Revoking Rights

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In important areas of law, such as the vested rights doctrine, and in several important cases—including those involving the continued validity of same-sex marriages and the Affordable Care Act—courts have scrutinized the revocation of rights once granted more closely than the failure to provide the rights in the first place. This project claims that in so doing, courts seek to preserve important constitutional interests. On the one hand, based on our understanding of rights possession, rights revocation implicates autonomy interests of the rights holder to a greater degree than a failure to afford rights at the outset. On the other hand, the institution revoking rights is more likely to exhibit impermissible behavior when taking away rather than failing to provide the right.

This is the first of two articles, and tackles the first of the project's claims. It examines the autonomy interests of the rights holder that are implicated in rights revocation. It relies on philosophical understandings of ownership, backed by empirical research, to argue that our identities and indeed, our ability to think of ourselves as separate beings apart from the collective, are partially based on what we possess at a given point in time. The rights we possess both allow us to do things that aid in our flourishing and allow us to conceive of ourselves as individuals. Important legal concepts, such as the vested rights doctrine, among others, rely on this understanding of rights.

However, the notion of rights, possession, and revocation are all constructed and subject to contestation. Courts and other institutional actors often face adversaries making (conflicting) rights claims. They must determine when a change in rights allocation is a rights revocation *or a* restoration *of the status quo ante. In taking sides, courts and legislatures adopt rights revocation/restoration frames, claiming that the winners have rights that are being restored, and that losers never had rights to begin with, or that their rights existed temporarily subject to correction. In so doing, institutional actors also shore*

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up their own legitimacy, often at the cost of each other. This dynamic provides an insight, not just into the work that rights do in constructing individuals, but also in developing institutional legitimacy. It shows how institutions themselves exploit rights claims in order to—consciously or not—further their own agendas.

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Introduction

Can the government take away rights or benefits from individuals or entities once they have been granted? In recent cases involving hot button issues such as same-sex marriage litigation as well as Medicaid expansion and in more mundane welfare or child custody cases, courts and

advocates have argued that in certain situations, the answer is no. Their reasoning relies on a long history of judicial hostility to rights revocation. This Article contends that this hostility is based on an understanding that already endowed rights are embedded in, connected to, and constitute individuals or entities—their personhood and identities—in a way that rights that have yet to be granted are not. Taking away previously granted rights fundamentally alters the nature of the existence and identity of the individual or entity, and must therefore be closely scrutinized. Given this understanding, the battle often shifts to the question of what a right is, or what should be understood as a revocation—questions that are subject to social, legal, and political contestation, the consequences of which often determine the outcome in these cases.

This understanding of endowed rights as deeply shaping one's identity and being has deep roots, both philosophical and empirical, as Part I explains. The philosophical account proceeds in two different ways. On the one hand, we exercise rights we possess to develop our personhood. On the other hand, these rights are part of who we are, shaping our sense of self. These claims are empirically supported by phenomena that developmental and behavioral psychologists refer to as self-anchoring and the endowment effect. I call this the "connectedness" account of rights ownership to distinguish it from other concepts of ownership that do not depend upon the connection between the individual and the property or right.

Part II turns to legal concepts and doctrines that have long reflected this connectedness account. As Part II.A explains, since the earliest uses of the word "rights" to denote subjective faculties, legal concepts have treated rights as connected to and constitutive of one's being. Now largely defunct legal doctrines, such as "vesting," corruption of blood, attainder, and forfeiture, captured and relied on this idea that rights in property are connected to and embedded in an individual. The most important of these legal doctrines, however, is the vested rights doctrine.

Part II.B, therefore, turns to and examines the vested rights doctrine in some depth. The vested rights doctrine prohibits or otherwise limits the revocation of certain existing rights, usually in contract and property. As this Subpart shows, the various doctrinal elements of the vested rights doctrine that measure the length of time a right was possessed, the reliance on the right, and the formalities that accompanied the genesis of the right, all ultimately seek to investigate how connected the right is to the personhood and life of the owner. When a right has reached a certain level of connection, it cannot be revoked.

A mainstay of constitutional litigation in the nineteenth century, the doctrine was rarely invoked after the passage of the Reconstruction Amendments except in specialized areas of litigation involving, for example, zoning and pensions. The doctrine has recently moved back into the

mainstream as marriage equality advocates have heavily relied on it to prevent revocation of same-sex marriage rights. In these cases, courts have invalidated same-sex marriage bans.[1] Most of these courts stayed the rulings pending appeal. However, in certain jurisdictions—Utah, Michigan, Wisconsin, and Indiana—injunctions requiring the states to recognize same-sex marriage went into effect immediately, and some time lapsed before they were stayed by higher courts.[2] During this time, numerous couples married.[3] These states argue that they need not recognize those marriages. Couples that have married claim that because their marriage rights vested upon the granting of the marriage license, they cannot be "strip[ped]" or "taken away" from the couples; thus, they sought preliminary injunctions requiring the recognition of their marriages.[4] These cases will remain active no matter the result in the marriage litigation currently before the Supreme Court.[5] Even if the Supreme Court ultimately holds that the Constitution provides marriage equality rights, the concerns regarding the financial and other losses that these couples have suffered in the interim because their states have refused to recognize their marriage rights will remain live.[6] Thus, Part II.B concludes with a closer examination of these cases.

But courts do not necessarily rely on formal constitutional doctrines when they resist rights revocation.[7] In the welfare arena, for example, the Court introduced procedural safeguards only for rights revocation without ever invoking the vested rights doctrine. Similarly, in the Affordable Care Act case, only one issue garnered agreement among a supermajority of the Supreme Court's Justices: although Congress was not obliged to provide Medicaid funding to states in the first place, once provided, the threat to withdraw this funding was problematic.[8] Again, while the Justices did not invoke the vested rights doctrine, connectedness-based concerns best

1. *See Marriage Litigation*, FREEDOM TO MARRY, http://www.freedomtomarry.org/litigation (last visited June 9, 2015).

2. *See* Herbert v. Evans, 135 S. Ct. 16 (2014) (granting stay of the district court's decision to issue a preliminary injunction "pending final disposition of the appeal"); Plaintiff's Motion for Preliminary Injunction at 4, Caspar v. Snyder, No. 14-cv-11499, 2015 WL 224741 (E.D. Mich. Jan. 15, 2015) [hereinafter Motion].

3. *See* Motion, *supra* note 2, at 1.

4. Motion for and Memor[an]d[u]m in Support of Preliminary Injunction at 18, Evans v. Utah, 21 F. Supp. 3d 1192, 1198 (D. Utah 2014) (No. 2:14-CV55-DAK) [hereinafter Motion & Memorandum]; Motion, *supra* note 2, at 18.

5. *See, e.g.*, Obergefell v. Hodges, 83 U.S.L.W. 3315 (U.S. Jan. 16, 2015) (No. 14-556) (argued Apr. 28, 2015).

6. *See, e.g.*, Motion & Memorandum, *supra* note 4, at 9–16 (describing financial and emotional harms); Motion, *supra* note 2, at 6–7 (describing payments plaintiffs have had to make in the interim because employer's insurance would not cover spouse as long as the state did not recognize the marriage).

7. For simplicity's sake, I use "rights revocation" also to refer to revocation of the broader panoply of liberties, privileges, and benefits that an individual possesses.

8. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2603–07 (2012).

explain the Court's approach, as this Article explains in Part II.C. In all these cases, what was at stake was the deprivation of a core right or set of benefits, around which the legal and personal identity of the individual or entity was constructed. Courts therefore were skeptical of the revocation of these rights and benefits.

This Article's account of hostility to rights revocation is based on solicitude toward rights holders: courts seek to protect the personhood interests and connectedness of the rights holders, no matter what institution is revoking the right. But another reason courts have resisted rights revocation is to police the intent or behavior of the rights *revokers*, no matter the effect of the revocation on the rights holder. Courts (claim to) more easily detect animus, arbitrariness, or other improper motivation when these institutions take away already-granted rights than when they deny rights at the outset. The Ninth Circuit's invalidation of California's Proposition 8, which took away same-sex couples' right to marry, is one such example.[9] Similarly, before the 2012 election, the Sixth Circuit held that the Ohio legislature's retraction of early voting in the weekend before the elections for everyone except military voters was impermissible: "[W]here the State has authorized in-person early voting through the Monday before Election Day for all voters, 'the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.'"[10] I save these questions for another article.[11]

Nonetheless, cases like *Perry v. Schwarzenegger*[12] and similar institutional-policing cases make a cameo in this Article as well. Like the vested rights, welfare, and Affordable Act cases, they present more universal questions that cannot be deferred. What is this metaphysical thing we call a right? And more importantly, what does it mean to take it away? Litigants and social movements are constantly at work, framing different interests as rights and claiming that a redistribution results in "revocation." The Proposition 8 proponents, for example, claimed that they were merely "restoring" the right to "define marriage"; gay activists protested the loss of a right to marry, and claimed that the proponents were

9. Perry v. Brown, 671 F.3d 1052, 1096 (9th Cir. 2012), *vacated on jurisdictional grounds by* Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013).

10. Obama for Am. v. Husted, 888 F. Supp. 2d 897, 910 (S.D. Ohio 2012) (citing Bush v. Gore, 531 U.S. 98, 104–05 (2000)), *aff'd*, 697 F.3d 423 (6th Cir. 2012). The Sixth Circuit essentially "embraced [the district court's] reasoning." Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1845 (2013). Other scholars have referred, in passing, to the retrogression principle apparent in the Sixth Circuit's opinion. *See id.* at 1844, 1846; Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of* Bush v. Gore, 81 GEO. WASH. L. REV. 1865, 1880–82 (2013).

11. *See* Craig Konnoth, Reasoning in Rights Revocation Cases: Policing Institutional Roles (Sept. 2014) (unpublished manuscript) (on file with author). Cases that appear in the follow-up article include *Reitman v. Mulkey*, 387 U.S. 369 (1967), and *Ricci v. DeStefano*, 557 U.S. 557 (2009).

12. 628 F.3d 1191 (9th Cir. 2011).

restoring nothing, but rather, taking away a right. Framing an interest an individual has in doing something (for example, "defining marriage") as a legal right helps establish a sense of connection with the interest that one may not feel to another, arbitrarily held interest. Thus, plaintiffs and other actors seek to frame their claims using rights language to drum up support both within their movement and from governmental actors. This in turn affects their sense of who they are, their preferences, and the claims they advance. Courts and other state actors, in turn, will frame the claim of the winning side as a "right."

In the long run, courts and legislatures themselves seek to tap into the power of the revocation/restoration frame to shore up their own legitimacy. On this account, the language of revocation and restoration is used not just to legitimize plaintiffs' claims to a right, but also the power of courts themselves. Courts frame the winners as rights holders, thus suggesting that they themselves are rights restorers, remedying revocations by other institutional actors, such as legislatures. Legislatures may respond by painting courts as taking away rights improperly, and in turn, claim the mantle of rights restorers, passing legislation that "restores" the rights that courts took away. The narrative of "rolling back" rights is therefore subject to contestation. The notion of what a right is and whether that right is possessed in the first place is part of a broader jurisgenerative struggle. This struggle does not nullify the doctrinal categories through which constitutional rights are analyzed, nor the power of the rights rollback narrative; rather, the fact that movements and governmental institutions struggle over these categories is both evidence of, and further reifies their power in, our legal discourse.

It bears noting that both the connectedness- and institutional-policing accounts of rights reversal are novel. Despite the commonality of the practice, few scholars have examined, and none have explained, judicial disfavor of rights reversal. Those that consider rights reversal as an independent matter generally dismiss the phenomenon as essentially policymaking from the bench.[13] In their 1998 article, John Jeffries and Daryl Levinson consider then-recent constitutional cases, which they argue exhibited a "non-retrogression principle," and assert that such a principle constitutes no more than judicial policymaking.[14] Cass Sunstein, in his earlier work culminating in *The Partial Constitution*, also points to a "status quo bias" in constitutional (and other areas of) law, which result in courts' treating any revocation that causes a deviation from the status quo with hostility.[15] As relevant to the problem here, Sunstein treats the status quo

13. *See, e.g.*, CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 45–46 (1993); John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CALIF. L. REV. 1211, 1220 (1998). I engage Sunstein's work with greater depth later in this Article. *See infra* Part IV.

14. Jeffries & Levinson, *supra* note 13, at 1220.

15. SUNSTEIN, *supra* note 13, at 168.

bias as the product of policy preferences as opposed to one serving constitutional interests. Hence, he argues, deliberative democracy must engage in constructing those preferences in a just manner.[16]

Given this lacuna, the other natural place to which one may turn to explain aversion to rights revocation is the literature on the vested rights doctrine. While the vested rights doctrine is one among the several sets of doctrines and approaches in Part II that reflects a connectedness account of rights holding, it is the only one of these doctrines that has enjoyed sustained contemporary scholarly and judicial attention. However, scholarship on vested rights is scarcely more enlightening. Indeed, some have despaired of explaining why, upon the vesting of a right, it cannot be revoked, even if it need not have been granted in the first place.[17] Those that are more optimistic provide two dominant accounts, neither of which can easily be extrapolated to the question of why courts dislike rights revocation outside the vested rights context, and both of which seem incomplete.

First, according to some, vested rights are based on constitutionally unenumerated natural law principles and are often coupled with and treated as the precursors to substantive due process. Edward Corwin, John Ely, and James Kainen all make variations of this argument.[18] Larry

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16. *Id.* The question this Article deals with is analytically independent of the question of constitutional baselines. A constitutional baseline—either descriptive or normative—discusses what rights are or should be in a given situation. While that is an important question (and, as I demonstrate in the final Part, related to the question I deal with here), it is an independent one from the one that I deal with at least in the first two Parts of this Article. My thesis in Parts I–II is that courts' discomfort with rights revocation is independent of the fact that the Constitution may mandate the granting of that right in the first place (that is, set a baseline). There is something about the perception that a right is being *revoked* that animates the courts to protect the right more urgently than they otherwise would based solely on the constitutional command that the right be granted. The final Part recognizes the importance of baselines, but argues that it is the framings of revocation and restoration that affect what we see of as a baseline in the first place, rather than the other way around as commentators seem to have argued. *See, e.g.*, Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1352 (1984) ("[T]he distinction between liberty-expanding offers and liberty-reducing threats turns on the establishment of an acceptable baseline against which to measure a person's position after imposition of an allocation."). I therefore do not directly engage with the large literature on constitutional baselines more generally. *See generally* Larry Alexander, *Understanding Constitutional Rights in a World of Optional Baselines*, 26 SAN DIEGO L. REV. 175 (1989).

17. They therefore concluded that all retroactivity should be constitutional. *See, e.g.*, Michael J. Graetz, *Retroactivity Revisited*, 98 HARV. L. REV. 1820, 1822 (1986) (noting his previous contribution that all changes in the law have an economic impact on the value of existing assets); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 512 (1986) (arguing that governmental policy changes affect reliance interests, similar to changes in the market; thus, it is better to rely on the market than on transition relief); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1069–73 (1997) (explaining that retroactivity is an indeterminate concept, better understood as a range of temporal options rather than a binary construct); *id.* at 1079 ("[M]ost new rules impose some retroactive effects [, which] undermines the claim that retroactive legislation necessarily violates the Due Process or Takings Clauses.").

18. *See generally* Edward Corwin, *The Doctrine of Due Process of Law Before the Civil War* (pts. 1 & 2), 24 HARV. L. REV. 366, 460 (1911); Edward Corwin, *The Extension of Judicial Review in New York:*

Tribe similarly argues that vested rights theory was a precursor to the flowering of natural rights ideas developed through substantive due process.[19] Under a second account, Michael McConnell and Nathan Chapman are the latest in a series of scholars to argue that the vested rights doctrine concerns separation of powers—courts used the doctrine to invalidate what they considered to be legislative imposition of a judicial sentence.[20] As *Marbury v. Madison* itself teaches us, "The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority."[21] Vested rights, on this account, are those property rights that can only be taken away by due process of law, pursuant to judicial decree.

Both accounts are deficient. Vested rights are not natural rights in the same way as fundamental rights (under substantive due process). An ex ante denial of a fundamental right is just as bad as ex post deprivation of the right; but the vested rights doctrine penalizes only deprivations, not denials, of the right. The separation of powers explanation, in turn, is also limited because it simply begs the question: if vested rights are those rights that require judicial intervention to be divested, we still need an explanation why these rights require judicial intervention.[22] Further, there

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1783–1905, 15 MICH. L. REV. 281–313 (1917); Laura Inglis, *Substantive Due Process: Continuation of Vested Rights?*, 52 AM. J. LEGAL HIST. 459 (2012); James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 114 (1994) ("Vesting became a question of substantive justice rather than legal definition . . ."). Another explanation that I categorize in a similar vein is that of JOHN HARDIN ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14–21, 73–75 (1980). Ely claims that judges differentiate vested rights from substantive due process rights because the former derive their authority from positive law, and the latter from natural law. *Id.* They both represent approaches to rights protections that are fashioned after the legal philosophies of their day.

19. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 415–34 (1978).

20. *See generally* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012). Others are of the same school of thought, at least with respect to the Fifth Amendment's Due Process Clause. *See, e.g.*, Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 411–12 (2010).

21. 5 U.S. 137, 167 (1803).

22. John Harrison makes a similar point. John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 522 (1997). Chapman and McConnell begin to provide this explanation, arguing that rules that divest property rights in a manner that are not both general and prospective require judicial intervention. Chapman & McConnell, *supra* note 20, at 1677–79. Yet, there are three problems with this explanation. First, (to their credit) they also point to several cases where courts invalidated seemingly "general" property divestments. *Id.* at 1718, 1751; *see, e.g.*, Hoke v. Henderson, 15 N.C. (4 Dev.) 1, 15–16 (1833) (any holder of a certain office divested of the office); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810) (all holders of a certain grant of land divested of the land). Although Chapman and McConnell frame these as general divestments of property, I do not think that these cases can be lumped together with situations in which the legislature targets a particular individual to take away her property in particular, without due process of law—Chapman and McConnell's archetypal example. Second, the approach fails to sufficiently cabin courts rather capacious definition of property during this period. *See* Kainen, *supra* note 18. Third, even if courts considered whether the taking was general and retroactive, Chapman & McConnell provide no conceptual explanation as

is reason to doubt that lack of judicial oversight was the sole reason for invalidating revocations of vested rights—even revocations with judicial process were sometimes viewed with suspicion. Indeed, contemporary thinkers, including numerous Framers, felt that even judicial process could not deprive certain rights once bestowed.[23] This suggests that the problem with taking away vested rights, in some situations, at least, was less that the wrong branch took away the right, but rather that there is something about certain vested rights that prevents any branch of the government from taking the rights away at all. Suggesting that vested rights are vested because they are identified with the judicial power puts the cart before the horse: heightened judicial protections for vested rights exist *because* of their vestedness, but these protections do not define what vestedness is. As Ann Woolhandler puts it, "the separation of powers concerns underlying" vested rights and related doctrines "can only be applied by taking into account the substantive rights at issue."[24] Thus, for what Corwin referred

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to why these considerations are important, and require due process (nor were they required to, given their primarily historical approach).

23. *See, e.g.*, Barton H. Thompson, Jr., *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373, 1390 (1992).

24. Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1019 (2006). Woolhandler, the only scholar I have identified to attempt a systematic treatment, draws a distinction between "private" and "public" rights. *Id.* For her, a "positively derived, traditional property that results from one's labor and voluntary exchange" can be distinguished from, and "more securely protects individuals from the state than . . . statutory entitlements." *Id.* at 1061–62. As she explains, "the public/private line distinguishes between statutory and common law rights, making the former easier to abrogate than the latter." *Id.* at 1060. Woolhandler admits that her thesis is more descriptive than prescriptive: she justifies the line by noting that "we have in the past and continue to provide more protection for traditional common law interests." *Id.* at 1061; *see also* Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3, 11–12 (1983) (arguing that judicial protection of traditional property rights serves as an external check on encroachment by nonjudicial branches of government). Although Woolhandler's distinction has merit—and appears to have been one of the animating concerns behind the judicial distinction between public and private rights, it could not have been the only one. Woolhandler does not consider antebellum cases such as *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, in which the Supreme Court of North Carolina invalidated the legislature's attempt to divest an individual of a government office in which, the court found, he had a vested interest. Yet, this was a deprivation of a public rather than a private benefit. Indeed, in *Marbury* itself, the Supreme Court held that a public office was a vested right. 5 U.S. at 162. Similarly, although corporation charters slowly became treated as private property, in pre-nineteenth century thought, corporation charters were considered public privileges. *See* Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 67–68 (1987) (citing cases). Yet, even then, many argued that these charters constituted vested rights. *Id.* at 68–69. The complicated history of these charters, as Siegel reminds us, challenges the easy distinction between private and public rights. *Id.* The distinction between private and public rights is, and remains, complicated. Indeed, it seems almost conclusory to claim that a right is "public," and therefore not worthy of protection, versus "private." Other rights apart from charter rights, most notably pensions, have a similar, changeable history—transforming from a matter of privilege to one of right, from public to private, nonvested to vested, depending on historical circumstances. Just *what* those circumstances are that *produce* the public and private distinction remains to be determined.

to as "the basic doctrine of American constitutional law,"[25] the vested rights doctrine has, remarkably, eluded philosophical and historical explanation.

Three caveats merit attention before proceeding. First, I refrain from making prescriptive claims as to what claims should be, or are, rights, or whether courts are right in resisting revocation. Rather, any interest has the potential to be framed as a right, depending upon what the social, political, and legal context will reasonably accommodate. As a general matter, the claims of this Article are descriptive rather than prescriptive, and indeed, the final Part describes the contingent and constructed nature of both rights and the concept of revocation. Second, courts permit (most) rights to be taken away with enough process. I do not consider here why that is.[26] Finally, this Article is only the first half of a larger story. As I note above, a follow up Article explains that in several cases, including *Perry*, the courts penalize rights revocation to police the institutions revoking rights, invoking equality and other principles, rather than relying directly on the harms caused to rights holders.[27]

I. Rights Ownership as Connectedness

Hostility to rights revocation relies on the understanding that owning a right connects the right to, and embeds the right in, the individual. Under this account of ownership as connectedness, ownership represents a philosophical and psychological connection between an individual and the right. As discussed later in this Part, this is not the only, or even (in the Fourteenth Amendment context) the dominant modern account of rights ownership. Nor do I suggest that it is a better account of rights ownership than any other. However, it explains, as I shall later argue, the greater solicitude certain legal doctrines exhibit to already owned rights.

Before proceeding, one may notice that throughout the Introduction, and for the remainder of this Article but most noticeably in this Part, I slip between individuals' connection to *objects* and their connection to *rights*. Two reasons justify this approach. First, property scholars and historians have long argued that our concept of rights as subjective faculties, the ability to engage in certain activities, is bound up in our concept of

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Andrea L. Peterson suggests in passing that another approach is to draw a clear distinction based on whether "when it first granted the right at issue to A, the government reserved the power to modify or eliminate that right. In other words, the government gave the right to A with strings attached." Andrea L. Peterson. *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 Calif. L. Rev. 1299, 1349–50 (1989). But as Siegel's work suggests, this distinction is not tenable given that, starting in the late nineteenth century, courts always implied strings in government grants. Siegel, *supra*, at 33–35.

25. Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 Mich. L. Rev. 247, 247 (1914).

26. For a literature review on the subject, see Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. Rev. 885 (1981).

27. *See* Konnoth, *supra* note 11.

property as a historical and philosophical matter.[28] Thus, it would be unsurprising for the philosophical and psychological conception of property ownership to cross over into rights ownership as well. Second, more importantly, and perhaps because of the first point, when one speaks of property or ownership, one is more properly talking about certain rights with respect to an object. Thus, to suggest that "property" becomes bound up in an individual is often shorthand for saying that the individual becomes attached to certain rights with respect to the object, including possession and certain kinds of uses. Thus, there is no principled reason for restricting a connectedness account to physical objects—as much as objects, the ability to exercise certain rights similarly can become bound up with an individual. Accordingly, courts and scholars, many on whom I rely on below, also slip between discussing possession of objects and rights, particularly in the vested rights context as discussed in the following Part.[29]

I should note that in providing this account of rights ownership I do not give a full exposition of how a right is developed. That explanation must wait until Part III. Until then, a right is best understood as a set of capabilities that is recognized by the positive law of a jurisdiction. Of course, not all capabilities are rights and not all rights are deeply embedded in personhood because of the factors described in greater depth in Part II.B

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28. Thus, Carol Rose notes, "[P]roperty analogies have a way of creeping into people's talk about all kinds of rights." Carol M. Rose, *Propter Honoris Respectum: Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 348 (1996). Indeed, property for some "is the symbolic means through which people convey and receive the meaning of all rights." *Id.* at 349. As an example, she gestures to a journal article by James Madison in which he describes as his property his religious beliefs, reputation, and other, more abstract possessions. *Id.* at 348–49 (citing James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON, 6 APRIL 1791–16 MARCH 1793, at 266 (Robert A. Rutland et al. eds., 1983)). Rose notes that some may be troubled by this slippage, partially because of a broader critique of rights rhetoric and property rhetoric that is beyond the scope of this Article. *Id.* at 350 (citing Joseph W. Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 44–47 (1991) (using the example of Native Americans to illustrate the partiality and injustice of property definitions)). Another reason to fear the slippage is the commodification thesis that Margaret Jane Radin discusses in *Market-Inalienability*, 100 HARV. L. REV. 1849, 1852–53 (1987). However, here I am, if anything, focusing on the non-commodified personhood values of property, which should not implicate commodification concerns. While critiques of this slippage exist, they are beyond the scope of this Article.

Richard Tuck, in his canonical history of the development of theories of natural rights, similarly notes that a theory of natural rights developed from concepts of property. RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 3 (1979). Early in the history of natural rights theory, "to have a right was to be the lord or *dominus* of one's relevant moral world, to possess *dominium*, that is to say, *property*." *Id.* (emphasis in original). Similarly, as a matter of constitutional law, there was a "reconceptualization of the legal concept of property to include all legally protected interests" as a result of Hofeldian legal analysis. James L. Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State*, 31 BUFF. L. REV. 381, 444 (1982).

29. Kathleen Sullivan relies on a similar metaphor. Sullivan has argued that certain rights should similarly be inalienable, and that "some attributes are so closely connected to the person that their alienation would injure personal identity." *See* Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1485 (1989). Just as different types of property are important to personhood to different degrees, so too would Sullivan "rank different constitutional rights as more or less central to personal identity." *Id.*

and II.C. But when advocates understand a specific capability to be an embedded right, they may believe and claim that it should not be easily revoked. Depending on whether their claim is recognized by the State, their claims will either be vindicated or fail. Thus, as explained more fully in Part III, there is no one account on what is an embedded right; rather, multiple constituents advance claims as to what should be an embedded right with varying degrees of success.

A. Embedded Rights

When something is owned it transforms personhood in a way that something that is yet to be owned does not. Philosophers and political theorists since at least John Locke identify a deep bond between owning rights in property and personhood. Scholars have developed these claims in two ways. First, some concentrate on the instrumental value of rights in developing personhood—being able to use one's property, skills, resources, or other abilities helps develop one's identity overall. Others, however, go further, and argue that certain rights, when deployed in a certain manner, become constitutive of personhood. That is, the very being of the individual becomes infused with the right, the exercise of which helps, in part, to define the person.

Margaret Radin embraces both approaches. Her famous psycho-philosophical account first relies on an instrumental view of property to develop personhood. Focusing on objects, she concludes that, "to achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment."[30] Similarly, Jedidiah Purdy argues that harnessing one's resources to perform tasks, such as volunteering, is linked to human flourishing and self-realization because of the "moral satisfaction" individuals get from participating in such projects.[31] Under this account, time, skill, and talent are forms of property, and individuals can utilize their ownership interests in these resources to develop their personhood.

However, possessing a right and deploying it as a means to develop personhood is different from saying that personhood is constituted by and infused in the right itself. For example, I may use my property interest in a bus ticket to go to church, therefore "using it" in some way to engage in personal development, but I would never claim that my personality was somehow constructed through or infused in the bus ticket.

Nevertheless, numerous theorists claim that in some cases, personhood becomes infused in the property and vice versa. Sartre observed that "[t]he totality of my possessions reflects the totality of my being. I am what I

30. Margaret Jane Radin, *Property and Personhood*, 34 Stan. L. Rev. 957, 957 (1982).

31. Jedediah Purdy, The Meaning of Property: Freedom, Community, and the Legal Imagination 150–51 (2010).

have . . . . What is mine is myself."[32] Hegel referred to property as "the existence of [my] personality."[33] And for Locke, upon a man's mixing the "[l]abour of his [b]ody" with possessions, they become "properly his."[34] Thus, by joining the property to "something that is his own" (his body and labor) the property becomes "a part of him, that another can no longer have any right to."[35] Similarly, in explaining how an individual obtains property interests through adverse possession, Oliver Wendell Holmes explained,

> [T]he notion of property . . . is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root *in your being* and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.[36]

Radin provides both a philosophical and psychological explanation for this understanding: possessing property is a precondition of conceiving of an individual in the first place—property is what permits an individual to project herself into the future or the past; it is required to populate one's memory with substance.[37] Indeed, even more fundamentally, to comprehend oneself as a person, one must differentiate and delineate one's body and mind from the collective. Rights in one's body and mind allow an individual to develop the self in order to achieve this task. It is the rights to certain objects that allow one to think of oneself as a continuing entity through time that is able to perform certain actions. Accordingly, as Radin explains, "persons [are] continuing self-consciousness characterized by memory [that] . . . is made of relationships with other people and the world of objects."[38] Thus, an individual's personhood is embodied or constituted, at least in part, "in terms of 'things," and "[m]ost people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world."[39]

In experiments that have received little attention in the legal literature,[40] developmental psychologists have found empirical support for Radin's philosophical thesis that individuals have a psychological

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32. JEAN-PAUL SARTRE, BEING AND NOTHINGNESS: A PHENOMENOLOGICAL ESSAY ON ONTOLOGY 591–92 (Hazel E. Barnes trans., Philosophical Library, Inc. 1956) (1943).

33. G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 51, at 81 (Allen Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1820) (emphasis added).

34. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287–88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

35. *Id.*

36. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897) (emphasis added).

37. *See generally* Radin, *supra* note 30.

38. *Id.* at 967.

39. *Id.* at 958–59.

40. One exception is a passing reference by Nestor M. Davidson in *Property and Identity: Vulnerability and Insecurity in the Housing Crisis*, 47 HARV. C.R.-C.L. L. REV. 119, 133 (2012).

connection with, and conceive of themselves through, their rights.[41] As these experiments have found, individuals perceive a link between themselves and their property in both an intellectual and affective manner; they feel and believe that the target of ownership is theirs. Further, there is an affective or emotional sensation that accompanies this state. Depending on the context, individuals emphasize an affective sense of ownership—a "feeling" of ownership—or cognitive ownership—an intellectual understanding that they own the object.[42]

Research in this area centers around the concept of self-anchoring—the idea that when something is associated with the self, one's affective attitude or emotional outlook toward it is reflected from or "anchored" by that which one holds toward oneself. As recent research reveals, owned objects are anchored in oneself and therefore judgments of owned objects correspond to judgments of self to a greater extent than that of unowned objects. Thus, in one recent experiment, researchers discovered, using implicit association testing, that (1) choosing an object was sufficient to create an affective link between the object and the individual—testing revealed that the object would be linked to words denoting oneself; (2) objects that were chosen were evaluated differently than objects that were rejected; and (3) evaluations of objects that were chosen mirrored evaluations of self-esteem.[43] Thus, "[a]ssociative self-anchoring can be understood as the formation of an association between an object and the self, leading to a subsequent transfer of already existing self-associations to the object."[44]

Developing these relationships with property or rights helps serve various functions. Jon Pierce, one of the foremost cognitive psychologists who write on the topic, has performed a meta-analysis of studies of the functions ownership serves. He concludes that a sense of ownership of rights in something (not necessarily tangible) helps individuals obtain a sense of potency and control by being able to affect their environment.[45] As one writer observes, to the extent the degree of control resembles that which an individual feels for her body, it contributes to a sense of efficacy.[46] Consumer research shows that[47] possession also helps establish

41. JON L. PIERCE & IIRO JUSSILA, PSYCHOLOGICAL OWNERSHIP AND THE ORGANIZATIONAL CONTEXT: THEORY, RESEARCH, EVIDENCE, AND APPLICATION 16, 19 (2011); *see generally* Leon Litwinski, *The Psychology of "Mine,"* 22 PHIL. 240 (1947).

42. Linn Van Dyne & Jon L. Pierce, *Psychological Ownership and Feelings of Possession: Three Field Studies Predicting Employee Attitudes and Organizational Citizenship Behavior*, 25 J. ORGANIZATIONAL BEHAV. 439, 442 (2004).

43. *See generally* Bertram Gawronski et al., *I Like It, Because I Like Myself: Associative Self-Anchoring and Post-Decisional Change of Implicit Evaluations*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 221 (2006).

44. *Id.* at 223–24.

45. PIERCE & JUSSILA, *supra* note 41, at 39–40.

46. Lita Furby, *Possessions: Toward a Theory of their Meaning and Function Throughout the Life Cycle*, 1 LIFE-SPAN DEV. & BEHAV. 297, 322–23 (P. B. Baltes ed., 1978).

identity, allowing individuals to express themselves and communicate their self-perception to society.[48] Identities and social roles are formed through narratives. In these "self-narratives, consumers play out their identities as a kind of performance on the stage of life, with products as props in the enactment of personalized version of cultural script."[49] Further, individuals absorb meaning from the objects they possess—as most midlife crises would suggest, they ascribe to themselves meanings that society may attach to the objects they own.[50] Future expectations and narratives regarding objects are important to developing a sense of self and even of identity.[51]

But even more than answering the identity-related question of *who* one is, connections to property help prove *that* one is, that is, that one exists as an independent human being separate from the collective. As some scholars explain using theories borrowed from developmental psychology, the concept of ownership helps children differentiate between self and the world.[52] As they develop, they learn to separate the self from the rest of the world.[53] As part of this process, children begin to separate the objects associated with themselves from the objects associated with others, extending these ideas over time to ownership of abstract concepts such as rights or intellectual property.[54] Different cultural understandings of what can be possessed and what possession means can result in different ways of understanding oneself and one's community.[55]

Both Radin's theory and empirical work show that some objects play a greater role in developing personhood, and some a lesser, depending on context. As Radin explains, "the personhood perspective generates a hierarchy of entitlements: the more closely connected with personhood, the stronger the entitlement."[56] At one end may be commercial interests such as the right one has in possession and alienation of money or goods a shop owner may hold for sale. At the other end are rights very close

47. Russell W. Belk, *Possessions and the Extended Self*, 15 J. CONSUMER RES. 139, 144–45 (1988); Banwari Mittal, *I, Me, and Mine—How Products Become Consumers' Extended Selves*, 5 J. CONSUMER BEHAV. 550, 557 (2006).

48. Belk, *supra* note 47, at 41.

49. Mittal, *supra* note 47, at 553.

50. HELGA DITTMAR, THE SOCIAL PSYCHOLOGY OF MATERIAL POSSESSIONS: TO HAVE IS TO BE 54 (1992).

51. *See, e.g.*, Aaron C. Ahuvia, *Beyond the Extended Self: Loved Objects and Consumers' Identity Narratives*, 32 J. CONSUMER RES. 171, 171–72 (2005).

52. Leon Litwinski, *Is There an Instinct of Possession*, 33 BRITISH J. PSYCH. 28, 34 (1942).

53. *Id.*

54. *Id.* at 34. This is, for me, the best explanation of why we feel connections to objects. But the causes for owner-object linkages are, admittedly, debated. Some point to biological causes based on anecdotal evidence. *See, e.g.*, PIERCE & JUSSILA, *supra* note 41, at 34–35. Of course, others argue that a combination of biology and development help shape our understanding of ownership. DITTMAR, *supra* note 50, at 23–34.

55. Carol Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985).

56. Radin, *supra* note 30, at 986.

and personal to the individual, which range from interests in family heirlooms to rights in body parts and the right to certain basic freedoms, among others.

What determines this "hierarchy"? Predictably, objects that are more entangled with our sense of identity and narrative of ourselves, our past and future, are more important to us. The foremost determinants are the degree of control over and, in Locke's story, the investment of one's own resources into, something.[57] Physical proximity makes a difference: if "*you now control*" something, you are more likely to feel connected to it, at least at that point in time.[58] Hegel in turn argued that physical "*occupancy* . . . is requisite."[59] Physical occupancy or control, however, is just one of several reasons an individual may feel invested in an object.

Researchers have found that individuals can develop connections through a variety of narratives to intangible rights or objects. Habitual and constant use of a right is more likely to increase its perceived value.[60] Similarly, as we come to know something and obtain more information about it, the more intimate the connection between the individual and the thing becomes, and the more wiling we are to invest in the object.[61]

Legal ownership—or perceived legal ownership[62]—similarly creates a powerful connective narrative about how the object or right plays a role in an individual's life. Pierce and his co-authors explain,

> [L]egal ownership may facilitate and speed up the emergence of psychological ownership, because it allows the individual to explore the . . . routes leading to this state. . . . [The] [l]ack of legal ownership may in some cases provide a more precarious form of ownership, in that an individual has to avoid violation of the law (e.g., physical barriers, customs, and social practices) [in order] to exercise one or more of the three routes to psychological ownership. In the absence of legal ownership, one may also have to contend with a greater fear of separation, claim of ownership by the legal owner, and loss of the object.[63]

This insight, that law provides an important narrative through which individuals understand a right as being connected to and constituting themselves, will prove crucial in later Parts.

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57. PIERCE & JUSSILA, *supra* note 41, at 122; Furby, *supra* note 46, at 331.

58. Radin, *supra* note 30, at 968 (emphasis added).

59. HEGEL, *supra* note 33, § 51, at 81 (emphasis added).

60. PIERCE & JUSSILA, *supra* note 41, at 79.

61. James K. Beggan & Ellen M. Brown, *Association as a Psychological Justification for Ownership*, 128 J. PSYCHOL. 365, 376–77 (1994).

62. Remember, I do not claim that the *perception* of an embedded right means that the state will recognize the right as embedded.

63. Jon L. Pierce et al., *The State of Psychological Ownership: Integrating and Extending a Century of Research*, 7 REV. GEN. PSYCHOL. 84, 96 (2003).

B. Taking Away Embedded Rights

Because the self is related to or constituted by objects, obtaining control over a certain object means that a bond is formed, and taking away an item that is owned imposes a greater burden than taking away an item that is not owned. Few of the philosophers and social scientists discussed in the previous Subpart examine the question of revocation of the right to which the individual is connected. However, those that do, predict that loss of these objects we control causes a "partial annihilation of self."[64] Even if the object or right itself is not important, an attack on ownership can be understood as an attack on self-sovereignty.

Because of the failure of connectedness theorists to focus on revocation, a better perspective could be gained from considering behavioral economics research conducted on the question of revocation of objects. Starting in the 1980s, behavioral economists observed that in many situations, individuals demanded more to give up a good they already owned than they were willing to give to obtain a good they did not yet own.[65] This "endowment effect" had massive implications for legal theory—if it correctly predicted preferences, it could affect laws ranging from creditor repossession rights to employment insurance policies.[66] Almost twelve hundred law review articles used the term "endowment effect" between 1990 and 2012.[67]

Endowment effect research progressed independently of the ownership theory research discussed in the previous Subpart. While the connectedness theorists developed a theory of ownership but did not focus on questions of revocation, endowment effect empiricists observed the effects of revocation without developing a clear theory of ownership. Thus, endowment effect researchers have struggled to determine what causes the effect. Most scholars have traditionally associated the endowment effect with a psychological phenomenon they call "loss aversion," according to which individuals weigh losses more heavily than potential gains.[68] Yet, the loss aversion theory itself appears to beg the question why individuals value losses more than gains. The legal literature has also pointed to other causes for the endowment effect, but has strangely failed to consider a connectedness account of ownership. In a recent paper, Gregory Klass and Kathryn Zeiler note that the effect remains unexplained, and radically suggest that the effect does not exist because of some independent overvaluation of already endowed objects;

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64. *See, e.g.*, Belk, *supra* note 47, at 143.

65. Russell Korobkin, *The Endowment Effect and Legal Analysis,* 97 Nw. U. L. Rev. 1227, 1228 & n.3 (2003).

66. Gregory Klass & Kathryn Zeiler, *Against Endowment Theory: Experimental Economics and Legal Scholarship*, 61 UCLA L. Rev. 2, 19 (2013).

67. *Id.* at 18.

68. *Id.* at 4.

rather, individuals claim to value endowed objects more to gain a bargaining advantage (when they are sellers) or to satisfy authority figures' suggestion that they should value the object more.[69] Notably, for evidence of this claim, Klass and Zeiler rely on experiments in which individuals were prevented from holding the good or were told that they did not own the good.[70]

But if anything, Klass and Zeiler's work suggests that the explanation for the endowment effect lies in the connection account of ownership. According to their experiments, heightened valuation of the good disappeared precisely when the link between the individual and the good was deemphasized, either by telling the individual that the good was not owned by them or by taking it away from the individual.[71] As explained above, when an ownership link is created between an object and oneself, the object begins to "reflect" the individual. At the outset, researchers find that an individual generally has positive associations with oneself.[72] Objects in which the self is "anchored" have a concomitantly magnified value than objects that are not. And delinking the object from the individual, as Klass and Zeiler did, will result in a devaluation of the object.

Empirical work supports this hypothesis. In a 1992 study that was mostly overlooked by the legal and endowment effect literatures, James Beggan conducted research that suggests that owners value their objects more than nonowners in order to enhance self-value.[73] Beggan deliberately eschewed the term "endowment effect" for various theoretical reasons and argued that ownership theory better explains the phenomenon. Beggan's work was not replicated until recently, where, using the theory of self-anchoring that has developed since Beggan, researchers argue that positive evaluations of objects are anchored in positive evaluations of self.[74] Individuals therefore experience deprivation of already-owned objects as more harmful than a failure to provide the object in the first place.

Finally, the factors outlined above that determine how connected an object is to a person have been found to determine the extent of the endowment effect.[75] For example, Radin hypothesizes that "a relationship between person and thing is stronger when resources are bound up with the

69. *Id.* at 40–41; *see* Korobkin, *supra* note 65, at 1248 (suggesting additional causes).

70. Klass & Zeiler, *supra* note 66, at 40–41.

71. *Id.*

72. Anthony G. Greenwald & Shelly D. Farnham, *Using the Implicit Association Test to Measure Self-Esteem and Self-Concept*, 79 J. PERSONALITY & SOC. PSYCHOL. 1022, 1026 (2000).

73. James K. Beggan, *On the Social Nature of Nonsocial Perception: The Mere Ownership Effect*, 62 J. PERSONALITY & SOC. PSYCHOL. 229, 231 (1992).

74. Jochen Reb & Terry Connolly, *Possession, Feelings of Ownership and the Endowment Effect*, 2 JUDGMENT & DECISION MAKING 107, 107 (2007).

75. *See supra* notes 56–63 and accompanying text.

individual than when they are free to be traded or held for trade."[76] In the endowment effect context, experiments have shown that objects held for trade exert a lesser endowment than objects entwined with an individual's sense of self.[77]

C. An Alternative Conception of Ownership[78]

It is important to note that this account of ownership as connectedness is contingent on context—it is only one, and today, probably not even the primary account of rights ownership under the Constitution. Rights can be conceived of in a way that ignores the fact that they are embedded in, connected to, and constitute an individual. Thus, on a distributive account of ownership, for example, the ownership scheme is merely the objective cartography of allotment under the law—who happens to own which bundle of rights. Ownership remains whether or not the individual is conscious of possessing the right.

Modern political theorists and constitutional scholars are primarily concerned with a distributive theory of ownership—ownership describes not what already constitutes an individual but what an ideal system of justice allots to them. Distributive justice (Kantian, utilitarian, or otherwise) will ultimately determine the ownership scheme; subjective experiences of ownership are irrelevant. David Hume, who, in contradistinction to Locke and Hegel, explains that property is not determined by what naturally constitutes an individual, but what "the laws of justice" allot, best represents this view.[79] Those "who make use of the words *property*, or *right*, or *obligation*, before they have explain'd the origin of justice . . . are guilty of a very gross fallacy."[80]

Prominent political theorists therefore engage with questions of ownership from this distributive point of view. John Rawls pointed to "primary goods" that individuals possess in a just world;[81] Martha Nussbaum and Amartya Sen identify a list of basic capabilities that all individuals should possess to engage in certain activities;[82] Radin similarly distinguishes between "fungible" goods and goods that are essential to personhood.[83] Notably, this account of ownership is not mutually exclusive from an account focusing on the bond between the individual and the

76. Radin, *supra* note 30, at 982.

77. Korobkin, *supra* note 65, at 1239.

78. There may be even other accounts of ownership that I do not engage with in this Article, but distinctions between theories of ownership are often determined by context.

79. David Hume, Hume's Treatise of Morals and Selections from the Treatise of Passions 136 (Ginn & Co. 1893) (1751).

80. *Id.*

81. John Rawls, A Theory of Justice 214–15 (1971).

82. *See generally* Martha C. Nussbaum, Women and Human Development: The Capabilities Approach 84 (2000); Amartya Sen, Inequality Reexamined 45 n.19 (1992).

83. Radin, *supra* note 30, at 986.

object—it simply takes more criteria into account. One can incorporate the connectedness account of ownership into the distributive justice account. Distributive justice can take into account the fact that there is a relationship between goods and the individual already owning them, and may give preference to the status quo for that reason.

Under the distributive approach, the key question in the legal context is whether, under the scheme for distribution of rights dictated by the Constitution, an individual should possess a right against the State. Plaintiffs argue for the right to perform a certain activity—same-sex intimate conduct, abortion, home schooling of children—not because the right cannot be taken away once allotted to certain individuals, but rather because the Constitution distributes those rights to all individuals. The distribution is dictated, in part, by how important a right is and the countervailing government interest: certain rights are deemed "fundamental" to our constitutional tradition because they are constitutionally enumerated; others because they are rooted in this nation's history or are important to an individual's sense of autonomy;[84] yet other allotments may improve efficient social functioning or maintain social cohesion.[85]

The key here is that distributive ownership does not (necessarily) concern itself with whether the right is not provided in the first place or is taken away post hoc. In substantive due process contexts, for example, the Constitution is indifferent as to whether the right is being denied ex ante (that is, without being ever bestowed) or taken away ex post (that is, after possession). Any deviation from the optimum distribution—whether before or after the right is possessed—is unconstitutional. While this is probably the predominant theory of rights ownership in modern constitutional doctrine, as the next Part will show, connectedness theories played an important role as a historical matter.

II. Connectedness in Legal Doctrine

My examination of the revocation of endowed and embedded rights continues by considering legal concepts that recognize the notion of connectedness. Part II argues that the notion that rights, especially property rights, become connected to an individual and embedded in her blood has long been part of Anglo-American legal understanding. This understanding appeared with the first discussion of rights as subjective legal capabilities in the thirteenth century, and continued into early modern America as legal doctrines such as attainder, forfeiture, and corruption of blood demonstrate. Each of these doctrines relied on a connectedness account of ownership.

84. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003); Washington v. Glucksberg, 521 U.S. 702 (1997).

85. *See* David Hume, A Treatise of Human Nature 490 (L.A. Selby-Bigge ed., Oxford Univ. Press 1978) (1739).

Subpart B turns to the vested rights doctrine, which more squarely presents the question of revocation. Although it is hard to apply, the vested rights doctrine is not conceptually complicated. A vested interest is a right that is fully realized and present as opposed to a mere expectation. Any legislation that takes away a vested right is considered retroactive and is disfavored or outright prohibited.[86] This doctrine, which dominated the nineteenth-century constitutional landscape, presents the clearest example of hostility to rights revocation.[87] Under the doctrine, a failure to provide the right in the first place merits no constitutional scrutiny. However, revocation of the right once vested (if even possible) demands the accouterments of due process.

Many rights have historically been considered "vested," including non-property rights. For example, the California Supreme Court held that the rights that attach to same-sex spouses for the couples that had already married had vested and that Proposition 8 did not repeal these rights.[88] I argue in Subpart B that the determinants of whether a right has vested, such as time, reliance, and completion of formalities, are meant to measure how "connected" a right is to an individual. While the doctrine has largely been the province of specialized areas of law such as zoning and pensions, recent same-sex marriage cases have returned the doctrine to the vanguard of constitutional litigation. I therefore turn to a closer analysis of these cases.

I conclude in Subpart C by explaining that the considerations that determine that a right has vested may be present in circumstances where courts, for various reasons, decide not to invoke the doctrine. In such cases, courts are still loath to permit rights revocation. Again, while this is apparent across multiple areas of law, which I describe briefly, the Affordable Care Act case is a prominent example of this principle.

A. Rights Connectedness in Legal History

In this Subpart I show that the Anglo-American legal tradition has long treated some rights as somehow part of—and embedded in—an individual. First, I examine the concept of "vesting." The term is used across vast historical periods. For the purposes of this Article, I simply note that every major legal thinker that invokes the term uses it to

86. *See* Resolution Trust Corp. v. Fleischer, 892 P.2d 497, 500 (Kan. 1995); *see generally* Peterson v. City of Minneapolis, 173 N.W.2d 353 (Minn. 1969). James L. Kainen provides a detailed historical discussion of the varied contexts in which the vested rights doctrine has been deployed in the Supreme Court—land, financial payments, and commissions. *See* Kainen, *supra* note 18, at 421. My point is simply that the Court's investigation of vesting of a particular right (whatever the right is) has always been carried out with an eye to whether the right can be taken away; once a state provides a right and it vests in the recipient, attempts to take away that right are disfavored, or even outright prohibited.

87. The vested rights doctrine discussed in Part II.B draws on the same conceptual roots of ownership-as-connectedness, but is distinct from the legal concepts and doctrines described in Part II.A.

88. Strauss v. Horton, 207 P.3d 48, 120 (Cal. 2009).

describe property as connecting to an individual. Similarly, other legal doctrines, such as attainder or corruption of blood, also rely on the notion of property as embedded within an individual. These concepts, while rarely (if ever) invoked today, most clearly exemplify the connectedness account of property, and hence bear some description. Underlying these legal concepts was an understanding that property constituted who the individual was, and that investing property in the individual, or divesting it, could fundamentally alter that identity.

It is unclear to what extent the vested rights doctrine, which properly deals with the question of *revoking* vested rights, can be directly traced to these doctrines or concepts. Certainly, the legal concept of "vesting" that describes an item of property as becoming closely connected to an individual is closely related, and probably logically precedent, to the vested rights doctrine, which prohibits taking away these closely connected rights. However, given the range of historical periods across which the concepts of "vestedness" appear, this Article does not seek to develop this relationship any further. Suffice it to say all these doctrines are conceptually related in that they consider property as embedded in the individual. But doctrinally speaking, at least, they remain distinct concepts.

1. "Vesting" of Property

Descriptions of rights as "vested," and therefore becoming embedded or connected to the individual, appear across historical periods. The earliest discussions date back to the earliest days of English jurisprudence in the eleventh and twelfth centuries, against a backdrop in which the term "right" itself (*ius*) was in the process of being developed. Thus, in exploring the concept of vesting in this context, it may be that we are discussing the term with respect to something that is not quite fully understood as a "right" in the modern sense. Nonetheless, the concept of vesting was applied to the medieval analogs of rights—possession, obligations, and powers.

Around 1100, the whole corpus of Roman law was recovered. Next came an immensely influential codification of church law in Gratian's Decretum.[89] These legal watersheds led to intense debates and important developments in theories of rights of the time.[90] The meaning of the term "right" (*ius*) was ambiguous.[91] Classically, the term *ius* denoted justice—the moral code that determined right and wrong. However, around the twelfth century, the term *ius* began to adopt its modern meaning, denoting

89. *See Decretum Gratiani*, *in* GRATIAN: THE TREATISE ON LAWS (Augustine Thompson trans., Catholic Univ. of Am. Press 1993) (1151).

90. *See generally* Brian Tierney, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW, AND CHURCH LAW, 1150–1625 (1997) ("Civilis autem est quæ animo tantum retinetur. Naturalis, quæ corpore, et aliquando iusta est et aliquando iniusta.").

91. *Id.* at 45.

subjective individual rights—"a faculty, an ability, a liberty to act" by the individual.[92] The *Laws and Customs of England*, by Henry Bracton, the most prominent jurist of this time, provided the first known systematic exposition of English law and contains one of the first examinations of this new approach to the idea of "rights." He noted that "*ius*" primarily refers to an objective moral code, but secondarily that it also indicates subjective individual rights, or "potestas."[93]

The concept of vesting, according to which a right became part of an individual's soul, was born concurrently with this new idea of rights. In the property context, Bracton explained, "[p]ossession is divided into civil and natural possession."[94] "Natural" ownership is purely a question of "physical occupation."[95] Nothing more profound is at play. Thus, one loses natural ownership at death, not at the time of death, but only "when the body is borne away."[96] Civil ownership, by contrast, is connected to our soul. "Civil [ownership] is . . . retained by the soul [*animo*] alone."[97] Therefore, one "loses civil possession [at the time of death,] when the soul [*animus*] quits the body."[98] Civil possession is therefore tied to the soul, and is lost when the soul is no longer present.

The difference between natural and civil possession translates to a difference between "bare" and "vested" possession. Bare possession is simply the fact of physical (or natural) possession without consideration of "right."[99] Vested possession is possession that is "clothed . . . by right, title, or time."[100] Transfer of right or title occurs through formalities such as livery of seisin.[101]

As I explain in greater detail below, formalities and time determine how connected a right or object is to an individual's sense of self even today.[102] On Bracton's account, they served a similar function. Formalities are an outward manifestation of deeper psychological processes. Formalities, to be sure, are "what is outward, in the light of external acts and according to the sight and understanding of men."[103] But the formalities reflect inner psychological bonds. They show that "the donor

92. *Id.* at 30.

93. *Id.*

94. 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 122 (Samuel E. Thorne trans., President & Fellows of Harvard Coll. 1998) (1235–1240), *available at* http://bracton.law.harvard.edu/Common/SearchPage.htm.

95. *Id.* at 122.

96. *Id.*

97. *Id.*

98. *Id.* at 155.

99. *Id.* at 122 ("Item alia nuda, alia vestita. Nuda, ubi quis nihil iuris habet in re, nec aliquam iuris scintillam, sed tantum nudam pedum positionem: vestita, iure, titulo, vel tempore.").

100. *Id.*

101. *Id.* at 130.

102. *See infra* Part II.B.1.

103. 2 BRACTON, *supra* note 94, at 130.

. . . [lacks] the possessory state of mind," and the donee takes the item with the intent to possess.[104] The formalities therefore reflect a transfer of the psychological bond as well. Witnesses can testify to this, and that the transfer was made "freely and of [the donor's] own will."[105] Finally, even without formalities, time similarly reflects a changed connection between the object and its owner. "[L]ong possession, like a mother, gives birth to right in the possessor."[106] Vesting here was tied to the state of one's sole or mind.

Bracton extended a similar analysis to contract law. An agreement "is contracted [using] several vestments, [including] a thing [consideration], by words, by writing, by consent, by traditio [, or] by conjunction."[107] Without these, a right is not vested, and its violation cannot be remedied through legal action.[108] Each of these formalities helps indicate some deeper bond between the object and its owner.

While I argue that the modern sense of vesting also has a relationship to one's soul or mind, Bracton's use of the term is different from how it is presently used. For Bracton, vesting was best understood transitively—formalities indicating the state of the individual's mind or soul vested or clothed the right. There is no use of vesting in the intransitive sense—of the right vesting *in* a person, as the term is more commonly used today. Possibly, as a result of this limited understanding of the term "vest," and indeed, the novelty of using *ius* to indicate subjective individual rights, the term "vested" was rarely used in the period. Word searches of the first *Year Books*, which appeared around this time and reported case proceedings before the Common Bench, reveal that variations of the term "vest" were rarely used.[109] Bracton's contemporary commentators rarely, if ever, used the term. Neither of the more summary works known as *Glanville* or *Fleta* used the term.[110] Similarly, Britton—one of the first major thinkers after Bracton—preferred the term "reposed" instead of "vested."[111]

As time progressed, however, the term gradually saw increased usage, along with a subtle change in meaning—but one that still indicated connectedness to an individual. Rights were mostly invoked in the context of property; courts would commonly refer to estates as being in

104. *Id.* "Animo possidendi." In modern usage, this would translate to the intent of possessing.

105. *Id.*

106. *Id.* at 157.

107. *Id.* at 283–84.

108. *Id.* at 45.

109. YEARBOOK OF THE REIGN OF KING EDWARD THE FIRST YEARS XX & XI (Alfred J. Horwood ed. & trans., 1866). These variations included vest, veste, vestu, vesti, vestire, vester, vestier, vesty, vestira, vestiras, vestera. *See generally id.* As late as 1292 or 1293, the term does not appear in the *Year Book* of that period. *Id.*

110. A TRANSLATION OF GLANVILLE (John Beames ed., 1812).

111. 1 BRITTON 212, 342 (Francis Nichols ed. & trans., Clarendon Press 1865).

("en") a person. Slowly, the term "vested" began to make an appearance in the *Year Books* during the course of the fourteenth century.[112] But its use remained rare. When Thomas Lyttleton, another prominent jurist, wrote his *Treatise on Tenures* (arguably the first textbook on property law) in the fifteenth century, he used (when not quoting from elsewhere) a variation of "vest" less than ten times, far preferring the term "invest" with property or benefices.[113] Coke, the next major legal expositor of private law, used the term less than thirty times across the various volumes of his work in the seventeenth century.[114]

This dwarfs the over one hundred times that William Blackstone used the term "vest" in his *Commentaries* that were published in the following century.[115] Notably, Blackstone became the first widely read commentator whose work survives today that hinted at a more detailed understanding of the term "vesting" since Bracton. Blackstone explained that vesting property rights relied on the fiction of feudal investiture. Under that fiction, "all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately, of the crown."[116] The land was granted directly or indirectly "by the ceremony of corporal investiture, or open and notorious delivery of possession."[117] And the modern day freehold which requires the "ceremony" of livery of seisin for conveyance "by the course of the common law . . . is the same as the fe[u]dal investiture."[118]

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112. For example, by the middle to the end of the century, the term began to be used on average once per every 100 pages of the *Year Books*. *See* YEAR BOOKS OF RICHARD II: 12 RICHARD II, A.D. 1388–1389 (George F. Deiser ed., 1914); YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD YEAR XX (FIRST PART) (Luke Owen Pike ed. & trans, 1908); YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD, YEARS XI AND XII (Luke Owen Pike ed. & trans., 1885).

113. THOMAS LITTLETON, ANCIENNES LOIX DES FRANÇOIS, CONSERVÉES DANS LES COUTUMES ANGLOISES (M. Houard ed., 2nd ed. 1769).

114. 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON (Charles Butler ed., 1985) (1628) [hereinafter COKE, FIRST PART]; EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (London, W. Clarke & Sons 1817) (1642) [hereinafter COKE, SECOND PART]; EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES (London, W. Clarke & Sons 1817) (1644) [hereinafter COKE, THIRD PART]; EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; CONCERNING THE JURISDICTION OF THE COURTS (London, W. Clarke & Sons 1817) (1648) [hereinafter COKE, FOURTH PART].

115. One possible explanation for this increased usage is that the term "vested" was more commonly used in English, and of all these authors, Blackstone was the first to write in English. Another possibility is that individuals had become more comfortable with the use of rights language—so much so that some historians believe that the understanding of rights as subjective attributes of the individual originated only in the seventeenth century. *See, e.g.*, RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 5 (Cambridge Univ. Press 1982) (1979).

116. 2 WILLIAM BLACKSTONE, COMMENTARIES *53.

117. *Id.*

118. *Id.* at *104. Blackstone possibly overplays the role of the "investiture" fiction in the imagination of popular jurists; it is notable that Lyttleton, who preceded Blackstone by nearly two centuries, was far more comfortable using the term invest and investiture to discuss the conveyance of property than vesting.

But obtaining, and perhaps more importantly retaining and passing on, property through feudal investiture is grounded in aspects of identity that are more fundamental than mere economic gain. At the outset, obtaining property in Blackstone's world fundamentally altered an individual's social standing and the sets of rights and obligations that came with it. The investiture ceremony required "an oath of *fealty,*" and a "professing, that '[the grantee] did become [the lord's] *man,* from that day forth, of life and limb and earthly honour.'"[119] In the religious context, vast amounts of property were held by the church. Much litigation in the common law courts surrounded the livings that came with certain vicar or rector positions. To obtain the living,[120] the "clerk . . . [must] be instituted."[121] This institution was an "investiture," not just of the land, but "of the spiritual part of the benefice: for by institution the care of the souls of the parish is committed to the charge of the clerk."[122] Vesting of property on Blackstone's account therefore was connected to broader aspects of social role. It determined an individual's social status. It represented loyalty, and connected the individual to a community.

Blackstone frequently treated property interests as living within an individual—the right "abides" or "resides" in a person, and the "ultimate property of the lands is in himself."[123] Indeed, the right *needs* a person within which to reside. Unless such a person exists, the right cannot transfer:

> For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void: it cannot pass out of him, without vesting somewhere; and in the case of a contingent remainder it must vest in the particular tenant, else it can vest nowhere . . . .[124]

But once an actual person exists, and the right is vested, the right "shall not afterwards be taken from him."[125]

Even though Blackstone's understanding of vesting differs from that of Bracton's, like Bracton, he was quite clear in distinguishing between these vested rights and the "mere *right of property*," which is analogous to Bracton's concept of "bare" possession. And as in Bracton, formalities determine whether a right fully vests. As he repeatedly reminded, us in different contexts ranging from avowdsons to freeholds, mere "nomination

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119. *Id.* at *53 (internal quotation marks omitted).

120. *Cf. id.* at *242 (without which confirmation and investiture, the elected bishop could neither be consecrated nor receive any secular profits).

121. 1 WILLIAM BLACKSTONE, COMMENTARIES *389.

122. *Id.* at 390.

123. 2 BLACKSTONE, *supra* note 116, at *197.

124. *Id.* at *171.

125. *Id.* at *128.

and institution"[126] or "mere words" are insufficient; "material ceremon[ies]" such as actual entry or livery of seisin determines whether the right vests.[127]

It is only when a right vests that it is absorbed into the being and blood of an individual that "makes a man complete owner; so as to transmit the inheritance to his own heirs."[128] Once formalities such as "corporal investiture and livery of seisin" are complete, they "give[] the tenant so strong a hold of the land, that it never after can be wrested from him during his life."[129] And of course, in the case of incorporeal interests, other formalities apply to distinguish between "a vague and indeterminate right" and a title vested by "the verdict of the jurors, and judgment of the court."[130] What remained remarkably stable across the centuries during which the understanding of vestedness changed was the relationship between vestedness and personhood.

2. *Pre-American Accounts of Blood Ownership*

In describing the vesting of property, Blackstone also referred to the related question of corruption of blood. As he explained, the violation of the oath taken during the investiture ceremony transforms the individual herself. With the "commission of any felony," for example, "the fe[u]dal covenant and mutual bond of fealty are held to be broken" and "blood of the tenant . . . is corrupted and stained."[131] As a result, "the inheritable quality of [the felon's] blood is extinguished and blotted out for ever. . . . In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revest in the lord . . . ."[132] According to Blackstone's metaphor, the tenant's ability to hold property is fundamentally grounded in the tenant's blood. Upon the commission of a crime of sufficient import, "the blood of the tenant being utterly corrupted and extinguished, it follows, not only that all that he now has should escheat from him, but also that he should be incapable of inheriting any thing for the future."[133]

The corruption of blood metaphor appears at length only in the work of early modern (that is, postmedieval) commentators. This work demonstrates how, for these writers at least, property ownership rights were linked to fundamental aspects of an individual's being. Medieval writers focused on the "contractual aspects" of vassalage that were common to their time, and the breaking of an oath was simply understood as a

126. *Id.* at *312.
127. *Id.* at *311.
128. *Id.* at *312.
129. *Id.* at *386–87.
130. *Id.* at *438.
131. *Id.* at *252.
132. *Id.*
133. *Id.* at *253.

violation of the contract.[134] Glanville recognized forfeiture as the result of a violation of the contract between the lord and the tenant, but never treated it as an issue of the "corruption" of the blood.[135] Similarly, Bracton noted that property is forfeit to the lord simply because the individual violated his contract with the lord by committing a crime—his passing reference to heirs also not being able to inherit property as the "seed and blood" of the oath breakers is a far cry from Blackstone's detailed assessment of the "heritable quality" of the tenant's blood.[136] Britton similarly referred in passing to attainder with no reference to the corruption of blood, though at least one of his translators made that leap.[137]

Historical events of the late fifteenth century, however, birthed what appears to be the first theory of property that embedded ownership in an individual's blood accompanied by an understanding that if the blood became corrupted, the property was lost. Before the fifteenth century, only courts could impose attainder or corruption of blood pursuant to a judicial sentence. There was also little controversy over the effect and purpose of attainder; any confusion that existed over the process and varieties of treason that could justify royal attainder was largely resolved in the Grand Statute of Treason in 1352.[138] However, in the fourteenth century, during the War of the Roses, "when the alternations of conflict placed in power one government after another," attainder for treason was imposed increasingly broadly and with greater frequency.[139] More importantly, to guarantee speedy retribution, this attainder was imposed not by judges, but by Parliament. In light of these developments, instigators of the process were at pains to justify it "with as much appearance of legality as possible."[140]

In this context, later-Chief Justice Fortescue and others, as members of Parliament, exerted "the 'most vengeable labour'" in defense of attainder.[141] Fortescue had to walk a fine line—on one hand, he had to assure his king's supporters that the collection, preservation, and inheritance of property, even against monarchs' whims, were secure. At the same time, under certain circumstances, he sought to show that attainder was appropriate. In achieving this goal, Fortescue anticipated Locke, tracing the origin of property to God's injunction to Adam "[i]n

134. Frank W. Harris, *The Law & Economics of High Treason from its Feudal Origin to the Early Seventeenth Century*, 22 VAL. L. REV. 81, 83–84 (1977).

135. A TRANSLATION OF GLANVILLE, *supra* note 110, at 189.

136. 2 BRACTON, *supra* note 94, at 366.

137. 1 BRITTON, *supra* note 111, at 37.

138. JOHN G. BELLAMY, THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES 89–102 (2004).

139. J.R. Lander, *Attainder and Forfeiture, 1453 to 1509*, 4 HIST. J. 119, 120 (1961).

140. *Id.*

141. *Id.*

the sweat of thy brow thouh shalt eat bread."[142] This, Fortescue argued, showed that man gained a property interest in items for which he expended labor. Property

> compensates for the sweat by which the body of the acquirer is enfeebled, . . . [to] compensate the damage resulting from his loss of bodily wholeness . . . thus the property takes the place of the man's bodily integrity, which he has lost, and coheres as an accident to the toiler.[143]

The property then "accompanies a man's blood" and is "united to him" upon his expenditure of labor. In effect, because his blood carries through to his heir, the property may also pass down to his heir.[144]

While the novelty of Fortescue's theory has been celebrated as the first of a labor, blood-based theory of property,[145] historians have overlooked that the theory had a polemical purpose. Fortescue played an important role in the widespread attainders of 1459.[146] What historians refer to as Fortescue's "innovative" and "distinctive" blood theory of property developed during the 1460s[147] was developed precisely to allow Fortescue to provide a convincing explanation of disinheritance by attainder. He explained that by attainder, the convict's "blood is forthwith adjudged by that law to be so corrupted that, although by the prince's favour he escape death, he nevertheless will not be capable henceforth of succeeding his parents in their inheritances, nor will any of his posterity succeed him in his inheritance."[148] Fortescue, rather than the champion of property rights that historians take him to be,[149] was quite the opposite. Like his better known writings, Fortescue's property theory is better understood as polemical, grounding the corruption of blood explanation of attainder and forfeiture.

The success of this theory is reflected in the heavy reliance on the corruption of blood metaphor by subsequent writers. Early modern treatises focused far less on contractual language. For the treatise authors, a crime defined the individual as corrupt through and through.[150] Thus, according to Coke, attainder rendered one "ignoble," and resulted

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142. 1 JOHN FORTESCUE, ON THE LAW OF NATURE, *in* THE WORKS OF SIR JOHN FORTESCUE 291 (Thomas Fortescue Lord Clermont ed., Chiswick Press 1869) (1486).

143. *Id.*

144. *Id.*

145. Edwin Callahan, *Blood, Sweat, and Wealth: Fortescue's Theory of the Origin of Property*, 17 HIST. OF POL. THOUGHT 21, 23 (1996).

146. Lander, *supra* note 139, at 120.

147. 1 CHRISTOPHER PIERSON, JUST PROPERTY: A HISTORY IN THE LATIN WEST, VOLUME ONE: WEALTH, VIRTUE, AND THE LAW 126 (2013); Callahan, *supra* note 145, at 27 n.28.

148. 1 FORTESCUE, *supra* note 142.

149. *See, e.g.*, Callahan, *supra* note 145, at 28.

150. A detailed exposition is beyond the scope of this Article.

in the forfeiture of property.[151] Francis Bacon provided a similar exposition.[152] Hale mentioned it around fifty times across his two volumes on the *History of the Pleas of the Crown*.[153]

This is not to say that the contractual aspects of Bracton's theory are lost—they remain, and explain why the estate is forfeited for small offenses such as making improper grants of the property. But corruption of blood occurs upon the commission of greater offenses. Property is understood as being absorbed into the blood of the individual who held it. When that blood is corrupted, the property is lost. This concept carried over into the United States, where jurists approached questions of property ownership as implicating the blood and being of the owner.

3. Blood Ownership in Nineteenth Century America

The corruption of blood and related doctrines, which treated property as somehow embedded in the blood of an individual, continued to play a prominent role in American property law until legislatures began statutory reform in the late nineteenth century. However, until then, corruption of blood played an important role in three sets of cases. The first set of cases date back to the early nineteenth century, as the United States dealt with the consequences of transitioning from British rule to self rule. The next cases arose when former slaves sought to hold or pass on property. The third and most enlightening involve confiscation of enemy property after the Civil War. All of these contexts show how deeply the blood-ownership metaphor was embedded in American property law.

a. British Ownership in Postcolonial America

After American independence, few areas of law presented more vexing questions than questions of inheritance.[154] On the one hand, hostility to their former enemy made legislators wary of permitting British subjects to own property—and indeed, under the common law, an alien could not inherit or devise property; legislatures passed and then repealed statutes permitting inheritability.[155] On the other hand, citizens had close personal and economic ties with relatives in Britain, making the ability to pass on property important.

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151. 3 A SYSTEMATIC ARRANGEMENT OF LORD COKE'S FIRST INSTITUTE OF THE LAWS OF ENGLAND 447 (J.H. Thomas, ed., Alexander Towar 1836) (1818). *See* COKE, FIRST PART, *supra* note 114, at xc, 53, 107; COKE, SECOND PART, *supra* note 114, at 68; *see generally* COKE, THIRD PART, *supra* note 114.

152. FRANCIS BACON, ELEMENTS OF THE COMMON LAWS OF ENGLAND: BRANCHED INTO A DOUBLE TRIAL 49 (Lawbook Exchange 2003) (1630).

153. *See generally* 1 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN (Prof'l Books Ltd. 1971) (1736).

154. *See generally* Allison Brownell Tirres, *Ownership Without Citizenship: The Creation of Noncitizen Property Rights*, 19 MICH. J. RACE & L. 1 (2013).

155. *See id.* at 4.

The Supreme Court faced the question of alien inheritability in a trio of important cases in the early part of the century, with Justice Johnson penning the key opinions. Johnson, it should be noted, explicitly understood property vesting as imbuing in the individual. As he famously noted in *Fletcher v. Peck*, explaining that land that Georgia had granted could not be summarily divested by a subsequent enactment—the property right once "vested in the individual; becomes intimately blended with his existence, as essentially so as the blood that circulates through his system."[156]

In the alienage cases, which the Court heard and judged at the same time, Johnson took as given this understanding of property ownership. In the first case, *M'Ilvaine v. Coxe's Lessee*, the Court took the rare step of "publishing the arguments of counsel" separately from its opinions (which came a few years later) because of the "importance and interesting nature of the questions involved."[157] The following year, the Court extensively published arguments in *Lambert's Lessee v. Paine*.[158] In both cases, counsel, arguing against alien inheritability, relied on the common law rule that aliens lack "inheritable blood." But at the same time, counsel had to reckon with the fact that American citizens would potentially inherit and devise land in Britain, even as they denied that the British could inherit or devise American land. Accordingly, they made an ingenious argument: Americans born during British rule were born imbued with allegiance to the King. Under English common law, this allegiance could not be renounced. Consequently, British-born American subjects had a "common bond" that "connect[ed] the inheritable blood" between them and their British ancestors, allowing them to "inherit [from] British subjects."[159] But the inverse was never true—after the American Revolution, "British subjects, not in this country at that time, never owed allegiance" to the United States, and "therefore, they [could] have no inheritable blood as to lands in this country."[160] The court punted in both of these cases. In the *M'Ilvaine* opinion, written by Justice Johnson, the Court held that the inheritor was an American subject.[161] In *Paine*, the Court held that the devisee did not intend for the alien to inherit.[162]

The Court finally engaged with the question in *Dawson's Lessee v. Godfrey*, where Justice Johnson explicitly recognized that while pre-Revolution born Americans could inherit from British subjects, the reverse

156. 10 U.S. 87, 143 (1810).
157. 6 U.S. 280, 280 n.† (1805).
158. *See* 7 U.S. 97 (1805).
159. *Id.* at 114.
160. *Id.*
161. *M'Ilvaine*, 6 U.S. at 297.
162. *Paine*, 7 U.S. at 129–30.

was not true because British subjects lacked American inheritable blood.[163] Lower courts recognized a corollary of this rule: because of the lack of inheritable blood, the property could never vest in, and therefore, could not pass through, an alien.

> Where a person dies, leaving issue, who are aliens, the latter are not deemed his heirs-in-law, for they have no inheritable blood, and the estate descends to the next of kin, who have an inheritable blood, in the same manner as if no such alien issue were in existence.[164]

Finally, even if a person naturalized, property could vest in their blood only from that time forth; they could not claim to have inherited property before that time.[165]

Legislatures, and, begrudgingly, the courts, later began to relax this approach. The United States and Britain signed treaties loosening the common law rule, and states adopted statutes permitting aliens to inherit, which courts interpreted narrowly at first,[166] but with increasing leniency as the century progressed.[167] In the Supreme Court, in turn, Justice Johnson's hard line approach—denying that property could vest in alien blood—began to falter. In *Fairfax's Devisee v. Hunter's Lessee*, the Court, in an opinion written by Justice Story, reversed the Virginia Supreme Court, holding that (what we would understand as) due process was required before lands of an alien could be forfeited to the sovereign.[168] Justice Johnson dissented because of the "disability" in an alien's blood.[169]

Courts also frequently relied on the notion that property resided in an individual's blood in cases involving illegitimate children. One court explained that an illegitimate child could "inherit nothing . . . [for she] has no ancestor from whom any inheritable blood can be derived."[170] Accordingly, as the Court eloquently observed in an oft-quoted passage from *Stevenson's Heirs v. Sullivant*, when a child was illegitimate "[t]he current of inheritable blood was stopt in its passage from, and through the mother, so as to prevent the descent of the mother's property and of the property of her ancestors, either to her own illegitimate children, or to their legitimate offspring."[171] Indeed, an illegitimate child could not inherit from his legitimate offspring: "[P]arents must be found who shall be the actual or

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163. 8 U.S. 321, 323 (1808). This was not always so in state courts, however. *See* Martin v. Brown, 7 N.J.L. 305, 339 (1799).

164. Orr v. Hodgson, 17 U.S. 453, 461 (1819); *see also* Jackson v. Green, 7 Wend. 333 (N.Y. Sup. Ct. 1831).

165. Lee v. Smith, 18 Tex. 141, 141–42 (1856).

166. McCreery's Lessee v. Somerville, 22 U.S. 354, 358 (1824); *see also* Spratt v. Spratt, 26 U.S. 343 (1828).

167. Hauenstein v. Lynham, 100 U.S. 483, 487 (1879); Hanrick v. Patrick, 119 U.S. 156 (1886).

168. 11 U.S. 603, 621 (1813). As Story explained, "It enables the owner to contest the question of alienage directly . . . [and] affords an opportunity for the public to know the nature, the value, and the extent of its acquisitions . . . ." *Id.* at 623.

169. *Id.* at 629 (Johnson, J., dissenting).

170. Blair v. Adams, 59 F. 243, 244 (C.C.D. Tex. 1893) (citations omitted).

171. 18 U.S. 207, 261 (1820).

assumed fountain of inheritable blood, and create the kindred of brothers."[172] Much like corruption of blood, illegitimacy cast a "legal taint of blood" in the individual, which the legislature could correct.[173] Legislatures slowly, and not without controversy, began to pass statutes permitting illegitimate children to inherit that, as one court vividly put it, "injected into his veins inheritable blood in its most comprehensive sense," permitting illegitimate children to inherit.[174] But, excepting certain states, these statutes were narrow in their reach, and read narrowly by the courts.[175]

b. Slave Property Ownership

As states began to allow illegitimate children and aliens to inherit property as the century progressed, the specter of blood ownership remained but was invoked in different contexts to deal with the repercussions of the Civil War.[176] The first set of consequences courts had to deal with involved the passage of property from former slaves to their heirs. In the majority of these cases arising in southern courts, the courts effectively held that the heir was illegitimate and therefore unable to inherit, although their decisions were more nuanced. For example, in *Daniel v. Sams*, the Florida Supreme Court explained that "slaves were not competent to contract a marriage, the issue of which would have inheritable blood."[177] Moreover, since slaves themselves did not have inheritable blood, "any other person" could also not inherit from a slave, "and for want of heirs at law their property would go to the State."[178]

The Alabama Supreme Court initially adopted a different approach, relying on alienage rather than illegitimacy cases to limit the ability of blacks to obtain property in the state. In 1875, the court was faced with a difficult case involving the inheritance of children of former slaves.[179] There was no question that the children were legitimate since neither parent was a slave at the time of marriage.[180] Unable to claim that the children were illegitimate, the court instead held that the children were aliens at the time of their parents' deaths because Alabama prohibited free blacks

172. Brewer's Lessee v. Blougher, 39 U.S. 178, 195 (1840).

173. Appeal of Edwards, 108 Pa. 283, 285 (1885).

174. Hicks v. Smith, 22 S.E. 153, 155 (Ga. 1895); *see* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 213 (1985) (referring in passing to this trend).

175. *See, e.g.*, Dickinson's Appeal, 42 Conn. 491, 511–12 (1875).

176. The trend was broader than the three cases described in Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999).

177. 17 Fla. 487, 494 (1880); *see* Williams v. Kimball, 16 So. 783 (Fla. 1895).

178. *Id.*

179. Donovan v. Pitcher, 53 Ala. 411, 415–16 (1875).

180. *Id.* at 411–12.

from residing in the state.[181] The next year, the court overruled previous cases that held that children of slave marriages were legitimate.[182]

c. Blood Ownership and Connectedness in the Post-Civil War Confiscation Debates

The distinction between the theories of property I am expounding came into sharp relief during the confiscation debates of the Civil War. The debates and subsequent Supreme Court opinions toggled between two views of property. The first—on which I have been focusing here—was the traditional connectedness account of property, which President Lincoln and the conservatives supported. On this account, an individual is connected to his property; divestment can only occur if the individual somehow is corrupted and can therefore no longer hold the property. And upon divestment, the property right must reattach to some other individual or entity. On the other account, advanced by the radicals, moderates, and later, government lawyers, property ownership merely represented distributive rules, as I outline in Part I.C. One may redistribute this property, and put it to different uses, without engaging with broader metaphysical questions of whether the blood of the original owner was corrupted, and to whom the new property right attaches.

The debates began with the passage of the First and Second Confiscation Acts of 1861 and 1862, which provided for the "permanent, uncompensated seizure of all the real and personal property" of "all those who recognized and supported the . . . Confederacy."[183] As Daniel Hamilton details, the 1862 Act, which provided for, among other things, the emancipation of slaves and convictions for treason, was controversial, but its passage represented a compromise between coalitions of "radicals," "conservatives," and "moderates."[184]

Radicals and moderates sought to confiscate the property of confederates.[185] However, conservatives argued that permanent property seizure without trial violated the constitutional prohibition on corruption of blood, as well as (relatedly) protections of vested property rights protected by the due process clause.[186] Both arguments were based on the understanding that property is fundamentally embedded in personhood; for property to become divested, there had to be some defect in personhood.

Radicals and moderates acknowledged that this represented the usual understanding under which property was divested. Under that traditional

181. *Id.* at 415.

182. Cantelou v. Doe, 56 Ala. 519, 521 (1876).

183. DANIEL W. HAMILTON, LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND THE CONFEDERACY DURING THE CIVIL WAR 1 (2007).

184. *Id.* at 25–26.

185. *Id.* at 33–34, 60, 62, 72–74.

186. CONG. GLOBE, 37th Cong., 2d Sess. 1572, 1754 (1862).

view, the law would "corrupt the blood," "destroy its inheritable qualities,"[187] or engage in "confiscation of property as a punishment for the crime of its owner."[188] The traditional form of property confiscation "did not, strictly speaking, attach *in rem*," that is, to the owned object, but rather, was the "part or consequence of the judgment of conviction of the offender."[189] The loss of the object occurred solely because of the link between the object and its owner—it was confiscated for no other reason than because its owner was a criminal. "[T]he thing was then primarily considered as the offender, and the offense was attached to *it*."[190]

But radicals and moderates sought to construct a different understanding of property—one where they could redistribute property without considering the owner. Under this view, the law could get at property without going through their owners, and indeed, without acknowledging a bond between the owner and the property at all. Their bill did "not pronounce judgment against any one," it only "affect[ed] property alone."[191] The radicals claimed their confiscation was different. The confiscation they were urging had no ramifications upon the individual's personhood: "[T]he thing used in violating the law may be seized and condemned without a judgment upon the guilt of the owner."[192] This, they argued, was similar to confiscations in admiralty (prize) or revenue cases where the property was seized and confiscated through civil *in rem* proceedings without a judgment as to the owner's guilt:[193]

> [I]f a man is trying to smuggle goods . . . [t]he goods are the instrument of the wrong; and therefore . . . you may take and condemn the thing . . . you do not give it a trial by jury, as when you proceed against the man.[194]

They relied on previous cases involving admiralty seizures of Confederate naval cargo and British possessions.[195] Their version of the bill required the proceedings to conform to admiralty or revenue seizure proceedings to maintain the fiction that property was being seized without attainting the person of the offender.[196]

Conservatives and the President agreed with the radicals that traditional forfeiture attainted and branded the offender himself, and not just his property. But that, they argued, was precisely what this bill

187. *Id.* at 1875.
188. *Id.* at 1617.
189. *Id.*
190. *Id.*
191. *Id.* at 1875.
192. *Id.* at 1617.
193. *Id.*
194. *Id.* at 1809.
195. *Id.*
196. *Id.* at 1875.

achieved by permanently confiscating property. The theory the radicals offered differed substantially from the vested rights approach to property, which had come to characterize American jurisprudence, and the conservatives refused to accept it. "I do not, I must confess," said Senator Joseph Wright, a Unionist from Indiana, "exactly see how you can get at the property of the person by a proceeding against his estate, when you must necessarily deal first with the person."[197] Senator Jefferson Davis of Mississippi was even more blunt: "The idea of punishment being attached to the offense or the offender's property, is simply absurd and impossible."[198] Thus, to divest property, the "proceeding *in rem* . . . ought to be a proceeding against a person."[199] And, if by confiscating property, the Act branded the person himself, then the bill was "monstrous" because it tarred all southern soldiers—whether leaders or compulsory recruits—with the same brush.[200] In this way, the conservatives rejected a theory of property that did not conceive of it as inextricably connected to the individual—even to the extent that the *in rem* approach applied to certain circumstances, it was no longer good law, belonging to "an age less enlightened than the present" and not conducive to "modern usages."[201]

Finally, for President Lincoln and the conservatives, the key factor that revealed the seizures to be corruption of blood was the following: "[U]nder the Constitution upon a trial and *conviction* of a traitor you can only take the life estate[;] these measures assume that without any trial or conviction you may take the fee simple."[202] This operates as "corruption of the blood, or the forfeiture of the property of the offender for a longer period than his life."[203] At the eleventh hour, President Lincoln informed Congress that he would veto the Act unless it included a resolution that the forfeiture was only for the life of the wrongdoer—"it declares forfeiture extending beyond the lives of the guilty parties, whereas the Constitution . . . declares that no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted."[204] Congress included the resolution.[205]

The Supreme Court's approach toward determining which theory of property the *in rem* proceedings represented was schizophrenic. In *Armstrong's Foundry*, the United States argued that if a confiscatee

197. *Id.* at 1769–70.
198. *Id.* at 1761.
199. *Id.* at 1769.
200. *Id.*
201. *Id.* at 1572, 1617.
202. *Id.* at 1617.
203. *Id.* at 1761.
204. President Abraham Lincoln, Message to Congress (July 17, 1862), *available at* http://www.presidency.ucsb.edu/ws/?pid=69771 (internal quotation marks omitted).
205. HAMILTON, *supra* note 183, at 106–07.

received a pardon, he did not automatically retrieve the confiscated property.[206] Following the radicals, the government explained that the pardon expunged any conviction of guilt that *he* had incurred.[207] However, it did not affect the property.[208] In other words, because like the radicals, the government assumed no bond between the property and its owner, proceedings involving one did not affect proceedings regarding the other. The Court, however, appeared to disagree and side with the conservative view: it was "unable to concur in" the radical view and held that the forfeiture concerned the person, not the thing. According to the Court, "the statute regarded the consent of the owner to the employment of his property in aid of the rebellion as an offence, and inflicted forfeiture as a penalty."[209]

A mere three years later, however, in *Miller v. United States*, the Court had to reckon with the constitutionality of the Act as a whole, and had to squarely deal with the fact that the "penalty" it alluded to in *Armstrong* was imposed without notice, trial by jury, or other accouterments of due process.[210] Ignoring *Armstrong*, the Court now sided with the radicals on the issue:

> [Confiscation] has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership. It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to appropriate the property. . . . It treated the property as the guilty subject. . . . [and therefore did not violate the] prohibit[ion on] bills of attainder.[211]

And while the Act confiscated the property only of certain individuals who provided certain kinds of aid to the enemy, "[p]ersons were referred to only to identify the property."[212]

Miller's approach would have been acceptable if property was generally conceived of in its own right as separate from the individual. However, as subsequent litigation would soon prove, the case was divorced from background property law principles and left numerous questions unanswered. In treating the Act as affecting only property, *Miller* ignored the fact that these background principles took for granted that property was enmeshed with the person. The basic issue that *Miller* (and the

206. 73 U.S. 766, 767 (1867).

207. *Id.* at 768.

208. *Id.*

209. *Id.* at 769.

210. 78 U.S. 268 (1870).

211. *Miller*, 78 U.S. at 305–06, 308, 312.

212. The Confiscation Cases, 87 U.S. 92, 105 (1873); *see* Semmes v. United States, 91 U.S. 21, 27 (1875) (noting trial for confiscation was independent of trial for treason).

radical Senators) ignored was that background property principles rely on a connectedness understanding and presume that the fee resides in some holder. Accordingly, *Miller* failed to answer the question if the property was confiscated, the question remained—who held the fee? If the property was only temporarily confiscated during the owner's life, and if the confiscation did not reflect on the owner's guilt or innocence, then, some would answer, the owner. But the Court decided, in 1875, that the fee did not reside in the owner and he could not sell future interests in the property because congressional purpose would be "thwarted" if the property remained "vested in the enemy's adherent,"—there is nothing "left in the person whose estate had been confiscated."[213] The Court still refused to express an opinion as to "where the fee dwells."[214]

But such an answer could not satisfy background property principles, and other questions soon arose. Heirs argued that if the fee resided in the United States and not the original owner, then the debts of the owner did not attach to the property—a position that the Court, somewhat unsatisfactorily, rebuffed.[215] More importantly, after the various rounds of amnesty for former rebels were completed, survivors sought reinstatement of property, pursuant to *Armstrong*.

The Court finally resolved these questions in *Illinois Central Railroad Company v. Bosworth*, decisively concluding (along the lines of *Armstrong*) that the Act did not separate property and the individual.[216] For, as the Court explained, if "[t]here is no corruption of blood[,] the offender can transmit by descent . . . [and] his heirs take from him by descent."[217] Accordingly, vesting of the property remained unaffected—"the dormant and suspended fee . . . continues in" the original owner.[218]

The task of the Court was difficult—even as it accepted the radical conception of rebel property as free floating, capable of being guilty on its own, it had to deal with traditional constitutional principles that treated property as vested, as connected with someone, and that allowed divestment and the rupture of this connection only upon a proper trial. This traditional connectedness account required the Court to situate "the disembodied shade of naked ownership . . . during the period of its ambiguous existence" in something or someone.[219] These property interests "could not have been floating in space without relationship to

213. Wallach v. Van Riswick, 92 U.S. 202, 209, 211 (1875).
214. *Id.* at 211–12.
215. Avegno v. Schmidt, 113 U.S. 293 (1885).
216. 133 U.S. 92, 103 (1890).
217. *Id.*
218. *Id.*
219. *Bosworth*, 133 U.S. at 101.

any one."[220] The Court ultimately reaffirmed a connectedness account of ownership.

The lesson to be taken from these cases then is this: Ownership of rights resided in the individual; taking rights away once they were vested fundamentally affected the individual and offended related constitutional guarantees, and was therefore disfavored. Indeed, the vestedness concept and the corruption of blood metaphor are not the only early modern legal examples of the understanding of property as grounded in a person's being and existence. Changes in an individual's being affected their ownership of property. For example, after marriage, a husband and wife became "one person in law, so that the very being and existence of the woman is suspended during the coverture, or entirely merged and incorporated in that of the husband."[221] This "unity of person" meant that the property of the wife became "vested in the husband."[222] And if changes in an individual's personhood could affect the way in which he owned property, then the reverse was true—the vesting of property could work changes to intrinsic aspects of an individual. Thus, if a lord "granted [a villein]" property, it implicitly gave freedom to the villein (or serf) because such ownership "vests an ownership in him entirely inconsistent with his former state of bondage."[223]

B. Doctrinal Aspects of Vestedness and the Connectedness Approach to Ownership

The most prominent modern context in which courts explicitly disfavor rights revocation is in the context of the vested rights doctrine. The doctrine was once, as Edward Corwin famously put it, the basic doctrine of constitutional law.[224] Indeed, the doctrine made an appearance in many blockbuster antebellum cases. Thus, in *Marbury v. Madison*,[225] the Court found that Marbury had "a vested legal right" in the office of magistrate.[226] In *Kendall v. United States*, which began the process of

220. Jenkins v. Collard, 145 U.S. 546, 554 (1892).

221. 2 Blackstone, *supra* note 116, at *433.

222. *Id.*

223. *Id.* at *94.

224. Corwin, *supra* note 25. The idea of retroactivity played a central role in the constitutional protection of property and contract rights before the late nineteenth century development of substantive due process. *See* Kainen, *supra* note 18. *See also* Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 Calif. L. Rev. 217, 218–19 (1984) ("[V]ested rights concerns [were] a major theme in American constitutional adjudication. . . . Derived from natural law concepts and from the heritage of seventeenth century English political debate—and then encapsulated in the contract clause—the vested rights doctrine was an absorbing concern for the Supreme Court in the early history of the Republic.").

225. 5 U.S. 137, 172 (1803).

226. "The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority." *Id.* at 167. The question of vested rights in public offices received further examination in subsequent cases. *See* Woolhandler, *supra* note 24, at 1031. *See also* Susan Low Bloch, *The Marbury Mystery: Why Did William Marbury Sue in the Supreme Court?*, 18 Const. Comment. 607 (2001).

laying out the limits of presidential control over executive officers, one argument advanced against following the President's direction was that vested rights would be lost.[227] *Ogden v. Saunders*, the basis of all bankruptcy law, held that these laws do not violate vested rights.[228]

The doctrine is, in some measure, a successor to the vestedness concept described in the previous Subpart, and perhaps a cousin of the corruption of blood metaphor, both of which rely on the understanding of ownership as connectedness. Rather than focus on the historical evolution of the doctrine that scholars have attempted elsewhere,[229] this Article focuses on its analytical underpinnings. As this Article explains, the doctrinal principles that distinguish vested rights from nonvested rights aim to measure how connected a right is to the person who holds it. At the outset, not every right is vested, of course—some rights are insufficiently connected with and constitutive of the individual to be considered vested. Courts generally express this point in similar ways—according to one court, "a right has not vested until it is 'so far perfected that it cannot be taken away by legislation,' and so 'complete and unconditional' that it 'may be equated with a property interest.'"[230] Similarly, as Chapman and McConnell argue, vested rights are "marked by finality" and are "conclusively acquired," as opposed to mere expectations.[231]

But what marks "finality," "perfection" or "conclusiveness"? This is a fraught question. Indeed, Kainen argues that this question proved so problematic that courts backed away from the vested rights doctrine altogether.[232] To take *Perry* as an example, why could one not conclude that the right to marry is so bound up with someone's being that even for unmarried individuals, the right to marry had already vested, just like the relationships of couples that had already married? Under the case law, vesting depends on three conditions: time, reliance, and completion of formalities. As I discuss in the next Subpart, each of these criteria are meant to measure the degree of connectedness between the individual and the right. With the right amount of time, reliance, and completion of formalities, the right becomes part of the individual.

Hence, once the right vests, it appears to become part of the individual, no matter the legal regime. The right "travels" with the individual, even if the law initially giving her the right is abrogated or is no longer in

227. Kendall v. United States, 37 U.S. 524 (1838). For the importance of *Kendall*, see Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568 (2008).

228. 25 U.S. 213 (1827).

229. *See, e.g.*, Kainen, *supra* note 18.

230. Dardeen v. Heartland Manor, Inc., 710 N.E.2d 827, 830 (Ill. 1999) (quoting First Co. v. Armstead, 664 N.E.2d 36, (Ill. 1996)).

231. Chapman & McConnell, *supra* note 20, at 1737.

232. Kainen, *supra* note 28, at 443–46.

effect. Unlike substantive due process rights, as one court recently put it, "[a] vested right may be derived from a statute or the common law, but 'once it vests it is no longer dependent for its assertion upon the common law or statute under which it may have been acquired.'"[233] A change in the distributive scheme of rights and benefits—as in the case of Proposition 8, which took the general right to marry away from same-sex couples—leaves unaffected a vested right because the right is now embedded in the individual who holds it. Thus vested rights historically also played a role in conflict of laws analysis—when an individual with a vested rights travels to a new jurisdiction with a different distributive scheme, they continue to possess the right as if they were in the previous jurisdiction. Indeed, scholars treat classical vested rights/retroactivity issues as raising inter-temporal conflicts of laws.[234]

1. Doctrinal Criteria of Vestedness

Traditional vested rights in contract and property obtain when formalities are complete. More recently, legislatures have imposed time minimums—that is, an individual must hold an interest, in pensions for example, for a certain period of time for it to vest.[235] Finally, courts also look to the reliance interests of the individual.[236] Vested interests generally obtain (when there are no contracts) when an individual relies on a right over some period of time. Thus, individuals may invoke longstanding uses of land to defend against rezoning, or invoke rights in statutes of limitations against claims.[237] All approaches relate to the degree of the connection between an object and an individual.

The time based approach intuitively relates to how objects connect to individuals. In most cases, the longer I possess an object, other factors being equal, the more intertwined it becomes to my sense of being, and

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233. City of Golden v. Parker, 138 P.3d 285, 290 (Colo. 2006) (en banc) (quoting Ficarra v. Dep't of Regulatory Agencies, Div. of Ins., 849 P.2d 6, 15 (Colo. 1993)).

234. *See, e.g.*, Francis Wharton, *Retrospective Legislation and Grangerism*, 3 INT'L REV. 50, 53 (1876) ("Laws may conflict not only because they emanate from rival sovereigns, each striving to possess the particular case, but because they emanate from distinct periods of time, each of which may claim to embrace the case in question within its sanctions."); Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1194 (1987).

235. U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 195 (1980) (Brennan, J., dissenting) (explaining what equities come into play when evaluating congressional purpose regarding vesting).

236. City of Elgin v. All Nations Worship Ctr., 890 N.E.2d 853, 857 (Ill. App. Ct. 2006) ("[W]hen a party expends substantial time and effort attempting to comply with an ordinance as it then exists and the legislative body amends the ordinance, the party may acquire a vested right to proceed under the old ordinance." (citation omitted)).

237. Dane, *supra* note 234, at 1194 (statute of limitations defense is a vested right); 51 AM. JUR. 2D *Limitation of Actions* § 17 (2015) (identifying property law's special protection for existing uses, exploring possible justifications for this protection, and arguing that none can support the strong protection that existing uses currently enjoy); Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222 (2009).

the harder it is for me to part with it. Similarly, (and relatedly), when I rely on the fact that I possess an object or certain right, and use it on a regular basis, it is more likely that I will consider it closely linked to me, and imagine it as playing a role in future life projects and plans. Reliance is also, therefore, a measure of the connection between the object and the individual. A right or object that has played a sufficient role in an individual's life such that an individual has taken action based upon the right is entitled to greater protection.

The formality based approach, however, requires more explanation. Under this approach, a right vests only when the formalities are complete. Some examples from the heyday of antebellum vested rights litigation are instructive. In *Marbury*, for example, "certain solemnities [were] required by law" including "the sign manual of the President, and the seal of the United States," for Marbury's commission to vest.[238] Similarly, government land grants, the subject of *Fletcher*, typically required formalities.[239] Finally, existence of valid contractual rights requires certain formalities be met.[240] Even after the reach of the Court's vested rights doctrine diminished, these contract rights continued to be protected as vested under the Contract Clause.[241]

Although the conclusion is less intuitively apparent, like the time and reliance based approaches, formalities also help "connect" the right, or, in the case of property transfer, the object, with the promisee in three ways: (1) causing the promisee to deliberate and cogitate over the benefits of the bargain; (2) lending legal weight and legitimacy to the promisee's interest; and (3) recognizing the exercise of will, the autonomy, and dignity of the promisee. Each of these aspects of formalizing the contract buttress each other, although they are analytically distinct.

238. Marbury v. Madison, 5 U.S. 137, 159–60 (1803).

239. *See* S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 741 (10th Cir. 2005); Fletcher v. Peck, 10 U.S. 87, 135 (1810). As the Court explained in *Fletcher*, certain legislative acts, such as grants of land or charters to provide public services, were "in [their] nature[,] a contract," such that "absolute rights have vested under that contract, [and] a repeal of the law cannot devest those rights." *Id.* Where states enter into transactions—sales of land in *Fletcher*, or employment of officers, accompanied (at the time) with bonds from sureties, as in *Marbury*, those transactions take on the role of bargained-for contracts, which, due to their similarities with traditional contract, cannot be repudiated.

240. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

241. Kainen, *supra* note 28, at 431. Notably, however, the early antebellum cases did not invoke the clause—as the scholarly debate and the judicial confusion suggests, the Court's vested rights doctrine does not admit of an easy textual explanation. *Id.* at 445.

a. Deliberative Function

Lon Fuller, whose half-century-old article still remains a leading authority on formalities in contract law,[242] expanded on the deliberative role they play. His focus, unlike mine, is on formalities from the point of view of the party that takes on a burden. He (following others before him) explained that when parties fit their behavior within legal formalities, they "will tend also to make apparent to the party the consequences of his action and will suggest deliberation where deliberation is needed."[243] The purpose, ultimately, is to ensure that an individual takes on a contractual burden after careful consideration. Similarly, another contemporary article explained that the "ceremonial" aspects of a transfer "impress[] the transferor with the significance of his statements and thus justify[] the court in reaching the conclusion, if the ceremonial is performed, that [the statements] were deliberately intended to be operative."[244]

My purposes require holding a mirror up to Fuller's argument, focusing on the benefits from the point of view of the promisee, to whom the benefits connect and in whom they vest. When parties enter a contract, they deliberate, not just over the cost of entering the contract—Fuller's focus—but also on the *benefits* of the contract to them. The cost, psychological wrenches, and other burdens that the individual takes on are measured against the benefit she expects to get. The individual considers (or at least, should consider) what it is she is giving up, the role that the right or item plays in her existence, against the potential benefits and ramifications of getting the new right or object through the contract or exchange. Thus, in the case of a large purchase—of a house, for example—with multiple formalities, these formalities ensure that a buyer carefully considers whether to give up savings or take on a mortgage as Fuller envisages; but the buyer measures this against the role a new home will play in her life. These formalities, and the resulting deliberation—involving careful consideration of *both* benefit and cost—give the sensation of a deprivation when the other party reneges on a contract. The promisee had contemplated the benefit of the contract, and integrated it into the narrative of her life. Thus, it is the formalities, and deliberation that arise from these formalities that help develop a connection between the would-be owner and the object; they help the object vest. This level of

242. Curtis Bridgeman, *Default Rules, Penalty Default Rules, and New Formalism*, 33 FLA. ST. U. L. REV. 683, 687 (2006).

243. Fuller, *supra* note 240, at 803.

244. Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 4 (1941); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 495 (1975) ("The execution of the will is made into a ceremony impressing the participants with its solemnity and legal significance.").

deliberation does not exist, for example, when a non-contractual right, such as a right against a tortious act, is involved.

b. Legitimizing Function

Second, legal formalities provide the promisee's claim of ownership in the contractual right with a sense of legitimacy, which bolsters the sense of vestedness right. Legal metaphors play a powerful role in helping individuals feel connected to certain interests. As Pierce notes, "psychological ownership also is further facilitated by the 'possession rituals' . . . . [R]ituals such as displaying, showing off, using, and personalizing possessions facilitate the movement of the culturally prescribed meaning of objects to the individual's self-identity."[245]

The contract is a legal ritual. Formalities help frame the parties' interest in the transaction. To be sure, when individuals recognize their actions as carrying legal import, backed by state power, they are more likely to deliberate to ensure that they wish to incur a burden that can be coercively enforced. However, the contractual right is understood, not just as a matter of raw power—framing the transaction they have engaged in as legal also brings to their interest an aura of legitimacy, a sense of "I deserve this as a right." Because this point is best made clear in a specific context, I shall return to it at the end of the Subpart, where I consider the role this understanding plays in the same-sex marriage debate.

c. Bargaining and Dignity Recognition

Finally, formalities ensure that the contract is a bargained-for exchange, and hence, that it is intimately connected to an exercise of will by the promisee. This creates a sense of community between the promisor and promisee. Both philosophical and empirical accounts support this deep connection between the contractual right and the promisee, and therefore, suggest that formally created contractual rights vest because of their intimate connection to personhood.

Under the philosophical account, formalities and related doctrines help denote vested rights because they are relevant to ensuring that the contract is a bargained-for exchange. On Daniel Markovits's account, contracts as bargained-for exchanges do more than facilitate the efficient exchange of goods—they create a "respectful community" between promisor and promisee that implicate the personhood of both parties.[246] When a promisor makes a promise to provide a good, or behave in a certain manner, she adopts the promisee's ends as her own. By adopting the promisee's ends as her own, the promisor respects the promisee, and submits to her will, and in so doing, treats her as an end in herself (and

245. Pierce et al., *supra* note 63, at 96.

246. Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1432 (2004).

vice versa). This mutual submission creates a community based in the common ends the promisee and promisor share through the contract—the benefits of the contract demarcate the bounds of the community.

As Markovits explains, the consideration doctrine, or other related (and required) formalities that indicate that the contract was a bargained-for exchange, ensures that the promisee played an active role in the exchange.[247] When the promisee is passive, she exercises no will of her own—the promisor presumes or hypothesizes the promisee's ends and acts accordingly. This does not create the mutual community which Markovits argues underlies contract theory. But when the promisee actively identifies an end to which the promisor submits, the promisee engages in developing the community. As Markovits shows, contract doctrines seek primarily to ensure the existence of an active promisee.[248]

The meaning, then, of a bargained-for exchange, is the promisor's submission to the ends, and ultimately, to the will, of the promisee, in the context of providing a specific contractual right. The right vests, under this account, not just because it is a part of the promisee's life narrative or plans, or because the promisee relied on it, but because it represents the will of the promisee, a recognition of the promisee as an end in herself. Breaking the promise, and depriving the promisee of the contractual right, does not just betray the sense of community created, but also disrespects the promisee.

Lest this approach seem more metaphysical than realistic, it bears mentioning that as an empirical matter, individuals, even in commercial situations, value contractual performance far more than the performance is actually worth.[249] More to the point, these experiments suggest that breach is considered to impose dignitary harms, such as betrayal and loss of trust, upon the promisee.[250]

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247. *Id.*

248. *Id.* at 1487.

249. *See* Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers*, 63 VAND. L. REV. 1003 (2010).

250. To be sure, experiments that show that loss in contract are seen as more harmful than loss in tort do not necessarily prove dignitary harm. *Id.* at 1024. Rather, as suggested above, it may merely mean that the promisee has fit the promise within her life, and maybe made plans in reliance on the promise. While this shows vesting, it is not the vesting that creates dignitary harms when the right is withdrawn.

However, if the right were important only because of the role it would play in the promisee's life, then contractual non-performance should be a greater blow in any case: the reason for non-performance should be irrelevant. However, the experiments show that promisees explicitly take into account the reason for non-performance. Experiments also show that promisees are more willing to accept non-performance due to promisor mistake rather than deliberate non-performance, mainly because the latter disrespects the promisee more than the former. The point is that the formally bargained-for contractual right is bonded to the promisor; the promisor's attitude toward that right is an indicator of the promisor's attitude toward the promisee herself. The formal right is not just bound up in the promisee's life plans, but signifies, in that context, the promisee's dignitary standing. Rights produced by formalistic bargaining thus are of key importance in determining vestedness.

My purpose here is merely to show that vestedness requires consideration of the connection between the right and its owner. However, this does not provide all the doctrinal answers: connection is a matter of degree, and it is not always clear when a right is sufficiently connected to be vested. The dilemma is clear with respect to each aspect of the doctrine—how much time or reliance, or what kind of formalities, are enough to establish the degree of connectedness for vesting to occur? Further, the nature of the connection may differ from right to right—some rights are constitutive of identity; others help define aspects of self that extend beyond one's identity or social role; and yet others (as we shall see in the next Subpart) are important for instrumental reasons, not themselves constitutive of identity, but helping us achieve other goals that are important to develop our personhood.

The antebellum Court similarly encountered problems regarding the boundaries of formal contract. The Court treated certain legislative grants of rights, including corporate charter grants, as contractual, and therefore, vested, and others as purely legislative subject to legislative change. The Court thereby created a thicket, where litigants and legislatures were unsure which laws were "locked in" and which were subject to change. The Court slowly retreated from treating corporate charters, for example, as contracts between the state and private entities. As the antebellum period progressed, the Court drew a firm line with the Contract Clause, protecting only contracts (or very similar enactments) to prevent such ambiguity.[251] But doctrinal problems still remain. Hopefully, by providing an underlying rationale for vested rights doctrine, this analysis will help guide future doctrine.

2. *Vested Rights Applied: The Same-Sex Marriage Cases*

Each of the criteria—time, reliance, and formalities—present their own vexing questions. For example, a question may arise as to what time period should count toward the vesting: in the case of a pension benefit, one could conceivably calculate the vesting period in various ways, dating from the date of hire, the employment start date, or the date of the first pension contribution, to the date of the last contribution, the date of departure, or the date of cessation of benefits. However, legislative or organizational policies often set such vesting rules, which are generally unambiguous except at the margins. By contrast, while time-vesting rules are usually specified, whether reasonable reliance vests a right may rely on a host of factors that are not similarly spelled out, but approached (I think correctly) in an ad hoc fact-specific fashion. Whether there is reliance and the reliance is reasonable, therefore, depends on facts on the ground, about which it is difficult to theorize ex ante, and regarding which there

251. Kainen, *supra* note 28, at 423.

is ample (if not entirely clear) guidance.[252] At any rate, these questions usually arise only in specialized areas of law, and are not included in this more general treatment.

Compared to the doctrine on vesting through time or reliance interests, the doctrine on vesting through formalities is less clear. Yet, the question has recently entered the constitutional mainstream in the marriage litigation context. Determining what formalities vest a right is also a context-based determination—in *Marbury*, for example, Chief Justice Marshall had no trouble determining that the affixing of the seal to Marbury's commission vested his right to the commission. But in other circumstances, tradition and positive law may fall short. Marriage equality litigation presents a useful contemporary and mainstream investigation of the undertheorized role formalities play in vesting rights.

At the time of writing, plaintiffs married between the invalidation of a same-sex marriage ban by the district court refusing to stay its judgment and the subsequent staying of a judgment by a higher court, filed lawsuits in three states.[253] These states seek to refuse to recognize these marriages. In all of these cases, the plaintiffs argue that even though the law no longer permits same-sex marriage, because the higher court stayed the district court orders invalidating the marriages, *their* marriages remain valid.

The most legally developed case (albeit now moot)[254] and the only one in which an opinion has been issued at the time of writing, is the case arising in Utah, where the district court struck down the marriage bans on December 20, 2013, without staying its ruling.[255] The Supreme Court stayed the ruling on January 6, 2014.[256] During this nearly one-year gap, some 300 same-sex couples married. In *Evans v. Utah*, the district court held that the marriages had to be recognized.[257] After providing some

252. These questions generally arise only where zoning ordinances are in question. Courts analyze the behavior of the agency, the rights holder, the stage of the development of the project, and the nature and scope of the right sought in determining whether there was reasonable reliance. *Zoning: Proof of Vested Right to Complete Development Project*, 35 AM. JUR. 3D *Proof of Facts* 385 provides an excellent overview of some of these considerations.

253. *Bloechl-Karlsen v. Walker—Freedom to Marry in Wisconsin*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/lgbt-rights/bloechl-karlsen-v-walker (last updated Sept. 17, 2014); Caspar v. Snyder, No. 14-cv-11499, 2015 WL 224741 (E.D. Mich. Jan. 15, 2015); Evans v. Utah, 21 F. Supp. 3d 1192 (D. Utah 2014).

254. The Tenth Circuit granted appellant's motion to dismiss. *See Evans v. Utah*, No. 14-04060 (10th Cir. Oct. 8, 2014) (order granting defendant's motion to dismiss). However, the arguments in the other cases are, so far, identical to those made in Utah.

255. Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013).

256. Herbert v. Kitchen, 134 S. Ct. 893 (2014), *aff'd*, 755 F. 3d 1193 (10th Cir. 2014), *cert denied*, 135 S. Ct. 265 (2014).

257. This case is now moot because the Tenth Circuit found in favor of plaintiffs in *Kitchen v. Herbert*, 775 F.3d 1193. However, in Michigan and Wisconsin, where the Sixth Circuit upheld marriage bans, the litigation remains active.

general background, the court began its discussion of the case itself with a description of the couples. This description focused on the formalities and rituals that characterized the couples' marriages. The sentence with which the court introduced each set of plaintiffs began with the plaintiffs' names, and concluded with "obtained" (or "got") "their marriage license and solemnized their marriage."[258] The court noted other ceremonies and licenses where appropriate. According to the court, the first set of plaintiffs had "performed a commitment ceremony in May 2009, even though the State of Utah did not recognize the union," and then got their license in 2013.[259] The next set of plaintiffs received a marriage license from Washington D.C. in 2010, and then Utah in 2013.[260] That license was used in a court proceeding seeking a birth certificate for their son, on which both (rather than just one) parent was listed.[261] The third set of plaintiffs had had a religious ceremony in 2007 and obtained medical power of attorney.[262] The final couple celebrated the Sunday after Thanksgiving as their wedding anniversary since one of the couple had proposed marriage on that day in 1992.[263]

Recall the three ways in which formalities achieve vesting: (1) encouraging deliberation resulting in reliance, (2) creating a sense of legitimate entitlement to the right in question, and (3) recognizing the mutual dignity of both promisees. The court's exhaustive listing of the various formalities the couples had completed, emphasized the first and third of these functions. First, the facts established the dignitary aspects of the marriage contract. After describing the rituals and legal forms that characterize the couples' relationships, the court continued by detailing the mutual commitments the couples made to each other. The partner in one couple sought to share the responsibility of child rearing with his partner. A partner in the second couple sought to help her partner with her medical issues.[264] The third sought to provide health insurance coverage for his partner.[265] The rituals constituted recognition of each others' needs as important, and a promise to respect these needs and adopt them as shared goals. Disrupting commitments entered into after such solemn rituals would be perceived as a greater blow to the partner's dignity and a greater ethical breach than if the ritual had never taken place.

Implicit in the court's discussion is also the idea that marriages were entered to with great deliberation. The second sentence of the court's

258. *Evans*, 21 F. Supp. 3d at 1198.

259. *Id.* at 1199.

260. *Id.* at 1198.

261. Utah recognizes joint adoption by unmarried individuals only in limited circumstances. *See* UTAH CODE ANN. § 78B-6-117(4) (West 2015).

262. *Evans*, 21 F. Supp. 3d at 1199.

263. *Id.*

264. *Evans*, 21 F. Supp. 3d at 1199.

265. *Id.*

descriptions of each couple listed the (in the case of each couple, substantial) lengths of the relationship. The premarriage ceremonies, followed by the marriage ritual, were the product of long standing deliberation. This is not quite the same as the decision to enter marriage *producing* the deliberation as I describe above. But because of the court's description, the marriage ritual became imbued with the weight of the couple's relationship. One would be hard pressed to describe these marriages as unplanned or accomplished with limited forethought. In getting married, the couples contemplated and deliberately sought specific benefits: "Plaintiffs began to exercise the rights associated with such valid marriages . . . ."[266] Revoking the vested marriage rights "'would disrupt thousands of actions taken in reliance on the [prior court ruling] by these same-sex couples, their employers, their creditors, and many others, throwing property rights into disarray, destroying the legal interests and expectations of thousands of couples and their families.'"[267] The various rights involved therefore amounted to "'undermining the ability of citizens to plan their lives according to the law.'"[268]

The court's recounting of the facts, of course, shaped its analysis. Based on the facts, which, as recounted, illustrated the deliberation-inducing and dignity-inducing role of the formalities, it concluded that the marriages had vested. In its analysis section, the court returned to the vested rights doctrine. It explained: The "marriages were authorized by law at the time they occurred. The marriages were solemnized and valid under the existing law so that nothing remained to be done. No separate step can or must be taken after solemnization for the rights of a marriage to vest."[269] The right "'ar[o]se[] upon a contract'"; thus, "'the repeal of the statute does not affect it'" as it "'stands independent of the statute'" and the right is "sacred."[270] This solemnization meant that individuals could rely on the "right to family integrity, the right to the custody and care of children of that marriage—that the State cannot take away regardless of the procedures the State uses."[271] Thus, "the State's application of the marriage bans to place Plaintiffs' marriages 'on hold,' necessarily 'takes away or impairs vested rights acquired under existing law,'" which is invalid.[272]

The court's reasoning was strongest when it came to describing the dignitary-inducing and deliberation- (and therefore, reliance) inducing roles of ritual. But Utah took square aim at whether the ritual could have

266. *Id.* at 1206.
267. *Id.* at 1204 (alteration in original) (citation omitted).
268. *Id.* (citation omitted).
269. *Id.* at 1206.
270. *Id.* (citing and quoting Tufts v. Tufts, 30 P. 309, 310–11 (Utah 1892)).
271. *Id.* at 1208.
272. *Id.* at 1206.

created a sense of legitimate entitlement by arguing that the marriages were never legitimate in the first place.[273] The State argued that while plaintiffs may have carried out a marriage ceremony, these were not legitimate, legally recognized formalities,[274] because they were not the result of a "*final* judgment."[275] They argued that only a final judgment, rather than an appealable ruling, could serve to change the law in such a way that carrying out formalities or rituals in prescription with that ruling could vest a right. Further, the State also argued that even *if* the nonfinal judgment changed the law, the marriages, while legal at the time they were carried out, did not create vested rights. The Supreme Court's stay of the district court's injunction prevented any vesting. Utah's reasoning on this point is not pellucid. It appears to argue that because the stay returned parties to the status quo ante,[276] it could not have "left Plaintiffs with a 'vested right.'" Rather, the stay retroactively drained all legal force from the district court's decision, such that it never had any force of law. Hence, any rituals conducted pursuant to that decision were retroactively drained of legal force, as if the decision had never existed.[277] "Thus," argued the State, "even if the district court were correct . . . that Utah's marriage laws became a 'legal nullity'" after it issued the injunction and the injunction became the law, "any rights that might otherwise vest once that order becomes final are still subject to legal changes."[278]

In focusing on the *legitimacy* of the ritual, the State tried to downplay the importance of the marriage formality itself. "The issuance of marriage licenses" is merely a "ministerial act required by the [court] decision, not some intervening or supervening cause of the Plaintiff's marital status."[279] Because the legitimacy of the ritual was questionable, the ritual itself could not embody the deliberative and reliance functions I outline above: "Plaintiffs were on notice—and may well have known"

273. The state made three other arguments. The first two do not squarely implicate the existence of vested rights, and relate to whether the statute should be read to apply retroactively and the policy implications of giving legal force to district court opinions that had not been stayed. Neither figured prominently in the court's analysis, and I do not address them. The third has to do with the scope of the vested right that I address in Part III.

274. My presentation of this point relies on the approach of H.L.A. Hart. To put it simply, my second order rule corresponds to Hart's rule of recognition that determines which precepts should be recognized as a binding legal rules. H.L.A. HART, THE CONCEPT OF LAW 91 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994).

275. I rely on the Supreme Court briefing, which is the best explication of the parties' argument. Emergency Application to Stay Preliminary Injunction Pending Appeal at 14, Herbert v. Evans, No. 14A65 (July 16, 2014) (emphasis in original).

276. *Id.*

277. Although no party makes this connection, I consider this argument identical to that of *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055 (2004), where the California Supreme Court held that marriages performed without state sanction lacked legal force.

278. Emergency Application, *supra* note 275, at 16.

279. *Id.* at 18.

that Utah was appealing the invalidation of an *existing* state ban that enjoyed a "presumption of correctness."[280]

In response, plaintiffs (and the lower court) argued, I think persuasively, that the district court's holding did change the law, and that rights that vested under the law as it existed at the time, permanently vested, just as if the vesting had occurred pursuant to a statute. First, a district court's injunction, they noted, has the force of law; property obtained as the result of transactions into which others, especially, as in this case, third parties who were not parties to the case, enter into on the basis of the injunction, vest.[281] Thus, in bankruptcy proceedings, for example, transactions that third-party creditors may carry out as the result of a holding cannot be undone.[282] Even the relevant government officials recognized that the marriages were carried out pursuant to law—as the Attorney General noted, "'marriages between persons of the same sex were recognized in the State of Utah between the dates of December 20, 2013 until the stay on January 6, 2014. Based on our analysis of Utah law, the marriages were recognized at the time the ceremony was completed.'"[283] Given that the "fundamental change in legal status" that a marriage works is at least comparable to the effect of a "commercial transaction," the vesting of the marriage right must be recognized.[284] Accordingly, no appellate stay can divest the right. A stay cannot turn back time. Indeed, to obtain a stay of the district court's ruling permitting same-sex marriage, the state would have had to argue that without a stay, it would suffer irreparable harm. The very premise of there being "irreparable harm" is that the district court's ruling would result in a legally imposed harm that cannot be undone as part of the regular appellate process.[285] Because the law had changed once an injunction had issued, the formality held a legitimate basis; therefore, a vested right was created that the appellate process by itself could not divest. The Supreme Court ultimately declined to grant the relief that Utah sought.

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280. *Id.* at 10, 15.

281. Respondents' Opposition to Application to Stay Preliminary Injunction Pending Appeal at 13, Evans v. Utah, 135 S. Ct. 16 (2014) (No. 14A65).

282. *Id.*

283. Evans v. Utah, 21 F. Supp. 3d 1192, 1197 (10th Cir. 2014) (quoting letter from Utah Attorney General Sean Reyes to county attorneys and county clerks).

284. Respondents' Opposition, *supra* note 281, at 17.

285. *Evans*, 21 F. Supp. 3d at 1210.

C. Vestedness Outside the Vestedness Context

1. Other Contexts Where Rights Connect

The explicit role of the vested rights doctrine in the marriage cases is a bit of an anomaly. As the distributive approach to ownership, embodied in substantive due process, gained ascendance at the turn of the century,[286] the vested rights doctrine became cabined to specialized doctrinal areas. However, the long established role that the connectedness approach played in our jurisprudence meant that in many contexts, the dominant distributional approach would adopt as its guide notions of connectedness, recognizing already possessed rights as more fundamental to individual existence, without formal or explicit invocation of connectedness-related doctrines. The clearest example is in the case of welfare benefits, where the refusal to provide rights comes under less scrutiny than taking away benefits once given. In his seminal article on the then-new benefits jurisprudence, Charles Reich anticipated this approach.[287] As he observed regarding government distributed benefits, "the exact nature of the government action" involving the benefit "makes a great difference."[288] Government action may take the form of a "denial of the right to apply, denial of an application . . . suspension or revocation of a grant, or some other sanction."[289] Although the doctrine had not solidified, Reich claimed that, "[i]n general, courts tend to afford the greatest measure of protection in revocation or suspension cases,"[290] rather than losses involving denials.

Less than a decade later, the Court converted Reich's observation into hard doctrine. After setting in place protections for *termination* of welfare benefits in *Goldberg v. Kelly*,[291] the Court declined to similarly protect denials of applications for benefits a year later.[292] Faced with an initial denial of disability benefits in *Richardson v. Perales*, the Court distinguished *Kelly*, noting merely that, "*Kelly*, however, had to do with termination of AFDC benefits without prior notice. . . . [(In *Perales*, we)] are not concerned with *termination* of disability benefits once granted. Neither are we concerned with a *change* of status without notice."[293] Courts have relied on *Perales* (again, to my knowledge, without reasoning) to hold that an initial denial of benefits does not merit due process.[294]

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286. Kainen, *supra* note 18, at 142 (describing the rise of substantive due process).
287. Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964).
288. *Id.* at 744.
289. *Id.*
290. *Id.*
291. Goldberg v. Kelly, 397 U.S. 254 (1970).
292. Richardson v. Perales, 402 U.S. 389 (1971).
293. *Id.* at 406–07 (emphasis added).
294. *See*, *e.g.*, Basco v. Machin, 514 F.3d 1177, 1183 (11th Cir. 2008).

The best explanation for this approach lies in a throwaway comment of Reich's: "The theory seems to be that [in cases of revocation] some sort of rights have 'vested,'"[295] an explanation, or rather, an analogy, upon which courts and scholars have similarly relied.[296] But the Court did not invoke the time, reliance, or formality factors of typical vested rights analysis. Rather, it pointed to the *nature* of the benefit to explain why the benefit was deeply intertwined with its recipient's life. As the *Goldberg* Court explained, the loss is "grievous"[297]: "[T]he crucial factor in" *Goldberg* was "that termination of aid pending resolution of a controversy over eligibility [might have] deprive[d] an *eligible* recipient of the *very means by which to live* while [s]he wait[ed]."[298] This impinges upon important personhood interests—not just in life itself, but also in developing as a human being. "Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community."[299] By contrast, in *Mathews v. Eldridge*, the Court sanctioned a lesser degree of protection for disability benefits than welfare benefits, noting, "[T]he hardship imposed upon the erroneously terminated disability recipient may be significant. . . . [but the] disabled worker's need is likely to be less than that of a welfare recipient."[300] Thus, benefits can develop connections with their recipients, not just because of reliance, time, or formality, but also because of their nature.[301]

Relatedly, in some cases, the Court has held that some benefits are simply too inchoate to count as interests that merit *Goldberg* type hearings, even if they are being taken away. In such cases, the Court looks to state law to see if the interest is clearly defined as a property right.[302] A court may also consider reasonable expectations of the parties with respect to the benefit or right.[303] Both considerations relate to the degree of connectedness between the benefit and the owner. An interest that I do not consider a right, nor expect to retain, is not one to which I would be closely connected.

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295. Reich, *supra* note 287, at 744.

296. Courts have also referred to benefits as vested rights. *See, e.g.*, Kelly Kare, Ltd. v. O'Rourke, 930 F.2d 170, 178 (2d Cir. 1991).

297. *Goldberg*, 397 U.S. at 263.

298. *Id.* at 263–64 (emphasis added).

299. *Id.* at 265.

300. 424 U.S. 319, 342 (1976).

301. Recall that moral theorists are likely to pick rights that are considered connected to an individual because of their nature as human or civil rights that all individuals possess in the distributive sense. But this does not, as discussed above, diminish their importance on a connectedness account.

302. *See, e.g.*, Kelly Kare, Ltd. v. O'Rourke, 930 F.2d 170, 178 (2d Cir. 1991) (interest not choate enough to constitute a vested right).

303. Forbes Pioneer Boat Line v. Bd. of Comm'rs, 258 U.S. 338 (1922); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 696 (1960).

The "new property," includes under its umbrella interests ranging from jobs, entitlements, occupational licenses, contracts, subsidies, as well as intangible property that are the product of labor, time, and creativity, such as intellectual property, business goodwill, and enhanced earning potential from graduate degrees.[304] As Reich observed, the new property "takes the form of rights or status rather than of tangible goods" (though, as I argue above, so does the "old" property).[305] Scholars have linked this notion of property to interests such as family relationships and even racial identity.[306] It is therefore unsurprising that the non-retrogression principle has wandered into other areas of doctrine as well.

2. NFIB v. Sebelius

The Affordable Care Act case, *National Federation of Independent Business v. Sebelius*,[307] is a good, contemporary example of anti-rights-retrogression principles where the vested rights doctrine is not formally involved. There, the Supreme Court struck down a major provision of the Patient Protection and Affordable Care Act that required states to expand Medicaid provision. In this case, private plaintiffs and numerous states challenged two major provisions of President Obama's landmark legislation. The first provision imposed a tax on individuals who did not purchase health insurance, which a bare majority of the Court upheld. The second required states to expand Medicaid to a broad swath of individuals who previously did not receive benefits by raising income limits or risk losing federal funding. A supermajority of the Court, in an opinion written by Chief Justice Roberts, with whom Justices Breyer and Kagan joined, and another opinion written jointly by Justices Scalia, Thomas, Kennedy, and Alito, held that this was unconstitutional coercion on the part of Congress. This holding was historic—it was the first time that the Court had found conditions Congress imposed on the receipt of federal funds coercive. As Mitchell Berman points out, the Medicaid holding was "the most potentially significant" of the Court's holdings in that case—and "the one supported by the least clear rationale."[308] The most coherent rationale for the invalidation involves contract law-like principles and vested rights-like analysis. This understanding makes the majority approach stronger.

What troubled the Justices most was the threat to take away federal funding, even though they agreed that the federal government was not

304. Joseph W. Singer, *Re-reading Property*, 27 NEW ENG. L. REV. 711, 722–23 (1992).

305. Reich, *supra* note 287, at 738.

306. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773 (2013).

307. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

308. Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion*, 91 TEX. L. REV. 1283, 1285 (2013).

obliged to provide the funding in the first place. The facts and arguments on which the opinions relied centered on two points introduced by the Chief Justice's controlling opinion.[309] First, Spending Clause legislation is "much in the nature of a *contract*," and the State must "voluntarily and knowingly accept[] the terms of the 'contract.'"[310] The second point is about coercion. Congress may not "directly command[] a State to regulate or indirectly coerce[] a State to adopt a federal regulatory system as its own."[311] To further these points, the Chief Justice described at some length the burdens that Medicaid withdrawal would impose on states, reasoning, therefore, that the withdrawal would amount to coercion. He then provided a shorter explanation as to why these burdens were unforeseen and therefore constitutionally valid.

The relationship between the Chief Justice's points—"contract" and "coercion"—is far from clear. If the only point of mentioning contract law is to point out that agreements between the federal and state governments must be voluntary, then the appeal to contract law is nominal. The law forbids coercing anyone, not just one's contractual partners.[312] And to be sure, the rest of the Chief Justice's reasoning focused more on the consequences of coercion than on contract law issues.[313] He explained the burdens withdrawal of funding would impose on states. The weight of the burden, he claimed, constituted coercion. This coercion, he explained at some length, "threaten[s] the political accountability key to our federal system."[314] And while states can sometimes be trusted to take care of themselves, sometimes they cannot; and in this case, Congress was holding "a gun to the head[s]" of the states.[315] The consequences were "economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."[316]

The opinion goes on to inquire whether the States could have anticipated the expansion as part of the Medicaid contract.[317] But this "contract" discussion is secondary to, and much shorter than, the discussion of coercion. It is made only in response to "the Government claim[] that the Medicaid expansion is properly viewed merely as a modification of the existing program because the States agreed that Congress could

309. Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861, 867–68 (2013) (explaining why the Chief Justice's opinion is best described as the controlling one in this context).

310. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2602 (internal citations omitted).

311. *Id.*

312. *Id.* at 2604–07.

313. *Id.* at 2604.

314. *Id.* at 2602.

315. *Id.* at 2604.

316. *Id.* at 2605.

317. *Id.*

change the terms of Medicaid when they signed on in the first place."[318] The Court held that there were limits to this power because the States could not have anticipated this expansion.[319] But it is unclear what the import of this argument is: based on the Court's reasoning, states' ability to anticipate the expansion was beside the point.[320] Coercion, whether anticipated or not, is unconstitutional.[321]

Scholarship has therefore focused on the coercion argument. As Glenn Cohen explains, there was no coercion because the federal government was never obliged to create the program in the first place. "[T]here is no normative or constitutional obligation for the federal government to create or fund a Medicaid programme *ab initio*," and the federal government could have imposed these conditions in a new plan.[322] Thus, unlike the case of the highway robber who imposes unlawful conditions, the federal government is in the clear.[323] Mitch Berman similarly argues that the Court's reasoning is undertheorized and insufficiently distinguishes between improper coercion and compulsion.[324] Samuel Bagenstos has similarly explored the constitutional contours of the coercion argument.[325] Cohen's assertion—that the coercion argument is both wrong and weak—is persuasive.

By contrast, the contractual argument—which is a far stronger argument—has received less attention in its own right (rather than as a corollary of the coercion argument). At the outset, we must confront the question of whether we can think of this argument analogously to contract law at all. The Chief Justice is on solid precedential ground in noting that federal spending programs are conceived of as "much in the *nature* of a *contract*."[326] But Justices Ginsburg and Sotomayor challenged this: "By including in the Act 'a clause expressly reserving to it "[t]he right to alter, amend, or repeal any provision" of the Act,' . . . Congress put States on notice that the Act 'created no contractual rights.'"[327] This argument, which is the only argument the dissent offered to undermine the contract-like nature of the program, is not persuasive.[328] Contracts frequently

318. *Id.*

319. *Id.* at 2606.

320. *Id.* at 2606–07.

321. *See also id.* at 2634 (Ginsburg, J., dissenting in part) (arguing that coercion is the ultimate point).

322. Glenn Cohen, *Conscientious Objection, Coercion, the Affordable Care Act, and U.S. States*, 20 ETHICAL PERSP. 163, 171–72 (2013).

323. *Id.*; Nicole Huberfeld et al., *Plunging into Endless Difficulties: Medicaid and Coercion in the Healthcare Cases*, 93 B.U. L. REV. 1 (2013).

324. Berman, *supra* note 308, provides a full exploration of the conception of coercion in this context.

325. Bagenstos, *supra* note 309, at 868–71.

326. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2602 (opinion of Roberts, C.J.) (internal citation omitted).

327. *Id.* at 2639 (Ginsburg, J., dissenting in part) (quoting Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 51–52 (1986)).

328. Justice Ginsburg also noted that according to precedent, "'[u]nlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing

contain clauses granting to one party sole discretion to modify contract terms.[329] The mere presence of an analogous term is not sufficient to render the program dissimilar to a contract.[330]

Next, the dissent claimed that even if the program were contract-like, there was no breach. The Medicaid statute "contains a clause expressly reserving '[t]he right to alter, amend, or repeal any provision'" to Congress.[331] However, under traditional contract law principles (that is, apart from any unrelated constitutional limitations), this does not give Congress carte blanche to alter the program. Under standard contract law doctrines recognized in most states, such as the covenant of good faith and fair dealing, such provisions encompass only those eventualities that both parties would reasonably contemplate.[332] Under this reading, then, even though the clause gave sole discretion to Congress, Congress was expected to act reasonably. This approach, admittedly, creates some ambiguity, but no more than has existed in contract doctrine in this area for many years. For example, it is unlikely that courts would countenance a bait and switch where Congress suddenly shifted the burden of funding to the states, or attempted to shirk federal commitments after states altered their infrastructure, and took other actions in reliance on the promises made in the program (that are not otherwise protected by other statutes or agreements).

A better ground for the decision, then, would have more clearly analogized to contract doctrine, specifically the covenant of good faith and fair dealing.[333] The decision to terminate the Medicaid program contract must be made in good faith; it cannot be used as a bargaining ploy to force

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the judgment of Congress concerning desirable public policy.'" *Id.* at 2637 n.21 (quoting Bennett v. Kentucky Dept. of Ed., 470 U.S. 656, 669 (1985)). But this is not terribly informative because it only informs us that there are some differences between Spending Clause legislation and contracts. It does not suggest that past cases have held that the distinction renders Spending legislation *unlike* a contract as a general matter—indeed, the precedent on which the controlling opinion relies on in suggesting that such legislation is "much in the nature of a contract" appears to foreclose that argument.

329. Peter A. Alces & Michael M. Greenfield, *They Can Do What!? Limitations on the Use of Change-of-Terms Clauses*, 26 GA. ST. U. L. REV. 1099, 1101–06 (2010) (providing a recent comprehensive overview of these kinds of contracts).

330. I recognize that the implication of my argument is that this aspect of the reasoning of *Bowen*, 477 U.S. 41, on which Justice Ginsburg relies, is incorrect. I believe that *Bowen* was undermined by *South Dakota v. Dole*, 483 U.S. 203 (1987), (decided the following year) and its progeny, on which the Chief Justice relies. Ultimately, however, the precedent is ambiguous, and I believe one must analyze the argument on its own terms.

331. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2574 (majority opinion) (quoting 42 U.S.C. § 1304 (2012)).

332. STEVE J. BURTON & ERIC G. ANDERSEN, CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH, ENFORCEMENT § 2.2.1, at 23–29 (1995).

333. Berman, *supra* note 308, at 1300, correctly argues that contract doctrine as presented by the Court does not support the majority's putative coercion-based reasoning, and looks beyond contract law to explain the Court's reasoning. However, my claim here is that *other* contract doctrines explain the reasoning independent of the coercion based argument. *See generally* Alces & Greenfield, *supra* note 329 (discussing the use of the doctrine in analogous contract contexts).

states into taking conditions that Congress could not otherwise force on them because of their unforeseeable nature. This approach does not require Congress to "provide clear notice of conditions it might later impose" at the outset of a program, as the dissent contends.[334] Rather, it simply requires that later conditions imposed as a result of the provision giving the federal government discretion to change the program *could have been* reasonably in the contemplation of the parties when the program was first enacted.[335]

The majority did not precisely adopt this approach. However, in responding to the government, it emphasized that states, as a factual matter, could not have contemplated the expansion when signing onto Medicaid: "A State could hardly anticipate that Congress[]" would endeavor to "transform [the Medicaid program] so dramatically."[336] The explanation is compelling:

> The original program was designed to cover medical services for four particular categories of the needy . . . . Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with

334. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2637 (Ginsburg, J., dissenting in part).

335. *Id.*

336. *Id.* at 2606 (opinion of Roberts, C.J.). Indeed, this foreseeability aspect of contract doctrine (combined with other doctrines, such as contracts void on grounds of illegality) can be used to explain Spending Clause jurisprudence more broadly, as laid out in *South Dakota v. Dole*, 483 U.S. 203. The elements of the doctrine suggest that one of the goals the Court hopes to achieve through this doctrine is (among other things) to ensure that when Congress alters the conditions of a program, the conditions remain within the contemplated scope of the contractual arrangement. *Id.* at 207–11. This justification of the factors applies only to situations where Congress may, ex post, alter the conditions of the contract, and not to situations where the conditions are laid out in advance. In such situations, the *Dole* factors cannot serve the predictability interest outlined here, as the conditions are already known. This Article remains agnostic as to whether they serve other values or no values at all.

Dole requires that a condition be (a) unambiguous, (b) related to the federal interest in the program, (c) constitutional, and, (probably) (d) not unduly coercive. *Id.* at 213. *But see Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2634 (Ginsburg, J., dissenting in part) (suggesting that this is not an element of the *Dole* test). Each of these serve the policy of ensuring that in complex programs, states are not blindsided when Congress imposes a new condition on existing programs. After all, states cannot clearly contemplate complying with a contractual arrangement whose terms are ambiguous, or whose terms range unpredictably beyond the subject matter of the contract. It is, after all, hard to clearly contemplate the meaning of a promise that is unclear. Nor could they imagine a condition that is unrelated to the program at hand: for example, if the Department of Health and Human Services (with Congressional authorization) adopted provisions commandeering state police forces, under a pure contract law approach (and independent of federalism concerns) such regulations would be invalid as the parties could not have contemplated that such conditions would accompany funding relating to health and human services. Additionally, a state could not contemplate complying with a condition that is unconstitutional or that is improperly coercive, under contract law principles against duress (for example, if Congress threatened to overthrow a state government for failure to accede to conditions) or void on grounds of public policy. I note that the unconstitutional conditions doctrine may be a free-standing bar, apart from the contract law analogy, to such conditions. Berman's defense of an anti-coercion principle resembles the unconstitutional conditions doctrine, *see supra* note 308; my use of the term "coercion" reflects traditional usage in contract law rather than in the Bermanian sense.

> income below 133 percent of the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.[337]

The subsequent discussion of the context of the Act's passage is also persuasive.

The dissent responded with two principal arguments, neither of which are compelling.[338] First, it relies on the language reserving to the federal government the right to alter the contract, and the precedent interpreting that language, which I address above (although the controlling opinion largely ignores this point).[339] Second, it points to "the enlargement of Medicaid in the years since 1965."[340] But as the controlling opinion points out, "the most dramatic alteration . . . does not come close to working the transformation the expansion accomplishes."[341]

The better argument in the dissent is that states could have anticipated a change of this kind precisely because of the context in which Medicaid was enacted. Medicaid was compromise legislation, enacted only after the failure of universal health care.[342] States were aware of this. They should have also been aware that given shifting political coalitions, *combined with* the clause giving the federal government discretion to change conditions, the program could be universally (speaking comparatively at least) expanded. I therefore am, ultimately, unsympathetic to the controlling opinion's conclusion; but contract law presents a far stronger argument than the coercion approach on which it seems to entirely rely. A contract approach, while ultimately incorrect, would not have been entirely unprecedented. Like courts have done for centuries, it would have reconstrued the parties' intentions based on the language of their contracts and past dealings, looked to the behavior of the parties with respect to the current transaction and argued that Congress "recognized it was enlisting the States in a new health care program," something the states could not have contemplated.[343]

Foregrounding the contract law argument helps explain why we should be (as the Justices were) concerned about the burden rights revocation imposes, which they, incorrectly used to bolster a coercion

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337. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2605–06 (opinion of Roberts, C.J.).

338. *Id.* at 2630 (Ginsburg, J., dissenting in part). "In short, given § 1304, this Court's construction of § 1304's language in *Bowen*, and the enlargement of Medicaid in the years since 1965, a state would be hard put to complain that it lacked fair notice when, in 2010, Congress altered Medicaid to embrace a larger portion of the Nation's poor." *Id.* at 2639.

339. *Id.* at 2630.

340. *Id.* at 2639.

341. *Id.* at 2606 (opinion of Roberts, C.J.).

342. GUNNAR ALMGREN, HEALTH CARE POLITICS, POLICY AND SERVICES: A SOCIAL JUSTICE ANALYSIS 81, 85 (2d. ed. 2012).

343. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2606.

argument. So far, my argument expounds contract law(-like) doctrines latent in the various opinions, and does not turn on the question of rights revocation. What is important is that there was (something like) a contract between two parties and there was a breach, or at least, a violation of a covenant analogous to that of good faith and fair dealing (which happened to involve revocation of funds).

But we must not forget (as Justice Ginsburg noted in passing)[344] that this was no usual contract, as the breaching party was the government. Historically, when there is a contract, and the breaching party is a state, the wrong was understood not just as a breach of a contract, but also a violation of a vested right.[345] The modern vested rights doctrine is not capacious enough anymore to easily lend itself to this analysis as a formal matter. However, the reasoning of much of the controlling opinion's and joint dissent's "coercion" analyses is more coherently understood as analogous to a vested rights analysis in that it relies on the fact that the rights involved are deeply connected to the operation of state government. Part of the reason is the fact that these rights are contractual or pseudo-contractual. Such rights are important for the reasons outlined in Subpart B. But the Chief Justice and the joint dissenters spilled a large amount of ink attempting to persuade readers of the importance of the Medicaid program to the states in other ways. The Medicaid program is constitutive of states—the program "accounts for over 20 percent of the average State's total budget" and "the States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives."[346] Much as with the case with *Goldberg*, taking away resources this important would be untenable. As the joint dissent worried:

> A State forced out of the program . . . would almost certainly find it necessary to increase its own health-care expenditures substantially, requiring either a drastic reduction in funding for other programs or a large increase in state taxes. And these new taxes would come on top of the federal taxes already paid by the State's citizens to fund the Medicaid program in other States.[347]

Thus, the conclusion is even more dramatic than that in *Goldberg*. There, the threatened loss was "grievous."[348] Here, it is "a gun to the head."[349] James Blumstein provocatively argues that the situation of the states is

344. *See supra* notes 328 and 330 (discussing *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2637 n.21 (Ginsburg, J., dissenting in part), and *Bowen*).

345. This is clearest perhaps in the context of corporate charters. A violation of the charter the State granted was seen as the State trying to get out of a contract it made with a corporation to recognize it and permit it to do business or hold a monopoly. This was treated as a vested rights violation. *See* Thompson, *supra* note 23.

346. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2604.

347. *Id.* at 2657 (Ginsburg, J., dissenting in part).

348. Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

349. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2604 (opinion of Roberts, C.J).

"analogous to the life-choice reliance regarding abortion."[350] Much like women who relied on the availability of abortion to order their "thinking and living," so too did states rely on the availability of federal funding to order their business.[351]

The contractual breach is, therefore, all the more troubling because it involves the separation of an entity from a constitutive set of benefits to which it is deeply connected. Foregrounding the contract argument then also helps explain the facts that so troubled the Justices, which they included in their "coercion" analysis, and connects the contract law and "coercion" arguments in a way that the various opinions fail to do. But one question remains—can we coherently talk about nonhuman "entities" as subject to a connectedness analysis?[352]

On balance, I think the answer is yes, albeit not with the same degree of urgency and immediacy as a natural person. First, as a legal matter, corporations have long been recognized as having vested rights.[353] Second, revoking an entity's vested rights could harm individuals associated with the entity, if not the entity itself. Our understanding of an artificial entity, our allegiance to it, our relationship to it, often depend on certain rights it possesses. The revocation of certain rights that have ordered our interactions with the entity and the entity's interactions with the world can affect real people affiliated with the entity—employees, customers, and, in the case of states, citizens. Thus, one could imagine that citizens of a state that suddenly stopped providing health benefits because of a loss of federal funding would be affected in ways apart from the damages caused by the loss of medical assistance. They could well reimagine their relationship with the State, perceive themselves as betrayed; the State itself could lose legitimacy in their eyes. While the entity itself, therefore, can feel no psychological blow, those who understand themselves in relation to the entity can be negatively affected when the entity ceases to be able to function in a way they feel is essential to the entity.[354]

Third, and finally, certain kinds of negotiation take place between small groups of individuals, in the intergovernmental context, often part of small subdivisions or working groups in agencies that have close and

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350. James F. Blumstein, *Enforcing Limits on the Affordable Care Act's Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule*, 2011–2012 CATO SUP. CT. REV. 67, 103 n.153.

351. *Id.* (internal quotations omitted).

352. *See* Cohen, *supra* note 322, at 181–82 (expressing doubt that a state can be personified and coerced); Markovits, *supra* note 246, at 1465 (doubting whether "it remains possible that contracts involving organizations might generate a morally valuable collaborative relation").

353. *See e.g.* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 576 (1819); Thompson, *supra* note 23.

354. While I agree with Markovits that the contract does not bind agents and stakeholders on the same moral basis as if they were promisees or promisors themselves, the point I am making here is a psychological rather than moral one. This, to some extent, may deviate from Markovits's view. *See* Markovits, *supra* note 246.

recurring professional relationships. These individuals can feel deeply connected to rights and benefits for which they have negotiated, and can take a breach personally as a betrayal and dignitary harm.[355] This last category does not apply to negotiation with respect to the Affordable Care Act, among which many entities were involved at arms-length negotiation.

The connectedness/vestedness argument does not completely turn on the contract law argument. Certainly, if there were a breach, vested rights would have been, under black letter law, revoked. But even without *contractual* or pseudo-contractual violations, the States could have developed other, property-like interests in holding on to the funding, much like the recipients in *Goldberg*. However, because ultimately there was no contractual breach and the entities involved were artificial rather than natural persons, the States' case became weaker. The decisive factor, however, distinguishing this case from *Goldberg*, is the fact that the States sought to limit their constituents' access to more of the same right. If state officials truly valued the State's role as a benefits provider, and valued the recognition of its citizens as such, they would have welcomed Medicaid expansion. Rejection of Medicaid expansion belies the claim that Medicaid funding is central to the State's identity for these officials. I therefore conclude, tentatively, that there was no violation under the connectedness principle. But this vestedness approach makes the majority's argument stronger and more coherently links coercion to the contractual concerns that underlay its argument.

III. Rhetoric and Rights, Revocation, and Restoration

One criticism of the inflation effect judges apply to rights revocation—at least in the due process context—is that it exerts a powerful status quo bias on behalf of those who have certain rights, and disfavors minorities who lack these rights. But such ossification has been avoided largely through the dialectic flexibility and ambiguity in the notions of "rights," or of restoration versus revocation, ambiguities that I have so far avoided in order to focus on the power the idea of rights revocation possesses. But rights claims themselves, and the notion of rights deprivation, are constructed. To understand a right as having been revoked, we take for granted extraneous understandings of the baselines, of *what* the interest it is that the State provided in the first place. Depending on whether we understand this interest as a right or not, we will consider the failure to respect an interest a revocation, or perhaps, as a restoration of a previously existing status quo. Because of the rhetorical power of rights revocation, opposite sides present their interests as rights, and a failure to respect those interests as revocation. When institutions partake in these struggles, their own legitimacy is put on the line. Thus,

355. *Id.* at 1465 (discussing small organizations).

the battles over revocation and restoration are more than questions of fact; rather they are questions over framing, legitimacy, and the role of the State. In so doing, courts (and other actors) construct the "victims" of the revocation, the entities claiming rights and their revocation, as well as the "perpetrators," the entities that allegedly revoke the rights.

Understanding how these claims play out is important in order to work out the role rights revocation analysis plays—the analysis is not some *product* of the burden imposed by a clear revocation of right. Rather, it helps construct the right itself, and whether the failure to respect the interest was a revocation. Subpart A explains the long deferred question of how we can even properly conceive of rights *violations* as rights *revocations*, and relies on a distinction of rights as constructed versus rights as capabilities. Subpart B expands on this understanding that rights are constructed: various constituencies claim that certain interests are rights. Hence both sides in a case may claim that there is a right involved. Plaintiffs claim that the challenged action has taken away the right. Defendants claim that the challenged action did no more than *restore* a right which was previously taken away. Subpart C concludes by explaining how the legitimacy of government institutions themselves is implicated in this process.

A. Conceptualizing Rights Revocation

Sometimes the State literally takes away a right, as I shall explain, in the case of Proposition 8. But sometimes, one may argue, what the State does is "violate" rather than literally take away a right. Throughout this Article, I, like many others, have casually referred to this behavior as rights revocation. As I explain, the different ways in which we conceptualize rights helps make sense of thinking of rights violations also as revocations.

Let us first consider the easiest case of rights revocation. Most lawyers would take a formal approach to defining rights: when a litigant goes into court and claims a right against the State, as a formal matter she is describing a certain legal relationship between herself and the State. The State has failed to respect that legal relationship, and the plaintiff seeks judicial remedy.

The State may alter the legal relationship between the plaintiff and itself, if it has the power to do so, to obliterate the plaintiff's claim. In such a situation, the taking away metaphor makes sense—the plaintiff no longer possesses the ability she once did to lay a claim against the State. One example is the case of Proposition 8. According to the California Supreme Court, at least, the state constitution as originally enacted by the citizens of the state, required that the State permit same-sex couples access to marriage at the same level as different-sex couples.[356] Opponents,

356. Strauss v. Horton, 207 P.3d 48, 63 (Cal. 2009).

of course, suggested that the court created the right, as I shall discuss more later. The State altered this relationship—the constitution was amended, and the right to marry was taken away from same-sex couples. These couples could no longer make this claim of the State (under California law, at least). These dynamics need not always occur at the constitutional level or involve citizens versus the State. If the legislature grants a benefit to an entity—for example, tort immunity in certain circumstances—and then takes it away, the legislature has altered the relationship and taken away a benefit that the entity previously enjoyed. In both examples, the "right" has been stripped by the same power that granted it.

Consider a situation, however, in which rights are not taken away by the same entity that grants them. There are no difficulties when the agency that takes away the right is superior in power to the agency that grants them—for example, Congress taking away a right granted by an agency, or the Constitution taking away a right granted by congressional or state statute. But when the agency that refuses to recognize a right is of lesser power, a problem arises with respect to the taking away metaphor when an abstract right is involved.

To speak of a state literally taking away rights granted by the Constitution appears to be an absurdity. If rights are abstract legal relationships between entities, permitting individuals to make certain claims once the Constitution defines what these relationships are, the State cannot alter them. The State may *ignore* this de jure relationship and may fail to respect it, thereby violating its terms. However it cannot alter this legal relationship, much less obliterate it. We therefore talk about the State as violating the right. Some may understand a right of a citizen against the State as a term of the social contract between the citizen and the State. But by breaching a term of the contract, a contracting party does not "take away" the contractual term—she simply violates it.

If the "taking away" of rights by inferior powers were simply infrequent metaphors in obscure law review articles, it would be an issue of no concern; legal scholars sometimes make indifferent poets. But we often talk about *violations* of rights as *revocations* of rights. The Constitution itself imagines rights revocation in this way. For example, the Fourteenth Amendment commands that no state shall "deprive" citizens of liberties "without due process of law."[357] The provision imagines that states may deprive—that is, take away—constitutionally guaranteed rights with due process. Even more puzzlingly, courts and individuals regularly imagine a world in which rights can be taken away, yet through some sleight of hand, retained. Thus in *Bray v. Alexandria*

357. U.S. CONST. amend. XIV, § 1.

Women's Health Clinic, Justice Stevens noted in his dissent that women have been "*deprive*[*d*] . . . of their constitutional right to choose an abortion . . . by [those] blockading clinics with the intended effect of preventing women from exercising a right . . . they *possess*."[358] This observation makes intuitive sense, but when further investigated, it seems problematic: how could women "possess" and be "deprive[d]" of a right at the same time? Yet litigants regularly state in one breath that they have rights, but at the same time, that the right was taken away. Unlike the proverbial cake, the State may devour your rights but leave them in your possession.

To answer this riddle, consider two alternate conceptions of rights.[359] One is the prescriptive understanding of rights-as-legal-claims. It describes what plaintiffs believe to be the ideal relationship and set of obligations and dues between themselves and the state (or the defendant). Another conception of rights, however, is a descriptive understanding of rights as capabilities. Rather than ideals, this understanding concerns pragmatic facts on the ground. To the extent a person can perform the activity without hindrance, she has a right to engage in the activity; to the extent she cannot, she lacks the right. Under this conception, we do not engage with moral or ethical questions as to the ideal relationship between the person and someone else.

To explain the distinction, consider a simple example: To say that a woman has the right to have an abortion has different meanings under the prescriptive and descriptive frameworks. Under the prescriptive framework, we are describing the proper ideal or moral behavior under the law of the state (and perhaps others) with respect to a woman. But under a descriptive account, a woman only has a right to an abortion if she has the money to go to a clinic where there are doctors who may perform the abortion. On this account, it does not matter whether she is owed non-interference or assistance as a moral matter or not—it only matters that she can, in fact, obtain the abortion should she wish to.[360]

Gaining a prescriptive right often entails making arguments to various groups, including courts, to recognize the right. The state can only deprive the individual of the right as a prescriptive matter by altering the state constitution or other moral or legal norms. Obtaining the right as a descriptive matter involves ensuring access to various other

358. 506 U.S. 263, 343 (1993) (emphasis added).

359. I base my exposition on the work of Martha Nussbaum. *See, e.g.*, Martha C. Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273, 293 (1997).

360. To the extent that our actual behavior is guided by our ideals, it may be important for us to secure prescriptive access to the right in order to secure the right as a descriptive matter: it may be harder to have access to something in actual fact (descriptive right), if no one recognizes our moral entitlement to it (prescriptive right). As Nussbaum puts it, a prescriptive "right . . . would be prior to a capability [that is, a descriptive right], and a ground for the securing of a capability." *Id.*

resources. The state (or someone else) can deprive the individual of the right as a descriptive matter by taking away any necessary resource.

When a person goes to court then, and says that she possesses a right that the state has taken away, she is using the term right in two different senses. She is saying that as a legal or moral matter, she has a right—a prescriptive right. However, as a *descriptive* matter, she is claiming the state took away her ability to engage in the activity—a descriptive right—either through ultra vires action or having in place statutes or policies that limited her actual access to the right in some way. To be sure, the line between state action and inaction, revocation, and restoration remains elusive and constructed.[361] This explains Justice Stevens's dissent—women "possess" the prescriptive right to have an abortion without interference (in that case, by a private party under a statute), but their actual capability of doing so is compromised.

There also remains the question of what level of interference—what burden—constitutes "taking away" a right.[362] For example, one may claim that only forcible prevention from engaging in the right (by refusal to provide resources, or ex ante detention) constitutes a deprivation. Alternatively, ex post sanctions for engaging in the right may also constitute deprivation. These ex post sanctions may range from drastic criminal penalties to unofficial harassment. Regulatory takings, in particular, raise similar questions as to how "heavy" a burden must be to constitute a deprivation on a regular basis.[363] One may differ on whether there is a line between taking rights away and merely burdening the right, and if there is one, where that line should be drawn. I set this question aside as the exact point on which a burden becomes a deprivation of a right is one that must be analyzed in specific contexts.

B. Constructing Rights and Revocation

Understanding rights as prescriptive, however, means that groups on both sides of a case can (and do) claim that a failure to respect their interests would "take away" their "rights." Understanding how these claims play out is important in order to work out the role rights revocation analysis plays—the analysis is not some *product* of the burden imposed by a clear

361. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Q. 470 (1923); Sunstein, *supra* note 13, at 85.

362. This is related to what is a "necessary" condition for an individual to exercise a right. *See, e.g.*, Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004) (distinguishing *Lawrence v. Texas*, 539 U.S. 554 (2003), which found there was a right to same-sex intimate conduct, from a case involving adoption by gay individuals by explaining that "[t]he relevant state action is not criminal prohibition [as involved in *Lawrence*], but grant of a statutory privilege [that is, adoption]").

363. Richard A. Epstein, *Physical and Regulatory Takings: One Distinction Too Many*, 64 Stan. L. Rev. Online 99 (2012) presents a recent statement.

revocation of right. Rather, it helps construct the right itself, and determines whether the failure to respect the interest was a revocation.

1. Constructing Rights

Not all interests can be understood as legal rights. To turn back to Fuller's (or indeed, Bracton's) discussion as an example, individuals understand only those agreements that are accompanied with formalities as embodying legal rights.[364] Formalities serve the purpose of giving an individual the understanding that the consequences of her action hold legal significance. The party to the contract understands, not just that a right can be asserted against her (which results, as Fuller notes, in deliberation), but also that she holds a right over another that possesses legal legitimacy. By contrast, as Bracton and Fuller would tell us, a promise made without formalities that cannot be enforced would not be a right. I claim that an individual feels more invested, or connected, to a right, once it has become understood as a legal right, and it has vested.

But contractual rights are just one set of interests that are understood as rights in our legal system. Other forces also shape claims as *legal* rights claims—and just as individuals feel a greater sense of connectedness to contractual rights in part because of their legal significance, understood through formalistic rights frames, individuals in other contexts feel a greater sense of connectedness to claims they understand as constituting legal rights.

My previous work documenting how the gay rights movement began to frame its interests in relationship recognition as a legal right to marriage in the 1970s provides a particular example of the difference between a mere interest and a right.[365] The fight to end discrimination based on sexual orientation travelled some distance before its leaders understood their arguments through legal lenses, and their claims as "rights." Leaders of the movement in the 1950s and 1960s utilized medical frames seeking to persuade society (including other gay individuals) that sexual orientation was a benign variation that did not deserve persecution. In the 1970s, however, gays developed a "legal, rights-seeking frame[]," by analogizing their claims to those of the civil rights movement, and positioning themselves as another minority group.[366]

Relationship recognition, in particular, travelled the distance from becoming an interest of the movement, to that of a legal right, to finally, a vested right in some contexts. After initially, apparently, rejecting the notion of marriage recognition in the early 1950s, the nascent homophile

364. *See supra* notes 242–44.

365. *See* Craig Konnoth, Note, *Created in its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s–1970s*, 119 YALE L.J. 316 (2009).

366. *Id.* at 328.

movement of the early 1960s began to articulate an interest in relationship recognition, to make easier the logistics of insurance, taxes, and child rearing. However, "demands remained limited and untranslatable into the language of a civil rights movement."[367] Gay activists knew they *wanted* relationship recognition, but did not consider it to be a civil right. Mobilization was discussed, but never really found purchase. It was only in the 1970s that historical developments allowed gay activists to think of the possibility that relationship recognition was a civil *right* of which they were being deprived. This ensured that cases were filed, and articles written. The indignation of rights deprivation resulted in marriage being claimed as a right and provoked related litigation.

Robert Post and Reva Siegel show the dialogic nature of rights discourse in general, as groups engage with outsiders to persuade them of that which group members already believe—that the interest they possess holds the power of being a "right."[368] Thus, when referring to a certain claim as a "right," litigants perform a performative, jurisgenerative,[369] political act, claiming an interest as an artifact of the constitutional universe.[370] They are conscious that this claim will be judged by courts and by the public, opponents will respond to it. Accordingly, they will engage in campaigns to frame the right *as* a right both within their own community and outside the community. Their claim that a certain option is a right is subject to numerous constraints. That rhetoric of rights establishes a felt connection between litigants or activists and the claim along with the concomitant sense of connection and loss when one feels that a *right* has been taken away.

Because interests are converted into rights through narrative, distributive notions of ownership birth the sense of connectedness to the right. It is those rights we describe as basic capabilities, primary goods or fundamental rights of Part I.C that we feel the deepest connections to—but to categorize those rights as such we need a theory of distribution, be it based on specific kinds of morality, as I explain above, utilitarianism, or something else. But here is where our understandings of ownership merge—we feel connected to an object because we believe we should possess it based on a distributive system of justice, which may in turn allot us the object because of the connection we feel to it.

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367. *Id.* at 359.

368. *See generally*, Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

369. Robert M. Cover, Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983).

370. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 868 (2002).

2. *Competing Rights*

As a conceptual matter, understanding what the right is requires an understanding of, as Sunstein puts it, the "constitutional baseline."[371] Is the correct baseline from which we measure state action a regime where no welfare benefits are provided, such that anything that goes over that baseline is something more, a non-right, which can be taken away without impunity? Or is the baseline the provision of benefits, such that the failure to provide the benefit is the revocation of a right? Extraneous normative arguments shape these claims.

Accordingly, and unsurprisingly, claims are often articulated as competing rights. In many cases, both sides may claim that they have "rights," of which they are being deprived. The quintessential example is that of opposing private parties (tabling the question of whether states can claim that their interests may also count as rights). Here, I am not only talking about competing contractual claims, but also constitutional cases. For example, as Herbert Wechsler famously observed many years ago, *Brown v. Board of Education*[372] limited the rights of white parents to ensure that their children did not associate with black children—which may have been inimical to important identity interests these parents held.[373] Reva Siegel describes the powerful role this argument played in the reaction in southern courts, legislatures, and other institutions that sought to limit the reach of *Brown*.[374] The State may even extend these prohibitions to other contexts, such as employment (though, of course, prohibiting private discrimination is not constitutionally required).[375]

In these cases, although a state *qua* state has no cognizable interest,[376] surely the individuals that are forced to participate in the state-sponsored activity may claim a vested right, or experience an endowment effect in the right of (non-)association (or of discrimination) they are forced to give up which may be important to their personhood. If courts considered a vested interest or the endowment effect in, for example, associational interests in their analysis under the Due Process Clause, the interests of discriminators could win the day. The rights reversal analysis would significantly harm the rights of minorities.

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371. It does so precisely because it embodies a controversial substantive baseline. Cass R. Sunstein, *Neutrality in Constitutional Law (Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 43 (1992); *see* SUNSTEIN, *supra* note 13, at 45.

372. 347 U.S. 483 (1954).

373. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

374. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1487–89 (2004).

375. But is currently prohibited by statute, *see* 42 U.S.C. § 2000e-2 (2015).

376. This resembles the point I make in Part II.C.2 that stakeholders in corporate entities are affected when the entity loses certain abilities, in this case, the ability of the State to discriminate.

At the doctrinal level, however, courts will not recognize a "vested right to do wrong"[377]—such as an interest in discrimination. Thus, in a case like *Brown*, a Court would answer that the interest of discriminators cannot be considered when bare animus animates the interest.[378] The Court *first* determines whether there is a legitimate, non-animus based interest present before it considers whether the right is taken away.

But the extra-constitutional forces that "construct" rights, to which Post, Siegel, and I, among others have pointed, ultimately influences this. A bare animus interest can shade into an interest in association,[379] as Wechsler pointed out, (or indeed, as we can imagine, into freedom of religion,[380] speech,[381] and so on). The Court must make (and has made) value judgments as to where this line lies based upon claims, analogies, and frames employed by litigants. Thus, when an individual claims the right of nonassociation with blacks, a court would have to first determine whether the First Amendment's right of association covers the interest. In *Boy Scouts of America v. Dale*,[382] in which the Boy Scouts violated a state antidiscrimination law by expelling a gay scoutmaster, and other cases,[383] the Court has concluded that the right of freedom of association protects certain discriminatory acts that exclude LGB individuals. Thus, the rights-revoking analysis would require a court to consider the endowment effect the Boy Scouts felt when losing the right to exclude LGBT individuals under state antidiscrimination law. In *Brown*, the rights at stake were not legitimate interests in association. Thus, the Court could not consider the discriminatory interests of certain white parents, nor the endowment effect attaching to those interests. The different framings of the rights at stake in *Brown* and *Dale* yielded different outcomes.

3. Constructing Revocation

Our definition of what a right is, ultimately, affects whether we conceptualize a government action as revoking or restoring rights. Because rights revocation rhetoric has visceral, and often doctrinal, power, cases often see a battle over whether the state action took a right away, or merely restored a preexisting right that was unfairly taken away. Let us return again to Proposition 8. Did the opponents take away a right

377. *See, e.g.*, Freeborn v. Smith, 69 U.S. 160, 175 (1864) (internal citation omitted).

378. *See* Romer v. Evans, 517 U.S. 620, 632 (1996).

379. Wechsler, *supra* note 373.

380. *Cf.* Wilson v. U.S. W. Commc'ns 58 F.3d 1337 (8th Cir. 1995) (holding that a prohibition on wearing an anti-abortion button featuring a fetus in employment does not constitute religious discrimination violating Title VII).

381. *Cf.* R.A.V. v. St. Paul, 505 U.S. 377 (1992) (holding that laws against hate speech violate the First Amendment).

382. 530 U.S. 640 (2000).

383. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557 (1995).

or restore the status quo? As I note above, the California Supreme Court suggested that the right to marry always existed in the California Constitution. Proponents of Proposition 8 disagreed; for them, marriage had traditionally been between members of different sexes. Thus, in reviewing the effects of Proposition 8, in a notable passage, the Ninth Circuit stated that "[p]roponents resist . . . framing . . . the question" as taking rights away.[384] "*In re Marriage Cases* was a 'short-lived decision,' and same-sex couples were allowed to marry only during a '143-day hiatus' between the effective date of the *Marriage Cases* decision and the enactment of Proposition 8."[385] Thus, proponents argued, Proposition 8 took no rights away, rather it was "a decision to 'restore' the 'traditional definition of marriage'" that the California Supreme Court had taken away.[386] Similarly, in their briefs to the U.S. Supreme Court, proponents argued that Proposition 8 took nothing away; it merely gave back what was already there.[387]

Proposition 8 was challenged on various federal constitutional grounds. The Ninth Circuit held specifically that revoking *already* existing marriage rights violated equal protection guarantees. Allowing proponents to successfully argue that the interests that same-sex couples had before Proposition 8 could not be called "rights" would have been fatal to the Ninth Circuit's decision. The court would not have been able to hold that Proposition 8 revoked rights, which, in turn, would have depleted the force of its argument. The court therefore made short shrift of this argument. The court claimed to be

> bound . . . by the California Supreme Court's authoritative interpretation of Proposition 8's effect on California law . . . Proposition 8 "eliminat[ed] . . . the right of same-sex couples to equal access to the designation of marriage" by "carv[ing] out a narrow and limited exception to these state constitutional rights" that had previously guaranteed the designation of "marriage" to all couples, opposite-sex and same-sex alike.[388]

This was therefore a case of rights revocation.

Contrast *Perry* with the important state action case, *American Manufacturers Mutual Insurance Co. v. Sullivan*.[389] There, workers complained that the State had facilitated insurance companies' ability to withhold payment for medical benefits by repealing an earlier law that

384. Perry v. Brown, 671 F.3d 1052, 1079 (9th Cir. 2012), *vacated on jurisdictional grounds by* Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013).

385. *Id.* (internal citations omitted).

386. *Id.*

387. Brief for Petitioner at 27–36, *Hollingsworth*, 133 S. Ct. 2652 (No.12-144).

388. *Brown*, 671 F.3d at 1079 (alteration in original) (quoting Strauss v. Horton, 207 P.3d 48, 61, 76 (Cal. 2009)).

389. 526 U.S. 40 (1999).

prohibited such withholding.[390] This, the workers claimed, was unconstitutional.[391] The Court rejected the claim, holding that rather than taking away the right of workers not to have payments withheld,[392] the repeal of the law simply *restored* the preexisting rights of insurance companies to withhold payments that earlier amendments took away. "The 1993 amendments, in effect, restored to insurers the narrow option, historically exercised by employers and insurers before the adoption of Pennsylvania's workers' compensation law, to defer payment of a bill until it is substantiated."[393]

The contrast between *Perry* and *Sullivan* is clear. Where the State takes away a right—as in *Sullivan*—it imposes a burden on those (there, the insurance companies) whose rights were withdrawn. It may therefore restore their rights. Indeed, in *Sullivan*, the Court held that not only was the State entitled to restore the rights, but also that such restoration did not even count *as state action* because it simply recreated a status quo that had been impermissibly altered. Thus, by successfully claiming the mantle of rights *restoration*, insurance companies erased the very agency of the State. In *Perry*, proponents claimed—and were denied—the same mantle of rights restoration. Being denied the mantle of rights restoration had important consequences: the change they effectuated was characterized as revocation rather than restoration, and therefore, treated as illegitimate. Multiple criteria can affect the framing as to whether revocation rather than restoration of rights, or some other innocuous change, has occurred.[394]

Clearly, the revocation-restoration frame and the rights-non-rights frames cannot be considered independent of each other. Determining when a particular behavior is a right or an entitlement often determines whether a court can frame its loss as a revocation or a restoration. To return to *Sullivan*, part of the Court's move was to characterize the right involved not as the workers' right *not to* have insurance payments withheld.[395] Rather, the right was that of the insurance companies to withhold payments.[396] Depending on who could lay claim to the language of rights, the revocation versus restoration analysis would have come out differently. Thus, the rhetoric of revocation-versus-restoration is, at the

390. *Id.* at 47–48.

391. *Id.*

392. *Id.* at 53–54. ("Before the 1993 amendments, Pennsylvania restricted the ability of an insurer (after liability had been established, of course) to defer workers' compensation medical benefits, including payment for unreasonable and unnecessary treatment, beyond 30 days of receipt of the bill.").

393. *Id.*

394. This is where I depart most sharply from Sunstein. *See* SUNSTEIN, *supra* note 13. Sunstein decries the status quo bias that institutions exhibit. I agree that in many cases, such a bias can create problems. However, Sunstein ignores the fact that our very notion of the status quo is constructed in many circumstances.

395. *Sullivan*, 526 U.S. at 53.

396. *Id.*

same time, an important battleground that frames and is framed by rights discourse itself.

To return to *Evans v. Utah*, briefly, the State attempts a similar move that illustrates how the scope of the right affects whether the state action constitutes impermissible revocation. In its reply brief, the State's second argument was that it did not seek to "revoke[]" "marriage licenses."[397] Rather, it would no longer recognize marriages of same-sex couples that married in Utah going forward. Thus, it was not taking away a right; rather, because it combined the scope of the right, its action was about prospective application. Of course, this premise can only be accepted if one sees the marriage right as an empty formality, rather than consisting of the bundle of rights and obligations that become vested with the ritual. At best, Utah's move here looks a lot like a regulatory taking: individuals can hold on to the property, but all value has been divested from the property. Unsurprisingly, this argument did not prove successful—having conceded that the lower court injunction created a marriage right, Utah was limited in its ability to cabin the scope of the right.

C. Institutional Conflict and Legitimacy Claims—Describing the Perpetrators

So far, this Article has concentrated on the rhetoric of revocation in cases used by courts and activists to explain themselves. The rhetoric is used to help explain why the winners in the cases won and why the losers lost. However, the players in the game are not only the litigants. Courts and their legitimacy are very much in the mix. Through their decisions, courts paint themselves as the restorer of rights taken away by other governmental actors. In this way, they attempt to ensure their stature and legitimacy in the constitutional world. But other constitutional actors, including legislatures and executives, also attempt to make similar claims. This becomes apparent in the tussle between the Proposition 8 proponents and the California Supreme Court on the issue of revocation and restoration.

In *Perry*, the Ninth Circuit claimed, based on the California Supreme Court's characterization in *Strauss v. Horton*, that the California Constitution always mandated marriage equality, which Proposition 8 "eliminated" and "repealed."[398] But *Strauss*'s characterization of Proposition 8 as revoking a right, rather than merely reinstating the status quo, is puzzling at first. *Strauss* was concerned with whether Proposition 8 was so broad that it constituted an impermissible revision

397. Reply in Support of Emergency Application to Stay Preliminary Injunction Pending Appeal at 4, Herbert v. Evans, No. 14A65 (July 18, 2014).

398. Perry v. Brown, 671 F. 3d 1052, 1068 (9th Cir. 2012); Strauss v. Horton, 207 P.3d 48, 61 (Cal. 2009).

to the California Constitution rather than just an amendment.[399] It held that Proposition 8 was a sufficiently minor change to the California Constitution that it constituted an amendment rather than a revision of the constitution.[400] Had *Strauss* held that the change merely *reinstated* a previously existing definition—just as the Supreme Court did in *Sullivan* by claiming that the legislature only reinstated a previously existing right—it may have bolstered its argument that the Proposition was nothing but an amendment by minimizing the extent of the change.

It is not as if the court lacked material to rely upon. Indeed, the Proposition 8 ballot material (on which the court partially relied)[401] would have allowed the court to do so. The first and longest capitalized phrase in the Proposition 8 ballot guide stated that Proposition 8 would "RESTORE THE DEFINITION OF MARRIAGE as a man and a woman."[402] Next, in listing the purpose of the measure, the first purpose was that it "*restores the definition of marriage* to what the vast majority of California voters already approved and human history has understood marriage to be."[403]

The court's failure to rely on this language is best explained by the attack on the court in the ballot measure itself. In explaining why restoration was necessary, the ballot statement stated that "four activist judges in San Francisco wrongly overturned the people's vote[.] [W]e need to pass this measure as a constitutional amendment to RESTORE THE DEFINITION OF MARRIAGE . . ."[404] In other words, the ballot initiative attempted to paint the *court* as the actor that took away the right of parents to determine what their children are "taught in public schools."[405] This point is belabored. The measure would "*overturn[] the outrageous decision of four activist Supreme Court judges* who ignored the will of the people."[406] Similarly, the plaintiff-petitioners noted in their brief to the Supreme Court that this right existed for a mere "142 *days* of California's 162-*year* history."[407] Thus, in claiming that it was restoring rights, the ballot attacked the legitimacy of the court.

Even as it upheld the validity of Proposition 8, the court sought to reclaim its own legitimacy. It held that its prior decision did not take away a preexisting right to define marriage as between two heterosexual

399. *Strauss*, 207 P.3d at 386–87.

400. *Id.* at 445.

401. *Id.* at 472.

402. *Proposition 8: Argument in Favor and Rebuttal*, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION Nov. 2, 2008, at 56–57, *available at* http://voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt8.htm.

403. *Id.* at 56 (emphasis in original).

404. *Id.*

405. *Id.*

406. *Id.*

407. Brief for Petitioner, *supra* note 387, at 25 (emphasis in original).

individuals. Rather, it declared the state of the law at the time. Accordingly, it was Proposition 8 that took something away—the initiative measure did not "declare the state of the law as it existed" under the California Constitution at the time of the *Marriage Cases*, "but instead established a new substantive state constitutional rule."[408] Thus, the court's response was to preserve its own legitimacy, claiming that all it did was what a court should do, as set out in the famous maxim of *Marbury v. Madison*—"declar[ing] what the law is."[409] In turn, the Ninth Circuit seized on this self-legitimizing rhetoric to paint proponents as right revokers, and therefore as illegitimate. This rhetoric defines the relationship, not just on a micro-scale between the California Supreme Court and the proponents of Proposition 8, but also on a macro-scale between courts and other government actors in general. Litigants and the courts who side with them paint other actors as *depriving* these litigants of preexisting rights to bolster their own legitimacy.

That is not to say that other branches of government take these claims lying down. Like the proponents in Proposition 8, Congress has responded with bills seeking to "restore" judicial revocation of rights.[410] Consider, for example, the Religious Freedom Restoration Act ("RFRA").[411] In *Employment Division v. Smith*, the U.S. Supreme Court held that enforcement of a neutral and generally applicable regulation does not violate the Free Exercise Clause of the federal Constitution even if it incidentally burdens the religious exercise of an individual or group.[412] This departed from the more stringent *Sherbert v. Verner* standard, under which any law that established a substantial burden on religion required compelling justification.[413] In response, Congress enacted RFRA, establishing strict scrutiny as a federal statutory standard for justifying enforcement of a general law where it imposes a substantial burden on religious exercise. RFRA squarely focuses on revocation and restoration: the Court was not merely in error, but "the Supreme Court virtually eliminated"[414] the previous First Amendment test; the primary purpose of RFRA (listed first) was not just to correct the Court, but to "restore" the previous definition.[415] The House Report uses similar rhetoric.[416]

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408. Strauss v. Horton, 207 P.3d 48, 115 (Cal. 2009).

409. Marbury v. Madison, 5 U.S. 137, 177 (1803).

410. *See* Ryan Eric Emenaker, Constitutional Interpretation and Congressional Overrides: Changing Trends in Court-Congress Relations 15 n.36 (Feb. 28, 2013) (unpublished manuscript), *available at* http://ssrn.com/abstract=2243912.

411. 42 U.S.C. § 2000bb (2015).

412. 494 U.S. 872, 878–79 (1990).

413. 374 U.S. 398, 406–07 (1963).

414. 42 U.S.C. § 2000bb(a)(4).

415. *Id.* 2000bb(a)(4), (b)(1).

416. H.R. Rep. No. 103-88, at 6 (1993).

But courts are jealous of their position as the ultimate arbiters of the Constitution, and therefore, as the determiners of when a constitutional right is taken away. The Supreme Court revealed as much in *City of Boerne v. Flores*, which struck down elements of RFRA as incompatible with the idea that only the court can determine what the substance of a constitutional right is.[417] On *Boerne*'s account, *Smith*'s test did nothing to *revoke* rights and change the status quo. While the Court admitted (as it had to) that *Smith* did not apply the traditional test, it claimed that the decision nonetheless comported with free exercise jurisprudence as it had always been understood[418]—the court therefore, took nothing away.

This shows a broader pattern in the battle between courts and legislatures. Courts claim to be above political manipulations of the rights discourses I have so far described; rights are constant and fixed and announced by them as appropriate. Engaging in the rhetoric and restoration endangers this picture. Legislative legitimacy, however, relies on being responsive and political. Legislatures can maximize their own legitimacy by painting other entities as political so that they can claim legislatures as great rights restorers. Thus, they have more to gain by claiming that constitutional rights are subject to alteration and revision, that courts can and do take them away, and that legislatures can restore them.

Ultimately, the institutions that may be involved in these battles are varied. In the LGBT context alone, reversals involve multiple players, including legislative bodies. Relationship recognition among same-sex couples began—and ended almost immediately—in San Francisco in 1989, where the Board of Supervisors passed a domestic partnership ordinance that was soon repealed by initiative.[419] A same-sex-marriage law in Maine was repealed by initiative more recently.[420] Maine voters reenacted the repealed law in 2012.[421] In 1977, Anita Bryant and the Save our Children Campaign succeeded in their effort to repeal Miami-Dade County's antidiscrimination ordinance.[422] In *Romer v. Evans*, where Colorado repealed municipal ordinances by amending the state constitution, the Supreme Court ruled in favor of gay rights under the

417. City of Boerne v. Flores, 521 U.S. 507, 532–36 (1997).

418. *Id.* at 513–14.

419. Katherine Bishop, *San Francisco Grants Recognition to Couples Who Aren't Married*, N.Y. TIMES, May 31, 1989, at A17.

420. John Curran, *Main Gay Marriage Vote: Voters Repeal Law Legalizing Gay Marriage*, HUFFINGTON POST (Mar. 18, 2010 5:12 AM), http://www.huffingtonpost.com/2009/11/03/maine-gay-marriage-vote-e_n_344688.html.

421. David Sharp, *Maine's Same-Sex Marriage Law Goes Into Effect*, HUFFINGTON POST (Dec. 29, 2012, 9:59 AM), http://www.huffingtonpost.com/2012/12/29/maines-same-sex-marriage-_n_2380334.html.

422. Joanne Mariner, *Anita Bryant's Anti-Gay Legacy*, Alternet (Feb. 2, 2004), http://www.alternet.org/story/17737/anita_bryant%27s_anti-gay_legacy.

Equal Protection Clause for the first time.[423] In each of these states, individuals were accorded rights only to watch as the law snatched them away. In such cases, the rhetoric may be somewhat different from that in this context.

CONCLUSION

From revocation we come full circle to restoration. Much of the political debate in this country is nostalgic, seeking to restore an allegedly idyllic age. But implicit in this notion of restoration is that of revocation—that age was taken away. Political actors blame various groups or institutional entities for this, and vice versa. These entities portray themselves as, and sincerely believe themselves to be, preserving important interests.

But these interests in granted rights exist. Psychological, philosophical theorizing, our very understanding *that* we are and *who* we are, depend in part on the rights that we own at a given point in time. At the same time, our self-understanding consistently evolves. Our evolving self-understanding both underlies and draws from the indeterminate and malleable nature of the terms "rights" and "revocation" in any given context. But judges and social movements generally cannot be agnostic as to what interests are legitimate legal rights—and where they determine that legitimate rights are involved, assuming for a moment the definition of right and revocation to be exogenously defined and fixed, they must attempt to remedy rights deprivation. A rights deprivation, understood as such, works violence, to a greater or lesser degree, in the conception of the individual. It alters her, changes her capability of functioning in a certain way, and may transform her in the eyes of the world, as well as, or, ultimately, in her own eyes, into something less than what she was. This affective and ontological link with the right never develops when the right is not previously endowed.

Finally, institutional engagement in rights discourse reifies the power of rights language. But while institutions infuse rights language with power, they also draw power from rights language. The way they wield the language of rights affects their legitimacy and social situation. Institutions use their relationship with rights to define and describe themselves. Rights revocation arguments therefore play a role, not just in shaping the individuals who make them, but the very institutions that have the power to grant, deny, "revoke," and "restore," "rights."

423. Romer v. Evans, 517 U.S. 620 (1996).