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### Of Brutal Murder and Transcendental Sovereignty: The Meaning of Vested Private Rights

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# OF BRUTAL MURDER AND TRANSCENDENTAL SOVEREIGNTY: THE MEANING OF VESTED PRIVATE RIGHTS

ADAM J. MACLEOD\*

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## INTRODUCTION

The idea of vested private rights is divisive; it divides those who practice law from those who teach and think about law. On one side of the divide, practicing lawyers act as though (at least some) rights exist and exert binding obligations upon private persons and government officials, such that once vested the rights cannot be taken away or retrospectively altered.<sup>1</sup> Lawyers convey estates in property, negotiate contracts, and write and send demand letters on the supposition that they are specifying and vindicating rights, which are rights not as a result of a judgment by a court in a subsequent dispute but rather because they *direct* judicial deliberations and *determine* judgments. Lawyers also negotiate compensation from local governments for expropriations and regulatory takings, demand due process protections for their clients, apply to courts for injunctive relief, and seek enforcement of laws and judgments across state lines. They do this on the presumption that officials are obligated to act or refrain from acting in certain ways because of the existence of rights enjoyed by persons in their unofficial capacities.

On the other side of the divide, scholars of law and jurisprudence generally proceed as if the concepts of vested right and nonretrospectivity have little real meaning.<sup>2</sup> The English positivist and American legal realist movements are thought to have discredited the doctrine of vested private rights. On the currently prevailing account, lawyers who practice private law are generating expectations, which might or might not be realized depending upon how courts interpret or construct the law and whether the legislative sovereign acts to change the law.

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1. See, e.g., J. Spencer Hall, *State Vested Rights Statutes: Developing Certainty and Equity and Protecting the Public Interest*, 40 URB. LAW. 451 (2008); Gregory Overstreet & Diana M. Kirchheim, *The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest*, 23 SEATTLE U. L. REV. 1043, 1044 (2000) (calling vested rights "absolutely critical" to real property practice); E.A. Prichard & Gregory A. Riegle, *Searching for Certainty: Virginia's Evolutionary Approach to Vested Rights*, 7 GEO. MASON L. REV. 983 (1999).

2. See, e.g., Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1071 (1997); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 517 (1986); Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657, 1658–59 (1999).

The sustained skepticism of the concept of vested private rights in the theoretical inquiries of scholars, coupled with sustained interest in the reality of vested private rights in the practical deliberations of lawyers, has left the doctrine in a state of limbo—neither fully discredited nor fully coherent. Neil Duxbury, a noted theorist, has observed that the concept of vested rights “is not easily shaken off.”<sup>3</sup> Yet Charles Siemon, an accomplished practitioner, has found it difficult to find order amidst the “confusion in the law.”<sup>4</sup>

This Article attempts to explain the continuing appeal of the vested private rights doctrine and to discern some coherence in it while also accounting for the causes of skepticism. The Article proceeds by way of comparing theoretical accounts of the doctrine in English positivist and American legal realist scholarship with instances of the doctrine in legal practice. Disagreement between theory and practice can be narrowed by critical engagement with both. In fact, a surprising area of agreement emerges when one distinguishes what the positivist and realist theorists claimed and *did not claim*, and what the doctrine does and *does not* (always) *do*. English positivists did not argue that vested rights doctrine is impossible or unlawful in principle, only that it is inconsistent with the legal systems they described, in which legislative sovereignty is a foundational constitutional commitment. And realists did not claim that law-abiding citizens, legislators, executive officials, and judges cannot or do not understand themselves to be bound to respect vested private rights, only that many citizens, officials, and judges are motivated by other concerns.

On the practice side, the doctrine of vested rights does not necessarily entail judicial review or judicial supremacy. It does not always prohibit legislators from changing laws retroactively or retrospectively. And vested rights do not always impose an absolute duty upon duty-bearers. Vested private rights often perform less ambitious tasks.

The theorists and practitioners disagree about the existence or efficacy of vested rights in the strongest possible sense, as

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3. Neil Duxbury, *Ex Post Facto Law*, 58 AM. J. JURIS. 135, 142 (2013).

4. CHARLES L. SIEMON & WENDY U. LARSEN WITH DOUGLAS R. PORTER, *VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS* iii (1982).

rights that bind persons conclusively and that cannot be altered by subsequent legislation. Yet even this disagreement reveals an implicit *agreement* about what the strongest—most central or focal—sense of vested private right *is*. Theorists and practitioners seem to agree that any vested private right worthy of the name must possess two essential characteristics. For reasons explained below, I call these essential features “*personal directiveness*” and “*public indefeasibility*.” A legal right that possesses both of these features in the fullest measure is a vested private right in the most complete or meaningful sense. Following jurisprudential thinkers from Aristotle to H.L.A. Hart to John Finnis, I call these rights *central instances* of the reality of vested private rights, and I call the concept that corresponds to a central instance the *focal meaning* of the idea of vested private rights.<sup>5</sup> A central instance of a vested private right found in legal practice most closely resembles the focal meaning of the concept of vested private right; the focal meaning of vested private right is the form or ideal type of the strongest and most effective vested private rights that are found in practice.<sup>6</sup>

Just as there are central instances, there are penumbral (not in the center but close to it), peripheral (more distant from the center, at the edge of the penumbra), and even defective (outside the penumbra) instances. And just as there is a focal meaning, there are less-focal, muddled, and even mistaken or wrong meanings. Between the center and the periphery lie various radiating spectra. Thus, if one has an adequate focal meaning of vested private right then one need not think of the existence of vested private rights in a binary, either-or fashion. Some rights might be more or less personally directive, and thus more or less like private rights. Others might be less or more defeasible, and thus more or less vested.

This study reveals coherence in the idea of the vested private right as a norm that imposes a conclusive duty upon a duty-

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5. See Aristotle’s mechanism for distinguishing between central friendships and friendships of utility in ARISTOTLE, *NICOMACHEAN ETHICS* bk. VIII.4 (c. 384 B.C.E.), and John Finnis’s translation of Aristotle’s terminology and interpretation of his method in JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 9–11 (2d. ed. 2011). See also H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 607–15 (1958).

6. On the importance and efficacy of central case and focal meaning in the study of law, see generally FINNIS, *supra* note 5, at 3–22.

bearer or class of duty-bearers<sup>7</sup> and which constrains powers to recognize, change, or adjudicate private rights and duties.<sup>8</sup> Central instances of this norm are rare. This accounts for theoretical skepticism of the concept. Yet less-central instances of vested rights are rather common. This accounts for the practical appeal of the doctrine itself. One can thus distinguish weak senses and peripheral instances of vested private rights, which are not as conceptually interesting but are nevertheless significant for the practice of law, from strong senses and central instances, which are rare in practice but theoretically interesting and important. This framework preserves the valuable insights of theory and the valuable utility of vested rights in practice, while not claiming too much for either. This way of understanding the doctrine might also open new lines of inquiry about the senses in which different private rights are and are not rights, and the senses in which they are and are not vested.

After this Introduction, this article proceeds in three additional parts. Part II briefly traces the history and development of the doctrine of vested private rights for the purpose of clarifying its contours. Part III examines and critiques theoretical challenges to the doctrine with particular emphasis on the early English positivism of Jeremy Bentham and John Austin and the American legal realist movement. Part IV draws lessons from Parts II and III to propose a focal meaning of the concept of vested private rights and illustrates each of its two essential features.

A note about terminology: I follow here what has become conventional terminology in jurisprudence scholarship,<sup>9</sup> but not uniformly in law or legal scholarship,<sup>10</sup> terming as “retro-

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7. In Hart’s influential theory of law, these duties arise out of what Hart called primary rules, which concern the obligations of law. See H.L.A. HART, *THE CONCEPT OF LAW* 91 (3d ed. 2012).

8. In Hart’s account, these powers arise out of what Hart called secondary rules, which concern the powers to recognize as valid, change, or adjudicate the primary rules, those rules that create obligations. See *id.* at 94. Though the discussion here concerns rights and duties, rather than rules, I follow Hart’s taxonomy of powers.

9. See Duxbury, *supra* note 3, at 136–37.

10. Among law professors, it is “standard practice” to use the terms “retrospective” and “retroactive” interchangeably. James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 *CORNELL L. REV.* 87, 102 n.51 (1993).

spective" those laws which alter a right or duty after it is settled and specified, and as "retroactive" those laws that impose or increase criminal sanction for an action after the action has been committed. This Article concerns retrospective laws, though derivatively, insofar as the maxim opposing retrospectivity rests upon, and applies only to, private rights that are vested.

## I. EVOLUTION OF THE BASIC CONSTITUTIONAL DOCTRINE

### A. A (Short) History of What It Is

The doctrine of vested private rights is generally viewed as an American phenomenon of largely historical interest. The concept of vested private rights as a check on legislative sovereignty came into full flower on American soil at the time of the Revolution.<sup>11</sup> It is difficult to understand the complaints against Parliament enumerated in the Declaration of Independence unless one conceives of constitutional limitations on Parliamentary supremacy. And the notion of limits on legislative power extended to the framing of American constitutions, including, according to some, the United States Constitution of 1787–89.<sup>12</sup> For example, James Madison characterized the Ex Post Facto Clauses of Article I as constitutional bulwarks against encroachment upon both personal security and "private rights."<sup>13</sup>

For a century after the Founding, American scholars and jurists identified vested rights doctrine as basal to American law

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11. See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1699–703 (2012); Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 780–82 (1936); Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1441–42 (1999). The revolutionary debates were framed in part by Parliament's then-recent divestment of the rights of John Wilkes and the East India Company without due process of law. See Chapman & McConnell, *supra*, at 1694–99.

12. THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 357–413 (1868) (arguing at length that due process and law of the land clauses were framed to prohibit the disturbance of vested rights).

13. THE FEDERALIST NO. 44, at 277–79 (James Madison) (Henry Cabot Lodge ed., 1888). Cooley also suggested that the "natural and obvious meaning of the term *ex post facto*" includes not only criminalization of an act after its commission but also retrospective legislation. COOLEY, *supra* note 12, at 264.

and made categorical statements about the limits that it placed upon legislative power to enact retrospective statutes.<sup>14</sup> Joseph Story stated the view, "Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact."<sup>15</sup> And so, in Story's interpretation of American constitutionalism, "no State government can be presumed to possess the transcendental sovereignty to take away vested rights of property."<sup>16</sup>

Although the doctrine of vested private rights specifically is distinctly American, the idea of rights as constraints upon government power is not. The notion of law as an antecedent source of obligations upon officials, which legislators and judges declare and do not generate, has deep roots in the common law.<sup>17</sup> The origins of rights against the sovereign can be traced back to both English common law and the unwritten constitution of British North America.<sup>18</sup> And the sources of those rights are distinctively English: "custom, ownership, inheritance, contract, and reason."<sup>19</sup> The existence of such rights does not depend upon the written charters and judicial opinions in which they are declared; they are part of the unwritten law, discovered and not commanded by judicial and political officials.<sup>20</sup> As Gordon Wood explains, American colonists inherited the English idea of democratic self-government as a means to secure rights and privileges.<sup>21</sup> They also shared the English eagerness to obtain from their rulers written recognition of their rights

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14. See Kainen, *supra* note 10, at 103; see also COOLEY, *supra* note 12, at 357–59; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 319 (2d ed., Halsted 1832); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1398–99, at 272–74 (5th ed. 1891).

15. 2 STORY, *supra* note 14, § 1398, at 272.

16. *Id.* § 1399, at 273.

17. See PHILIP HAMBURGER, LAW AND JUDICIAL DUTY xiii–xiv (2008); ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 175–202 (1966).

18. See 1 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 9–11 (1986); JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 4 (2003); Smead, *supra* note 11, at 780.

19. 4 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF LAW 114 (1993).

20. Wood, *supra* note 11, at 1423–24.

21. *Id.* at 1426–27.



and privileges, which of course was grounded in the historical experiences of Magna Carta and the English Bill of Rights.<sup>22</sup> Yet written charters were not understood to create the rights, but rather to settle and specify them—"to reduce to a certainty the rights and privileges we were entitled to," as one colonist expressed it.<sup>23</sup>

In English history, of course, the threats to liberty have primarily come from the crown. And thus at least since the Cromwellian and Glorious Revolutions, Parliament has been viewed as the guardian of, not a threat to, rights and liberties.<sup>24</sup> As the Declaration of Independence illustrates, Americans at the time of the Founding had a very different experience of Parliament's powers than their English counterparts.<sup>25</sup> American lawyers adopted the common law canon of charitable construction that a statute should not be read to divest vested rights unless the plain language of the statute made the divesting interpretation unavoidable.<sup>26</sup> Yet, following Coke's suggestion that the maxim reflected something inherent in the nature of law itself—a requirement of justice—American lawyers held retroactive and retrospective laws "to be oppressive and unjust, and it was maintained that the essence of a law was that it be a rule for the future."<sup>27</sup>

The doctrine of vested private rights continued to occupy a prominent place in the foundation of American law long after the Founding. As late as 1914, Edward Corwin described the "Doctrine of Vested Rights" as "*the* underlying doctrine of American Constitutional Law."<sup>28</sup> Indeed, as between vested rights and the police powers, Corwin argued that vested rights was the more basic doctrine.<sup>29</sup> And in 1936, Dartmouth Professor Elmer Smead referred to the more general maxim against

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22. *Id.* at 1427.

23. *Id.*

24. *Id.* at 1425–26.

25. And the philosophical and political assumptions shared by lawyers in colonial America and the early Republic were more amenable to thinking of rights as limitations on legislative power. *See id.* at 1427–35.

26. *See Smead, supra* note 11, at 780–81.

27. *Id.* at 780.

28. Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 255 (1914) (emphasis added).

29. *See id.*

retroactive and retrospective legislation as a “basic principle of jurisprudence.”<sup>30</sup>

Of course, *Calder v. Bull*<sup>31</sup> looms large over the subject. Yet while the *Calder* Court interpreted the Ex Post Facto Clause of Article I, Section 10 of the United States Constitution to apply only to retroactive criminal laws, the ruling did not endorse state legislative supremacy.<sup>32</sup> Assuming that *Calder* was rightly decided (a question of persistent controversy),<sup>33</sup> it is not obviously read for the proposition that private rights may be abrogated in the exercise of legislative sovereignty.<sup>34</sup> It was enough for the *Calder* Court to hold that the Ex Post Facto Clauses of the Constitution of the United States do not reach the matter because the states did not delegate to the federal government powers to secure private rights.<sup>35</sup> Except for the impairment of contracts, the power to discern the boundaries between vested rights and lawful retrospective laws was reserved to the states.<sup>36</sup>

That interpretation of *Calder*, later maintained by Thomas M. Cooley<sup>37</sup> and Corwin,<sup>38</sup> was put to the test in 1814. Sitting as a

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30. Smead, *supra* note 11.

31. 3 U.S. (3 Dall.) 386 (1798).

32. See Smead, *supra* note 11, at 791.

33. See, e.g., *E. Enters. v. Apfel* 524 U.S. 498, 538–39 (1998) (Thomas, J., concurring); *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 416 (1829) (Johnson, J., concurring); Corwin, *supra* note 28, at 249; Smead, *supra* note 11, at 791.

34. Writing for the Court, Justice Chase would not “subscribe to the omnipotence of a state legislature” over private law. *Calder*, 3 U.S. (3 Dall.) at 387–88. Indeed, to maintain that a state legislature may “violate the right of an antecedent lawful private contract; or the right of private property” would be a “political heresy.” *Id.* at 388–89.

35. See *id.* at 386–87; Kainen, *supra* note 10, at 106–07. Alternatively, the holding might rest upon the premise that the act of the Connecticut legislature ordering the probate court to grant Bull a new hearing did divest Calder and his wife of a vested private right. Justice Chase observed that the legislation did not “revise and correct” the original judgment. *Calder*, 3 U.S. (3 Dall.) at 387. Nor did the disallowance of Morrison’s will necessarily entail that Calder and his wife were the sole and rightful heirs. Justice Chase explained that “a right . . . only to recover property cannot be called a perfect and exclusive right. I cannot agree, that a right to property vested in Calder and wife, in consequence of the decree (of the 21st. of March 1783) disapproving of the will of Morrison, the Grandson.” *Id.* at 394. For, he explains, “the decree against the will (21st. March 1783) did not vest in or transfer any property to” Calder and his wife. *Id.*

36. See 2 STORY, *supra* note 14, § 1398, at 272.

37. See COOLEY, *supra* note 12, at 169–73.

Circuit Justice, Joseph Story affirmed and adhered to the doctrine of vested private right as a matter of state constitutional law in a case that presented a question of "delicacy and embarrassment."<sup>39</sup> Justice Story regarded it as an "unwelcome task" to "call in question the constitutionality of" a New Hampshire statute that awarded a tenant who was wrongfully in possession the value of improvements he made during his possession.<sup>40</sup> Justice Story noted that, according to the *Calder* ruling, the Ex Post Facto Clauses of the United States Constitution apply "only to laws, which render an act punishable in a manner, in which it was not punishable, when it was committed."<sup>41</sup> Nevertheless, the New Hampshire Constitution prohibited the making of "retrospective laws . . . either for the decision of civil causes or the punishment of offences."<sup>42</sup>

In interpreting the term "retrospective," Justice Story concluded that it must include not only laws that take effect prior to passage, but also "all statutes, which, though operating only from their passage, affect vested rights and past transactions."<sup>43</sup> He reasoned, "Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective; and this doctrine seems fully supported by authorities."<sup>44</sup> For this principle he cited *Calder v. Bull*.<sup>45</sup> Writing for the court, Justice Story held that the New Hampshire statute was unconstitutional because it "confers an absolute right to compensation on one side, and a corresponding liability on the other, if the party would enforce his previously vested title to the land."<sup>46</sup> The statute thus effected "a direct extinguishment of a vested right in all the improve-

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38. For a discussion of Cooley's interpretation, see Corwin, *supra* note 28, at 250-52.

39. *Soc'y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 766 (C.C.D.N.H. 1814) (No. 13,156).

40. *Id.*

41. *Id.* at 767.

42. *Id.* (quoting N.H. CONST. of 1784, pt. I, art. XXIII).

43. *Id.*

44. *Id.*

45. *See id.*

46. *Id.* at 768.

ments and erections on the land, which were annexed to the freehold."<sup>47</sup>

Other state constitutions were held to protect vested rights against subsequent alteration and abrogation.<sup>48</sup> A state legislature could not retrospectively expand an adverse possessor's claim against the original owner to include a portion of a tract that he did not physically possess or improve where the adverse possessor did not act under color of title.<sup>49</sup> The common law recognized only actual adverse possession, rather than constructive possession of the whole tract, without color of title.<sup>50</sup> The retrospective reach of the statute infringed a state constitutional provision declaring the right of "acquiring, possessing, and protecting property," and a state constitutional takings clause.<sup>51</sup>

By the same logic, constitutional protections for vested rights did not always protect unvested expectations, statutory privileges and other beneficial results of state action, or posited privileges that were contrary to natural law, such as the privilege to own a slave.<sup>52</sup> For example, where a claimant had been conveyed title by a special statute, repeal of the statute did not divest the claimant of a vested private right.<sup>53</sup> The court reasoned that the statute was "repealed by the same authority which enacted it, and therefore the plaintiff's title cannot be assisted thereby."<sup>54</sup> These cases, and others like them,<sup>55</sup> illustrate that vested rights and duties were often understood to be settled and specified by some pre-political source of authori-

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47. *Id.*

48. *See, e.g., Spachius v. Spachius*, 16 N.J.L. 172 (1837).

49. *See Proprietors of Kennebec Purchase v. Laboree*, 2 Me. 275, 278 (1823).

50. *See id.* at 287-88.

51. *Id.* at 290-91.

52. *See, e.g., Griffin v. Potter*, 14 Wend. 209 (N.Y. Sup. Ct. 1835). *But compare* *Buckner v. Street*, 4 F. Cas. 578 (E.D. Ark. 1871) (No. 2,098) (decided under the Thirteenth Amendment), *with Fisher's Negroes v. Dabbs*, 14 Tenn. 119 (1834) (decided under the Tennessee Constitution).

53. *See Austin v. Trs. of Univ. of Pa.*, 1 Yeates 260 (Pa. 1793).

54. *Id.* at 261.

55. *Compare Berdan v. Van Riper*, 16 N.J.L. 7, 10-11 (1837) (vested right in joint tenancy created by grant before statute enacted altering rule for creation of a joint tenancy) *with In re Anthony Street*, 20 Wend. 618 (N.Y. Sup. Ct. 1839) (no vested right in damages for expectation that land would be taken for laying out of public street).

ty—customary law, private ordering, natural law, natural rights, and equity—or by the political commonwealth exercising dominion as landowner over its own lands.<sup>56</sup>

For more than a century after *Calder*, the Supreme Court of the United States perceived constitutional protections for vested rights in clauses of the United States Constitution other than the Ex Post Facto Clauses.<sup>57</sup> Legislative limitations on private rights were construed so as not to abrogate them.<sup>58</sup> And natural property rights notions provided coherent, if not thoroughly originalist, bases for a workable regulatory takings doctrine.<sup>59</sup> The maxim against retrospectivity, resting upon the doctrine of vested private rights, was “the primary organizing idea”<sup>60</sup> in constitutional rights protection before the substantive due process era that commenced with *Lochner v. New York*.<sup>61</sup>

*Lochner* initiated a much more sweeping limitation upon democratic self-governance than the earlier vested rights doctrine.<sup>62</sup> And as *Lochner* was left behind in the march of the Court’s twentieth-century rights jurisprudence, economic rights were as well. Since the legal realist revolution (about which more is said below) and the New Deal, impairments of vested rights have been allowed on varying standards of reasonableness.<sup>63</sup> This more recent jurisprudence overturned not just the judicial activism and libertarianism of *Lochner* but also much common law and fundamental constitutional doctrine with it.<sup>64</sup>

56. See, e.g., *Union Canal Co. v. Landis*, 9 Watts 228 (Pa. 1840).

57. See Smead, *supra* note 11, at 792–97; Kainen, *supra* note 10, at 102–08; see also *Coombes v. Getz*, 285 U.S. 434, 441–45 (1932); *Tr. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 640–44 (1819); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 49–51 (1815).

58. See *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420, 547–50 (1837).

59. See Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1566–73 (2003).

60. Kainen, *supra* note 10, at 88–89.

61. 198 U.S. 45 (1905).

62. See Kainen, *supra* note 10.

63. See, e.g., *Energy Reserves Grp. v. Kan. Power & Light*, 459 U.S. 400, 413–17 (1983); *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 445–48 (1934).

64. Though vested private rights are often mistakenly associated with *Lochner*, see, e.g., *Honeywell Inc. v. Minn. Life and Health Ins. Guar. Ass’n*, 110 F.3d 547, 554–55 (8th Cir. 1997), the concept of vested private rights was not invented by

Yet, as demonstrated below, the idea did not go away that some rights are beyond the competency of legislative powers to alter or abrogate. The idea remains in law, though not in a comprehensive or even doctrinally coherent way. The Supreme Court of the United States has in recent decades employed realist language in its retrospectivity jurisprudence, leaving to the “sound instincts” of judges the question whether any particular right claim is sufficiently grounded in “settled expectations” to qualify as vested,<sup>65</sup> but it treats certain rights as vested for other purposes, such as establishing expropriation liability under the Takings Clause of the Fifth Amendment.<sup>66</sup> The doctrine continues to bear weight in private law and in state constitutional law. Meanwhile, many new rights have been announced by courts of last resort, which perform the same work that vested rights were understood to do in early decades. These generally arise out of the doctrine of substantive due process, which is grounded in radically different principles than the maxim against retroactivity and retrospectivity.<sup>67</sup>

### B. *What It Is Not*

That short history of the doctrine must be sufficient for present purposes. Some words are now in order about what the doctrine of vested private rights does *not* necessarily mean. Of course the doctrine carries with it certain historical, political, and linguistic baggage, which cannot be avoided altogether. But I hope to set aside at least some of that baggage to better reveal the doctrine itself. I leave to the reader to determine how much of it must be picked up again at the end of the Article.

First, and it might seem most obviously, the doctrine of vested private rights concerns only *private* rights. In an informative study, Ann Woolhandler has shown the importance of the distinction between private rights and public rights during the

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activists during the *Lochner* era and does not depend upon a classical liberal theory of economics or constitutionalism. See Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993); Kainen, *supra* note 10, at 132–33.

65. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269–70 (1994).

66. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019–20 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35, 438, 441 (1982).

67. See Kainen, *supra* note 10, at 111–12.

pre-New Deal era when the doctrine of vested private rights enjoyed its greatest prestige.<sup>68</sup> In that period, the doctrine reached only private rights. Woolhandler associates those with what the jurists called the absolute rights of individuals—life, liberty of movement, and property—which persons would enjoy in a state of nature, plus rights to the enforcement of contracts.<sup>69</sup> The doctrine did not secure against retrospective alteration of public rights, which included the government’s own proprietary rights, delegated government power, and statutorily-created privileges.<sup>70</sup>

One might draw the line between public and private rights in a slightly different place,<sup>71</sup> but the basic distinction itself seems to explain quite a lot about how the doctrine worked in practice before the *Lochner* era and the New Deal.<sup>72</sup> And the distinction is firmly grounded in common law jurisprudence. Though the doctrine of vested private rights imbued it with novel significance,<sup>73</sup> the public-private distinction was not an American innovation. Blackstone divided the third and fourth volumes of his *Commentaries* into discussions “Of Private Wrongs” and “Of Public Wrongs.”<sup>74</sup> He took pains to communicate that common law rights and duties could be classified along that cleavage, for each wrong corresponds to and contrasts with the right it abridges, and consists in a violation of a duty not to commit the wrong.<sup>75</sup> Thus:

Wrongs are divisible into two sorts or species; *private wrongs*, and *public wrongs*. The former are an infringement or priva-

68. See Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1023–29 (2006).

69. See *id.* at 1020–22, 1020 nn. 18–21.

70. See *id.* at 1027–36.

71. For common law jurists, the pre-political sources of rights and obligations included not just hypothetical states of nature but also custom, divine law, and natural law, which they viewed as real and meaningful foundations of law. See, e.g., 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*38–92; JOSEPH STORY, *A DISCOURSE PRONOUNCED UPON THE INAUGURATION OF THE AUTHOR AS DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY* 6–21 (Boston, Hilliard 1829).

72. See Woolhandler, *supra* note 68, at 1027–36.

73. See Wood, *supra* note 11, at 1426–33.

74. See John Finnis’s helpful explanation of Blackstone’s jurisprudence in 4 JOHN FINNIS, *PHILOSOPHY OF LAW: COLLECTED ESSAYS*, 189–210 (2011).

75. Blackstone defined a wrong as “being nothing else but a privation of right.” 3 BLACKSTONE, *supra* note 71, at \*2.

tion of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors*.<sup>76</sup>

Next, it is prudent to disavow any intention of taking sides on the debate between judicial sovereignty and legislative sovereignty. The nonretroactivity and nonretrospectivity principles are often treated as aspects or incidents of the separation between legislative and judicial powers.<sup>77</sup> Constraints on a legislature's competence are expressed as gains for the judiciary, and it is commonplace to assign vested rights doctrine to the judiciary's side of the ledger.<sup>78</sup> The doctrine of vested rights is thus perceived as antithetical to constitutional orders, such as England's, that have legislative sovereigns. Coke's maxim that right reason controls contrary acts of Parliament<sup>79</sup> has long been read through Blackstone's interpretation of Coke's decision as one of statutory interpretation to avoid a consequence not intended by Parliament<sup>80</sup> and his insistence that Parliament can abrogate even fundamental and absolute rights by stating its intention to do so expressly.<sup>81</sup> Yet this dichotomy is not strictly entailed in Parliamentary supremacy vis-à-vis the judiciary. The constitutional supremacy of reason, custom, and the

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76. *Id.*

77. *See, e.g.,* Woolhandler, *supra* note 68, at 1019.

78. *See, e.g.,* Corwin, *supra* note 28; Woolhandler, *supra* note 68.

79. "[W]hen an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void." SIR EDWARD COKE, *Dr. Bonham's Case*, in 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE, 275 (Steve Sheppard ed., 2003).

80. *See* 1 BLACKSTONE, *supra* note 71, at \*91.

81. *See id.* This framing as a Coke vs. Blackstone debate is typical:

The principle [prohibiting retroactive and retrospective legislation] in England took the form of a rule of construction. Believing that retroactive laws which affected past acts disadvantageously were unjust the common law courts declared that they would not give such a statute in general words a retrospective operation. Parliament, however, could make a statute specifically retroactive. Thus, the principle illustrates the well-known conflict between the Cokian doctrine of natural law and the Blackstonian doctrine of legislative sovereignty.

Smead, *supra* note 11, at 797.



duty of judges to maintain fidelity to superior law is more firmly grounded and deeply rooted than either Parliamentary sovereignty<sup>82</sup> or judicial review.<sup>83</sup> As Arthur Hogue reminded us, “[l]egislative sovereignty is a modern invention; the legal historian must set aside many modern ideas while working back to the foundation years of the common law.”<sup>84</sup>

In the American context, the notion of vested rights is often expressly coupled with judicial review. Edward Corwin made this connection.<sup>85</sup> Another scholar argued that “the absence of the rule of legislative sovereignty and the presence of the institution of judicial review . . . were essential to the development” of vested rights doctrine.<sup>86</sup> Yet the doctrine does not necessarily entail the power of judicial review that Corwin asserted, much less judicial supremacy. Professor Philip Hamburger has found evidence “not of a power of judicial review, but of a duty of judges to decide in accord with the law of the land.”<sup>87</sup> Indeed, vested rights were part of American jurisprudence long before the concept of judicial review.<sup>88</sup> Cases articulating the modern

82. Compare T.R.S. ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* (2001) (arguing that, because ordinary common law binds both private citizens and public officials, Parliamentary sovereignty is qualified), and J.G.A. POCKOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* (1987) (showing that seventeenth-century common law jurists viewed common law as permanent, reaching back to time immemorial), with JEFFREY GOLDSWORTHY, *PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES* (2010) (arguing that Parliament has unlimited legislative authority), and JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* (1999) (denying that Parliamentary sovereignty is created by and subordinated to common law), and Richard Ekins, *Judicial Supremacy and the Rule of Law*, 119 *Law Q. Rev.* 127 (2003). For a position that might be described as intermediate between the two, see R.H. HELMHOLZ, *NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE* 94–126 (2015) (explaining that common law jurists viewed natural law as partly indeterminate, requiring legislative specification, but that judges also had a duty not to discern a legislative intent contrary to reason).

83. See HAMBURGER, *supra* note 17.

84. HOGUE, *supra* note 17, at 193.

85. Corwin, *supra* note 28, at 275; see also EDWARD S. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW: ITS LEGAL AND HISTORICAL BASIS AND OTHER ESSAYS*, 10–18 (1914).

86. Smead, *supra* note 11, at 781.

87. HAMBURGER, *supra* note 17, at 2.

88. As Matthew Franck has shown, it was Corwin who first gave “judicial review” its name and doctrinal justification. See Matthew J. Franck, *Edward S. Corwin*

view of judicial *supremacy* came later still.<sup>89</sup> Corwin's own scholarship on vested rights did not entail judicial supremacy. To the extent that protection of vested rights against legislative encroachment involved adjudication, he maintained, judges did not become moral philosophers. Instead, natural and other vested private rights were understood to be defined according to their common law contours.<sup>90</sup>

One can perceive (and jurists have perceived) the existence of vested rights without affirming the power of judicial review,<sup>91</sup> and one might not perceive them without being a legislative supremacist.<sup>92</sup> Coke did not invoke what we would today recognize as a concept of vested private rights, even as he struck down an act of Parliament as contrary to reason.<sup>93</sup> On the other hand, Blackstone expressed the view that at least some rights and duties are beyond the competence of human lawmakers to alter,<sup>94</sup> even as he argued that "what the parliament doth, no authority upon earth can undo."<sup>95</sup> The point is

*win and the Emergence of "Judicial Review,"* in *THE DOCTRINE OF JUDICIAL REVIEW: ITS LEGAL AND HISTORICAL BASIS AND OTHER ESSAYS* (Transaction Press ed., 2014).

89. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (noting that "courts retain the power . . . to determine if Congress has exceeded its authority under the Constitution"); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (stating that "the federal judiciary is supreme in the exposition of the law of the Constitution").

90. Corwin, *supra* note 28, at 254.

91. See, e.g., *Williams v. Register of W. Tenn.*, 3 Tenn. 214, 217–18 (1812) (holding that claimant had been deprived of vested property right in violation of state constitution but that legislature had not given judiciary power to remedy the deprivation).

92. See the discussion of legal realism in Part III.C, *infra*.

93. 1 COKE, *supra* note 79, at 275.

94. 1 BLACKSTONE, *supra* note 71, at \*41–44.

95. *Id.* at \*161. Blackstone also argued that the unwritten, customary law is entitled to deference and that legislation is prone to mischief:

The mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question; and how far they have been owing to the defective education of our senators, is a point well worthy the public attention. The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity exchanged, for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays, (which have sometimes disgraced the English, as well as other courts of justice,) owe their original not to the common law

that vested rights can operate as binding norms upon the deliberations of both legislators and judges. Vested rights doctrine gives rise to a conflict between rights and retrospective laws, not between legislative powers and judicial powers.<sup>96</sup> At least where there exists a written constitution, the dichotomy between legislative and judicial supremacy is more problematic; written constitutions can be amended to overrule both legislation and judicial decisions.

That vested rights can alone influence and even direct legislative deliberation and decision-making, without any consideration of judicial review, is illustrated by the fact that legislatures treat some rights as vested regardless of how those rights have been characterized in adjudication. A striking example is found in Congressional deliberations concerning private patent-term restoration statutes for veterans who served overseas during their patent terms and were thus deprived of opportunity to benefit financially from their inventions. Proponents of term extension argued that extending the patent term was really a restoration of patent rights promised to the patent owners that they did not receive.<sup>97</sup> Though the term "vested right" was not used, this argument appealed to the public obligation to secure to veterans the rights that they were promised when issued their patents.<sup>98</sup>

For an American audience, one must bracket debates about the meaning of the Due Process Clauses, and particularly the merits of substantive due process doctrine. Different accounts

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itself, but to innovations that have been made in it by acts of parliament, "overladen (as Sir Edward Coke expresses it) with provisoes and additions, and many times on a sudden penned or corrected by men of none or very little judgment in law."

*Id.* at \*10.

96. Richard Helmholz observed that, for common lawyers, the apparent inconsistency between Parliamentary supremacy and natural law would not have been viewed as a source of conflict between courts and legislature but rather as a clash "between the law of nature and the powers of both Parliament and the royal courts. . . . Both were bound by the laws of nature." HELMHOLZ, *supra* note 82, at 120.

97. See Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYRIGHT SOC'Y U.S.A. 19, 54-55 (2001).

98. See Erika Lietzan, *An Invitation to Further Patent Reform: The Case for Reconsidering Section 156 of the Patent Act*, 25 GEO. MASON L. REV. (forthcoming 2018) (on file with author).

of due process might be more<sup>99</sup> or less<sup>100</sup> compatible with a vested-rights reading of the Due Process Clauses. The doctrine of vested rights itself, however, does not depend upon any particular conception of due process, or even a Due Process Clause at all.<sup>101</sup> Before the invention of substantive due process, vested rights doctrine was the constitutional basis for distinguishing valid from invalid retrospective legislation.<sup>102</sup> Legislation could validly abrogate expectancies and unvested interests, and could alter or supply remedies, but could not alter vested rights.<sup>103</sup>

If some rights are vested, then they are reasons for action from the internal point of view of legislators, just as they are for judges and citizens.<sup>104</sup> As James Ely has observed, Blackstone's "analysis of the fundamental rights secured by the 'law of the land' only makes sense if binding on Parliament."<sup>105</sup> Legislators can understand themselves to have strong reasons for fidelity to laws that are not reducible to what judges say.<sup>106</sup> Who has

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99. See generally COOLEY, *supra* note 12, at 351–59; James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315 (1999); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585 (2009); Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305 (1988); Ryan C. Williams, *The One and Only Substantive Due Process Clause* 120 YALE L.J. 408 (2010).

100. See generally Chapman & McConnell, *supra* note 11; Matthew J. Franck, *What Happened to the Due Process Clause in the Dred Scott Case? The Continuing Confusion over "Substance" versus "Process,"* 4 AM. POL. THOUGHT 120 (2015).

101. See, e.g., Chapman & McConnell, *supra* note 11, at 1680 ("We emphasize that our argument here is confined only to the Due Process Clauses. . . . We take no position here on whether other provisions of the Constitution . . . empower courts to engage in . . . the judicial recognition of rights originating in something other than positive law, in the teeth of legislative enactments to the contrary."). But see *id.* at 1725–26; Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?*, 5 N.Y.U. J.L. & LIBERTY 1 (2010); Michael W. McConnell, *Ways to Think About Unenumerated Rights*, 2013 U. ILL. L. REV. 1985, 1993–94.

102. See Kainen, *supra* note 10, at 102–23.

103. See COOLEY, *supra* note 12, at 357–64; Kainen, *supra* note 10 at 89.

104. See *Williams v. Register of W. Tenn.*, 3 Tenn. 214, 217 (1812) ("The obligation contracted by the State, to issue a grant, or grants, to Dillon, or his assignee, we have no doubt the State is morally bound to comply with.").

105. Ely, *supra* note 99, at 323.

106. McConnell notes that the natural law was "binding on Parliament itself." McConnell, *Natural Rights and the Ninth Amendment*, *supra* note 101, at 21.

the ultimate authority to decide when a citizen or the legislature has transgressed vested rights, and what remedies are available for those transgressions, are questions that can be bracketed. The object here is to make the concept of vested private rights intelligible, and to explain why it might be considered a source of power and obligation for judicial officers, legislators, and citizens alike, while also accounting for rules and institutions of legal change.

This Article is not about natural rights *per se*, and skepticism of natural rights should not be an obstacle to understanding the meaning of vested private rights. For one thing, the association between vested rights doctrine and natural law is not strictly necessary (though the association is commonly and sensibly made). All that is required for the doctrine to be coherent is *some* authority prior to and independent of the law-making sovereignty of government. That prior authority could be natural law, natural rights, or divine law. But it could also be customary law and other ancient traditions, or acts of private ordering such as contract formation and property conveyance. Vested rights doctrine has drawn upon all of these legal sources.

In particular, vested rights (and their correlative duties) should not be confused with *Lochner*-style natural abstract "rights." General liberties of property and contract, insofar as they are merely absences of legal duty, differ from vested rights (including vested liberties), which have been previously settled and specified to correlate with particular duties and to entail incidental rights and duties that mark out their normative contours. For example, one may have a vested liberty to continue to use one's land as one has used it in the past without committing a nuisance, but not a vested right to make any hypothetical use one might want to make of it in the future.

The difference between unvested (*Lochner*-esque) liberties and vested rights is one reason why facial challenges to regulatory burdens on private property invite less exacting judicial review than as-applied challenges. In *Village of Euclid v. Ambler Realty Co.*,<sup>107</sup> which yielded the Supreme Court's landmark decision approving zoning ordinances, the landowner had not yet

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107. 272 U.S. 365, 384–85 (1926).

chosen any particular uses for his land and brought a facial challenge to the constitutionality of the ordinance as a whole. In as-applied challenges by land users who have been deprived or burdened in the exercise of particular uses of land, the more exacting review of *Nectow v. City of Cambridge*<sup>108</sup> is called for. "Although a zoning ordinance may be valid in its general aspects, it may nevertheless be invalid as applied to particular piece of property or a particular set of facts."<sup>109</sup>

## II. THEORETICAL CHALLENGES AND THEIR LIMITATIONS

### A. *English Positivism*

The objections of early positivists are now familiar: If a right is said to be vested because it imposes a constitutional duty upon the lawmaking sovereign then the claimant is just confused. Because law consists of commands of the sovereign, there are no constitutional rights, only what Bentham called "concessions of privileges." The sovereign cannot be bound "who has the whole force of the political sanction at his disposal." From the sovereign's point of view, rights have normative force only insofar as he chooses to recognize them; "they are not laws."<sup>110</sup>

If one takes a more modest view and considers a vested right as a right that is present and attached to an ascertained person, then to call a right vested is tautological; all rights are present and attached to a person. The only meaningful distinction is between rights and expectations ("chances or possibilities of rights," in Austin's terms<sup>111</sup>), or between rights to present enjoyment, such as a possessory estate, and expectations of future

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108. 277 U.S. 183, 185, 188–89 (1928).

109. *Ziman v. Vill. of Glencoe*, 275 N.E.2d 168, 171 (Ill. App. Ct. 1971) (citing *People ex rel. Joseph Lumber Co. v. City of Chi.*, 83 N.E.2d 592 (Ill. 1949)). See generally Adam J. MacLeod, *Identifying Values in Land Use Regulation*, 101 KY. L.J. 55 (2012); Ahira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717 (2008).

110. JEREMY BENTHAM, *Of Laws in General*, in THE COLLECTED WORKS OF JEREMY BENTHAM 1, 16 (H.L.A. Hart & J.H. Burns eds., 1970).

111. 2 JOHN AUSTIN, *LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW* 857 (R. Campbell ed., 5th ed. 1885).

enjoyment, such as a remainder.<sup>112</sup> The normative statement that a legislature should not deprive parties of vested rights is really a statement that those rights are inviolable against legislative sovereignty, a contention that Austin thought was false. All laws are justified on the basis of general utility, and non-vested rights are those the sovereign has determined should be abrogated in service to utility.

The collapse of Austin's conceptual critique of vested rights into a descriptive declaration of parliamentary sovereignty should not be attributed to sloppiness on Austin's part, but understood as an entailment of Austin's commitment that posited law is the only law worthy of the name.<sup>113</sup> If all laws are positive laws, and all positive laws are commands of the sovereign who possesses legislative power, then the retrospectivity of laws is, to put it colloquially, not a bug but a feature. The same would hold if laws result from judicial discretion. Austin ridiculed as a "childish fiction" the common law idea that adjudication involves declaring law rather than making it.<sup>114</sup>

Yet Austin's project was descriptive and his rejection of vested rights is not necessarily entailed in his positivism. An autonomous legal system *can* have vested rights; legislative supremacy is not universal among legal systems. Legislative sovereignty and judicial discretion are in various times and places constrained or limited in such a way that private rights are treated as vested.<sup>115</sup> To the extent that Austin's conceptual critique depends on the fact of parliamentary sovereignty, it cannot be universalized.<sup>116</sup>

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112. See THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 121–22 (2d ed. 2012).

113. Contrast the common law jurists who identified unwritten and as-yet undeclared law as law. John Selden: "All the law you can name, that deserves the name of law, is reduced to these 2: it is either ascertained by custom or confirmed by act of parliament." POCOCK, *supra* note 82, at 296. Blackstone: "The municipal law of England . . . may with sufficient propriety be divided into two kinds: the *lex non scripta*, the unwritten, or common law; and the *lex scripta*, the written, or statute law." 1 BLACKSTONE, *supra* note 71, at \*63.

114. AUSTIN, *supra* note 111, at 634.

115. See generally Wood, *supra* note 11; see also Kainen, *supra* note 10, at 102–11.

116. There are also practical difficulties with a strong, normative positivism. One is that by denying the lawful authority of rights from the perspective of the legislating sovereign, a strong positivist account undermines the security and stability of rights from the perspective of right holders. See Jeremy Paul, *The Hid-*

More recent positivist theories allow for the coherence of the concept of vested rights. What Hart called the "social sources of the law" include more than mere commands of the sovereign legislator.<sup>117</sup> Thus, it is theoretically possible that a right settled and specified by (for example) customary law would, under a rule of recognition, be accorded greater weight than a later, conflicting rule promulgated by a legislator or declared by a court. So long as at least one authority exists prior to and independent of the current legislative and judicial powers, vested rights are possible.<sup>118</sup>

Indeed, right claims constraining official action are asserted today in courts throughout the British Commonwealth, though they are typically grounded in either posited sources, such as written charters, or more abstract principles, such as personal autonomy. Customary rights and property rights have lost much of their efficacy. For example, the common law rule required the expropriator of property rights to pay just compensation.<sup>119</sup> That rule is now considered anachronistic except where preserved by statute.<sup>120</sup> Meanwhile, more novel rights have assumed the ambition to place limitations on legislative power in the United Kingdom and elsewhere in the Common-

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*den Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1411 (1991). Daniel Webster expressed this problem dramatically in 1829. "If at this period there is not a general restraint on legislatures, in favour of private rights, there is an end to private property." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 646 (1829); see also 2 STORY, *supra* note 14, § 1399, at 273 ("That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon a legislative body, without any restraint.").

117. HART, *supra* note 7, at 269.

118. Nevertheless, for Hart rights and duties remain within the system of positive law itself. "[L]egal rights and duties are the point at which the law with its coercive resources respectively protects individual freedom and restricts it or confers on individuals or denies to them the power to avail themselves of the law's coercive machinery." *Id.*

119. See *Sinnickson v. Johnson*, 17 N.J.L. 129, 153 (1839); *People v. Platt*, 17 Johns. 195, 215–16 (N.Y. Sup. Ct. 1819); *Gardner v. Newburgh*, 2 Johns. Ch. 162, 165–66 (N.Y. Ch. 1816); *Manitoba Fisheries Ltd. v. The Queen* (1978), [1979] 1 S.C.R. 101, 118 (Can.); *Att'y Gen. v. De Keyser's Royal Hotel, Ltd.* [1920] AC 508 (HL) 514 (appeal taken from Eng.); 1 BLACKSTONE, *supra* note 71, at \*139.

120. See, e.g., *Mariner Real Estate Ltd. v. Nova Scotia* (Att'y Gen.) (1999), 177 D.L.R. 4th 696, para. 66 (Can. N.S. C.A.); *Steer Holdings Ltd. v. Manitoba*, [1992] 21 R.P.R. (2d) 298, 298 (Can. Man. Q.B.); *France Fenwick & Co. v. The King* [1927] 1 K.B. 458 at 465 (appeal taken from Eng.); TOM ALLEN, *THE RIGHT TO PROPERTY IN COMMONWEALTH CONSTITUTIONS* 162–200 (2000).



wealth, as courts entertain rights claims that have not been given recognition in positive law.<sup>121</sup> This development raises several challenges,<sup>122</sup> not least that judicial law-making is no less retrospective than legal change accomplished by a legislature.<sup>123</sup>

### B. *A Limiting Case: Free English Soil*

The law as practiced by lawyers routinely relies upon the distinction between vested and unvested rights for purposes other than limiting legislative power. Unvested future interests are subject to the Rule Against Perpetuities while future interests that have vested in interest (though not necessarily possession) are not.<sup>124</sup> And vested rights perform work in conflict of laws, such as where a right of recovery under the law of one state is enforced in the courts of another state.<sup>125</sup>

The implications of vesting for the powers of state sovereigns naturally varies according to constitutional structure. The English doctrine of parliamentary supremacy entails, *inter alia*, that Parliament has power to give its acts retrospective application by stating so expressly. Thus, in *West v. Gwynne*,<sup>126</sup> the Chancery Division ruled that a statute prohibiting landlords from exacting fines in consideration of consent to assign a lease annulled contrary lease covenants made before enactment; Parliament's manifest purpose was to interfere with lessors' existing rights.<sup>127</sup> The lessor's "right" to exact a fine was not a vested private right but merely a privilege that Parliament had power to terminate.<sup>128</sup>

121. One of these is the asserted right to receive medical assistance in suicide, which was not recognized by courts in the United Kingdom, see *Nicklinson v. Ministry of Justice* [2014] UKSC 38, [66], but was given constitutional recognition by the Supreme Court of Canada, see *Carter v. Canada* [2015] 1 S.C.R. 331 (Can.).

122. See generally GRÉGOIRE WEBBER, *THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS* (2009); *PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING* (Grant Huscroft et al. eds., 2014).

123. See Philip Sales & Richard Ekins, *Rights-Consistent Interpretation and the Human Rights Act 1998*, 127 L.Q.R. 217, 218–19 (2011).

124. THOMAS W. MERRILL & HENRY E. SMITH, *THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY* 110–13 (2010).

125. See *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201–02 (N.Y. 1918).

126. (1911) 2 Ch 1.

127. *Id.* at 13.

128. *Id.* at 4.

Yet Parliamentary sovereignty has limits. Statutes impairing private rights are presumed to be prospective only,<sup>129</sup> and vested rights limit the scope of new privileges created by statutes.<sup>130</sup> More broadly, the canon of charitable construction—which does not allow an attribution of unjust intention to Parliament absent clear language of such an intention—limits the exercise of power to change law insofar as it requires courts to avoid unjust interpretations of positive laws, even where the unjust result would be required by a literal reading of the enactment.<sup>131</sup> Parliament is not presumed to have abrogated inviolable rights and other conclusive norms of natural justice.<sup>132</sup>

Inviolable legal rights are known in English jurisprudence even alongside Parliamentary supremacy. They are found even in Blackstone's *Commentaries*, tempering and qualifying Blackstone's more-famous endorsement of Parliament's power to alter law by an express statement of intention. Not all of what Blackstone called the "absolute" rights of life and limb, liberty of movement, and property are inviolable in the strongest sense.<sup>133</sup> Rather, the inviolable rights are found among the rights and duties of the "superior" law, which "no human leg-

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129. *State Comm'n on Human Relations v. Amecon Div. of Litton Sys., Inc.*, 360 A.2d 1, 4 (Md. 1976); *Lauri v. Renad* [1892] 3 Ch 402 at 421.

130. *See Phillips v. Pembroke Real Estate, Inc.*, 819 N.E.2d 579, 584–85, 585 n.12 (Mass. 2004).

131. *See Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 49–62 (1911); *Pleak v. Entrada Prop. Owners' Ass'n*, 87 P.3d 831, 834–36 (Ariz. 2004); 1 BLACKSTONE *supra* note 71, at \*42, \*54, \*86–87, \*91, \*254.

132. *See HELMHOLZ, supra* note 82, at 116–17. So strong was the imperative to preserve the integrity of the Crown and Parliament's intention to do justice that judges were sometimes called upon to "construe statutes quite contrary to the letter." *Id.* at 116; *see also, e.g., Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889).

133. "Absolute rights" in Blackstone's account are liberties secured by the municipal law. Because the protection of municipal law is both a security and a substitute for natural liberty, extended in exchange for one's relinquishment of natural liberty when one enters society, the contours of the absolute rights are coterminous with the contours of the natural liberties in exchange for which they are created. 1 BLACKSTONE, *supra* note 71, at \*123–25; *see also* Hamburger, *supra* note 64. They are absolute, not in the sense of being pre-political and immutable, but rather because an individual cannot be deprived of them by the sovereign unless he has first been adjudicated to have committed some wrong act—generally, a crime—that entailed the forfeiture of one's liberties according to the law of the land. *See* 1 BLACKSTONE, *supra* note 71, at \*126.

islature has power to abridge or destroy, unless the owner shall himself commit some act that amounts to forfeiture."<sup>134</sup>

One such right that was widely discussed at the time of the American founding is the doctrine of free English soil.<sup>135</sup> Blackstone located it within both the superior law and the absolute rights of English civil law. He considered the doctrine in his discourse on the "Absolute Rights of Individuals"<sup>136</sup> in English common law, where he declaimed that the "spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and so far becomes a freeman."<sup>137</sup>

In the late eighteenth century, this emancipation right sat at the boundary between inviolable rights and legislative sovereignty. The problem of chattel slavery in the British Empire was a problem of the conflict between the laws of nature and the laws of man in certain colonies.<sup>138</sup> English common law did not recognize slavery because slavery was understood to be contrary to reason.<sup>139</sup> Yet the positive laws of England's American colonies and their Spanish colonial neighbors did recognize slavery by local custom and positive legislation. The inevitable conflict produced a well-known workaround and a lesser-known conceptual limitation on the power of legislatures to change law.

The landmark case is *Somerset v. Stewart*.<sup>140</sup> Stewart purchased Somerset as a slave in Virginia and later traveled to England with Somerset in his company. While in England, Somerset sought his freedom with the assistance of friends

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134. 1 BLACKSTONE, *supra* note 71, at \*5.

135. Like the inviolability of life today, free English soil was not always uncontroversial. Compare *Chamberlain v. Harvey* (1696) 91 Eng. Rep. 994; 1 LD. Raym. 146, and *Smith v. Gould* (1706) 92 Eng. Rep. 338; 2 LD. Raym 1275, with *Pearne v. Lisle* (1749) 27 Eng. Rep. 47; Amb. 76 (Ch.). But that the doctrine did not always enjoy universal assent does not prevent its being studied as a coherent legal doctrine.

136. 1 BLACKSTONE, *supra* note 71, at \*122.

137. *Id.* at \*127.

138. See generally JUSTIN BUCKLEY DYER, *NATURAL LAW AND THE ANTISLAVERY CONSTITUTIONAL TRADITION* (2012).

139. See *id.* at 37–73.

140. (1772) 98 Eng. Rep. 499; Lofft. 1.

made there. Stewart then detained Somerset in the vessel of a Captain Knowles with the intent to sell Somerset into slavery in Jamaica.

Before allowing a habeas corpus petition to remove Somerset from the vessel and set him at liberty, Lord Mansfield ruled that slavery cannot be tolerated in England and cannot be resumed after emancipation.<sup>141</sup> Stewart and his agent Knowles thus had a binding duty to deliver Somerset up for his liberation, notwithstanding the positive claim-rights Stewart had acquired in Somerset's labor by operation of Virginia law, Knowles's sovereign power over his ship as its captain, the goods and benefits to be derived from Stewart's plans for Somerset, or any other reason.

Furthermore, Stewart's "property" in Somerset, derived from positive law, was not vested. Mansfield explained:

The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law.<sup>142</sup>

The positive law of slaveholding, resting on no reasons external to itself, was the only reason that could be offered in support of Somerset's enslavement. The sovereignty of the Virginia legislature was confined within Virginia. Stewart's positive rights acquired in Virginia enjoyed no enforcement in England, notwithstanding the usual requirements of interstate comity, and no other reasons could justify defeating Somerset's right to enjoy his freedom. In England, Stewart's duty to relinquish Somerset was absolute and conclusive.

The obvious question raised is whether the slaveowner's right is re-established if the slave and master return to the jurisdiction where slavery is authorized. Some read the admiralty case of *The Slave, Grace*<sup>143</sup> to limit the doctrine of *Somerset* in this

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141. *Id.* at 504.

142. *Id.* at 510.

143. (1827) 166 Eng. Rep. 179; 2 Hagg. 94.

way.<sup>144</sup> Grace, a slave, traveled to England with her mistress, then returned to Antigua. Two years later, the collector of customs in Antigua alleged that Grace had been illegally imported, having become a “free subject of His Majesty” while in England.<sup>145</sup> This collector subsequently took possession of Grace under a procedure to remedy illegal importation of property. A judge of the Vice-Admiralty Court ordered Grace to be returned to her master. The High Court of Admiralty affirmed, not on the ground that Grace had gained emancipation and then lost it upon her return to Antigua, but instead on the ground that the record did not establish that she had gained emancipation.<sup>146</sup>

As an alternative ground for the decision, the court disputed Mansfield’s characterization of slavery as founded only in positive law. Slavery is indistinguishable from villenage, the court asserted, and villenage is an ancient English custom.<sup>147</sup> On the basis of this contestable<sup>148</sup> assertion, the court opined that a slave arriving in England is not emancipated without some act of manumission.<sup>149</sup> “The slave continues a slave, though the law of England relieves him in those respects from the rigours of [the colonial slave] code while he is in England; and that is all that it does.”<sup>150</sup> The court noted Coke’s maxim that a villein

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144. PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 16–17 (1981); EARL M. MALTZ, SLAVERY AND THE SUPREME COURT, 1825–1861, at 168 (2009).

145. *The Slave, Grace* (1827) 166 Eng. Rep. 179, 180; 2 Hagg. 94, 99 (n. 129) 180.

146. *Id.* at 181.

147. *Id.* at 183–84.

148. Pollock and Maitland were of the opinion that a serf, though a freeman concerning his equals, was called a serf only because Bracton had no word for slave. 1 SIR FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 436 (Liberty Fund, 2d ed. 2010) (1895). “[H]e was a *servus* and his person belonged to his lord.” *Id.* at 438. Yet the status of serfdom “at many points comes into conflict with our notion of slavery,” insofar as the serf has all the rights of a freeman with respect to those who are not his lord. *Id.* at 438. Even as against his lord, the serf’s status “seems better described as unprotectedness than as rightlessness.” *Id.* at 440. A fugitive serf who acquired a seisin of liberty could appeal to the king’s court, where the lord seeking his return would encounter a “leaning in favor of liberty.” *Id.* at 440–41. Furthermore, serfs bore many of the public duties of freemen. *Id.* at 44–46. Thus, Pollock and Maitland could not call the status of serfdom slavery. *Id.* at 438.

149. *See The Slave, Grace* (1827) 166 Eng. Rep. 179, 185; 2 Hagg. 94, 112–13.

150. *Id.* at 187.

freed for an hour is free forever, but, contradicting its earlier assertion, opined that slavery is not the same as “ancient villenage.”<sup>151</sup> The court insisted that “[v]illenage did not travel out of the country,” while slavery is “prevalent in every other part of the world, and has existed at all times.”<sup>152</sup> This was not a limitation on the right of emancipation but a confused attack on its jurisprudential foundation and a wholesale rejection of the doctrine itself.

Other decisions suggest that the emancipation right is binding law from the perspective of public lawmakers and officials. This can be inferred from Mansfield’s allowance of habeas corpus over Somerset’s person. It can be viewed more directly in the seriatim opinions in *Forbes v. Cochrane*.<sup>153</sup> Forbes was a British merchant living in Pensacola in the Spanish province of West Florida and operating a cotton plantation in East Florida, a Spanish province that allowed slavery. Thirty-eight slaves escaped from the plantation into a British man of war lying a mile out to sea off Cumberland Island, which the British had recently taken from the Americans in the War of 1812. The British commander, Rear Admiral Sir George Cockburn, allowed Forbes to attempt to persuade the slaves to return. The former slaves were not persuaded, and Cockburn thereafter refused to deliver them to Forbes. Instead, at the direction of Vice Admiral Sir Alexander Inglis Cochrane, Cockburn took the former slaves to Bermuda pending adjudication of their status.<sup>154</sup>

Forbes complained that Cochrane and Cockburn had deprived him of his property. The court framed the issue more narrowly: Did Cochrane and Cockburn act contrary to their duties as naval officers? The rule of decision was emancipation on free English soil (a British warship constituting English soil when at sea).<sup>155</sup> Justice Best stated the operation and implications of the doctrine as follows:

The moment they put their feet on board of a British man of war, not lying within the waters of East Florida, (where, un-

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151. *Id.* at 186.

152. *Id.*

153. (1824) 107 Eng. Rep. 450; 2 B. & C. 448.

154. *Id.* at 450–53 (Best J).

155. *Id.* at 458.

doubtedly, the laws of that country would prevail,) those persons who before had been slaves, were free. The defendants were not guilty of any act prejudicial to the rights which the plaintiff alleges to have been infringed. Those rights were at an end before the defendants were called upon to act. Slavery is a local law, and, therefore, if a man wishes to preserve his slaves, let him attach them to him by affection, or make fast the bars of their prison, or rivet well their chains, for the instant they get beyond the limits where slavery is recognised by the local law, they have broken their chains, they have escaped from their prison, and are free. These men, when on board an English ship, had all the rights belonging to Englishmen, and were subject to all their liabilities.<sup>156</sup>

In short, Cockburn harbored no slaves. Cockburn had no duty to hand the refugees over to Forbes—in fact, he had a duty to prevent the use of force upon them, as any such force exerted on freemen would constitute a trespass to person.<sup>157</sup>

Justice Bayley thought that because English law recognized no universal basis for slavery rights, Forbes's action could not be maintained without a factual showing of legal authority. Because slavery is antithetical to general law, each assertion of right by a putative slave owner required proof of the local laws and particular transactions that generated the ownership claim.<sup>158</sup> Justice Holroyd concurred on the same ground. Forbes had not shown that his right to own the slaves was grounded in the municipal laws of East or West Florida, and he could claim no "general right" to hold slaves because "according to the principles of the English law, such a right cannot be considered as warranted by the general law of nature."<sup>159</sup>

On the view of Justices Bayley and Holroyd, from the perspective of naval officers and judicial officials the emancipation right is a *prima facie* exclusionary reason against the assertion

156. *Id.* at 457.

157. *Id.* at 457–58.

158. He concluded that the officers did not act in bad faith by failing to investigate the legal status of these thirty-eight. The captain of an English man of war cannot be expected to inquire into the legal status of every escaped servant who comes into his vessel because his duties to the Navy often require him to leave his station at a moment's notice, and he cannot afford to send crew members ashore in order to perform an investigation. *Id.* at 454–55 (Bayley J).

159. *Id.* at 455 (Holroyd J).

of ownership. It can be overcome only by a discrete category of countervailing reasons in combination. The category is limited to evidence of a positive law authorizing the purchase of human beings, coupled with sufficient evidence of an actual purchase of the human being over which ownership is being asserted, together with residence of the enslaved within the jurisdiction of the positive law allowing slavery. Given that legislative formalities and title assurance schemes vary in different jurisdictions, the category could easily be narrowed further by requiring strict compliance with formal requirements, such as codification, compliance with the Statute of Frauds, and record notice. The right of emancipation is a very strong *prima facie* reason, categorical in nature.

Furthermore, once the slave reaches English soil, the category of countervailing reasons is reduced to nil. Justice Holroyd opined:

The law of slavery is, however, a law in invitum [by force of law; without consent; obeyed reluctantly?]; and when a party gets out of the territory where it prevails, and out of the power of his master, and gets under the protection of another power, without any wrongful act done by the party giving that protection, the right of the master, which is founded on the municipal law of the particular place only, does not continue, and there is no right of action against a party who merely receives the slave in that country, without doing any wrongful act."<sup>160</sup>

Once a slave puts his foot on English soil, "his slavery is at an end."<sup>161</sup> Forbes's rights in the slaves were extinguished and the British officers did not act contrary to their duties.

The refusal of English courts to extend comity to the laws of Florida and Virginia reveals how strongly the emancipation right operated in the deliberations of the judges themselves. The opinions reveal a concern that an English court which gave judicial recognition to the slavery laws of Florida would go beyond what reason and judicial integrity allow a judge to do, whatever other obligations a judge might have to apply the duly-positated law of a non-hostile sovereign. Justice Bayley wor-

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160. *Id.* at 456.

161. *Id.*



ried that, by asking the court to declare the actions of the naval officers a wrong, Forbes was asking them to make the law of England an "active" participant in slavery; implied in such a declaration would be a ruling that the slaves were property.<sup>162</sup> Justice Best thought the judicial obligation not to give legal effect to slavery laws even more conclusive and obligatory. Slavery is a *malum in se* crime, he opined, and therefore never lawful. He characterized slavery as "a relation which has always in British Courts been held inconsistent with the constitution of the country."<sup>163</sup> "For our convenience or our gain it ought not to be allowed to exist."<sup>164</sup> The law of East Florida "is an anti-christian law, and one which violates the rights of nature, and therefore ought not to be recognised here."<sup>165</sup>

Here is the answer to Austin's claim that the declaratory part of law is a "childish fiction."<sup>166</sup> The right of emancipation determined the deliberations of the justices in *Forbes*; it was not determined by them. The maxim that courts must not "permit themselves to be used as instruments of inequity and injustice"<sup>167</sup> imposes on judicial officers a binding obligation. A court has an obligation to preserve its integrity, at least to the extent of refusing to sanction intrinsically unjust acts that would introduce incoherence into the law.<sup>168</sup> The concern expressed by Justices Bayley and Best was thus consistent with an understanding of the judicial tradition of which they were part.

Justice Best went further in obiter dictum. In an open disparagement of Parliamentary supremacy, he opined that whatever a legislature might do, judges must not give legal recognition to any such relation as slave-master, because as a matter of "natural right" and the "genius of the English constitution," "human beings could not be the subject matter of property."<sup>169</sup>

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162. *Id.* at 454 (Bayley J).

163. *Id.* at 458 (Best J).

164. *Id.* at 457.

165. *Id.* at 460.

166. AUSTIN, *supra* note 111, at 634.

167. *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 86 (N.J. 1960) (quoting *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting)).

168. *See Hall v. Hebert*, [1993] 2 S.C.R. 159, 176 (Can.).

169. *Forbes* (1824) 107 Eng. Rep. at 459 (Best J). On the other hand, Justice Best opened his opinion by insisting that he had no intention of "trenching upon the

Even acts of the British Parliament creating positive rights of slavery in the West Indies could not bind the court:

If, indeed, there had been any express law, commanding us to recognise those rights, we might then have been called upon to consider the propriety of that which has been said by the great commentator upon the laws of this country, "That if any human law should allow or injoin us to commit an offence against the divine law, we are bound to transgress that human law."<sup>170</sup>

That last sentence is a quotation taken from Blackstone's description of the "Nature of Laws in General," where Blackstone insists that municipal law cannot "be suffered to contradict" natural and divine law, upon which it is founded.<sup>171</sup> This does not mean that Best was correct about where (if anywhere) the boundaries of Parliamentary sovereignty lie. But as a conceptual matter, it is not the case, as Austin supposed and Bentham asserted, that a vested right is a meaningless concept. No logical or necessary incompatibility stands between a doctrine of vested private rights and the supremacy of the legislative power over the judicial. The doctrine *is* in tension with the idea that courts must give effect to express, retrospective legislative enactments. But that understanding of legislative sovereignty is conventional and contingent.

The right of emancipation on English soil proved not to be an absolute right because one reason was strong enough to defeat it. That reason was the right of Parliament to change the law,

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local rights of the proprietors of lands in our West India Islands," who had acquired rights "to the services of their slaves . . . under the encouragement of the Legislature of this country, and they ought not to be put in jeopardy by any power in this country, unless a complete compensation be given to them by the public for the capital which they have been encouraged to embark in such property." *Id.* at 457.

170. *Id.* at 458.

171. 1 BLACKSTONE, *supra* note 71, at \*39, \*42. By contrast to the indifferent points of law on which natural and divine law leave humans at liberty to specify legal norms, Blackstone thought that natural and divine rights and duties create binding obligations regardless of what the municipal law declares. He took on board Locke's account of the exchange of natural liberties for civil rights, but he also had a separate category for the divine and natural rights (life and liberty) and duties (for example, maintenance of children and *mala in se* offenses) of the "superior" law, which "no human legislature has power to abridge or destroy . . . unless the owner shall himself commit some act that amounts to a forfeiture." *Id.* at \*54.

even in unjust directions. More precisely, when it has exercised its power to change law Parliament has an absolute, exceptionless, and vested claim-right to be obeyed (and those under its sovereignty have a correlative absolute duty to obey). Drawing on the tradition of natural and absolute rights that Blackstone purported to celebrate, American jurists such as Story objected to precisely this conception of Parliament's rights.

### C. *Legal Realism*

American legal realists made a more radical critique of the idea of vested rights. For legal realists, retrospective laws are both unavoidable and unproblematic; all laws upset some expectations, even those expectations that are styled "rights." As one realist expressed the view, "There is no such thing as a law that does not extinguish rights, powers, privileges, or immunities acquired under previously existing laws. That is what laws are for."<sup>172</sup>

In the realist account, rights can be altered at will because rights are not reasons in themselves. Legal realists inherited from earlier pragmatists (especially Oliver Wendell Holmes, Jr.) a concept of right as a special form of prophecy about one's expectation of realizing value or avoiding an unpleasant consequence.<sup>173</sup> The concept of *vested* rights has the limited utility of enabling lawyers to "forecast with some degree of confidence" the fate of retroactive and retrospective laws that will be challenged in court.<sup>174</sup>

In the work of Felix Cohen,<sup>175</sup> Walter Wheeler Cook,<sup>176</sup> and other legal realists, rights emanate and derive their authority from state sovereignty exercised in judicial power.<sup>177</sup> This ren-

172. Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 233 (1927).

173. See Robert L. Hale, *Value and Vested Rights*, 27 COLUM. L. REV. 523 (1927); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

174. Smith, *supra* note 172, at 248.

175. See generally Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

176. See generally Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924).

177. Leading property scholars in the United Kingdom now also locate the authority of property norms in "judge-made rules." See, e.g., ROBERT MEGARRY &

ders the powers of private lawmakers contingent, because private rights owe their existence to the judgments of courts. Contracts are not contracts because people made mutual promises but only because and insofar as courts impose consequences for breach.<sup>178</sup> Property norms and institutions also are contingent upon sovereign action or abstention.<sup>179</sup> The realist view also makes any assertion of a vested right appear circular:<sup>180</sup> The court should not allow interference with the right because it is vested; this right is vested if the court says it is vested.

Joseph Beale's "vested rights" theory, on which the First Restatement of Conflicts was predicated, briefly established a rival to the realists' skeptical account.<sup>181</sup> But in short order Beale was viewed as having been thoroughly discredited—"brutally murdered,"<sup>182</sup> in one colorful account—by those "archangels of doctrinal destruction,"<sup>183</sup> legal realists.<sup>184</sup> It is not difficult to see why; Beale's "vested rights" were not the vested rights of American common law constitutionalism, nor the natural rights of classical liberalism, but rather formal norms that appeared to legal realists as arbitrary elements of a "mechanical

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WILLIAM WADE, *THE LAW OF REAL PROPERTY* 8 (Charles Harpum et al. eds., 8th ed. 2012).

178. In *Coombes v. Getz*, 285 U.S. 434 (1932), Justice Cardozo dissented from the majority's ruling in favor of a vested right of contract arising out of California because he deemed the right not vested but contingent. His reasoning was quintessentially realist. "The meaning of the California Constitution is whatever the courts of California declare it to be. The obligation of the petitioner's contract is whatever the law of California attached to the contract at the hour of its making." *Id.* at 450–51 (Cardozo, J., dissenting).

179. As Professor Henry Smith observes, the realist view of property entails that "the state could always withdraw or alter its endorsement of an owner's decisional power." Henry E. Smith, *Emergent Property*, in *PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW* 327 (James Penner & Henry E. Smith eds., 2013).

180. See MERRILL & SMITH, *supra* note 112, at 122.

181. See Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2455–58 (1999).

182. Nicholas D. Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1087–88 (1956).

183. *Id.* at 1107.

184. Roosevelt, *supra* note 181, at 2458–61. Little, if anything, remains of Beale's vested rights approach to the conflicts of laws in practice. See Lawrence K. Griffith, *Conflict of Laws—The Supreme Court Deals Death Blow to "Vested Rights" Doctrine*, 57 TUL. L. REV. 178, 180 n.14 (1982).

jurisprudence.”<sup>185</sup> Beale wanted rights to exist as part of the “unwritten law,” prior to the judicial decisions in which they are given legal effect.<sup>186</sup> Yet he did not accept that rights and duties are settled and specified by authorities other than the sovereign state. What Beale termed “rights” are mere interests until “created by law” as rights.<sup>187</sup> And Beale expressly rejected private ordering, customary norms,<sup>188</sup> and natural law<sup>189</sup> as sources of rights.

Beale thus shared with his realist critics a thin concept of rights. Like the realists, he rejected notions of superior law or a priori norms.<sup>190</sup> Like much twentieth-century American jurisprudence, this thin concept of rights can be traced back to Holmes. For Holmes, right, duty, and obligation are illusions if considered as such.<sup>191</sup> Rather, “a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court—and so of a legal right.”<sup>192</sup> This perspective on law pre-

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185. Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2075–78 (1995).

186. See 1 JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS §§ 3.1–3.4, at 20–25 (1935).

187. See *id.* §§ 8A.6–8A.9, at 62–67.

188. “In the legal sense,” Beale insisted in an early work, “all rights must be created by some law. A right is artificial, not a mere natural fact; no legal right exists by nature. A right is a political, not a social thing; no legal right can be created by the mere will of parties.” 3 JOSEPH BEALE, A SELECTION OF CASES ON THE CONFLICT OF LAWS 501 (1902). In Beale’s view, law annexes upon an event (not an intention) a certain consequence, which is styled “the creation of a legal right.” *Id.*

189. “Law as the lawyer knows it is absolutely distinct from any rule of conduct based on a moral ground no matter how strong.” 1 BEALE, *supra* note 186, § 4.11, at 44.

190. See Sebok, *supra* note 185, at 2087–90. Similar presuppositions frustrate the attempted coherence of post-realist attempts to explain and justify vested rights which take on board the assumption that rights are legal constructs, which result or not depending upon their recognition by legal and political actors. For example, see the discussion in Craig J. Konnoth, *Revoking Rights*, 66 HASTINGS L.J. 1365, 1428–38 (2015).

191. To understand the norms of private law one must view them as prophecies of what courts will do, Holmes insisted, because the law is properly understood from the perspective of the bad man, and the bad man “cares only for the material consequences which such knowledge enables him to predict,” and does not find “his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.” Holmes, *supra* note 173, at 459.

192. *Id.* at 458.

serves the form of right. Thus preserved, the right is not recognizable as a right in a meaningful sense. It gives rise to no sense of obligation cognizable from the perspective of the putative duty-bearer, much less a judge. It does not provide any reason for action in itself. To say that a right is vested is only to say that its infringement will prove costly, and it will prove costly *as a result of* a judicial ruling forbidding retroactive or retrospective application of a statute or ordinance. To say that it will prove to be vested is simply to predict the outcome of the judicial ruling, which is not itself determined by the right but determinative of it.

So on the view of a pragmatist or realist, to understand the concept of vested right properly, one must "leave the matter of definition to follow rather than precede the discussion," for "the distinction between vested and non-vested rights . . . is of use primarily as a basis on which to classify decisions after they have already been reached on other grounds."<sup>193</sup> It is the fear of bad consequences, and not a promissory obligation or duty of self-exclusion, that performs the work in the reasoning of a putative duty-bearer, and some assessment of social advantage that performs the work in the reasoning of a judge. Rights and duties are merely signals, shorthand symbols for complex predictions, and no more.

Predictions are no more valuable than their efficacy for accurately foretelling future events, a utility that can often be measured empirically but can claim no normative force, least of all for the judge,<sup>194</sup> and only instrumentally and contingently for the putative duty-bearer. If it is more efficient to disregard "duties" and "obligations," to violate "rights," then any rational utility maximizer will choose that course. A commenter in the *Yale Law Journal* stated with confidence in 1925, "it is impossible to say that a property interest is so sacred to-day that it may not be taken away to-morrow."<sup>195</sup>

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193. Smith, *supra* note 172, at 231, 246.

194. Kermit Roosevelt observed the "obvious problem" with the realists' predictive theory of law, "that it fails to explain the thinking of a judge deciding a case, whose attempts to discern the correct rule of law are surely not attempts to predict his own behavior." Roosevelt, *supra* note 181, at 2460 n.63.

195. Comment, *The Variable Quality of a Vested Right*, 34 *YALE L.J.* 303, 306 (1925).

D. *Persistence of Vested Rights in American Law*

Ultimately, the idea of vested rights and duties is more incompatible with realist and pragmatist accounts than it is with English positivism. Realists and pragmatists are committed, as positivists are not, to the external perspective of the scientist who views the actions of those who interact with law and assesses the results and consequences of their actions. This makes it rather difficult for the realist to account for the internal point of view of those who understand vested rights and duties to be reasons for their own choices and actions.<sup>196</sup>

The problem is that American constitutional law is more complex than legal realism contemplates. People understand themselves to have binding reasons to honor rights as such, and officials understand their deliberations and actions to be governed by the existence of rights. Rights matter and vesting matters, though they matter for some constitutional purposes and not others in varying degrees and with different implications.

Indeed, the variety of implications of vested rights doctrine illustrates its importance, but also makes its definition difficult. Some common examples:

- Those rights known in common law must be adjudicated by a jury,<sup>197</sup> while privileges created by positive enactments may be adjudicated by any institution the legislature provides.<sup>198</sup>
- Repeal of a statute declaring a common law norm does not alter rights vested under the statute, while

196. Hart criticized the theorist who keeps “austerely to this extreme external point of view and does not give any account of the manner in which members of the group who accept the rules view their own regular behaviour.” HART, *supra* note 7, at 89–90.

197. *See, e.g., Ex parte Moore*, 880 So.2d 1131, 1134–35 (Ala. 2003); *People v. One 1941 Chevrolet Coupe*, 231 P.2d 832, 843 (Cal. 1951); *Wisden v. Superior Court*, 124 Cal. App. 4th 750, 754 (Ct. App. 2004); *Anzaldua v. Band*, 550 N.W.2d 544, 551 (Mich. Ct. App. 1996).

198. *See, e.g., Stevenson v. King*, 10 So.2d 825, 826 (Ala. 1942); *Franchise Tax Bd. v. Superior Court*, 252 P.3d 450, 458 (Cal. 2011); *Young v. City of LaFollette*, 479 S.W.3d 785, 793 (Tenn. 2015).

repeal of a statute that departed from the common law norm restores the common law norm.<sup>199</sup>

- The Full Faith and Credit Clause entitles foreign judgments to a finality<sup>200</sup> that is not accorded to foreign positive laws, unlitigated rights claims, and procedures.<sup>201</sup>
- Legislatures are constrained in their power to alter the civil legal significance of acts or omissions after occurrence,<sup>202</sup> for example by preventing trial judges from retroactively awarding new statutory rights of recovery after commission of a wrongful act (if the recovery is not remedial).<sup>203</sup>
- Land use laws prohibit retrospective changes to a land use regulation that would invalidate an application already applied for or relied upon.<sup>204</sup>
- An expropriation of property rights requires a government to pay just compensation.<sup>205</sup>
- Where a government causes damage to private property it cannot abrogate the right of recovery by repealing the law on which recovery is predicated.<sup>206</sup>

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199. See *Roberts v. Johnson*, 588 P.2d 201, 204 (Wash. 1978).

200. See *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 470 (1982).

201. See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232, 249 (1998); *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501–02 (1939).

202. See *Robinson v. Crown Cork & Seal Co, Inc.*, 335 S.W.3d 126, 139–43 (Tex. Ct. Spec. App. 1996).

203. See *Anderson v. Memphis Hous. Auth.*, 534 S.W.2d 125, 127–28 (Tenn. Ct. App. 1975). The court in that case used the term “retrospective” but it is apparent from the facts of the case that the problem was with the statute’s *retroactive* application to a wrong performed before the statute’s enactment.

204. See, e.g., *Recycle & Recover, Inc. v. Georgia Bd. of Nat. Res.*, 466 S.E.2d 197, 199 (Ga. 1996); *Town of Sykesville v. W. Shore Commc'ns, Inc.*, 677 A.2d 102 (Md. Ct. Spec. App. 1996).

205. See, e.g., *Sinnickson v. Johnson*, 17 N.J.L. 129, 143–45 (1839); *People v. Platt*, 17 Johns. 195, 215 (N.Y. 1819); *Gardner v. Newburgh*, 2 Johns. Ch. 162, 166 (N.Y. Ch. 1816); *Lucas v. S.C. Coastal Council* 505 U.S. 1003, 1007 (1992).

206. See *Ettor v. City of Tacoma*, 228 U.S. 148, 156 (1913) (“The right to compensation was a vested property right.”).



Many state constitutions provide even stronger protections for vested rights. Some private rights are vested in the strong or focal sense that they cannot be altered by retrospective changes of state law.<sup>207</sup> Many estates and future interests cannot be destroyed by statute—not only a fee simple absolute but even a right of entry or reversion.<sup>208</sup> Water rights gained by first appropriation (in those states that employ the first-appropriate doctrine) cannot be divested by legislation.<sup>209</sup> Legislatures are prohibited from creating new duties that would alter a legal title.<sup>210</sup> Property may not be taken from one owner and conveyed to another, even with compensation<sup>211</sup> (though this security has been weakened to varying degrees by expansive interpretations of public use requirements<sup>212</sup>). A cause of action for a tortious wrong committed cannot be divested by retrospectively changing the elements of the tort,<sup>213</sup> nor can an action for enforcement of a note be foreclosed by a statute forbidding a remedy.<sup>214</sup> Some contracts are constitutionally protected from impairment by subsequent legislation.<sup>215</sup>

One strand of the fundamental rights jurisprudence concerning marriage and family holds that the pre-political, jural relations of marriage and natural parentage are beyond the competence of legislatures and courts to alter, while state-created

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207. See *In re Marriage of Howell*, 361 P.3d 936, 941 (Ariz. 2015), *rev'd on other grounds sub nom.* *Howell v. Howell*, 137 S. Ct. 1400 (2017).

208. See *State v. Goldberg*, 85 A.3d 231, 240–47 (Md. 2014).

209. See *San Carlos Apache Tribe v. Superior Court ex rel. Cty. of Maricopa*, 972 P.2d 179, 189 (Ariz. 1999) (en banc).

210. See *Fowler Props., Inc. v. Dowland*, 646 S.E.2d 197, 199–200 (Ga. 2007); *Muskin v. State Dep't of Assessments & Taxation*, 30 A.3d 962, 971–73 (Md. 2011).

211. See *Sadler v. Langham*, 34 Ala. 311, 330 (1859); *Nesbitt v. Trumbo*, 39 Ill. 110, 118 (1866); *Wild v. Deig*, 43 Ind. 455, 459 (1873); *Taylor v. Porter & Ford*, 4 Hill 140, 143–44 (N.Y. 1843).

212. See *Lockridge v. Adrian*, 638 So.2d 766, 771 (Ala. 1994) (“[T]he taking of a private property for a private use is constitutional provided that there exists a valid public purpose for the taking.”); *Cty. of Wayne v. Hathcock*, 684 N.W.2d 765, 783 (Mich. 2004) (noting three contexts where transferring a condemned property to a private entity would be appropriate).

213. See *Van Fossen v. Babcock & Wilcox Co.*, 522 N.E.2d 489, 497–98 (Ohio 1988).

214. See *Riggs, Peabody & Co v. Martin*, 5 Ark. 506, 508 (1844).

215. See *King County v. Taxpayers of King Cty.*, 949 P.2d 1260, 1271–72 (Wash. 1997) (en banc) (holding that the right to issue bonds pursuant to state act was a vested right which could not be affected by subsequent state legislation).

institutions and relationships, such as foster care and adoption, can be altered by whatever process the state deems sufficient.<sup>216</sup> This suggests intriguing questions about the vestedness of marital property. In the nineteenth century, state courts invoked vested rights concepts to declare unconstitutional *both* the English common law doctrine of coverture,<sup>217</sup> by which the property of a married woman came under her husband's control at marriage,<sup>218</sup> and retrospective application of the Married Women's Property Act,<sup>219</sup> by which coverture was abolished. Obviously, these courts disagreed as to when the property rights at issue vested and by what authority, and therefore came to opposing conclusions—divesting the wife at marriage was unconstitutional in one, divesting the husband by statute in the other. But in both cases vested private rights performed the normative work.

In light of this evidence, what sustains skepticism of the existence of vested private rights? The realist or pragmatic view approaches the matter from the perspective of the claimant who cares only whether his expectations will be realized, his desires satisfied. In fact, many moral agents act as if they and others have vested rights, and those rights are reasons for action, regardless of consequences. An economist or realist might say that such people are mistaken; they confuse expectations for rights. Austin might say that they confuse their possibilities of acquiring rights for rights. Yet neither of those explanations accounts for the internal point of view of the person, including the legislator or judge, who understands herself to be obligated with respect to a right or duty,<sup>220</sup> and who takes that right or

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216. See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2571–72 (2013) (Scalia, J., dissenting); *id.* at 2574–75 (Sotomayor, J., dissenting); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925). The pre-political source and fundamental nature of the natural family's liberty and the parents' power impose limitations on "the competency of the state." *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923). The distinction between the vested rights of the natural family and the non-rights of adoption have precedent in English common law. HELMHOLZ, *supra* note 82, at 96–97.

217. See *Jones v. Taylor*, 7 Tex. 240, 246–47 (1851).

218. Natural rights arguments were used to establish the unconstitutionality of both coverture and slavery. Hamburger, *supra* note 64, at 956–57 n.133.

219. See *White v. White*, 4 How. Pr. 102, 109 (N.Y. Sup. Ct. 1849); *Nat'l Metro. Bank of Wash. v. Hitz*, 12 D.C. (1 Mackey) 111, 119–21 (1881).

220. See HART, *supra* note 7, at 90.

duty as a conclusive reason for her decisions.<sup>221</sup> From the perspective of a law-abiding duty bearer, the question is not whether he can expect his desires to be satisfied or his expectations to be met. Rather, the question is what should he do or not do? In other words, the matter is one of obligation.

What H.L.A. Hart called the "predictive interpretation of obligation" ignores and discounts the internal point of view of the law-abiding citizen who understands law to be a reason for her choices and actions, quite apart from consequences. This internal perspective of law makes sense of obligation in a way that the predictive or bad-man interpretation cannot. Hart says that one who adheres strictly to Holmes's external perspective on law, observing only the scientific correlation between legal signals and consequences, is like "one who, having observed the working of a traffic signal in a busy street for some time, limits himself to saying that when the light turns red there is a high probability that the traffic will stop."<sup>222</sup> However, to treat the traffic signal merely as a sign *that* traffic will stop misses entirely the perspective of the drivers themselves who are under law and therefore view the traffic light as a signal *for* them to stop.<sup>223</sup> This causes the legal scientist to "miss out a whole dimension of the social life of those whom he is watching."<sup>224</sup> This is the dimension of acting "in conformity to rules which make stopping when the light is red a standard of behaviour and an obligation,"<sup>225</sup> which is the "internal aspect" of law seen from the internal point of view of those who live under law.

This dimension is shared both by the system of rules generally and by that part of the system that consists of duties to others. It is that facet of the internal dimension of law—private obligation—that makes sense of the concept of private rights. Attention to the practical point of private law, as to the practical point of law generally, opens to view both the desirability and the possibility of vested rights and their correlatives—directive, obligation-creating duties. Private law exists to an-

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221. See generally *id.* at 79–91; FINNIS, *supra* note 5, at 314–20; FINNIS, *supra* note 74, at 23–45.

222. HART, *supra* note 7, at 90.

223. See *id.*

224. *Id.*

225. *Id.*

swer the question of what one should do or not do in his dealings with this person or agent. Property specifies one's rights and duties with respect to things.<sup>226</sup> Tort identifies which harmful actions are wrong and empowers those harmed by wrongful conduct to obtain redress.<sup>227</sup> Contract tells one which promises one must honor.<sup>228</sup> Private law is a special kind of normativity that directs practical reasoning primarily by supplying reasons for action and only secondarily by specifying (not predicting) consequences for breach of one's duties and violations of others' rights. And one can comprehend reasons not to allow legislative powers to abrogate or alter at least some of those rights when one consider the perspective of those good lawmakers who understand themselves bound by duties, and who can themselves appreciate the obligations of private duty-bearers. The next part takes up consideration of that perspective.

### III. THE FOCAL MEANING OF VESTED PRIVATE RIGHT

#### A. *Discerning a Focal Meaning*

Notwithstanding the practical value of vested private rights and duties, grasping the concept as a matter of speculative inquiry remains difficult. Defining the concept of vested private rights would not be a productive exercise if the definition were tautological, if elements of the definition beg the question of which characteristics are essential and which are incidental, or if a precise definition required so many caveats that the exceptions swallowed the rule. In light of the variety of forms that vested private rights take in law, and the number of exceptions and caveats to their recognition in positive law, those pitfalls seem to lurk in the path that leads to any precise definition.

Some progress can be made in bridging over those pitfalls by developing a focal meaning of vested private right. A focal

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226. See generally ADAM J. MACLEOD, *PROPERTY AND PRACTICAL REASON* (2015); *PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW* (James Penner & Henry E. Smith eds., 2013).

227. Benjamin C. Zipursky, *The Inner Morality of Private Law*, 58 AM. J. JURIS. 27, 40 (2013); see generally ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (2012).

228. See CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981).

meaning establishes what is most essential about the phenomenon to be studied, while avoiding the difficulties of achieving definitional precision.<sup>229</sup> It enables one to avoid overly simplistic meanings that must be artificially applied in univocal fashion to different states of affairs.<sup>230</sup> It enables one to differentiate between stronger and weaker—central and peripheral—instances of the phenomenon, and to evaluate different instances with references to a central case that most fully instantiates the essence of the type under consideration.<sup>231</sup>

To ensure that the focal meaning developed here accurately captures what is important about the doctrine and to avoid errors of identification and analogy, careful reflection is warranted concerning what must be essentially true of a vested private right for it to have meaning from the practical point of view of those who encounter it and who must decide how, if at all, it will affect their choices and actions. In this reflection, the shortcomings and limitations of the theoretical critics are instructive. It is worthwhile to recall (and imitate) H.L.A. Hart's critique of command theories of law generally, and legal realism in particular. Hart criticized command theories for their overly exclusive focus on the external perspective of one who observes legal phenomena and their neglect of the internal point of view of the law-abiding person.<sup>232</sup> By excluding the internal point of view from consideration, command theorists missed the basic concept of law as a norm that does not merely *oblige* by operation of the consequences or threat of sanction attached to it, but *obligates* by operation of the reason for action that it presents to moral agents who respond to law in practical deliberations, choices, and actions.<sup>233</sup> Recovering a perspective on the concept

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229. See FINNIS, *supra* note 5, at 9–11.

230. *Id.* at 10.

231. The discernment that one meaning is central or focal and another peripheral or secondary involves a judgment about importance and significance. Therefore, neutrality as between central and peripheral instances is impossible; moral considerations cannot be avoided. See *id.* at 11–18. So, scholars do well to “assess importance or significance in similarities and differences within their subject-matter by asking what would be considered important or significant in that field by those whose concerns, decisions, and activities create or constitute the subject matter.” *Id.* at 12.

232. See HART, *supra* note 7, at 50–99.

233. See *id.* at 79–91.

of obligation enabled Hart's "fresh start" in analytical jurisprudence.<sup>234</sup> It opened up new understandings of the operation of legal systems as unions of primary and secondary rules.<sup>235</sup>

Hart critiqued on more precise grounds the basic claims of legal realism, which Hart called "'rule-scepticism,' or the claim that talk of rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the prediction of them."<sup>236</sup> Though this bracing realism makes a "powerful appeal to a lawyer's candour,"<sup>237</sup> it is ultimately untenable. The precise premises of his argument<sup>238</sup> are less important here than the fundamental insight underlying them: that "it cannot be doubted that at any rate in relation to some spheres of conduct in a modern state individuals do exhibit the whole range of conduct and attitudes which we have called the internal point of view."<sup>239</sup> From that point of view, legal norms such as rules, rights, and duties are neither illusory nor mere tools of prediction but rather are obligatory reasons for action, including judicial action.<sup>240</sup>

What early English positivists and American legal realists excluded from consideration when examining the possibility of vested private rights is instructive for present purposes. Realists denied that vested rights exist because they understood rights to be mere shorthands for complex predictions about what officials will do in fact. Implicit in this denial was an acknowledgement that one who understands rights and duties to *direct* and *determine* practical and judicial deliberation and judgment would understand rights and duties to be meaning-

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234. *See id.* at 79.

235. *See id.* at 91–99.

236. *Id.* at 136.

237. *Id.*

238. A strong version of realism that denies the reality of both primary and secondary rules "is indeed quite incoherent; for the assertion that there are decisions of courts cannot consistently be combined with the denial that there are any rules at all." *Id.* at 136. A moderate version of realism, which concedes that there must be rules constituting courts is a non-starter. "For it is an assertion characteristic of this type of theory that statutes are not law until applied by courts but only sources of law, and this is inconsistent with the assertion that the only rules that exist are those required to constitute courts." *Id.* at 137.

239. *Id.*

240. *See id.* at 136–47.

ful as such. Precisely insofar as rights and duties do not direct and determine deliberation and judgment, the realists thought, they are not intrinsically meaningful. Precisely insofar as rights have no persistence when altered or abrogated by a legislative power, the positivists thought, rights are not vested. The consensus emerges that vested rights would be real things if they directed and determined deliberation and judgment, and if they were resistant to subsequent legal change.

Corwin's description of the doctrine affirms this consensus. In Corwin's statement, the American doctrine of private vested rights in its "most rigorous form—setting out with the assumption that the property right is fundamental, treats any law impairing vested rights, whatever its intention, as a bill of pains and penalties, and so, void."<sup>241</sup> The norms arising out of the doctrine are (1) a private property right and (2) a disability upon the legislator, correlating with an immunity in the property right owner from having his right altered by legislation, which is to say that the lawmaker lacks power to alter the property-right owner's legal status.

As Corwin's definition suggests, vested rights doctrine was hewn from the raw materials of property law.<sup>242</sup> Nevertheless, the idea can be generalized beyond the property context. To begin with, a central case of a private *right* must conclusively resolve practical questions for a moral agent (generally, a duty-bearer) in a way that imposes an obligation. If the right is fully conclusive and fully right—that is, entirely determined and consistent with what justice forbids and requires—then it excludes from further consideration any reason from among the universe of potential reasons for acting or omitting to act. To be fully right-like, it must fully exclude from deliberations all other reasons.<sup>243</sup> There must be no first- or second-order reason extant that might reasonably defeat the right in the deliberations of the agent. It must be peremptory, conclusive, non-discretionary, and fully binding. Therefore, the most central

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241. Corwin, *supra* note 28, at 255 (emphasis omitted).

242. *See id.*; cf. MERRILL & SMITH, *supra* note 112, at 121–22 (explaining that a fee title of Indian lands was not absolute ownership, but an exclusive right to purchase the right of occupancy).

243. *See generally* JOSEPH RAZ, PRACTICAL REASON AND NORMS (1999).

case of a vested right is a right that imposes an exceptionless duty: an inviolable right.

To be *vested*, the central instance must be resistant to alteration by public officials after the fact, at least to the extent of excluding various first-order reasons from the officials' deliberations and decisions. It must be law not only from the perspective of the duty-bearer but also from the perspective of the officials. Rather than being merely a privilege created by positive law and contingent upon the lawmaker's forbearance, it must perform the work that Austin and Holmes thought impossible: it must constrain legislative will, judicial discretion, and executive force in meaningful ways.

Thus, two essential characteristics of a focal meaning of vested private right stand out. Call them "personal directiveness" and "public indefeasibility." Personal directiveness means that the right supplies a fully conclusive, exclusionary reason for action to a duty-bearer or identifiable class of duty-bearers. Public indefeasibility means that the powers of public officials to recognize, adjudicate, or change the law in such a way as to alter the right's personal directiveness are limited.

The personal directiveness of a right consists in its obligatory strength, the normative momentum, and direction of the reason that it supplies to the practical reasoning of an agent to act or refrain from acting.<sup>244</sup> To be fully personally directive, the right must either be specified as a conclusive, three-term jural relation, identifying the duty-bearer, right-holder, and action or omission that is required (for example, Sam has a right to receive a \$1000 scholarship from State University today), or must be an inviolable duty of abstention in its universal formulation, such as the duty not to enslave. It must close or foreclose deliberation about what is to be done. It must bind, it must control, and it must obligate.

The second characteristic—public indefeasibility—is normative momentum directed toward the practical reasoning of a grantor, licensor, law-making sovereign, executive officer, judge, or other person with authority to change, adjudicate, or

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244. Thus, absolute rights are specified with respect to the relevant actor's intention, not the action's unintended side effects. See John Finnis, *Absolute Rights: Some Problems Illustrated*, 61 AM. J. JURIS. 195, 195–200 (2016).



enforce the law. The most robust, central, or essential instance of a publicly-indefeasible right entails a Hohfeldian immunity against abrogation or alteration.<sup>245</sup> That robust sense of vestedness is rare in jurisdictions that maintain Parliamentary or legislative sovereignty. Weaker senses of indefeasibility than absolute immunity are more common. A right can be resistant to defeasance without being entirely immune from abrogation.

In this more comprehensive (though less robust) sense, a vested private right disables the otherwise-empowered agent from altering the right or imposes upon the agent some liability for doing so, such as just compensation for expropriation. Both Hartian positivist and common law jurisprudences can account for indefeasibility. Viewed in Hartian terms as part of a system of rules, the vested right acts as an exception to the general rules of change, limiting the powers conferred by secondary rules of change. Viewed as part of a tradition of norms, including rights, wrongs, duties, and obligations, the vested right is a superior reason that defeats other reasons for action.

Insofar as it imposes an obligation on officials and legislators not to change the law out of which it arises, the vested right is indefeasible. The attractiveness of indefeasibility is not difficult to perceive from the perspective of right-holders and duty-bearers. Indefeasibility has obvious economic and utilitarian value because it stabilizes expectations, facilitates alienability and trade, and incentivizes stewardship and maximization of the resource.<sup>246</sup> Less obviously, indefeasibility (rightly-settled, or perhaps not-unreasonably-specified) has moral and political value. People respond to rights and duties as reasons. Once they build plans of action—including life plans—on the basis of those reasons, the integrity of their plans depends to a large degree on the indefeasibility of those foundational reasons.<sup>247</sup> The indefeasibility of rights and duties enables human beings

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245. See Christopher M. Newman, *Vested Use-Privileges in Property and Copyright*, 30 HARV. J.L. & TECH. 75, 80–81 (2016). Regarding Hohfeldian immunities and their relation to other rights generally, see Leif Wenar, *Rights*, in STAN. ENCYCLOPEDIA PHIL., at § 2.1 (last updated Sept. 9, 2015), <https://plato.stanford.edu/entries/rights/> [<https://perma.cc/5UFM-GHV8>].

246. See generally Harold Demsetz, *Toward a Theory of Property Rights*, in PERSPECTIVES ON PROPERTY LAW 135 (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman eds., 3d ed. 2002).

247. See generally MACLEOD, *supra* note 226, at 94–121, 173–96.

to realize the good of integrity, which is an essential attribute of the good of moral freedom, which is sometimes called personal autonomy.<sup>248</sup> This good has important value for the political community as a whole, which occurs to one who reflects on the fate of political communities that do not respect the vestedness of property ownership and other private rights.<sup>249</sup>

### B. *Central Instances of Personally Directive Rights*

Personal directiveness has at least two aspects of its own: completeness and conclusiveness. A complete legal norm accounts for all possible reasons for action that might bear upon the practical question. It leaves no exceptions or conditions precedent. A conclusive legal norm is not defeasible or alterable; it is not subject to conditions subsequent. It is the law's final answer to the practical question of what is or is not to be done.<sup>250</sup> A right or duty that is both fully conclusive and fully complete is inalterable and exceptionless. Rights or duties of this kind are relatively few, but they are not unknown.

An obvious example is the Thirteenth Amendment's prohibition against slavery. Each and every American has a conclusive

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248. Of course, this has limits. Autonomy can be exercised in pursuit of evil ends. And when exercised in pursuit of evil ends autonomy does not add value to a person's choice. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 120, 380–81 (1986). Thus, it makes sense to say that personal autonomy is not valuable in and of itself; its value is contingent upon, and derived from, the more basic reasons in favor of which it is exercised. See ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 175–80 (1993); Christopher Wolfe, *A Response to Joseph Raz*, in *NATURAL LAW, LIBERALISM, AND MORALITY* 135–136 (Robert P. George ed., 1996); Donald H. Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 S. CAL. L. REV. 995, 1075–85 (1989). Likewise, the stability of expectations and the persistence of rights and duties are not valuable in and of themselves. The value of each depends in large part on the justice of the particular rights and duties under consideration.

249. See, e.g., EDMUND BURKE, *SELECT WORKS OF EDMUND BURKE: VOLUME 2: REFLECTIONS ON THE REVOLUTION IN France* 255–57 (Liberty Fund ed. 1999); PAUL JOHNSON, *MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE NINETIES* 92–93, 261–72, 724–28 (1992); RICHARD PIPES, *PROPERTY AND FREEDOM* 209–25 (1999); Richard Pipes, *Human Nature and the Fall of Communism*, 49 BULL. AM. ACAD. ARTS & SCI. 38 (1996).

250. But not just the law's final answer, for there can be absolute moral rights as well. As Professor John Finnis explains, "There are some absolute human (or natural) rights, because there are some kinds of acts that everyone has an indefeasible, exceptionless moral duty of justice not to choose and do." Finnis, *supra* note 244, at 195.

and exceptionless duty not to enslave another (who has not forfeited the right by committing a crime) and each and every one has a conclusive and exceptionless right not to be enslaved (provided, again, the right is not forfeited).<sup>251</sup> Another such right recognized at various times in Anglo-American legal history is the right not to be coerced to act contrary to conscience. Though it has lately fallen out of favor, at the time of the American founding this right was understood by many to be both inviolable and inalienable.<sup>252</sup> Indeed, early Americans were conditioned to accept the notion of private rights by their familiarity with religious liberty.<sup>253</sup>

The directiveness of an absolute right is best observed from the perspective of the duty-bearer, whose practical deliberations such a right directs. For rights are best understood as reasons for action—norms having practical meaning—that respond to the most elementary question of all practical inquiry: *What should I (not) do?* The person who bears the duty is the one who must either choose to act or choose not to act. In this sense, duty precedes right for purposes of both justification and understanding.<sup>254</sup> Rights both arise out of and correlate with duties when such rights have practical significance.<sup>255</sup>

Consider again the question whether to enslave another. Whatever conditions and qualifications might entangle attempts to understand whether there is an absolute right of freedom in the abstract, one can see clearly that one must never enslave another for any reason because one has complete and conclusive legal (and moral) reasons to refrain from enslaving. The right not to be enslaved, which correlates with those rea-

251. The Thirteenth Amendment provides, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

252. See Barry A. Shain, *Rights Natural and Civil in the Declaration of Independence*, in *THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND* 116, 119–20 (Barry A. Shain ed., 2007); Vincent Phillip Muñoz, *Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion*, 110 AM. POL. SCI. REV. 369 (2016).

253. See Wood, *supra* note 11, at 1439; DANIEL L. DREISBACH & MARK DAVID HALL, *THE SACRED RIGHTS OF CONSCIENCE*, at xxvi–xxix (2009).

254. See FINNIS, *supra* note 5, at 205–10.

255. As a matter of history as well, duty arguably has priority over right. See Shain, *supra* note 252, at 119–20.

sons, is fully personally directive upon the practical deliberations, choices, and actions of the person who is contemplating whether to enslave another.

### C. Central Instances of Publicly Indefeasible Rights

Whereas a fully personally directive right cannot be defeated in the duty-bearer's deliberations and choices, a publicly indefeasible right cannot be defeated by the political processes usually employed to bring about legal change. An indefeasible right is settled, specified, and vested by an authority that is independent of politics. It does not rest upon politics for its authority. This independent authority might be an ancient local custom or some other immemorial usage, an act of contract or other private ordering, an act of self-governance by a professional association, or something more transcendental such as Blackstone's "superior law." Such an independent authority need not be superior to political authorities in a comprehensive or hierarchical way, as the governor of a state is superior in executive power to the state secretary of transportation. It is enough that such an independent authority is competent to settle and specify the particular rights and duties at issue, and that the political authorities that are otherwise empowered to change law have conclusive reasons not to disrupt the judgments of those independent authorities.

A classic example is the public's title to land held in public trust by the state. In the landmark decision in *Illinois Central Railroad Co. v. Illinois*,<sup>256</sup> the U.S. Supreme Court ruled that the Illinois legislature could not convey title in the lakebed under Lake Michigan to the Illinois Central Railroad, even for purposes of enabling the railroad to construct at its own expense a wharf from which the public would benefit. The question, as the Court framed it, was "whether the legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago."<sup>257</sup> The Court answered no. The state holds title in lands submerged beneath navigable waters "by the common law,"<sup>258</sup> and it does not hold that title in its

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256. 146 U.S. 387 (1892).

257. *Id.* at 452.

258. *Id.*

own right. "It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."<sup>259</sup>

By framing the matter as one of the legislature's competence, the Court was posing the people's title as an inherent limitation on the legislature's power to change law. That the root of that title was not found in the state itself but in common law—ancient customary law that preceded Illinois' statehood—meant that the title could not be defeased by the mere exercise of political authority. "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."<sup>260</sup> In this statement the Court echoed a premise of the Declaration of Independence, that governments are instituted among men to secure their vested rights, not the other way around.

#### *D. Penumbral and Peripheral Instances*

The focal meaning of vested private right brings clarity to less focal meanings and less central instances. Not all private rights exert the same normative force upon the deliberations and judgments of private citizens and public officials as the right of emancipation on English soil. Many rights partake of some of the nature of that inviolable right but not in all respects, or not in the same degree. Some rights are categorical exclusionary reasons, but not fully exclusionary. Some rights may be altered by public officials, but only in particular ways or on particular conditions. And many right claims are not rights at all. The partial contingency of most legal norms is what justifies the positivists' and realists' skepticism of claims that certain private rights are vested. Yet that same contingency opens the possibility that at least some private rights are vested because legislative or judicial supremacy are themselves partially contingent, and opens to view in what senses and to what extents they might be vested rights.

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259. *Id.*

260. *Id.* at 453.

A right can impose an exclusionary reason upon duty-bearers without imposing an *absolute* exclusionary reason. Some rights exclude fewer categories from deliberation than others. Thus, a right can be a right though it is limited.<sup>261</sup> Some rights operate as exclusionary reasons for action upon the deliberations of duty-bearers, but, unlike free English soil, they do not exclude from deliberation and judgment *all* possible, first-order reasons for action. Instead, they exclude discrete categories of reasons. Without being fully specified in a conclusive judgment as a three-term jural relation, a right can impose a categorical duty of abstention upon some identifiable class of persons, for example, no one may enter Blackacre without Pat's permission except out of strict necessity to save a human life. The right excludes from consideration all categories of reasons but one—a strict necessity to preserve life.

Similarly, a right can be vested without being *inalterably* vested. Some rights are thus within the penumbra of the doctrine though not its center. This most often means that either:

1. The sovereign has no competence to apply a new criminal prohibition retroactively (that is, *ex post facto*);
2. The sovereign is required to internalize some cost of retrospective application that alters a legal status or jural relation (that is, compensation for expropriation of private property);
3. The sovereign may not impair the exercise of a liberty without an adjudication of forfeiture in a proceeding required by the law of the land (that is, due process requirements);
4. The sovereign must interpret its own laws and other positive rules in such a way as to avoid abrogating common law rights and duties when possible; or
5. Because the right was settled in common law, the parties are entitled to have adjudication of the right and its correlative duty performed by a common law institution, such as a civil jury.

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261. Cf. Hamburger, *supra* note 64, at 910–11 (arguing that natural rights at the time of the Founding were understood to be inherently limited by natural law norms such as prohibitions against defamation, obscenity, and fraud).

The status of vested rights is sometimes arrogated wrongly on behalf of peripheral instances of rights. Much skepticism of the concept of vested private rights is understandably directed toward non-central cases, such as usufructs and other context-dependent norms. Those rights are not absolute and conclusive in their abstract form, but rather must be settled and specified in deliberations and judgments that take in not one or two discrete categories of first-order reasons but rather many first- and second-order reasons for action. Indeed, except for the handful of absolute norms of prohibition, all other rights require some specification (for example, in a judgment resulting in a three-term Hohfeldian jural relation of the form *A* has a right that *B* do or not do *x*),<sup>262</sup> and some require quite a lot in the way of qualification, limitation, specification, and boundary drawing (for example, *A* has a right that *B* do or not do *x*, but not a right that *B* do or not do *y*) to mark out the first-order reasons that are and are not excluded from consideration.<sup>263</sup>

In short, perhaps the concept of vested private rights fell into disrepute in part because too much was claimed under its reputation.<sup>264</sup> When less-than-vested rights are identified using the same terminology as fully-vested or nearly-fully-vested rights, the category appears to be indeterminate at best and misleading at worst. It is therefore important to distinguish different senses of vested rights—especially stronger or more central instances—from weaker and more peripheral ones. The focal meaning developed here makes possible that project.

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262. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning II*, in *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 65, 65–70 (Walter Wheeler Cook ed., 1923).

263. Compare WEBBER, *supra* note 122, at 116–46, and Bradley W. Miller, *Justification and Rights Limitations*, in *EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY* 93 (Grant Huscroft, ed. 2011), and John Oberdiek, *Specifying Rights Out of Necessity*, 28 *OXFORD J. LEGAL STUD.* 127 (2008), and John Oberdiek, *What's Wrong With Infringements? (Insofar as Infringements Are Not Wrong): A Reply*, 27 *LAW & PHIL.* 293 (2008), and Russ Shafer-Landau, *Specifying Absolute Rights*, 37 *ARIZ. L. REV.* 209 (1995), with FINNIS, *supra* note 5, at 198–230, and MACLEOD, *supra* note 226, at 173–96.

264. Cf. Kainen, *supra* note 10, at 105.

## IV. CONCLUSION

Fully-vested private rights are few and their status is mistakenly appropriated for less-than-vested rights and privileges. But examining central instances of vested rights brings into focus a meaning of vested right that can be used to understand peripheral instances, which are more common. In light of the importance of vested rights to the practice of law and the moral agency of public officials, this study promises to bear fruit.