²⁶ Later courts came to the same conclusion as *Perez*, either expressly or by implication.²⁷ One court has referred to “reduces” as “an antiwaiver provision.”²⁸ Another, in invalidating an employer plan, noted that “Congress intended a uniform set of protections available to returning veterans in the several states and expressly forbade modification of these protections by . . . contractual bargaining because it would frustrate the statutory purpose.”²⁹ However, none of these rulings considered the possibility, as proposed by the later ruling in *Wysocki*, that § 4302(a) limits § 4302(b).³⁰

The Department of Labor’s interpretation of USERRA echoes the interpretation of these lower courts. It promulgated rules in 2005 interpreting “more beneficial” to mean that “USERRA establishes a

²³ 68 Cal Rptr 3d 872 (Cal App 2007).

²⁴ See *id.* at 875.

²⁵ *Id.*

²⁶ *Id.*

²⁷ For an example of a case that considers USERRA § 2(a), 38 USC § 4302(a)–(b), but ignores this relational interpretative problem, see *Carder v Continental Airlines, Inc.*, 2009 WL 4342477, *7 (SD Tex).

²⁸ *Kitts v Menards, Inc.*, 519 F Supp 2d 837, 840 (ND Ind 2007).

²⁹ *Wriggelsworth v Brumbaugh*, 129 F Supp 2d 1106, 1112 (WD Mich 2001).

³⁰ See Part I.C.1.

floor, not a ceiling” for employment and reemployment rights.³¹ In other words, “[i]f an employer provides a benefit that exceeds USERRA’s requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA.”³² DOL also reversed the order of the provisions as presented in the statute, including § 4302(b) in its entirety at 27 CFR § 1002.7(b) and § 4302(a) at 27 CFR § 1002.7(c). The regulations go on to illustrate the consequences of this interpretation:

For example, even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.³³

Note that DOL does not suggest that it is relevant whether the veterans’ gains from more paid days of leave outweigh their losses from fewer unpaid days—the fact an additional benefit was provided cannot permit an employer to limit a USERRA right. Thus, according to DOL, § 4302 allows agreements to augment benefits but prohibits trading away rights for a *net* beneficial bargain.³⁴ DOL’s “floor” does not make explicit exceptions for waivers or releases of USERRA claims. The natural consequence of this hard limit is that veterans may not bargain for outcomes that clearly make them better off. Providing benefits in addition to those granted by the statute does not permit reducing those it guarantees. Just as a fixed number of days of paid military leave is an additional benefit that could not justify an employer limiting unpaid leave, a cash settlement

³¹ 20 CFR § 1002.7(a).

³² 20 CFR § 1002.7(d).

³³ 20 CFR § 1002.7(d).

³⁴ Oddly, courts interpreting § 4302 have so far ignored DOL’s interpretation. See, for example, *Wysocki*, 607 F3d at 1102, 1107–08; *id.* at 1110 (Martin concurring). Accordingly, they have also ignored the possibility that this interpretation is entitled to deference. See *National Association of Home Builders v Defenders of Wildlife*, 551 US 644, 665 (2007) (stating the rule that courts defer to an agency’s reasonable interpretation of a statute “only where Congress has not directly addressed the precise question at issue through the statutory text”); *Carder v Continental Airlines, Inc.*, 636 F3d 172, 181 (5th Cir 2011). But deference is not a foregone conclusion, because the regulations do not specifically address full releases of USERRA rights—they do so only by deductive reasoning. See *Middleton v City of Chicago*, 578 F3d 655, 661 (7th Cir 2009). Whether these regulations are entitled to deference is not, however, relevant to this Comment, because it seeks to establish the *correct* interpretation of § 4302, for both courts and DOL. See text accompanying notes 35–36.

is an additional benefit that could not excuse an agreement to waive all other USERRA rights.

While perhaps it is not surprising that DOL interprets this provision as broadly as possible in favor of veterans (at least superficially), there is good reason to think that the agency did not consider the effect of this interpretation on waivers. In the Federal Register, the agency responded during the notice-and-comment period to many of its proposed regulations related to USERRA.³⁵ Yet this document merely reproduces the regulations promulgated to interpret § 4302 as applied to service members after their return without mentioning any concerns or counterarguments to its position—it merely proffers it without explanation.³⁶ This suggests that no serious attempt was made to challenge the agency’s interpretation. It’s quite possible that DOL did not consider the impact of its interpretation on waiver and release, and from this it is not obvious that it examined the legislative history of USERRA to reach its interpretative conclusion.

C. *Wysocki* and Its Lineage

In *Wysocki v International Business Machines Corp.*,³⁷ the Sixth Circuit departed from the antiwaiver rule.³⁸ George Wysocki was a longtime IBM employee and military reservist.³⁹ After returning from his previous tours of duty, IBM had provided him the necessary retraining and benefits guaranteed to him under USERRA.⁴⁰ Upon his return in July 2007, however, IBM claimed that Wysocki’s skills had unacceptably deteriorated. Rather than granting him opportunities to shadow and retrain, IBM refused to offer these services and terminated his employment in October 2007.⁴¹

³⁵ See Department of Labor, Uniformed Services Employment and Reemployment Rights Act of 1994, 70 Fed Reg 75245, 75245–75313 (2005) (responding after comment period on proposed 20 CFR § 1002).

³⁶ 70 Fed Reg at 75256–57 (cited in note 35) (discussing three comments contesting the inability to waive USERRA reemployment rights before or during service and the department’s response that the text and legislative history of § 4302(b) indicate prohibition against waiver). In DOL’s response, the antiwaiver analysis was restricted to situations arising under § 1002.88 (regarding reemployment waivers) and did not extend to analysis of situations arising under § 1002.7 (regarding the “floor” in employee benefits after securing reemployment).

³⁷ 607 F3d 1102 (6th Cir 2010).

³⁸ See *id.* at 1108.

³⁹ Brief for George Wysocki in Support of the Petition for Certiorari, *George Wysocki v International Business Machines Corp.*, No 10-647, *6 (US filed Nov 12, 2010) (available on Westlaw at 2010 WL 4641647).

⁴⁰ *Wysocki*, 607 F3d at 1103.

⁴¹ *Id.*

IBM quickly offered Wysocki a severance agreement that would give him \$6,023.65 if he agreed to release all his claims related to his “veteran status” against IBM. The terms stated that Wysocki had twenty-one days to consider the offer and seven days to rescind the agreement after signing, and suggested he talk to an attorney before making a decision.⁴² Wysocki accepted the offer, did not rescind the contract within the seven-day period, and never returned the payment to IBM. He brought suit in the Eastern District of Kentucky under USERRA, claiming IBM discriminated against him based on his status as a veteran.⁴³

1. The majority opinion: agreements supported by consideration are “more beneficial” as a matter of law.

On appeal, the Sixth Circuit affirmed the district court’s decision to grant IBM summary judgment on other grounds.⁴⁴ The court held first that the release implicated Wysocki’s substantive rights because the release would preclude his right to seek redress at all, in any forum.⁴⁵ The next step, then, was to analyze whether USERRA’s “more beneficial” provision operated to void the severance agreement.

At the outset, the court declared that “the critical inquiry is whether the Release is exempted from the operation of § 4302(b) by § 4302(a), because the rights it provided to Wysocki were more beneficial than the rights that he waived.”⁴⁶ It held then that the “application [of § 4302(b)] is limited by § 4302(a).”⁴⁷ The court did not explain why this must be so. It noted the policy toward interpreting the statute in favor of veterans.⁴⁸ It also looked to legislative history, reasoning that the drafters of the statute intended to allow veterans “to waive their individual USERRA rights by clear and unambiguous action,” and it cited House and Senate reports in support of this proposition.⁴⁹ Veterans’ ability “to waive their USERRA rights without unnecessary court interference, if they *believe* that the consideration they will receive for waiving those rights is more *beneficial* than pursuing their rights through the courts, is both valuable and beneficial to veterans.”⁵⁰ The court concluded

⁴² Id at 1104.

⁴³ Id.

⁴⁴ *Wysocki*, 607 F3d at 1108.

⁴⁵ Id at 1107.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ *Wysocki*, 607 F3d at 1107.

⁴⁹ Id at 1108.

⁵⁰ Id (emphasis added).

from this premise that the “more beneficial” provision saved the release.

The court then applied its apparent rule that waivers are allowed if the veteran believed, at the time the agreement was finalized, the consideration she received was “more beneficial” than her USERRA rights. It found that “Wysocki understood that the Release eliminated his USERRA rights” and “that he signed the Release because he believed that the rights provided in the Release were more beneficial than his USERRA rights.”⁵¹ Finally, Wysocki did not present “any argument or evidence to the contrary,” nor did he show that his consent was the result of “mistake, incapacity, fraud, misrepresentation, unconscionability, or duress.”⁵²

Worth noting is the majority’s dual use of the word “believe”—suggesting that the court contemplated a subjective test to satisfy § 4302. This raises the question whether the interference the opinion cautioned against was *judicially* or *legislatively* sanctioned, given that the statute specifies the “more beneficial” language, not the common law. Finally, it is important to note that the majority concludes simply that waivers are “valuable and beneficial to veterans,” but fails to weigh the ability to waive against the competing interests the statute was intended to protect.

2. The concurring opinion: agreements are “more beneficial” if the veteran believes they are net beneficial to USERRA rights

Judge Martin Boyce Jr’s concurring opinion agreed with the result and much of the majority’s opinion but differed on the analysis necessary to determine whether an agreement is “more beneficial.” He argued that the posture of the case made it inappropriate to make broad statements about the effect of § 4302. Wysocki’s complaint did not mention the release, and he provided no evidence that created “a dispute over whether the Release resulted in a situation more beneficial than [Wysocki’s] USERRA rights.”⁵³

Martin agreed with the result and gave tentative support for the majority’s reasoning only as he understood it.⁵⁴ He did not “read section 4302 to affect the law’s general preference for enforcing contractual waivers of rights . . . though section 4302 drastically alters the test for determining the enforceability of a waiver.”⁵⁵ The text

⁵¹ Id.

⁵² *Wysocki*, 607 F3d at 1108.

⁵³ Id at 1109 (Martin concurring).

⁵⁴ Id at 1109–10.

⁵⁵ Id at 1110.

and legislative history of § 4302 indicated that veterans could waive their rights “so long as the waiver passes” the beneficiality test. His description of the “critical inquiry” differed subtly from the majority, however, asking “whether the waiver of USERRA rights results in a situation more beneficial to the veteran than if the veteran had asserted his USERRA rights.”⁵⁶

Martin then further clarified his own position in case the majority opinion’s meaning differed from his presumed meaning. He first argued that finding that the waiver clearly intended to release USERRA rights, and that the veteran obtained substantial consideration, “does not permit the inference that the consideration was more beneficial to the veteran than his USERRA rights.”⁵⁷ Rather, the existence of a release only proves that the employer has met the initial burden of production in asserting the release. The dispositive fact to Martin was not that the waiver was supported by consideration, but that Wysocki did not respond with any evidence that the release was less beneficial than USERRA after IBM satisfied this burden.⁵⁸ Martin suggested that “[a]n affidavit likely would have sufficed to create a question of fact that would have required the district court . . . to determine what it means for one thing to be ‘more beneficial’ than something else.”⁵⁹

One distinction worth noting between the two opinions is the language suggesting conceptual differences in the scope of “more beneficial.”⁶⁰ Martin’s analysis requires courts to determine whether a contract at issue “results in a situation more beneficial” than what USERRA would provide.⁶¹ They must imagine two worlds—one as if the waiver is signed, and one as if it is not—and compare. The majority, by contrast, requires only that veterans “believe that the

⁵⁶ *Wysocki*, 607 F3d at 1110 (Martin concurring).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ One very strange similarity between the opinions, on the other hand, is their failure to address or even mention the relevant DOL regulations discussed in Part I.B. See *Wysocki*, 607 F3d at 1107–08; *id.* at 1110 (Martin concurring). It is unclear from the opinions if the regulations were purposefully omitted from the discussion, or whether the court ignored them because the deference line of argument was not briefed by the parties’ counsel. See Brief on Behalf of Defendant-Appellee International Business Machines Corporation, *Wysocki v International Business Machines Corp.*, Civil Action No 09-5161, *17 (6th Cir filed Apr 28, 2009) (available on Westlaw at 2009 WL 1209409) (interpreting § 1002.7 to apply only to substantive rights, but arguing waivers were procedural); Reply Brief on Behalf of the Plaintiff-Appellant George Wysocki, *Wysocki v International Business Machines Corp.*, Civil Action No 09-5161 (6th Cir filed May 12, 2009) (available on Westlaw at 2009 WL 8379166) (neglecting or failing to discuss § 1002.7). For a discussion considering whether these regulations are entitled to deference, see note 34.

⁶¹ *Wysocki*, 607 F3d at 1110 (Martin concurring).

consideration they will receive . . . is more beneficial than pursuing their rights through the courts.”⁶²

Both opinions leave open room for subjective analysis. The majority’s view appears to be purely subjective. It is concerned only with whether the veteran believed the contract to be “more beneficial,” not with whether it actually was so. The concurrence’s focus is on comparing the hypothetical *situations* that would occur if the veteran did or did not sign the waiver. It suggests, however, that Wysocki would have needed to merely submit an affidavit stating his belief to avoid summary judgment.⁶³ Requiring a mere assertion about a private belief under oath is not an evidentiary hurdle that meaningfully distinguishes it from a subjective test—though it is one strongly favoring plaintiffs.⁶⁴

Moreover, the subjective language applied by the majority suggests that the concurrence’s reading of the majority opinion was incorrect. Recall that Martin agreed with the majority opinion only as he understood it. His understanding was that Wysocki lost because he failed to offer evidence answering the more “beneficial claim” on summary judgment, not because the existence of consideration compelled the inference that the contract was “more beneficial.” The subjective language and stated policies underlying the majority’s opinion suggest the opposite reading is more accurate. This account of the *Wysocki* interpretation appears to be convincing to federal courts. In *Baldwin v City of Greensboro*,⁶⁵ the Middle District Court of North Carolina cited *Wysocki* as a potential answer to the plaintiff’s claim that waivers were unenforceable under § 4302.⁶⁶ In a parenthetical, the court described the Sixth Circuit as holding “that the language of Section 4302 did not supersede a settlement agreement because the plaintiff received valuable consideration for his release of his rights under USERRA.”⁶⁷ The court nonetheless denied summary judgment to the defendant on another ground: the plaintiff provided evidence of duress.⁶⁸

Regardless of whether this statement was actually intended as the holding, the fact that the language of the opinion creates these

⁶² Id at 1108 (majority).

⁶³ Id at 1110 (Martin concurring).

⁶⁴ Judge Martin’s approach is objective in *theory* but not in practice. If the veteran can get to trial merely by asserting his subjective belief in an affidavit, much of the value of the release is negated for the employer—it will have to bear the full cost of trial litigation in addition to the transaction costs in securing the release.

⁶⁵ 2010 WL 3211055 (MD NC).

⁶⁶ Id at *5.

⁶⁷ Id.

⁶⁸ Id at *6.

interpretative problems is evidence enough that more clarification is necessary. For the purposes of brevity and clarity, this Comment will refer to the argument that agreement is “more beneficial” as a matter of law if it is supported by consideration as the “*Wysocki* holding” or “*Wysocki* interpretation”—with the caveat that it might be dictum.

D. Legislative History

The legislative history of the bill paints a picture unrecognizable from the courts’ interpretations of § 4302. First, both the House and the Senate indicated that “more beneficial” allows veterans to retain ownership over their USERRA rights. The House wished to “stress that rights under [USERRA] belong to the claimant, and he or she may waive those rights, either explicitly or impliedly, through conduct,”⁶⁹ while the Senate maintained that USERRA rights “belong to the employee.”⁷⁰ Both also noted that, though waivers were possible, they must be supported by clear actions. The House said § 4302 required that waivers be “clear, convincing, specific, unequivocal, and not under duress.”⁷¹ The Senate used fewer adjectives but expressed a similar sentiment, noting that “rights . . . can only be waived through unambiguous and voluntary action.”⁷²

These passages are damning for the *Perez* line of cases and DOL’s interpretation of “more beneficial.” Both chambers intended waivers of USERRA rights to be enforceable in at least some situations. Moreover, if Congress’s idea of “waiver” was an agreement that offered greater benefits in some ways and did not reduce them in any others, why would it demand clear and convincing evidence? This would actually serve to make it more difficult for veterans to assert their rights to additional benefits their employers might bestow. Instead, this evidentiary standard implies that Congress also contemplated the enforceability of at least some waivers that pare back USERRA rights.

On the other end of the spectrum, the House and Senate reports do explain in part where DOL derived some of the language of its rules. The Senate report states that the “more beneficial” provision “restate[s] the policy . . . [USERRA] is intended to be a floor and

⁶⁹ HR Rep No 103-65 at 20 (cited in note 12) (“[A]ny waiver must, however, be clear, convincing, specific, unequivocal, and not under duress. Moreover, only known rights which are already in existence may be waived.”).

⁷⁰ *Uniformed Services Employment and Reemployment Rights Act of 1993*, S Rep No 103-158, 103d Cong, 1st Sess 41 (1993).

⁷¹ HR Rep No 103-65 at 20 (cited in note 12).

⁷² S Rep No 103-158 at 41 (cited in note 70).

not a ceiling on reemployment rights.”⁷³ The House report says that § 4302(a) “would reaffirm that, to the extent that a Federal or state law or employer plan or practice provides greater rights than those provided under the Committee bill, those greater rights would not be preempted.”⁷⁴

In explaining the “reduces” provision, however, the House appeared to be concerned more with ensuring that federal law preempted collective modifications of USERRA rights in state legislation, collective bargaining, and employer plans than with prohibiting employers and employees from bargaining over USERRA rights in individual cases. The House report cited *Peel v Florida Department of Transportation*⁷⁵ and *Cronin v Police Department of the City of New York*,⁷⁶ which both addressed the relationship between the VVRA and conflicting state laws. *Peel* stands for the proposition that veterans’ rights statutes are a legitimate exercise of Congress’s war power and are not limited in their effect by either the Tenth or Eleventh Amendments to the US Constitution.⁷⁷ The court in *Cronin* held that the VVRA preempted a New York statute that placed a limitation on the period in which veterans could gain pension credit for their military leave, when the VVRA contained no such limitation.⁷⁸ It further suggested that the “federal government’s interest in the area of veterans’ and reservists’ rights ‘is pervasive and exhibits a clear intent to preempt conflicting state legislation.’”⁷⁹ The House report also cites to the Supreme Court case *Fishgold v Sullivan Drydock & Repair Corp.*,⁸⁰ which holds that employer plans and collective bargaining agreements could not “cut down” service time adjustments authorized by Congress.⁸¹

These cases all suggest that the “reduces” provision was primarily intended to ensure that the statute would have preemptive force over plans and statutes that interfered with federal guarantees to groups of veterans en masse, not necessarily to interfere with individual bargaining where employers seek waivers or releases as part of a severance package. Accordingly, there is no evidence that either chamber intended § 4302 to always prohibit veterans from

⁷³ Id.

⁷⁴ HR Rep 65 No 103-65 at 20 (cited in note 12).

⁷⁵ 600 F2d 1070 (5th Cir 1979).

⁷⁶ 675 F Supp 847 (SDNY 1987).

⁷⁷ *Peel*, 600 F2d at 1085.

⁷⁸ *Cronin*, 675 F Supp at 854.

⁷⁹ Id, quoting *Mazak v Florida Department of Administration*, 1983 WL 1995, *4 (ND Fla).

⁸⁰ 328 US 275 (1946).

⁸¹ See id at 285. The Court nevertheless found that the plaintiff asked for more than was actually guaranteed to him. Id.

trading away some of their USERRA rights to their employer in exchange for more valuable benefits.

Another part of USERRA's legislative history lends support to the notion that Congress intended to limit, but ultimately preserve, veterans' ability to individually bargain away their USERRA rights. Unlike either the *Perez* or *Wysocki* lines of cases, the House report distinguishes between agreements that affect "known rights which are already in existence" and those that affect rights which have not yet accrued.⁸² To illustrate, the House report cites *Leonard v United Airlines, Inc.*,⁸³ a case arising under the VRRRA, the predecessor to USERRA.⁸⁴ In *Leonard*, a pilot sued his airline company employer to recover pension funds that would have accrued while he was serving in the Air Force from 1948 to 1953.⁸⁵ Though he failed to contribute to the fund while he was activated, Leonard requested that he be allowed to make up the contributions upon his return. But United claimed he waived his rights to make these contributions when—on the condition that he sign a release form—he decided to withdraw from the plan and take the money in 1948.⁸⁶ Leonard claimed that participation in the plan was a requisite of seniority and sued under the VRRRA.⁸⁷

The court found that he made a knowing and intelligent choice to sign the waiver and withdraw just before being called to duty.⁸⁸ Despite this finding, the court refused to enforce the release agreement. The court noted, "There is no question that veterans can waive their rights to reemployment and the perquisites of seniority after their return from service."⁸⁹ However, the court did "not think that an employee can waive his rights under the Act *before* entering military service."⁹⁰ The Seventh Circuit reasoned that the employment rights provided by the VRRRA were directed to the survivors of conflict, intended by Congress to aid them to "return to civilian life as easily as possible."⁹¹ Because veterans should not be burdened by the choices they make when facing reasonable uncertainty over their future survival, the court held that contracts

⁸² HR Rep 103-65 at 20 (cited in note 12).

⁸³ 972 F2d 155 (7th Cir 1992).

⁸⁴ For a discussion of the VRRRA and its relation to other law, see notes 10–14, 20, and accompanying text.

⁸⁵ *Leonard*, 972 F2d at 156.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 159.

⁸⁹ *Leonard*, 972 F2d at 159.

⁹⁰ *Id.*

⁹¹ *Id.* at 160.

waiving rights before return—that is, prospective contracts—were void under the Act.⁹² The House expressly approved of this common law exception in the report, advising that “[a]n express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, would be contrary to the public policy embodied in the Committee bill and would be void.”⁹³

This report sheds light on a congressional purpose behind the statute that is not immediately apparent. Congress did not intend the text of § 4302 to constitute the entire law on the enforceability of USERRA waivers and modifications.⁹⁴ Rather, it expressly approved of common law rules that *supplemented* its protections.⁹⁵ Limitations on veterans’ USERRA rights en masse would interfere with Congress’s intent to preempt all statutes, plans, and collective bargains. Some forms of individual bargaining—namely, those agreements that would affect future rights—would be void. But, importantly, accrued rights belong to veterans, and nothing in the common law would prevent them from bargaining these benefits away. The fact that Congress explicitly disapproved of only one category of waivers without doing so generally lends further implicit support that some waivers are permissible.

II. ROAD TO NOWHERE: EXISTING APPROACHES TO INTERPRETING “MORE BENEFICIAL”

As noted in Part I.A, there is no dispute among courts and federal agencies as to whether USERRA allows agreements that augment USERRA rights either qualitatively or quantitatively. All of the existing interpretations of “more beneficial” would rightly allow a contract to, for example, guarantee returning veterans a promotion upon their return. A private agreement could also extend USERRA protections for an additional year. These agreements are “more beneficial” because they augment rights and are uniformly enforceable, as we would expect. It is less clear whether an agreement can either add new rights or increase existing protections while reducing them in other areas. In other words, does “more beneficial” save net beneficial agreements? For example, could a private agreement guarantee reemployment for two years in exchange for fewer days of paid leave? Or, does “more beneficial” save a severance package that provides a cash payout worth more

⁹² See *id.* at 159.

⁹³ HR Rep No 103-65 at 20 (cited in note 12).

⁹⁴ *Id.* at 19.

⁹⁵ *Id.* (“[T]he extensive body of [VRRRA] case law . . . remains in full force and effect.”).

than the rights and protections provided by USERRA but eliminates entirely those USERRA rights? If the answer to these questions is yes, should we determine whether the payout is “worth more” than USERRA by the subjective beliefs of the parties or objective valuations?

This Part argues that the two major interpretations of “more beneficial” available from existing sources are fatally flawed—they either violate established canons of construction or contravene the express wishes of Congress. Part II.A discusses an interpretation advanced by DOL and *Perez*—“more beneficial” prohibits net beneficial agreements and waivers. Part II.B explores the flaws of the *Wysocki* holding—that “more beneficial” saves any agreement supported by consideration as a matter of law.

The alternative approaches that have thus far been advocated or implied, but not yet codified or adopted, are similarly unworkable because they indirectly lead to the same consequences that lead us to reject the major interpretations they deviate from. Part II.C discusses the *Wysocki* concurrence’s suggestion that “more beneficial” will not save agreements that veterans do not believe are worth more than their USERRA rights. Finally, Part II.D, inspired by a literal reading of the legislative history, explains why “more beneficial” cannot simply draw a different line between retrospective and prospective agreements.

A. The DOL Approach: “More Beneficial” Allows No Waivers

One interpretation of “more beneficial” is that it disallows net beneficial agreements. The textual justification for this reading is that “reduces,” as encompassed in § 4302(b), flatly prohibits any reduction in USERRA rights whatsoever, and that “more beneficial,” per § 4302(a), is merely a recognition that these rights are not a ceiling above which employers are not allowed to offer new and better rights to veterans. Of course, the natural consequence of this reading is that waivers of USERRA rights are prohibited. Section 4302(b) applies to “agreements,” which severance packages surely are, and “other matters,” which is a catch-all that ensures it applies to anything that could not be characterized exactly as an agreement, like a pre-trial settlement agreement. There are three major reasons why this interpretation is flawed. First, this reading contravenes the express wishes of Congress. Second, it violates established textual principles of construction. Third, it violates, albeit counterintuitively, the interpretative rule to construe USERRA “in favor of veterans.”

The first argument is that it violates congressional intent. The House indicated veterans “may waive [USERRA] rights, either explicitly or impliedly, through conduct,” while the Senate stated that rights could be “waived through unambiguous and voluntary action.”⁹⁶ The House and Senate both recognized that veterans retain some ownership of their USERRA rights.⁹⁷ Part III.A will explain why legislative history is uniquely persuasive in interpreting “more beneficial,” but it suffices here to note that both chambers expressed unequivocally that § 4302 allows veterans to waive their USERRA rights.

Luckily, we do not need to rely solely on legislative history. The canon of construction *in pari materia* states that provisions should be interpreted symmetrically with similar statutes passed at different times.⁹⁸ The VRRRA implicitly allowed waivers and releases of claims despite a lack of express statutory authorization.⁹⁹ This is unsurprising since courts rarely require such express terms to infer the ability to waive protections—especially if they are bargained away. Despite provisions suggesting they are *not* allowed, waivers of Age Discrimination Act,¹⁰⁰ Title VII,¹⁰¹ and Family Medical and Leave Act¹⁰² (FMLA) are all enforceable.¹⁰³ Moreover, even the constitutional rights to due process and a jury trial in such actions can be waived in exchange for consideration, though nothing in the Constitution expressly authorizes such waivers.¹⁰⁴ Thus, a more sensible presumption is that waivers are allowed unless there is clear language showing that they are not.¹⁰⁵ If Congress intended to reverse this practice, it would have included provisions disallowing waiver,

⁹⁶ Id at 20; S Rep No 103-158 at 41 (cited in note 70).

⁹⁷ See notes 69–70 and accompanying text.

⁹⁸ See *Branch v Smith*, 538 US 254, 281 (2003) (“[C]ourts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part.”), citing *United States v Freeman*, 44 US 556, 564–65 (1845).

⁹⁹ See note 20. See also *Leonard*, 972 F2d at 159 (discussing ways veterans may waive rights but citing no statute to support this proposition); *Paisley v City of Minneapolis*, 79 F3d 722, 725 (8th Cir 1996).

¹⁰⁰ Pub L No 90-202, 81 Stat 602 (1967), codified at 29 USC § 621 et seq.

¹⁰¹ Title VII of the Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 253, codified at 42 USC § 2000e et seq.

¹⁰² Pub L No 103-3, 107 Stat 6, codified in various sections of Title 29.

¹⁰³ See *Faris v Williams WPC-I, Inc*, 332 F3d 316, 322 (5th Cir 2003).

¹⁰⁴ See Robert Frankhouser, *The Enforceability of Pre-dispute Jury Waiver Agreements in Employment Discrimination Cases*, 8 Duquesne Bus L J 55, 55 (2004) (“[P]re-dispute jury waiver agreements under current federal . . . law are enforceable in employment discrimination cases.”); Stephen J. Ware, *Arbitration, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 L & Contemp Problems 167, 197 (2004).

¹⁰⁵ See Ware, 67 L & Contemp Problems at 188 (cited in note 104) (arguing that the modern Supreme Court has adopted a “market-oriented” view receptive to allowing contractual waivers of constitutional rights).

not created a provision that could be read in a way to retain it.¹⁰⁶ Therefore, the best interpretation of the statute would reconcile the sub silentio approval of the right to waiver of rights with the text of the statute rather than allow an interpretation that would incidentally destroy it.

Finally, interpreting USERRA to forbid waiver is not justifiable even purely on the basis of public policy. The primary policy argument for prohibiting waivers goes as follows: Duress should be presumed in many situations where veterans waive their USERRA rights. A no-waiver rule would prevent employers from pressuring employees and would take the necessarily imprecise post hoc analysis of the courts out of the equation.

In response to this argument, it might be said that a blanket no-waiver rule would discourage employers from offering severance packages at all—even where such packages might be permissible under USERRA. Severance packages, as in *Wysocki*, are vehicles to extract claim settlements from veterans. But where these settlements are presumptively unenforceable, employers will refuse to give up something (cash) for nothing (an unenforceable piece of paper). Employers set on firing their employees—either for questionable reasons or because they believe they have an affirmative defense—would do so without the preemptory cash settlement. Thus, veterans exposed to possible employment discrimination would experience significant short-term suffering while facing the prospect of only probable long-term relief. Even veterans with claims that should settle might face reduced or eliminated severance packages due to their employers' uncertainty about the later enforceability of the settlement. This is hardly a construction, then, “in favor of the service member.”¹⁰⁷

B. The *Wysocki* Approach: “More Beneficial” Allows Any Waivers Supported by Consideration

The second potential interpretation of “more beneficial” is the one adopted by the *Wysocki* majority. Under this interpretation, “more beneficial” includes any agreement that is supported by consideration. The justification for this interpretation is that the operation of the “reduces” provision is limited by the “more beneficial” provision. That is, if an agreement diminishes some

¹⁰⁶ Consider *Faris*, 332 F3d at 321–22 (suggesting that a rulemaking body intending “a departure from the policy employed in analogous areas” would have “manifested this intent forthrightly”).

¹⁰⁷ *Gordon v Wawa, Inc.*, 388 F3d 78, 81 (3d Cir 2004). See also HR Rep No 103–65 at 19 (cited in note 12).

USERRA rights but nonetheless improves the veteran's position, USERRA does not supersede it. This leaves the question of how to determine whether the veteran's position has indeed been improved. The *Wysocki* court thought that consideration was sufficient evidence of this improvement.¹⁰⁸ This might be explained by the intuition that courts are not institutionally competent to value agreements. Under this theory, we respect the judgment of our veterans; thus, we should respect their judgments that waiving USERRA rights was "more beneficial" unless we can find evidence that the bargain was not at arm's length or otherwise unfair.¹⁰⁹

Consideration, used here, is a judicial shortcut. Some veterans, like George Wysocki, will take severance agreements only because they are the least bad option, not because those agreements are worth more than USERRA claims. For example, facing certain unemployment and only potential judicial relief years down the road, a person with a \$100,000 discrimination claim might take \$6,000 to keep food on the table for his family while he looks for another job. Liquidity concerns could explain this result even if the eventual probability of victory causes the expected value of the claim to outweigh the settlement agreement.

The existence of counterexamples might not be sufficient to reject the rule. But while this interpretation might be immediately appealing for its administrative simplicity, it has no basis in the text of the statute or the common law principles it invokes. Part II.B.1 will show that textual principles strongly suggest that the *Wysocki* interpretation is flawed. Part II.B.2 will show that the policies underlying the *Wysocki* construction are misguided—its interpretation relies on an overly formalistic conception of contract doctrine that is not in accord with modern law.

1. Issues of statutory construction.

The rule against superfluity cautions against the *Wysocki* holding. Under this canon, interpretations that give meaning to every term of a provision are preferred to ones that strip terms of all meaning. The majority in *Wysocki* held that contracts supported by consideration are "more beneficial" to the veteran as a matter of law. All contracts by definition are supported by consideration, because, absent consideration, no contract is formed. Any contract would therefore be "more beneficial" than USERRA under this

¹⁰⁸ See Part I.C.1.

¹⁰⁹ See *Wysocki*, 607 F3d at 1108.

reasoning. But if this were the case, “more beneficial” could not limit the word “contract.” This renders the limitation superfluous.

Moreover, “reduces” would never apply to contracts, because “more beneficial” would always shield them from its voiding effect. This interpretation thus fails the rule against superfluity because it renders terms superfluous and meaningless in both § 4302(a) and (b). Admittedly, “contract” is only one type of matter that triggers the “more beneficial” provision.¹¹⁰ Consideration is irrelevant to statutes and policies. But interpretations that avoid superfluity entirely are superior to those that allow it for some but not all members of a list.¹¹¹

In addition, the *Wysocki* rule leads to results contrary to the intent of Congress. The majority held that the “reduces” provision in § 4302(b) does not apply when the “more beneficial” provision in § 4302(a) is satisfied. USERRA’s “more beneficial” requirement applies not only to contracts, but also to any “Federal or State law (including any local law or ordinance) . . . or other matter.”¹¹² A state could therefore upset the federal veterans’ rights scheme under the *Wysocki* rule by enacting legislation that provided veterans wholly different—yet net beneficial—guarantees from those granted by federal law. For example, states could guarantee veterans a \$200,000 cash payment after their return and three months of health insurance, but no reemployment rights. For many veterans, this might be an improvement over USERRA’s guarantees. Similarly, collective bargaining agreements or employer policies could offer arguably net beneficial schemes and thereby circumvent USERRA coverage.

Congress did not enact a law that carefully struck a balance between employer hardship, veterans’ rights, and military recruitment, only to allow employers and city governments to unilaterally alter this balance without the consent of the veteran.¹¹³ Congress instead drafted § 4302 to “reaffirm a general preemption as to State and local laws and ordinances, as well as to employer practices and agreements, which provide fewer rights or otherwise limit rights.”¹¹⁴

¹¹⁰ See USERRA § 2(a), 38 USC § 4302(b).

¹¹¹ See *Duncan v Walker*, 533 US 167, 174 (2001), quoting *Market Co v Hoffman*, 101 US 112, 115 (1879) (internal quotation marks omitted); *United States v Nordic Village, Inc.*, 503 US 30, 35–36 (1992) (noting “the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect,” rejecting an interpretation reducing a provision to “trivial application”).

¹¹² USERRA § 2(a), 38 USC § 4302(a).

¹¹³ See notes 72–74 and accompanying text.

¹¹⁴ HR Rep No 103-65 at 20 (cited in note 12).

Indeed, “the federal government’s interest in the area of veterans’ and reservists’ rights is ‘pervasive and exhibits a clear intent to preempt conflicting state legislation.’”¹¹⁵ The opposite position would leave “the States and the courts in a position to review the reasonableness of the military’s needs in the area of personnel management and reservist training, and to balance such needs against employers’ interests in minimizing the burdens placed upon them . . . a task for which the States and the courts are wholly unqualified.”¹¹⁶

Section 4302 governs how USERRA relates to all other laws—it doesn’t apply just to contracts. Absent an additional limiting principle distinguishing the way USERRA interacts with individual bargains and collective decision making, the *Wysocki* rule therefore produces workable results only in relation to some forms of *private* law and fails to adhere to Congress’s intent in relation to *public* law and policies.

2. Contract doctrine.

The *Wysocki* interpretation also relies on an outmoded and inaccurate conception of the meaning of consideration in relation to what it tells us about the value of an exchange. If an agreement is unsupported by consideration, no legally enforceable contract is formed.¹¹⁷ Consideration exists either when a benefit gained or a detriment suffered by another induces a party to come to an agreement.¹¹⁸ This hurdle is often quite low—even the mere possibility of future gain can be adequate consideration.¹¹⁹ The requirement serves three functions: it is cautionary, channeling, and evidentiary.¹²⁰ In light of these purposes, it is unsurprising that courts generally refuse to inquire into the adequacy of consideration. After all, “the parties to a contract are free to make their bargain, even if the consideration exchanged is grossly unequal or of dubious value.”¹²¹ This also shows that consideration doctrine does not purport to establish that, *ex ante* or *ex post*, an inducement was *actually* beneficial to the parties. Because it does not measure at all,

¹¹⁵ *Cronin*, 675 F Supp at 854, quoting *Mazak v Florida Department of Administration*, 1983 WL 1995, *4 (ND Fla).

¹¹⁶ *Cronin*, 675 F Supp at 854.

¹¹⁷ See *Labriola v Pollard Group, Inc*, 100 P3d 791, 793–96 (Wash 2004).

¹¹⁸ *Marshall Durbin Food Corp v Baker*, 909 S2d 1267, 1277 (Miss App 2005).

¹¹⁹ See *Apfel v Prudential-Bache Securities, Inc*, 616 NE2d 1095, 1097 (NY 1993).

¹²⁰ Lon L. Fuller, *Consideration and Form*, 41 Colum L Rev 799, 799–801 (1941) (arguing that consideration is “intended to remove the hazards of mistaken or perjured testimony which would attend the enforcement of promises for which nothing is given in exchange”).

¹²¹ *Apfel*, 616 NE2d at 1097, citing *Spaulding v Benenati*, 442 NE2d 1244, 1246 (NY 1982).

consideration is an inappropriate measuring stick of the value of a bargain.

In addition, the rule is not without exceptions. In many situations, courts will examine the value of the exchange to each party and use this evidence to invalidate contracts. *Wysocki* inaccurately argued that courts do not look to the adequacy of consideration. The most glaring example is the doctrine of unconscionability, where the procedures or substance of a bargain are so grossly unequal as to “shock the conscience” of the court.¹²² According to Russell Korobkin, “When finding a term substantively unconscionable, courts nearly always focus their attention entirely on explaining why the term is extremely beneficial to sellers and/or detrimental to buyers.”¹²³ Indeed, courts have invalidated terms in waivers or other agreements because they in effect benefit only the drafter,¹²⁴ “unreasonably benefit one party over another,”¹²⁵ unreasonably diminish statutorily mandated protections,¹²⁶ create economic impediments to relief,¹²⁷ or simply bind parties to a price disparity too great for the court to abide.¹²⁸

Courts must also engage in similar inquiries to determine whether the parties bargained based on a material mistake. A party proves a mistake is material “by showing that the exchange is not only less desirable to him but is also more advantageous to the other party.”¹²⁹ It is often relevant to the court to compare the value of the contract if facts were as both parties thought they were with the ex

¹²² *Armendariz v Foundation Health Psychcare Services*, 99 Cal Rptr 2d 745, 752, 766–67 (Cal App 2000) (establishing the dual standards of procedural and substantive unconscionability in California).

¹²³ Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U Chi L Rev 1203, 1273 (2003).

¹²⁴ See, for example, *Olvera v El Pollo Loco, Inc*, 93 Cal Rptr 3d 65, 74 (Cal App 2009) (“[T]he waiver is unfairly one-sided because it benefits only El Pollo Loco, which is unlikely to sue its employees in a class action lawsuit.”); *Szetela v Discover Bank*, 118 Cal Rptr 2d 862, 868 (Cal App 2002).

¹²⁵ See, for example, *Cordova v World Financial Corp*, 208 P3d 901, 908–09 (NM 2009) (modifying an arbitration provision that the court found to be egregiously one-sided).

¹²⁶ See, for example, *Padilla v State Farm Mutual Automobile Insurance Co*, 68 P3d 901, 906–07 (NM 2003) (striking down a provision in an insurance contract that allowed de novo appeal of damage awards).

¹²⁷ See, for example, *Ruhl v Lee’s Summit Honda*, 322 SW3d 136, 139–40 (Mo 2010). *Brewer v Missouri Title Loans, Inc*, 2010 Mo LEXIS 202, *10–15 (refusing to enforce a class action waiver where the complexity of the claims would make it economically impossible for any individual claimant to hire a lawyer to represent her).

¹²⁸ See, for example, *American Home Improvement, Inc v Iver*, 201 A2d 886, 889 (NH 1964) (holding unconscionable an agreement where “the defendants have received little or nothing of value and under the transaction they entered into they were paying \$1,609 for goods and services valued at far less”).

¹²⁹ Restatement (Second) of Contracts § 152, comment c (1979).

post value when determining materiality—disagreements over these values have precluded summary judgment.¹³⁰ In other situations, courts have declined to enforce contracts where a bidder “names a consideration that is out of all proportion to the value of the subject of negotiation and the other party . . . takes advantage of it.”¹³¹ Finally, courts will compare market value and next-lowest bids to find evidence of a scrivener’s error.¹³²

Another common law exception exists when fiduciaries engage in hard bargaining.¹³³ Courts require a higher bar in these situations, requiring “not merely the absence of unconscionability” but “fair terms in the light of the circumstances at the time of its making.”¹³⁴ At least one court has invalidated a contract where there was evidence of a fiduciary relationship, uneven bargaining positions, and an “inequality of the values exchanged.”¹³⁵

These examples all show that to the extent *Wysocki* relied on a hard judicial rule against determining the value of a contract, it was wrongly decided. Any such judicial policy, at least in modern contract doctrine, is riddled with exceptions at best and is illusory at worst. Moreover, the *exceptions* square better than the rule with the statute—it asks courts to determine whether an agreement is “more beneficial,” not whether the agreement is “supported by consideration.” Nothing in the text of § 4302 suggests that consideration is the appropriate starting point to determine whether “more beneficial” should be assessed subjectively or objectively. Because “supported by consideration” is not sufficient to prove that a contract was net beneficial to any party either *ex post* or *ex ante*, it is a poor yardstick for determining the scope of “more beneficial” under § 4302(a).

¹³⁰ See *Buesing v United States*, 42 Fed Cl 679, 693–97 (1999) (declining summary judgment on material mistake where the values were at issue).

¹³¹ See *Water Works Board v Jones Environmental Construction, Inc.*, 533 S2d 225, 227 (Ala 1988), quoting *Ex parte Perusini Construction Co.*, 7 S2d 576, 578 (Ala 1942).

¹³² See *James T. Taylor and Son, Inc v Arlington Independent School District*, 335 SW2d 371, 375–76 (Tex 1960) (noting that the party who alleged mistake placed a bid more than \$10,000 below the next lowest competitor). But see *Bartlett v Department of Transportation*, 388 A2d 930, 933–34 (Md App 1978).

¹³³ See Restatement (Second) of Contracts § 173(a).

¹³⁴ *Id* at § 173, comment b.

¹³⁵ *Lang v Derr*, 569 SE2d 778, 783 & n 2 (W Va 2002) (noting that a fiduciary obligation requires one “to secure the best price obtainable under the circumstances”).

C. An Approach Derived from the *Wysocki* Concurrence: “More Beneficial” Allows Any Waivers That the Veteran Believes Makes Him Better Off

An alternative interpretation to *Wysocki*’s consideration rule could be extracted from the language of its concurrence. Under this interpretation, “more beneficial” still limits “reduces,” but the veteran must provide only an affidavit stating that she did not believe the contract was “more beneficial” to her in order to create an issue of material fact.¹³⁶ In other words, subjective evidence alone is sufficient to permit an inference that the contract is not “more beneficial.”

There is little textual support for imputing this subjective test to USERRA. Section 4302(a) does not provide that USERRA saves agreements that “the veteran believes or believed made him better off” or “that the employer had reason to believe would make the veteran better off.” Rather, it saves only those agreements that establish “a right or benefit that *is* more beneficial to . . . a right or benefit provided” by USERRA.¹³⁷ The word “is” implies an objective inquiry—the statute asks what “is” as opposed to what is perceived. Moreover, as Part III.B will show, courts have interpreted other laws with similar language to require objective valuations. Finally, imputing subjective requirements cuts against the general preference in contract law for more objectivity rather than less. This is evidenced by the erosion of the subjective “meeting of the minds” toward an objective theory of mutual assent and the prominence of the reasonable person standard in contract interpretation.¹³⁸

Finally, this interpretation leads to the same policy result that cautioned against adopting the DOL interpretation in Part II.A. In order to argue that a severance package was not “more beneficial” than the rights provided by USERRA, a veteran would need only to swear under oath that she did not think the contract benefitted her

¹³⁶ *Wysocki*, 607 F3d at 1110 (Martin concurring).

¹³⁷ USERRA § 2(a), 38 USC § 4302(a) (emphasis added).

¹³⁸ See Russell A. Hakes, *Focusing on the Realities of the Contracting Process—An Essential Step to Achieve Justice in Contract Enforcement*, 12 Del L Rev 95, 99–100 (2011) (describing the general shift to objective evidentiary standards in determining assent in contract formation); Amy Kristin Sanders and Patrick C. File, *Giving Users a Plain Deal: Contract-Related Media Liability for Unmasking Anonymous Commenters*, 16 Comm L & Pol 197, 204 (2011) (“Over time, [] courts have moved away from this subjective theory of assent to an objective theory of assent that requires merely an outward expression of mutual assent to form a contract.”); Daniel P. O’Gorman, *Expectation Damages, the Objective Theory of Contracts, and the “Hairy Hand” Case: A Proposed Modification to the Effect of Two Classical Contract Law Axioms in Cases Involving Contractual Misunderstandings*, 99 Ky L J 327, 342–43 (2010) (discussing the move away from subjective theories of contract interpretation in the mid-nineteenth century to today’s objective standard).

as much as a USERRA judgment would have. Her employer, understanding that a release would be enforceable only upon the whim of a terminated employee, will likely refuse to offer severance payments to compensate for it. A subjective test does not, then, meaningfully differ from a rule prohibiting waivers, because the hurdle to invalidate them is trivially easy to clear.

D. An Alternative Approach Derived from Legislative History:
“More Beneficial” Allows Only Retrospective Waivers
Bargained for Individually

The final available interpretation can be extracted from the language of the House committee report interpreting § 4302. Under this approach, we take Congress at face value when it says USERRA was not intended to abrogate common law interpreting the VRRRA.¹³⁹ Courts interpreting the VRRRA and its predecessor, the Selective Training and Service Act of 1940, held that collective bargaining agreements and state statutes modifying the VRRRA’s protections were superseded.¹⁴⁰ They also interpreted the VRRRA to invalidate reductions in future rights as a matter of law.¹⁴¹ This approach would read § 4302 to also imply these prohibitions. USERRA would therefore supersede any limitations imposed by statute, ordinance, or collective bargaining. The remaining matters that could conflict with USERRA—such as individual bargains—would be enforceable only if they affect rights already accrued (that is, retrospective). Those affecting future rights (that is, prospective)—ones that the veteran cannot presently exercise—are invalid.

One benefit of this interpretation is that it avoids the *Wysocki* rule’s loophole allowing state law and collective bargains to circumvent USERRA protections. It also prevents employers from pressuring employees to prospectively modify their USERRA benefits. An agreement that, for instance, eliminates health coverage if the employee goes on active duty and returns but expands her reemployment guarantees for two years would reduce rights she cannot yet exercise. It thus limits her future veteran’s rights and must be invalid under the rule. This does not create a redundancy problem because these matters can still augment rights but can never reduce them. “More beneficial” is thus limited but still has meaning. Another benefit is that it has textual basis—§ 4302(b) imposes limits

¹³⁹ See HR Rep No 103-65 at 19 (cited in note 12).

¹⁴⁰ See *Fishgold v Sullivan Drydock & Repair Corp.*, 328 US at 284–91; *Peel*, 600 F2d at 1073–74; *Hogan v United Parcel Service*, 648 F Supp 2d 1128, 1142 (WD Mo 2009) (collecting cases).

¹⁴¹ See *Leonard*, 972 F2d at 159–60; *Cronin*, 675 F Supp at 854–55.

on “prerequisites for relief,” which would limit any employer plan that conditioned employment on waiver or reducing USERRA rights. This is a prospective waiver because it affects reemployment rights that have not yet accrued.

The issue here is that this distinction is not made in § 4302(a)—the “more beneficial” provision. If all Congress meant by “more beneficial” was that retrospective contracts are okay and prospective ones are not, why didn’t it simply make this explicit? Moreover, it doesn’t appear, once § 4302(b) does its work, that “more beneficial” any longer imposes limits on retrospective contracts. In other words, we know that prospective contracts that reduce in some ways and benefit in others are invalid. But we do not know whether *retrospective* contracts that reduce in some ways and benefit in others are invalid. This interpretation standing alone would allow the result in *Wysocki*, which did deal with rights that already accrued to a veteran, without wrestling with the question whether that agreement really did make him better off or not. It is, in this way, even less limiting than the *Wysocki* consideration rule. This reading cannot tell us whether net beneficial agreements are enforceable—it therefore does not meaningfully explain the relationship between “more beneficial” and “reduces.”

III. PERFECT WORLD: A BETTER INTERPRETATION OF “MORE BENEFICIAL”

As noted in Part II, every available interpretation of USERRA’s “more beneficial” requirement would allow agreements augmenting veteran benefits. That is not the issue here. The question that must be resolved is when, if ever, “more beneficial” saves net beneficial agreements. Part II demonstrated the flaws inherent in current interpretations of “more beneficial.” How can they be reconciled?

Strangely enough, none of the current interpretations of “more beneficial” take the provision at face value: namely, that the agreement must actually be “more beneficial” than USERRA rights. In other words, “more beneficial” demands an objective test. Under this literal reading, “more beneficial” would save net beneficial matters that make veterans objectively better off than they would be counterfactually exercising their USERRA rights. Courts would assess the value of the agreement, then the value of the USERRA guarantees. If the former outweighs the latter, the release is enforceable, and the employer wins on summary judgment. Otherwise, the case may proceed to trial.

This interpretation resolves many of the problems discussed in Part II. Unlike DOL's interpretation, it allows waivers in some instances. But it would not allow waivers in all instances, thus avoiding the redundancy arguments cutting against *Wysocki*. Furthermore, by avoiding a strained subjective test, both parties will gain predictability and unworthy claims will not proceed to trial. This literal interpretation, however, cannot be the end of the analysis. An objective test alone would not solve the problems in Part II.B: without more, an objective test would still allow states and collective bargaining to preempt federal law if they arguably make veterans better off on net.

The next step, then, is to find a limiting principle elsewhere in the law to accord our interpretation of "more beneficial" with congressional intent. Courts should, relying on *in pari materia* and the implicit support for these cases in USERRA's legislative history, continue to recognize the common law protections in *Leonard*, *Peel*, *Cronin*, and *Fishgold* as valid law and an essential step in analyzing "more beneficial." Retaining these common law restrictions on en masse and prospective waivers would prevent such matters from reducing any USERRA rights, even if they make the veteran better off. This part of the solution neatly solves the preemption issue. All state actions, employer plans, and collective bargaining agreements reducing any USERRA right would be void under *Peel*, *Cronin*, and *Fishgold*. Remaining matters applying to veterans who have not yet returned from service necessarily affect their future rights and would thus be void under *Leonard*.¹⁴²

For these reasons, "more beneficial" should only save retrospective, individual agreements that make the veteran objectively better off than she would be exercising her rights under USERRA. This rule allows waivers in some circumstances but only after guaranteeing an objective floor for the level of care a veteran will receive after she returns—whether this care is in status, salary and benefits, or a one-time cash payout. If she makes a conscious choice to agree with her employer to leave her job, she can do so as long as the agreement is actually net beneficial to her.

This solution is subject to a few criticisms. First, legislative history is persuasive but not binding. There is no mention of a "prospective" or "retrospective" distinction, or a flat ban on collective waivers, in the statute. Part III.A argues that, even if legislative history is unpersuasive, purely textual reasons allow us to

¹⁴² See Part II.D.

conclude that Congress intended to retain these common law protections from the case law interpreting USERRA's predecessor.

The second line of criticism is that, while *Wysocki* might have been overly formalistic, requiring courts to open up bargains still seems like an imprudent result that should be avoided if other interpretations are available. Part III.B concludes that this interpretation is nevertheless consistent with the way similar provisions have been applied by drawing analogies to other antidiscrimination laws and the Bankruptcy Code.

A. "More Beneficial" Does Not Save Prospective or Collective Waivers

Congress assumed that the *Leonard* rule against prospective waiver would remain in force under USERRA to supplement § 4302. To return to the canon of construction *in pari materia*, it is preferable to read statutes to be consistent with the common law interpreting previous statutes.¹⁴³ Nothing in USERRA explicitly abrogates *Leonard*. To the contrary, the "reduces" provision, § 4302(b), also prohibits "prerequisites" to exercising rights.¹⁴⁴ Prerequisites are a form of future reduction of rights. Suppose an employee agreement required a reservist to agree to attend a two-week, unpaid training session before she could return to work from her future tour of duty. This agreement limits future rights by circumscribing the conditions under which she can exercise them—she can get her year of reemployment after she returns if only she agrees before she returns that she will be reemployed subject to conditions imposed by the employer. The inclusion of this word could be read to implicitly distinguish reductions that occur before the right is enjoyed and those that occur after it has accrued.

The second textual justification is that including these common law supplements to § 4302 resolves a recursive loop between § 4302(a) and (b). As pointed out in Part II, DOL and the *Wysocki* court disagree over which provision is prior—"more beneficial" or "reduces." Recall it isn't clear from the statute whether the applicability of "reduces" is conditional upon the inapplicability of "more beneficial." In other words, the text alone cannot answer whether the "reduces" provision is triggered any time there is a rights reduction, or if "reduces" is triggered only when "more beneficial" is not triggered. If "reduces" is prior to "more beneficial," no net beneficial agreements are allowed, but also no

¹⁴³ See note 97 and accompanying text.

¹⁴⁴ USERRA § 2(a), 38 USC § 4302(b).

waivers are allowed. This is clearly an absurd result given the VRRRA, legislative history, and the presumption that waiver is allowed unless explicitly prohibited by a statute.¹⁴⁵ But if “more beneficial” is prior, without more, it would allow at least net beneficial state laws and employer plans to supersede federal law. Thus, both approaches are equally problematic. Yet, other than the weak argument that § 4302(a) merely comes before (b), the statute provides no structural guidance as to which problematic result to prefer.

Leonard and the cases banning collective waivers under the VRRRA resolve this conflict by eliminating the problems for one of the choices. If collective or prospective reductions of rights are prohibited as a matter of law, no state law or collective bargaining agreement could possibly be enforceable—they are not made with the consent of the veteran and would affect rights of persons who are not yet in the military.¹⁴⁶ Prioritizing “more beneficial,” then, would not be a concern. These cases therefore provide a neat solution to an intractable harmonization issue between “more beneficial” and “reduces.”

If Congress intended to retain the protections advocated here, why were they not written into the statute? Unlike the consideration inference drawn in *Wysocki*, these rules were expressly approved by the House report—evidence that the relation-to-other-laws provision is to be read with them in mind.¹⁴⁷ Moreover, this distinction is not foreign to waivers. For instance, a far more blunt regulation promulgated under the Family and Medical Leave Act of 1993 provides “[e]mployees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA.”¹⁴⁸ Yet, the Fifth Circuit, analyzing the intent of the promulgating body, held that “[a] plain reading of the regulation is that it prohibits *prospective* waiver of rights, not the post-dispute settlement of claims.”¹⁴⁹ Prospective waivers of Title VII claims are also disallowed, though there is no text from which to draw this distinction.¹⁵⁰ Securities law also takes this approach—courts interpreting waivers and releases in securities law have drawn a distinction between

¹⁴⁵ See Part II.A.

¹⁴⁶ See Part II.D.

¹⁴⁷ See notes 83–96 and accompanying text.

¹⁴⁸ 29 CFR § 825.220(d).

¹⁴⁹ *Faris v Williams WPC-I, Inc.*, 332 F3d 316, 321 (5th Cir 2003) (emphasis added) (affirming also that this is consistent with the language in the rest of the regulation).

¹⁵⁰ See *Alexander v Gardner-Denver Co.*, 415 US 36, 51 (1974) (“[T]here can be no prospective waiver of an employee’s rights under Title VII.”); *Richardson v Sugg*, 448 F3d 1046, 1056 (8th Cir 2006).

anticipatory and prospective waivers, though the text of the rule could be used to justify eliminating all releases.¹⁵¹ Finally, though no courts have yet held that it applies, courts considering *Leonard* as applied to the VRRRA have suggested in dicta that the *Leonard* rule would apply to USERRA actions.¹⁵²

B. “More Beneficial” Means Objectively Better Off

If “more beneficial” cannot include collective or prospective waivers of future rights, which individual, retrospective waivers will it nonetheless save? *Wysocki* stands for the proposition that contracts releasing USERRA claims and supported by consideration are “more beneficial” to the veteran. Part II.B.2 established that this approach depends on an understanding of contract doctrine that oversimplifies its nuances, glossing over well-established principles that would have allowed the court to apply the statute as written. This Part shows that the reluctance to “interfere” with contracts—despite the “more beneficial” provision—is inconsistent with the approach the Supreme Court and other appellate courts have taken in relation to similar statutory commands in the employment discrimination context and the law generally. Moreover, courts have proven institutionally competent to take on the task of valuing and comparing the consideration exchanged in contracts in other contexts. This Part concludes that the best reading of “more beneficial” gives it its plain meaning—it requires courts to evaluate the worth of the USERRA rights at issue and the agreement objectively to determine whether the agreement’s value is greater than the value of the USERRA guarantees.

1. Valuation of contracts and modification of the common law in antidiscrimination statutes.

Exceptions to the judicial reticence toward analyzing bargains do not exist only at common law. The argument that more is required than sufficient consideration gains even more weight where statutes either impliedly abrogate the common law or create additional requirements to enforceability. The general rule is that statutes do not abrogate the common law without a clear signal from

¹⁵¹ See *Korn v Franchard Corp.*, 388 F Supp 1326, 1329 (SDNY 1975) (“To rule otherwise would foreclose the parties from settling matured claims and force every claimant to pursue the litigation to its costly conclusion.”).

¹⁵² See *Lapine v Town of Wellesley*, 304 F3d 90, 105–08 (1st Cir 2002) (extending *Leonard* to voluntary members of the armed services).

Congress.¹⁵³ But the Supreme Court has held that other employment and antidiscrimination statutes modify or outright destroy common law doctrine by implication.

One example is waiver in the age discrimination context. In *Oubre v Entergy Operations*,¹⁵⁴ the Court invalidated a waiver of claims under the Older Workers Benefit Protection Act¹⁵⁵ (OWBPA) that was supported by consideration and therefore sufficient at common law but did not meet the precise statutory requirements meant to protect older workers.¹⁵⁶ Because the statute laid out these requirements in great detail, the Court held that the OWBPA “sets up its own regime for assessing the effect of [Age Discrimination in Employment Act] waivers, separate and apart from contract law.”¹⁵⁷ Lower courts have thus far roundly refused to apply *Oubre* to antidiscrimination claims where relation-to-other-law provisions do not require additional safeguards to ensure arms-length bargaining.¹⁵⁸ However, the case illustrates an example when “federal law . . . abrogated this common law doctrine [of release] through Congress’ policy decision requiring heightened protection.”¹⁵⁹

Oubre also provided justification for a fascinating case relevant here. In *United States Equal Employment Opportunity Commission v Johnson & Higgins*,¹⁶⁰ a district court denied summary judgment to an employer that came forward with evidence of release.¹⁶¹ In that case, the court expressly examined the adequacy of consideration, finding an issue of material fact because \$1,000 was offered in return for releasing rights the United States Equal Employment Opportunity Commission (EEOC) claimed were worth at least \$3 million.¹⁶² It concluded that the amount was not sufficient as a matter of law because “[c]ommon law doctrines of consideration, though they may inform our reading, are not dispositive where there has not been compliance with the statute.”¹⁶³ The *Johnson & Higgins* holding was

¹⁵³ See *United States v Texas*, 507 US 529, 534 (1993), quoting *Mobil Oil Corp v Higginbotham*, 436 US 618, 625 (1978).

¹⁵⁴ 522 US 422 (1998) (holding that employees cannot waive ADEA claims unless their waiver satisfies the OWBPA’s requirements for doing so).

¹⁵⁵ Pub L No 101-433, 104 Stat 978 (1990), codified in various sections of Title 29.

¹⁵⁶ *Oubre*, 522 US at 427–28.

¹⁵⁷ *Id* at 427.

¹⁵⁸ See, for example, *Duval v Callaway Golf Ball Operations*, 501 F Supp 2d 254, 263 (D Mass 2007).

¹⁵⁹ *Bennett v Coors Brewing Co*, 189 F3d 1221, 1233 (10th Cir 1999).

¹⁶⁰ 5 F Supp 2d 181 (SDNY 1998).

¹⁶¹ *Id* at 186.

¹⁶² *Id* at 185–86.

¹⁶³ *Id* at 186.

limited to its facts in the dicta of a later case in the same district.¹⁶⁴ However, even this decision limiting *Johnson & Higgins* still approved of its approach: where there exists a relation-to-other-law provision, a contract can be valid only if it first passes threshold federal statutory requirements.¹⁶⁵ Only then is it proper for the court to look to pre-statute contract doctrine to determine its validity in state law.¹⁶⁶

Express provisions as in *Oubre* are not always necessary. The Supreme Court has also found that federal statutes implicitly abrogated common law doctrine in other employment antidiscrimination cases. For example, the Supreme Court held that the Age Discrimination in Employment Act¹⁶⁷ (ADEA) abrogated federal estoppel rules by implication.¹⁶⁸ The Court has also held that Title VII—with only implicit support from the statute—abrogates the common law presumption toward claim preclusion when cases are adjudicated by federal agencies.¹⁶⁹ Finally, state statutes often modify contract doctrine without an express statement to this effect. A famous example is UCC § 2-207, which abrogates the mirror image rule.¹⁷⁰ And Delaware, for instance, established rules that impliedly eliminated fiduciary duty principles in favor of freedom of contract.¹⁷¹

There is nothing radical about the suggestion that § 4302 implicitly abrogated common law consideration doctrine for determining the validity of waivers. In the antidiscrimination context especially, courts have proven willing to set aside state contract law when it conflicts with Congress's statutory goals and commands. Rather than assume it was bound to bend its construction of USERRA to accommodate contract law, the *Wysocki* court should have considered bending contract law to accommodate USERRA's statutory language.

¹⁶⁴ Consider *Sheridan v McGraw-Hill Companies, Inc.*, 129 F Supp 2d 633, 639 (SDNY 2001) (labeling *Johnson & Higgins* an “extraordinary case” and suggesting that evidence of coercion explained the result).

¹⁶⁵ See *Sheridan*, 129 F Supp 2d at 639 (holding that the court may look to contract principles only “after examining a waiver’s validity under the statutory framework established by the OWBPA”).

¹⁶⁶ See *id.*

¹⁶⁷ Pub L No 90-202, 81 Stat 602 (1967), codified at 29 USC § 621 et seq.

¹⁶⁸ See *Astoria Federal Savings and Loan Association v Solimino*, 501 US 104, 110–11 (1991).

¹⁶⁹ See *University of Tennessee v Elliott*, 478 US 788, 794–96 (1986).

¹⁷⁰ See Mark P. Gergen, *A Theory of Self-Help Remedies in Contract*, 89 BU L Rev 1397, 1440 n 178 (2009) (“[T]he U.C.C. abolishes the strict form of the mirror image rule.”).

¹⁷¹ See Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 Del J Corp L 1, 10 (2007) (suggesting the legislature intended to “establish legislative policy in derogation of the common law’s fiduciary duty principles”).

2. Comparing values for fraudulent conveyances.

One final concern is that courts are not institutionally competent to value contracts at all. Consideration doctrine, the argument goes, might indeed be an imperfect proxy for measuring beneficiality. But if it is true that the doctrine is the only tool courts have in their toolbox, we might nevertheless conclude that it is the least bad alternative absent precedent that can guide courts in how to perform these valuations. Luckily, courts applying “more beneficial” can draw on an extensive body of law where courts regularly value contracts pursuant to statutory commands—bankruptcy.

An instructive example is the fraudulent transfer provision in the Bankruptcy Code. Under 11 USC § 548(a)(1)(B), a trustee may avoid a transfer made within one year of filing if the debtor was insolvent and “voluntarily or involuntarily . . . received less than a reasonably equivalent value in exchange for such transfer.”¹⁷² This provision requires courts to calculate the value of the transaction from the debtor to a third party from the creditor’s point of view, voiding the transfers that net the debtor assets “substantially comparable to the worth of the transferred property.”¹⁷³ Essentially, “[t]he value of consideration received must be compared to the value given by the debtor.”¹⁷⁴

In applying this provision, courts regularly investigate both the stated values of exchange and their true worth. For instance, one court held that a transfer of over \$2.3 million in assets was not a reasonably equivalent value to assets with a stated worth of \$2 million, where most of that \$2 million was unlikely ever to materialize.¹⁷⁵ Another court invalidated a transfer where a plan that increased pension benefits cost “twice the norm” and “exceeded the amount necessary to retain employees.”¹⁷⁶

¹⁷² 11 USC § 548(a)(1)(B).

¹⁷³ *United States v Loftis*, 607 F3d 173, 177 (5th Cir 2010), quoting *BFP v Resolution Trust Corp.*, 511 US 531, 548 (1994).

¹⁷⁴ *In re Fruehauf Trailer Corp.*, 444 F3d 203, 213 (3d Cir 2006), quoting *Mellon Bank v Metro Communications, Inc.*, 945 F2d 635, 648 (3d Cir 1991).

¹⁷⁵ See *Loftis*, 607 F3d at 177. *Loftis* also provides an instructive example of a court valuing assets more complex than the ones in play in a USERRA dispute. There, the court evaluated the monetary worth of assets as diverse as a partial interest in a home, a minority stake in a limited liability company, restitution payments to the government from fraudulent conduct, and, most relevantly, the value of a person’s future income in perpetuity. See *id.* (making these comparative determinations despite the difficulty of “determin[ing] with any precision” their present values, finding that the expected worth of one party’s future income asset was limited by the government investigation into his criminal activities, including a potential prison term and fines).

¹⁷⁶ See *Fruehauf*, 444 F3d at 215.

Admittedly, “reasonably equivalent value” does not always demand courts to compare assets exchanged in bargains. The Supreme Court, in *BFP v Resolution Trust Corp.*,¹⁷⁷ held that in a forced sale, the actual price of a transfer has “reasonably equivalent value” so long as “all the requirements of the State’s foreclosure law have been complied with.”¹⁷⁸ This result, at first blush, appears to support the intuition behind the *Wysocki* holding. The Court, rather than applying the text of the statute to require courts to determine reasonably equivalent values, used state law as a proxy for reasonableness. The “reasonably equivalent value” is the value of the exchange, just as contracts are “more beneficial” when they are actually agreed to.

However, this glosses over an important difference in the reasoning supporting *BFP*. Justice Antonin Scalia, writing for the majority in *BFP*, admitted that the language of the statute was straightforward. It “directs an inquiry into the relationship of the value received by the debtor to the worth of the property transferred.”¹⁷⁹ The Court mirrored state law requirements because it is otherwise impossible to determine the true value of a forced sale from the market price.¹⁸⁰ The alternative is to first make a determination of what the market price would have been, were a market possible, and then to judge what values would count as reasonably equivalent to that imaginary value.¹⁸¹ But this cannot account for “the lesser included inquiry into the impact of forced sale” given its “effect of completely redefining the market.”¹⁸²

The phrase “more beneficial” in USERRA is similarly straightforward, but applying it lacks the valuation problems that worried the Court in *BFP*. Unlike the hypothetical market value of property in a foreclosure, the value of employment benefits are easy to calculate. Courts have already proven institutionally competent to determine the worth of USERRA guarantees in particular—they make these determinations regularly when calculating damages.¹⁸³ Similarly, they already have guidelines for evaluating the worth of both back and front pay in other anti-employment discrimination

¹⁷⁷ 511 US 531 (1994).

¹⁷⁸ *Id.* at 545.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 544–45.

¹⁸¹ *BFP*, 511 US at 544–45.

¹⁸² *Id.* at 548.

¹⁸³ *United States v Alabama Department of Mental Health and Mental Retardation*, 2010 WL 3326704, *3–7 (MD Ala) (calculating the worth of USERRA reemployment rights based on several hypothetical scenarios in order to calculate damages).

statutes.¹⁸⁴ Moreover, because USERRA rights are only valid for a year after reemployment begins, the chance of error is quite low.¹⁸⁵ That leaves only the comparison, which—after determining values—is the easy part.¹⁸⁶

Indeed, some lower courts after *BFP* have refused to apply its rule—even in foreclosure cases—where these valuation problems are not present. One appellate bankruptcy panel held that \$450 was not “reasonably equivalent value” for a house appraised at between \$10,000 and \$50,000 where the price was set by the amount of tax debt on the debtor.¹⁸⁷ The Supreme Court itself recognized that its interpretation was to be limited only to forced sales, noting that “reasonably equivalent value” maintained an “independent meaning . . . outside the foreclosure context.”¹⁸⁸

* * *

These examples are meant to suggest that, contrary to the traditional view, modern courts are called upon in federal statutes to determine the adequacy of consideration in a bargain—a task they handle competently. They also show that courts interpreting statutes with analogous language to USERRA’s “more beneficial” provision

¹⁸⁴ See *Madden v Chattanooga City Wide Service Department*, 549 F3d 666, 679 (6th Cir 2008). In *Madden*, the Sixth Circuit outlined a six-factor test that district courts must use in their discretion to set the value of front pay in a Title VII case. *Id.* The factors include

(1) the employee’s future in the position from which she was terminated; (2) her work and life expectancy; (3) her obligation to mitigate her damages; (4) the availability of comparable employment opportunities and the time reasonably required to find substitute employment; (5) the discount tables to determine the present value of future damages; and (6) other factors that are pertinent in prospective damage awards.

Id. (internal quotation marks omitted), quoting *Suggs v ServiceMaster Education Food Management*, 72 F3d 1228, 1234 (6th Cir 1996). A court capable of performing these tasks pursuant to one employment discrimination statute is certainly capable of performing simpler, backward-looking analysis under another.

¹⁸⁵ See USERRA § 2(a), 38 USC § 4316(c) (“A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause within one year after the date of such reemployment, if the person’s period of service before the reemployment was more than 180 days.”).

¹⁸⁶ Consider *BFP*, 511 US at 547 (arguing that the plain meaning of reasonably equivalent value still leaves ambiguity as to the worth of a foreclosed property).

¹⁸⁷ *Sherman v Rose*, 223 BR 555, 559 (BAP 10th Cir 1998) (discerning that not just any sale of the property should be determined to be “reasonably equivalent value”). Compare *In re Grandote Country Club Company*, 252 F3d 1146, 1152 (10th Cir 2001) (distinguishing *Sherman* because the state procedures at issue did require a competitive bidding process), with *In re Talbot*, 254 BR 63, 70 (Bankr D Conn 2000) (rejecting this distinction on grounds that states have the right to establish this value).

¹⁸⁸ *BFP*, 511 US at 545 (explaining why its interpretation did not render the provision “superfluous”). See also *id.* at 548–49 (“[F]oreclosure has the effect of completely redefining the market . . . [because] normal free-market rules of exchange are replaced by the far more restrictive rules governing forced sales.”).

have employed the objective analysis proposed by this Comment. The Sixth Circuit feared that comparing the value of Wysocki's severance to his employment rights would constitute judicial interference. But this "interference" is in fact an established tradition in employment discrimination and other areas like bankruptcy. The more plausible case for interference here is interference with *Congress*—especially when commanded to perform this analysis by statute.¹⁸⁹ Instead, the plain requirement to compare the benefits of the contract with the hypothetical benefits provided by USERRA is coherent with modern trends in the law, alleviating the need to resort to the judicial short-cut taken in *Wysocki*.

Finally, this rule is consistent with the spirit and purpose of the statute—to protect veterans.¹⁹⁰ The *Wysocki* opinion was correct to point out that the drafters intended veterans to retain ownership of their rights.¹⁹¹ This is certainly an important goal. However, this is but one value of many that Congress attempted to balance in passing USERRA. The statute was principally designed to minimize or eliminate disadvantages and disruption to civilian employment for veterans. Surely, unencumbered rights "ownership" is not so highly prioritized that it trumps the express purpose in the preamble of the bill. Indeed, courts have read paternalistic principles into USERRA's predecessor. The *Leonard* court noted:

War is hell, and a call to arms is harrowing. Faced with this unavoidable disruption in their lives, inductees may make choices that are sensible when death looms, but cease to make sense when they discover that they have survived. *The reemployment rights provided by the Act are necessarily directed to the survivors, and Congress intended that they be able to return to civilian life as easily as possible.*¹⁹²

Quite the opposite of respecting bargains and choices made by veterans, the overarching goal of protection and reintegration has justified courts in *rejecting* bargains otherwise made absent duress or misrepresentation. Given this, it is not so surprising that Congress required agreements to be "more beneficial" than USERRA rights. Far from allowing uninhibited freedom of contract, this underlying purpose suggests Congress wanted to ensure that veterans did not too easily squander the rights directed to them. Thus when they give

¹⁸⁹ See *Lopez v Dillard's, Inc.*, 382 F Supp 2d 1245, 1248–49 (D Kan 2005) (comparing USERRA with the ADEA, FMLA, FLSA, Civil Rights Act, ADA, and Title VII, and finding that "none of these acts contain any statement that remotely approaches the sweep" of § 4302).

¹⁹⁰ For a more complete discussion of USERRA's history and purpose, see Part I.A.

¹⁹¹ *Wysocki*, 607 F3d at 1108.

¹⁹² *Leonard*, 972 F2d at 159–60 (emphasis added).

away their USERRA rights after a tour of duty, servicemembers should receive at least the level of benefits Congress contemplated for them in return.

CONCLUSION: STOP MAKING SENSE

Section 4302 is an extraordinary provision, but that does not mean we must ascribe to its language meanings that are out of the ordinary. “More beneficial” contracts are not those that are merely supported by consideration or believed to improve the veteran’s position, but those that actually make her better off. This solution reflects the plain meaning of the phrase and explains why adopting alternative constructions constitutes judicial intervention, not simply executing its clear command.

Of course, judges might need to flesh out the “more beneficial” inquiry, depending on the arguments raised by the opposing parties. Questions such as whether to measure beneficiality *ex post* or *ex ante*,¹⁹³ or incorporate the likelihood of success on the merits into the expected value of the alternatives are potentially relevant questions.¹⁹⁴ Courts could also consider shifting the burden of production on employers, reasoning that § 4302 establishes an additional element to the affirmative defense of release. This would require the *employer* to prove the contract was “more beneficial” to avoid summary judgment against its defense. Finally, parties might resolve the comparative valuation issues by itemizing the benefits being traded and stipulating to their value in the agreement itself. Courts could presume that these stipulations were accurate and made voluntarily unless a party presents sufficient evidence to call them into question.

Many other questions, such as how to value the harm stemming from the disruption of continuous employment on future career prospects, would likely properly be reserved for the finder of fact. This Comment does not seek to hypothesize about how the answers to these legal questions should come out absent concrete facts.¹⁹⁵ Courts are already quite capable of determining the value of

¹⁹³ Consider Korobkin, 70 U Chi L Rev at 1274 (cited in note 123) (arguing that courts analyzing unconscionability should focus “on the utility of the entire contract to buyers *ex ante* compared to a counterfactual contract”).

¹⁹⁴ Consider *Johnson & Higgins*, 5 F Supp 2d at 185 (considering “the damages to which the employees would be entitled if they prevailed on the merits”).

¹⁹⁵ Fraudulent conveyance law may yet again provide useful answers to this inquiry. For a succinct discussion of how bankruptcy courts evaluate a transfer’s worth, see *In re Gonzalez*, 342 BR 165, 172–73 (Bankr SDNY 2006).

USERRA benefits when calculating damages, and there is no reason why those tools could not be applied to § 4302.¹⁹⁶

What this Comment hopes to establish is both that retrospective waivers are enforceable under USERRA and that more than a showing of consideration is necessary if the veteran can provide evidence that the agreement was objectively not “more beneficial” than the benefits she would have received under the statute. This solution reconciles precedent currently ignored by courts with a natural reading of the statute, and avoids a result that eviscerates its effective protection or disallows veterans from exercising limited ownership over their rights.

¹⁹⁶ *United States v Alabama Department of Mental Health and Mental Retardation*, 2010 WL 3326704, *3–7 (MD Ala) (calculating the worth of USERRA reemployment rights based on several hypothetical scenarios in order to calculate damages).