

7-1-1982

Vested Seniority Rights: A Conceptual Approach

Francis A. Citera

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Jurisprudence Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Francis A. Citera, *Vested Seniority Rights: A Conceptual Approach*, 36 U. Miami L. Rev. 751 (1982)
Available at: <https://repository.law.miami.edu/umlr/vol36/iss4/7>

This Comment is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

COMMENT

Vested Seniority Rights: A Conceptual Approach

Under contemporary jurisprudence, vested seniority rights are considered creatures of contract. As such, they generally are subject to "divestiture" with the termination of the collective-bargaining agreement. Relying upon Zdanok v. Glidden Co. and Locke's labor theory of property, the author argues that seniority rights are property rights derived from the worker's employment independent of the contract.

I. INTRODUCTION	751
II. A STATEMENT OF THE PROBLEM: <i>Cooper and Glidden</i>	752
III. LOCKE'S INFLUENCE ON AMERICAN LEGAL AND POLITICAL PHILOSOPHY	756
A. <i>Locke's Labor Theory of Property</i>	756
B. <i>Locke's Influence on Government</i>	761
C. <i>Locke's Influence on Nineteenth-Century Jurisprudence</i>	763
IV. THE <i>Glidden</i> APPROACH TO VESTED SENIORITY RIGHTS	768
A. <i>Glidden Revisited: A Post-Mortem or a Prophetic Message?</i>	768
B. <i>The Nature of Seniority</i>	770
C. <i>Policy Considerations</i>	772
D. <i>Implications</i>	774
V. CONCLUSION: A CONCEPTUAL APPROACH TO VESTED SENIORITY RIGHTS	775

I. INTRODUCTION

In recent years, there has been an infusion of traditional philosophical thought into the field of American legal scholarship.¹ Although many authors have attempted to apply a Marxist approach to a particular legal doctrine,² few have discussed John Locke's in-

1. See generally Hart, *Utilitarianism and Natural Rights*, 53 TUL. L. REV. 663 (1979); Hexter, *Thomas Hobbes and the Law*, 65 CORNELL L. REV. 471 (1980); Shiner, *Hart and Hobbes*, 22 WM. & MARY L. REV. 201 (1980); Stein, *Adam Smith's Jurisprudence—Between Morality and Economics*, 64 CORNELL L. REV. 621 (1979); Weinrib, *Utilitarianism, Economics and Legal Theory*, 30 U. TORONTO L.J. 307 (1980). For a discussion of the application of contemporary European thought to American legal scholarship, see Hermann, *Phenomenology, Structuralism, Hermeneutics, and Legal Study: Applications of Contemporary Continental Thought to Legal Phenomena*, 36 U. MIAMI L. REV. 379 (1982).

2. See, e.g., B. EDELMAN, *OWNERSHIP OF THE IMAGE: ELEMENTS FOR A MARXIST THEORY OF LAW* (1979).

fluence on American legal scholarship.³ Nonetheless, Locke has played an important role in shaping both our political institutions⁴ and our attitude toward private property. Therefore, it is surprising that more commentators have not discussed the jurisprudential implications of his theories.

One of Locke's major contributions is his labor theory of property, which asserts that a laborer has a property right in the product of his work. Today, however, conventional wisdom maintains that an employee's rights stem from a contract or collective-bargaining agreement, and not from an inherent property interest. The distinction between these two theories is extremely important to an understanding of the employer-employee relationship. For example, Locke's theory suggests that an employee's property right, once vested, cannot be divested by contract or otherwise without the consent of the employee. But under the traditional view, an employee's property rights are subject to divestiture upon termination of his employment contract. As this Comment will illustrate, the tension between these two theories results from an incoherent approach toward a definition of property rights.

II. A STATEMENT OF THE PROBLEM: *Cooper* AND *Glidden*

The concept of vested seniority rights generally has been limited to public employment.⁵ Courts tend to view seniority rights in the private sector as creatures of contract, whose creation depend on the terms of particular contracts.⁶ For example, the United States Court of Appeals for the Fifth Circuit observed in 1941 that "collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract, beyond its life, when it has been terminated in

3. A notable exception is Hamilton, *Property According to Locke*, 41 YALE L.J. 864 (1932).

4. Locke's influence on the Bill of Rights and the fourteenth amendment is clear. The fifth and fourteenth amendments' prohibition against arbitrary interference with "life, liberty, and property" is foreshadowed by two aspects of Locke's *Second Treatise*: the limitations that it imposes on legislative power and its emphasis on property rights. J. LOCKE, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT (P. Laslett ed. 1960).

5. The Supreme Court of the United States has held that a tenured college professor at a state university has an interest in continued employment and that his interest is safeguarded by due process. *Slochower v. Board of Educ.*, 350 U.S. 551 (1956).

6. See, e.g., *Baker v. Newspaper & Graphic Communication Union*, 628 F.2d 156, 159-60 (D.C. Cir. 1980); *Ekas v. Carling Nat'l Breweries, Inc.*, 602 F.2d 664, 666-67 (4th Cir. 1979); *Charland v. Norge Div., Borg-Warner Corp.*, 407 F.2d 1062, 1064 (6th Cir.), cert. denied, 396 U.S. 871 (1969); *Interscience Encyclopedia Inc.*, 55 Lab. Arb. 210 (1970) (Roberts, Arb.).

accordance with its provisions"⁷ Litigation in this area involves problems in determining seniority rights in various situations, such as layoffs,⁸ promotions,⁹ interdepartmental transfers,¹⁰ mergers,¹¹ consolidations,¹² and plant shutdowns.¹³

The import of prevailing authority is that seniority rights in the private sector are only as secure as the underlying employment contract. But seniority rights were not always, and need not now be, so tenuous. Indeed, the employee finds far greater security under Locke's labor theory of property. A comparison of *Cooper v. General Motors Corp.*¹⁴ and *Zdanok v. Glidden Co.*¹⁵ illustrates these two disparate approaches to the issue of vested seniority rights.

In *Cooper* supervisory employees of the General Motors Corporation (GM) brought a class action suit against GM and the United Automobile Workers (UAW), seeking to enjoin enforcement of seniority provisions of a collective-bargaining agreement that did not accord seniority privileges in the bargaining unit to supervisory employees laid off by GM. Before 1976 the collective-bargaining agreement provided that a member of the bargaining unit would continue to accumulate unit seniority after being promoted out of the bargaining unit into a non-unit position.¹⁶ But the 1976 agreement¹⁷ eliminated the accumulation of unit seniority by employees working as supervisors.¹⁸

The plaintiffs argued that in accepting supervisory positions

7. System Fed'n No. 59 of Ry. Employees Dep't v. Louisiana & Atl. Ry., 119 F.2d 509, 515 (5th Cir.), cert. denied, 314 U.S. 656 (1941).

8. See, e.g., *Edwards v. Capital Airlines, Inc.*, 176 F.2d 755 (D.C. Cir.), cert. denied, 338 U.S. 885 (1949).

9. See, e.g., *Stewart v. Day & Zimmermann, Inc.*, 294 F.2d 7 (5th Cir. 1961).

10. See, e.g., *Napier v. System Fed'n No. 91, Ry. Employees' Dep't*, 127 F. Supp. 874 (D.C. Ky. 1955).

11. See, e.g., *Carver v. Brien*, 315 Ill. App. 643, 43 N.E.2d 597 (1942).

12. See, e.g., *Moore v. International Bhd. of Teamsters*, 356 S.W.2d 241 (Ky. 1962).

13. See, e.g., *Oddie v. Ross Gear & Tool Co.*, 305 F.2d 143 (6th Cir.), cert. denied, 371 U.S. 941 (1962).

14. 651 F.2d 249 (5th Cir. 1981).

15. 288 F.2d 99 (2d Cir. 1961), rev'g 185 F. Supp. 441 (S.D.N.Y. 1960), cert. denied in relevant part, 368 U.S. 814 (1961). *Zdanok* was overruled in 1968 by *Local 1251 UAW v. Robertshaw Controls Co.*, 405 F.2d 29 (2d Cir. 1968).

16. 651 F.2d at 250.

17. During negotiations of the new agreement, the UAW did not represent the supervisory employees because of their supervisory status. *Id.*

18. The new contract provided that an employee transferred from a supervisory position to a job classification in the bargaining unit would be credited with seniority accumulated prior to March 1, 1977, and with time worked in the bargaining unit after that date. *Id.*

they had detrimentally relied on the assurance of seniority status under the original contract. Further, they claimed that GM, by agreeing to and applying the 1976 contract, had violated its prior agreement with the supervisory personnel.¹⁹ GM and the UAW moved for summary judgment, arguing that the supervisory personnel did not have vested seniority rights in the bargaining unit and that neither GM nor the UAW had breached the existing contract.²⁰ Without stating its reasons, the district court granted the motion. On appeal, the United States Court of Appeals for the Fifth Circuit affirmed, holding that seniority rights are a creature of collective bargaining and consequently, seniority rights conferred in a prior contract can be divested in a subsequent contract.²¹

Although *Cooper* is in the mainstream of contract and federal labor law, *Zdanok v. Glidden Co.* represents an approach to vested seniority rights unique in American labor law. In *Glidden* five former employees sought damages against their employer, alleging a breach of the seniority provisions of a collective-bargaining agreement. As the expiration date of the agreement approached, the employer notified the union that it would not renew the collective-bargaining agreement.²² The employer began to reduce production at its factory in Elmhurst, New York and to remove its machinery and equipment to a newly established plant in Bethlehem, Pennsylvania, where it continued to produce similar products. The employer then discharged its New York employees and refused to rehire them at the Bethlehem plant except as *new* employees with no seniority status.²³

The plaintiffs argued that the seniority rights created by the collective-bargaining agreement survived the employer's termination of the contract,²⁴ and that they were entitled to reinstatement

19. *Id.*

20. Supervisory employees brought this class action claiming that they had vested rights in the collective bargaining agreement that had expired and that they had detrimentally relied on the previous agreement when they accepted non-unit positions. *Id.*

21. *Id.* at 250-51.

22. *Zdanok v. Glidden Co.*, 185 F. Supp. 441, 443 (S.D.N.Y.), *rev'd*, 288 F.2d 99 (2d Cir. 1960), *cert. denied in relevant part*, 368 U.S. 814 (1961). In effecting the termination of the contract, the employer complied with all statutory and contractual requirements. The plaintiffs' suit concerned the loss of their seniority rights resulting from the expiration of the contract.

23. *Id.*

24. Under the seniority system in effect at Elmhurst, employees were to be laid off in reverse order of plant seniority and recalled in inverse order of layoff. In instances of continuous layoff, the seniority of an employee with less than five

with similar seniority status at the Bethlehem plant.²⁵ The employer disputed the survivorship claim, maintaining that seniority rights ceased to exist when it properly terminated the collective-bargaining agreement.²⁶ The district court agreed with the employer and held that the seniority system in the collective-bargaining agreement did not give the employees "the right to 'follow their work' to the new plant."²⁷ The United States Court of Appeals for the Second Circuit reversed, holding that seniority rights that had vested by virtue of the employees' compliance with their collective-bargaining agreement "could not be unilaterally annulled" by the employer.²⁸ In construing the language of the contract, the court found that "the reasonable expectations of the parties" would be fulfilled by interpreting the contract to accord the Elmhurst employees seniority rights at the Bethlehem plant.²⁹ Seven years

years' employment was to terminate after two years' continuous layoff; for employees with more than five years' service, seniority was to be terminated at the end of three years. If seniority has been terminated by reason of continuous layoff, a former employee would still be entitled to preference before new employees were hired.

Id. at 446 (footnotes omitted).

25. 288 F.2d at 101. The plaintiffs maintained that their seniority status would have survived the termination of the collective-bargaining agreement had the Elmhurst plant's operations continued. Further, they argued that transfer of their seniority rights to jobs in the new plant did not adversely affect the Bethlehem operations, because the new plant contained approximately seventy-five percent of the machinery previously used at the Elmhurst plant, and also because the new employees performed virtually the same duties as their counterparts at the old site. 185 F. Supp. at 443 & nn.4-5.

26. The preamble of the union contract read: "This Agreement Made and Entered into . . . for and on behalf of its plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York" 185 F. Supp. at 448 n.27. The defendant relied upon this specific geographical limitation to prove that the seniority provisions of the contract applied only to the Elmhurst plant.

27. 185 F. Supp. at 447. The court read the geographic description in the contract as limiting the scope of the employees' seniority rights. Indeed, the district court found this restrictive language to be a valuable consideration that gave rise to a valid contract. *Id.* at 448.

28. 288 F.2d at 103.

29. *Id.* at 104. Judge Madden concluded that the narrow geographical description in the preamble to the collective-bargaining agreement could not be regarded as setting fixed boundaries to the scope of the agreement. Narrowly construed, *Glidden* is based on either equitable considerations or national labor policies. A broad interpretation of the decision suggests that an employee with vested seniority rights has the right to "follow the work" to a new job site.

In departing from the norm, the *Glidden* court apparently relied on two important factors: the similarity of the work being performed at both plants and a clause in the employment contract providing for reemployment within a specific time period. *Id.*; see Blumrosen, *Seniority Rights and Industrial Change*: *Zdanok v. Glidden Co.*, 47 MINN. L. REV. 505, 511-12 (1963).

later, however, the Second Circuit overruled *Glidden*.³⁰

III. LOCKE'S INFLUENCE ON AMERICAN LEGAL AND POLITICAL PHILOSOPHY

A. *Locke's Labor Theory of Property*

At its most basic level, the disparity between *Cooper* and *Glidden* can be explained either in terms of contract law or federal labor law.³¹ At a different, more troublesome level, the disparity between the two opinions can be understood as a clash between different attitudes toward property rights. To this end, John Locke's labor theory of property acquisition is a useful tool in defining the nature of seniority rights arising out of a collective-bargaining agreement.

Briefly stated, the fundamental concept of the labor theory of property acquisition "is that people are entitled to hold, as property, whatever they produce by their own initiative, intelligence, and industry."³² This theory is derived from the premise that one has a property right in his own body.³³ This right arises from the fact that people, in general, have a duty not to interfere with the rights of others. After all, property rights are simply a means of regulating the rights of people with respect to their property. According to Locke, one person's "life, liberty, and estate" may be limited only to protect the equally valid claims of some other person who has the same rights. In this context, "[p]roperty rights . . . , as in the standard cases of ownership, are fundamentally rights to *exclude* others."³⁴

30. *Local 1251 UAW v. Robertshaw Controls Co.*, 405 F.2d 29 (2d Cir. 1968) (en banc). Chief Judge Lombard, the lone dissenter in *Glidden*, wrote the majority opinion in *Robertshaw*. The Second Circuit in *Robertshaw* overruled *Glidden* for several reasons. First, commentators sharply criticized the decision, and courts and arbitrators refused to follow its rule. *Id.* at 31-32. Second, the court decided to construe strictly the language in the collective-bargaining agreement that placed geographical limitations on the employee's seniority rights. *Id.* at 32. Third, a shift in jurisprudential thinking led the court of appeals to state that the "basic proposition of [*Glidden*], that seniority is a vested right, finds no support . . . in the socio-economic setting of labor-management relations. Seniority is wholly a creation of the collective agreement and does not exist apart from that agreement." *Id.* at 33.

31. Under federal labor law, seniority is not inherent in the employment relationship but arises out of the contract. *Broniman v. Great Atl. & Pac. Tea Co.*, 353 F.2d 559, 561 (6th Cir.), *cert. denied*, 384 U.S. 907 (1965). If seniority rights are to persist beyond the term of a contract, the agreement must so provide or be susceptible of such a construction. See *Local 36 v. Brotherhood of Ry., Airline & S.S. Clerks*, 496 F. Supp. 1160, 1166 (E.D. Mich 1980).

32. L. BECKER, *PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS* 32 (1977).

33. J. LOCKE, *supra* note 4, § 27.

34. L. BECKER, *supra* note 32, § 37 (emphasis in original).

Locke begins his analysis of property rights with a description of the state of nature.³⁵ In this realm, men have a collective rather than an individual right of ownership.³⁶ Locke's conceptualization of property rights in the state of nature differs from his labor theory, which presupposes that property rights in the fruits of one's labor vest in the individual. Thus, from a theoretical perspective, Locke's most difficult task is to demonstrate "how Men might come to have a *property* in several parts of that which God gave to Mankind in common."³⁷

The explanation of Locke's theory is found in the transition from original communism to private ownership. The economic imperatives of maximizing the use of the community's resources and preventing their waste accounted for this shift in ideology.³⁸ An individual's right of appropriation was a concomitant result of this new economic philosophy. The nature that Locke described as granting the individual the opportunity of possession "does also bound that *Property* too" so that no one may "*ingross* as much as he will."³⁹

The transition from a collective to an individual right of ownership necessitated a new conceptualization of society. So long as there was a collective right, men only had duties to each other. But with the introduction of private property, men had a duty not only to the individual but also to his property. Men were led, therefore, to leave the state of nature and set up social and political organizations to find a source of power "for the Regulating and

35. Locke characterized the state of nature as one of "Peace, Good Will, Mutual Assistance and Preservation." J. LOCKE, *supra* note 4, § 19.

36. The justification for property rights in Locke's state of nature is similar to those of other thinkers of his time. Mankind's right to the goods of nature derives from God's grant in the Scriptures, from man's rationality, and from the fundamental natural law of self-preservation. *Id.* § 25.

37. *Id.*

38. These premises are as follows: "[M]en, being once born, have a right to their Preservation, and consequently to Meat and Drink, and such other things, as Nature affords for their Subsistence . . ." *Id.* § 25. The earth and its yield were given to men "for the Support and Comfort of their being," and though they belonged to mankind in common, "yet being given for the use of Men, there must of necessity be a means to appropriate them some way . . . before they can be of any use, or at all beneficial to any particular Man." *Id.* § 26. The rightful means of appropriation is derived from the premise that "every Man has a *Property* in his own Person", so that "[t]he *Labour* of his Body, and the *Work* of his Hands" are his. *Id.* § 27. Therefore, whatsoever "he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with . . . and thereby makes it his *Property*." *Id.* Because things that exist with a surplus are without intrinsic value, the sole source of value lies in man's labor. *Id.* § 40.

39. *Id.* § 31.

Preserving of [their] Property."⁴⁰

The introduction of money catalyzed the formation of this new social and political framework. Locke depicted money as an outgrowth of the barter system and characterized it as "some lasting thing that Men might keep without spoiling, and that by mutual consent Men would take in exchange for the truly useful, but perishable Supports of Life."⁴¹ The use of money fostered a system of exchange that allowed men to cultivate more land than was necessary for their support,⁴² which in turn enabled individuals to alienate their labor. Locke recognized the exchange value of labor when men began to trade their services for goods.

The exchange system presupposed that man had the right of appropriation. After all, a man could not barter with property that he did not own and control. In this sense, the new economic order based on private ownership differed markedly from original communism, which had imposed several limitations on an individual's right of appropriation: First, a man could appropriate property only if he left property equal in amount and in kind;⁴³ second, because property belonged to the community, it was wrongful for a man to appropriate more property than he could use;⁴⁴ and third, a man's rightful appropriation was not to exceed the amount that he could procure with his own labor.⁴⁵

The introduction of money allowed men to overcome these limitations. As to the first limitation, Locke's depiction of money as capital was antithetical to the desire to hoard. In *The Political Theory of Possessive Individualism*,⁴⁶ C.B. Macpherson explained how the introduction of money overcame the spoilage limitation:

40. *Id.* § 3.

41. *Id.* § 47. Before the emergence of money, the law permitted commoners to do three things with the products of their labor: use these goods themselves for support and comfort, give them away, or barter with them. *See id.* § 46. In so doing, a commoner "did no injury; he wasted not the common Stock; destroyed no part of the portion of Goods that belonged to others, so long as nothing perished uselessly in his hands." *Id.*

42. Men have agreed to disproportionate and unequal Possession of the Earth, they having by a tacit and voluntary consent found out a way, how a man may fairly possess more land than he himself can use the product of, by receiving in exchange for the overplus, Gold and Silver, which may be hoarded up without injury to any one, these metall's not spoiling or decaying in the hands of the possessor.

Id. § 50.

43. *Id.* § 27.

44. *Id.* § 31.

45. *Id.* § 32.

46. C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* (1962).

The introduction of money is shown to provide both the opportunity and the reason (which could not have existed previously) for a man to enlarge his Possessions beyond the use of his Family, and a plentiful supply to its Consumption, either in what their own Industry produced, or they could barter for like perishable, useful Commodities, with others'. It is 'Commerce . . . to draw *Money* to him by the Sale of the Product' that provides the reason for appropriation of land in excess of what would provide 'a plentiful supply to [his family's] Consumption.'⁴⁷

The second limitation on appropriation—the prevention of waste—was deemed unnecessary under a system of private ownership. Locke suggested that under the exchange system, there would be less waste and enough property for all men.⁴⁸ In this way, the exchange system served as an impetus for larger possessions, overcoming the sufficiency limitations imposed in the state of nature. Locke assumed that the increase in productivity would be distributed to those left without land, and that private appropriation would actually increase the amount left for others:⁴⁹

No doubt at some point, there is no longer as much left for others. But if there is not then enough and as good *land* left for others, there is enough and as good (indeed a better) *living* left for others. And the right of all men to a living was the fundamental right from which Locke had in the first place deduced their right to appropriate land. Not only is as good a living provided for others after the appropriation of all the land; it is *by* the appropriation of all the land that a better living is created

47. *Id.* at 205 (quoting J. LOCKE, *supra* note 4, § 48).

48. The initial natural law rule, "that every man should have as much as he could make use of," was undermined by the invention of money. J. LOCKE, *supra* note 4, § 36. Locke specifically stated,

[H]e who appropriates land to himself by his labour, does not lessen but increase the common stock of mankind. For the provisions serving to the support of humane life, produced by one acre of inclosed and cultivated land, are (to speak much within compass) ten times more, than those, which are yielded by an acre of Land, of an equal richnesse, lying wast in common. And therefor he, that incloses Land and has a greater plenty of the conveniencys of life from ten acres, than he could have from an hundred left to Nature, may truly be said, to give ninety acres to Mankind. For his labour now supplies him with provisions out of ten acres, which were but the product of an hundred lying in common.

Id. § 37.

49. Cf. J. LOCKE, *The First Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* §§ 41-42 (P. Laslett ed. 1960) ("Charity gives every Man a title to so much out of another's Plenty, as will keep him from extream want, where he has no means to subsist otherwise").

for others.⁵⁰

Thus, through the alienation of one's labor, those without land can satisfy their natural right to subsistence.

The transcendence of the third limitation on appropriation in the state of nature—that one could procure only as much property as he could earn with his labor—is important to the development of a conceptual approach to vested seniority rights. At the core of this development is the realization that labor is a form of property and thus can be exchanged or alienated.⁵¹ The free alienation of property and labor is essential to capitalist production. Locke is careful, however, to distinguish the alienation of one's labor from the alienation of one's life. Macpherson points out that "Locke did not care to recognize that the continual alienation of labour for a bare subsistence wage, which he asserts to be the necessary condition of wage-labourers throughout their lives, is in effect an alienation of life and liberty."⁵²

The development of a wage relationship has far-reaching im-

50. C. MACPHERSON, *supra* note 46, at 212.

51. *Id.* at 214-15.

52. *Id.* at 220. This point is central to Karl Marx's ideology:

Marx's analysis of the concept of alienated labor consists of four successive steps: (1) Since it does not belong to him, the product of his labor appears to the workers as an alien object. (2) Consequently, the worker considers his work as imposed, forced labor. It is not the satisfaction of a need, but only a means for satisfying other needs. This is the relationship of the worker to his own activity as something alien and not belonging to him. (3) "Conscious labor reverses the relationship, in that man because he is a self-conscious being makes his life activity, his being, only a means for his existence . . . Thus alienated labor turns the species life of man . . . into an alien being, and into a means for his individual existence. It alienates . . . his human life." (4) "A direct consequence of the alienation of man from the product of his labor, from his life activity and from his species life is that man is alienated from other men." From these considerations about the alienated labor stems the final conclusion concerning the nature of private property: "Private property is . . . the product . . . of alienated labor, of the external relations of the worker to nature and to himself."

Thus, the emergence of property rights creates the possibility of progress, that is the subordination of nature to man, but it also creates hostile social classes. In this alienated environment the state emerges as a *means* of preserving the existing property relations and protecting the possessing class against the nonpossessing class. Marx was very positive in his belief that the state does not create property relations; its function being to guarantee the existing ones. The existing property relations describe the prevailing social power and from them the passive role of the state is deduced analytically.

Pejovich, *Towards an Economic Theory of the Creation and Specification of Property Rights*, in *THE ECONOMICS OF LEGAL RELATIONSHIPS* 46-47 (H. Manne ed. 1975) (footnotes omitted) (quoting K. MARX, *ECONOMIC AND PHILOSOPHICAL MANUSCRIPTS OF 1844*, at 101-03 (1960)).

plications. The payment of wages entitles the employer to both the labor of the employee and the products of that labor. Accompanying the wage relationship is the proposition that "authority over the manner of work and the workplace belongs to the employer, not the employee. In this way the employer can conform the work to the requirements of production, enforcing the most efficient division of labor" ⁵³ Thus, among the most important implications of the wage relationship is its effect on vested seniority rights—seniority rights have conformed to the economic necessities of the owners of capital. Management's desire for a mobile labor force has limited the vesting of seniority rights, thereby reducing the cost of removing an employee and casting the burden of an economic crisis upon the laborer.

B. *Locke's Influence on Government*

A fundamental aspect of Locke's labor theory of property acquisition is his conceptualization of a government that recognizes the primacy and immutability of certain moral rights and duties. According to Locke, a legitimate government is one derived from a social contract or agreement between the body politic and the ruling authority.⁵⁴ Locke believed that the government's existence could be justified only by, and with the consent of, the governed; therefore, the government could not justifiably deprive anyone of his life, liberty, or property except by his own consent. The right to unequal property is an example of a right that men brought into civil society. Therefore, it is individual consent in the state of nature, and not the agreement to enter civil society, that justifies property in excess of the initial natural limit.

Locke draws an important distinction between natural power and natural rights. When men enter into political society, they surrender their natural power to the legislature, but they do not surrender their natural rights. The legislature is given the duty to regulate this power in accordance with natural law.⁵⁵ If the legislature

53. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 132 (1976). Although the employment-at-will doctrine is beyond the scope of this Comment, it produces similar results. Feinman makes the point that "termination at will is the law's development of a fundamental principle of the economy." *Id.* at 118.

54. Natural rights take precedence over those principles that are established by the socio-political practices of men: "The Obligations of the Law of Nature, cease not in Society but only in many Cases are drawn closer, and have by Humane Laws known Penalties annexed to them, to inforce their observation. Thus the Law of Nature stands as an Eternal Rule to all Men, Legislators as well as other." J. LOCKE, *supra* note 4, § 135.

55. *Id.*

transgresses the law of nature, men regain the power to exercise their natural rights⁵⁶ and, if necessary, even revolt against the government.⁵⁷ The threat of revolution acts as a check upon the legislature to ensure that it properly regulates the powers entrusted to it.

In a state of nature, men direct their natural power toward preservation of property. After this power is entrusted to the legislature, it is directed toward the same end. Locke equated the public good with the preservation of property and, in so doing, suggested that the aim of the legislature is identical to the aim of men who enter into political society.⁵⁸ Locke's definition of political power established a means-end relationship between the regulation of property and the public good:

The public good can be considered as a principle of justice governing society in either of two ways: as an aggregative principle it refers only to the total amount of good enjoyed by a particular group; as a distributive principle it refers to the share of that good which different members of the group have for themselves Since the public good is the natural end of preservation as it applies to political society, it is equivalent to the good or preservation of each [T]he preservation of each, including comfort as well as support, entails three natural rights: to pres-

56. For no Man, or Society of Men, having a Power to deliver up their *Preservation*, or consequently the means of it, to the Absolute Will and arbitrary Dominion of another; whenever any one shall go about to bring them into such a Slavish Condition, they will always have a right to preserve what they have not a Power to part with; and to rid themselves of those who invade this Fundamental, Sacred, and unalterable Law of *Self-Preservation*, for which they enter'd into Society.

Id. § 149.

57. A recent study indicates that as early as 1681, Locke set out to refute the theories of Sir Robert Filmer. Laslett, *Introduction to J. LOCKE*, *supra* note 4, at 72. Filmer believed that the state was a patriarchal society under the king. The patriarchalists argued that absolute monarchy was the only proper form of government. This view was rooted in the doctrine of the divine right of kings. See J. DUNN, *THE POLITICAL THOUGHT OF JOHN LOCKE* 50 (1969).

Locke's refutation of Filmer went beyond a basic outline of legitimate royal authority. Instead, he offered a theoretical basis for the ultimate right of revolution. This is important, because it illustrates that he did not write his *Two Treatises* simply to justify the Glorious Whig Revolution of 1688. *Id.* at 60.

58. Locke's definition of political power encompasses this notion:

Political Power then I take to be a *Right* of making Laws with Penalties of Death, and consequently all less Penalties, for the Regulating and Preserving of Property, and of employing the force of the Community, in the Execution of such Laws, and in the defence of the Common-wealth from Foreign Injury, and all this only for the Public Good.

J. LOCKE, *supra* note 4, § 3.

ervation, to the liberty of preserving oneself and others, and to the material possessions necessary for preservation. These claim rights to life, liberty and possessions are completed and regulated naturally in the state of nature and, by this means, preservation is realised.⁵⁹

Having established that the preservation of property was commensurate with the public good, Locke concluded that the natural end of political society was the public good: "[The legislature's] Power in the utmost Bounds of it, is *limited to the publick good* of the Society. It is a Power, that hath no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the Subjects."⁶⁰

C. *Locke's Influence on Nineteenth-Century Jurisprudence*

Locke has played an important role in America's philosophical tradition. His premise that the purpose of government is to preserve individual rights found support in the American colonies. Men such as Thomas Jefferson⁶¹ and Thomas Paine quoted John Locke in constructing a framework for the American Revolution. While these men echoed Locke's theories on government, Locke's notion of property rights found expression in other arenas.

Locke's theory that property was inseparable from personality was absorbed easily into the thinking of a pre-industrial nation. As late as 1886, the Supreme Court of the United States relied on the fourteenth amendment⁶² to protect personal opportunity. In *Yick Wo v. Hopkins*,⁶³ the Court reversed a conviction under a mu-

59. J. TULLY, A DISCOURSE ON PROPERTY 162-63 (1980) (citations omitted).

60. J. LOCKE, *supra* note 4, § 135.

61. Mr. Jefferson found in the Civil Government the raw material for his organ-like prelude to the Declaration of Independence. A number of erstwhile colonies had to be welded into a union,—and from the same storehouse ideas were drawn for incorporation into a Constitution which was to be "the supreme law of the land." In it "the forces of democracy" were "set over against the forces of property" and a "fundamental division of powers" was effected "between voters on the one hand and property-owners on the other."

Hamilton, *Property According to Locke*, 41 YALE L.J. 864, 873 (1932) (footnotes omitted).

62. The fourteenth amendment provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

63. 118 U.S. 356 (1886). Yick Wo was a Chinese alien who had operated a laundry business for many years. The trial court convicted him of violating the licensing ordinance when he continued to operate his business without a permit.

nicipal ordinance that prohibited the construction of wooden laundries without a license granted by a board of supervisors. Although the licensors' decisions were entirely discretionary, the Court found them blatantly unjust because the board granted permits to seventy-nine of the eighty non-Chinese applicants, but to none of the two hundred Chinese applicants. The Court noted that the fourteenth amendment protected the Chinese laundry operators from the discriminatory administration of local laws. This right to equal protection of the laws preserved their businesses, the ownership of which constituted a property right:

[T]he fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.⁶⁴

The rise of industrialism, however, severely strained Locke's philosophy: "[Industrialism] separated the laborer from the instruments of production, articulated establishments into an industrial system, and enabled a capitalistic ownership to come into the repute of a personalized property."⁶⁵

The *Slaughter-House Cases*,⁶⁶ at least in spirit, are a fine example of the new industrialism at work. These cases concerned an 1869 Louisiana statute that awarded a monopoly to a slaughterhouse company in New Orleans.⁶⁷ The statute granted the Crescent City Live-Stock Landing & Slaughter-House Company a twenty-five-year license to manage the slaughtering of all animals in the New Orleans area. The legislation effectively deprived approximately one thousand butchers of work. Some of these butchers sought an injunction against the monopoly, contending that the statute deprived them of the "right to exercise their trade"⁶⁸ and

64. *Id.* at 370.

65. Hamilton, *supra* note 61, at 877. See generally A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

66. 83 U.S. (16 Wall.) 36 (1873).

67. The act was entitled "An act to protect the health of the city of New Orleans, to locate the stock-landings and slaughter-houses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company." *Id.* at 59.

68. *Id.* at 60.

was violative of the fourteenth amendment.⁶⁹ The Supreme Court of Louisiana decided in favor of the slaughterhouse company.

Represented by the former Mr. Justice Campbell, the butchers then appealed to the Supreme Court of the United States. Locke's influence on the case is best manifested in the butchers' brief, which stated,

The right to labor, the right to one's self physically and intellectually, and to the product of one's own faculties, is past doubt property, and property of a sacred kind. Yet *this* property is destroyed by the act; destroyed not by due process of law, but by charter; a grant of privilege, of monopoly⁷⁰

The Supreme Court held that the Louisiana law did not violate the fourteenth amendment's privileges and immunities clause. Although the Court recognized that the right of a butcher to ply his trade was among those civil rights of state citizens that could not be infringed lawfully, Justice Miller refused to find the statute unconstitutional, holding that it represented a classic exercise of the state police power.⁷¹

Justices Field, Bradley, and Swayne strongly disagreed with the reasoning of the majority opinion.⁷² They relied on the natural law tradition and argued that no government could deprive its citizens of their inherent rights:

The right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe. It may prescribe the manner of their exercise, but it cannot subvert the rights themselves.⁷³

Justice Swayne emphasized that the monopoly granted by Louisiana to the slaughterhouse deprived the butchers of their livelihood.

69. The butchers charged that the Louisiana law violated the fourteenth amendment, *see supra* note 62, by abridging the "privileges and immunities" of United States citizens, denying the plaintiffs "the equal protection of the laws," and depriving them "of their property without due process of law." They also argued that the statute created an "involuntary servitude" in violation of the thirteenth amendment.

70. Abstract of the argument against monopolies, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 56 (1873).

71. *Id.* at 60-63. The implication here, tenuous as it might seem, is that a law that prohibits a person from plying his trade is not unconstitutional as long as it can be characterized as an exercise of the state's police power.

72. Chief Justice Chase also dissented but did not write a separate opinion.

73. *Id.* at 114 (Bradley, J., dissenting); *see also id.* at 95-96 (Field, J., dissenting) (expressing similar sentiments).

He also argued that the statute violated the butchers' fundamental rights under the fourteenth amendment and characterized these rights in Lockian fashion:

Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty.⁷⁴

Swayne concluded that the availability of labor is, to a large extent, the foundation of most other forms of property and consequently warranted a high degree of protection.

Toward the end of the nineteenth century, capitalists sought to expand the scope of the fourteenth amendment. The American legal system soon felt the pressures of a growing industrialism: "The modern industrial system came into being—and the most Lockian phrases in the Constitution were employed to guard its integrity. The property which Locke knew,—or perhaps only wrote about,—receded; and business enterprise won for itself certain immunities from its former over-lord, the state."⁷⁵ Corporate interests, arguing that a laissez-faire attitude was necessary to maintain growth, sought to use the due process clause of the fourteenth amendment as a means of protecting the legal rights of industry.

In *Santa Clara County v. Southern Pacific Railroad*,⁷⁶ the Supreme Court of the United States observed that corporations were "persons" within the meaning of the equal protection clause and therefore were entitled to the protection of the fourteenth amend-

74. *Id.* at 127 (Swayne, J., dissenting).

75. Hamilton, *supra* note 61, at 874. "The parallel growth of judicial review made the judiciary the overlord of the legislature, assigned to it a role in the control of the economic order, and gave to the ownership of corporate wealth the protection of the Constitution." *Id.* at 877.

The rise of substantive due process is an example of this idea. In the *Slaughter-House Cases*, the United States Supreme Court rejected the notion of substantive due process. By the end of the nineteenth century, however, substantive due process became an integral part of American jurisprudence. See *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

In *Lochner v. New York*, 198 U.S. 45 (1905), the Court invalidated a New York law prohibiting the employment of bakery employees for more than ten hours a day or sixty hours a week. The Court deemed the law "an illegal interference with the rights of individuals." *Id.* at 61.

76. 118 U.S. 394 (1886).

ment.⁷⁷ Decisions such as *Santa Clara* have produced a tension between individual and corporate rights. The property that Locke justified by natural right was an isolated possession of personal origin; the property of modern industrialism is an aggregate of rights inseparable from the gigantic collectivism of business.⁷⁸

The development of a property right inseparable from the rights of industry eventually led to reform. The reformers argued that in contrast to Locke's theory, property must be separated from personality. "The regulatory agencies . . . were born of the reform. In sustaining . . . major inroads on private property, the Supreme Court rejected the older idea that property and liberty were one, and wrote a series of classic opinions upholding the power of the people to regulate and limit private rights."⁷⁹ The reforms enacted by legislatures limited corporate power and increased the power of the federal government.⁸⁰ This trend has not protected or benefited the individual.⁸¹

In summary, modern industrialism placed severe limitations on the labor theory of property acquisition.⁸² Even so, Locke's importance in American jurisprudence should not be diminished. Locke could not have anticipated the rise of modern industrialism and its accompanying perils. As one commentator suggested, at the time Locke wrote the *Second Treatise*, "[s]upporters of capitalist

77. See also *Mississippi R.R. Comm'n v. Mobile & Ohio R.R.*, 244 U.S. 388, 391 (1917) (state may not exercise regulatory powers in arbitrary and unreasonable manner so as to deprive railroad of a fair return on its invested capital).

78. See Hamilton, *supra* note 61, at 877, 879.

79. Reich, *The New Property*, 73 YALE L.J. 733, 773 (1964).

80. *Id.*

81. Professor Reich wrote,

Government as an employer, or as a dispenser of wealth, has used the theory that it was handing out gratuities to claim a managerial power as great as that which the capitalists claimed. Moreover, the corporations allied themselves with, or actually took over, part of government's system of power. Today it is the combined power of government and the corporations that presses against the individual.

Id.

82. As one commentator observed in 1932,

The individual is no longer thought of as a miniature god who has a title to his own creation. It is now impossible to place a mark of personal workmanship upon any chattel; a multitude of men have mixed their labor—and many another personal contribution beside—into such earthly possessions as a motor-car, a sky-scraper, a railroad, a going concern, and a handful of intangibles. In an economic order which comprehends all men the technical contribution of the individual to usable wealth cannot be isolated and measured. Nor can "the worth he has produced" be determined except in terms of the market value of his services or property,—and that is begging the question.

Hamilton, *supra* note 61, at 878.

production, of whom Locke was one, were not yet troubled in their consciences about any dehumanizing effects of labour being made into a commodity"⁸³ The Bill of Rights and the fourteenth amendment were enacted to make the people secure in their persons and property. When it came time to interpret these enactments, however, the judiciary failed to realize the import of Locke's words. Instead, "property" became a catchword for an accumulation of rights in whose name the rise of modern industrialism largely went unchecked. Subsequent reforms stressed the need for a separation of property and personality and created an even greater gap than previously had existed between Locke's theory of property and contemporary concepts.

IV. THE *Glidden* APPROACH TO VESTED SENIORITY RIGHTS

A. *Glidden Revisited: A Post-Mortem or a Prophetic Message?*

The tension between rights created under a collective-bargaining agreement and the concept of vested seniority rights results from an incoherent approach toward a definition of property rights. The rise of modern industrialism, with its emphasis on the wage relationship and a mobile labor force, severed the link between personality and property, thereby rendering Locke's theory something of an anachronism. Yet, vestiges of the labor theory still remain, as evidenced by the steady stream of litigation over vested seniority rights.⁸⁴ These disputes center on an issue related to Locke's formulations: whether an employee has a vested right in his employment, based not upon a contract, but rather upon a property right derived from his seniority status. Not surprisingly, the concerns over capital and a transient labor force also play an important role in the resolution of this issue. A comparison of *Cooper* and *Glidden* demonstrates how these two factors have helped to shape our attitude toward vested seniority rights.

Cooper reflects the well-accepted rule that an employer can relocate part or all of his operation, provided that the relocation did not violate a contract, was justified economically, and was not

83. C. MACPHERSON, *supra* note 46, at 217.

84. See, e.g., *Schick v. NLRB*, 409 F.2d 395 (7th Cir. 1969); *Charland v. Norge Div., Borg Warner Corp.*, 407 F.2d 1062 (6th Cir.), *cert. denied*, 396 U.S. 871 (1969); *Oddie v. Ross Gear & Tool Co.*, 305 F.2d 143 (6th Cir.), *cert. denied*, 371 U.S. 941 (1962); *Conran v. Great Atl. & Pac. Tea Co.*, 499 F. Supp. 727 (E.D. Pa. 1980); *Crusco v. Fisher & Bros.*, 458 F. Supp. 413 (S.D.N.Y. 1978).

motivated by anti-union sentiment.⁸⁵ Consequently, commentators have characterized *Glidden* as part of a belated effort by the courts "to catch up with what has been a serious gap in the common law analysis of job rights."⁸⁶ In a speech before the American Law Institute, then-Secretary of Labor Arthur Goldberg commented upon this failure in the development of common-law concepts:

[T]he genius which produced the law of property rights and commercial instruments, which developed the corporate fiction that permitted the combination of capital, and established rules of reasonable notice to protect tenants from unconscionable, summary eviction, had left a working man vulnerable to instant discharge, despite years of faithful service. This failure of the common law led, through collective bargaining, to a private concept of job rights which "The Law" itself had failed to develop.⁸⁷

Most courts and commentators disagree with this *Glidden*-type analysis.⁸⁸ In fact, reaction to the *Glidden* opinion was swift and predominantly adverse. Several writers accused the court of legislating what it considered to be a desirable social result, rather than applying a valid legal concept. They argued that, by compelling the employer to expressly negate the concept of vested seniority rights at the bargaining table, *Glidden* placed an unfair burden on the employer.⁸⁹ Much of the criticism of *Glidden* is misplaced. By emphasizing the security aspect of seniority,⁹⁰ the Second Cir-

85. See *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961).

86. Panel Discussion, *Plant Removals and Related Problems*, 13 LAB. L.J. 914, 914 (1962).

87. *Id.* (panelist's paraphrase of remarks by Secretary Goldberg).

88. See, e.g., *Woody v. Sterling Prods., Inc.*, 365 F.2d 448 (8th Cir. 1966) (collective-bargaining agreement defines scope and extent of employee's rights); *NLRB v. Local 542, Int'l Union of Operating Eng'rs*, 331 F.2d 99 (3d Cir. 1964) (union recognition does not survive collective-bargaining agreement); *Proctor & Gamble Indus. Union v. Proctor & Gamble Co.*, 312 F.2d 181 (2d Cir. 1962) (agreement to arbitrate not applicable because grievance arose after expiration of the agreement); *Oddie v. Ross Gear & Tool Co.*, 305 F.2d 143 (6th Cir. 1962) (employees not entitled to assert seniority acquired in old plant for purpose of being hired at new plant); Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532 (1962); Lowden, *Survival of Seniority Rights Under Collective Agreements: Zdanok v. Glidden Co.*, 48 VA. L. REV. 291 (1962); Turner, *Plant Removals and Related Problems*, 13 LAB. L.J. 907 (1962); Comment, *Industrial Mobility and Survival of Seniority—What Price Security?*, 36 S. CAL. L. REV. 269 (1963).

89. See Panel Discussion, *supra* note 86, at 915; see also *Local 1251 UAW v. Robertshaw Controls Co.*, 405 F.2d 29, 33 (2d Cir. 1968) (Court must "construe the contract upon which the parties agreed and not . . . substitute for it one with more humane or less destructive terms.") (quoting Chief Justice Lumbard's dissent in *Zdanok v. Glidden*, 288 F.2d 99, 105 (2d Cir. 1961)).

90. The basic reason for the existence of the seniority system is to protect workers with

cuit extended protection to employment interests that courts had overlooked for many years. Although *Glidden* suffers from ambiguity, its result nonetheless has a strong philosophical base: vested seniority rights give rise to a possessory interest in one's job.

B. *The Nature of Seniority*

The fact that seniority is composed of certain security aspects helps to illustrate the philosophical underpinnings of vested seniority rights.⁹¹ A worker's participation in a collective bargaining unit is an unconscious reassertion that man must, in some respects, be identified with his work:

Every discussion of shop rules, of efficiency, of grievances, of rights and duties, of obligations and expectancies, embodies the recognition that the relationship between man and his work cannot be defined as purely impersonal, pecuniary, and fluid. The union embraces a concern about the industry, and the feeling, so evident in a thousand past instances, of "this is my job" is but a pathetic restatement that the work and the man belong to each other.⁹²

Seniority rights, therefore, are an outgrowth of the labor³ movement. They are not inherent in the employment relationship but arise instead from either a statute⁹³ or a collective bargaining agreement.⁹⁴

The *Glidden* court correctly reasoned that job security, as measured by seniority status, is meaningless if a company is allowed to terminate unilaterally seniority rights. Implicit in this reasoning is the notion that seniority is a type of "unemployment insurance" that vests over time.⁹⁵ An employee with seniority rights expects that as he works, he provides not only for his immediate needs, but also for his future needs. For example, in the case of a layoff, seniority status is frequently used to determine which

the longest terms of service from future industrial problems.

91. The development of trade unions has been characterized as "an attempt by individual workers to escape from insecurity." F. TANNENBAUM, *A PHILOSOPHY OF LABOR* 176 (1951).

92. *See id.*

93. The legislature, unlike the judiciary, has been willing to protect seniority rights. For example, Congress creates and protects the seniority rights of employees who enter military service, thereby assuring them a preferential right to reemployment when they return to civilian life. *See* 38 U.S.C. § 2021 (1976 & Supp. V 1981).

94. *See, e.g.,* Aaron, *supra* note 88, at 1533.

95. *Glidden*, 288 F.2d at 103.

workers will be dismissed.⁹⁶

In contrast to *Glidden*, cases like *Cooper* seem to discount the security aspect of seniority: "Whether or not any of the plaintiffs relied on the old agreement in accepting promotions to supervisory positions is immaterial. By relying on a contract of limited duration, imminently subject to renegotiation, [the supervisory personnel] could not estop the parties from changing it."⁹⁷ In refusing to recognize that seniority rights are extracontractual, courts have placed greater emphasis on the day-to-day benefits of seniority.⁹⁸ This refusal has immunized modern employers from a vast number of claims.

The holding in *Glidden* demonstrates a willingness on the part of one court to analogize the security aspects of seniority to other types of security interests that have been protected in the past. Courts and arbitrators generally have agreed that benefits other than seniority often survive termination of the collective bargaining agreement. The rights to vacation pay,⁹⁹ severance pay,¹⁰⁰ and retirement pay¹⁰¹ may be enforced after the contract expires or is terminated: "[T]hese are monetary rights which are earned by virtue of the employee's service and form a part of his earned wages.

96. In constructing a model of industrial pluralism, David Feller seems to place great emphasis on this function of seniority:

Seniority provides an ideal example of both the employee consent and the management disciplinary functions of the collective agreement There is undoubtedly an advantage in promoting the most qualified employees to vacant positions and in retaining the most efficient when layoffs are required. Judgments as to these matters, however, are not precise and when the decisions are made, as they must be, at a low level of the management bureaucracy there are enormous possibilities for favoritism or the use of improper criteria. Perhaps of more importance, there is usually no adequate method by which it can be demonstrated that the choice of persons to be promoted or laid off is not based on considerations unrelated to performance. . . .

Length of service, on the other hand, can be objectively calculated by fixed, if sometimes arbitrary, rules. Use of the seniority criterion thus both eliminates a possible source of employee resentment and ensures that lower elements in the managerial hierarchy do not misuse the authority given them.

Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 768 (1973) (footnote omitted). Applying this model, seniority rights vest in the collective unit rather than in the individual; "[t]he collective bargaining agreement is not a contract between the employer and any employee" *Id.* at 773.

97. *Cooper*, 651 F.2d at 251.

98. The day-to-day benefits of seniority are those aspects of seniority other than the job security aspect. One example is the determination of wage rates based on the amount of time employed; the amount of vacation time permitted is another.

99. *In re Wil-Low Cafeterias, Inc.*, 111 F.2d 429 (2d Cir. 1940).

100. *Owens v. Press Publishing Co.*, 20 N.J. 537, 120 A.2d 442 (1956).

101. *Richardson v. Communications Workers of Am.*, 443 F.2d 974, 979 (8th Cir. 1971).

Some writers refer to these as vested rights."¹⁰²

C. Policy Considerations

Glidden represents a resolution of the tension between two competing needs: the employer's need for mobility of industry and the employee's need for economic security.¹⁰³ The remedy offered by *Glidden* protects older blue-collar employees who, though still capable of good work, might be laid off and forced to face an unwelcome job market.¹⁰⁴ The *Glidden* decision "may clarify the conditions under which industrial innovations will take place, thus paving the way for wiser and more humane solutions to some of the problems implicit in industrial change."¹⁰⁵

Whether this post-*Glidden* panacea can be realized by the American labor force is questionable given the dynamics of the present economy: "The rapidity of technological change strongly suggests that the average employee in the immediate future will have to change jobs at least several times during his working life."¹⁰⁶ Like the rise of industrialism in the late nineteenth century, which strained Locke's theories,¹⁰⁷ the technological revolution in the past twenty years has contributed greatly to the continuing separation of men from the product of their labor. This separation will no doubt continue to limit the concept of vested seniority rights to a very particularized area.¹⁰⁸ In order to protect

102. Seminar, *Plant Removals and Subcontracting of Work*, 14 LAB. L.J. 366, 371 (1963) (comments by Irving M. Friedman).

103. See Blumrosen, *supra* note 29, at 526.

104. The following unemployment figures for the past two years indicate that blue-collar workers have been hit the hardest during the current employment crisis.

Characteristic	UNEMPLOYMENT RATE		
	Annual Average(%)		August 1982
	1980	1981	
Total, 16 years and over	7.1	7.6	9.8
White-collar workers	3.7	4.0	4.8
Blue-collar workers	10.0	10.3	14.2

BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, 105 MONTHLY LAB. REV. 57, 62 (1982).

105. Blumrosen, *supra* note 29, at 527.

106. Aaron, *supra* note 88, at 1563. Professor Aaron also had suggested that automation, which has drastically changed our concepts of work, may cause the seniority principle to become obsolete.

107. See *supra* note 65 and accompanying text.

108. Faculty tenure is an example of a vested seniority right. It ensures that a faculty

the value of labor in a rapidly changing market, courts should attempt to slow this growing rift equitably.

[I]ndustrial power has value in our society only if men, and not machines, are the masters. The well being of the individual provides the rationale for these intensive efforts to increase and improve industrial production. The worker's quest for security is as urgent a need, as important a social value, as the mobility of industry. Each is a *sine qua non* of continuing progress in our society, and although the values appear to conflict, they are also complementary.¹⁰⁹

Today, courts apparently are reluctant to protect the worker during periods of economic change.¹¹⁰ For example, the *Cooper* court subtly relied on this reluctance in making its decision.¹¹¹ The most troubling aspect of this trend is that decisions such as *Cooper*, by weakening the worker's bargaining position, are contributing to the economic problems of the American labor force. A new judicial attitude, shaped by *Glidden*, would help to fortify labor's negotiating position in the collective-bargaining process.

member will not be terminated without adequate cause. At a public institution, elaborate procedures are constitutionally required before a tenured professor may be terminated. See *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956). At a private institution, elaborate procedural safeguards are often mandated by contract. See generally *Lehmann v. Board of Trustees of Whitman College*, 89 Wash. 2d 874, 576 P.2d 397 (1978). In *Lehmann* an advisory investigatory committee held 21 sessions and heard testimony from 20 persons. This was followed by an additional nine days of hearings that produced a 1,249 page transcript.

109. Comment, *supra* note 88, at 283.

110. The Third Circuit's approach in *In re Bildisco*, 682 F.2d 72 (3d Cir. 1982), illustrates this point. The issue was whether a debtor-in-possession may reject a collective bargaining agreement as an executory contract. *Id.* at 74. The court held that section 365(a) of the Bankruptcy Reform Act does permit such a rejection. *Id.* at 78; see 11 U.S.C. § 365(a) (1976 & Supp. V 1981). An important aspect of the court's analysis is its recognition of the current economic problems:

Because Bildisco is involved in the building supply business, a business directly associated with the construction business, and the employees who are covered by the labor contract are warehousemen, drivers, mechanics, and outside field servicemen, it is significant that 18.1% of the nation's construction workers were unemployed compared with 12.5% of blue-collar workers in general. Under circumstances of a distressed economy, a bankruptcy court could properly consider that it would be in the interests of the workers in a bargaining unit to be afforded the opportunity to continue to work under less generous financial benefits than to insist upon an absolute payment of vacation benefits, pension, health and welfare benefits, and wage increases. In weighing the equities the court could well conclude that it is in the public interest for employees to work without the advantage of fringe benefits than not to work at all.

682 F.2d at 81 n.13 (citation omitted).

111. *Cooper*, 651 F.2d at 250-51.

D. Implications

Upon close examination, the entire collective-bargaining process is affected by the characterization of seniority as a vested right. As previously noted, the development of seniority rights has conformed to the economic necessities of the owners of capital.¹¹² This results in a presumption in favor of the employer that seniority rights generally do not vest. At first blush, *Glidden* effectuates a new presumption that requires management to introduce strong evidence to prove that the agreement was not intended to create vested seniority rights. If management is unable to satisfy this burden, then it will be forced to either accede to this view or bargain over labor's seniority rights.

It has been argued that the right to follow the work recognized in *Zdanok v. Glidden* will not be extensively exercised, but will be waived in exchange for a little more severance pay. Such a result will simply reflect the needs of the parties as expressed in collective bargaining Law in labor relations does not dictate the choices that union, management, and employee must make. It creates a framework within which the various decisions are worked out. The parties are free to shape their own actions within this framework. One method that provides flexibility is the ability to convert rights into money.¹¹³

Glidden forces management to articulate better its position at the bargaining table because the characterization of seniority as a vested right places labor in a more advantageous position. Since a majority of the disputes involving seniority will be disposed of through the grievance process,¹¹⁴ the need for greater specificity in the bargaining process will be acute. If this specificity is found wanting, then arbitrators will be allowed to deal with these cases

112. See *supra* note 53 and accompanying text.

113. Blumrosen, *supra* note 29, at 526 (footnote omitted).

114. In a series of cases involving the United Steelworkers of America, the Supreme Court of the United States announced that courts would have a limited role in actions to enforce arbitration awards:

In those cases, the Court exalted the role of the arbitrator as a force for industrial peace, articulated a view of the labor contract as a working arrangement between labor and management engrossing unwritten understandings and plant practices not reflected in the written terms, and announced a doctrine of judicial self-restraint in cases in which the parties have assigned the task of dispute resolution to an arbitrator privately selected.

R. GORMAN, BASIC TEXT ON LABOR LAW 551 (1976); see *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960).

on an ad hoc basis without developing abstract principles to resolve them.¹¹⁵

V. CONCLUSION: A CONCEPTUAL APPROACH TO VESTED SENIORITY RIGHTS

The distinction between *Cooper* and *Glidden* manifests itself as a conflict in property rights:

In a sense, the labor movement embodies the development of a new set of property rights generated within the womb of an older set of property concepts. The older set must either repress the developing concepts or adapt to them by a process of accommodation. Collective bargaining is essentially an experimental procedure to reconcile these conflicting property concepts in an evolving social system.¹¹⁶

This interpretation provides a coherent approach to the seniority question. In an effort to offset the obsolescence and displacement of basic skills, which are natural products of a rapidly changing economy, *Glidden* attempts to establish a property right for the worker in his job. This result is warranted because of the inequality that exists between the owners of capital and the owners of labor.¹¹⁷ The existence of a property right in one's work is rooted in Locke's labor theory of property acquisition and is given current expression by the system of closed shops and closed unions. One author who compared contemporary notions toward private property and labor recognized the traditional link between personality and property:

The deep feeling of private property holders about their land finds its sanction in a complex jurisprudence that goes back to John Locke and Blackstone. The same deep feeling of workers about the property rights in their jobs received its first quasi-legal sanction in 1926 with the passage of the Railway Labor Act. We do not question the rationality of the feeling of the private property holder. It is part of our system of conditioned reflex. We are confused by the apparently irrational behavior of workers who will not sacrifice their property rights in the name

115. See Blumrosen, *supra* note 29, at 509.

116. Gomberg, *Featherbedding: An Assertion of Property Rights*, in READINGS IN LABOR ECONOMICS AND LABOR RELATIONS 350-51 (R. Rowan ed. 1972).

117. The owners of capital are compensated for the deterioration of their capital values through the process of depreciation. I.R.C. § 167 (West 1982). No similar protection is afforded to the owners of labor. *But cf.* Rottenberg, *Property in Work*, in READINGS IN LABOR ECONOMICS AND LABOR RELATIONS 359 (R. Rowan ed. 1972).

of productivity. Are the differences in our reactions a matter of tradition?¹¹⁸

If we decide that the differences in our attitude toward private property and labor are a matter of tradition, then we have ignored an important goal of the labor movement. Selig Perlman, in *A Theory of the Labor Movement*,¹¹⁹ identifies this goal as labor's desire to wrest control of capital's private property rights.¹²⁰ There are three possible means by which labor can accomplish this result: the political and legislative route, the economic route, and the co-operative production route.¹²¹ Through the use of regulatory restrictions, the political and legislative route prevents the employer from acquiring absolute control over the means of production.¹²² The economic route, which takes the form of union activity, strikes, and boycotts, imposes restrictions on the rights of private property that are even more far-reaching.¹²³ The cooperative production route has the least effect on private property rights. This course "sets out to beat private capitalism by the methods of private business: greater efficiency and superior competitive power."¹²⁴

By characterizing the labor movement as a campaign against the rights of private property, it becomes necessary to examine the role that private property plays in American society: "The enormous strength of private property in America, at once obvious to any observer, goes back to the all-important fact that, by and large, this country was occupied and settled by laboring pioneers, creating property for themselves as they went along and holding it in small parcels."¹²⁵ Thus, early in American history, the laboring

118. Gomberg, *supra* note 116, at 352.

119. S. PERLMAN, *A THEORY OF THE LABOR MOVEMENT* (1949).

120. Perlman characterized the labor movement as "an organized campaign against the rights of private property, even where it stops short of embracing a radical program seeking the elimination, gradual or abrupt, 'constitutional' or violent, of the private entrepreneur." *Id.* at 155-56.

121. *Id.* at 156.

122. *Id.* Minimum wage legislation is one example of how government has limited management's control over an important element of production—the cost of labor.

123. *Id.*

124. *Id.* What is meant by the cooperative production route is unclear. One example may be employee ownership of the workplace. Early attempts to organize the workplace in this fashion involved "workingmen who were seeking an escape from a rising industrial system and who were trying desperately to preserve their rapidly disappearing status as skilled and independent craftsmen." 1 P. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES* 180 (1947). Most of these cooperatives failed. *Id.* at 181.

125. S. PERLMAN, *supra* note 119, at 157 (footnote omitted).

class erected and owned private property. This seems antithetical to the contemporary notion that the labor movement seeks to limit the rights of private property.

The assertion of a property right in labor appears to conflict with traditional American attitudes toward private property. In order to resolve this problem, a proper balance must be struck between these conflicting interests. There are two possible solutions. One solution imposes a systematized set of working rules that define an emerging property right for the worker in his job. If we accept such a proposition, then we must conclude that when a worker is deprived of his job, he is deprived of a property right for which he is entitled to some sort of compensation.

[W]orking rules . . . have had a profound effect upon the concept of property, changing that concept from a principle of exclusive holding of physical objects for the owner's private use, into a principle of control of limited resources needed by others for their use and thus into a concept of intangible and incorporeal property arising solely out of rules of law controlling transactions.¹²⁶

This solution does not offend traditional American attitudes. It provides for the resolution of conflicting values through the process of collective bargaining.¹²⁷ The rules that emerge from the collective-bargaining agreement correspond to the model of industrial pluralism that is central to American labor law.¹²⁸ These rules are

126. J. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 6, 7 (1957). Similarly, Professor Gomberg offers the following example:

[A] jurisdictional claim of a yard worker that he and he alone can handle a train in the yard and the corresponding claim of a road worker that he and he alone can handle a train on the road stem from a property right of each craft in the particular job area.

Gomberg, *supra* note 116, at 351.

127. David Feller explains management's acceptance of collective bargaining as follows:

[A]ny industrial enterprise must have a system of rules, and the larger and more complex the enterprise, the greater the necessity for rules and their formalization. Collective bargaining can serve many useful functions for management in connection with the formulation and administration of these rules. First, it establishes a mechanism by which employee consent to those rules can be obtained. That consent not only extends to those rules established in the collective agreement but also to rules established by management in areas not covered by the agreement to the extent that the union, by not insisting upon participation in the formulation of those rules, can be said to have at least implicitly consented to management's authority to impose them.

Feller, *supra* note 96, at 764.

128. See Cox, *Some Aspects of the Labor Management Relations Act* (pt. 1), 61 *HARV. L. REV.* 1 (1947). The doctrine of industrial pluralism categorizes the process of collective bargaining as a system of self-government by management and labor.

helpful in establishing a system of job security, which in turn promotes greater productivity.

A second possible solution would be an active judiciary that attempts to balance the property interests of the workers with those of management:

[T]he law must intervene actively to alter the definitions of property rights in order to create true equality. If such equality is desirable, either to improve wages, hours, and working conditions, or to affirm workers' dignity, then there must be a new theoretical and doctrinal approach to the law of labor relations.¹²⁹

Glidden can be interpreted as an attempt to reconcile these conflicting philosophies. It offers a partial solution to the problem faced by the employee who has spent the greater part of his adult life working for a single employer, only to find his job security destroyed when the collective-bargaining agreement expires. Since vested seniority rights are an effective means of dealing with another common problem—the displacement of workers as a result of new technologies—it may be best to classify this issue as a matter of public policy. "This approach would enable workers to struggle in the arena in which their strength is greatest—the national political arena."¹³⁰ Such a struggle would once again thrust upon government the duty to preserve individual rights, rather than the accumulation of rights in whose name we have witnessed the rise of modern industrialism.

FRANCIS A. CITERA

129. Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1580 (1981).

130. *Id.*