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Vested Patents and Equal Justice

Adam MacLeod
amacleod@stmarytx.edu

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Cover Page Footnote

Professor of Law, Faulkner University, Thomas Goode Jones School of Law; Senior Scholar, Center for Intellectual Property and Innovation Policy, George Mason University. For helpful comments and criticisms, I am grateful to Aaron Cobb, Carys Craig, Bryan Cwyk, Christopher Essert, Jason Jewell, Santiago Legarre, Allen Mendenhall, Lateef Mtima, Kali Murray, Adam Mossoff, David Simon, and Talha Syed. Ned Swanner and Jacob Jackson provided helpful research assistance.

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VESTED PATENTS AND EQUAL JUSTICE

Adam J. MacLeod[+]

In a time of renewed interest in equal justice, the vested patent right may be timely again. Vested patent rights helped marginalized Americans to secure equal justice earlier in American history. And they helped to make sense of the law. Vested patent rights can perform those tasks again today.

The concept of vested rights render patent law coherent. And it explains patent law's interactions with other areas of law, such as property, administrative, and constitutional law. The vested rights doctrine also can serve the requirements of equal justice, as it has several times in American history. Vested rights secure justice for vulnerable minorities against majority factions. They resist the tendency of law to devolve into power. And they solve practical problems consistent with what we owe each other as equal agents of practical reason.

[+] Professor of Law, Faulkner University, Thomas Goode Jones School of Law; Senior Scholar, Center for Intellectual Property and Innovation Policy, George Mason University. For helpful comments and criticisms, I am grateful to Aaron Cobb, Carys Craig, Bryan Cwyk, Christopher Essert, Jason Jewell, Santiago Legarre, Allen Mendenhall, Lateef Mtima, Kali Murray, Adam Mossoff, David Simon, and Talha Syed. Ned Swanner and Jacob Jackson provided helpful research assistance

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I. VESTED PATENTS AND OTHER CLASSICAL LEGAL CONCEPTS

The vested patent right is an idea whose time came and went. But in a time of renewed interest in equal justice, it may be timely again. Vested patent rights helped marginalized Americans to secure equal justice earlier in American history. And they helped to make sense of the law. Vested patent rights can perform those tasks again today.

The vested right is a classical American legal concept, and classical legal concepts are now back in style. A growing body of scholarship employs classical legal concepts to analyze contemporary concerns about intellectual property, data privacy, and cyber wrongs.[1] The Supreme Court of the United States shares this interest. When answering difficult legal questions, including those concerning twenty-first century concerns such as innovation and data privacy, the Supreme Court often employs classical concepts such as private rights,[2] franchise grants,[3] and bailments.[4]

The use of classical legal concepts generates employment for the classical jurists. The Court has long trotted out Edward Coke, William Blackstone, John Adams, Joseph Story, and company for the purpose of interpreting old

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1. *See*, *e.g.*, Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 STAN. L. REV. 277, 280–81 (2022); Caleb Nelson, *Vested Rights, "Franchises," and the Separation of Powers*, 169 U. PA. L. REV. 1429, 1431–33 (2021); Adam Mossoff, *The Injunction Function: How and Why Courts Secure Property Rights in Patents*, 96 NOTRE DAME L. REV. 1581, 1582–85 (2021); Adam J. MacLeod, *Public Rights After Oil States Energy*, 95 NOTRE DAME L. REV. 1281, 1281–82 (2020) [hereinafter *Public Rights*]; Adam Mossoff, *Institutional Design in Patent Law: Private Property Rights or Regulatory Entitlements*, 92 SO. CAL. L. REV. 921, 921–23 (2019); Adam J. MacLeod, *Patent Infringement as Trespass*, 69 ALA L. REV. 723, 726–27 (2018) [hereinafter, *Patent Infringement*]; Dmitry Karshtedt, *Causal Responsibility and Patent Infringement*, 70 VAND. L. REV. 565, 624–36 (2017); Orin S. Kerr, *Norms of Computer Trespass*, 116 COLUM. L. REV. 1143, 1143 (2016); Andrew Keane Woods, *Against Data Exceptionalism*, 68 STAN. L. REV. 729, 731–33 (2016); Saurabh Vishnubhakat, *An Intentional Tort Theory of Patents*, 68 FLA. L. REV. 571, 578–91 (2016); Christopher J. Cifrino, *Virtual Property, Virtual Rights: Why Contract Law, Not Property Law, Must Be the Governing Paradigm in the Law of Virtual Worlds*, 55 B.C.L. REV. 235, 236–37 (2014); Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 204–06 (2012); Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL L. REV. 953, 953 (2007) [hereinafter *Patent Privilege*]; Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1016 (2006); Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1049–50 (2005); Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1745–46 (2007) [hereinafter *IP as Property*]; Danielle Keats Citron, Reservoirs of Danger: The Evolution of Public and Private Law at the Dawn of the Information Age, 80 SO. CAL. L. REV. 241, 244–45 (2007); Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 208–10; Harold Smith Reeves, *Property in Cyberspace*, 63 U. CHICAGO L. REV. 761, 761–63 (1996).

2. *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 343–49 (2016) (Thomas, J., concurring).

3. *See* Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 138 S. Ct. 1365, 1374–75 (2018).

4. *See* Carpenter v. United States, 138 S. Ct. 2206, 2268–70 (2018) (Gorsuch, J., dissenting).

documents such as the Constitution. Increasingly, the Court also consults them on the meaning of classical legal terms to resolve new questions about intellectual property,[5] data privacy,[6] and other concerns of the information age.

Classical legal concepts are resurgent just as Americans are renewing interest in questions of equal justice. The Equal Justice Initiative has called attention to injustices perpetrated during the long decades between the first civil rights movement of the 1860s and 1870s and the second civil rights movement of the 1950s and 1960s.[7] And legal scholars have recently called attention to the ways in which American patent law failed to deliver on the promise of equal justice prior to the first civil rights movement, and how patent rights proved an important evidence of equality under the law after the abolition of slavery.[8]

Classical legal and juristic concepts have long played a central role in arguments for equal justice. In a defining expression of the second civil rights movement, Martin Luther King, Jr. famously appealed to the classical juristic idea known as Augustine's maxim that an unjust law is defective, for it seems to be "no law at all."[9] The classical idea of legal justice has proven enduring in Western jurisprudence, perhaps because it responds to a human need to know whether our laws are good laws or are instead raw exercises of power.[10]

Classical legal and juristic concepts have proven enduring in analysis of intellectual property and cyber law also because they help to make sense of the law during a period of rapid legal change. Laying classical legal concepts over

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5. *See* Golan v. Holder, 566 U.S. 302, 322 (2012); SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC, 137 S. Ct. 954, 961 (2017); Impression Prods. v. Lexmark Int'l, Inc., 137 S. Ct. 1523, 1526, 1532 (2017); Georgia v. Public.Resource.Org Inc., 140 S. Ct. 1498, 1516 (2020) (Thomas, J., dissenting); TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2217 (2021) (Thomas, J., dissenting); Google v. Oracle, 141 U.S. 1183, 1202–03 (2021).

6. *See Spokeo*, 578 U.S. at 344–45 (Thomas, J., concurring); *Carpenter*, 138 S. Ct. at 2239 (Thomas, J., dissenting); *id.* at 2247–48 (Alito, J., dissenting).

7. *See Museum and Memorial*, EQUAL JUST. INITIATIVE, https://museumandmemorial.eji.org/ (video at the middle of the page titled, *The Legacy of Racial Injustice*) (last visited Nov. 19, 2022); Ja Nai Wright, *Equal Justice Initiative Opens New Legacy Museum in Montgomery*, ALA. NEWS NETWORK (September 29, 2021), https://www.alabamanews.net/2021/09/29/equal-justice-initiative-opens-new-legacy-museum-in-montgomery/; Adam J. MacLeod, *Racism, the Legacy Museum, and the Costs of Self-Deception*, PUB. DISCOURSE (August 1, 2018), https://www.thepublicdiscourse.com/2018/08/21986/.

8. *See*, *e.g.*, Bryan L. Frye, *Invention of a Slave*, 68 SYRACUSE L. REV. 181, 185-86, 223-25 (2018); Kara W. Swanson, *Race and Selective Legal Memory: Reflections on Invention of a Slave*, 120 COLUM. L. REV. 1077, 1104 (2020).

9. Martin Luther King, Jr., *Letter from Birmingham Jail*, THE CHRISTIAN CENTURY, June 12, 1963, at 769. In Aquinas's expression of the idea, "that which is not just seems to be no law at all: wherefore the force of a law depends on the extent of its justice." ST. THOMAS AQUINAS, SUMMA THEOLOGICA *First Part of the Second Part* Q 95 art. 2.

10. *Compare* King, *supra* note 9, at 769–70, *with* ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 7 (Martin Ostwald trans., The Liberal Arts Press, Inc., 1962) (c. 384 B.C.E.) (discussing the relationship between natural justice and legal justice), *and* ST. THOMAS AQUINAS, SUMMA THEOLOGICA *First Part of the Second Part* Qs 90–97 (Fathers of the English Dominican Province trans., Micro Book Studio) (discussing how human law relates to natural and divine law).

contemporary legal doctrines often helps us to clarify the law's features and functions. It may even help us understand the problems to be solved. Patent infringement can be understood as a kind of trespass, where the metes and bounds of the patent claim are analogous to those of an estate or future interest in land.[11] That conceptual framing helps one sort out the senses in which patent infringement liability is and is not "strict," and why experimental use is non-trespassory.[12] Today, cyber wrongs are also understood as trespasses.[13] Trespass norms and property concepts help to define the res that is infringed in cyber wrongs and to mark the boundaries between authorized and unauthorized access.[14] Trademarks are helpfully understood as usufructuary property rights, akin to easements or riparian use rights.[15] This similarity explains why trademark protection in Anglo-Canadian-American law extends to marks that are used in commerce,[16] rather than to free-floating property rights in symbols or brands.

This article puts forward for consideration one classical property concept that has played an important role in patent law,[17] and which continues to perform conceptual work in the field:[18] the vested private right.[19] The concept of vested rights helps make sense of patent law. It is also tied to claims of equal justice. In practice, vested rights are inherently anti-majoritarian, and therefore especially beneficial for the protection of minority rights. Doctrines of vested private rights have been used on several occasions in American history to secure the rights of former slaves, Native peoples, and other minority groups.

Thus, the vested right serves both as a legal concept to make sense of patent law and as an important legal security for equal legal justice. When inventors

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11. Adam Mossoff, *The Trespass Fallacy in Patent Law*, 65 FLA. L. REV. 1687, 1693–94 (2013).

12. Vishnubhakat, *supra* note 1, at 571; *Patent Infringement*, *supra* note 1, at 735–76.

13. *See* Richard A. Epstein, *Cybertrespass*, 70 U. CHI. L. REV. 73, 74 (2003); Mary W.S. Wong, *Cyber-trespass and 'Unauthorized Access' as Legal Mechanisms of Access Control: Lessons From the U.S. Experience*, 15 INT. J.L. INFO. TECH. 90, 91 (2007); *see also* MICHAEL D. SCOTT, SCOTT ON INFORMATION AND TECHNOLOGY LAW § 15.14 (2022) (discussing trespass to chattels); RAYMOND T. NIMMER, LAW OF COMPUTER TECHNOLOGY § 16:9 (2022) (same).

14. *See* Kerr, *supra* note 1, at 1143.

15. *See* Adam Mossoff, *Trademark as a Property Right*, 108 KY. L.J. 1, 5 (2018).

16. *See* 15 U.S.C. § 1051 (2018); Planetary Motion, Inc. v. Techsplosion, Inc., 261 F.3d 1188, 1193 (11th Cir. 2001) ("Under common law, trademark ownership rights are 'appropriated only through actual prior use in commerce.'"); *In Re* Cedar Point, Inc., 220 U.S.P.Q. 533, 535 (T.T.A.B. 1983) ("[A]t common law, a trademark was not protected unless it was . . . used by affixing it to goods to identify their source of origin"); Bita Amani & Carys Craig, *The 'Jus' of Use: Trademarks in Transition*, 30 INTELL. PROP. J. 217, 226–27 (2018).

17. *See* McClurg v. Kingsland, 42 U.S. 202, 206–07 (1843).

18. *See* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1988–89 (2021) (Gorsuch, J., concurring).

19. *See* Nelson, *supra* note 1, at 1432, 1435, 1438, 1440–41; Adam J. MacLeod, *Of Brutal Murder and Transcendental Sovereignty: The Meaning of Vested Private Rights*, 41 HARV. J.L. & PUB. POL'Y 253, 254–73 (2017) [hereinafter *Vested Rights*].

have been unjustly deprived of their rights because of their race or status as slaves, the rights of which they were deprived were vested rights in their inventions.[20] The wrong consists not only in a kind of group or identity-based inequality but also in acts of wrongdoing against particular persons, depriving them of rights that they possessed as human beings, bearers of equal dignity who were entitled to the law's equal protection. And where racial minorities have been treated justly, their just treatment before the law consisted precisely in the vindication and recognition of their vested patent rights.[21]

Vested rights, and private intellectual property rights generally, now face intellectual headwinds in legal scholarship. According to the now-conventional account, the Legal Realists debunked the notion of vested private rights. Rights are neither determinate nor efficacious until settled in an act of legal judgment, usually by a judge. But that account is difficult to reconcile with judges' use of classical legal concepts, such as vested rights, to direct and even determine their judgments. Judges who understand themselves to be obligated by law act as though their judgments are the products of legal rights, rather than the other way around.

A more radical challenge comes from critical theories, especially Critical Legal Studies and Critical Race Theory. Those theories cast a skeptical eye on classical legal concepts, especially concepts of property rights. They understand classical concepts, especially liberal rights, to be social conventions or discursive regimes adopted by the powerful to exclude and discriminate against the marginalized and the weak. Critical theories call attention to some important truths, for example that the way we define and use words can make some ideas unthinkable, and that who exercises power to craft legal concepts and terms thus wields a formidable power. But as argued below, critical theories are badly aimed when used to criticize classical concepts such as vested private rights, which more often than not protect minorities against majoritarian powers.

This article will address both Legal Realist and critical theories directly. It will demonstrate that classical legal concepts such as vested rights are determinate enough to do the job of securing equal rights, even if they elude perfect definition. And it will demonstrate that vested private rights are at least as likely to protect the interests of marginalized groups and individuals as the powerful. The process of meeting those influential criticisms will disclose to view how classical legal concepts, especially property concepts, work in legal reasoning to solve practical problems without necessarily smuggling in illicit power relations.

After this introductory Part I, this article proceeds in four additional sections. Part II discusses how property concepts work in legal reasoning concerning

20. *See* 9 THE OPINIONS OF HON. JEREMIAH S. BLACK, OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL 171 (J. Hubley Ashton eds., 1866); Frye, *supra* note 8, at 181–82, 187; *see also infra* Part IV.C.

21. *See* discussion *infra* Part IV.C.

information resources. It explains the utility, and surveys the career, of normative concepts generally and legal concepts in particular. Normative concepts that impose duties and other conclusive reasons meet persistent human needs, not only to overcome the limitations of information costs but also to provide guidance to human beings as moral agents. We need to know what is good to do and we need to avoid infringing the rights of others. We must act toward others with respect for their equal moral agency. In short, we all have social and civic obligations. So, we need to know what others' rights are.

Part III answers two objections to the use of classical legal concepts in relation to intangible resources. The first objection is that classical property concepts smuggle in contestable normative assumptions. The second is that property concepts are insufficiently determinate. The first objection understates the neutrality of property concepts, and the second objection overstates their indeterminacy. In the course of answering those objections, the article raises to view the work that property concepts perform in shaping patent law, and intellectual property law generally.

Part IV illustrates the work that property concepts perform in legal reasoning about information resources with examples drawn from patent law. The examples are specifications of a particular property concept, the concept of vested private rights. By operating as normative stops that impose duties and legal disabilities upon the powerful, especially powerful majorities, vested patents function in legal reasoning as an important security for equal rights, in addition to all of the other benefits that they provide to society generally. The idea of patents as both rights of equal citizenship and vested, natural rights played a role in the struggle for equal human rights during the first civil rights movement in the nineteenth century. We can draw lessons from that use of vested patents to secure legal justice. Part V briefly concludes.

II. CLASSICAL LEGAL CONCEPTS IN THE INFORMATION AGE

A. The Continued Vitality of Classical Concepts

Old ideas make sense of new challenges. So, we find that legal terms and concepts derived from ancient philosophy, English common law, and the transnational *ius gentium* appear in analysis of patent rights (*e.g.*, claim[22] and technological arts[23]), patentable subject matter (e.g., inherently public

22. *Compare* 35 U.S.C. §§ 111, 112, *and* 2 WILLIAM ROBINSON, THE LAW OF PATENTS FOR USEFUL INVENTIONS § 504 (1890) (discussing patent claims), *with* 2 COLLECTED WORKS OF JAMES WILSON 818–19 (2007) (comparing inventors' "claim" of exclusive right with natural property rights in literary works).

23. *Compare* 35 U.S.C. § 112(a) (specification must be written for one "skilled in the art to which it pertains"), *and* Graham v. John Deere Co., 383 U.S. 1, 5-8, 19 (1966) (discussing the meaning of "useful arts" in light of advances in "technology"), *with* ARISTOTLE, POLITICS III.11, 1282a (discussing the "art[s]" of various specialized fields of knowledge).

property),[24] cyber wrongs (e.g., trespass to chattels),[25] and other contemporary concerns that Aristotle, Justinian, James Wilson, and Emer de Vattel never envisioned but would have understood using familiar, conceptual categories. Classical legal concepts such as duty, rights, trespass, and publication, and modern concepts such as obligation and liberty, have survived the invention of the printing press, the industrial revolution, and the political upheavals of the twentieth century. They endure in the age of information, even as the circumstances in which they operate change dramatically.

From the Western discovery of Justinian[26] in the eleventh century until the American Legal Realist revolution a few decades ago, lawyers in the West thought and wrote about the law in conceptual terms, and shaped legal discourse on conceptual grounds. In the common law tradition, which shaped American law and constitutions,[27] the most foundational and far-reaching concepts were property concepts.[28] After the English Revolution and the ascendancy of liberal ideals, many of those property concepts became known as "rights" and "liberties," and the juristic significance of those concepts was primarily legal, not political.[29] The Constitution of the United States uses the term "right," together with its attendant property concepts, to describe the legal advantages that Congress is empowered to secure for authors and inventors.[30] And for most of American jurisprudential history, property concepts, especially property

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24. *Compare* Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127, 130 (1948) (explaining why "manifestations of the laws of nature" belong in common to all), *and* Diamond v. Chakrabarty, 447 U.S. 303, 309 (1980) (same), *with* J.B. MOYLE, THE INSTITUTES OF JUSTINIAN II, Title 1 at 35–37 (5th ed. 1913) (listing resources that are "by natural law common to all"), *and* EMER DE VATTEL, THE LAW OF NATIONS Book 1 §§ 234–36 (Charles D. Fenwick trans., 1758).

25. *Compare* Intel Corp. v. Hamidi, 71 P.3d 296, 299–300 (Cal. 2003) (analyzing "unauthorized electronic contact with computer systems as potential trespasses to chattels"), *with* THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY 70–71 (2010) (explaining how the common-law doctrine of trespass to chattels applies to cyber wrongs).

26. *See* JUSTINIAN I, THE DIGEST OF JUSTINIAN (Alan Watson trans., 1998); JUSTINIAN I, THE INSTITUTES OF JUSTINIAN (J.B. Moyle trans., 5th ed. 1913).

27. *See generally* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 21-25 (1868); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 7 (2d ed. 1832); Morris L. Cohen, *Thomas Jefferson Recommends a Course of Law Study*, 1119 U. PA. L. REV. 823, 824 (1971); Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 4–13 (1996); R.H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 131–41 (2015).

28. *See* ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 6–8 (1966); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 505 (1956).

29. MATHEW HALE, OF THE LAW OF NATURE 89–90 (David S. Sytsma ed., 2015); JAMES R. STONER, JR., COMMON-LAW LIBERTY 10–16 (2003); ROBERT LOWRY CLINTON, GOD & MAN IN THE LAW 71–72, 93–94 (1997).

30. *See* U.S. CONST. art. I, § 8, cl. 8.

rights, have determined the structure and many of the norms of intellectual property law.[31]

The classical law of wrongs does as much work as concepts of rights.[32] Today, both patent infringement[33] and cyber wrongs[34] are helpfully understood as kinds of trespass.[35] Originally, the remedy for patent infringement was the writ of trespass on the case, which differentiated itself from earlier trespass writs in part by separating itself from rights in land.[36] Trespass was originally a Medieval writ employed by common lawyers in England to remedy forceful wrongs against land and human bodies.[37] Later trespass writs remedied wrongs against property *rights* and incorporeal resources.[38] Finally, patent infringement came to be remedied by the writ of trespass on the case.[39] The concept of trespass as a wrong against property rights explains a lot about the law of patents in the United States to this day.[40]

Other areas of the law governing intangible resources are also elucidated, to various degrees, by property concepts and legal doctrines that concern rights to use, control, or alienate resources. Courts declaring the rules of cyber-trespass have employed the doctrine of trespass to chattels.[41] That doctrine is intelligible and functions well to the extent that it relies upon basic property concepts,[42]

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31. *See* Oren Bracha, *The Commodification of Patents 1600-1836: How Patents Became Rights and Why We Should Care*, 38 LOYOLA L.A.L. REV. 177, 179, 184–85, 191–92, 206–07 (2004); *Patent Privilege*, *supra* note 1, at 963–65, 972, 976.

32. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2 (1765) ("[P]rivate wrongs" are "an infringement or privation of the private or civil rights belonging to individuals.").

33. *Patent Infringement*, *supra* note 1, at 732, 734–38, 748–60.

34. Kerr, *supra* note 1, at 1153–61.

35. *See* 3 BLACKSTONE, *supra* note 32, at *208–15.

36. *See* Elizabeth Jean Dix, *The Origins of the Action of Trespass on the Case*, 46 YALE L. J. 1142, 1172–73, 1176 (1937).

37. *See* 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 113–14, 551–52 (2d ed. 1898).

38. *See* 3 BLACKSTONE, *supra* note 32, at *122–23; Dix, *supra* note 36, at 1167–69, 1175–76.

39. *See, e.g.*, Hogg v. Emerson, 52 U.S. 587, 588 (1850); Parkhurst v. Kinsman, 18 F. Cas. 1207, 1210 (C.C.D. Mass. 1847); Stein v. Goddard, 22 F. Cas. 1233, 1233 (C.C.D. Cal. 1856).

40. *See Patent Infringement, supra* note 1 at 733–40. Alternatively, patent infringement can be understood as a species of nuisance, a different property wrong. Christopher M. Newman, *Patent Infringement as Nuisance*, 59 CATH. U. L. REV. 61, 97–99 (2009). Patent infringement and nuisance were remedied by the same writ—trespass on the case—and the wrong at the heart of nuisance is similar in important respects to what is wrong about infringement. Both concern wrongful interference with another's exclusive use of an owned resource. Patent Infringement, supra note 1, at 746-48; Newman, at 122-23.

41. Thrifty-Tel, Inc. v. Bezenek, 46 Cal. App. 4th 1559, 1566–67 (Cal. Ct. App. 1996); CompuServe, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1020 (S.D. Ohio 1997); Adam Mossoff, *Spam—Oy, What a Nuisance*!, 19 BERKELEY TECH. L.J. 625, 640–46 (2004).

42. *See* Fairfield, *supra* note 1, at 1053–55, 1064–67, 1071–72.

especially bailments and licenses.[43] And to think of trademarks as a type of appurtenant easement helps to clarify many of trademark law's more puzzling features.[44]

The administrative state's arrogation of power to regulate information resources has not entirely arrested the tendency of classical concepts to shape and clarify intellectual property law.[45] Private law concepts are the building blocks from which public law concepts are constructed. So, conceptual clarity in private law facilitates doctrinal accuracy in constitutional and administrative law.[46] For example, once one understands what is wrong about patent infringement, one can understand the sense in which patents secure private rights, which result from the creative efforts of innovators and are vested for constitutional purposes, and the sense in which patent grants are "public rights," which governments create and confer upon inventors and which administrative agencies may abrogate at will.[47] The distinction between public and private rights matters for determining who has jurisdiction to adjudicate patent validity,[48] who has standing to initiate a proceeding contesting a patent,[49] when official action with respect to a patent amounts to a taking,[50] and whether changes in patent law can be retrospectively applied.[51]

The objects upon which law operates have changed. But the practical reasoning of human beings has not. Humans still must answer practical questions about what to do and what not to do with stuff, tangible and intangible. And political communities secure property rights in both tangible and intangible resources in part because communal flourishing depends radically on the just practical reasoning of individuals. To craft good legal artifacts and employ them to solve practical problems well is to facilitate the practical reasoning of

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43. Adam J. MacLeod, *Cyber Trespass and Property Concepts*, 10 IP THEORY 4, 12–17 (2021) [hereinafter *Cyber Trespass*].

44. Mossoff, *supra*, note 15 at 4–5.

45. Kali Murray, *First Things, First: A Principled Approach to Patent Administrative Law*, 42 J. MARSHALL L. REV. 29, 48–54 (2008).

46. *See id.*; *see also* James Y. Stern, *Property's Constitution*, 101 CAL. L. REV. 277, 279 (2012).

47. *See Patent Privilege*, *supra* note 1, at 990–92; Adam Mossoff, *Statutes, Common Law Rights, and the Mistaken Classification of Patents as Public Rights*, 104 IOWA L. REV. 2591, 2593–94, 2596–2601 (2019) [hereinafter *Common Law Rights*]; *Public Rights*, *supra* note 1, at 1283–92, 1326–36.

48. *See generally* Nelson, *supra* note 1, at 1443–47; Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 138 S. Ct. 1365, 1372–74 (2018); Gary Lawson, *Appointments and Illegal Adjudication: The America Invents Act Through a Constitutional Lens*, 26 GEO. MASON L. REV. 26, 38–39, 47 (2018).

49. *See Public Rights*, *supra* note 1, at 1334–35.

50. *See* Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689, 693–95 (2007). *Contra* Christy, Inc. v. United States, 141 Fed. Cl. 641, 649–50, 658 (2019). .

51. *See*, *e.g.*, Celgene Corp. v. Peter, 931 F.3d 1342, 1356 (Fed. Cir. 2019).

persons,[52] whose well-being is the whole point of law and legal rights.[53] To do *that*, legislatures, executives, and judges must understand how property concepts relate to information resources. Legal scholars who inform them would also benefit from understanding this relation.

B. Practical Legal Concepts: More Than Power Relations

Many of the affirmative arguments for property rights in intellectual resources are now well known. Classical conceptions of property ownership are more analytically sound than pragmatic ideas of property as mere expectations,[54] they are more information-cost efficient,[55] they motivate the internalization of externalities,[56] and they require less state interference with Pareto-optimal exchange.[57] But these pro-property arguments do not always confront concerns about the implicit morality and indeterminacy of property concepts. In answering those objections, we can clarify how legal concepts work to solve practical problems concerning use and management of information resources. The task before us is to understand the continued coherence and utility of classical property concepts in the information age consistent with basic requirements of justice.

Classical property concepts persist also because they anchor claims of legal justice in the midst of legal change. Property concepts persist in the information age for the same reason that they persisted after the Norman Conquest, during settlement of the American West, and through the Industrial Revolution. At each of those revolutionary moments in the development of the law, jurists needed some way to identify whose resources are whose. Property rights claims were often asserted on both sides. The most just claims were not always vindicated.[58] But many times they were.[59] And understanding the senses in which the weak

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52. *See generally* Eric R. Claeys, *Property, Concepts, and Functions*, 60 B.C. L. REV. 1, 9–13 (2019) [hereinafter *Concepts and Functions*]; Eric R. Claeys, *Intellectual Property and Practical Reason*, 9 JURIS. 251, 261-64 (2017) [hereinafter *IP and PR*].

53. *See* JOHN FINNIS, COLLECTED ESSAYS: VOLUME II: INTENTION & IDENTITY 19–35 (2011).

54. *See* J.E. PENNER, THE IDEA OF PROPERTY IN LAW 2 (1997); ADAM J. MACLEOD, PROPERTY AND PRACTICAL REASON 1–5, 18–19, 30–31 (2015).

55. *See generally* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1852–57 (2007); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 5–19, 60 (2000).

56. *See* Harold Demsetz, *Toward a Theory of Property Rights,* 57 AM. ECON. REV. 347, 348–50, 355–56 (1967).

57. *See* Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2092–93, 2097 (1997); RICHARD A. EPSTEIN, DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW 45–52 (2011).

58. *See infra* Part IV.C.

59. *Id.*

and marginalized have vested, pre-positive property rights,[60] and are in that sense no less than the powerful and connected,[61] enables us to reason well about competing claims to tangible and intangible resources.

One set of objections to the continued use of classic property concepts (considered in Part III) grows out of the Critical Legal Studies (CLS) movement[62] and its post-structuralist successors, such as feminist theory[63] and Intersectionality theory.[64] The essential worry is that old legal concepts are the product of normative assumptions and social constructs that are inequitable and biased, which the concepts conceal behind a façade of apparent neutrality.[65] On this view, to describe or declare the law is not a neutral act but instead is an act of perpetuating outdated discursive practices. Property is essentially power.[66]

The second set of objections clusters around the problem of indeterminacy, which was first articulated by Legal Realists as a challenge to formal reasoning in private law, and was later advanced in public law scholarship by other rule skeptics.[67] The indeterminacy critique is also a central feature of CLS and post-structuralist theories.[68] The essential concern is that legal concepts can mean different things to different interpreters, have no inherent or univocal meaning, and are used to give the appearance of lawfulness to official actions that are, in reality, raw assertions of power.

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60. *See* MACLEOD, PROPERTY AND PRACTICAL REASON 216–41 (2015); ERIC R. CLAEYS, NATURAL PROPERTY RIGHTS (forthcoming 2023).

61. *See*, *e.g.*, POPE FRANCIS, POST-SYNODAL APOSTOLIC EXHORTATION QUERIDA AMAZONIA OF THE HOLY FATHER FRANCIS TO THE PEOPLE OF GOD AND TO ALL PERSONS OF GOOD WILL 9–11, 16, 23–24 (2020).

62. *See generally* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979); ROBERTO MANGABEIRA UNGER, THE KNOWLEDGE ECONOMY (2019).

63. *See*, *e.g.*, CARYS CRAIG, COPYRIGHT, COMMUNICATION AND CULTURE: TOWARDS A RELATIONAL THEORY OF COPYRIGHT LAW 31–59 (2011).

64. *See* Margaret Chon, *Intellectual Property Research and Critical Theories*, *in* HANDBOOK OF INTELLECTUAL PROPERTY RESEARCH 746, 746–60 (Irene Calboli and Maria Lillà Montagnani, eds. 2021); *see also* Anjali Vats & Deidré Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 735, 737–38 (2018). CLS theories differs from post-structuralist and Intersectionality theories in important respects. But both groups of theorists criticize classical or liberal legal norms and institutions for hiding their normative priors behind putatively neutral rights and principles. *Compare* Kennedy, *supra* note 62, at 294-303, and UNGER, *supra* note 62, at 113, *with* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1719 n.34 (1993), *and* Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. DAVIS L. REV. 1673, 1674–75 (2017).

65. *See* UNGER, *supra* note 62, at 47–48; Chon, *supra* note 64, at 747–50.

66. *See generally* Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752, 1752–53 (1988); Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L.J. 763, 763 (2011).

67. *See generally* Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 359-61 (1954); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L. REV. 1165, 1223, 1244–45 (1967).

68. *Compare* Jonathan Turley, *The Hitchhikers Guide to CLS, Unger, and Deep Thought,* 81 NW. U. L. REV. 593, 604, 611–14 (1987), *with* MADAN SARUP, AN INTRODUCTORY GUIDE TO POST-STRUCTURALISM AND POSTMODERNISM (2d ed. 1993), *and* Chon, *supra* note 64, at 747.

The indeterminacy tenet and the inequitable normativity tenet are related, of course. But there is also tension between them. For a legal concept to carry the water for oppressive discursive practices it must have an intelligible meaning, and that meaning must be intelligible to all upon whom the legal concept casts an obligation. But we can leave this problem aside for present purposes. The project here is to answer critical theories in part, and in answering them to come to understand why classical property concepts have proven so resilient, despite the onslaught of scholarly criticisms over the last century or so. To answer critical objections is to see the indispensable function that classical property concepts perform in legal reasoning. And it is to begin to see why such concepts retain their appeal in an age in which information and knowledge are more valuable than land and cattle.

In short, legal concepts and other normative referents are often determined by demands of practical reasoning that have little or nothing to do with power relations or class domination.[69] Established practical norms, such as legal concepts, respond to the practical demands of reasoning in the world, especially reasoning in community with others to solve practical problems.[70] By studying legal concepts we can understand the authoritative solutions that communities of people devise to their practical problems when it is necessary or rationally desirable to cooperate with each other.[71] Those solutions must respond to several determinative influences, including the nature of the world, of human beings, and of practical reason itself.[72] These requirements upon the law include the requirements of justice, respect not only for the good of oneself but also for the common good of the communities of which one is part.[73]

For example, like theoretical reason, practical reason must respect the principle of non-contradiction to avoid incoherence.[74] To recognize that the same proposition cannot be simultaneously affirmed and denied is to begin to see that the settlements of practical reason are not *mere* social constructs, conventions, or products of discursive regimes. Many limitations on normative discourse are inherent in the practical reason of the kind of beings that we are—human beings.

Simply put, all human beings have basic needs. And we aspire to achieve common goals, to realize certain goods that we all share, such as friendship, professional success, and innovation. To meet those needs and to realize those aspirations we usually must cooperate. And to cooperate we must all know what

69. *Compare* Chon, *supra* note 64, at 751–54, *with IP and PR*, *supra* note 52, at 261-64.
70. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 3 (2d ed. 2011).
71. *See id.* at 3, 231–33.
72. *See generally id.* at 100–60.
73. *See id.* at 160–64.
74. ST. THOMAS AQUINAS, SUMMA THEOLOGICA *First Part of the Second Part* Q94, art. 2.

to do in relation to each other.[75] We need rights and duties in order to pursue the common good.[76]

C. Classical Concepts Serve Human Needs

Classical property concepts retain vitality in the information age because they meet fundamental needs that human beings have as they reason practically about the management, use, and disposition of resources. As we reason about what to do, we must overcome information costs and other limitations of knowledge.[77] We must also know what is good to do, given the plurality of options available to us and the limitations on our time and resources. And we must know how to act toward others so that we do not infringe their rights of equal moral agency and citizenship. In short, we must reason cooperatively with other beings of our kind—human beings.

Many of the requirements of practical reason are the same with respect to information resources as they are for tangible stuff.[78] Classical concepts operate upon and within human reason *with respect to* resources, not on the resources themselves. That the resources at issue are intangible rather than tangible does not change how practical reason structures deliberation, choices, and actions between the persons interested in the resources.

Human deliberation and action require reasons that are structured by norms.[79] The job of human practical reasoning is to evaluate potential reasons for action and to choose some as against others.[80] This cannot be done at every moment from scratch, on a clean slate. Human reasoning is constrained by time, available information, embodiment, and individual agency, which all are finite.

To take a now-familiar example, the requirements of practical reasoning include information-cost efficiency. Familiar linguistic constructs are efficient. A closed set of known terms and concepts reduces information costs in comparison to novel terms and concepts.[81] To refer to a familiar term of art that has associated legal implications already built into it might require that adjustments be made to account for differences between the old applications of the term and the new context in which it is being used. For example, the right to exclude from land will be somewhat different from the right to exclude from patents. But those adjustments require less work than creating a new term and building its associated incidents from the ground up.

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75. *See* FINNIS, *supra* note 70, at 134–60, 213–33.

76. *See id.* at 210–18.

77. Thomas W. Merrill & Henry E.Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1853-58, 1895 (2007).

78. *IP as Property, supra* note 1, at 1745; *IP and PR*, *supra* note 52, at 261-64.

79. JOSEPH RAZ, PRACTICAL REASON AND NORMS 15-48 (1999).

80. JOSEPH RAZ, PRACTICAL REASONING 128-43 (1978).

81. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 35–36 (2000).

On the basis of this insight, which Thomas Merrill and Henry Smith have been articulating for some years, we can see how the persistence of classical legal concepts is partly attributable to the limitations of human logic and language. It is prohibitively information-expensive and time-consuming to reason through each practical problem from scratch, all the way from first principles down to concrete judgments. It is even more expensive and time-consuming to invent and define terms for each act of reasoning. Classical terms of art that refer to simple property concepts solve this problem.

The finitude of instrumental reasoning is not the only reason why structured norms are indispensable to practical reasoning about human action. If instrumental rationality were not bounded—if, for example, we were able to employ computers to overcome all information costs and life coaches to overcome all boundaries on our will power—we still would need norms that are structured according to reality as we find it. The nature of the world and the demands of communal life impose inherent limitations on humans who deliberate about what to do and what not to do. Those limitations make legal concepts necessary. We need norms of reason that are not inconsistent with our own nature, the world, and the communities that we inhabit.[82]

Legal concepts therefore must enable human beings to act reasonably in response to the possibilities before us given the (part of the) world that we inhabit, the decisions that we have made previously, and the conventional settlements of our communities. The world is not a clean slate, and right reason cannot disregard the nature of the world. Automobile drivers, for example, must simply accept that a moving automobile has momentum when deciding when to apply the brakes.

Inherent limitations on practical reasoning can be classified in two groups, pre-moral and moral. Pre-moral limitations result from the fact that we are finite beings. We can only achieve some possibilities in our lifetimes, not all, and we must act in cooperation with others to bring most good ends to realization. Moral limitations result from the fact that we must settle practical questions in community with others. We owe duties to others not to infringe their inherent rights as we pursue our ends, including ends that are worthwhile.

One pre-moral limitation is that we act in time. Because valuable pursuits require sustained commitment to a plan of action, as against other possible plans and pursuits, if we ever want to accomplish anything worthwhile then our present choices are constrained by our prior choices. Normative concepts serve as shorthand referents in practical reasoning for those prior commitments. Because most worthwhile accomplishments are worthwhile precisely insofar as we achieve them in cooperation with others, our present choices are further constrained by the prior and contemporaneous choices of the institutions and communities in which we act. Concepts enable us to achieve a shared

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82. *See* JOHN FINNIS, COLLECTED ESSAYS: VOLUME I: REASON IN ACTION 19–40, 212–30 (2011).

understanding of the normative implications of those communal choices and thus to cooperate.

Consider the choice to become a lawyer, a worthwhile life plan. When one is in the middle of law school, or in the process of building a law practice, or trying a case, one cannot afford to get up every morning and reconsider all of the reasons one has to be or not to be a lawyer, nor all of the skills, habits of mind, and technical devices that are necessary to practice law successfully. To achieve the goal of having and completing a successful legal career, one must often refer to normative goals such as "briefing" "cases," devising a "theory" of a case, and seeking payment of "accounts receivable," without continually rebuilding the meaning of those terms from the ground up. One must take the terms and the concepts to which they refer as given if one is to get on with the business of executing one's life plan to end one's career as a successful attorney.

Next, we must notice that each attorney is not free to define those terms and form their associated concepts for himself or herself. To get on in the legal profession each must, to a large degree, take the terms and concepts of legal practice as previously defined by the community. Of course, one may try to influence the use of the terms and concepts when one finds them defective in some way, *e.g.*, ineffectual, or unjust. But one cannot *sua sponte* disregard them, or simply substitute new terms and concepts, without damaging the cooperation that is necessary to sustain the profession or other community.

In addition to pre-moral limitations on choice, we also act under moral limitations. There exist moral facts. For example, it is wrong to steal from one's client because moral integrity and civic friendship are good, while exploitation of vulnerable clients is bad. A lawyer who steals from his client has acted in a defective way, no matter what good ends might have motivated the theft (*e.g.*, purchasing a birthday gift for his wife). Some choices are out of bounds. Terms such as "theft" and "property" of the client, and the concepts to which they refer, enable us to stay normatively in bounds, and thus to avoid constituting ourselves as unsuccessful members of the profession.

Not all moral limitations on choice are as peremptory as the prohibition against stealing from clients. Some are conventional. Questions settled by conventional rights and duties are originally what jurists have called matters of indifference, meaning that they concern moral problems that could reasonably be resolved in different ways.[83] But once the relevant community has settled on a normative solution to the matter of indifference, that settlement can become binding on the community's members.[84] Custom can become law.[85] We are

83. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *54–*55.

84. *See id.* at *55. *See generally* ARISTOTLE, ETHICS BK. V.7 (explaining how laws settle conclusively the requirements of justice in matters of indifference).

85. *See* Neil Duxbury, *Custom as Law in English Law*, 76 CAMBRIDGE L.J. 337, 340 (2017); Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES IN L. 5, 6 (2009); David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1375 (1996).

constrained by the settled conventions of our community because those conventions are promulgated by conduct, with which we must coordinate our own actions.[86]

The obligation of conventional rights and duties is not the result of some suspicious, hocus-pocus trick or an oppressive discursive regime but rather from the practical necessity of having a normative settlement and the fact that the community has chosen a single settlement for everyone in the community. A driver in the United States must accept that vehicles travel on the right in order to avoid causing a wreck, while a driver in the United Kingdom must act on a different conventional norm. Both are binding for practical reasons.

To act consistently with legal conventions requires us to understand the concepts by which the conventions operate within practical reason. To return to the example of attorney-client cooperation, the legal profession has settled upon different ways to secure client funds from unscrupulous attorneys. One such settlement is the requirement that lawyers must hold client funds in an Interest on Lawyer Trust Account (IOLTA). Once the legal community has settled upon IOLTA accounts as *the* way to hold client funds, a lawyer has an obligation to place client funds in an IOLTA account. That normatively correct action requires the lawyer to distinguish IOLTA accounts from other means of holding funds. In short, to act rightly, the lawyer must have and act upon a correct concept of IOLTA accounts.

D. The Practical Point of Property Right Concepts

Practical reasoning about the use and development of resources is not done alone, in isolation. Legal concepts such as vested rights satisfy an important demand of practical reasoning insofar as they enable people to cooperate to make resources productive and useful. That too is a practical purpose.

To answer practical questions and direct human actions was the original significance of the term "right"—*ius*—in Western jurisprudence. *Ius* (as compared to a more narrow term for written law, *lex*) refers to what actions are rational with respect to persons.[87] So, in what became the most foundational text in modern Western jurisprudence,[88] Justinian's jurists opened the *Institutes* by identifying law ("ius" or "iurus") with what is today translated as "justice" ("iustitia"), and used the same term, jurisprudence ("iurisprudentia"), to describe the study of both law and justice.[89] The point of the whole enterprise, the *Institutes* teach, is "the set and constant purpose" which gives to every other person what we owe them (*suum cuique*).[90]

86. *See* AQUINAS, SUMMA THEOLOGICA *First Part of the Second Part* Question 97 art. 3.

87. *See* FINNIS, *supra* note 70, at 206–10.

88. HELMHOLZ, *supra* note 27, at 14–15.

89. *See* JUSTINIAN I, THE INSTITUTES OF JUSTINIAN Title I, II (J.B. Moyle, D.C.L. trans., 5th ed. 1913).

90. *Id.* at Title I.

Over time, the artifact of a "right" has come to stand on its own, independent of the actions and omissions to which it refers, as a thing that one possesses. So, in the vernacular of what CLS scholars call "legal liberalism," it is now sensible to speak of someone's right to exclude without reference to another's duty of self-exclusion, or someone's right of bodily integrity without reference to another's duty not to commit battery. But despite the abstraction and detachment of a liberal "right" for theoretical and rhetorical purposes, the practical payoff of a right remains the same. What it means to have a right to exclude and a right to bodily integrity is precisely that others have a duty not to touch my stuff and my body. The "right" is a solution to a practical problem to which we all can refer, and from which we all can benefit.

Because legal scholars study legal concepts as subjects of academic inquiry, it is possible to overlook their practical significance. For centuries in Europe, and to a lesser extent in England, legal education began with the study of Roman legal concepts whose employment had ended centuries earlier but which retained practical significance because they tied the practice of law to certain universal principles and maxims.[91] Legal concepts perform *both* theoretical, descriptive work for scholars and jurists who are trying to understand the law and other products of human reasoning *and* practical work for parties, lawyers, and judges who live under the law and must employ it in their practical deliberations if they hope to retain law's integrity and consistency.[92]

Consider again the concept of the right to exclude. For scholars of law, economics, sociology, and legal history, the concept that the phrase "the right to exclude" signifies is a conventional referent that facilitates the study of law by tying together various legal practices that share essential or core features. It explains what a bailment and a patent have in common, the shared sense in which both are "property." But what makes the right to exclude worth studying is that it has *practical* significance for people who interact with resources. For people who interact with other people's things, the property right enables them to act justly. Except in cases of necessity to save a human life, the right directs the person to keep out.

The facility of property concepts to enable practical cooperation is also evident in patent law when one considers the sense in which patent infringement is a species of trespass. This does not entail that patents are essentially about exclusion. To the contrary, a patent secures prior use liberties, which the inventor enjoys at common law.[93] The Patent Act authorizes the Patent and Trademark Office to issue a patent that renders the inventor's use rights

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91. *See* HELMHOLZ, *supra* note 27, at 14–15; R.H. HELMHOLZ, ROMAN CANON LAW IN REFORMATION ENGLAND 12-20 (1990).

92. Pavlos Eleftheriadis explains this distinction succinctly: "Theoretical reason is concerned with what is rational to believe. Practical reason is concerned with what is rational to do." PAVLOS ELEFTHERIADIS, LEGAL RIGHTS 16 (2008).

93. United States v. Am. Bell Tel. Co., 167 U.S. 224, 238 (1897).

exclusive.[94] The point of patents is to maximize the productive value of the prior use rights, a practical purpose. Patent law renders creators' rights exclusive *and* it enables financing, licensing, and other cooperative ventures that maximize the value of information resources, all by employing simple property concepts.

III. Responding to Objections

A. Sound Descriptive Scholarship About the Normative Enterprise of Law

CLS and post-structuralist scholars are not the first to criticize classical property concepts. This is worth noting. We can learn something about classical property concepts from the efforts of their predecessors to dislodge classical concepts from the law. We also learn important lessons from more recent theoretical efforts to understand and employ classical property concepts. In short, we learn that law is a practical enterprise, and thus normative. And we should keep in mind that any good theoretical or descriptive account of law must take its normative structure into account.

Sound jurisprudence analyzing normative, property concepts is not illicit. To the contrary, insofar as law is an enterprise of normative, practical reasoning, sound descriptions and analyses of law must take seriously the structure of practical reasoning in law, including (or especially) the legal concepts that people use in solving legal problems. Unsound judicial decisions and legal scholarship move too quickly from a set of normative assumptions to evaluation, without considering whether the normative assumptions are true to the peoples' practical reasoning, in which legal concepts play a part. Or they mistake what is peripheral to practical reasoning for what is central to it, or vice versa. (Or they make both mistakes).

Some formalist jurisprudence in the late nineteenth century got carried away with the logical structure of legal reasoning and claimed too much on behalf of artificial legal concepts. But the proper response to unsound jurisprudence is not to disregard the normative structure of law and reject legal concepts. It is instead to perform sound jurisprudential analysis of what those concepts can and cannot do, and to provide an accurate account of how legal concepts work in the practical reasoning that people perform. This requires us to understand law from both the internal and external perspectives, and to take care in identifying what is central or essential to legal concepts and what is not. That sort of account of law can, in turn, assist the practical reasoning of lawyers and those who live under law by clarifying the reasoning in which they are engaged.

B. Objections Already Tried

Since the Legal Realist revolution of the early twentieth century, conventional academic doctrine has taught that intellectual property is justified on utilitarian

94. *See* Cont'l Paper Bag Co. v. E. Paper Bag Co., 210 U.S. 405, 442 (1908); *see also Patent Infringement*, *supra* note 1, at 746.

grounds and that IP rights are pure products of contingent policy choices rather than private property or other private rights.[95] On this view, statutory IP rules express policy preferences of legislatures, while common-law IP rules express the policy preferences of judges.

A characteristic expression of this view contrasts statutory IP rights with common law doctrines such as trade secret. "Statutes . . . were just expressions of historically and culturally contingent social policy. Therefore, the Copyright and Patent Acts had no special claim to authority. Their authority depended entirely on the policy choices of particular legislatures at particular times."[96]

We have reasons to doubt that the utilitarian or positivist conception of patents can provide a comprehensive account of American patent law. For one thing, to the extent that it purports to be an accurate historical account of patent law, it is incomplete or even false.[97] For another thing, it reads an anachronistic, post-positivist conception of statutes back onto the Patent Act.[98] For centuries prior to the Legal Realist revolution of the twentieth century,[99] and still today in legal practice within courtrooms,[100] jurists and lawyers distinguish between remedial statutes, on one hand, and "declaratory"[101] or "confirmatory"[102] statutes, on the other. While remedial statutes make some (usually limited) change in the common law or restore a common-law doctrine that has fallen into desuetude,[103] declaratory statutes restate or clarify pre-existing law,[104] which is often unwritten and includes immemorial customary doctrines[105] (such as due process and ex post facto prohibitions), institutions (such as the jury trial and property

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95. A leading Intellectual Property casebook simply asserts the proposition:

> The principal object of intellectual property law in the United States is to ensure consumers a wide variety of intellectual goods at the lowest possible price. Intellectual property law aims to achieve this end by giving individuals and businesses property rights in the information they produce and, through the opportunity to profit from the information, the economic incentive to produce it.

PAUL GOLDSTEIN & R. ANTHONY REESE, COPYRIGHT, PATENT, TRADEMARK, AND RELATED STATE DOCTRINES 18 (8th ed. 2017).

96. Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CALIF. L. REV. 241, 256 (1998).

97. *See* Nelson, *supra* note 1, at 1435–37, 1441; *Patent Privilege*, *supra* note 1, at 955–60, 1010–12.

98. *Common Law Rights*, *supra* note 47, at 2593–94, 2610–11, 2615–16.

99. About which, *see generally*, GEORGE C. CHRISTIE, PATRICK H. MARTIN & ADAM J. MACLEOD, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 820–99, (West Acad., 4th ed. 2020); *see* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 189–200 (5th ed. 2009).

100. *See*, *e.g.*, Rogers v. Donovan, 518 P.2d 1306, 1307 (Or. 1974) ("[T]he statute in question has been held to be declaratory of the common law").

101. 1 BLACKSTONE, *supra* note 83, at 86.

102. *See* ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 209 (1966).

103. 1 THE SELECTED WRITINGS OF SIR EDWARD COKE 78–84 (Steve Sheppard, ed. 2003).

104. *See* 1 BLACKSTONE , *supra* note 83, at 86.

105. *See Id.* at 63–84.

ownership), absolute rights (such as life and limb), and *mala in se* wrongs (such as murder, theft, and fraud)[106] that comprise the foundational architecture of our law.[107]

Though many legal scholars today neglect this distinction between declaratory and remedial enactments, it continues to perform important work in the legal analysis performed by courts.[108] It works in patent law just as it does in other areas of statutory interpretation.[109] As the Supreme Court has explained, "Congress is understood to legislate against a background of common-law adjudicatory principles."[110] And unless Congress expresses a clear intention to abrogate a common law doctrine, speaking directly to the question addressed by the doctrine, it leaves the common law doctrine in place.[111] For example, the "well-established exhaustion rule marks the point where patent rights yield to the common law principle against restraints on alienation."[112]

More generally, many statutes that secure intellectual property rights and private rights of data privacy are at least partly declaratory of classical legal doctrines taken from the common law and *ius gentium*.[113] When interpreting intellectual property statutes, just as when reading any other statute, the Supreme Court assumes that the statute leaves in place well-established common-law doctrines, unless the statute expresses a manifest purpose to the contrary.[114] Because all intellectual property statutes leave in place or declare at least some existing law, classical legal concepts often provide the best heuristics for interpreting such statutes and understanding the legal doctrines governing information resources.[115] Furthermore, many rights of intellectual property and data privacy are derived directly from common law doctrines such as trade secret and unfair competition, as well as common law writs such as trespass on the case and trespass to chattels.

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106. *See Id.* at 54–57.

107. *See Id.* at 38–62.

108. *See*, *e.g.*, Peer v. Liberty Life Assurance Co., 992 F.3d 1258, 1262–63 (11th Cir. 2021); Presbyterian Camp and Conf. Ctrs., Inc. v. Super. Ct. Santa Barbara Cnty., 501 P.3d 211, 217 (Cal. 2021); Albert v. Sheeley's Drug Store, Inc., 265 A.3d 442, 446 (Pa. 2021); Abutahoun v. Dow Chem. Co., 463 S.W. 3d 42, 51–52 (Tex. 2015); Poole v. Commonwealth, 860 S.E. 2d 391, 395–96 (Va. 2021); D.C. Pub. Schs. v. D.C. Dep't of Emp. Servs., 95 A.3d 1284, 1287–88 (D.C. 2014).

109. *See*, *e.g.*, Minerva Surgical, Inc. v. Hologic, Inc., 141 S. Ct. 2298, 2307 (2021), and the decisions cited therein.

110. Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991).

111. *See id.*; Allen v. D.C., 969 F.3d 397, 402–03 (D.C. Cir. 2020).

112. *See* Impression Prods., Inc. v. Lexmark Int'l, Inc., 137 S. Ct. 1523, 1531 (2017).

113. *See Common Law Rights*, *supra* note 47, at 2612–14; *Cyber Trespass*, *supra* note 43, at 2–5.

114. *See* B & B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 148 (2015); *Impression Prods.*, 137 S. Ct. at 1532; *Minerva Surgical*, 141 S. Ct. at 2307.

115. *See*, *e.g.*, Vishnubhakat, *supra* note 1, at 598–99, 605–10; MacLeod, *Patent Infringement*, *supra* note 1, at 725–27.

The digital world has proven to be an inhospitable environment for the pragmatic jurisprudential theories that dominated the early twentieth century. The utilitarian distinction[116] has run its course. H.L.A. Hart identified one reason for the failure of skeptical theories: they failed to take seriously the practical reasoning of people who employ legal norms and who participate in legal institutions.[117] Command theories exclude most of what law is, *e.g.*, powers and promises and other non-commands, and thus cannot understand most legal reasoning.[118] Meanwhile, the prediction theories of Holmes and the Legal Realists had nothing to say about the practical reasoning of the law-abiding judge, who takes law not to be a byproduct of her decisions or mere means of predicting how she will rule, but rather as a direction for her to rule in a certain way.[119] Nor did they have anything to say about the law-abiding citizen who takes law as a reason for her action.[120]

116. This term is borrowed from H.L.A. Hart's famous debate with Lon Fuller, in which he rehabilitated the thesis that law is separable from morals by restating it in more modest terms than those used by earlier utilitarians, such as Bentham and Holmes. Those earlier positivists eliminated from jurisprudence the perspective of the law-abiding person who takes law as a reason for action because she believes that law has a purpose and that she therefore has a reason to obey. Lon Fuller criticized those theories as a "series of definitional fiats," whose authors refused to acknowledge that they were setting down "direction posts for the application of human energies." Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 631–32 (1958). Utilitarian positivists did not survive the totalitarian social experiments of the twentieth century with their credibility intact. As Hart acknowledged, the utilitarian distinction was placed in the dock and confronted with "the testimony of those who have descended into Hell, and, like Ulysses or Dante, brought back a message for human beings." H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615–16 (1958). Further, Nazi imitation of American eugenics programs ratified by Holmes himself did not clothe pragmatic legal theories in glory. *See*, *e.g.*, *Buck v. Bell*, 274 U.S. 200, 207 (1927),

Hart conceded that the utilitarian positivists insisted on the separation of law from morals "partly because they thought that unless men kept these separate they might, without counting the cost to society, make hasty judgments that laws were invalid and ought not to be obeyed." H.L.A. HART, THE CONCEPT OF LAW 211 (3d ed. 2012). Their theories were driven by normative concerns. But he explained why a *descriptive* separability of law and morals is both correct and defensible. Hart, *Positivism and the Separation of Law and Morals*, *supra*, at 615–21. He reinterpreted the separability thesis as a descriptive thesis, the "distinction between law as it is and as it ought to be." *Id*. at 600. I take his descriptive positivist thesis to be both a truism and consistent with moral influences upon, and critiques of, law, as Hart himself did. *See id*. at 596–99. Though the descriptive positivist thesis remains controversial, *see*, *e.g.*, BRIAN MCCALL, THE ARCHITECTURE OF LAW 433–36 (2018), there is no inherent incompatibility between positivism and moral theories of the law, such as natural law and natural rights theories. Indeed, natural law theories at the center of the tradition, from Thomas Aquinas to John Finnis, affirm the indispensable role of positive law in settling practical questions and generating legal obligations. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA, *First Part of the Second Part* Questions 95, 96; JOHN FINNIS, NATURAL LAW & NATURAL RIGHTS 260–90 (2d ed. 2011); GRÉGOIRE WEBBER ET. AL., LEGISLATED RIGHTS 86-115 (2018).

117. HART, THE CONCEPT OF LAW, *supra* note 116, at 88–91 .

118. *Id.* at 35-38.

119. *Id.* at 141-47; Finnis, *supra* note 70, at 322-23.

120. Hart, *supra* note 116, at 89-90.

People need to choose and act. Law assists and even directs their practical reasoning. In this sense, law is like other normative enterprises. People employ law to achieve their ends. Whether those ends are characterized as interests, goods, or satisfaction of preferences, the point is that people use law for normative purposes. People will engage in practical reasoning with or without law; human beings are normative beings. Either people will coordinate their choices and actions according to law, or they will act for other motivations.

C. New Critical Objections

The more recent objections advanced by CLS and post-structuralist theorists, briefly stated above, present a different challenge. To restate: The first objection is (roughly) that legal concepts are products of outdated and inequitable discursive practices and must be treated with suspicion, lest their hidden normative assumptions be smuggled in under the guise of neutral description. The second objection is that legal concepts are endlessly indeterminate and can be put to nearly any use simply by picking out and emphasizing different features.

These objections challenge the efficacy of descriptive legal scholarship, which is a type of theoretical reasoning about practical reasoning. From the critical or post-structuralist perspective, liberal legal scholars are the problem. They perpetuate and legitimize biased norms under a false veneer of neutrality.

The answer to the first kind of objection is that, because law is a practical enterprise, theories that describe law *must* be open-sighted with respect to norms. Any good descriptive theory will account for the first-order reasons that motivate people to employ legal concepts and the practical uses to which those concepts are employed in the plans and actions of persons. This does not entail that the theorist must endorse the norms that people act upon. It does not even entail that the legal concepts under consideration constitute endorsement of the first-order ends to which they are directed. Often, legal concepts are generated and employed precisely to enable normative judgment *against* actions (such as murder and slavery). Thus, someone who wants to criticize law as inequitable will benefit from an accurate understanding of legal concepts.

The answer to the second set of objections is that good legal scholarship should be neither more nor less precise than the legal concepts it sets out to describe.[121] Legal concepts are not perfectly determinate because life is not perfectly determinate. A theorist who demands precise definitions of legal concepts will be frustrated, not always because the legal concepts are defective but rather because they are effective at solving practical problems that are themselves indifferent or complex. To understand legal concepts, then, it is

121. Compare Aristotle, supra note 84, at I.3 (explaining why some subjects cannot be described as precisely as others); Hart, supra note 117, at 13-17 (explaining the deficiencies of univocal definitions); Finnis, supra note 70, at 9-11 (explaining why Aristotle's and Hart's theories of justice and law are superior to more simplistic theories).

better to use central case methods, which enable fruitful comparisons and analysis, though not always precise definitions.

We now take up these answers in more detail.

1. Describing a Normative Enterprise

A sound account of concepts is fundamentally descriptive. But when the concepts being described are legal concepts, a sound account cannot avoid making normative evaluations. People often employ laws to answer practical questions. Put in analytical terms, lawful people take laws to be their reasons for action. A sound descriptive theory will candidly reveal the first-order reasons for which legal concepts, as second order exclusionary reasons,[122] are not always transparent.

To describe law well is not just to describe human actions. It is also in part to describe *reasons* for action. And laws are reasons of a certain kind. They are second-order reasons, generally peremptory and conclusive,[123] always exclusionary of at least some first-order reasons.[124] People cannot reason all the way through every practical problem all the way from first principles every time they act. We need settled reasons. The job of a legal concept, whether a rule, a right, a duty, or a presumption, is to supply settled, second-order reasons, which make it unnecessary to consider already-rejected and unreasonable possible actions. This job entails that legal concepts must privilege some first-order reason(s) over other reasons. Law takes sides. When it works well, it resolves some uncertainties (though it may generate new ones).

The language that lawyers use to answer practical questions for their clients demonstrates this normative orientation of legal concepts. The client expresses a problem in terms of first-order reasons, such as the plan she intends to pursue or the consequences he wants to avoid. The skillful lawyer responds with an answer expressed in terms of technical concepts that constitute second-order reasons for the client to consider and act in response to. *To provide for your children's future education you should create a trust. To avoid liability for patent infringement you should perform a prior art search. To put others on notice of your claim you should register your domain name*. The "should" in each of those sentences signifies the client's normative motivation to care about what would otherwise be uninteresting legal concepts.

Good conceptual scholarship elucidates the concepts which lawyers employ. Infringement of a patent claim and remedies for infringement are determined by

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122. *See generally* RAZ, *supra* note 79, at 10 (discussing how norms direct practical reasoning based on their weight of influence); JOSEPH RAZ, THE MORALITY OF FREEDOM Chs. 7–8 (1986) (discussing how liberty is valuable for all people and generates fundamental rights reflected in law) [hereinafter RAZ, FREEDOM].

123. *See* H. L. A. HART, THE CONCEPT OF LAW 81, 89–90, 94 (2nd ed. 1994); H. L. A. HART, ESSAYS ON BENTHAM 243–55 (1982).

124. *See* RAZ, FREEDOM *supra* note 122, at 165–92; RAZ, *supra* note 79, at 35–48, 73–89; RAZ, *supra* note 80, at 128–43.

reference to some concepts. Where the rules of a statute adequately specify the concept, the rules are carrying the concept's water and concealing the important work being performed by pre-existing concepts that the rule-makers took for granted. Where rules are indeterminate, the lawyers and the judge must employ some concept in the act of interpretation.[125] The law thus employs concepts in legislation, adjudication, or both. Therefore, an accurate account of patent rights must rest upon accurate concepts of rights as they operate in positive law and legal judgment.

Accordingly, an accurate and helpful theory of law must take legal concepts into account, and many of those legal concepts are normative. Law contains norms along with institutions and procedures. Good descriptive scholarship must describe those norms. To achieve that, a theorist must make assessments about the relative centrality or importance of various features of the law, including the legal concepts that function as norms. Conceptual scholarship is unavoidably normative in the same ways that all descriptive theories of human action are normative. Human law is normative for people. To avoid norms is to avoid law. There is no option for a norm-free theory of law. The only options are good descriptive accounts of norms and bad theories. Good theories have transparent and candid accounts of the norms that people use to solve their practical problems. Bad theories are inscrutable because they ignore the ways in which norms direct practical reason and action.

A theory about legal concepts, whether sound or not, is normative in at least two senses, one prior to the theory and one subsequent to it. Prior to description, legal concepts presuppose judgments of importance or centrality. A central case of a legal concept has some essential features and not others because it is formed to perform some functions and not others.[126] A sound descriptive theory must identify those essential features. The job of correctly describing legal concepts is unavoidably normative, but it does not make normative evaluations of its own. It sets out to account for the normative structure of law from the internal point of view of those who make, use, and obey law.

This internal point of view, as Hart called it, is the perspective of contemporary neo-formalist and neo-natural rights theories.[127] Formalists are interested in legal concepts and doctrines as such. They attempt to discern the internal coherence of private law.[128] Natural rights theorists[129] study legal

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125. *See* J.W. HARRIS, PROPERTY AND JUSTICE 129–31 (1996).

126. *Concepts and Functions*, *supra* note 52, at 19–21.

127. Hart, *supra* note 116, at 88-91; Finnis, *supra* note 70, at 11-18.

128. *See*, *e.g.*, Abraham Drassinower, *A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law*, 16 CAN. J.L. & JURIS. 3, 15–17 (2003); James Y. Stern, *The Essential Structure of Property Law*, 115 MICH. L. REV. 1167, 1170–77 (2017).

129. Throughout this article, this term refers both to those who maintain theories of natural rights in law, such as Adam Mossoff, *Patent Privilege*, *supra* note 1, at 953, Eric Claeys, *IP and PR*, *supra* note 52, at 251, and Adam D. Moore, *A Lockean Theory of Intellectual Property Revisited*, 50 SAN DIEGO L. REV. 1070, 1070–71 (2012), as well as to natural law theories that

concepts as intelligible derivatives or specifications of principles of practical reason that are universal and valuable in themselves. Both schools aim to understand practical reasoning from the internal point of view of those who perform it.

This is what the Legal Realist and Critical Legal Studies scholars misunderstood about common law jurists who critiqued positive law from the grounds of customary norms and natural rights. William Blackstone, Joseph Story, James Kent, and other influential jurists were lawyers, not philosophers. When they wrote variations on the Augustinian maxim that an unjust law is a defective law, they lacked the analytical precision of the scholastics, such as Thomas Aquinas, and of later analytic philosophers, such as Hart, Raz, and Finnis. But the basic idea that they were expressing, albeit unartfully, is really quite sensible—even obviously true—from the internal point of view of the lawful people of the day. It is simply that a law which requires a person to do an evil act provides an insufficient reason to motivate that person's choices and actions. It is in that sense a defective law, though in other respects it is manifestly a law, especially in the sense of being a promulgated enactment of an agent or institution who possesses the power to change the law. As a description of ineffectual law, the common law maxim that nothing contrary to reason can be law is thus far from illicit. Indeed, as a description of the practical reasoning of then contemporary law-abiding people, who almost all believed in the authority of natural and divine law, it was not even ideological.

Subsequent to description, legal concepts take on the meanings and uses for which they are employed in the resolution of practical problems. They are used for practical ends. Those practical ends can be evaluated from the external perspective of theorists and social scientists. Today, the most influential such account is law and economic. A typical economic account of law posits an end—efficiency—employs rigorous analytical and empirical research methods, and identifies concrete strategies for achieving the posited end.

This is the sense of normativity about which CLS and post-structuralist scholars rightly worry. A sound descriptive theory must be aware of the normative uses of legal concepts and the degree to which those uses are controversial or rationally contestable, else it risks legitimizing and perpetuating questionable acts unaware. If we assume that efficiency is the end of all law, and that assumption turns out to be false, then we have not only misunderstood law, but we have also changed it. The enterprise of legal scholarship is a back-

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affirm a role for rights in legal reasoning, such as FINNIS, *supra* note 70, at 198–230, and MacLeod, *supra* note 54, at 173-96. There are important differences between both groups. For present purposes, however, what they have in common is more important. Both theories identify objective standards of critical rationality, reasons for action that determine practical reasoning within law to some (usually limited) extent. In other words, law has the shape and content that it has in part because human beings chose to make it a certain way but also in part because it is good and right to shape law in some ways and not in others.

and-forth commute between the practical and the descriptive, and the risk of smuggling evaluation into description is a standing danger.

The most successful law-and-economics theories do not confine themselves to the external perspective of economic science. They take as their subject matter legal concepts that have endured throughout many periods of legal change and treat those legal concepts as normative from the perspective of those who employ them in practical reasoning.[130] These theories account for how law-abiding people actually reason with respect to things and other resources. They fail precisely to the extent that they try to cram all legal concepts into economic assumptions.

For example, information-cost efficiency explains aspects of private law that Blackstone and Locke left unexplained. But it works better to explain some property concepts than others. It works really well for concepts that are simple, *in rem*, and context-independent. It works less well for the internal norms of private law, which tend to be more complex, *in personam*, and context-dependent.

What counts as a reasonable use of a resource? The information costs of answering that question are high. Yet it is an important question for lawyers engaged in practical reasoning. Indeed, it is often the most important question for those who exercise liberties and powers to use *i.e.*, those who are on the inside of practical reasoning about resources, the lawyer's clients. Its context-dependence and importance are both on display in nuisance doctrine in real property, fair use doctrine in copyright, and the doctrine of commercial morality in unfair competition law.

As an external account of legal norms, the economic study of law makes important contributions. But we need also an internal account, which takes into consideration the internal point of view of those who need to act in the world and want to know what they may and should do. Classical legal concepts endure because they answer the pressing, practical question in ways that respond not only to the demands of efficiency but also to other human goods, such as health, life, and knowledge.

Consider the concept of trespass. Originally, a common-law writ to remedy forceful contact, trespass was first transformed into a legal concept covering unlawful intrusions against persons, land, and chattels. Trespass then extended to incorporeal resources by the doctrine of patent infringement, a species of

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130. Not all economic accounts of law do this. But the early economic scholars of law did so. *See, e.g.*, Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347–59 (1967); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 188–92 (1991). And several do today. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM & MARY L. REV. 1849, 1849–51 (2007); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3–12 (2000); Epstein, *supra* note 57, at 2091–92, 2095–97, 2099; Daniel B. Kelly, *Dividing Possessory Rights*, *in* LAW AND ECONOMICS OF POSSESSION 175, 175–206 (Yun-Chien Chang ed. 2015).

trespass remedied by the writ of trespass on the case. Trespass is predicated on in rem rights. It therefore answers practical questions in simple, context-independent terms consistent with basic, legal duties. But it also makes allowance for more basic goods, such as life and knowledge. An unconsented entry on land is not a trespass to land if done for the purpose of preserving human life. And an unconsented exercise of a patented invention is not infringement if done for the purpose of acquiring knowledge.

From the internal point of view, formalist and natural law/rights theories provide indispensable insights into how and why people act under law and with respect to things. They can explain, for example, that life and knowledge are intrinsic goods which justify categorical exceptions to trespass liability. But some internalist theories tend to understate or even ignore the role that adjudication and remedies play in specifying rights. In their efforts to avoid the consequentialist fallacy, many rights-based theorists have jettisoned the genuine insights of pragmatism and economics and thus made rights seem more reified than they actually are.[131]

Common law adjudication does not deal in universal abstractions. It gets at rights by way of supplying remedies for wrongs. Courts specify rights only at the level necessary to resolve cases and controversies between claimants, and only for those claimants. For example, to make out an action in replevin, the claimant had to show a superior right to possess. To make out an action in trover, the claimant also had to show superior title. The writ determines the remedy, which determines the specification of the right. Law and economics theory captures this dynamic of right specification better than many formalist and natural rights theories.[132]

We need both perspectives.[133] If we are careful to understand both the internal and external points of view then openness to norms at the description stage should not only be uncontroversial but encouraged. Lawyers choose certain concepts over alternatives for fundamental reasons. If, as some suppose, property concepts serve goods which people think are important, such as liberty or autonomy or practical reasonableness, we ought to notice that those goods are at stake in our selection of alternative concepts over property concepts. Whether or not those goods should be pursued and whether the concepts which serve them should be chosen as against possible alternatives are not the primary concern of legal theorists; they occupy social scientists, moral philosophers, and theologians. But that those fundamental reasons and the concepts which serve them are normative in orientation is simply a fact. Good descriptive accounts

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131. MacLeod, *supra* note 54, at 180-81, 191-96.

132. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093, 1096–98, 1100–05, 1114, 1118–19, 1112–24, 1127–28 (1972); James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 440–41, 452–80 (1995).

133. *C.f.* Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357, 357–58 (2003) (viewing Internet law from both external and internal points of view).

must not leave out normative facts any more than they should leave out empirical facts.

Consider the concept of a public right. What makes a public right "public" in the first instance depends upon the reasons why it was historically classified as public. Those reasons may vary according to context such that "public" has had different meanings in different categories of cases. But leaving that complication aside, even a univocal meaning of "public" requires selection from among possible features of a right that might make it more or less public or more or less private.

Do we say that a right is public if it pertains to the government's duties, or if it imposes no duties on the sovereign such that the sovereign can revoke it at will, or if it is justified on the basis of majority interests, or if it can be vindicated without a showing of particularized injury? Each of those different aspects of what we sometimes call "public" rights could claim to be more essential or important to the publicness of a right. And each might lead to a different conception of public rights and, by deduction, a different conception of private rights. (The same could of course be done in reverse, starting with a concept of private rights). Each will turn out to be predicated on normative evaluations that people have made of the desirability of governments having duties, and of officials having discretion, and of majority rule, and of judicial power, and of much else. The job of the legal scholar is to state as accurately as she can the essential features of the legal concept which reflect those normative evaluations.

The normative task of descriptive theorists remains both necessary and unproblematic when describing old legal concepts that have been put to new uses. To say that an accused patent infringer is engaged in a kind of trespass is to say that the practical problem of identifying wrongful takings of invention resources is in its central aspect the same kind of practical problem as that of identifying wrongful entry upon land or wrongful appropriation of tangible resources. There is nothing illicit or suspect about having a theory of wrongs that accurately describes how people have defined those wrongs.

Descriptive theories need not smuggle norms illicitly. Solving practical problems is a normative, practical enterprise. Examining how people solve those problems is a descriptive, theoretical enterprise. The efficacy of the legal concepts that people use in fact stands independently of any practical use that people make of them. And accurate descriptions of legal concepts and their uses stand independent of both the concepts and their uses.

Consider the legal concept that corresponds to the word "slave." Let us stipulate that this concept has something to do with one natural person asserting property ownership of another natural person. And let us stipulate that this assertion can never be justified, no matter the strength of the first-order reasons offered to explain the assertion. It can never be consistent with legal justice to confer upon a person the legal status of slave. Nevertheless, the legal concept of "slave" is both justified and practically useful. Indeed, it is justified and useful *because* the legal status of slave is never justified, even when useful, and

we must be able to speak of it in discussions of intellectual property law, as in other areas of the law.[134] We must have some way of readily and consistently identifying those actions and practices that constitute slave holding, so that slave holders can be held legally responsible and that those placed in the condition of slavery can be freed (and can be recognized as inventors and creators). Just as intentional killing is not justified and so we need a legal concept of "murder," involuntary servitude is never justified and so we need a legal concept of "slave."

To observe that slave holders oppress slaves is therefore not to show that the legal concept of a "slave" is an unjustified artifact of an oppressive discursive practice. To the contrary. Similarly, to concede that some assertions of private property rights are unjustified is not to undermine the legal justice of the concept of private property. We should not be surprised that property rights have normative assumptions built into them. They are used for practical purposes. That alone does not make the concept of property rights suspect. It does not even reach the question whether private property rights are justifiable. Unlike the category "slave," the category "property" is capable of many justifiable applications.

Subsequent to description, legal concepts have normative implications insofar as lawyers and judges use them to render judgments about particular cases. They might use a legal concept in ways that are more or less consistent with their original uses. But consistency aside, they continue to use legal concepts because and insofar as those concepts help them to solve practical problems that are similar in important respects to the practical problems to which the concepts were earlier addressed.

That first-order reasons enter into both the formation and the employment of legal concepts means that one can critique conceptual legal theories both on positive grounds—according to their measure of fit with the materials in which one is attempting to discern coherence—and on critical grounds—according to the ends that legal concepts are supposed to serve and their efficacy for achieving those ends. So, for example, when Legal Realists deny that property concepts do the work attributed to them in practice, they are offering the first sort of critique; legal concepts do not explain what is really going on in intellectual property. When utilitarian scholars reject the use of property concepts in intellectual property discourse, they often are critiquing legal concepts on the second basis; intellectual property law is supposed to incentivize innovation, while property concepts are supposed to serve other ends, such as personal autonomy or distributive justice.

2. *Central Cases and Focal Meaning*

Classical property concepts operate by calling attention to a central case of some action with respect to a resource, which enables comparison to other cases. The central case is compared to new cases of relevantly-like kind and contrasted

134. *See*, *e.g.*, Frye, *supra* note 8, at 182–83.

with cases that are dissimilar in respect of what is relevant. Those features are relevant that are shared by the central case and all that are close to it, while those features are irrelevant that are not shared between the central case and peripheral instances. By picking out the essential features and distinguishing the accidental or unnecessary features, the theorist or jurist can articulate a "focal meaning" of the legal concept under consideration.[135]

A focal meaning is not always a precise definition. Its efficacy lies precisely in *not* trying to attain greater determinacy than is appropriate to the thing being considered. A focal meaning does not try to impose a univocal meaning on differentiated phenomena, nor to insist on finding one common denominator. Instead, a focal meaning enables one to differentiate in a multi-faceted manner, to distinguish cases that are more like and less like the central case to which the legal concept refers.[136]

A central case has identifiable features. Those features, when generalized and abstracted, form the focal meaning of the concept that refers to the case. Take Aristotle's example, a true friend. Sam is my friend. Sam wants what is best for me, even when he gets nothing out of it. Thinking about my friendship with Sam, I can see that the focal meaning of a true friend is a person who wants what is good for his friend not for merely instrumental reasons but also just to see that his friend prospers.

Now I consider a new case and apply the focal meaning to it. John is my business partner. John wants what is best for me because when I am doing well, our business prospers, and therefore, John prospers. By comparison to the central case of a friend, Sam, John is less friend-like. But like Sam, he wants me to prosper. He is a friend, though not in the central, full sense that Sam is a friend.

I do not need a determinate definition of friendship that settles, once and for all, whether John is my friend. Indeed, such a definition would be unjust to John. He is my friend in some senses and not in others. A univocal definition would also deprive me of the conceptual clarity I need to reason practically. With respect to our business activities and other shared, instrumental ends, I ought to act on the understanding that John is my friend. When my individual prosperity is at stake for its own sake, and not for the sake of our joint business enterprise, I might be wise not to count on John to act for the sake of my well-being (though he might surprise me, in which case he will turn out to be a true friend).

Thus, the existence of peripheral instances and borderline cases does not mean that a concept has no real meaning, or no objective referent, or no true essence. Useful taxonomies that make sense to real people and which solve real problems

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135. This part draws heavily from ARISTOTLE, ETHICS, *supra* note 84, at VIII.4; HART, THE CONCEPT OF LAW, *supra* note 120, at 81, 206-12; RAZ, PRACTICAL REASON AND NORMS, *supra* note 79, at 150; and especially FINNIS, *supra* note 70, at 9–18.

136. *C.f. Concepts and Functions*, *supra* note 52, at 57–58 (explaining how focal-case methods in legal philosophy help to clarify legal concepts).

for real people should not be abandoned just because clever scholars can find hard or borderline case.[137]

The same method works for conceptual clarity about law. A central case of lawful action enables a practical reasoner to know whether his proposed plan of action seems lawful. And it enables a judge or theorist to identify a focal meaning of a legal concept in order to render a judgment of lawfulness or unlawfulness. Central cases and focal meaning enable accurate assessments in both practical reasoning and in theories about practical reasoning.

The work of central-case reasoning is clearly perceived in judicial decision making, where new cases of alleged wrongdoing are compared to old cases of known wrongdoing by focusing on what is essential and differentiating what is peripheral or accidental. In Case A, a court ruled that it is an act of infringement when one uses a welding process on which another's patent does not read directly but which nevertheless is functionally equivalent to the patented invention, because the only difference is substitution of a similar flux that is known to perform the same function.[138] The case identifies what is essential or indispensable in an act of patent infringement: function and obviousness. Elements that perform the same function and are known to those skilled in the relevant art may not be used to avoid liability for an act that would otherwise be covered by another's patent claim if only essential features were considered.

In later Cases B, C, and D, a judge or jury reviewing accused acts of infringement will compare those acts with the central case of equivalent infringement in Case A. The cases might differ in respects that are non-essential and be the same with respect to function and obviousness, and therefore amount to infringement on the precedent of Case A. For example, the patented process in Case B might be a process for assembling widgets. But that the process concerns widgets and not welding is not relevant to the focal meaning of equivalent infringement, and therefore is irrelevant to the analysis whether the process accused in Case B is infringement.

D. Sound Scholarship About Legal Concepts

Central cases and focal meaning also enable good scholarship because they enable scholars to describe concepts of law and legal justice accurately and precisely. Legal scholarship is a descriptive exercise about a normative, practical enterprise, namely law. Sound legal scholarship must make normative assessments if it is to ably describe normative actions. And it must develop focal meaning to account for the practical operation of central cases. This requires capable legal scholars to choose some concepts over others.

For example, when economic scholars measure efficiency they necessarily refer to a concept which might be other than it is. A selection between static and

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137. Samuel Beswick, *The Decline of the Fish/Mammal Distinction?*, 165 U. PA. L. REV. ONLINE 91, 91–97 (2017).

138. Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 339 U.S. 605, 611–12 (1950).

dynamic efficiency involves a judgment about which is the more important or efficacious measurement for the task at hand. And economic accounts must have a settled meaning for the concept of an "entitlement," else linguistic slippage will make comparisons impossible. What counts as an entitlement may depend at least in part on which expectations concern the persons involved in disputes about conflicting uses, which may turn on immemorial usage and other long-standing legal conventions.

Furthermore, the selection of efficiency to the exclusion of other possible ends for IP is itself less than obvious from other points of view. From the perspectives of people other than law professors and social scientists, IP rights serve various ends other than maximizing innovation. From the point of view of patentees and licensees IP can facilitate cooperation, even enable altruist actions. From the perspective of judges, rights can facilitate deliberation and judgment. Perhaps those reasons are not sufficient to justify rights. Or perhaps they are already encompassed within the ends and means identified in utilitarian accounts. But we would not be warranted in ignoring them without some account as to why they are either inadequate or already accounted for in utilitarian justifications.

Thus, one can criticize any conceptual account either in terms of fit—a descriptive critique—or in terms of how well it comprehends the normative interests at stake in use of the concept under consideration—a normative critique. When it comes to common-law property concepts in intellectual property law, the first criticism has more bite than the second. Scholarship which elucidates common-law concepts has room for a wide variety of normative commitments. As Eric Claeys has observed, like other fields of law which employ rights concepts, intellectual property can pursue multiple goals simultaneously.[139] Utility and the ends of common law rights are not mutually-exclusive, as Richard Epstein has demonstrated.[140] And even if the ultimate goal of IP is to incentivize valuable creation it might need property and tort and other legal concepts to achieve that goal.[141] Claeys suggests there remains "the possibility that infringement and related remedies pursue that possibility indirectly. By encouraging owners to innovate and disseminate their works, well-developed systems of patent rights, torts, and remedies may encourage more innovation and dissemination than other institutional arrangements could do."[142]

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139. Eric R. Claeys, *The Conceptual Relation Between IP Rights and Infringement Remedies*, 22 GEO. MASON L. REV. 825, 837–38 (2015).

140. *See* Richard Epstein, *Property and Necessity*, 13 HARV. J. L. & PUB. POL'Y 2, 7–8 (1990); *see also* Richard Epstein, *The Common Law Foundations of the Takings Clause: The Disconnect Between Public and Private Law*, 30 TOURO L. REV. 265, 265–67 (2014).

141. Consider Ted Sichelman's suggestion that "common law property, contract, and tort" can serve as "midlevel principles" in reasoning about patent law. Ted Sichelman, *Patents, Prizes, and Property*, 30 HARV. J.L. & TECH. 279, 297 (2017).

142. Claeys, *supra* note 139, at 837.

The descriptive critique requires a more detailed response. Perhaps common-law concepts such as property and trespass do not fit the judgments we find in legal practice. It might be that lawyers and judges do not often use legal concepts. Or perhaps they use concepts of rights and duties, but they mask their pre-determined conclusions behind legal jargon, as CLS and post-structuralist theorists charge.

This possibility is not necessarily an indictment of classical property concepts. It might well be an indictment of cynical lawyers and judges. That the reasoning of cynics is estranged from the core of legal concepts does not resolve which has the better claim to "law." And we cannot resolve the gap between legal concepts and legal cynics by appealing to percentages or other empirical measurements. Even if all lawyers were cynics, their use of legal concepts to mask their consequence-determined judgments might well be the tribute that vice pays to virtue.

That legal concepts do not fit the facts on the ground simply begs the question whether legal concepts or the facts on the ground are more deserving of the moniker "intellectual property law." To choose consequence-oriented judgment over rights-determined judgment is to make a choice—a controversial choice—about what is essential or important about judgment by juridical actors and officials.

Of course, most of those who prefer utilitarian accounts of IP do not privilege consequence-oriented judging in this way. They prefer rules which are most likely, all things considered, to achieve the desired levels of creation and innovation. And they want lawyers and judges to follow those rules instead of rules that result in less innovation. They are rule utilitarians, and in this sense, they embrace law or something very much like it. They do not doubt the fit of concepts generally. But many doubt the efficacy of common law, or *ius gentium*, or equitable concepts—promise, trespass, unclean hands, etc.—in particular.[143] Concepts such as entitlements, utility, and incentives are preferable.

This rejection of property concepts is subject to the same counter-critique as skepticism of legal concepts in general. Just like trespass and rights, entitlements are themselves conceptual, as are the ends that efficient rules are supposed to serve. To assert that utilitarian concepts fit IP better than property concepts is to assume that those features which are most essential or important to IP law are reflected in utilitarian concepts, and those which are reflected in property concepts are peripheral or irrelevant. It is, in other words, to assume a judgment about what is most essential—or even exclusively essential—to IP.

But now it might seem that we are drawing up sides. Isn't this all very judgmental? In a sense it is. To describe any human artifact accurately requires judgments of fit and importance. And insofar as human beings design and use artifacts such as law to achieve certain ends (and not others), good descriptive

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143. *See, e.g.*, Ted Sichelman, *Purging Patent Law of "Private Law" Remedies*, 92 TEX. L. REV. 517, 530–35 (2014).

scholarship must account for the features of the artifact under consideration which result from those moral judgments. But we require both external and internal judgments. So, our judgments need not devolve into theoretical rivalry.

Conceptual scholarship both is and is not inherently normative in the same sense that all good scholarship both is and is not inherently normative. It is inherently normative, as John Finnis has explained, "in so far as there is no escaping the theoretical requirement of a judgment of significance and importance if theory is to be more than a vast rubbish heap of miscellaneous facts described in a multitude of incommensurable terminologies."[144] Assessments of significance and importance are grounded in a practical perspective on human actions and affairs. Scholars of law are engaged in academic inquiry—what classically has been known as *theoretical* reasoning, inquiry for the sake of knowing what is true—about the *practical* reasoning of people who act for legal reasons. To perform good descriptive work about the normative activities of human beings requires some understanding of those normative activities from the inside. We must perceive from the practical perspective of those who act for legal reasons. Yet we must also critically evaluate those reasons, and so must abstract from the practical perspective to an external point of view.

Good scholarship about the concepts employed in patent law, like good scholarship about human acts and artifacts generally,[145] does both. It carries on a "movement to and fro" between, on one hand, attention to the ends or values or goods which people act to attain and "on the other hand, explanatory descriptions (using all appropriate historical, experimental, and statistical techniques to trace all relevant causal interrelationships) of the human context" in which law operates.[146] Each perspective must adjust according to the insights of the other. This is one reason why H.L.A. Hart argued more than half a century ago that scholarship about law must attend both to the external perspective of sciences such as economics and the internal point of view of those who act for legal reasons.[147]

So, when Lon Fuller set out to identify the "forms and limits" of adjudication, he took care to identify the "true" and essential forms, and to distinguish those from false and defective forms, all by reference to the goals and ideals toward

144. FINNIS, *supra* note 70, at 17.

145. Aristotle explained why one seeking a theoretical understanding of practical reason must take account of both acts and artifacts. ARISTOTLE, NICOMACHEAN ETHICS I.1. Expanding on this more than a millennium later, Thomas Aquinas identified not just two but four distinct ways, or orders, in which practical reason operates. Reason apprehends what is given by the natural order, participates in language and logic to comprehend and communicate, motivates actions of the will, and generates artifacts in the world. ST. THOMAS AQUINAS, COMMENTARY ON ARISTOTLE'S NICOMACHEAN ETHICS 1–2 (C. J. Litzinger trans., 1993).

146. FINNIS, *supra* note 70, at 17.

147. HART, *supra* note 117, at 88–91.

which adjudication is directed.[148] He was on the hunt for a "rational core."[149] Recognizing that academics are "allergic" to words such as truth and essence, he nevertheless insisted that judgments of truth and essence are indispensable. "For if there is no such thing as 'true adjudication,' then it becomes impossible to distinguish the uses and abuses of adjudication."[150] The scholar must distinguish uses from abuses because law and lawyers do, and the scholar's job is to account for and explain the coherence of law and legal practice. To deny that adjudication has any essential features is to suggest that lawyers are "talking nonsense" when they discuss which disputes are fitted to which tribunals and which procedures.[151] Fuller asked rhetorically, "[d]o those engaged in discussions of this sort deceive themselves in believing that they are engaged in rational inquiry?"[152]

Fuller respected the internal point of view of lawyers enough to explain the coherence of their deliberations and choices. That does not mean that the good scholar accepts uncritically everything that presents as adjudication, for humans are limited in their knowledge and capacities and, even when they act with the best of intentions (which does not always happen), they fail to live up to their own ideals. As a result, they build and maintain imperfect artifacts full of "tosh—that is, superfluous rituals, rules of procedure without clear purposes, needless precautions preserved through habit."[153] Fuller explained, "[o]ur task is to separate the tosh from the essential."[154]

If we will not inquire into the essence of things, then what is the alternative? If we suppose that nothing is essential, and that all concepts are constructs of raw power, then how are we to reason about the real practical reasoning that people actually do? People act; that is given. We are acting beings. The only alternatives are to act according to reason or simply to assert subjective experience against subjective experience, to be trammeled in what Hanoch Dagan calls the "trap of helpless relativism that, paradoxically, ends up reaffirming the status quo."[155]

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148. Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 355–57 (1978).
149. *Id.* at 360.
150. *Id.* at 355–56.
151. *Id.* at 356.
152. *Id.*
153. *Id.*
154. *Id.*
155. This is how Dagan describes it:

> A measure of suspicion is indeed necessary to counter the tendency to impose contingent preferences as natural or necessary truths. But sociological suspicion should not collapse into skepticism about reason and normativity. I reject the way some critical legal scholars characterize reason itself as a disciplinary technology and normative analysis as arbitrary power. These claims imply a dubious meta-ethical position that ends in relativism, skepticism, or nihilism. By equating normative reasoning with parochial interests and idiosyncratic perspectives, they also undermine any possibility of moral justification, and thus also of moral evaluation and moral criticism.

By contrast, reasoning by reference to central cases and focal meanings enables us to understand the important work that legal concepts do for people in the real world, while also understanding and allowing for peripheral and defective instances. The device of central case and focal meaning enables us to understand normative successes and failures; legal justice and legal injustice. It also enables us to classify legal concepts.

E. An Illustration: Alienable and Inalienable Rights

To illustrate, consider the legal concept of alienability. For centuries, jurists have distinguished between alienable and inalienable resources when declaring and shaping legal rights. Someone who owns a chair, a book, or another movable resource may sell, give, or bequest it to another person. It is understood that ownership of such resources entails a power to separate ownership of the resource from oneself. The same is not true of body parts. On the classical view, my leg is part of my body, and my body is an inseparable aspect of me, of who I am essentially. Other inalienable resources include personal licenses to practice professions, hunt, fish, and carry a weapon. Like parts of one's body, these licenses are understood to be inherently personal and therefore inseverable from the person whose rights they are.

The concept of inalienability can aid practical reason and shape law independent of the justification for its application in any particular concept, and of any particular assumptions about personhood. The concept is versatile. One need not accept the classical concept of human beings as rational, embodied animals to find the distinction between alienable and inalienable resources indispensable to practical reasoning. Indeed, human bodies and personal licenses are not the only inherently inalienable resources in law. For example, the concept explains why a riparian landowner may not sell the use of water to a non-riparian owner. In riparian jurisdictions, water rights are use rights rather than full ownership, and the use of water is inherently appurtenant to the land to which the water is adjacent. It also explains why a state government may not convey a lakebed underlying navigable water. Because navigable waterways are inherently common resources, a state has legal interests in the resource not as full owner but rather in a peculiar, inalienable trust for the people.

Nor is the concept limited to law. The concept of alienability proved so successful in law that moral and political philosophers adopted it to explain why some natural rights cannot be relinquished in political society, and why consent of the governed is therefore insufficient to justify infringement of certain, fundamental rights. Citizens can consent to the exchange or waiver of certain rights (*e.g.*, the right to remain silent, the liberty to contract) but not others (e.g. the right not to be enslaved, the rights of conscience and religious liberty).

The key thing to notice is that rights can be *more or less* alienable. There are central instances of alienable rights, central instances of inalienable rights, and

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HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY 77 (2021).

a spectrum in between, along which rights are peripheral to both poles and thus mixes in character.

IV. A PROPERTY CONCEPT IN PATENT LAW: VESTED RIGHTS

A. The Concept of Vested Private Rights

The vested private right is one of the most influential and foundational concepts in American jurisprudence.[156] A private right is vested in the fullest sense if it is immunized against retrospective abrogation, such that once a person can be said to own the right, it cannot be taken away, even by a subsequent change in generally-applicable legislation.[157] Vested rights thus protect the fundamental rights of minorities against tyrannies of political majorities,[158] especially against retrospective abrogation.[159] And they level legal and political inequalities in particular cases insofar as they prevent powerful persons and corporations from taking what belongs to a less powerful creator or owner.

In the classical legal terms expressed by Daniel Webster, it is beyond the competence of a legislature to abrogate private rights once they are vested, or to take them from one person and convey them to another without the vested party's consent.[160] In *Dartmouth College v. Woodward*, Webster famously and successfully argued that as a result of their original trust and the later letter-patent of the Crown "the trustees possessed vested liberties, privileges and immunities, under this charter; and that such liberties, privileges and immunities, being at once lawfully obtained and vested, are as inviolable as any vested rights of property whatever."[161] Edward Corwin later explained that the concept of vested rights was the touchstone for the rule against retrospectivity, which 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."[162]

In theory and practice, the concept of vested property rights resists the power of majoritarian interests to expropriate vested property.[163] In their strongest

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156. *See* Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 247 (1914); Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 776 (1936); Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1421 (1999); *see also* Nelson, *supra* note 1, at 1442–63 (highlighting case law on the subject).

157. *See* Nelson, *supra* note 1, at 1433–44. Not all vested rights are fully vested in that strong sense. *See Vested Rights*, *supra* note 19, at 290–95, 304–06.

158. About which, *see* THE FEDERALIST NO. 10 (James Madison).

159. *See generally* Nelson, *supra* note 1, at 1433–34, 1437–38.

160. *See Dartmouth Coll.*, 17 U.S. at 558.

161. *Id.* at 576. The Court agreed with Webster's argument. *Id.* at 651.

162. Corwin, *supra* note 156, at 255 (emphasis in original).

163. *See*, *e.g.*, San Carlos Apache Tribe v. Superior Court *ex rel.* Cty. of Maricopa, 972 P.2d 179, 189 (Ariz. 1999); 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).

operation, once private rights vest, they cannot be taken away.[164] American jurists have long held the conviction that retrospective abrogation of vested rights is unjust, contrary to the natural obligations that we owe each other as fellow social creatures.[165]

The idea that some private rights are vested rests in the jurisprudential conviction that there exist sources of authority other than and prior to positive enactments, and that some rights rest in those sources of authority.[166] Legislatures are competent to change a positive law when the reasons supporting the positive law change.[167] And legislatures may abolish at least some privileges created by positive laws for public purposes, so-called "public rights."[168] But vested private rights are justified on other reasons. As one court explained regarding the vestedness of patents, if a "patent is valid, it is so merely because it is in confirmation of previous existing rights, and not because it created any new rights."[169] Conversely, that a patent has been issued does not by itself make a patent vested; its validity is contingent on the patentee holder's priority and merit.[170]

More broadly, the strong sense of vesting, that at least some rights vest prior to political action upon them, makes it possible to resist tyrannies of majorities. The pre-positive vested right is the solution to what one scholar calls the "problem of positivism," which is when a government and the faction that controls it cannot "simultaneously be responsible for establishing the property rights of the citizenry and also be entrusted not to render its constituents helpless when conditions dictate defining property rights so as to benefit public officialdom."[171]

The understanding that some rights are vested by pre-positive sources of legal authority, such as immemorial custom, natural law, or a social contract, makes it possible to think that powerful factions can lack the power—suffer a legal disability[172]—to take those rights away after vesting, not even by persuading a legislature to enact generally-applicable, retrospective legislation abrogating the

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164. *See*, *e.g.*, People v. Dorr, 157 P.2d 859, 861 (Cal. Ct. App. 1945).

165. *See* HELMHOLZ, *supra* note 27, at 171.

166. *See* Ames v. Empire Star Mines Co., 110 P.2d 13, 16–17 (Cal. 1941) (Congress "of course" lacks power to "divest private owners of existing vested rights" that previously vested under "local rules, customs, and regulations").

167. *See* RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 121–25 (2012).

168. *See* Nelson, *supra* note 1, at 1448–51. *See*, *e.g.*, Town of E. Hartford v. Hartford Bridge Co., 51 U.S. 511, 534 (1851).

169. Wood v. Gleason, 140 P. 418, 419 (Okla. 1913).

170. *See* Kling v. Haring, 11 F.2d 202, 204 (D.C. Cir. 1926).

171. Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1411 (1991).

172. On the relations between powers, disabilities, and other jural incidents, *see* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Legal Reasoning*, 26 YALE L.J. 710 (1917).

rights.[173] Further, "[t]he Legislature has no power to pass laws impairing or divesting vested rights—and laws, which would have that effect, are void and inoperative."[174] The concept of vested private rights thus plays its most dramatic, constitutional role in limiting legislative power and thus pushing back against tyrannous majorities.

In its less dramatic but arguably more important, practical operation, the concept of vested private rights motivates the canon of charitable construction. Courts must interpret statutes with a presumption that, absent an unambiguous expression to the contrary, a legislature did not intend to divest the vested rights of one person "to the advantage and favoritism of another."[175] When two or more interpretations of a statute are possible and one would retrospectively divest a vested right holder, the court is to choose the interpretation that is "reasonable and just" in the sense that it is "promotive of the security of vested rights and property."[176] Legislatures should not be presumed to have intended unjust results, and divestment would be unjust.

The concept grew out of the common law of property estates. The law of property has long distinguished mere expectations of future possession from estates of ownership that had not yet accelerated and matured into rights of present possession but were nevertheless vested in the sense that they were subject to no remaining conditions precedent.[177] This distinction plays an essential role in legal reasoning about various rules which limited dead hand control, such as the rule against perpetuities.[178] It also enables lawyers to assign rights and responsibility for stewardship of resources under the doctrine of waste.[179]

In the United States, the concept of vested private rights took on new meanings to solve new problems in private, public, and constitutional law. The concept has performed its most notorious work in constitutional law, especially in circumscribing legislative power.[180] Indeed, Corwin referred to the doctrine of vested rights as "The Basic Doctrine of American Constitutional Law."[181] As

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173. *See* KENT, *supra* note 27, at 319; 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1398–99, at 272–74 (5th ed. 1891); COOLEY, *supra* note 27, at 357–59.

174. Smith's Lessee v. Devecmon, 30 Md. 473, 481 (1869).

175. Hackler v. Cabel, 1 Miss. 91, 94–95 (1821); *see also* Lathrop v. Mills, 19 Cal. 513, 530–31 (1861); Union Mfg. Co. v. Lounsbury, 41 N.Y. 363, 374–75 (1869) (Grover, J. dissenting); Casey v. Thieviege, 48 P. 394, 398 (Mont. 1897); Lone Tree Ditch Co. v. Cyclone Ditch Co., 91 N.W. 352, 354 (S.D. 1902).

176. *Ex Parte* Wood, 22 U.S. 603, 612 (1824).

177. *See* MERRILL & SMITH, *supra* note 25, at 103–04.

178. *See id.* at 110–13.

179. *See id.* at 106–08.

180. *See* Smead, *supra* note 156, at 789–91, 797; James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 108–11 (1993); Wood, *supra* note 156, at 1439, 1442–45.

181. Corwin, *supra* note 156, at 247.

James Madison explained in Federalist 10, American jurists were concerned about the power of factions to bring about a tyranny of the majority.[182] Unlike English lawyers, who accepted the supremacy of Parliament over all law, American jurists looked for legal concepts to articulate and give practical meaning to constitutional limitations on the powers of legislatures and legislative majorities to abrogate retrospectively the rights of politically-vulnerable minorities.[183]

The concept of vested rights was also pressed into service in the legal doctrines resolving conflicts of laws.[184] As a result, it plays an elemental role throughout the First Restatement of the Conflict of Laws.[185] Joseph H. Beale, the architect of the First Restatement, gave the vested rights of unwritten common and natural law jurisprudential priority over the incidents of positive laws,[186] and Legal Realists dismissed it as an expression of "transcendental nonsense."[187] But leaving aside its philosophical connotations, the concept persists in the working conflicts doctrines of several states because it possesses "the virtues of consistency, predictability, and relative ease of application."[188]

Legal Realists disparaged the concept of vested private rights because these individuals did not see the concept doing the work that it purported to do.[189] A vested right is only as good as a judge's willingness to be obligated by it; in essence, it is solely the judge's attitude toward rights that matters, not the inherent value of the rights themselves.[190] Their account was long considered a success; they were said to have "brutally murdered" Beale's First Restatement of Conflicts.[191] But their victory was only apparent.

Legal Realists proceeded "from the assumptions that 'law' is a prophecy of what courts will do and that 'rights' are hypostases of that prophecy."[192] But as

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182. *See* THE FEDERALIST NO. 10 (James Madison).

183. *See*, *e.g.*, Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 627–29, 651 (1819); Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 766 (C.C.D.N.H. 1814).

184. *See* Fitts v. Minn. Min. & Mfg. Co., 581 So.2d 819, 821–23 (Ala. 1991).

185. *See generally* RESTATEMENT (FIRST) OF CONFLICT OF LAWS (AM. L. INST. 1934); Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2455–58 (1999).

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

187. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 811–16 (1935).

188. Dowis v. Mud Slingers, Inc., 621 S.E.2d 413, 416 (Ga. 2005).

189. *See*, *e.g.*, Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 480–81, 484–85 (1924); Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 233 (1927).

190. *See* Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1962–66 (2005).

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

192. David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 175 (1933).

Hart showed shortly thereafter, this strictly external, predictive theory of law is incomplete—indeed beside the point—from the perspective of the law-abiding person or judge who wants to know what the law obligates her to do.[193] People understand themselves to be obligated to honor the rights of others. To exclude this social fact from one's theory of law is arbitrary and is to miss most of the work that law and rights do in the real world.

In short, Legal Realism turned out to not be very realistic.[194] The Legal Realists' critique of vested rights looks plausible only if one focuses exclusively on weak, peripheral instances of vested private rights and ignores central cases of robustly vested rights. Strong, central instances include Indigenous land titles[195] and navigable servitudes,[196] which legislatures and other sovereign actors are powerless to alienate or abolish. Less central instances include the immunity of land owned by religious assemblies from taxation and the comparatively weak protection for private property from eminent domain afforded by the requirement that a government pay just compensation for what it takes. Peripheral or remote instances include what Charles Reich called the "new property" of government entitlements[197] and various statutory and equitable privileges of mortgage redemption,[198] all of which derive their authority entirely from positive laws and are therefore contingent upon sovereign power in the fullest sense.

The existence of peripheral and even borderline cases does not cast doubt on the legal work performed by vested private rights in central, strong cases. Public rights, privileges, and private rights are different, and to be attentive to the differences between them is to avoid the simplistic notion that all rights collapse into concessions of privilege from the sovereign. Statutory or regulatory privileges may be altered or abolished by positive enactment.[199] And as Caleb Nelson has observed, executive and legislative officials may terminate public rights, as where a legislature repeals a criminal statute retroactively, a prosecutor negotiates plea bargains, or a president or governor pardons.[200] But the political branches "cannot unilaterally dispose of the defendant's *private* rights."[201]

193. *See* HART, *supra* note 117, at 50–99.

194. *See* Green, *supra* note 190, at 1993.

195. *See* Terry L. Anderson & Dominic P. Parker, *Sovereignty, Credible Commitments, and Economic Prosperity on American Indian Reservations*, 51 J.L. & ECON. 641, 647–48 (2008).

196. *See*, *e.g.*, Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435–37 (1892).

197. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 785–87 (1964).

198. *See* Hamilton v. Hamilton, 154 P. 717, 723–24 (Mont. 1916) (holding that the right of redemption is not subject to sale because it is a personal privilege and not a property right); Stevenson v. King, 10 So. 2d 825, 826 (Ala. 1942).

199. *See Hamilton*, 154 P. at 723 (holding that the right of redemption is not subject to sale because it is a "personal privilege and not a property right"); *Stevenson*, 10 So.2d at 826 (stating that a compulsory arbitration statute was "a mere personal privilege and not a property right" and therefore could be regulated by the legislature).

200. Nelson, *supra* note 1 at 1437–38.

201. *Id.* at 1438.

B. Two Implications of Vested Patent Rights

This part focuses on two examples of vested private rights. Both legal doctrines proved so successful in shaping fundamental doctrines of patent law that the concepts themselves came first to be taken for granted, then neglected, then forgotten. As a result, the concepts are not well known today, though they were commonplace during the decades when patent law's basic doctrines were being settled in American law.

1. Patents

Throughout American history, patent rights have been considered capable of vesting at or prior to issuance of the patent.[202] Vestedness is a feature of patents in land and mineral estates,[203] and extends to riparian water rights.[204] The idea carried over into patents for the exclusive use of inventions to prevent their retrospective abrogation without a judicial finding of invalidity.[205] For example, the "reissue of a patent is only designed to cure defects in a former issue which it is designed to make perfect. It would not be competent to destroy vested rights" confirmed by the first patent.[206]

There are at least two categories under which American patents have at various times been conceived as vested rights. First, the terms, extent, and jural incidents of a patent right can be immunized, to varying degrees, against subsequent, retrospective change or abrogation.[207] Second, the priority of the inventor over other, competing claimants to a patent right was, until very recently, vested at the time of invention. The incapacity of a legislature such as Congress to abrogate a patentee's rights retrospectively, and of powerful competitors to abrogate an inventor's priority retrospectively, both can be understood in the context of a distinctive understanding of patents as positive rights that are justified based on the inventor's pre-positive, natural or common-law rights (though neither sense of vesting strictly requires that one understand inventors' rights as natural). The right is cognizable in equity or natural justice prior to its perfection in positive law.

The goal here is neither to re-cover the well-trodden ground of the history of American patent law nor to resolve the much-discussed question of whether Jefferson or Madison had the better view of the patent right's justification. The

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202. *See*, *e.g.*, Smith's Lessee v. Devecmon, 30 Md. 473, 482 (1869).

203. *See*, *e.g.*, Glacier County v. United States, 99 F.2d 733, 734–35 (9th Cir. 1938); Board of Comm'rs v. United States, 87 F.2d 55, 56–57 (10th Cir. 1936); Casey v. Thieviege, 48 P. 394, 397–98 (Mont. 1897).

204. *See*, *e.g.*, Sturr v. Beck, 133 U.S. 541, 547 (1890); Lone Tree Ditch Co. v. Cyclone Ditch Co., 91 N.W. 352, 353 (S.D. 1902).

205. *See*, *e.g.*, James v. Campbell, 104 U.S. 356, 358 (1882); Harrison v. Ingersoll, 22 N.W. 268, 269 (Mich. 1885); *Ex Parte Wood*, 22 U.S. at 612–13; McCormick Harvesting Mach. Co. v. C. Aultman & Co., 169 U.S. 606, 611–12 (1898).

206. *Harrison*, 22 N.W. at 269.

207. *See Lone Tree Ditch Co.*, 91 N.W. at 353–54.

key point is that the patent rights are secure against subsequent expropriation by the powerful to the extent that they are understood to be vested.

2. *No Retrospective Abrogation of Terms*

As Nelson explains, the term "franchise" has at times been used to refer to both concessions of positive public privilege and vested private rights.[208] That a patentee has a franchise or exclusive right as specified in positive law, therefore, does not answer the question to what extent the right is secure against abrogation.[209] If a patent is a mere monopoly privilege (the English conception of patents,[210] shared by Thomas Jefferson[211] and Roger Taney[212]), granted for utilitarian purposes only, then it may be quite insecure. If, on the other hand, it is a statutory substitute for an inventor's natural or common-law rights in her invention[213] (the conception expressed by James Madison and Daniel Webster)[214] then it has a just claim to be secure from derogation or abrogation. Indeed, the idea that patents are franchises given in exchange for an inventor's pre-positive rights in his invention militated in favor of the concept of patents as property, to be secured in law as much as possible.[215] Congress has acted consistently with that view, expanding patent rights on several occasions, and never acting to revoke a patent once issued.[216]

Justice Joseph Story articulated this latter, robust conception of patents as vested property most prominently in *Ex Parte Wood & Brundage*.[217] After a United States District judge entered an order that a patent for an invention be repealed, the patentees moved that the judge conduct a *scire facias* proceeding on the validity of the patent.[218] The judge refused and the patentees moved the Supreme Court to issue mandamus directing the District judge to make a record of the proceedings and issue a *scire facias* to try the patent's validity.[219]

The Court gave the patentees their mandamus, holding that a provision of the patent act authorizing judges to repeal invalid patents was in the nature of a *scire facias* at common law.[220] An essential premise of Story's reasoning was his understanding that an inventor has "a property in his inventions; a property

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208. Nelson, *supra* note 1, at 1432–33, 1438–51.

209. *See id.* at 1437–51.

210. *See* John F. Duffy, *Inventing Invention: A Case Study of Legal Innovation*, 86 TEX. L. REV. 1, 23–33 (2007).

211. *See Patent Privilege*, *supra* note 1, at 955–56.

212. Prigg v. Pennsylvania, 41 U.S. 539, 627–28 (1842) (Taney, J. dissenting).

213. *See generally Nelson*, *supra* note 1 at 1434.

214. THE FEDERALIST NO. 43 (James Madison); *Nelson*, *supra* note 1, at 1444.

215. *See Patent Privilege*, *supra* note 1, at 955–56. *See generall*y Nelson, *supra* note 1.

216. *See* Nelson, *supra* note 1, at 1506-07.

217. 22 U.S. 603 (1824).

218. *See id.* at 603–04.

219. *See id.* at 604.

220. *See id.* at 608–09.

which is often of very great value, and of which the law intended to give him the absolute enjoyment and possession."[221] With this premise, the Court had a duty to interpret the statute with a presumption that Congress did not intend to divest the owners without a jury's finding invalidity.[222] To interpret the provision as authorizing repeal of a patent without trial of its merits would be contrary to the "plain and obvious" meaning of the statute as a whole and, furthermore, would jeopardize the "vested rights and property" of the patentees.[223] By contrast, to allow a trial on the merits was consistent with "the purposes of general justice."[224]

Story reiterated his idea of patents as vested property rights while riding circuit and adjudicating a patent dispute between two private persons.[225] The character of patents as vested property determines how a court should interpret not only the Patent Act but also patent claims. "Patents for inventions are not to be treated as mere monopolies odious in the eyes of the law," Story stated, "and therefore not to be favored; nor are they to be construed with the utmost rigor, as strictissimi juris."[226] Courts should instead construe patents "fairly and liberally."[227]

Story's account of patents came into direct conflict with the narrow conception of patent privileges advanced by Chief Justice Roger Taney.[228] Those two conceptions of patent rights have contended with each other throughout American history.[229] Taney's view of patents and other citizenship rights as contingent upon political power would later play a role in the divestment of African American inventors.[230] But Story's account of patent rights as more than "mere monopolies,"[231] "vested rights and property[,]"[232]begged the question as to what extent patent rights are vested.

The Court addressed this question in *McClurg v. Kingsland*.[233] An inventor allowed his employer to use his invention even though he obtained a patent in it. Under the then-applicable law, enacted in 1793 and 1800, the act of publicly allowing the employer to exercise his patent rights would have voided the

221. *Id.* at 608.
222. *See id.* at 607–08.
223. *Id.* at 611–12.
224. *Id.* at 613.
225. *See* Ames v. Howard, 1 F. Cas. 755, 757 (C.C.D. Mass. 1833).
226. *Id.* at 756.
227. *Id.*
228. *See* Kathleen Wills, *Patenting an Invention as a Free Black Man in the Nineteenth Century*, 101 J. PAT. & TRADEMARK OFF. SOC'Y 206, 209–12 (2019); *see also Patent Privilege*, *supra* note 1, at 1000.
229. *See generally Patent Privilege*, *supra* note 1, at 989–1009.
230. *See infra* Part IV.C.
231. *Ames*, 1 F. Cas. at 756.
232. *Ex Parte Wood*, 22 U.S. at 612.
233. 42 U.S. 202, 205–06, 209 (1843).

patent.[234] Later, in 1839, Congress added a provision to the patent laws explicitly stating that public use of an invention, prior to patenting, would not void the patent unless the invention was made two years before the patent application.[235] In *McClurg*, the Court had to decide whether the 1839 act should be interpreted to abrogate or extend any legal protections afforded to the inventor under the earlier acts.

Congress has "plenary" power over patent law, the Court noted, and may change the rules governing patent infringement proceedings in contravention of the *public's* rights.[236] But Congress should not be understood to have intended to take away a patentee's property rights. Citing *Society for the Propagation of the Gospel v. Town of New Haven*,[237] a famous, early vested rights decision, the *McClurg* Court reasoned that Congress is powerless to divest a patentee and his assignee of any property rights that they have in the patent.[238] Congress's repeal of the patent acts of 1793 and 1800 "can have no effect to impair the right of property then existing in a patentee, or his assignee," and with respect to all private rights vested under the 1793 and 1800 acts, "the patent must therefore stand as if the acts of 1793 and 1800 remained in force."[239] For this reason (among others) the new provision added in 1839 must be interpreted to secure the existing property rights of the inventor and the license of his employer by allowing public use within two years prior to the patent application.[240]

3. Priority Vested at the Time of Invention

A different right, the right of priority, can vest before issuance of a patent, at the time of invention. Throughout nearly all of American history, the first person to qualify for a patent, such as a first inventor of an invention or a first settlor of land, has a vested right to the patent. This does not entail that any inventor,

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234. *See id.* at 206–07.

235. The provision read:

> That every person or corporation who has, or shall have purchased or constructed any newly-invented machine, manufacture, or composition of matter, prior to the application by the inventor or discoverer of a patent, shall be held to possess the right to use and vend to others to be used, the specific machine, manufacture, or composition of matter, so made or purchased, without liability therefore to the inventor, or any other person interested in such invention; and no patent shall be held invalid by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public, or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent.

Id. at 208.

236. *See id.* at 206–07. *Compare* Golan v. Holder, 565 U.S. 302, 318, 334 (2012) (holding that Congress may extend the term of copyright protection for existing works, and affirming Congress' grandfather protection for vested uses of works that had passed into the public domain prior to the extension).

237. 21 U.S. 464 (1823).

238. *McClurg*, 42 U.S. at 206.

239. *Id.*

240. *Id.* at 208–09.

innovator, or deserving claimant has a vested property right to have the patent issued without more, for the immunity aspect of the "vested right does not arise until there has been full compliance with the extensive procedures set forth" in the relevant laws governing patent issuance.[241] As Nelson argues, the idea of patents as a contractual exchange between inventor and the public, in which the inventor gives up the right to keep the invention secret in exchange for a franchise, suggests that patents vest in the fullest sense upon issuance rather than at the time of invention.[242] But it does entail that the right to receive a patent can vest in equity when the justifying act—first entry upon land or first invention of an innovation—is performed, and after legal perfection of the patent right the patentee's priority relates back to the time of that justifying act.[243]

In the case of patents for inventions prior to the America Invents Act, the inventor's priority vests at the time of invention, at which moment she is said to have an "inchoate" right of exclusive use.[244] Though inchoate, the right is vested, and "the divestment of a vested right to a patent is tantamount to divestment of the patent itself, i.e., a divestment of 'property.'"[245] And until recently, the first inventor's priority was vested at the time of invention.

Riding circuit and sitting in a patent case (again),[246] Justice Story explained to a jury one implication of the fact that an inventor's right is vested at the time of invention:

> For the defendants the argument is, that the Eagle Screw Company had a right to use the machines purchased by them from Read before Crum's patent was obtained, although Crum was the prior and true inventor and patentee under the 7th section of the patent act of 1839, c. 88; and great reliance is placed upon the case of *McClurg v. Kingsland*, 1 How. [42 U.S.] 202. In my opinion, neither the act of congress, nor the case of [*McClurg*] *v. Kingsland*, justifies such a doctrine. Supposing the argument to be well founded, what would be the legal result? Why, that a mere wrong-doer, who by fraud or artifice, or gross misconduct, had gotten knowledge of the patentee's invention before he could obtain his patent, without any laches on his part, could confer upon a purchaser under him—bona fide and without notice—a title to the patented machine, which he himself could not exercise or possess. Certainly, there is no ground to say, that a person, who pirates the invention of any party prior in point of time and right, can make any valid claim thereto against the prior and true inventor.[247]

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241. Freese v. United States, 639 F.2d 754, 758 (Ct. Cl. 1981). *Accord* United States v. Shumway, 199 F.3d 1093, 1102 (9th Cir. 1999).

242. *See* Nelson, *supra* note 1, at 1498.

243. Nicholson v. Congdon, 103 N.W. 1034, 1035–36 (Minn. 1905).

244. Gayler v. Wilder, 51 U.S. 477, 493 (1851).

245. *Freese*, 639 F.2d at 758.

246. *See* Pierson v. Eagle Screw Co., 19 F. Cas. 672 (C.C.D.R.I. 1844).

247. *Id.* at 673.

Story insisted that "the inventor, and the inventor alone, is competent to abandon his invention to the public, and no use by the public except with his knowledge and consent can be deemed an abandonment of his invention to the public."[248] Only abandonment would suffice because the inventor's right to the patent is vested. "It has been the uniform doctrine of the courts of the United States, that no fraudulent or wrongful use of an invention, and no public use without the consent or knowledge or sanction of the inventor, would deprive him of his right to a patent."[249] The jury returned a verdict for the plaintiff.[250]

Story's opinion is packed full of clues about the jurisprudential concepts he was employing in his analysis. They are property and tort concepts. In common-law tort and property, a prior possession acquired in an act of wrongdoing, such as trespass or conversion, vests no rights in the possessor, for in the common-law way of thinking, right and wrong are opposites. Black-letter property law also teaches that a bona fide purchaser can take voidable title from someone other than the actual owner, but void title cannot pass even to a bona fide purchaser. The difference between voidable and void title is that voidable title passes from the true owner where he voluntarily yields custody or possession, consenting to the wrongful appropriator's possession though he is fraudulently induced to do so, while void title is acquired by theft, with no participation or consent by the true owner. The true owner may also abandon his property rights, but absent abandonment a subsequent possessor or finder holds subject to the true owner's superior rights.

The upshot is that the true inventor's rights were vested at the time of invention, he neither voluntarily transferred custody of them nor abandoned them, and therefore no other person may divest him of his property in the invention. Story's analysis proceeds according to settled doctrines of property law. It begins with the act of invention.

C. Vested Rights and Equal Justice

Both the particularity and the vestedness of vested rights make them difficult to dislodge from their rightful owners. The strongest, or most central case of a vested right, is some particular incident of property or contract that cannot be abrogated retrospectively, even by the majority vote of an otherwise sovereign legislature. This makes vested rights resistant to majoritarian oppression. For this reason, vested rights have proven useful tools to vindicate the natural rights of minority groups.

The most famous examples in American history (though not as well known today as they were earlier) are the employments of vested rights to vindicate the rights of former slaves and to deny compensation to former slave owners. The basic concept carried over from English common law. As Lord Mansfield had

248. *Id.* at 674.
249. *Id.*
250. *See id.* at 675.

explained in *Somerset's Case*,[251] a slave owner's privileges to buy and own slaves cannot be vested against retrospective abrogation because they are entirely contingent upon the positive laws or local customs that gave rise to them, while a former slave's freedom is vested because it pre-exists the positive law that deprived him of it; the doctrine called Free English Soil is founded on natural and common law.[252] Mansfield famously wrote:

> 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.[253]

The doctrine acquired more explicit grounding in the case *Forbes v. Cochrane*.[254] British naval officers refused to return slaves who had escaped to a British ship lying just off the coast of Spanish West Florida.[255] In explaining why the officers had acted lawfully, the judges contrasted the unvested privileges of the slave master, which were "founded on the municipal law of the particular place only," with the now-vested freedom of the former slaves, which rests in "the general law of nature."[256] The court reasoned,

> 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.[257]

The slavery law of Spanish West Florida "is an antichristian law, and one which violates the rights of nature," and therefore its rights cannot reach beyond Spain's power to enforce them.[258]

Justice McLean brought this line of reasoning into the jurisprudence of the United States Supreme Court in *Groves v. Slaughter*.[259] A majority of the

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251. *See* Somerset v. Stewart (1772) 98 Eng. Rep. 499 (KB).

252. *See id.* at 501–04. The reference to free English soil comes from Blackstone's description of the absolute right of liberty in common law, that the "spirit of liberty" is so deeply rooted "even in our very soil" that a slave becomes a freeman "the moment he lands in England." BLACKSTONE, *supra* note 32, at *123. *See generally* Tobias Barrington Wolff, The Thirteenth Amendment and Slavery in the Global Economy, 102 Colum. L. Rev. 973, 997-1001 (2002); T.K. Hunter, Transatlantic Negotiations: Lord Mansfield, Liberty and Somerset, 13 Tex. Wesleyan L. Rev. 711, 712 & n.2 (2007).

253. 98 Eng. Rep. at 510.

254. 107 Eng. Rep. 450 (1824).

255. *See id.* at 450–53.

256. *Id.* at 455–56.

257. *Id.* at 457.

258. *Id.* at 457–60.

259. *See* Groves v. Slaughter, 40 U.S. 449, 507–08 (1841) (McLean J., Dissenting).

justices affirmed a circuit court's enforcement of a promissory note given in Mississippi in consideration for slaves imported into Mississippi notwithstanding that Mississippi's constitution then prohibited the importation of slaves, because Mississippi did not enact a *statute* prohibiting importation of slaves until after execution of the contract.[260]

Writing separately, McLean pointed out that the majority's interpretation generated a conflict between Mississippi law and the Commerce Clause, which vests power over interstate commerce exclusively in Congress.[261] "If a state may admit or prohibit slaves at its discretion, this power must be in the state, and not in Congress."[262] The solution to this conundrum was to recognize that slaves are not property under the general law of the Union. "The constitution treats slaves as persons" in the three-fifths clause and elsewhere.[263] The power of slave holding is local and contingent on the positive law of the states, while the powers of free states to protect themselves from the "evil" of slavery "is higher and deeper than the Constitution."[264] If Mississippi and other states treat slaves as property:

> [T]hat cannot divest them of the leading and controlling quality of persons, by which they are designated in the Constitution. The character of property is given them by the local law. This law is respected, and all rights under it are protected by the federal authorities; but the Constitution acts upon slaves as persons, and not as property.[265]

McLean's solution to the interstate commerce problem was clever. It led to the conclusion, favored by slavery proponents such as Chief Justice Taney,[266] that each state has power to regulate slaves brought within its borders. But McLean's solution injected into the Court's jurisprudence a principle repugnant to slave owners, that the personhood of slaves is more deeply vested that the positive rights of slave traders because its authority rests in law that is more fundamental than the positive law enacted by the states and Congress.

Taney offered a very different version of the vested rights doctrine a year later in *Prigg v. Pennsylvania*.[267] The Court in *Prigg* considered the kidnapping conviction of Edward Prigg, who had forcibly removed Margaret Morgan from Pennsylvania, a free state, to Maryland, a slave state.[268] Pennsylvania law

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260. *See id.* at 502–3.
261. *See id.* at 504.
262. *Id.* at 506.
263. *Id.* at 506–07.
264. *Id.* at 508.
265. *Id.* at 506–07.
266. *See id.* at 508–09.
267. 41 U.S. 539 (1842).
268. *See id.* at 608–09.

prohibited the kidnapping of slaves;[269] Maryland law allowed it.[270] Justice Story, writing for the Court, reasoned that Pennsylvania had no obligation to honor the rights of Maryland slave owners under Maryland law, for "[b]y the general law of nations, no nation is bound to recognise the state of slavery, as to foreign slaves found within its territorial dominions . . . ."“[271] Story insisted,

> If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon, and limited to the range of the territorial laws. This was fully recognised in Somerset's Case, which . . . decided before the American Revolution.[272]

Story thus endorsed the Mansfield-McLean theory of vested rights. Nevertheless, the fugitive slave provisions of the Constitution and the United States Fugitive Slave Act of 1793 contemplated "a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control, or restrain."[273] Prigg's conviction was overturned on that ground.[274] Margaret Morgan's vested freedom was secure against Maryland law, but not against the Supremacy Clause.

In a separate partial dissent, Taney objected to Story's reasoning. The right of a slave owner is vested under the laws of the slave state and the Constitution, which requires each member of each state to participate in returning fugitive slaves, Taney asserted.[275] "The right of the master, therefore, to seize his fugitive slave, is the law of each state; and no state has the power [to] abrogate or alter it."[276] On Taney's view, what makes a right vested is either that it was settled *first* or that its security is required by the highest positive law, not that it rests in a pre-positive source of legal obligation.

A few years later, Taney infamously swept aside the Mansfield-McLean-Story concept of vested rights, along with the Missouri Compromise, in *Dred Scott v. Sandford*.[277] But Taney did not refute the classical concept of vested rights. He triumphed because he ultimately had more votes on the Court.[278] The vested rights doctrine thus did not assist Margaret Morgan and other slaves who lived prior to the Civil War.[279]

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269. *See id.* at 608.
270. *See id.* at 608–09.
271. *Id.* at 611.
272. *Id.* at 611–12.
273. *Id.* at 610, 612.
274. *See id.* at 625–26.
275. *See id.* at 627–28.
276. *Id.* at 628.
277. 60 U.S. 393 (1857).
278. *Id.* at 399.
279. *See*, *e.g.*, Eells v. People, 5 Ill. 498, 511–12 (1843) (endorsing Taney's separate concurrence in *Prigg* and affirming conviction of a man who assisted a fugitive slave); United

After the Thirteenth Amendment abrogated both the Fugitive Slave Act and the pro-slavery provisions of the Missouri Compromise, Mansfield's conception of the vested rights doctrine prevented slave owners and traders from receiving compensation for their losses for a time. Lower courts followed Mansfield's reasoning that the rights of slave traders were contingent on the positive laws of the slave states and could extend neither beyond the borders of the state nor the time of abolition, while the freedom of former slaves is vested from the moment of their liberation.[280] After discussing *Somerset's Case* and *Forbes*, one judge reasoned:

> The fundamental ground on which emancipation proceeded was, that the right of the slave to his freedom was paramount to the claim of his master to treat him as property; that slavery was founded in force and violence, and contrary to natural right; that no vested right of property or action could arise out of a relation thus created, and which was an ever new and active violation of the law of nature, and the inalienable rights of man, every moment that it subsisted.[281]

But the Supreme Court of the United States put a stop to this in 1871, adopting Taney's theory of rights and holding that former slave traders were owed compensation after the Thirteenth Amendment because their contracts were authorized by state positive laws at the time they were executed.[282]

Vested rights have served other minority groups, as well. The concept of vested, natural rights was used in legal arguments for the abolition of both slavery and coverture.[283] It also secured the property rights of Mexicans and those claiming by grant of the Mexican government against an attempt by a legislature to divest them of title.[284] The concept of vested patents, specifically, has been used to protect the vested titles of Native peoples and other minorities against attempts to divest them of land use rights and immunities from taxation.[285] In Canadian law, Native groups enjoy particularly strong vested

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States v. Scott, 27 F. Cas. 990, 994–95 (D. Mass. 1851) (holding that an indictment for assisting a fugitive slave may be tried without a jury).

280. Osborn v. Nicholson, 18 F. Cas. 846, 847 (C.C.E.D. Ark 1870), *rev'd* 80 U.S. 654 (1871); Buckner v. Street, 4 F. Cas. 578, 580 (C.C.E.D. Ark. 1871).

281. *Osborn*, 18 F. Cas. at 856.

282. White v. Hart, 80 U.S. 646, 653–54 (1871); Osborn v. Nicholson, 80 U.S. 654, 660–63 (1871); Holmes v. Sevier, 154 U.S. 582, 583 (1872).

283. *See*, *e.g.*, Jones v. Taylor, 7 Tex. 240, 246–47 (1851) (reasoning that English coverture doctrine, which "divested" a married woman "of her faculties as a rational being," was not part of Texas law because a married women's property rights "vested" as a matter of equity); JUSTIN BUCKLEY DYER, NATURAL LAW AND THE ANTI-SLAVERY CONSTITUTIONAL TRADITION 106–07 (2012); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 956–57 n.133 (1993); *Vested Rights*, *supra* note 19, at 276–86.

284. *See*, *e.g.*, Lathrop v. Mills, 19 Cal. 513, 531–35 (1861).

285. *See*, *e.g.*, *Glacier County*, 99 F.2d at 734–35; *Caddo County*, 87 F.2d at 56.

rights. For example, vested customary rights to hunt on tribal land are immunized against abrogation by public hunting laws.[286]

Had vested rights doctrine not been lost to legal scholars in the twentieth century they might have continued this work. Consider the opposition of vested property rights to racial segregation and other forms of majoritarian tyranny, and the extent to which racially discriminatory practices have needed to overcome vested private rights. One simple example is that zoning ordinances would be much less effective at excluding established, lawful land users and uses had state courts not weakened or done away with the vested private rights doctrine in the twentieth century.[287] The civil rights achievement of *Shelley v. Kraemer*[288] resulted from the Court's refusal to allow neighbors with no enforceable property rights in the Shelleys' home to deprive them of their vested title in the home.[289] And public accommodation statutes that secure equal access rights for racial minorities declare pre-existing property rights that licensees enjoy at common law.[290] Consider also that America's second civil rights movement was birthed and nursed behind closed doors on private property, in churches and homes where leaders planned bus boycotts and peaceful marches.[291]

In between the civil rights movements of the mid nineteenth and twentieth centuries, two important proponents of improving the lives of Southern blacks were Booker T. Washington and his Tuskegee Institute colleague, George Washington Carver.[292] In an era of social Darwinism and dehumanizing racial

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286. R v. Meshake, [2003] O.J. No. 202, ¶¶ 17–22 (Ont. Ct. Just.), *rev'd* by 85 O.R. (3d) 575 (Ont. 2007).

287. *Contrast* Nectow v. City of Cambridge, 277 U.S. 183, 185–89 (1928) (reversing a judgment in favor of a city that had rezoned the claimant's land, depriving him of a vested contract for sale), *with* Harbison v. City of Buffalo, 152 N.E.2d 42, 46 (N.Y. 1958) (upholding zoning amendments that allowed "reasonable termination periods" for abrogation of landowners' vested property rights). *See generally* Adam J. MacLeod, *Metaphysical Right and Practical Obligations*, 48 U. MEMPHIS L. REV. 431, 436–40 (2017).

288. 334 U.S. 1 (1948).

289. 334 U.S. 1, 20–23 (1948); Adam J. MacLeod, *Strategic and Tactical Totalization in the Totalitarian Epoch*, 5 BRITISH J. AM. L. STUD. 57, 79–80 (2016).

290. Adam J. MacLeod, *Tempering Civil Rights Conflicts: Common Law for the Moral Marketplace*, 2016 MICH. ST. L. REV. 643, 689–90.

291. *See The Civil Rights Movement And The Second Reconstruction, 1945–1968*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Keeping-the-Faith/Civil-Rights-Movement/ (last visited Feb. 7, 2023). The second civil rights movement of the 1950s and 1960s was largely home-grown in the South, whereas the first civil rights movement of the 1860s and 1870s was largely a Reconstruction project led by Northern Republicans. *See generally* U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV; Civil Rights Act of 1866, Pub. L. No. 39-26, 14 Stat. 27; Civil Rights Act of 1871, ch. 22, 17 Stat. 13; Civil Rights Act of 1875, ch. 114, 18 Stat. 335–37.

292. *See generally* BOOKER T. WASHINGTON, UP FROM SLAVERY (1901); George Washington Carver, George Washington Carver: In His Own Words (2d ed., Gary R. Kremer, ed. 2017).

stereotypes,[293] Washington set out to demonstrate that black Americans are as virtuous and industrious as white Americans and as capable of owning property and producing marketable goods and services.[294] As one historian explains, "[h]e yearned to place black progress and black manhood on display at a time when white Southerners and Social Darwinists claimed that blacks were drifting backward into barbarism."[295] He made his case in large part by "displaying the very accomplishments whites so deeply wanted to deny," such as the "houses, schools, and businesses owned by African Americans,"[296] and their ability to invent new technologies.[297]

That Carver held patents[298] and innovated in other ways, vindicated Washington's case.[299] Carver was not unique; recent scholarship has called overdue attention to the achievements of black inventors, including many patent owners, both before and after the Civil War.[300] For example, the phrase "the real McCoy" is an homage to the inventor Elijah McCoy, whose parents were escaped slaves and who ultimately owned fifty-seven patents.[301] His innovations and products include enormous successes such as devices to lubricate steam cylinders and bearings in steam engines.[302]

Washington also made use of a negative example, the period in American history in which persons of African descent were prohibited from obtaining legal rights in their inventions.[303] The United States Government divested enslaved blacks of their natural inventors' rights in the 1858 Attorney General opinion, *Invention of a Slave*.[304] Significantly, the Attorney General also concluded that the slave's owner could not patent the invention because the Patent Act limited patent rights to the original and first inventor.[305] Washington and other

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293. DAVID H. JACKSON, JR., BOOKER T. WASHINGTON AND THE STRUGGLE AGAINST WHITE SUPREMACY 11–29 (2008).

294. *See id*. at 32–33.

295. *Id.* at 52.

296. *Id.* at 98.

297. *See* Frye, *supra* note 8, at 187–88.

298. *See* U.S. Patent No. 1,522,176 (filed Sept. 17, 1923); U.S. Patent No. 1,541,478 (filed June 13, 1923); U.S. Patent No. 1,632,365 (filed June 13, 1923).

299. *See generally* Mark D. Hersey, *Hints and Suggestions to Farmers: George Washington Carver and Rural Conservation in the South*, 11 ENV'T HIST. 239 (2006).

300. *See* Frye, *supra* note 8, at 185–87; Wills, supra note 228, at 218–19; Swanson, *supra* note 8, at 1085; PORTIA P. JAMES & COLIN L. MURRAY, THE REAL MCCOY: AFRICAN AMERICAN INVENTION AND INNOVATION, 1619–1930 (1989); *see also* 3 DARLENE CLARK HINE, BLACK WOMEN IN AMERICA 104–05, 329–30 (2d ed. 2005). *See generally* PAUL FINKELMAN, ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY 1896 TO THE PRESENT (2009).

301. *See* FINKELMAN, *supra* note 300, at 365; *see also id.* at 279.

302. U.S. Patent No. 128843 (July 23, 1872); U.S. Patent No. 614,307 (filed November 15, 1898).

303. *See* Swanson, *supra* note 8, at 1095–96.

304. Invention of a Slave, 9 Op. Att'y Gen. 171, 171–72 (1858).

305. *See id.* at 171–72. The vesting of patent right priority in the first to invent thus prevented the further indignity of allowing a slave owner to profit from his slave's innovation. *Id.*

proponents of racial equality called attention to *Invention of a Slave* in order to preserve its place in history, situating it alongside the Confederate patent law that allowed slave owners to patent the inventions of their slaves and the efforts of abolitionist Charles Sumner[306] to restore the patent rights of black inventors.[307]

The injustice of *Invention of a Slave* is intelligible if slaves have rights to their inventions, in some meaningful sense of the term "right," with or without any recognition of those rights in positive law. Inventive slaves must have been wrongfully deprived of something that belonged to them, else the policy of denying them patent rights would have been self-justifying. Some juristic concept other than positive law is necessarily implicit in any critique of the policy.

Earlier, Frederick Douglass had drawn the connection between holding a patent and enjoying the equal rights of citizenship.[308] At the time, patentees had to swear an oath of citizenship.[309] When Taney and a majority of the U.S. Supreme Court ruled in *Dred Scott v. Sandford*[310] that Americans of African descent could not be citizens, *Invention of a Slave* became inevitable.[311] The legal capacity of black Americans to be patented inventors, and the existence of African American patentees before the *Dred Scott* decision, refuted Taney's false history and erroneous jurisprudence.[312]

More fundamentally, the moral capacity of persons of all races to invent is the ground to recognize the natural, pre-positive rights of inventors. Human beings invent. And the capacity to reason, create, and innovate is the same capacity that evidences our equal human dignity and suitability to bear and exercise fundamental rights. Rights may be vested in reason prior to their declaration in law. When vested, it may be unjust to take them away, even with positive law's approval.

CONCLUSION

Property concepts help us to know what we owe each other with respect to resources. To understand the normative purposes for which property concepts were formed, and to grasp the focal meaning of each concept by reference to central cases, is to begin to see the law governing information resources clearly. And once property concepts are clear in our mind's eye, we can give them new employments to solve new problems. As long as people are still people, and insofar as we need to reason practically using common terms and concepts in

306. *See* Frye, *supra* note 8, at 224–25.
307. *See* Swanson, *supra* note 8, at 1088 n.58.
308. *See id.* at 1107-08.
309. *See* Wills, *supra* note 228, at 207–08.
310. 60 U.S. 393 (1857).
311. *Id.* at 423 (1857); Wills, *supra* note 228, at 207.
312. *See* Wills, *supra* note 228, at 207–08.

order to cooperate for the common good, property concepts will retain their utility for helping us to flourish, whether the resources necessary for flourishing are tangible or intangible.

Property concepts that concretize individual, natural rights, such as the vested rights doctrine, also can serve the requirements of equal justice. Vested rights enable vulnerable minorities to resist the power of majorities. They resist the tendency of law to devolve into power. They solve practical problems consistent with what we owe each other as equal agents of practical reason.