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Social Security Old-age Insurance: Is There a Constitutional Right?**

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The Social Security Program as a whole, and parts of its framework such as Old-Age Insurance in particular, are under attack from people who will profit by dismantling them while causing harm to nearly everyone else. Part 1 of this Article will explore Social Security Old-Age Insurance which was established as an act of prevention, not a cure. Part 2 of this Article will conclude by examining the Constitutional implications of changing or eliminating Social Security Old-Age Insurance in the current age of profit-taking as the motivation behind what some have euphemistically called cultural "deconstruction."

A. Social Security Old-Age Insurance: Prevention, Not a Cure

This is not a legislative history as lawyers understand the term. The legislative history of the Social Security Act has been addressed in many United States Supreme Court decisions, some of which will be recounted here.[1]

The history addressed here might be called the "social history" of social insurance, in this case, of Social Security. Our social history of the Social Security Act begins with its name: the federal Old Age, Survivors, Disability and Health Insurance program.[2]

A national program. Social Security was designed from the beginning as a *national* program.[3] This feature too has been held constitutional. The nation as a whole was facing a national crisis during the Great Depression, and the Supreme Court thought it was a good fit with the U.S. Constitution for Congress to enact a *national* solution.[4]

Compulsory. Social Security was made compulso-

1. *E.g.,* Helvering v. Davis, 301 U.S. 619, 641-43, 57 S. Ct. 904, 909 (1937); Chas. C. Steward Mach. Co. v. Davis, 301 U.S. 548, 588, 596-97 & n.13, 57 S. Ct. 883, 891, 895 & n.13 (1937).

2. Overall, the Social Security Act was held constitutional within two years after it took effect, in a majority opinion written by Justice Cardozo. Chas. C. Steward Mach. Co. v. Davis, 301 U.S. 548, 57 S. Ct. 883 (1937). Then Assistant Attorney General Robert Jackson was on the federal government's team arguing for a holding of constitutionality.

3. As one of the architects of Social Security old-age insurance, Dean J. Douglas Brown, put it in "The Genesis of Social Security in America" (1969), available online at https://www.ssa.gov/history/jdb5.html (last accessed on Sunday, May 28, 2017):

> Our insistence that there was need for a national contributory social insurance program to meet the need of the aged grew out of our study of the steadily rising balance of old people, compared to the working population, in the years ahead. America had become accustomed to thinking of itself as a young nation, but already the combined factors of longevity, industrialization, and urbanization were making inevitable a serious problem of support for increasing millions of people beyond 65. To attempt to meet the problem by state old age assistance programs alone offered little hope. A more constructive mechanism which would *prevent* a vast load of dependency among the aged was vitally necessary. The only such mechanism available was compulsory contributory old age insurance.

Dean Brown was, as they say, present at the creation of the Social Security old-age insurance program. During his lifetime he was, among many other things, the head of the Industrial Relations Section at Princeton University, a member of all four Advisory Councils on Social Security, Provost and Dean of the Faculty at Princeton, a member of the Emergency Committee for Employment in 1930-31 appointed by President Hoover, and a member of the old age staff of the Cabinet Committee on Economic Security appointed by President Roosevelt.

The need for a national system is mentioned repeatedly in histories of the Social Security old-age insurance program.

ry, not voluntary, from the beginning.[5] As the Supreme Court has clearly pointed out, then as now "[t]he program is financed through a payroll tax levied on employees in covered employment, and on their employers."[6]

Prevention, not a cure. The aim of Social Security was to prevent the future experience of financial ruin in old age on the part of people in the United States. Most of the elderly people in the United States were experiencing financial ruin at the time the Social Security Act was written into law during the Great Depression. Social Security was written in order to prevent anyone else from having a similar experience in a future United States. The "plea" of the people writing the old-age insurance Social Security program "was to prevent dependency in old age, rather than just to relieve it after it had occurred."[7] In upholding the constitutionality of the Social Security Act, the Supreme Court has taken note that Social Security is a measure to prevent financial hardship from occurring, not a cure for financial hardship that has already taken place.[8]

Old age. The evidence supports the prevailing view that the people who wrote Social Security into existence were focused on the elderly.[9] The evidence includes not only the historical sources, but the fact of the framework of the Social Security Act itself. There is no means test in it, for example, by which a person could qualify for some form of "assistance" under the Social Security Act by being poor even if they were also young. The reason is that the people of the time demanded insurance, not another dole:

> Now, it would be satisfying, looking back in history, if one could say-especially an economist-that it was the academic economist, the specialist group in the universities or Government, that brought about the change. But it wasn't. It was the people. It was the people who rebelled in the time of the Great Depression and who felt that individual personal dignity was not being taken care of under the concept of means-test relief; that rights were involved; that a man had a right not to have to be in that situation; and that with the universal franchise, he had a right to do something about it. It was the belated recognition that this was a poor way of taking care of individual dignity, and especially when one had a vote to bring it about.
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> It was, then, this resurgence of recognition of individual rights that sparked the American approach to social insurance. That's where it got its start.[10]

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4. Helvering v. Davis, 301 U.S. 619, 644, 57 S. Ct. 904, 909-10 (1937), another majority opinion authored by Mr. Justice Cardozo.
5. "From the very first," said Dean Brown, "it was our conviction that any old age insurance plan in the United States should be *national, compulsory, and contributory* and provide benefits *as a matter of right*. To us, these necessary elements were obvious[.]" J. Douglas Brown, "The Genesis of Social Security in America" (1969), available online at https://www.ssa.gov/history/jdb5.html (last accessed on Sunday, May 28, 2017) (italics in original).
6. Flemming v. Nestor, 363 U.S. 603, 609, 80 S. Ct. 1367, 1372 (1960).
7. Speech by J. Douglas Brown, titled "The Birth of Old-Age Insurance, 1934-35," to the Social Security District Office Managers conference at Yonkers, New York on May 17, 1963, available online at https://ssa.gov/history/jdb4.html, last accessed on Sunday, May 28, 2017.
8. *See* Helvering v. Davis, 301 U.S. 619, 641, 57 S. Ct. 904, 909 (1937):
   > The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.
9. In addition to the many other social history sources and the Supreme Court decisions cited in this Chapter, *see* J. Douglas Brown, "The Genesis of Social Security in America" (1969), available online at https://www.ssa.gov/history/jdb5.html (last accessed on Sunday, May 28, 2017):
   > [T]he benefits then proposed were far less important strategically, we were convinced, than the establishment of the principle of old age benefits as a *matter of right*, related to past contributions to a national system.

   (Boldface added; italics in original.)
10. J. Douglas Brown, "The Idea of Social Security," speech at the Meeting of the Bureau of Old-Age and Survivors Insurance in Baltimore, Maryland on November 7, 1957, accessible online as the "original version" of this 1957 speech, at https://www.ssa.gov/history/brown3.html, last accessed on Sunday, May 28, 2017.

Social Security has always been a system for the elderly, although elderly workers began contributing to it when they were younger workers themselves. Nonetheless, Social Security was and remains at all times a system focused on workers who have reached old age. "In 1934, the American people greatly needed a constructive program for the prevention of poverty in old age. The experience of the depression prepared the way for a drastic new step."[11]

Contributory. It was never a coincidence that Social Security has required contributions from workers since the beginning. *Contribution* was planned. It was planned for the purpose of evidencing a *right*. The architects and authors of the Social Security old-age insurance program, and the Members of Congress who voted it into existence, knew this from the inception.[12] "Benefits are a matter of right."[13] I will return to this subject later.*Insurance.* The final feature of Social Security to be addressed here is its most important feature. Social Security was established as insurance. It was not the dole in the Great Depression, and it is not an unearned benefit now.

Social Security does not resemble established notions of property and casualty insurance. Social Security is more like an annuity, payable at fixed times. The contributions workers make out of their paychecks are the equivalent of paying the insurance premiums.[14]

As has always been the case with private insurance, the first question to ask before issuing an insurance policy is the nature of the risk to be assumed by the insurance company. The risk assumed under Social Security old-age insurance was clear from the beginning. "*Risks insured against: ... Loss of earning capacity through old age, old age being defined [at the outset of the program] as the age of 65 years or over.*"[15]

Another, more recent description of the risks to be insured against is that "the general purpose of the

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11. J. Douglas Brown, "The Genesis of Social Security in America" (1969), accessible online at https://www.ssa.gov/history/jdb5.html, last accessed on Sunday, May 28, 2017.

12. "The soundness of *the concept of joint contributions* in an American system of social insurance does not arise out of economics. It *stems from our political and social traditions.* Of course, arguments can be made about shifting and incidence, as with all taxes or costs, but the fact remains that the first incidence of any contribution to government or to any other recipient, church, family or trade union, is of great psychological importance. Out of such incidence political influence arises, loyalty and responsibility are encouraged, and personal satisfaction and dignity are gained.

* * *

"In America we have a wholesome suspicion of big government. And now we have given government the tremendous task of providing a floor for our individual security. I for one would feel more certain that our leaders in government would continue to respect the sanctity of the trust we have imposed upon them if every potential beneficiary who is gainfully employed were both a voter and a contributor to all social insurance systems." J. Douglas Brown, Sidney Hillman memorial lecture at the University of Wisconsin delivered on November 18, 1955, combined in part with a lecture delivered at Social Security Headquarters in Baltimore, Maryland on November 7, 1957, "published in 1972," titled, "The American Philosophy of Social Insurance," accessible online at https://www.ssa.gov/history/brown2.html, last accessed on Sunday, May 28, 2017. (Emphasis added.)

13. J. Douglas Brown, "The Genesis of Social Security in America" (1969), accessible online at https://www.ssa.gov/history/jdb5.html, last accessed on Sunday, May 28, 2017.

14. In this sense, the persistent myth that Social Security old-age insurance was put into place in order to move older workers out of the workforce, denies the "risk-sharing inherent in insurance schemes." In the case of Social Security old-age insurance, the shared risk is that "one must retire in order to receive a retirement benefit because loss of earnings is the insured condition." Larry DeWitt, SSA Historian, "Special Study #7: The History and Development of the Social Security Retirement Earnings Test" (August 1999), available online at https://www.ssa.gov/history/ret2.html, last accessed on Sunday, May 28, 2017.

15. Barbara Armstrong, "Invalidity and Old Age Insurance" (unpublished paper, written in August, 1934) (emphasis in original), quoted by Larry DeWitt, SSA Historian, in "Special Study #7: The History and Development of the Social Security Retirement Earnings Test" (August 1999), available online at https://www.ssa.gov/history/ret2.html, last accessed on Sunday, May 28, 2017.

Professor Barbara Armstrong was a Professor of Law and Economics at the University of California School of Law at the time. Like many other persons involved in designing the Social Security old-age insurance program, she had previously written a book on the subject of social insurance. Her concentration was on designing old-age insurance in the then-to-be-developed Social Security program.

Professor Armstrong brought her expertise in that area to bear as one of three consultants on old-age insurance on the Technical Committee attached to the Committee on Economic Security (CES) beginning in 1934. The CES was appointed by President Roosevelt to design the Social Security program.

old-age, survivors', and disability insurance provisions of the statute is to protect workers and their dependents from the risk of loss of income due to the insured's old age, death, or disability."[16]

Parenthetically, risk of loss of income from old age was precisely focused on loss of income from work by workers, because labor is interrupted by old age, death, or disability, whereas "the receipt of income from the investment of capital" is not affected nearly as much, if at all, by these events.[17]

In this regard, Social Security old-age insurance was designed to share a significant feature of private annuities, which is that payment would begin when a condition in the insurance contract was fulfilled by the holder of the annuity, or in the case of Social Security old-age insurance, by the employee. "The old-age insurance program required *retirement from gainful employment as a condition of benefit receipt*."[18]

In the Social Security old-age insurance framework, national scope is a manifestation of all insurance underwriting, namely, spreading the risk:

> In economic and actuarial terms, a social insurance system would be most efficient if it covered the area of a national economy. Insurance administration is basically a routine operation for which unit costs decline with increasing size. Even in the more complex field of private life insurance, companies of great size have been outstandingly successful. The risks of old age, death, survivorship, disability and unemployment can be better averaged over a wider area. In a limited reserve system in which mutually offsetting flows of contributions and benefit payments are depended upon heavily in current financing, a wider averaging of risks is very important.[19]

In sum, the social history of Social Security[20] provides the background of the Social Security Method, which is the subject of the next section.

B. The price to pay for taking it away: Social Security as every qualifying individual's enforceable right.

The people affected by Social Security, and the effects upon them of changes to the Social Security system, are most clearly considered from the perspective of Social Security being made completely unavailable or taken away. That perspective provides the clearest analysis of whether there is a *right* to Social Security.

The groups affected break down into the following three, in basic and general terms:

> 1. Those receiving old-age insurance benefits from Social Security;
>
> 2. Those who have not yet attempted to receive Social Security old-age insurance benefits, or have not applied, but are currently

16. 1 Soc. Sec. L. & Prac. § 1:1, "Nature of Social Security Act" (Thomson Reuters, December 2016 Update).
17. 1 Soc. Sec. L. & Prac. § 1:1, "Nature of Social Security Act" (Thomson Reuters, December 2016 Update).
18. Larry DeWitt, SSA Historian, in "Special Study #7: The History and Development of the Social Security Retirement Earnings Test" (August 1999), available online at https://www.ssa.gov/history/ret2.html, last accessed on Sunday, May 28, 2017. (Emphasis added.)
19. J. Douglas Brown, Sidney Hillman memorial lecture at the University of Wisconsin delivered on November 18, 1955, combined in part with a lecture delivered at Social Security Headquarters in Baltimore, Maryland on November 7, 1957, "published in 1972," titled, "The American Philosophy of Social Insurance," accessible online at https://www.ssa.gov/history/brown2.html, last accessed on Sunday, May 28, 2017. (Emphasis added.)
20. What I am referring to here as the social history of Social Security consists of all the writings, speeches, and lectures given on the history of Social Security, and of Social Security old-age insurance in particular, by those who participated in designing it. The "core" documents, or what the Social Security Administration Historian has termed "the primary source documentation of the intentions of the program's designers on the CES [Committee on Economic Security]," are "the unpublished 10-volumes of studies, the 74-page report, the draft administration bill, the President's cover message to Congress and the 1937 book," all of which resulted from the work of the CES. Larry DeWitt, SSA Historian, in "Special Study #7: The History and Development of the Social Security Retirement Earnings Test" (August 1999), available online at https://www.ssa.gov/history/ret2.html, last accessed on Sunday, May 28, 2017.

Given that perspective, I can provide in this limited space only that amount of social history of Social Security which, it is hoped, is sufficient to understand the true purposes of those who wrote the program.

eligible to receive them; and

3. Those who have not yet applied for old-age insurance benefits from Social Security, and are eligible to receive them in the future, but are contributing now.

It is generally agreed that the United States Supreme Court will be the ultimate authority on the question of whether *anyone* has a constitutionally protected right to receive Social Security old-age insurance benefits. In the absence of U.S. Supreme Court authority directly on point, it is necessary to reason by analogy to similar cases decided on related points of law and governed by the same or similar overarching guiding principles as govern the outcome of the question at issue here: whether there is a constitutionally protected right to receive Social Security old-age insurance benefits on the part of any of the three groups of persons we have identified here.

Not all the cases, including cases decided in lower courts, will be examined here. This is an outline, not a lawyer's argument, in any event. Lawyer's arguments depend upon future cases.

The class of people receiving benefits. This group of people may be seen as having the strongest claim to a right to old-age insurance benefits. By definition, they are people who have already begun to receive Social Security benefits, so for them ending Social Security is a matter of taking something away from them.

However, a majority of the Supreme Court in a 5-to-4 decision in 1960 apparently agreed that the interest a worker has in continuing to receive Social Security benefits that have already begun, is a "noncontractual" interest. Workers generally receive old-age insurance benefits out of all proportion to the ordinarily much smaller amount of their accumulated payroll contributions. The amount most workers receive in insurance benefits may even be out of proportion to the total contributions made by their employers added to the total amount of their own individual contributions.

For this reason, Mr. Justice Harlan wrote for the 5-Justice majority in *Flemming v. Nestor*[21] that a person receiving old-age insurance benefits under Social Security is not in a position that could be "soundly analogized" to the position of a person holding an annuity. The stated reason, and the only reason given in the opinion, to distinguish insurance annuities from old-age insurance benefits, is that the person holding an annuity paid premiums for it, so, as Mr. Justice Harlan wrote, her or his "right to benefits is bottomed on his contractual premium payments."[22]

There are many grounds on which Justice Harlan's

21. Flemming v. Nestor, 363 U.S. 603, 80 S. Ct. 1367 (1960).

22. Flemming v. Nestor, 363 U.S. 603, 610, 80 S. Ct. 1367, 1372 (1960). Justice Harlan expressed this understanding of an annuity in the majority opinion immediately after he wrote that a worker's contributions to the Social Security *system* by taxation do not reflect the payments she or he receives from Social Security. In full context, Justice Harlan wrote, for the majority in this case:

> But each worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he was called upon to support the *system* by taxation. It is apparent that the noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments.

Flemming v. Nestor, 363 U.S. 603, 609-10, 80 S. Ct. 1367, 1372 (1960) (emphasis added). What is missing from this comparison is that the holder of an annuity does not receive payments in proportion to her or his premium payments, either.

The framework of the Social Security system was set up as a reflection of employees' contributions to the *economy* of the United States, and *not* as a reflection of the amount of payroll taxes they contribute to the Social Security *system*. Simply stated, the people who wrote the Social Security program recognized that contributions to the U.S. economy and contributions to the Social Security system are not to be conflated because they simply are not the same thing:

This is the approach of contract, not of benevolence.

> Our approach is that, *within limits, the individual worker establishes the level to his protection by his individual contribution to our economy.* I want to emphasize the distinction, "to our economy," not "to the system." Not to the Treasury of the United States but to our economy.

J. Douglas Brown, "The Idea of Social Security," speech at the Meeting of the Bureau of Old-Age and Survivors Insurance in Baltimore, Maryland on November 7, 1957, accessible online as the "original version" of this 1957 speech, at https://www.ssa.gov/history/brown3.html, last accessed on Sunday, May 28, 2017. (Emphasis in original.)

opinion has been criticized and evaluated since 1960. Like many of the Court's opinions even tangentially involving any aspect of Social Security, it has attracted many citations by lower courts and commentators.

A prominent ground on which it has been distinguished, is that the case involved the termination of an individual's Social Security benefits when he was deported. The individual whose rights were at issue in that case apparently became eligible for Social Security some seven months before he was deported. The decision went off on Due Process grounds inasmuch as the deported individual did not receive a hearing before his benefits were terminated.[23] In the course of addressing the Due Process issues in that case, the majority in *Flemming* refused to impose a "property interest" analysis upon the complex framework of the Social Security Act:

> To engraft upon the Social Security system a concept of 'accrued property rights' would deprive it of the flexibility and boldness in adjustment to everchanging conditions which it demands.[24]

Mr. Justice Harlan's opinion betrays a misunderstanding of annuities. An annuity is not payable in direct proportion to the total amount of premiums paid by the person holding the annuity. Justice Harlan's opinion seems to imply the opposite, that annuities are payable on the basis of the premiums paid in by the holder, which is not the case now and was not the case in 1960 when Justice Harlan wrote his opinion in Nestor's case.

The analogy to annuities is helpful, nonetheless, to understand the nature of Social Security old-age insurance benefits. They are not based on how much the holder has paid for them. And the holder has a contract right to receive them.

When the federal government issues the insurance, the holder may or may not also hold "Due Process" rights before the federal government takes the insurance payments away, and that decision from a case decided in 1960 may or may not be valid today, but other constitutional rights may be implicated in that situation.

In 1976, the Court held that the Fifth Amendment and "procedural due process" binds the federal government to hold a hearing when it acts to take away the statutorily created "property interest" in receiving Social Security Disability Benefits.[25] The Court in that case, *Mathews v. Eldridge*, actually said that its decision in *Flemming v. Nestor*, among other cases, recognized a "property interest" in continued receipt of benefits under the Social Security Act.[26] To the extent that the *Mathews* decision rests on a ruling concerning Due Process, it has a long and checkered history of state-law and criminal cases which reject or distinguish it. All but one of these citing cases has come from lower courts, and in the one case subsequently decided by the Court itself in which *Mathews* was cited,[27] it did not affect the outcome of the case nor the validity of *Mathews*.

Earlier precedent exists which, by analogy, supports the simple proposition that strictly

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23. As the majority wrote under the circumstances of that case:

> We must conclude that a person covered by the Act has not such a right in benefit payments as would make *every* defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment.

Flemming v. Nestor, 363 U.S. 603, 611, 80 S. Ct. 1367, 1373 (1960) (emphasis added). The emphasized word, "every," indicates of course that in other cases where the federal government takes away old-age insurance benefits, then even in the majority view in this case the Due Process clause of the Fifth Amendment may be violated. Commentators have noticed this obviously intentional nuance in Justice Harlan's opinion, of course.

It is beyond the scope of this book to consider whether *Flemming v. Nestor* was correctly decided in 1960, or whether it retains any continuing validity now. It is assumed for purposes of the discussion here, that the decision is still valid. It is after all a decision of the Supreme Court of the United States and for that reason alone cannot be ignored. However, it is appropriate to observe that the individual whose rights were adjudicated in that case, Mr. Ephram Nestor, was deported in July, 1956 at the height of the "Red scare." Mr. Nestor was from Bulgaria who had been a member of the Communist Party. He terminated his membership in the Communist Party 17 years before he was deported. *See* Flemming v. Nestor, 363 U.S. 603, 605, 80 S. Ct. 1367, 1370 (1960).

24. Flemming v. Nestor, 363 U.S. 603, 611, 80 S. Ct. 1367, 1372 (1960).

25. Mathews v. Eldridge, 424 U.S. 319, 332, 96 S. Ct. 893, 901 (1976).

26. Mathews v. Eldridge, 424 U.S. 319, 332, 96 S. Ct. 893, 901 (1976).

27. Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 437, 131 S. Ct. 1197, 1204 (2011).

considered from an *insurance* point of view, there is an interest which the law protects in receiving insurance benefits under a contract of insurance. A constitutional perspective is added in those cases—but from our perspective in this article it is an added perspective, not the only or even the central perspective—that when the federal government issues the insurance, then the federal government is constrained by the federal Constitution. Still, our perspective here is on insurance first, and for present purposes other issues certainly exist in these cases, but here those non-insurance issues come second.

The federal government acted to terminate insurance benefits payable under federally issued insurance under the Risk Insurance Act of 1917. When the Great Depression began, the federal government acted in March, 1933 to terminate the payment of all insurance benefits under this and other laws. Two consolidated challenges to the federal government's termination of insurance benefits reached the United States Supreme Court after lower courts had dismissed the claims, in the consolidated appeals considered in *Lynch v. United States*.[28]

The Supreme Court reversed. In a unanimous opinion authored by Mr. Justice Brandeis, the Court's reasons for decision addressed both the nature of insurance including the status an insurance policy has as a contract, and the nature of the constitutional constraints upon the actions of the federal government, particularly with respect to its contracts. The Court held:

> [W]ar risk policies, being contracts, are property and create vested rights. The terms of these contracts are to be found in part in the policy, in part in the statutes under which they are issued and the regulations promulgated thereunder.
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> * * *
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> The Fifth Amendment commands that property be not taken without making just compensation. *Valid contracts are property*, whether the obligor be a private individual, a municipality, a state, or the United States. *Rights against the United States arising out of a contract with it are protected by the Fifth Amendment*.[29]

Rights under an insurance contract, in other words, are protected from arbitrary federal government conduct. This analysis is simple and direct:

- The insurance involved is provided under an insurance contract, and not as a gratuity;
- The right to payments under the insurance contract is supported by the payment of premiums; and
- The insurance benefits are taken away under a contract of insurance previously issued by the federal government.

The status of payments under insurance contracts issued by the federal government is, in the law, a status which might be compared to, but is not nearly the same as, the status of government gratuities. For example, the Supreme Court has held that the receipt of welfare assistance is not a right but a "statutory entitlement." Still, even a "statutory entitlement" draws the protections of federal procedural due process. [30] An approach based on appraising insurance benefits in terms of whether a court might call them "statutory entitlements" strikes the modern ear as sounding in the language of unearned largesse, of payments made by a beneficent government.[31] Except to illustrate by the comparison that a right to payment under an insurance contract is a "right" and not a "gratuity," I would further submit that such an approach is beside the point.

28. Lynch v. United States, 292 U.S. 571, 54 S. Ct. 840 (1934).

29. Lynch v. United States, 292 U.S. 571, 577, 579, 54 S. Ct. 840, 842, 843 (1934) (emphasis added). In a footnote, a panel of the Seventh Circuit Court of Appeals distinguished *Lynch* on the ground that in its view, later Supreme Court decisions on the "Takings Clause" had impliedly overruled *Lynch*. As of the present time, no Supreme Court decision has ever explicitly attempted to limit *Lynch*, let alone overrule it. Moreover, the circuit court panel thought that *Lynch* should have been decided only on the basis of the "Due Process" Clause in any event. Pro-Eco, Inc. v. Board of Comm'rs, 57 F.3d 505, 510 n.2 (7th Cir. 1995), cert. denied, 516 U.S. 1028, 116 S. Ct. 672 (1995).

The right to receive payment under an insurance contract has given us the law of insurer bad faith when payment is withheld arbitrarily and in violation of the implied contractual covenant of insurer good faith and fair dealing. So strong is the law and the jurisprudence of insurer bad faith that thousands of cases and volumes of books have been written about it.[32]

When the federal government is the insurance carrier, its allegedly arbitrary or "bad faith" conduct is subject to constraints imposed by the Constitution of the United States. Under any reading of the Supreme Court's decisions which have been discussed here, the Court has recognized that some of the constitutional constraints on the conduct of the federal government with respect to contracts of insurance it has issued, are imposed by the Fifth Amendment. Whether "just compensation" for taking Social Security old-age insurance benefits, for example, would consist of a return of premiums, or payment of accrued future benefits, and whether payment would include the amounts of employer contributions, would all potentially be subject to future arguments of lawyers and further decisions of judges.[33] The measurement of "just compensation" for an unconstitutional taking by the federal government may be subject to future dispute in the arena of Social Security old-age insurance benefits, but that potential future dispute cannot distort the legal reality that Social Security old-age insurance benefits are paid under a contract with individuals who are required to pay premiums to keep the contract in place.

The group of persons most clearly entitled to just compensation for taking rights to payment of old-age insurance benefits away, are the people who, having contributed premiums throughout their working lives, have already begun to receive the payments they expected under their insurance contract of old-age insurance.

The group of people who have not yet attempted to receive benefits (have not applied for Social Security), but are eligible right now. A big question for people falling into this group, as distinct from the class of persons who have already begun to receive payments, is whether this group of persons can alleged an "injury in fact." It has been held by a U.S. District Court that with respect to persons who "have not applied for any [Social Security] benefits yet, any injury is at this point hypothetical or speculative, and thus insufficient to establish standing."[34]

In the same case it was held with respect to other persons who had already applied for "monthly Social Security benefits," that "[c]onversely," such persons "have a redressable injury and, thus, standing to pursue this claim."[35]

The Social Security Act itself provides that old-age insurance rights to future payment cannot be

30. Goldberg v. Kelly, 397 U.S. 254, 261-62, 90 S. Ct. 1011, 1017 (1970). As is the case with *Mathews*, *Goldberg* has generated quite a few citations in subsequent cases, and all but one of them came in decisions of lower courts. The one time that *Goldberg* was cited by in a case decided by the Court, apparently, was in a couple of plurality opinions in a case in which the final decision of the Court was to uphold the denial of an individual's visa application as sufficiently compliant with Due Process. Kerry v. Lin, ___ U.S. ___, 135 S. Ct. 2128, 2143-44 (2015).

31. The existence of a "beneficent government" may be mythical, at best. There is no evidence of which I am aware that such a government has existed which, by universal agreement, is "beneficent." It would be strange indeed for the federal government to be seen at one and the same time as all-powerful and yet helplessly indulgent in its largesse, for example. Perhaps "strange" is not the correct word for such a situation. "Impossible" is much more accurate, as in, it would be impossible indeed for the federal government at one and the same time to be all-powerful and yet hopelessly indulgent in its largesse.

32. *See, e.g.*, Dennis J. Wall, Litigation and Prevention of Insurer Bad Faith (3d ed. published by Thomson Reuters in 2 Vols., with 2017 Supplements in process).

33. *See, e.g.,* Matthew M. Hawes, "So No Damn Politician Can Ever Scrap It: The Constitutional Protection of Social Security Benefits," 65 U. Pitt. L. Rev. 865, 907-10 (2004).

34. Hall v. Sebelius, 689 F. Supp. 2d 10, 18 (D.D.C. 2009).

35. Hall v. Sebelius, 689 F. Supp. 2d 10, 19 (D.D.C. 2009). The claims of all of the plaintiffs, those receiving benefits and those who had not yet applied for Social Security benefits, were based on a change to "Medicare Part A" by the Social Security Administration by which Medicare Part A payments would be deducted from monthly Social Security old-age insurance payments. All of the plaintiffs wanted to "opt out" of the deductions from Medicare and yet receive old-age insurance benefits; in the case of those already receiving Social Security benefits, they alleged further that they wished to continue to receive them without the hindrance of the new regulations.

transferred or assigned, whether voluntarily or involuntarily. Significantly, the right to receive future payments does not depend on having already received them. It is instead a right of "any person" to receive "any future payment" under the old-age insurance Social Security program and it is protected:

> **(a) In general**
>
> *The right of any person to any future payment* under this subchapter shall not be transferable or assignable, at law or in equity, *and none of the moneys paid or payable or rights* existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.[36]

The ban on transfer and assignment will survive until another law expressly refers to this section and expressly changes its provisions:

> **(b) Amendment of section**
>
> No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.[37]

Conclusion

The foregoing analysis focuses on the rights of persons already receiving benefits, not the group of persons who have not yet applied for old-age insurance benefits, are not eligible yet but are likely to become eligible in the future, and are contributing to the Social Security old-age insurance program now. This group of persons presents an open question. Their expectations and rights are open to development in the case law at this point.

36. 42 U.S.C.A. § 407(a), current through P.L. 114-254, and also P.L. 114-256. (Emphasis added.)
37. 42 U.S.C.A. § 407(b), current through P.L. 114-254, and also P.L. 114-256.