The Pension Expectation as Constitutional Property

*By Peter M. Rehon**

Introduction

In April of 1950, John Daniel, a man with an eighth grade education, became a truck driver for a company which had a collective bargaining agreement with Local 705 of the International Brotherhood of Teamsters. Daniel learned of Local 705's pension plan in 1955, and understood that he would be eligible for retirement benefits upon completion of twenty years of employment with employers under union contract. He was sent descriptive information in 1958 and in 1969 which described the plan as one which would afford security and protection for himself, his wife and his children upon his retirement.

John Daniel worked for employers who were under contract with his local for twenty-two and one-half years, uninterrupted except for a four-month period in 1960-61 when he was temporarily laid off due to adverse economic conditions and was unable to find other work.

In December of 1973, when he was sixty-three and unable to drive due to cataracts, John Daniel retired. When he applied for his pension, he was shocked to learn that he was ineligible to receive any benefits because of his four-month involuntary layoff thirteen years earlier.[1] The trustees of the fund, composed equally of union and employer representatives, explained that the plan required twenty *continuous* years of service to prevent complete forfeiture of all benefits. Ironically, had John Daniel known, he could have preserved his eligibility by making the two dollars a week contribution himself during his four-month layoff.

In court, John Daniel sought recovery of his pension, alleging that the fund trustees had both neglected to state, and had consciously misrepresented, facts material to his interest in his pension, and that they had, as a consequence, committed securities fraud. The United States District Court for the Northern District

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1. Daniel's problem was further compounded by his employer's bookkeeper's embezzlement of the pension fund contribution for three months after his return to work. Under the plan, this represented an additional break-in-service.

of Illinois allowed recovery[2] and the judgment was affirmed by the Court of Appeals for the Seventh Circuit,[3] which summarized Mr. Daniel's plight as "unfair in the extreme, shocking to the conscience."[4]

On January 16, 1979, the United States Supreme Court reversed,[5] holding that the Securities Exchange Act of 1934 does not govern the area of pensions, and that John Daniel's complaint therefore did not state a ground for relief in federal court.[6]

It was estimated that in 1973, over one-half of the American work force, or over forty million workers, were members of and participants in private pension plans.[7] The combined sum of all private and public pension funds in this country amounts to over $500 billion,[8] and is growing at a rate of 10% a year,[9] representing the single largest fund of investment capital in the United States and the deferred savings of millions of American workers.[10] Though these funds represent the sole source of retirement security for most employees, only an estimated four to eight percent of participants in private plans since 1950 have ever received any benefits from their pensions.[11]

The United States Constitution, and virtually every state constitution, provides that persons shall not be deprived of their prop-

2. Daniel v. International Bhd. of Teamsters, 410 F. Supp. 541 (N.D. Ill. 1976).

3. 561 F.2d 1223 (7th Cir. 1977).

4. *Id.* at 1228.

5. 439 U.S. 551 (1979).

6. *Id.* at 570.

7. SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., 2D SESS., 1 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 207 (1976)(remarks of Senator Ribicoff) [hereinafter cited as LEGIS. HIST. OF ERISA].

The President's Commission on Pension Policy has recommended in its May 1980 interim report that "serious consideration . . . be given to the establishment of a universal minimum advance-funded pension system." THE PRESIDENT'S COMMISSION ON PENSION POLICY, AN INTERIM REPORT 10 (May 1980) [hereinafter cited as COMMISSION REPORT]. Such a system would substantially expand the portion of the work force covered by retirement systems other than Social Security.

8. J. RIFKIN & R. BARBER, THE NORTH WILL RISE AGAIN 10 (1978).

9. *Id.* at 234.

10. To put this amount of capital into perspective, it represents 26.5% of the gross national product in 1977, $1.89 trillion. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1978, at 441 (99th ed. 1978).

11. SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 1ST SESS., PRELIMINARY REPORT OF THE PRIVATE WELFARE AND PENSION PLAN STUDY 8 (Senate Comm. Print 1971) [hereinafter cited as PRELIM. REPORT]. Unofficial estimates range from 5% to 20%. *See* 1 LEGIS. HIST. OF ERISA, *supra* note 7, at 208 (remarks of Senator Ribicoff).

erty without due process of law.[12] To determine whether due process protection will be extended to a particular claim or benefit, two questions must be asked. First, is the subject of the action "property" within the meaning of the Fifth and Fourteenth Amendments? Second, does the action of the government constitute an unconstitutional deprivation of that property?[13]

This note will explore whether an unvested pension expectation is "property" worthy of due process protection under the United States Supreme Court's current formulation of constitu-

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12. *See, e.g.*, U.S. CONST. amend. V, amend. XIV, § 1; ALA. CONST. art. 1, § 6; ARIZ. CONST. art. 2, § 4; ARK. CONST. art. 2, § 8; CAL. CONST. art. 1, § 7a; COLO. CONST. art. 2, § 25; IDAHO CONST. art. 1, § 13; ILL. CONST. art. 1, § 2; LA. CONST. art. 1, § 2; MICH. CONST. art. 1, § 17; NEV. CONST. art. 1, § 8; N.Y. CONST. art. 1, § 6; WASH. CONST. art. 1, § 3.

13. J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 490 (1978).

If pensions are determined to be a constitutional form of property warranting due process protection, such protection will be afforded only when the impairment or deprivation of a pension expectancy is a consequence of state action. While such state action is readily apparent in cases involving public employee pension plans, it is not so apparent where private pension plans are concerned.

Where the challenged party is a private actor, as in the case of a private pension trustee, the courts will find state action only when there is a sufficient nexus between private conduct and activity by a branch of government. Flagg Bros. v. Brooks, 436 U.S. 149 (1978); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). This nexus may be found, for instance, where government legislation commands, encourages or promotes constitutionally forbidden activity. Adickes v. Kress & Co., 398 U.S. 144 (1970).

In the area of private pension plans, impermissible state action may exist as a result of extensive federal regulation of such plans through the enactment of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1381 (1975) [hereinafter referred to as ERISA]. State action may also be found where government regulation of a private entity is so extensive as to give the appearance of direct governmental approval or encouragement. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 356-59 (1974); Norwood v. Harrison, 413 U.S. 455, 463-65 (1973); CBS v. Democratic Nat'l Comm., 412 U.S. 94, 114-21 (1973). For a discussion of the pervasive impact of ERISA on the administration of private pensions, see notes 173-247 and accompanying text *infra*.

There may be sufficient connection to the unconstitutional conduct to warrant a finding of state action where the government provides subsidies or aid to the offending party. Norwood v. Harrison, 413 U.S. 455, 463-65 (1973). Courts have found impermissible state action where the government has provided specialized tax exemptions which are the equivalent of direct subsidies. See Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Griffin v. County School Bd., 377 U.S. 218 (1964).

Private pension funds and sponsoring employers are afforded lucrative tax advantages when the plans meet ERISA's minimum standards. *See* note 212 and accompanying text *infra*. The relationship between government regulation of private pension plans and the "carrot" the state offers in the form of a profitable tax benefit might constitute an additional basis for a state action challenge. *See generally* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 675 (1974).

tional property. It will discuss and apply the Entitlement Doctrine, the theory by which the Court assesses whether due process protection will be extended to a particular claim or benefit.

Section I will trace the evolution of constitutional property from the Right-Privilege Doctrine to the Court's current theory of "entitlements." The Entitlement Doctrine will be criticized for its inability to guarantee due process protection.

Section II will trace the development of the legal concept of pensions from the latter part of the nineteenth century, when pensions were viewed as a gratuity, to the present time, when pensions are viewed as a form of deferred compensation for employment services presently rendered. The latter view will be shown to be anomalous in that it regards pensions to be "wages" yet permits the employee to be deprived of those "wages" prior to the satisfaction of plan eligibility requirements.

The last section, section III, will assess the likelihood of due process protection being extended to pensions under the Entitlement Doctrine. Two points will be illustrated. The first is that while the pension fund itself, a valuable pool of investment capital, is afforded legal protection, the rights of employees who are theoretically the fund's sole beneficiaries, are not. The second point is that the Entitlement Doctrine is inadequate to guarantee constitutional protection to employees deprived of what is often their sole means of security upon retirement—their pensions.

I. The Nature of Constitutional Property

A. Historical Background

Anglo-American political theory is premised on the protection of property. John Locke, whose seventeenth century liberalism substantially influenced the drafting of the United States Constitution, saw property[14] as the well-spring of civil society.[15] According to Locke, property was granted by God to all persons in the state of nature.[16] Its protection was the reason people came to-

14. Locke described property as the sum of all human interests worth protecting. This included "money, lands, horses, furniture, and the like," J. LOCKE, THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 126 (3d ed. 1966) (1st ed. London 1689), as well as "life, liberty and estate[s]." J. LOCKE, THE SECOND TREATISE OF GOVERNMENT 48 (T. Peardon ed. 1952) (1st ed. London 1690).

15. "The reason why men enter into society is the preservation of their property." J. LOCKE, THE SECOND TREATISE OF GOVERNMENT, *supra* note 14, at 123.

16. *Id.* at 17.

gether in civil society;[17] it was the source of political legitimacy[18] and legal efficacy.[19] It was the *sine qua non* of democratic consent.[20] For John Locke, the protection of property meant the assurance of fundamental rights for all persons in civil society.[21]

The Utilitarians later reworked Locke's concept of natural rights to suit the needs of eighteenth century industrial England,[22] but laid equal stress on the primacy of property:

> The institution of property, when limited to its essential elements, consists in the recognition in each person of a right to the exclusive disposal of what he or she have produced by their own exertions, or received either by gift or by fair agreement, without force or fraud, from those who produced it. The foundation of the whole is the right of producers to what they themselves have produced.[23]

The Framers of our Constitution, influenced by Locke and the Utilitarians, wrote into the document their concern for the protection of property from arbitrary appropriation by a tyrant or a tyrannical majority.[24]

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17. *Id.* at 123-24.
18. *Id.* at 79.
19. Man "has by nature a power not only to preserve his property—that is, his life, liberty, and estate—against the injuries and attempts of other men, but to judge of and punish the breaches of that law in others as he is persuaded the offense deserves, even with death itself in crimes where the heinousness of the fact in his opinion requires it." *Id.* at 48.
20. *Id.* at 29.
21. This view has not been embraced by all with equal enthusiasm.

As Jean-Jacques Rousseau wrote of the nature of private property: "The first man who, having enclosed a piece of ground, bethought himself of saying 'This is mine,' and found people simple enough to believe him, was the real founder of civil society. From how many crimes, wars, and murders, from how many horrors and misfortunes might not any one have saved mankind, by pulling up the stakes, or filling up the ditch, and crying to his fellows: 'Beware of listening to this impostor; you are undone if you once forget that the fruits of the earth belong to us all, and the earth itself to nobody.'" J. ROUSSEAU, *A Discourse on the Origin of Inequality*, in THE SOCIAL CONTRACT AND DISCOURSES 234 (G. Cole ed. 1950)(1st ed. Paris 1755) (original emphasis).

Marx was perhaps more succinct: "The transcendence of private property is therefore the complete *emancipation* of all human senses and attributes. . . ." K. MARX, THE MARX-ENGELS READER 73 (R. Tucker ed. 1972).

22. *See, e.g.,* 3 J. BENTHAM, PANNOMIAL FRAGMENTS, THE WORKS OF JEREMY BENTHAM 221 (1962).
23. J.S. MILL, PRINCIPLES OF POLITICAL ECONOMY 218 (1961).
24. *See* THE FEDERALIST (A. Hamilton, J. Jay & J. Madison).

Some constitutional theorists view the Constitution as primarily an economic document designed to protect the property interests of landowners such as the drafters. This view, popular among Progressive Era historians, is best exemplified by the writings of Charles A. Beard, particularly in C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913). *Contra,* R. BROWN, CHARLES BEARD AND THE CONSTITUTION (1956); F. MCDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (1958).

The actual definition of property, however, has been one of the more difficult questions in the area of constitutional jurisprudence.[25] While property at common law meant almost exclusively ownership of tangibles, including realty, chattels and incorporeal hereditaments,[26] the constitutional definition of property has undergone considerable enlargement by the United States Supreme Court.[27] Property under the Constitution has come to mean such things as a license,[28] old age and social security benefits,[29] and one's interest in public education,[30] public employment,[31] and in continuing gas and electric service.[32]

B. The Right-Privilege Doctrine

The first test devised by the Supreme Court to determine whether a particular claim or benefit was "property" under the Fifth and Fourteenth Amendments was the Right-Privilege Doctrine. Originally suggested by Justice Holmes while he was still on the Supreme Judicial Court of Massachusetts,[33] the doctrine holds that rights are the basis of all constitutional protections afforded to citizens and thus cannot be abridged without notice or justification, but that privileges—those interests bestowed at the discretion of the state—may be revoked without constitutional protection.[34] The Court of Appeals for the District of Columbia Circuit stated the rule quite concisely: "Due process of law is not applicable unless one is being deprived of something to which he has a right."[35]

The application of this standard has often proved harsh. In

25. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 13, at 491.

26. T. HOLLAND, ELEMENTS OF JURISPRUDENCE 211 (13th ed. 1924); 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND §§ 1-14.

27. *See* E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 387 (14th ed. 1978).

28. *See* Mackey v. Montrym, 443 U.S. 1 (1979); Bell v. Burson, 402 U.S. 535 (1971).

29. *See* Mathews v. Eldridge, 424 U.S. 319 (1976); Richardson v. Perales, 402 U.S. 389 (1971); Wheeler v. Montgomery, 397 U.S. 280 (1970).

30. *See* Goss v. Lopez, 419 U.S. 565 (1975).

31. *See* Connell v. Higgenbotham, 403 U.S. 207 (1971) (per curiam); Wieman v. Updegraff, 344 U.S. 183 (1952). *Contra,* Bishop v. Wood, 426 U.S. 341 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972).

32. *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).

33. *See* McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892). In denying a petition for mandamus to a police officer who was fired for soliciting political contributions, Justice Holmes noted, in his oft-quoted dictum, "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* at 220, 29 N.E. at 517.

34. *See also* People v. Crane, 214 N.Y. 154, 108 N.E. 427, *aff'd,* 239 U.S. 195 (1915).

35. Bailey v. Richardson, 182 F.2d 46, 58 (D.C. Cir. 1950), *aff'd by an equally divided Court,* 341 U.S. 918 (1951).

Bailey v. Richardson,[36] for example, the plaintiff was a nine-year federal employee who was discharged and barred from all federal employment for three years due to a finding of disloyalty by the Federal Employee Loyalty Review Board. The finding was partially based on her membership in the American League for Peace and Democracy, an organization judged to be subversive by the Attorney General. Although the plaintiff strenuously asserted her loyalty and argued that she had been denied due process, the Court held that her employment interest could only be characterized as a privilege, not a right,[37] and as such could be withdrawn at any time for any reason.[38]

Similarly, in the private sector, the Supreme Court held in 1954 that a physician's license to practice medicine may be suspended or revoked without due process since "[s]uch practice is a privilege granted by the State under its substantially plenary power to fix the terms of admission."[39] Appellant was convicted of a felony for failing to comply with a subpoena duces tecum issued by the House Un-American Activities Committee, for which he served five months in jail. Upon his release, his medical license was suspended for six months by a New York State medical committee, even though substantial evidence of his competence as a practitioner and his loyalty as a citizen was introduced.[40]

Justice Douglas' dissenting opinion is fervent in its attack on the Right-Privilege Doctrine:

> The dictum of Holmes gives a distortion to the Bill of Rights. It is not an instrument of dispensation but one of deterrents. Certainly a man has no affirmative right to any particular job or skill or occupation. The Bill of Rights does not say who shall be doctors or lawyers or policemen. But it does say that certain rights are protected, that certain things shall not be done. And so the question here is not what government must give, but rather what it may not take away.[41]

Justice Douglas suggests that characterizing an interest as a "right" or a "privilege" does not define the nature of that interest,

36. 182 F.2d 46 (D.C. Cir. 1950).

37. *Id.* at 57-58.

38. "To hold office at the will of a superior and to be removable therefrom only by constitutional due process of law are opposite and inherently conflicting ideas. Due process of law is not applicable unless one is being deprived of something to which he has a right." *Id.* at 58.

But see the strong dissent by Circuit Judge Edgerton. *Id.* at 74.

39. Barsky v. Board of Regents, 347 U.S. 442, 451 (1954).

40. *Id.* at 458 (Black, J., dissenting).

41. *Id.* at 472-73 (Douglas, J., dissenting).

but merely permits a tautological conclusion that one demands constitutional protection and the other does not. The dichotomy provides no illumination as to *why* a particular employment, license or benefit is more or less deserving of judicial recognition than any other. The Doctrine provides the labels for justification of a particular conclusion; it does not suggest a rationale.[42]

Without rejecting the tenuous distinction between rights and privileges outright, the Supreme Court pared away at it by imposing numerous limitations and exceptions.[43] Between 1926 and the late 1960's, the Court developed nearly a half dozen doctrines which strictly delimited the scope and impact of the Right-Privilege Doctrine[44] and all but stripped it of its efficacy.

The development and application of the various theories which tempered the harshness of the Right-Privilege Doctrine began the gradual expansion of the concept of constitutional property. Ultimately, the Supreme Court rejected the "wooden distinction" between rights and privileges.[45]

C. The Entitlement Doctrine

The final years of the Warren Court majority[46] witnessed the recantation of the Right-Privilege Doctrine and proved to be the high water mark of due process protection for previously unrecognized property interests. During this period the Court employed a balancing test in which it weighed the importance of the interest in issue against the state's interest in summary deprivation.[47]

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42. *See* Professor Van Alstyne's discussion and authorities cited in Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439, 1459 n.63 (1968).

43. *See id.* at 1445.

44. *See id.* at 1445-58.

45. *See* Elrod v. Burns, 427 U.S. 347, 361 n.15 (1976); Board of Regents v. Roth, 408 U.S. 564, 571 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Graham v. Richardson, 403 U.S. 365, 374 (1971); Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Sherbert v. Verner, 374 U.S. 398, 404 (1963).

46. For the purposes of the present discussion, this refers to the transition period—1969-1972—during which members of the Warren Court were replaced by appointees of President Nixon.

This alteration in the Court make-up has resulted in a discernible philosophical shift in certain of the Court's decisions. *See* Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983,* 51 S. CAL. L. REV. 355 (1978); Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law,* 89 HARV. L. REV. 1 (1975); Comment, *Section 1983 and the New Supreme Court: Cutting the Civil Rights Act Down to Size,* 15 DUQ. L. REV. 49 (1976).

47. *See* Goldberg v. Kelly, 397 U.S. 254, 262 (1970), and its companion case, Wheeler v. Montgomery, 397 U.S. 280 (1970). *See also* Bell v. Burson, 402 U.S. 535, 540 (1971);

Stating that "[m]uch of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property," the Supreme Court in *Goldberg v. Kelly*[48] held that welfare recipients have a "statutory entitlement" to their welfare payments and cannot be deprived of them without due process of law.[49] The Court did not rely on its own definition of the nature of an "entitlement," a term borrowed from Professor Reich.[50] Rather, it relied on its assessment of the importance of the property interest to the claimant, as compared to the government's interest in summary adjudication.[51]

It was not until June of 1972, two years after *Goldberg,* that the Court, in *Board of Regents v. Roth*[52] and two related cases,[53] began defining the nature of constitutional property. This was a departure from the balancing approach suggested by earlier cases where the importance of the interest to the claimant was primary in determining whether due process protections would be extended to the claim or benefit:[54] "The question is not merely the 'weight' of the individual's interest, but whether the *nature* of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."[55]

The Court in *Board of Regents* included within the parameters of constitutional property "those claims upon which people rely in their daily lives. . . ."[56] The Court did not itself define con-

Boddie v. Connecticut, 401 U.S. 371, 378 (1971); Note, *Non-Tenured Teachers and Due Process: The Right to a Hearing and Statement of Reasons,* 29 WASH. & LEE L. REV. 100, 105-10 (1972).

48. 397 U.S. 254 (1970).

49. *Id.* at 262.

50. *See id.* n.8. *See also* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues,* 74 YALE L.J. 1245 (1965); Reich, *The New Property,* 73 YALE L.J. 733 (1964).

51. 397 U.S. at 264, 266.

52. 408 U.S. 564 (1972).

53. Perry v. Sindermann, 408 U.S. 593 (1972); Morrissey v. Brewer, 408 U.S. 471 (1972).

"[W]hile the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words 'liberty' and 'property' in the Due Process Clause . . . must be given some meaning." Board of Regents v. Roth, 408 U.S. at 572.

54. *See* Monaghan, *Of "Liberty" and "Property",* 62 CORNELL L. REV. 405, 409 (1977); Note, *Board of Regents v. Roth: Procedural Rights for Non-Tenured Teachers,* 73 COLUM. L. REV. 882, 890 (1973).

55. Morrissey v. Brewer, 408 U.S. 471, 481 (1972). *See also* Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972).

56. 408 U.S. at 577. The Court also noted that "[t]o have a property interest in a benefit, a person must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of

stitutional property, nor did it look to the Constitution for a definition. Instead it noted that property interests "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[57]

Thus, in assessing whether to extend due process protection to the property interest in issue, the Court will determine whether "existing rules or understandings," such as state law, federal statute or a contract, "entitle" the claimant to his or her "property."[58]

But the Court's formulation of entitlements as arising out of rules or understandings external to the Court and Constitution[59] make the Entitlement Doctrine a difficult doctrine to apply.

In *Arnett v. Kennedy*,[60] for example, the Court splintered over how to apply the doctrine, with three justices joining in the plurality opinion,[61] two justices concurring in the result only,[62] and four justices dissenting.[63] The plurality held that a federal employee may be discharged for making allegedly false accusations against

entitlement to it." *Id.*

57. *Id.* That the definition of property stems from state law is not novel. *See, e.g.*, Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42-44 (1944); Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89, 110-11 n.85. *But see* Tushnet, *The Newer Property: Suggestions for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 267-77.

58. In *Board of Regents*, since neither the respondent's employment contract nor state law supported his claim of entitlement to continuing employment as a college professor, his interest in continuing employment was held not to be property within the meaning of the Fourteenth Amendment, and procedural due process protection was not extended to it. *Board of Regents* was expanded somewhat by Perry v. Sindermann, 408 U.S. 593 (1972), which held that there may be an implied, *de facto*, property interest, based on the claimant's subjective understanding and expectancy of a benefit, sufficient to support a claim of entitlement, even though there exists no express statutory or contractural basis for such an entitlement. *Id.* at 599-602. *See also* Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361 (9th Cir. 1976); Note, *Property and Liberty Limitations on the Dismissal of Arizona Public Employees*, 1977 ARIZ. ST. L.J. 835, 837.

59. 408 U.S. at 578.

60. 416 U.S. 134 (1974). For a criticism of *Arnett*, see Comment, *Arnett v. Kennedy—A Dubious Approbation of Adverse Actions Procedures*, 16 WM. & MARY L. REV. 153 (1974); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 13, 83-90 (1974).

61. Rehnquist, J., delivered the Court's opinion, in which Burger, C.J., and Stewart, J., joined. 416 U.S. at 136.

62. Powell and Blackmun, JJ., concurred in the result. *Id.* at 164.

63. White, J., concurring in part and dissenting in part, *id.* at 171; Douglas, J., dissenting, *id.* at 203; Marshall and Brennan, JJ., dissenting, *id.* at 206.

his superior. The plurality reasoned that the federal act[64] upon which the appellee based his claim of entitlement allowed only certain minimum procedural safeguards and, as such, established no grounds for a constitutionally protected property interest.[65] Because of its holding, the plurality never reached the issue of the constitutional sufficiency of the process allowed.[66]

The concurring opinion by Justices Powell and Blackmun agreed with the conclusion of the plurality but not with the reasoning. Both justices felt that due process had been satisfied by the government in its discharge procedure,[67] but they reached that conclusion only after finding that there was indeed a constitutionally protected property interest set out by the statute, a right "conferred not by legislative grace, but by constitutional guarantee."[68]

Similarly, the dissenting justices in *Arnett* termed the plurality opinion:

> an approach which would render [due process] protection inapplicable to the deprivation of any statutory benefit—any "privilege" extended by Government—where a statute prescribed a termination procedure, no matter how arbitrary or unfair. It would amount to nothing less than a return, albeit in somewhat different verbal garb, to the thoroughly discredited distinction between rights and privileges which once seemed to govern the applicability of procedural due process.[69]

In 1976, the Court, in *Bishop v. Wood*,[70] held that the definition of constitutional property under the Fourteenth Amendment must stem from state law and state law alone.[71] The petitioner, a North Carolina policeman, argued that his dismissal deprived him of the property interest in his job without due process of law under

64. The Lloyd-LaFollette Act, 5 U.S.C. § 7501 (currently codified at 5 U.S.C. §§ 7503 & 7513 (1980)).

65. 416 U.S. at 152. "In the area of federal regulation of government employees, . . . in the absence of statutory limitation the governmental employer has had virtually uncontrolled latitude in decisions as to hiring and firing . . . ." *Id.*

66. *Id.* at 155 n.21.

67. *Id.* at 171 (Powell and Blackmun, JJ., concurring in result).

68. *Id.* at 166-67.

In the Court's most recent discussion of the Entitlement Doctrine, Justice Blackmun expresses similar dissatisfaction with the Court's analysis. *See* O'Bannon v. Town Court Nursing Center, 100 S. Ct. 2467, 2478-85 (1980) (Blackmun, J., concurring).

69. *Id.* at 211 (Marshall, J., joined by Douglas and Brennan, JJ., dissenting).

70. 426 U.S. 341 (1976)(5-4 decision).

71. "A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law." *Id.* at 344.

the Fourteenth Amendment. The majority, in an opinion by Justice Stevens,[72] relied not on North Carolina case law, which was inconclusive, but rather on the determination of the lower court judge who "[sat] in North Carolina and practiced law there for many years."[73] It was the opinion of the district court that the petitioner "held his position at the will and pleasure of the city,"[74] and the Supreme Court therefore held that he was not entitled to due process protection.

The net effect of *Bishop* is to endow the states and Congress with sole authority in defining the scope of a basic constitutional right.[75] This allows them to determine which, if any, benefits and interests will be afforded protection under the Fifth and the Fourteenth Amendments. A state or Congress need only statutorily define an interest as temporal and noncontinuous to defeat a future claim of entitlement.[76]

When the Supreme Court allows state legislatures and Congress to define the scope and nature of property under the due process clauses of the Fifth and Fourteenth Amendments, it delegates to those bodies the Court's own authority to determine the constitutionality of the others' acts,[77] and denies the overarching constitutional character of the rights guaranteed by the Fifth and Four-

72. Joined by Burger, C.J., and Stewart, Powell and Rehnquist, JJ. *Id.* at 342.

73. *Id.* at 345.

74. Bishop v. Wood, 377 F. Supp. 501, 504 (N.D.N.C. 1973), *quoted at* 426 U.S. at 345 n.9.

75. *Cf.* Glennon, *supra* note 46, at 363-66. Professor Glennon suggests a narrower reading of *Bishop* to limit its impact on future cases seeking vindication of individual rights. While such a reading is certainly preferable, at least from a civil libertarian point of view, the Court and the circuits are not likely to so limit its application. *See, e.g.*, Codd v. Velger, 429 U.S. 624, 626-28 (1976)(per curiam); Bundy v. Rudd, 581 F.2d 1126, 1131 (5th Cir. 1978); Graves v. Duganne, 581 F.2d 222, 224 (9th Cir. 1978); Drummond v. Fulton County Dep't of Family & Children's Services, 563 F.2d 1200, 1207 (5th Cir. 1977).

76. As Justice Brennan noted in his dissent in *Bishop:*

"By holding that States have 'unfettered discretion' in defining 'property' for purposes of the Due Process Clause of the Federal Constitution, . . . the Court is . . . effectively adopting the analysis rejected by a majority of the Court in *Arnett v. Kennedy* . . . . More basically, the Court's approach is a resurrection of the discredited rights/privileges distinction, for a State may now avoid all due process safeguards attendant upon the loss of even the necessities of life . . . merely by labeling them as not constituting 'property.' " 426 U.S. at 353-54 n.4 (Brennan, J., dissenting) (citations omitted). Recent cases confirm that the Entitlement Doctrine represents little more than a revival of the Right-Privilege Distinction. *See* Bordenkircher v. Hayes, 434 U.S. 357 (1978), and Maher v. Roe, 432 U.S. 464 (1977), *discussed in* Note, *The Resurrection of the Right-Privilege Distinction?*, 7 HASTINGS CONST. L.Q. 165, 182-215 (1979). *See also* Williams v. Zbaraz, 100 S. Ct. 2694 (1980); Harris v. McRae, 100 S. Ct. 2671 (1980); Monaghan, *supra* note 54, at 440; Comment, *supra* note 57, at 110-11.

77. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

teenth Amendments.[78]

D. The New Property

In his seminal article on the changing nature of society and property rights,[79] Professor Charles A. Reich examined how changes in economic relationships have necessitated a re-evaluation of the traditional view of property and its attendant rights.[80]

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78. As Justice Brennan pointed out in his dissent in *Bishop v. Wood:* "There is certainly a federal dimension to the definition of 'property' in the Federal Constitution . . . ." 426 U.S. at 353. *See also* Glennon, *supra* note 46, at 375; Monaghan, *supra* note 54, at 434; Monaghan, *supra* note 46, at 44-50.

One of the primary by-products of the present Court's definition of constitutional "liberty" and "property" has been the substantial curtailment of actions brought in federal court under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), to vindicate rights abridged by state action. *See* Codd v. Velger, 429 U.S. 624 (1977); Montanye v. Haymes, 427 U.S. 236 (1976); Meachum v. Fano, 427 U.S. 215 (1976); Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693 (1976). *See also* Glennon, *supra* note 46; Comment, *supra* note 46; Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape,* 82 HARV. L. REV. 1486 (1969). The Civil Rights Act was enacted to provide a substantive cause of action for persons whose rights under the Fourteenth Amendment had been abrogated and, more importantly, to provide a federal forum to which to turn in the event of an unconstitutional state action. Whether out of fear of the expanding federal caseload of section 1983 actions, concern for the "debasement" of constitutional rights asserted to protect so many diverse interests, or out of respect for states' rights, a petitioner to the Supreme Court seeking relief under the Fourteenth Amendment is now placed in the unenviable position of facing a court which will look to state law to determine whether that petitioner has a "right" upon which to base an action against that very same state. As will be discussed *infra* in relationship to pension legislation, the same paradox exists regarding the Fifth Amendment and acts of Congress.

Allowing non-constitutional sources to define the parameters of due process protection not only eviscerates the protection afforded to property interests under the Fifth and Fourteenth Amendments, but also has an indirect "chilling" effect on other rights. In *Arnett,* for example, Justice Douglas dissented, fearing that other constitutional rights would be impacted by such a holding: "There is more than employment and a job at issue in this case. The stake of the federal employee is not only in a livelihood, but in his right to speak guaranteed by the First Amendment." 416 U.S. at 203 (Douglas, J., dissenting). *See also* Board of Regents v. Roth, 408 U.S. 564, 581 (1972) (Douglas, J., dissenting); Note, *Constitutional Law—Property and Liberty Interests in Public Employment,* 55 N.C.L. REV. 242, 253 (1977).

79. Reich, *The New Property,* 73 YALE L.J. 733 (1964) [hereinafter cited as *The New Property].*

80. Reich notes, for example, that "social insurance substitutes for savings; a government contract replaces a businessman's customers and good will. The wealth of more and more Americans depends upon a relationship to government. Increasingly, Americans live on government largess—allocated by government on its own terms, and held by recipients subject to conditions which express 'the public interest.'

"The growth of government largess, accompanied by a distinctive system of law, is having profound consequences. It affects the underpinnings of individualism and independence. It influences the workings of the Bill of Rights." *Id.* at 733. *See also* Reich, *Individual*

Professor Reich's central theme is that the "new property"—licenses, permits, franchises, welfare and unemployment benefits and the like—is as basic to economic security as is the old property. And because this new property is "steadily taking the place of traditional forms of wealth,"[81] Reich argues that it is equally deserving of Bill of Rights protection.[82]

To illustrate his point, Reich discusses the Court's treatment of Social Security pensions in *Flemming v. Nestor.*[83] Ephram Nestor paid Social Security taxes from 1936 to 1955. In 1955, he became eligible for Social Security benefits—$55.60 a month. In 1956, he was deported pursuant to an act passed by Congress in 1952, for having been a member of the Communist Party from 1933 to 1939.[84] His Social Security benefits were terminated shortly after his deportation.[85]

The Supreme Court held, in a five to four decision, that it is not unconstitutional to deprive one of Social Security benefits to which he or she is otherwise entitled, for engaging in lawful conduct.[86] Specifically, the Court determined that Ephram Nestor did not have an "accrued property right"[87] to Social Security benefits, and that he therefore was not entitled to due process protection under the Fifth Amendment.[88]

The Court's logic in *Flemming* presaged the Entitlement Doctrine. To determine whether a property interest in such benefits indeed existed, invoking the protection of the Fifth Amendment, the Court considered the possible impact of such a finding on the

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Rights and Social Welfare: The Emerging Legal Issues, 74 YALE L.J. 1245 (1965).

81. *The New Property, supra* note 79, at 733.

82. *Id.* Professor Tushnet suggests a revival of substantive due process as just such a vehicle for extending protection to "the new property." See Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process,* 1975 SUP. CT. REV. 261.

For a contrary view, see Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 YALE L.J. 920 (1973); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases,* 1973 SUP. CT. REV. 159.

83. 363 U.S. 603 (1960). *See The New Property, supra* note 79, at 768.

84. Section 241(a) of the Immigration and Nationality Act (codified at 8 U.S.C. § 1251 (a)-(c)(1976)) made such membership grounds for deportation. Its terms were retroactive.

85. Section 202(n) of the Social Security Act (codified at 42 U.S.C. § 402(n)(1)(A)(1976)) allowed termination of benefits upon deportation of the recipient.

86. Justice Harlan wrote the majority opinion, joined by Justices Frankfurter, Clark, Whittaker and Stewart.

Justice Black dissented, as did Chief Justice Warren and Justices Douglas and Brennan.

87. The circuit court had found such a right. Nestor v. Folsom, 169 F. Supp. 922, 934 (D.C. Cir. 1959).

88. 363 U.S. at 611.

Social Security Act itself: "To engraft upon the Social Security system a concept of 'accrued property rights' would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands."[89]

But if Reich's thesis is correct, and Social Security benefits can be characterized as new property, then the government's assertion of virtually unrestrained dominion over such property amounts to, in Reich's words, the "new feudalism."[90] He notes that:

> No form of government largess is more personal or individual than an old age pension. No form is more clearly earned by the recipient. . . . No form is more obviously a compulsory substitute for private property; the tax on wage earner and employer might readily have gone to higher pay and higher private savings instead. No form is more relied on, and more often thought of as property. No form is more vital to the independence and dignity of the individual. Yet under the philosophy of Congress and the Court, a man or woman, after a lifetime of work, has no rights which may not be taken away to serve some public policy.[91]

Pensions differ from other forms of "new property"; they represent more than mere government largess. Pensions are not bestowed by the state, but rather earned as compensation and deferred by agreement until retirement. Reich's argument for including new property within the ambit of Fifth and Fourteenth Amendment protection has particular force as applied to pensions. Not only does the pension substitute for traditional wealth in the abstract, but it substitutes for and defers receipt of wages presently earned.

The next section will explore the evolution of judicial perceptions of the private pension, from gratuity to deferred compensation.

II. The Historical Development of the Pension Concept

While the purpose of the pension has been the obvious one of

89. *Id.* at 610.

90. "The philosophy of *Flemming v. Nestor* . . . resembles the philosophy of feudal tenure. Wealth is not 'owned,' or 'vested' in the holders. Instead, it is held conditionally, the conditions being ones which seek to ensure the fulfillment of obligations imposed by the state." The *New Property, supra* note 79, at 769.

91. *Id.*

providing economic security,[92] defining the legally enforceable rights, if any, of employees *vis-à-vis* their pension plans, has spawned much litigation and is a subject of considerable controversy. Though recent federal statutory law[93] effectively occupies the field of pension regulation, common law fashioned over the last fifty years still defines the fundamental nature of the pension plan, as well as each employee's rights and interests thereto.

A survey of the judicial treatment of the worker's interest in his or her pension reflects a growing recognition that the pension is, and always has been, the primary means of providing needed financial security to the retired worker.

A. Pensions as a Gratuity

The first pension plans were those unilaterally adopted by employers to reward certain key employees for long and faithful service.[94] Most were informal and left to the discretion of the employer the size of the plan and the conditions precedent to employee participation.[95]

As a result, most courts in the late nineteenth and early twentieth centuries viewed noncontributory private pension plans as mere gratuities granted at the sufferance of the employer and revocable at any time for any reason.[96] These plans generally contained

92. *See* P. HARBRECHT, PENSION FUNDS AND ECONOMIC POWER 3 (1959).

93. Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001-1381 (1975)).

94. The adoption of pension plans was not without benefit to the employer as well. Pension benefits attracted a better trained, more stable work force and provided a powerful incentive for both long-term service and industrial quiescence, particularly during the dramatic boom-and-bust cycles of the late nineteenth century. In fact, it was because of this that craft unions originally opposed pension plans, viewing them as a tool to manipulate workers into servility. In addition, the provision of pension plans was good public relations and provided an effective means of phasing out an older, less efficient work force.

Because of these and other advantages, early shareholder attacks on corporate pension plans as an *ultra vires* waste of corporate assets were largely unsuccessful. *See* Fogelson v. American Woolen Co., 170 F.2d 660 (2d Cir. 1948); O'Neal, *Stockholder Attacks on Corporate Pension Systems,* 2 VAND. L. REV. 351 (1949); Note, *Legal Problems of Private Pension Plans,* 70 HARV. L. REV. 490 (1957).

95. NATIONAL INDUSTRIAL CONFERENCE BOARD, INC., INDUSTRIAL PENSIONS IN THE UNITED STATES 41-60 (1925), *cited in* B. AARON, LEGAL STATUS OF EMPLOYEE BENEFIT RIGHTS UNDER PRIVATE PENSION PLANS 8 n.9 (1961).

96. *See, e.g.,* Menke v. Thompson, 140 F.2d 786 (8th Cir. 1944); Dolge v. Dolge, 70 A.D. 517, 75 N.Y.S. 386 (1902); McNevin v. Solvay Process Co., 32 A.D. 610, 53 N.Y.S. 98 (1898), *aff'd,* 167 N.Y. 53, 60 N.E. 1115 (1901); 42 A.L.R.2d 461, 464 (1955). *See also* Pennie v. Reis, 132 U.S. 464 (1889).

While this view has been rejected by the overwhelming weight of American authority, it has retained a remarkable vitality in some jurisdictions. *See, e.g.,* Jones v. Cheney, 253 Ark.

clauses disclaiming the creation of any rights in the employee and reserving the right to reduce or eliminate benefits even after their accrual.

In *McNevin v. Solvay Process Company*,[97] the earliest case involving a private noncontributory pension plan,[98] the employer unilaterally established a pension fund which was owned, controlled and administered by himself and his trustees. In a suit by a discharged employee for recovery of his pension benefits, the court, in holding that such a plan afforded no rights to an employee regardless of length of service, stated that:

> [T]he scheme by which this fund is created is simply a promise on the part of the defendant to give to its employés a certain sum in the future, with an absolute reservation that it may at any time determine not to complete the gift, and, if it does so determine, an employé has no right of action to recover the sum standing to his credit on the books of the pension fund.[99]

B. Pensions as a Trust

The next theory to develop regarding the nature of the pension fund held that it was a trust and that the worker, whose eligibility had matured, had an equitable, but not a present legal interest in it.[100] This theory was rejected with regard to plans unilaterally adopted and administered by employers,[101] but was accepted as applying to so-called Taft-Hartley funds.[102] These funds were jointly administered by an equal number of employer and employee representatives in conformance with section 301 of the

926, 489 S.W.2d 785 (1973); Taylor v. Board of Educ., 152 W. Va. 761, 166 S.E.2d 150 (1969).

97. 32 A.D. 610, 53 N.Y.S. 98 (1898), *aff'd*, 167 N.Y. 53, 60 N.E. 1115 (1901).

98. The oldest case holding a *public* pension plan to be a gratuity is Pennie v. Reis, 132 U.S. 464 (1889).

99. 32 A.D. at 611, 53 N.Y.S. at 100.

The dissent here is worth noting: "[A]n adverse decision to the plaintiff in this case would justify the discharge of employés who may have loyally and faithfully performed their duties to the company for a long period of years simply upon a mere declaration that the company had cause for dissatisfaction, and the employé would be deprived of the moneys that he had fairly earned, without any remedy for their recovery in a court of justice." 32 A.D. at 614, 53 N.Y.S. at 106 (Green, J., dissenting).

100. *See* 42 A.L.R.2d 464, 471 (1955).

101. *See* Gearns v. Commercial Cable Co., 266 A.D. 315, 42 N.Y.S.2d 81, *aff'd*, 293 N.Y. 105, 56 N.E.2d 67 (1943); Dolge v. Dolge, 70 A.D. 517, 75 N.Y.S. 386 (1902); McNevin v. Solvay Process Co., 32 A.D. 610, 53 N.Y.S. 98 (1898), *aff'd*, 167 N.Y. 53, 60 N.E. 1115 (1901).

102. *See* Assalone v. Carey, 473 F.2d 199 (D.C. Cir. 1972); Lewis v. Benedict Coal Corp., 259 F.2d 346 (6th Cir. 1958), *rev'd on other grounds*, 361 U.S. 459 (1960); Van Horn v. Lewis, 79 F. Supp. 541 (D.D.C. 1948).

Labor Management Relations Act (Taft-Hartley).[103]

The recognition of jointly administered funds as trusts was facilitated by the introduction of a third party—unions—into the pension agreement, and by the passage of sections 301 and 302 of the Labor Management Relations Act. These sections strictly delimited the conduct of fund trustees. The trust approach enabled union trustees to compel employers to pay delinquent pension fund contributions,[104] but it recognized only a marginal equitable interest in the beneficiary,[105] giving fund trustees considerable latitude in the exercise of their discretion.[106]

C. Pensions as a Contract

In an attempt to avoid the harshness of the gratuity theory and the vagaries of the trust fund approach, some courts have interpreted pension plans as creating contractual rights in the employee, and as imposing concomitant obligations on the employer.[107] The employer's plan, under this view, constitutes an offer of a unilateral contract, with the employee's performance, in accordance with the terms of the plan, constituting the acceptance.[108] Consideration is found in either the employee's years of long and faithful service, or in her day-to-day work.[109]

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103. 29 U.S.C. § 186 (1970).

104. *See, e.g.*, Lewis v. Benedict Coal Corp., 259 F.2d 346 (6th Cir. 1958), *rev'd on other grounds*, 361 U.S. 459 (1960).

105. *See, e.g.*, Assalone v. Carey, 473 F.2d 199 (D.C. Cir. 1972). Joseph Assalone was a coal miner for forty years until he retired due to miner's asthma and athrosclerosis. His pension plan was a Taft-Hartley fund which required that signatory coal operators contribute 30 cents a ton mined per worker into the pension plan. When Joseph Assalone applied for his pension, his claim was rejected, primarily because the trustees had changed the eligibility requirements three times during the term of the plan so that it was, in the court's words, "mathematically impossible" for him to meet the eligibility requirements. *Id.* at 204.

Nonetheless, the Court of Appeals for the District of Columbia Circuit rejected Assalone's claim for relief, holding that the fund was in the nature of a charitable trust and that "individual miners do not have a sufficient interest in the actual moneys paid into the fund by the coal operators to justify a claim of forfeiture under the facts here presented." *Id.* at 205.

106. *See id.;* Gaydosh v. Lewis, 410 F.2d 262, 265 (D.C. Cir. 1969); Miniard v. Lewis, 387 F.2d 864 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 873 (1968); Kosty v. Lewis, 319 F.2d 744, 748 (D.C. Cir. 1963).

107. *See, e.g.*, Hunter v. Sparling, 87 Cal. App. 2d 711, 197 P.2d 807 (1948); Langer v. Superior Steel Corp., 105 Pa. Super. Ct. 579, 161 A. 571 (1932); Texas & New Orleans R.R. Co. v. Jones, 103 S.W.2d 1043 (Tex. Civ. App. 1937). *See also* B. AARON, *supra* note 95, at 9-10; P. HARBRECHT, *supra* note 92, at 181-84; Comment, *Private Pension Plans: The Prospects for Reform*, 5 COLUM. HUMAN RIGHTS L. REV. 465, 475 (1973).

108. 42 A.L.R.2d 461, 467 (1955).

109. Comment, *Consideration for the Employer's Promise of a Voluntary Pension*

The leading case supporting the contract view is *Hurd v. Illinois Bell Telephone Co.*[110] This was a class action brought by retired employees challenging their employer's practice of subtracting the amount employees received in Social Security or other retirement benefits from the amount of benefits to which they were entitled under the employer's pension plan.[111]

The plan was a private noncontributory one, unilaterally administered by five trustees appointed by the Board of Directors of Illinois Bell. The plan was amended shortly after the passage of the Social Security Act to allow for the offsetting of pension benefits with Social Security benefits.

The plaintiffs asserted, *inter alia,* that such an amendment violated their rights under the agreement and that the defendant-trustees, as fiduciaries, were obligated to act *solely* for the benefit of the beneficiaries of the plan, and could not act to maximize the employer's interests under the plan at the expense of the beneficiaries.[112]

The court held that the nature of the obligations under the plan was purely contractual[113] and that the parties were bound by the plan's terms. Despite the questionable nature of the amendment, it was nonetheless binding upon the parties to the pension "contract."[114] The Court of Appeals for the Seventh Circuit noted that while the amendment "represents a 'reaching' for an economic benefit" by the employer, it "poses a problem within the realm of moral evaluation, not legal."[115]

Plan, 23 U. CHI. L. REV. 96, 99-100 (1955).

It is this latter form of consideration which provides the springboard for the deferred compensation view discussed *infra,* notes 118-49 and accompanying text.

110. 136 F. Supp. 125 (N.D. Ill. 1955), *aff'd,* 234 F.2d 942 (7th Cir.), *cert. denied,* 352 U.S. 918 (1956).

111. This practice is known as "offsetting" or "integration." It reduces the amount the fund has to pay out as well as the amount of pension benefits received by the employee. *See* R. NADER & K. BLACKWELL, YOU AND YOUR PENSION 86-88 (1973).

112. 234 F.2d at 945. *See also* Gorr v. Consolidated Foods Corp., 253 Minn. 375, 91 N.W.2d 772 (1958); D. MCGILL, FUNDAMENTALS OF PRIVATE PENSIONS 170-73 (3d ed. 1975).

113. "The pension plan is a unilateral contract which creates a vested right in those employees who accept the offer it contains by continuing in employment for the requisite number of years." 234 F.2d at 946.

114. "Plaintiffs have no cause for complaint if their net pension entitlement was computed by application of the provisions of the contract as it existed at the time of their retirement. . . . We believe that plaintiffs have received the full measure of their rights under the plan." *Id.* at 947.

115. *Id.* at 946. Similarly, the lower court had stated that "[w]hether the integration of a private pension plan with Social Security to produce the results found in this case is good policy or unfair and misleading to the employees is a question which the court cannot decide

While the contract theory has been touted as a means of providing at least marginal legal protection for the employee-beneficiary, no rights attach under the unilateral contract theory until the worker has tendered full performance, that is, has satisfied the plan's eligibility requirements.[116] But eligibility requirements have proven so onerous in the past that they have been the primary cause of widespread forfeiture among unsuspecting workers.[117] Thus, the legal protections provided by this approach have proven ephemeral.

D. Pensions as Deferred Compensation

As was noted earlier,[118] one variant of the contract view gave rise to the notion that pensions are actually wages contracted to be deferred until retirement.[119] Consideration for the promise to pay pension benefits is found in the day-to-day employment services rendered by the employee participant.[120]

The seminal case supporting this theory is *Inland Steel Co. v. NLRB*.[121] In that case, the Court of Appeals for the Seventh Circuit affirmed the National Labor Relations Board holding that pensions are "wages" within the meaning of the Wagner Act[122] and were, as such, subject to compulsory collective bargaining.[123]

It is significant that both the Board and the court of appeals base their conclusion that pensions are wages not upon an analysis of the function and purpose of the collective bargaining process, but rather upon an analysis of the form and operation of pensions

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for the parties in this action." 136 F. Supp. at 156.

116. *See* Gallo v. Howard Stores Corp., 145 F. Supp. 909 (E.D. Pa.), *aff'd*, 250 F.2d 37 (3d Cir. 1956).

117. *See* R. NADER & K. BLACKWELL, *supra* note 111, at 30-44; Levin, *Proposals to Eliminate Inequitable Loss Of Pension Benefits*, 15 VILL. L. REV. 527 (1970); Comment, *supra* note 107, at 465-67.

118. *See* note 109 and accompanying text *supra*.

119. *See* Hunter v. Sparling, 87 Cal. App. 2d 711, 722, 197 P.2d 807, 814 (1948).

120. *Id.*; B. AARON, *supra* note 95, at 10.

121. 77 N.L.R.B. 1 (1948), *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

122. National Labor Relations Act §§ 8(a)(5), 9(a) (49 Stat. 453 (1953), *as amended by* the Labor Management Relations Act of 1947 (Taft-Hartley), 29 U.S.C. §§ 158(a)(5), 159(a)).

Sections 8(a)(5) and 9(a) of the Act require employers to bargain collectively with employee representatives "in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ."

123. 170 F.2d at 255. *See also* Sheeran v. General Electric Co., 593 F.2d 93, 96 (9th Cir. 1979); White Motor Corp. v. Malone, 545 F.2d 599, 604 (8th Cir. 1976); Pittsburgh Plate Glass Co. v. NLRB, 427 F.2d 936, 941 (6th Cir. 1970).

in the workplace. As the Board stated:

> In substance . . . the respondent's monetary contribution to the pension plan constitutes an economic enhancement of the employee's money wages. Their actual total current compensation is reflected by both [pension contribution and money wages].
>
> Realistically viewed, this type of wage enhancement or increase, no less than any other, becomes an integral part of the entire wage structure, and the character of the employee representative's interest in it, and the terms of its grant, is no different than in any other case where a change in the wage structure is effected. Indeed, the practice of offering retirement benefits in lieu of current wage increases is not uncommon in bargaining between employers and employees' representatives.[124]

Similarly, the court of appeals, in rejecting as "far-fetched" the argument that a pension is a gratuity, noted:

> Every day that such an employee worked his financial status would be enhanced to the extent that his pension benefits increased, and his labor would be performed under a pledge from the company that certain specified monetary benefits would be his upon reaching the designated age. It surely cannot be seriously disputed but that such a pledge on the part of the company forms a part of the consideration for work performed. . . . In this view, the pension thus promised would appear to be as much a part of his "wages" as the money paid him at the time of the rendition of his services.[125]

While *Inland Steel* represents probably the single most important case in the history of pension fund litigation involving employees' rights, its assertion that pensions are wages was not novel.[126] It has been noted elsewhere,[127] for instance, that employer contributions to a pension plan which ultimately benefit the employee fit the economic definition of "wages" propounded by classical liberal economists.[128] And in the United States, the view that pensions are actually wages deferred until retirement found early

124. 77 N.L.R.B. at 5.

125. 170 F.2d at 253.

126. As an assistant general counsel for the National Labor Relations Board noted thirty years ago: "It would thus seem to call for no particular refinement of economic or legal insight to recognize a pension plan, whether from the point of view of the employer or the worker, as a form of compensation for the latter's services. In recognizing it as such, the Board in its decision in the *Inland Steel* and related cases can hardly be said to have been indulging in trail blazing." *Quoted in* Somers & Schwartz, *Pension and Welfare Plans: Gratuities or Compensation?*, 4 INDUS. & LAB. REL. REV. 77, 83 (1950).

127. *Id.* at 80 n.16.

128. J.S. MILL, PRINCIPLES OF POLITICAL ECONOMY, bk. I, ch. iii (1921) (1st ed. London 1848); A. SMITH, WEALTH OF NATIONS, bk. I, ch. vi (1933) (1st ed. London 1776).

expression.[129]

By assessing the social and economic function of pensions in the employment relationship, both the courts and Congress have found pensions to be compensation for services rendered in a variety of different contexts. Pensions and retirement benefits are within the Internal Revenue Act's definition of "wages" for purposes of federal income taxation, as they are considered a form of "compensation for personal services."[130] Pensions have been adjudged to be a form of wages for purposes of the Miller Act,[131] and have been determined to be wages under the Bankruptcy Act[132] as well.[133]

Probably the most dramatic characterization of pension rights as wages has been in the area of community property law. A number of states recognize that pensions are a form of employment compensation deferred until retirement and, as such, are subject to community property division.[134] However, the California Supreme Court has taken this view to its logical conclusion, and has held that *nonvested* retirement benefits constitute community property as well.[135]

129. "A pension system considered as part of the real wages of an employee is really paid by the employee, not perhaps in money, but in the foregoing of an increase in wages which he might obtain except for the establishment of a pension system." deRoode, *Pension as Wages*, 3 AM. ECON. REV. 287 (1913), *quoted in* D. MCGILL, *supra* note 112, at 19.

130. Hooker v. Hoey, 27 F. Supp. 489, 490 (S.D.N.Y.), *aff'd*, 107 F.2d 1016 (2d Cir. 1939) (interpreting § 22(a) of the Revenue Act of 1932). "It cannot be doubted that pensions or retiring allowances paid because of past services are one form of compensation for personal services. . . ." *Id. See also* I.R.C. § 61(a)(1).

131. United States v. Carter, 353 U.S. 210 (1957). The Miller Act extends protection to persons supplying labor for the construction of federal public buildings. 40 U.S.C. §§ 270a-270d (1979).

132. Bankruptcy Act § 64a(4) (currently codified at 11 U.S.C. § 507(a)(3)(1979)).

133. *In re* Schmidt, 33 L.R.R.M. 2283 (S.D. Cal. 1953). *See also* Note, *Union Retirement and Welfare Plans: Employer Contributions as "Wages" under Section 64a(2) of the Bankruptcy Act*, 66 YALE L.J. 449 (1956-1957). *Contra*, United States v. Embassy Restaurant, Inc., 359 U.S. 29 (1959); *In re* Sleep Products Inc., 141 F. Supp. 463 (S.D.N.Y. 1956), *aff'd sub nom.* Local 140 Security Fund v. Hack, 242 F.2d 375 (2d Cir.), *cert. denied*, 355 U.S. 833 (1957).

But see the strong dissent by Justice Black, joined by Chief Justice Warren and Justice Douglas in *Embassy Restaurant*, 359 U.S. at 35.

Embassy Restaurant was subsequently overruled by the 1978 Bankruptcy Act. *See* 11 U.S.C. § 507(a)(4)(1979).

134. *See* Note, *Pensions as Property Subject to Equitable Division upon Divorce in Oklahoma*, 14 TULSA L.J. 168, 182-87 (1978).

135. *In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). The Court in *Brown* reasoned that "[s]ince pension benefits represent a form of deferred compensation for services rendered . . ., the employee's right to such benefits is a contractual right, derived from the terms of the employment contract. Since a contractual right is

Most revealing, of course, are the subjective understandings and expectations of employees themselves. A California State Senate Committee, investigating the operation of pension funds in the state, described the feelings of workers denied their pensions after years of service:

> These people now have no tangible benefits for their years of labor. These people cannot understand why they have lost everything. They feel that if they cannot receive a pension, they should at least get their money back. They view employer contributions as a part of their salary which was withheld. Today in many multi-employer plans an excess of one dollar per hour is contributed in a pension plan for the benefit of retired or to be retired workers. When this sum of money is forfeited, especially for reasons that do not appear fair to the participant, the participant is bitter because he believes that the money contributed based on the numbers of hours he worked should rightfully belong to him.[136]

The assertion that retirement contributions are a form of employment compensation deferred by agreement is consistent with the way pension benefits are provided for in the collective bargaining process.[137] While at first blush pension fund contributions made by an employer appear to be a unilateral benefit conferring no present interest upon the employee, they are treated in the collective bargaining process as a part of the *entire* cost "package" over which the employer and the union bargain.[138] In fact, it is not

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not an expectancy, but . . . a form of property . . . *an employee acquires a property right to pension benefits when he enters upon the performance of his employment contract." Id.* at 845, 544 P.2d at 565, 126 Cal. Rptr. at 637 (emphasis added). *Brown* overruled French v. French, 17 Cal. 2d 775, 112 P.2d 235 (1941), which held that pension benefits were expectancies only and not subject to community property division.

136. CALIFORNIA STATE SENATE COMM. ON BUS. & PROF., PRELIM. REPORT ON THE OPERATION OF PRIVATE PENSION PLANS 24 (Comm. Print, Nov. 28, 1973). After hearing extensive testimony, the Committee concluded that the deferred wages view of pensions was "compelling." *Id.* at 24-25.

Extensive testimony of retirees denied pension benefits can be found in ERISA's legislative history, LEGIS. HIST. OF ERISA, *supra* note 7, and in R. NADER & K. BLACKWELL, *supra* note 111.

137. *See* M. BERNSTEIN, THE FUTURE OF PRIVATE PENSIONS 119-21 (1964); M. GRANOF, HOW TO COST YOUR LABOR CONTRACT 60-62 & 90-94 (1973); P. HARBRECHT, *supra* note 92, at 269; D. MCGILL, *supra* note 112, at 19-21.

138. As former Justice Arthur J. Goldberg noted while still General Counsel for the C.I.O.: "The union and management come to the bargaining table with some appraisal of how much money there is in the "kitty" for an increase. The appraisals are, naturally, different. But it is the total cost of improvements which provides the framework within which the union and management bargain. If the 5 cents, for example, does not go into a health fund, it can go into a wage increase or two extra holidays or double time for overtime on Saturdays. This is what collective bargaining is all about." *Quoted in* M. BERNSTEIN, *supra* note

unusual for employees in a bargaining unit to take an increase in pension benefits *in lieu of* an immediate wage increase.[139] In spite of this, the employee's interest in her pension is a contingent one at best, contingent upon the satisfaction of those eligibility requirements established by the plan.[140]

If pensions are paid as compensation for employee service, the concept of a complex eligibility system involving age, length of service and job stability seems like both a legal and a logical anomaly. It is difficult to imagine, for instance, any other circumstances where eligibility is necessary to obtain wages rightfully earned. Eligibility requirements clearly reflect a view of pensions as gratuities or gifts, with years of faithful service as a prerequisite to paid retirement.[141]

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137 at 119.

139. D. McGill, *supra* note 112, at 26.

During World War II and the Korean War, when wage stabilization boards effectively froze wage increases, unions were successful in negotiating substitute increases in fringe benefits, particularly retirement benefits. This contributed greatly to their acceptance by unions, and the concomitant growth in size and importance of the funds. *See* P. Harbrecht, *supra* note 92, at 7.

140. The two most common eligibility requirements are retirement age and length of service. A typical plan will require an employee to work ten to fifteen years and reach the age of 65 to satisfy plan requirements so as to receive a pension.

Prior to the passage of ERISA, pension plans often set out unreasonable requirements which not infrequently led to forfeitures. Such abuses have been exhaustively chronicled elsewhere. *See* Subcomm. on Labor, Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Interim Report of Activities of the Private Welfare and Pension Plan Study 119 (Comm. Print 1972) [hereinafter cited as Inter. Rep.]; R. Nader & K. Blackwell, *supra* note 111.

Eligibility requirements, forfeiture and ERISA will be discussed more fully in notes 184-239 and accompanying text *infra*.

141. Mr. Justice Marshall noted in Alabama Power Co. v. Davis, 431 U.S. 581 (1977) that: "[While] it is obvious that pension payments have some resemblance to compensation for work performed . . . [t]he same observations, . . . can be made about any benefit and therefore are of little assistance in determining whether a particular benefit recompenses labor or rewards longevity with an employer.

"Other aspects of pension plans . . . suggest that the 'true nature' of the pension payment is a reward for length of service. The most significant factor pointing to this conclusion is the lengthy period required for pension rights to vest in the employee. It is difficult to maintain that a pension increment is deferred compensation for a year of actual service when it is only the passage of years in the same company's employ, and not the service rendered, that entitles the employee to that increment." *Id.* at 592-93.

In *Davis*, the most recent case in which the Supreme Court has considered the "nature" of pensions aside from *Daniel*, the Court concluded unanimously that pension benefits are "predominantly rewards for continuous employment with the same employer." *Id.* at 594. While this would strongly suggest that the Court has rejected the deferred compensation theory in favor of a neo-gratuity approach, those circuits citing *Davis* thereafter have chosen to interpret it narrowly, using it to determine whether a returning serviceman is entitled to

Nonetheless, whatever their justification, the present function of eligibility requirements is to guarantee the actuarial soundness of the plan.[142] Pension plans are deliberately funded to pay benefits to only a small percentage of employees since it is felt that employers do not have the wherewithal to provide adequate benefits to all covered employees. Plan administrators know that, statistically, only a minority of those workers covered at any given time will comply with all provisions of the plan; it is fully expected that the rest will quit, transfer or die prior to the vesting of their pension interest.[143]

It is largely because of these economic considerations that the courts have been reluctant to upset the delicate actuarial balance of pension plan determinations.[144] Other economic pressures, external to the funds,[145] have also made the courts hesitant to extend

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employment benefits under section nine of the Military Selective Service Act when he returns to his former job. *See, e.g.*, Barret v. Grand Trunk W.R.R. Co., 581 F.2d 132, 135 (7th Cir. 1978); Cohn v. Union Pacific R.R. Co., 572 F.2d 650, 651 (8th Cir. 1978); Aiello v. Detroit Free Press, 570 F.2d 145, 148-49 (6th Cir. 1978); Bury v. GM Corp., 476 F. Supp. 1262, 1266 (N.D. Ohio 1979).

Interestingly, two cases within the same circuit have interpreted *Davis'* language more broadly, each giving it an interpretation seemingly contradictory to the other. *See* Nachman Corp. v. Pension Benefit Guaranty Corp., 592 F.2d 947, 962 (7th Cir. 1979), *aff'd* 100 S. Ct. 1723 (1980); Daniel v. Teamsters, 561 F.2d 1223, 1244-45 n.43 (7th Cir. 1977), *rev'd* 439 U.S. 551 (1979). *See also* Krouner, *Employee Benefit Plans: Due Process for Beneficiaries*, 23 LAB. L.J. 425, 431 (1972).

142. For a discussion of the nexus between eligibility requirements and actuarial cost factors, *see* D. MCGILL, *supra* note 112, at 305-62.

143. *See id.*; P. HARBRECHT, *supra* note 92, at 53-56. The most authoritative source available indicates that only four to eight percent of participants in pension plans since 1950 have received any retirement benefits from the plan in which they participate. PRELIM. REPORT, *supra* note 11, at 8.

The most optimistic estimate of the percentage of plan participants who actually receive pension benefits is fifty percent. D. MCGILL, PENSIONS: PROBLEMS AND TRENDS 40 (1955). More current figures indicate that the McGill estimate is overly optimistic. *See* 1 LEGIS. HIST. OF ERISA, *supra* note 7, at 208 (remarks of Senator Ribicoff)(estimating that only five percent of all plan participants receive their benefits).

144. *See* Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978); Tomlin v. Board of Trustees, 586 F.2d 148 (9th Cir. 1978).

As the Court of Appeals for the District of Columbia Circuit noted in Roark v. Lewis, 401 F.2d 425 (D.C. Cir. 1968): "The court is fully cognizant of the internal pressures asserted on the trustees: the size of the pie is fixed and variations can be achieved only by changing the size or the number of the slices. There is no camouflaged design on the part of the court to second-guess the discretionary judgments of the trustees. . . . It is for the trustees, not judges, to choose between various reasonable alternatives." *Id.* at 429. *See also* cases cited in note 147 *infra*.

145. As was noted in the introduction, the combined sum of both private and public pension funds amounts to over $500 billion, representing approximately 26.5% of the gross national product in 1977. *Supra* note 8. These pension funds in the aggregate own 20-25%

the notion of the pension as wages to confer rights upon the worker vis-á-vis the pension plan.[146] In fact, the courts have cloaked plan trustees with immense discretion in making determinations of retirement eligibility and benefit payment.[147] While this may change in the future as more plans are challenged under the more liberal vesting and fiduciary requirements mandated by ERISA,[148] there has not heretofore been any significant indication that ERISA is amenable for use as a swift sword to vindicate pensioners' rights.[149]

As the foregoing indicates, many courts have recognized that

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of the stock listed on the New York and American Stock Exchanges and own 20% of all financial securities in this country, including stocks, bonds and notes. SATURDAY REVIEW, Sept. 2, 1978, at 11. *See also* J. RIFKIN & R. BARBER, *supra* note 8, at 10.

While this sizeable portion of the American productive capacity is technically "owned" by American labor, it is controlled by a relative handfull of banks, corporations and financial institutions. Such control has led to, or has been facilitated by, intense economic centralization. For instance, the ten largest corporate pension and profit sharing plans, whose management is controlled by corporate employers, account for $20 billion in tax-exempt funds. 1975 PENSIONS DIRECTORY, INSTITUTIONAL INVESTOR 11 (1975).

Similarly, the ten largest institutional asset managers in the United States, charged with control of pension and profit sharing funds, control $88.8 billion in assets at market value. *Id.* at 55. They are:

1.	Morgan Guaranty Trust Co.	$20.0 billion
2.	First National City Bank	14.2
3.	Bankers Trust Co.	11.0
4.	Prudential Insurance Co. of America	9.8
5.	Equitable Life Assurance Society	7.5
6.	Metropolitan Life Insurance Co.	6.3
7.	Manufacturers Hanover Trust Co.	5.2
8.	Chase Investors Management Corp.	5.0
9.	Lionel D. Edie & Co.	5.0
10.	Aetna Life and Casualty	4.8

While pension funds are ostensibly organized for the exclusive benefit of employee-participants, those economic organizations whose existence depends on pension fund control are likely to resist any changes which would redistribute the benefits of fund organization.

146. *Compare* the holdings in the areas of community property, notes 134 & 135 *supra,* and taxation, note 130 *supra, with* the cases cited in note 147 *infra.*

147. This is usually to the detriment of the employee plan participant. *See* Tomlin v. Board of Trustees, 586 F.2d 148 (9th Cir. 1978); Wilson v. Board of Trustees, 564 F.2d 1299 (9th Cir. 1977); Rehmar v. Smith, 555 F.2d 1362 (9th Cir. 1976); Thurber v. Western Conference of Teamsters Pension Plan, 542 F.2d 1106 (9th Cir. 1976); Toesing v. Brown, 528 F.2d 69 (9th Cir. 1975); Giler v. Board of Trustees, 509 F.2d 848 (9th Cir. 1975); Lee v. Nesbitt, 453 F.2d 1309 (9th Cir. 1972); Gomez v. Lewis, 414 F.2d 1312 (3d Cir. 1969); Gaydosh v. Lewis, 410 F.2d 262 (D.C. Cir. 1969); Moglia v. Geoghegan, 403 F.2d 110 (2d Cir. 1968); Miniard v. Lewis, 387 F.2d 864 (D.C. Cir. 1967).

148. Note 100 *supra.*

149. *See, e.g.,* Teamsters v. Daniel, 439 U.S. 551 (1979); Tomlin v. Board of Trustees, 586 F.2d 148 (9th Cir. 1978); Bueneman v. Central States Pension Fund, 572 F.2d 1208 (8th Cir. 1978); Wilson v. Board of Trustees, 564 F.2d 1299 (9th Cir. 1977).

pensions, given their operation and purpose, are compensation for present employment, deferred by agreement until retirement. Nonetheless, the law views such "compensation" as affording only those rights to the employee as are set out in the "deferment agreement," that is, the pension plan. Despite the importance of pensions to individual workers, and the extent of past abuse by employers and trustees (often leading to wholesale forfeiture), the courts have not fashioned a body of common law sufficient to protect the pension expectancies of prospective pensioners.

In the final section, the pension rights of beneficiaries will be analyzed by applying the Entitlement Doctrine. The application of the Supreme Court's Fifth Amendment formula to assess the possibility of constitutional protection for employee pensions will illustrate problems inherent both in the Entitlement Doctrine, and in the lack of basic constitutional protection afforded to workers whose earnings are deferred until—and often denied upon—retirement.

III. The Pension Expectation as a Constitutionally Protected Property Interest: The Application of the Entitlement Doctrine

As was discussed in section I, for an individual's pension to be recognized as "property" under the Fifth or the Fourteenth Amendment, the individual must be entitled to that pension under state or federal law.[150] Such an entitlement may arise by operation of statute[151] or contract.[152]

A. Pension Rights Under Statute

Pension funds were subject to only indirect regulation prior to 1974.[153] State laws regulated pension funds as they regulated all other trusts operating within their jurisdictions,[154] and federal law

150. *See* Paul v. Davis, 424 U.S. 693, 710 (1976); Arnett v. Kennedy, 416 U.S. 134, 151-52 (1974); Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

151. *See* O'Bannon v. Town Court Nursing Center, 100 S. Ct. 2467, 2475 (1980); Bishop v. Wood, 426 U.S. 341, 344 (1976); Arnett v. Kennedy, 416 U.S. 134, 151 (1974); Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Russell v. Hodges, 470 F.2d 212, 216 (2d Cir. 1972).

152. *See* Perry v. Sindermann, 408 U.S. 593, 601 (1972); Hodgin v. Noland, 435 F.2d 859, 860 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1972).

153. *See* D. McGILL, *supra* note 112, at 29.

154. *See, e.g.*, CAL. INS. CODE §§ 10640-10655 (West)(repealed 1965); CONN. GEN. STAT. ANN. §§ 31-78 (West)(repealed 1967); MASS. ANN. LAWS ch. 151D, §§ 1-18 (Michie/Law. Co-

addressed pensions almost exclusively from a tax perspective.[155] Neither state nor federal statutes provided any substantial protection for pension expectations nor vested workers with any substantive rights other than those afforded to trust fund beneficiaries at common law.[156]

1. *The Labor Management Relations Act of 1947*

Towards the end of the 1940's, two developments changed the focus of federal legislation in the pension area. First, due to the passage of the Wagner Act,[157] trade unions and union membership grew and asserted a new power in the American economy and in the work place. At the same time, unions ceased their early opposition to pensions and, instead, pushed for larger, more comprehensive pension and employee benefit packages, and for increased control as well.[158]

The second major development was the growth in the number and size of pension funds themselves. While in all years prior to

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op 1976); N.Y. BANKING LAW §§ 60-75 (McKinney 1971); WASH. REV. CODE ANN. §§ 49.64.010-.030 (1962).

On state regulation of pension funds, McGill notes: "The fiduciary responsibility laws of the various states in theory applied to persons and institutions managing the assets of pension plans, but the reach of the laws and the scope of the remedies were considered by most legal experts to be inadequate for pension plans, especially those operating across state boundaries." D. MCGILL, *supra* note 112, at 29.

Currently, all state employee benefit statutes, as far as they affect the subject matter described in ERISA, are preempted by ERISA § 514(a), 29 U.S.C. § 1114(a)(1976). *See also* Malone v. White Motor Corp., 435 U.S. 497 (1978); *Recent Decisions—Labor Law*, 11 GA. L. REV. 715 (1977).

155. Since 1926, employers have been permitted to deduct contributions to, and income from, qualified pension trust funds. *See, e.g.*, Int. Rev. Code of 1954, ch. 1, § 404, 68A Stat. 138 (now I.R.C. § 404).

The phenomenal growth in private pension plans is attributable in large part to substantial federal tax incentives offered for the creation and operation of plans. In fact, it is estimated that private pension plans are subsidized through tax deductions amounting to approximately $3 billion annually. 2 LEGIS. HIST. OF ERISA, *supra* note 7, at 1619 (remarks of Senator Ribicoff). Of course, this is vigorously disputed by some who claim that pensions and their investments are afforded no special tax concessions and are taxed in accordance with standard tax principles. *See* R. GOETZ, TAX TREATMENT OF PENSION PLANS: PREFERENTIAL OR NORMAL? (1969).

For a general discussion of federal regulation of private pension plans prior to ERISA, see E. PATTERSON, LEGAL PROTECTION OF PRIVATE PENSION FUND EXPECTATIONS 85-112 (1960).

156. *See* B. AARON, *supra* note 95, at 117; D. MCGILL, *supra* note 112, at 30-33.

157. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935)(codified at 29 U.S.C. §§ 151-168 (1976)).

158. This was due in large part to the restraints on real wages imposed during World War II, and the return of a more security-conscious workforce. *See* note 139 *supra*.

1940, only 659 pension and profit-sharing plans were established,[159] between 1940 and 1949 alone, 12,206 plans were created.[160] This growth in numbers was accompanied by a growth in importance, both as a form of economic security for an increased number of workers and as a pool of investment capital upon which a larger portion of the private sector became dependent. By 1950, the aggregate book value of private, noninsured pension funds *alone* amounted to over $6.45 billion[161] at a time when total United States government spending was $42.4 billion.[162]

The growth of private pension funds into a vital pool of economic capital, combined with the concomitant growth of unions during and after World War II, led to increased congressional pressure to impose restraints on union control over pension funds.[163] This pressure culminated in the inclusion of section 302 in the Labor Management Relations Act of 1947,[164] also known as the Taft-Hartley Act.

The Labor Management Relations Act was the first federal law to impose restraints on the administration of private pension plans so as to affect the rights of pension fund beneficiaries. Section 302 of the Act regulates pension funds by imposing restrictions on the payment of funds to employee (*i.e.*, union) representatives. It prohibits payments of any and all kinds of funds from an employer to a union representative[165] excepting "money or other things of value paid to a trust fund . . . for the sole and exclusive

159. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LAB., STATISTICAL RECORD OF THE GROWTH OF PRIVATE RETIREMENT PLANS (unpublished, 1979).

160. *Id.*

161. SEC ANN. REP. 307 (1978). *See also* U.S. DEP'T OF HEW, SOC. SEC. AD., SOC. SEC. BULL. 3, 4 (June 1976).

162. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1972, at 386 (93d ed. 1972).

163. As Senator Robert Taft stated, summarizing the intent behind his efforts to impose such controls: "[I]t seems obvious that if these funds grow rapidly, as they are growing—which is perfectly proper—they should be regulated by the Federal Government. They should be in definite terms. They should not be subject to the arbitrary discretion of the union leaders. . . .

"The purpose is to prevent the abuse of welfare funds. . . . The tendency [of unions] is to demand a welfare fund as much in the power of the union as possible. Certainly unless we impose some restrictions we shall find that the welfare fund will become merely a war chest for the particular union. . . ." 93 CONG. REC. 4746-47 (1947)(remarks of Senator Taft).

164. 29 U.S.C. § 186 (1976).

165. Taft-Hartley Act § 302(a) & (b), 29 U.S.C. § 186(a) & (b)(1976). Thus, a telling feature of Taft-Hartley's § 302 is its application only to pension plans administered in any way by unions. It exempts totally from regulation those funds unilaterally administered by employers. *See* H.R. REP. No. 510, 80th Cong., 1st Sess. (1947), *reprinted in* [1947] U.S. CODE CONG. SERV. 1135, 1173.

benefit of the employees of such employer, and their families and dependents. . . ."[166]

The Act goes on to set out a series of requirements for the administration of these union-negotiated plans,[167] the primary one being that such funds be trust funds jointly administered by an equal number of employer and employee representatives.[168]

While section 302 was ostensibly designed to enlarge the rights of employees in their pension plans,[169] its primary purpose was to restrict union control over pension and health and welfare funds.[170] The Taft-Hartley Act has no provision governing the specific mechanics of pension benefit entitlement. Until the passage of ERISA, plan trustees and employers were left to themselves to determine what rights, if any, employees had under their retirement systems.[171]

Due to the narrow judicial reading given section 302 in light of congressional intent, the Taft-Hartley Act does not support a claim of entitlement upon which an employee may base a plea for constitutional protection for his or her pension expectancy. While other legislation was passed in the aftermath of Taft-Hartley to protect pension plan assets,[172] it was not until 1974 that Congress undertook a thorough revision of federal pension law designed to address the rights of individual workers to their pensions.

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166. Section 302(c)(5), 29 U.S.C. § 186(c)(5)(1976).

167. Section 302(c)(5)(A)-(C), 29 U.S.C. § 186(c)(5)(A)-(C)(1976).

168. Section 302(c)(5)(B), 29 U.S.C. § 186(c)(5)(B)(1976).

169. *See* 93 CONG. REC. 4746 (1947)(remarks of Senator Taft).

170. *See* S. Rep. No. 105, 80th Cong., 1st Sess. 52 (1947).

171. *See* Lugo v. Employee's Retirement Fund, 529 F.2d 251, 255 (2d Cir. 1976), *cert. denied*, 429 U.S. 826 (1976); Pete v. UMWA Welfare & Retirement Fund, 517 F.2d 1275, 1283 (D.C. Cir. 1975); Cuff v. Gleason, 515 F.2d 127, 128 (2d Cir. 1975); Bowers v. Ulpiano Casal, Inc., 393 F.2d 421, 426 (1st Cir. 1968).

The test applied to assess the legality of trustee conduct under § 302 has been the "arbitrary and capricious" standard. Thus, before a court will disturb a benefit or eligibility determination by a Taft-Hartley trustee, plaintiffs must show that the pension fund trustees' conduct, in denying plaintiffs their pension benefits, was wholly arbitrary and capricious. This approach was modestly described as "noninterventionist" by the court in Souza v. Trustees of the Western Conference of Teamsters Pension Trust, 460 F. Supp. 843, 847 (N.D. Cal. 1978). *See also* Johnson v. Botica, 537 F.2d 930, 935 (7th Cir. 1976); Alvares v. Erickson, 514 F.2d 156, 166 (9th Cir. 1975), *cert. denied*, 423 U.S. 874 (1975); Gaydosh v. Lewis, 410 F.2d 262, 265-66 (D.C. Cir. 1969); Roark v. Lewis, 401 F.2d 425, 427 (D.C. Cir. 1968).

172. Aside from periodic revisions of the Internal Revenue Code in the 1950's and 1960's affecting pension plans, the primary pension reform at the federal level in the interim between Taft-Hartley and ERISA was the Federal Welfare and Pension Plans Disclosure Act of 1958. 29 U.S.C. §§ 301-309 (1970)(repealed 1975). Described by McGill as "largely ineffectual," it was repealed by ERISA § 111(a)(1), 29 U.S.C. § 1031(a)(1)(1976).

2. *The Employee Retirement Income Security Act of 1974 (ERISA)*

On September 2, 1974, Labor Day, President Gerald R. Ford signed into law Public Law 93-406. Entitled the "Employee Retirement Income Security Act of 1974," it was Congress' first attempt at comprehensive pension reform, revising mammoth blocks of the Internal Revenue Code and Title Twenty-nine of the United States Code. The result was labyrinthian, even by congressional standards; it reflected numerous amendments, compromises and revisions.[173]

The primary goal of its drafters was to protect the pension expectations of prospective retirees covered[174] under private pension plans.[175] ERISA was passed in response to widespread abuse within the private pension system,[176] due at least in part to the

173. The law is 208 pages in length, consists of four titles, and has a legislative history that runs well over 5,000 pages in three volumes.

174. The Act governs all pension and employee benefit plans, excepting primarily those which are governmental, church-established, or outside the United States for the benefit of nonresident aliens. ERISA § 4, 29 U.S.C. § 1003 (1976).

175. *See* 1 LEGIS. HIST. OF ERISA, *supra* note 7, at 210 (remarks of Senator Bentsen). Congress set out the policy of the Act in ERISA § 2(b), 29 U.S.C. § 1001(b)(1976), "to protect . . . the interests of participants in employee benefit plans and their beneficiaries. . . ." *See also* Eaves v. Penn, 587 F.2 453 (10th Cir. 1978); Marshall v. Snyder, 430 F. Supp. 1224 (E.D.N.Y. 1977), *aff'd*, 572 F.2d 894 (2d Cir. 1978).

The protection of employees' pension rights was not the sole concern of Congress as it considered its first attempt at comprehensive pension reform legislation. As was suggested in note 145 *supra*, the aggregation of pension funds in this country has vested a segment of the economic community with a significant interest in the future of private pension plans. Their influence, combined with the recognized importance of pension funds in the capital formation process, has made Congress very aware of the importance of protecting the funds themselves: "[ERISA's] most important purpose will be to assure American workers that they may look forward with anticipation to a retirement with financial security and dignity, and without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society. *The enactment of progressive and effective pension legislation is also certain to increase stability within the framework of our nation's economy, since the tremendous resources and assets of the private pension plan system are an integral part of our economy.*" 1 LEGIS. HIST. OF ERISA, *supra* note 7, at 599 (emphasis added). *See also* N. LEVIN, ERISA AND LABOR-MANAGEMENT BENEFIT FUNDS, at x (2d ed. 1975).

176. "All too often working men and women contribute to these pension plans only to find when they retire that the benefits they had been promised are denied them.

"In addition, frequently the pension funds themselves are abused by those responsible for their management who manipulate them for their own purposes or make poor investments with them.

"It is time controls were imposed to safeguard the workers' valuable funds. Genuine pension reform will be achieved only by Federal regulation.

"In the absence of comprehensive pension reform legislation, abuses and phantom retirement security benefits have been frequent." 1 LEGIS. HIST. OF ERISA, *supra* note 7, at 207 (remarks of Senator Ribicoff).

laissez-faire attitude toward the funds by Congress and the courts, and the rapid growth of the funds. In the twenty-five year period between the passage of the Taft-Hartley Act and ERISA, external factors such as substantial tax exemptions,[177] pressure by unions due to the *Inland Steel* decision,[178] and other economic factors[179] caused pension funds to grow extraordinarily, and become even more prominent in the American economy. While in all years prior to 1940, only 659 private pension and profit-sharing plans had been established, by 1974, the year ERISA was passed, 455,905 new private pension and profit-sharing plans had been formed.[180] Between 1950 and 1975, the year ERISA came into effect, the total book value of the assets of private, noninsured pension funds, which represent one-third of all public and private retirement funds excluding Social Security, increased from $6.45 billion to $145.17 billion, or a total increase or 2,251%.[181]

This exponential growth of pension funds nationwide was accompanied by widespread corruption and misuse of plan assets. A study completed by the Senate Committee on Labor and Public Welfare, estimated that of all pension participants since 1950, no more than four to eight percent have received any benefits whatsoever from their plans.[182] Another study, conducted by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, in 1971, determined that the median income among those who *actually received* benefits under private pension plans in the United States was $99.00 a month, or a total of $1,188 a year.[183]

The extent and nature of pension fund abuse has been exhaustively chronicled elsewhere.[184] Employees and their beneficiaries have been denied all of their retirement benefits after many years of service due to death,[185] disability,[186] discharge,[187] onerous vest-

177. *See* note 155 *supra.*

178. *See* notes 121-25 and accompanying text *supra;* D. McGILL, *supra* note 112, at 26-28.

179. *See* note 139 *supra.*

180. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LAB., STATISTICAL RECORD OF THE GROWTH OF PRIVATE RETIREMENT PLANS (unpublished, 1979).

181. SEC ANN. REP. 91 (1978). *See also* U.S. DEP'T OF HEW, SOC. SEC. AD., SOC. SEC. BULL. 3, 4 (June, 1976).

182. PRELIM. REPORT, *supra* note 11, at 8.

183. 1 LEGIS. HIST. OF ERISA, *supra* note 7, at 597.

184. *See* note 182 *supra;* INTER. REP., note 140 *supra;* 1 LEGIS. HIST. OF ERISA, *supra* note 7, at 207-08; 2 LEGIS. HIST. OF ERISA, *supra* note 7, at 1598-1601, 3519-22; 3 LEGIS. HIST. OF ERISA, *supra* note 7, at 4790-5106; R. NADER & K. BLACKWELL, note 111 *supra;* Levin, *Proposals to Eliminate Inequitable Loss of Pension Benefits,* 15 VILL. L. REV. 527, 531-54 (1970); Comment, *supra* note 107, at 469-73.

185. *See, e.g.,* Freitzsche v. First W. Bank & Trust Co., 168 Cal. App. 2d 705, 336 P.2d

ing requirements,[188] layoffs[189] and plant closures.[190] While workers have lost their retirement security due to criminal conduct by employers and trustees, the most serious forms of abuse leading to wholesale forfeiture have been, on the whole, perfectly legal. These include underfunding,[191] fund mismanagement, self-dealing and conflicts of interest,[192] unreasonable eligibility requirements[193] and plan terminations.[194]

The problem of forfeitures has been compounded by the lack of legal recourse available to employees denied their benefits and the attendant lack of recognition of their plight. As a California State Senate Committee concluded:

> The result . . . is that only the exceptionally persistent pension victim ever receives any official or public notice. The vast majority are either too intimidated or unsophisticated to even attempt to protest their treatment, or are eventually forced to give up due to the inability or unwillingness or anyone to aid them.[195]

It was this void in the protection of employees' rights that ERISA was designed to fill. While some commentators saw ERISA as the cutting edge of "pension fund socialism" in America,[196] it

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589 (1959).

186. *See, e.g.,* Smith v. Union Carbide Corp., 350 F.2d 258 (6th Cir. 1965).

187. *See, e.g.,* Schneider v. McKesson & Robbins, 254 F.2d 827 (2d Cir. 1958); Gorr v. Consolidated Foods, Inc., 253 Minn. 375, 91 N.W.2d 772 (1958).

188. *See* note 140 *supra. See also* Schneider v. McKesson & Robbins, 254 F.2d 827 (2d Cir. 1958).

189. Askinas v. Westinghouse Elec. Corp., 330 Mass. 103, 111 N.E.2d 740 (1953).

190. *See, e.g.,* Local 2040 v. Servel, Inc., 268 F.2d 692 (7th Cir. 1959), *cert. denied,* 361 U.S. 884 (1959). *See also* Bernstein, *Employee Pension Rights when Plants Shut Down: Problems and Some Proposals,* 76 HARV. L. REV. 952 (1963).

191. *See* Bernstein's discussion of Studebaker, *supra* note 137, at 94-95; INTER. REP., *supra* note 140, at 80-81.

192. Blankenship v. Boyle, 329 F. Supp. 1089 (D.D.C. 1971); R. BLODGETT, CONFLICTS OF INTEREST: UNION PENSION FUND ASSET MANAGEMENT (1977); J. BROOKS, CONFLICTS OF INTEREST: CORPORATE PENSION FUND ASSET MANAGEMENT (1975); R. NADER & K. BLACKWELL, *supra* note 111, at 65-78; Bradner, *Conflicts of Interest in Commercial Bank Trust Departments and Corporate Fund Asset Management,* 114 TRUSTS & EST. 786 (1975).

193. Gaydosh v. Lewis, 410 F.2d 262 (D.C. Cir. 1969); Miniard v. Lewis, 387 F.2d 864 (D.C. Cir. 1967); McCostis v. Nashua Pressman Union, 109 N.H. 226, 248 A.2d 85 (1968).

194. Gorr v. Consolidated Foods, Inc., 253 Minn. 375, 91 N.W.2d 772 (1958).

195. CALIFORNIA STATE SENATE COMM. ON BUS. & PROF., PRELIM. REPORT ON THE OPERATION OF PRIVATE PENSION PLANS 10 (Comm. Print, Nov. 28, 1973).

196. P. DRUCKER, THE UNSEEN REVOLUTION: HOW PENSION FUND SOCIALISM CAME TO AMERICA 11-16 (1976).

Senator Metcalf calls Professor Drucker's assertion that workers own the means of capital production in this country through pension funds a "major, monstrous myth." Retirement Income: A Report from the Pension Rights Center 11, col. 3 (1979).

As P. Harbrecht notes: 'Rights of ownership are a source of power only so long as they

actually constituted an elaborate compromise between the rights of the employees who rely on private pension plans for their retirement years and the interests of employers, trustees and the investment community who have a substantial stake in pension funds themselves. As President Ford stated upon signing ERISA in 1974: "I believe this act is a model of what can be done by the Government to improve the lives of Americans within the private sector without harming the dynamics of our free enterprise system."[197]

This compromise manifests itself in the complexity of ERISA, its evolution and its numerous amendments.[198] More particularly, it reveals itself in various provisions of the bill designed to offer remedial protection for employees' pension expectations while securing the interests of others who have an economic stake in the funds.

One example is ERISA's fiduciary provisions,[199] touted for the strong restraints they impose on trustee and asset manager conduct.[200] In essence, ERISA requires that fiduciaries, as defined under the Act,[201] conduct themselves (1) for the exclusive benefit of the plan participants and their beneficiaries;[202] and (2) "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[203] ERISA's fiduciary provisions also require the diversification of the pension trust portfolio[204] and disallow certain "prohibited transactions" as defined

are joined with the right to control the use of property." P. HARBRECHT, *supra* note 92, at 278.

197. Statement on the Employee Retirement Income Security Act of 1974, 1974 PUB. PAPERS, GERALD R. FORD 79. Similar statements may be found in ERISA's legislative history. *See* 1 LEGIS. HIST. OF ERISA, *supra* note 7, at 204 (remarks of Senator Javits); 2 LEGIS. HIST. OF ERISA, *supra* note 7, at 1601, 1604 (remarks of Senator Williams).

198. *See generally* LEGIS. HIST. OF ERISA, *supra* note 7. *See, in particular, id.* at 205 (remarks of Senator Javits).

199. ERISA §§ 401-414, 29 U.S.C. §§ 1101-1114 (1976). *See also* the House and Senate Conference Committee's joint explanatory statement on ERISA, H.R. REP. No. 93-1280, 93d Cong., 2d Sess. 294-326 (1974) [hereinafter cited as CONF. REP.].

200. Kilberg, *The Labor Department Perspective,* 31 BUS. LAW. 75 (1975).

201. ERISA § 2003, I.R.C. § 4975(e).

202. ERISA § 404(a)(1)(A)(i), 29 U.S.C. § 1104 (a)(1)(A)(i)(1976).

203. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B)(1976).

204. ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C)(1976).

One of the most significant reforms produced by ERISA is its prohibition against pension plan acquisition and holding of securities of the *sponsoring employer* in excess of ten percent of the market value of the plan's assets. ERISA § 407(a)(2), 29 U.S.C. § 1107(a)(2)(1976). Prior to ERISA, trustees would purchase and manipulate the sponsoring employer's stock, greatly benefiting the employer at the expense of the employees covered

under the Act.[205]

While ERISA's fiduciary requirements are designed to protect the worker's interest in her pension by strictly proscribing the kinds of self-dealing and conflicts of interest which led to the wholesale depredation of trust assets in the past, these requirements have been criticized as furthering the interests of the pension and investment community at the expense of the rights of the pension beneficiaries.[206] While ERISA has been successful in arresting the more overt forms of pension corruption, there is some evidence that fund assets are still subject to sophisticated methods of self-interested manipulation and depletion. Two recent research monographs prepared under the auspices of the Twentieth Century Fund have documented significant conflicts of interest, not uncommon among corporate and union funds, which remain unassailable under ERISA.[207] A study prepared by A. G. Becker, Inc., of Chicago, indicates that over the past ten years, 3,000 private pension funds invested chiefly in stocks and bonds increased in value an average of only 2.5% a year.[208] The impact on pension fund beneficiaries is great; a *one percent* change in the rate of return on the trust portfolio translates into a *ten to twenty percent* increase or decrease in pension benefits payable out of the fund.[209]

The stress inherent in ERISA between the interests of employers and the investment community on the one hand, and the pension rights of employees on the other, is nowhere more appar-

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under the plan. *See* B. AARON, *supra* note 95, at 101-02; J. BROOKS, *supra* note 192, at 13-25. As the Douglas Committee noted: "[A]n unduly large holding of this type may not be in the interests of the beneficiaries . . . [and] tends to raise the question whether the fund is being operated for the sole interest of the beneficiaries." S. REP. No. 1734, 84th Cong., 2d Sess. 51-52 (1956).

Employee stock ownership plans (ESOP's) are exempt from the ten percent employer's securities limitation. ERISA §§ 407(b)(1) & (d)(6), 29 U.S.C. §§ 1107(b)(1) & (d)(6)(1976). *See* C. SCHARF, GUIDE TO EMPLOYEE STOCK OWNERSHIP PLANS: A REVOLUTIONARY METHOD FOR INCREASING CORPORATE PROFITS 26 (1976).

205. ERISA § 406, 29 U.S.C. § 1106(1976).

206. *See* remarks of William Winpisinger, of the Machinists Union, in J. RIFKIN & R. BARBER, *supra* note 8, at 102. For a contrary view, *see* Note, *Public Employee Pensions in Times of Fiscal Distress,* 90 HARV. L. REV. 992 (1977).

207. R. BLODGETT, *supra* note 192; and J. BROOKS, *supra* note 192. *See also* J. RIFKIN & R. BARBER, *supra* note 8, at 104-24.

208. NEWSWEEK, Nov. 5, 1979, at 86.

A.G. Becker's 1978 report on the rates of return on 3,500 managed pension fund portfolios indicates that the median annual return for pension and profit sharing funds from 1969 to 1978 has been 2.0% and 2.1% respectively. A.G. BECKER, 1978 PERFORMANCE CHARACTERISTICS 16 (1979). This is to be compared with the consumer price index annual inflation rate for the same period, which was 6.7%. *Id.* at 5.

209. N. LEVIN, *supra* note 175, at 73.

ent than in ERISA's minimum vesting and eligibility requirements.[210] These provisions ostensibly guarantee the pension expectations of American workers. Their net effect, however, is to ensure the stability of the fund by reducing the number of persons who are entitled to pension benefits through eligibility screening.[211]

ERISA's participation and vesting sections must be scrutinized to determine whether ERISA creates an entitlement in a particular pension. Under ERISA, an entitlement is established when an individual's pension has *vested,* that is, has become a nonforfeitable interest recognized by law. In order for her pension to vest, a worker must satisfy a series of conditions precedent set out as minimum standards in ERISA.[212] Then and only then will a legally cognizable interest in a pension be created.

An analysis of the way pension eligibility requirements operate reveals that an entitlement to pension benefits is not readily established, even under the most liberal minimum standards set out in the pension reform act. For instance, presuming that an employee falls within ERISA's coverage provisions,[213] she must then satisfy the conditions precedent to plan *participation*[214] so that years of

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210. ERISA §§ 202, 203, 29 U.S.C. §§ 1052, 1053 (1976).

211. The eligibility requirements, by reducing the amount of money paid out in benefits, concomitantly increase the overall balance of the fund, thereby (1) benefiting the employer by reducing his future pension obligations and (2) enhancing the effectiveness of the fund as an investment device, since long-term stability of funds is essential for profitable investment and efficient capital management. Theoretically, no real benefit is derived, since each denial of benefits is part of an overall actuarial scheme which predetermines the amount of fund contributions necessary to meet the unfunded liabilities of the plan. *See* D. McGILL, *supra* note 112, at 305-425.

212. ERISA §§ 202, 203, 29 U.S.C. §§ 1052, 1053 (1976). These provisions are pivotal to ERISA; should a plan fail to meet these minimum standards, it will not constitute a qualified trust under I.R.C. § 401(a) and thus not be entitled to receive the generous tax benefits afforded to private pension plans under ERISA. *See* ERISA §§ 1011, 1012, I.R.C. §§ 410, 411.

213. Under § 201 of ERISA, 29 U.S.C. § 1051 (1976), the participation and vesting requirements do not apply to governmental plans, church plans, excess benefit plans and assorted others. *See also* CONF. REP., *supra* note 199, at 260-61.

214. ERISA § 202(a)(1)(A), 29 U.S.C. § 1052(a)(1)(A)(1976), which states in pertinent part: "No pension plan may require, as a condition of participation in the plan, that an employee complete a period of service with the employer or employers maintaining the plan extending beyond the later of the following dates—

(i) the date on which the employee attains the age of 25; or

(ii) the date on which he completes 1 year of service."

However, there are exceptions. A plan may extend the service requirement to three years if the plan provides for full and immediate vesting. ERISA § 202(a)(1)(B), 29 U.S.C. § 1052(a)(1)(B)(1976).

A plan may also exclude altogether employees who are within five years of the plan's normal retirement age. ERISA § 202(a)(2)(B), 29 U.S.C. § 1052(a)(2)(B)(1976). *See also*

service which accrue may be counted toward the satisfaction of a second set of eligibility requirements which determine whether the employee will ultimately receive benefits.

Once the minimum participation requirements are satisfied,[215] the employee-plan participant[216] must then satisfy the minimum vesting standards under section 203 of the Act.[217] ERISA requires that plans adopt one of three vesting formulae,[218] which determine *when* the pension vests, as well as one of three benefit accrual schedules,[219] which determine the *rate and amount* of benefit accrual. The most common method adopted is "cliff vesting," where an employee becomes entitled to 100% of her benefits after ten years of service,[220] at which time her pension becomes nonforfeitable.[221]

Prior to the passage of ERISA, there were no vesting requirements mandated by federal law, and as a result, onerous eligibility requirements often led to wholesale denial of employees' pension benefits.[222] Even under ERISA, however, a variety of circumstances can conspire to deprive an employee of all pension contributions made on her behalf. For instance, because most employers prefer the ten-year "cliff vesting" requirement permitted by

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CONF. REP., *supra* note 199, at 262.

215. ERISA § 202(a)(2)(B), 29 U.S.C. § 1052(a)(2)(B)(1976).

216. Defined by ERISA § 3(7), 29 U.S.C. § 1002(7)(1976).

217. 29 U.S.C. § 1053 (1976).

218. ERISA § 203(a)(2)(A)-(C), 29 U.S.C. § 1053(a)(2)(A)-(C)(1976). They are, respectively: (1)"Cliff" vesting—100% vesting after ten years of service, irrespective of age, with no vesting at all during the first ten years.

(2)"Graded" vesting—Progressive vesting over fifteen years of service, with a nonforfeitable right to 25% of the pension accruing after at least five years of service and 100% vesting occurring after fifteen years of service, and with gradational vesting occurring in between as set out in the Act.

(3)"Rule of 45" vesting—Where the pension vests progressively based on the sum of the employee's age and length of service, with a forty year-old employee with five years of service accruing a 50% nonforfeitable interest, and all employees with ten years of service accruing at least a 50% nonforfeitable interest.

See CONF. REP., *supra* note 199, at 268-69.

219. ERISA § 204(b)(1)(A)-(C), 29 U.S.C. § 1054(b)(1)(A)-(C)(1976). *See* CONF. REP., *supra* note 199, at 273-75.

220. ERISA § 203(a)(2)(A), 29 U.S.C. § 1053(a)(2)(A)(1976). This method is generally preferred because it reduces administrative costs involved in accounting for partially vested rights. It is particularly desirable in industries where there is a high labor turnover, since an employee must work a minimum of ten years to accrue any benefit credits.

221. ERISA § 3(19), 29 U.S.C. § 1002(19)(1976), defines "nonforfeitable" as "a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan."

222. *See* note 140 *supra*.

ERISA, well over half of those employees covered will not gain an "entitlement" to their pension benefits since labor mobility studies indicate that most employees change jobs prior to the time when their pension rights would vest.[223]

Similarly, an employee may work for ten or more years, yet not accrue any benefit credits because of one or more temporary interruptions in continuous work performance, called "breaks-in-service." For instance, if a worker is unable to work due to pregnancy, disability, layoff or termination, she may lose some or all of her credits, depending on the length of the break-in-service and the amount of benefit credit accrued.[224]

Should a pension plan terminate prior to an employee's interest having vested, she would lose all benefits accrued on her behalf, since the system of government termination insurance enacted by ERISA[225] covers *only* vested, nonforfeitable benefits.[226] This affects a significant, if unascertainable, number of persons, given the fact that over 1,000 pension plans terminate each year for economic reasons.[227]

Even if an employee succeeds in completing ten continuous years of service and becomes entitled to receive 100% of the benefits determined to be nonforfeitable under the Act, that employee still must reach normal retirement age[228] to actually *receive* full

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223. The Department of Labor indicates that in 1972, for instance, the median length of employment for persons covered under private pension plans was 8.6 years. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, COVERAGE & VESTING OF FULL TIME EMPLOYEES UNDER PRIVATE RETIREMENT PLANS 19 (Sept. 1973). *See also* M. BERNSTEIN, *supra* note 137, at 49-84.

ERISA does permit reciprocity agreements and tax-free rollovers, allowing a degree of portability, whereby an employee can transfer her vested interest in her pension to another retirement system under some circumstances. *See* CONF. REP., *supra* note 199, at 341-42. Unfortunately most private pension plans do not have reciprocity clauses. *See* U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, DIGEST OF SELECTED PENSION PLANS (1979).

As one commentator put it: "The older worker who must forfeit his pension if he chooses to change employers is uncomfortably close to serfdom." SCHULZ, PENSION ASPECTS OF THE ECONOMICS OF AGING 39 (1970).

224. ERISA § 203(b), 29 U.S.C. § 1053(b)(1976); CONF. REP., *supra* note 199, at 268-70.

225. ERISA §§ 4001-4068, 29 U.S.C. §§ 1301-1368 (1976).

226. ERISA § 4022(a), 29 U.S.C. § 1322(a) (1976). *See also* Nachman Corp. v. Pension Benefit Guar. Corp., 592 F.2d 947 (7th Cir. 1979), *aff'd*, 100 S. Ct. 1723 (1980).

227. DEP'T OF TREASURY & DEP'T OF LABOR, STUDY OF PENSION PLAN TERMINATIONS, 1972 FINAL REPORT (Aug. 1973), *cited in* Brief of PROD, Women's Lobby, Inc., and Institute for Public Interest Representation as *Amici Curiae* in Support of Respondent, at 25, Teamsters v. Daniel, 439 U.S. 551 (1979).

228. Defined under the Act as the lowest age specified in the plan at which eligible pension plan participants are permitted to retire with full benefits. This cannot exceed 65,

benefits.[229] Indeed, while vested rights to an accrued benefit attributable to employer contributions are generally *not* forfeitable, they can be forfeited where the employee-plan participant dies prior to reaching the normal retirement age specified in the plan.[230] Vested rights can also be forfeited due to retroactive plan amendments,[231] re-employment of the employee,[232] and the voluntary withdrawal of mandatory contributions.[233]

A case pending before the Ninth Circuit illustrates ERISA's weaknesses regarding workers' pension rights.[234] Mario Hernandez was a participant in a pension plan administered by the Southern Nevada Culinary and Bartenders Pension Trust, which required ten years of employee service for pension benefits to vest. The plan also required that the employee retire at the age of sixty-two to receive benefits. Mario Hernandez worked thirteen and one-half years in employment covered under the multi-employer plan and thus had a 100% vested interest in his pension.[235] On October 16, 1977, Mario Hernandez died at the age of sixty-one years and nine months, just three months short of his sixty-second birthday and three months short of reaching normal retirement age under the plan.

America Hernandez, the widow of Mario Hernandez, applied for his pension benefits from the trust and was turned down, even though her late husband's pension was 100% vested at the time of his death. She then brought an action for declaratory relief and an accounting in the District Court of Nevada, which found that, under ERISA, a pension plan may deny all retirement benefits to an employee's beneficiary if that employee dies prior to reaching the plan's normal retirement age.[236] Accordingly, such a denial is

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which is the most common age specified. ERISA § 3(24), 29 U.S.C. § 1002(24)(1976).

229. ERISA § 203(a)(3)(A), 29 U.S.C. § 1053(a)(3)(A)(1976).

230. *Id.;* CONF. REP., *supra* note 199, at 271.

231. ERISA §§ 203(a)(3)(C), 302(c)(8), 29 U.S.C. §§ 1053(a)(3)(C), 1082(c)(8) (1976); CONF. REP., *supra* note 199, at 271.

232. ERISA § 203(a)(3)(B), 29 U.S.C. § 1053(a)(3)(B)(1976); CONF. REP., *supra* note 199, at 271.

233. ERISA § 203(a)(3)(D), 29 U.S.C. § 1053(a)(3)(D)(1976); CONF. REP., *supra* note 199, at 271.

234. Hernandez v. Southern Nev. Culinary & Bartenders Pension Trust, No. 79-36 (D. Nev. Sept. 4, 1979), *appeal docketed,* No. 79-3616 (9th Cir. Sept. 25, 1979).

235. In addition, Mr. Hernandez had elected the joint and survivor annuity option, which would have entitled his beneficiary to 50% of the amount which he was eligible to receive at the time of his death.

236. No. 79-36, slip op. at 5-6 (D. Nev. Sept. 4, 1979).

"Plaintiff urges this court to hold that because the contributions by the employer were made pursuant to a collective bargaining agreement, they are in lieu of wages which would

not a prohibited forfeiture under ERISA,[237] even though an employee's interest is fully vested; thus, America Hernandez was entitled to neither benefits from, nor an accounting of, her late husband's pension.

As ERISA is the non-constitutional source which must form the basis of any claim of pension entitlement cognizable under the Entitlement Doctrine, it must be subjected to more critical scrutiny to determine whether, and to what extent, it extends protection to the day-to-day pension expectancies of millions of American workers. While ERISA has been hailed as offering "more benefits and rights and success in the area of labor-management than almost anything in the history of this country,"[238] it might more accurately be characterized as representing "a mirage of reform but not its substance."[239]

The "mirage" of ERISA is due to the disparity between the public pronouncements of its drafters and the actual substance of the bill itself. For instance, it is clear from the legislative history of ERISA that its drafters saw pensions as a form of wages to which the worker is entitled. Senator Harrison Williams, Chairman of the Senate Committee on Labor and Public Welfare, stated during hearings on ERISA: "I would stress that pensions are not gratuities, like a gold watch bestowed as a gift by the employer on retirement. They represent savings which the worker has earned in the form of deferred payment for his labors."[240]

Similarly, Senator Jacob Javits, co-author and chief sponsor of ERISA, noted:

> The fact of the matter is that the private pension plan is a means for transferring earnings during the working years into income for a decent living in the older years. The worker "works" for that pension the same way he "works" for his wages or salary. . . .[241]
>
> I believe that [ERISA] has settled in an indisputable fashion, the legal status of private pensions. Whatever lingering doubts may have persisted prior to its passage, the law tells us that pri-

otherwise have been paid to the employee and therefore constitute employee contributions which belong to the estate of the decedent. Such an interpretation is contrary to the clear intent of the Act." *Id. But see* notes 240-42 and accompanying text *infra.*

237. ERISA § 203(a)(3)(A), 29 U.S.C. § 1053(a)(3)(A)(1976).

238. Remarks by President Gerald Ford on signing the Employee Retirement Income Security Act of 1974, 1974 PUB. PAPERS, GERALD R. FORD 76-77.

239. Professor M. Bernstein, *quoted in* R. NADER & K. BLACKWELL, *supra* note 111, at 117.

240. 2 LEGIS. HIST. OF ERISA, *supra* note 7, at 1605.

241. *Id.* at 1609.

vate pensions are a form of deferred wages and not a form of gratuity to be offered and withdrawn at the whim of the employer. In short the "gold watch" theory of pensions is dead for once and for all.[242]

Nonetheless, ERISA creates in a worker no entitlement to her pension prior to the satisfaction of the plan's eligibility requirements. In balancing the interests of both the employer and the economic community against the right of employees to the fruit of their deferred wages, Congress has promulgated a bill which perpetuates an actuarially-based eligibility system which is a holdover from the gratuity theory[243] and which results in extensive pension deprivation.

Allowing Congress to determine whether a claim has constitutional stature short-weights the interests of pension plan beneficiaries, who are all but excluded from congressional deliberation about pension rights.[244] This cannot be over-stressed. Employers' organizations like the Chamber of Commerce seek to legislatively define pension rights as narrowly as possible, to minimize benefits paid out and to lower the employer's total contribution obligation. Investment institutions like Morgan Guaranty Trust Company are not likely to encourage legislation which would reduce the total value of the investment monies under their managerial control. Even labor unions, who are often the sole representatives of work-

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242. *Quoted in* Brief of PROD, Women's Lobby, Inc., *supra* note 227, at 14 n.7.

243. Ralph Nader has proposed an alternative mode of pension fund organization similar in some respects to the present IRA/Keogh system. While a debate as to its merits is beyond the scope of this note, it bears study as it recognizes an immediate, truly nonforfeitable interest in an employee to her pension from the time of the first contribution. *See* R. NADER & K. BLACKWELL, *supra* note 111, at 163-68 (Appendix C). *See also* J. BROOKS, *supra* note 192, at 8.

244. As Ralph Nader has noted: "Up to now, pension legislation has been formulated in the virtual absence of constituent pressure—that is, pressure from employees who hope to benefit from the system. Without their involvement, legislative reforms will continue to do too little . . . . How much stronger would they be if congressmen were as familiar with employees' desires as with the desires of employers? How much stronger would they be if beneficiaries conducted even half the lobbying efforts of the pension industry? We do not yet know the answer." R. NADER & K. BLACKWELL, *supra* note 111, at 123-24.

The dramatic imbalance of organizational resources weighing heavily against the employee-plan participant is illustrated by the lineup of *amici curiae* who submitted briefs in the case of Teamsters v. Daniel, 439 U.S. 551 (1979). Organizations submitting amicus briefs for the trust fund included the United States government, the AFL-CIO, the Chamber of Commerce of the United States, the American Bankers Association, the ERISA Industry Committee (ERIC), National Coordinating Committee for Multi-employer Plans, the American Academy of Actuaries and the American Bar Association. Submitting briefs for the respondent, Mr. Daniel, were the Securities Exchange Commission, the Gray Panthers and three public interest organizations joining in one petition. *See* TEAMSTERS V. DANIEL, BRIEFS AMICI CURIAE, 12 LAW REPRINTS, LAB. SERIES (1979).

ers' interests in the legislative process, have an interest in pension plans which is often not distinguishable from that of employers, since unions are charged with defending the Taft-Hartley funds to which they appoint trustees.[245]

Though ERISA does establish minimum eligibility standards more liberal than those imposed by most employers prior to ERISA's enactment, the number of workers who will benefit from the new standards will not approach the number still denied benefit and control. It has been estimated that for those pension plans in operation prior to ERISA's passage whose eligibility requirements were similar to ERISA's, as many as 75% of the beneficiaries did not receive benefits of any kind.[246] As one commentator put it: "[W]hile ERISA may offer hope for a few, it is certainly not the savior of the many."[247]

B. Pension Rights Under Contract

The trust indenture and the plan document itself are the contracts which must be scrutinized to determine the existence, if any, of a pension benefit entitlement. So extensive is ERISA's coverage that, with few exceptions, virtually all private plans now conform to the strictures of ERISA.[248] However, since ERISA sets out only *minimum* vesting and participation standards, plans may still provide more liberal eligibility requirements, such as immediate vesting, thereby expanding the pension rights of plan participants.[249]

There are approximately 450,000 to 500,000 pension plans in this country, covering as much as one-half of the American work force, or between forty and fifty million workers.[250] The United States Department of Labor publishes the *Digest of Selected Pension Plans*[251] which summarizes the key features of specific plan

245. *See* Renfrew, *Fiduciary Responsibilities Under the Pension Reform Act,* 32 BUS. LAW. 1829 (1977).

246. Estimate by Professor M. Bernstein, *quoted in* Miller & Dudowitz, *The Unfinished Task of Private Pension Reform,* 13 TRIAL 18, 19 (May 1977).

247. *Id.*

248. ERISA § 201, 29 U.S.C. § 1051 (1976). The most significant form of retirement plan exempt from much of ERISA's coverage is the employee stock ownership plan (ESOP). *See* note 204 *supra.*

249. ERISA § 203(d), 29 U.S.C. § 1053(d) (1976).

As Senator Williams stated: "Its provisions are only minimum standards, and no employer is impeded from building upon or improving these minimum requirements.

"Improvement upon the design, coverage, and benefits is a matter of free choice by employers." 2 LEGIS. HIST. OF ERISA, *supra* note 7, at 1601.

250. *See* note 7 and accompanying text *supra.*

251. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, DIGEST OF SELECTED PENSION

agreements throughout the country. The plans are not selected as a representative sample of all private pension plans in this country; rather they are chosen because they cover a large number of employees in a broad cross-section of industries nationwide.[252] Thus while they are not a statistically accurate index of the distribution of particular plan provisions, they do indicate what private pension plans, on the whole, provide the average worker in the way of pension rights.

A survey of the plans contained in the Department of Labor *Digest* reveals that few plans, if any, provide more liberal provisions than the minimum standards set out in ERISA. In fact, all of the 148 plans summarized have vesting provisions, most requiring ten years of service. Almost all of the plans also have a minimum age requirement setting the time of retirement generally at between 62 and 65 years of age.

Thus, pension plans, while permitted to provide more rights than set out in ERISA, almost invariably do not do so. Given this, they cannot be looked to as a significant source of entitlement to pension benefits.

C. Summation: Pensions as an Entitlement

Statutory and contractual provisions regulating and defining the nature of pension rights illustrate the weaknesses inherent in the Entitlement Doctrine. While the courts have increasingly recognized pensions as a form of deferred compensation, federal law and private pension plans treat them as little more than gratuities, held in trust for the employee and vesting only after years of service.

The fact that federal pension statutes operate to deprive employees of both control over, and benefit of, their pension funds reflects the pluralist[253] nature of Congress' responsiveness to powerful organized interests seeking to maintain control over what Senator Harrison Williams has called "the largest single source of virtually unregulated capital in our country."[254] While the Court

PLANS (1979).

252. *Id.* at iii & 359-63.

253. Pluralism—the process by which organized groups seek to maximize their interests in the political market place—was the cornerstone of the Framers' view of democratic action. *See, e.g.,* THE FEDERALIST (A. Hamilton, J. Jay & J. Madison).

254. 2 LEGIS. HIST. OF ERISA, *supra* note 7, at 1600. The President's Commission on Pension Policy has stated that "issues related to the ownership and control of pension fund assets are extremely important," and went on to recommend that "issues related to the ownership, control and investment of pension fund assets . . . be investigated to identify

may rightly wish to defer to congressional expertise in a matter clearly as complex as national pension reform, it must recognize that congressional deliberations on ERISA did not comprehend the constitutional repercussions of imposing conditions on a worker's receipt of benefits which are part of her compensation package. It is the Court's function to preserve the rights of citizens under the nation's charter, regardless of legislative action.[255]

It is in the interest of employers to condition eligibility for pensions so as to afford few rights to employees. The Entitlement Doctrine, whereby the Court looks to a non-constitutional source, such as contract or statute, to determine if one's interest is sufficient to be constitutional property, allows Congress and employers to determine whether employees are entitled to their pension benefits. ERISA and employers' pension plans thus determine whether workers have an interest in their pension that goes beyond the "contingent expectancy" described by the *Daniel amici*.[256] However, to condition the finding of a constitutional property right on the terms of a statute or contract, when neither reflects the interest of the party claiming the right, debases an important constitutional guarantee. The Court fosters tragic results with this circularity—if the Congress and employers fail to allow the worker the pension for which she has worked and upon which she has relied, the Court will conclude that she must therefore not have been entitled to it.

Conclusion

This note has attempted to assess whether pensions are constitutional property, and to sketch the economic and legal parameters of the pension rights issue. Whether constitutional protection for employees who are divested of control and ultimate benefit of their pensions will be extended in a particular case depends, as the present Supreme Court has noted, upon whether an individual can claim an "entitlement" to the benefit. Whether an entitlement exists depends upon whether "existing rules of understandings" such as contracts or state or federal statutes define the claimed interest as an entitlement.

and clarify areas for further study." COMMISSION REPORT, *supra* note 7, at 51.

255. Elrod v. Burns, 427 U.S. 347 (1976); Pennekamp v. Florida, 328 U.S. 331 (1946); Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Doe v. Israel, 358 F. Supp. 1193 (D.R.I. 1973), *motion denied*, 482 F.2d 156 (1st Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

256. Brief for Gray Panthers as Amicus Curiae in Support of Respondent at 8, Teamsters v. Daniel, 439 U.S. 551 (1979). *See also* Brief for Petitioner Teamsters at 40.

As was noted earlier, both federal pension statutes and employer pension fund agreements define pensions as little more than gratuities, affording only those rights delineated by the agreement itself. Most agreements spell out eligibility requirements designed to protect the fund itself from depletion and to reduce the employer's pension payment liabilities. Thus under the Entitlement Doctrine, employees who have not satisfied the agreement's requirements are afforded no constitutional protection when they are deprived of their pension benefits.

Pensions are paid by the employer as a form of deferred compensation for employment services presently rendered. It is this deferred compensation which most workers look forward to as their primary source of economic security for their retirement years. Because of minimum eligibility requirements which are present in most pension plan agreements and in federal pension law, most employees will be denied all or part of their pensions, regardless of representations and expectations to the contrary.

While such eligibility requirements guard the sanctity of the fund itself, they are contrary to the operative premise behind pensions—that they are compensation for services presently rendered by the employee. The fact that such compensation is deferred by agreement should not divest the employee of either ultimate benefit or present control of the wages of her own toil.

The inadequacy of the constitutional protection available to persons who often work all of their productive years only to be denied their retirement security highlights both the inadequacy of the Entitlement Doctrine and the legal pre-eminence assigned to the pension fund itself at the expense of the purported beneficiaries.