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ESSAY

RETCONNING THE LAW: A REPLY TO PROF. NELSON

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> *Retcon*, n.: In a fictional work or series: a piece of new (and typically revelatory) information which imposes a different interpretation on previously described events, often employed to facilitate a dramatic plot shift or account for an inconsistency . . . .[1]

INTRODUCTION

I want to start by thanking Caleb Nelson for his deep engagement with my article. Scholars always hope that people will read their work, but I did not anticipate that I would have a fellow traveler on my strange dive into the particularities of nineteenth-century land law. "The details of organization of the land system," the historian Henry Adams wrote in 1879, "implied much labor and minute attention, but they are not interesting."[2]

I was ambivalent whether to reply to Nelson's response for the reason that Adams flagged—who would find it interesting or worthwhile? I was not surprised that my evidence failed to persuade Nelson; indeed, I

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[1] Retcon, Oxford English Dictionary, https://www.oed.com/dictionary/retcon_n?tab=meaning_and_use#273284888 [https://perma.cc/87NM-7VAA] (last visited Sep. 30, 2026).

[2] Henry Adams, The Life of Albert Gallatin 299 (Peter Smith 1943) (1879).

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anticipated this outcome in my original piece.[3] Equally unsurprisingly, I stand by my original conclusions. But scholars claiming that they are right is decidedly "not interesting."[4]

I *was* surprised, and impressed, by the seriousness with which Nelson took my critique and the history I cited. Surprised, because, though I invoked Nelson's work as the best example of a framework that I thought my evidence questioned,[5] most of the article was targeted at statements by the Supreme Court, and I only cited Nelson nine times.[6] Impressed because I know firsthand the "labor and minute attention"[7] this research requires, and so I genuinely appreciate Nelson's willingness to follow me into this tangled history. Moreover, as Nelson himself notes, he and I actually *agree* about much of the history, even if we disagree about some of the conclusions it supports.[8] But admiration and agreement are perhaps even more tedious to read.

Finally, much of this debate turns on obscure law and technical legal distinctions. Relitigating each historical example in the same detail as either my original 30,000-plus-word article or Nelson's 30,000-plus-word reply—even if I had the room to do so, which I don't—would not make for gripping reading, either.

I am also not naïve about the broader stakes or context. I had little expectation at the outset that my history would meaningfully unsettle a hardening originalist consensus around the meaning and significance of public and private rights. I have even less hope that an exchange with Nelson will change many minds in what has become yet another polarized public law conversation: I see little cause for optimism in the interminable debates over the historical pedigree of, say, the non-delegation doctrine.[9]

I nonetheless decided to write this response for three reasons. First, I felt it important to repay the courtesy that Nelson showed in taking my

[3] See Gregory Ablavsky, Getting Public Rights Wrong: The Lost History of the Private Land Claims, 74 Stan. L. Rev. 277, 347–48 (2022).

[4] Adams, supra note 2, at 299.

[5] Ablavsky, supra note 3, at 282.

[6] Id. at 282 nn.16–18, 283 n.23, 288 n.48, 320 n.236, 322 n.254, 323 nn.255 & 259.

[7] Adams, supra note 2, at 299.

[8] See, e.g., Caleb Nelson, Did I Get Public Rights Wrong?, 112 Va. L. Rev. 661, 724 (2026).

[9] This literature is too vast to comprehensively survey. For an overview of the debate, see Julian Davis Mortenson & Nicholas Bagley, Essay, Delegation at the Founding: A Response to the Critics, 122 Colum. L. Rev. 2323, 2324 nn. 1–2 (2022).

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arguments seriously.[10] Second, I thought that our conversation might highlight important methodological disagreements in thinking through historical evidence. Third, several scholars said they found my original article useful as a guide to nineteenth-century property doctrine, and so perhaps further spelunking in the historical intersection between property and public law might be helpful.

If you've gotten this far, you're presumably aware of the private land claims, as both my original article and Nelson's response describe them in detail. If you're just joining this conversation, very briefly, the claims were land grants from prior European empires and Mexico that the United States promised to honor when those sovereigns ceded territory to the United States. The federal government generally resolved them through boards of commissioners that, depending on the statute, either reported on them to Congress, provided for federal court involvement, or made the boards' determinations final. The core of the dispute between Nelson and me is that I argue that these procedures question the assertion that core vested rights to property could not be subject to administrative resolution; he disagrees.

I aim to do two things in this response. First, I want to expand beyond my original article and offer some broader thoughts on the place of history in constitutional debate more generally. Second, I will flag where, despite important agreements on much of the law governing the private land claims, Nelson and I still disagree about the evidence and its import. Here, I'll focus on three questions: Were the private land claims vested? What is the significance that the private land claims were not judicially cognizable absent congressional action? And how should we interpret the California Land Act of 1851? In each of these instances, I find Nelson's efforts to explain away contrary evidence implausible.

I also have two more general points of disagreement with the framing of Nelson's response. First, his approach fits within a well-established game—the game of doctrine and litigation.[11] In that game, you advance a theory of the case that supports your position, adduce evidence, and attempt to distinguish the evidence that seems to contradict your position.

[10] Space, as well as inclination, means that I cannot emulate Nelson's fondness for parentheticals. In any event, I think the key disagreements between us are not about the weight of the evidence but its interpretation and significance.

[11] I borrow the "game" metaphor from my colleague Jonathan Gienapp. See Jonathan Gienapp, The Second Creation: Fixing the American Constitution in the Founding Era 8–9 (2018).

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Hence why Nelson repeatedly says that various pieces of historical evidence are "consistent" with the framework in his original article, in that they don't contradict it.[12] And the thing about litigation is that, if the litigants have done their jobs well, both positions are plausible. Here, I will happily concede that, if you accept all the distinctions that Nelson has crafted and resolve all evidentiary ambiguities in his favor, the history I recounted can be massaged to fit his earlier account.

That result would be fine if Nelson's framework was, indeed, *his* framework: that is, rooted in what he regards as the best reading of the applicable law. And perhaps he'd be right: I am no expert on what the correct law governing non-Article III adjudication *should* be.

The problem, however, is that he argues that this approach is not actually *his* framework, but that of nineteenth-century American jurists, legislators, and lawyers. This requires a slightly different game—the game of history. It, too, involves making claims that best fit the evidence. But to play this game, you must do more than just show that current law is consistent with the history; you have to show that what you're recounting is, in fact, their law, not your law.[13]

And here, in my view, is where Nelson's account fails to persuade. His historical account does not seem to me a plausible explanation of the evidence. Nelson is unquestionably correct when he suggests that most mid-nineteenth-century jurists thought that some category of legal rights could not be subject to administrative adjudication. But what those rights were, how they were defined, what the relevant limitations were, and how the rules changed over the nineteenth century were all hotly contested, with little resembling a coherent framework. Indeed, instead of providing clarity, Nelson's response now proposes *new*, further distinctions and exceptions to try to explain away my evidence.

Hence why I have entitled this response "retconning the law," a perhaps unfamiliar title that may reveal the generational divide between Nelson and me. The term "retcon"—short for retroactive continuity—describes when authors go back and alter the past to make it fit current

[12] See, e.g., Nelson, supra note 8, at 695, 698 n.136, 718, 720, 722; see also id. at 711 (describing the effect of land confirmations on later federal grants as "not inconsistent with the framework I described").

[13] I articulated this concern in my original article, too. Ablavsky, supra note 3, at 348 (expressing concern about "attempt[ing] to cram the past into present-day jurisprudential assumptions").

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narrative needs.[14] Though the term largely arose in the context of comic books and television shows,[15] law engages in its own form of retconning, in which judges and lawyers who want to construct a story about the connection between past and present construct their own stylized narratives. But "retcon" is rarely a term of approbation, and for good reason: as Merriam-Webster notes, a retcon facilitates "a general disregard for reality."[16] We should be still more concerned about efforts to rewrite historical categories to serve present narrative needs when it involves real power and actual people, not just Chewie and Han Solo.

The second divergence concerns how Nelson characterizes my intervention. He casts the private land claims as a "pocket of law";[17] he also describes them as different from "normal vested rights."[18] The implication is that I have unearthed a minor "alleged counterexample"[19] to his overall framework.

This, in my view, is doubly wrong. First, it is anachronistic. I have a pet peeve about the term "normal" in characterizing law, since it arrogates to the interpreter the power to decree the norm and then to cast less helpful material as exceptional.[20] To be sure, just like every area of law, the private land claims were distinctive. But they were both highly important *and* one of the key ways that the federal government governed property in the nineteenth century. You cannot sideline hundreds of Supreme Court decisions, let alone the enormous amount of legislative and congressional attention that they consumed, as a minor part of nineteenth-century American jurisprudence. I may be wrong about their meaning, but I don't think there is a serious question about their significance.

Second, I understood the claims not as a counterexample but as a *test case*: a deep dive into one important area where federal adjudication intersected with property to see how this distinction between public and private rights held up. As both of our articles suggest, getting this material

[14] A Short History of 'Retcon,' Merriam-Webster, https://www.merriam-webster.com/word play/retcon-history-and-meaning [https://perma.cc/YH3X-VHH3] (last visited Sep. 30, 2026).

[15] Id.

[16] Id.

[17] Nelson, supra note 8, at 725.

[18] Id. at 681.

[19] Id. at 665.

[20] Gregory Ablavsky, Sovereign Metaphors in Indian Law, 80 Mont. L. Rev. 11, 40 (2019) ("[T]he language of exception and anomaly does more: it smuggles in ideas about legitimacy.").

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right takes lots of work and careful attention. Nelson seems to interpret this targeted approach as an acceptance of the validity of his framework applied to other areas. In fact, I'm skeptical. A large literature, including Nelson's own work, exists to try to make sense of the so-called "historical exceptions" to the limits on non-Article III federal tribunals, a category that conventionally includes courts-martial, the territorial courts, and perhaps bankruptcy and tax courts, but also encompasses a whole host of less familiar courts, that all adjudicated private rights.[21] And this perspective does not include additional courts that barely feature in the current literature on non-Article III tribunals like the courts of Indian

[21] Overviews of non-Article III courts appear in William Baude, Adjudication Outside Article III, 133 Harv. L. Rev. 1511 (2020); Laura K. Donohue & Jeremy McCabe, Federal Courts: Article I, II, III, and IV Adjudication, 71 Cath. U. L. Rev. 543 (2022); John M. Golden & Thomas H. Lee, Congressional Power, Public Rights, and Non-Article III Adjudication, 98 Notre Dame L. Rev. 1113 (2023); James E. Pfander, Article I Tribunals, Article III Courts, and the Judicial Power of the United States, 118 Harv. L. Rev. 643 (2004). On military courts, see Stephen I. Vladeck, Military Courts and Article III, 103 Geo. L.J. 933, 939–45 (2015); David A. Schlueter, The Court Martial: An Historical Survey, 87 Mil. L. Rev. 129, 145–50 (1980). On international tribunals, see Marco Basile, Lincoln's Commissioners on the International Slave Trade Courts at Sierra Leone, 10 J. Civ. War Era 160 (2020); Eugene Kontorovich, The Constitutionality of International Courts: The Forgotten Precedent of Slave-Trade Tribunals, 158 U. Pa. L. Rev. 39, 43–44 (2009); Jenny S. Martinez, International Courts and the U.S. Constitution: Reexamining the History, 159 U. Pa. L. Rev. 1069, 1075–80 (2011); Henry Paul Monaghan, Article III and Supranational Judicial Review, 107 Colum. L. Rev. 833 (2007). On the consular courts, see Donohue & McCabe, supra, at 601–02; Eugene Kontorovich, Essay, Three International Courts and Their Constitutional Problems, 99 Cornell L. Rev. 1353, 1375–76 (2014). On territorial courts, see Gary Lawson & Guy Seidman, The Constitution of Empire: Territorial Expansion and American Legal History 139–50 (2004). On federal commissioners under the Fugitive Slave Act of 1850, see Baude, supra, at 1555; Jeffrey M. Schmitt, The Antislavery Judge Reconsidered, 29 Law & Hist. Rev. 797, 803–09 (2011). On non-Article III adjudication in federal enclaves, see Stephen I. Vladeck, Petty Offenses and Article III, 19 Green Bag 2d 67, 74–78 (2015).

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offenses,[22] Freedmen's Bureau Courts,[23] and federal commissioners under the Fugitive Slave Act.[24]

Whether all these courts are consistent with Article III is hotly contested, with arguments back and forth. My view of this debate echoes my concerns with Nelson's response. Of course clever scholars can craft all sorts of present-day explanations as to why these historical examples are consistent with a formalist vision of Article III (or are perhaps just outliers that can be ignored). But in every instance in which I have dug into the underlying evidence, the effort to make these courts fit a formalist account felt, at best, a partial and tendentious interpretation of the historical record. At some point, these attempts to cram unruly history into tidy categories start to seem like so many just-so stories motivated less by a desire to understand the past than by a vision of how scholars wish the law to be now. Perhaps, if you're spending all your time

[22] See Denezpi v. United States, 142 S. Ct. 1838, 1849–51 (2022) (Gorsuch, J., dissenting) (recounting the late nineteenth-century creation of the courts and querying "how an executive agency can claim the exclusive power to define, prosecute, and judge crimes"). On the history of these courts, see William T. Hagan, Indian Police and Judges: Experiments in Acculturation and Control (1966); Alexandra Fay, Courts of Indian Offenses, Courts of Indian Resistance, 124 Mich. L. Rev. 777 (2026). In my research on the history of federal Indian law, I have in fact encountered other non-Article III tribunals that arguably adjudicated private rights, most notably the Department of the Interior's tribunal to adjudicate Native allottees' probate rights, see Hallowell v. Commons, 239 U.S. 506 (1916). Whether the Choctaw-Chickasaw Citizenship Court involved private rights seems a closer question. See Wallace v. Adams, 204 U.S. 415, 422–23 (1907) (suggesting that in determining citizenship the court was not deciding a "vested right" but merely "privileges").

[23] Amalia D. Kessler, Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877, at 263–322 (2017); John M. Bickers, The Power to Do What Manifestly Must Be Done: Congress, the Freedmen's Bureau, and Constitutional Imagination, 12 Roger Williams U. L. Rev. 70, 75, 84 (2006); Bernice B. Donald & Pablo J. Davis, "To This Tribunal the Freedman Has Turned": The Freedmen's Bureau's Judicial Powers and the Origins of the Fourteenth Amendment, 79 La. L. Rev. 1, 16–17 (2018); Zachary Newkirk, A Brief Moment in the Sun: The Reconstruction-Era Courts of the Freedmen's Bureau, 101 Judicature, no. 4, 2017, at 49, 52.

[24] I had long been surprised by the absence of substantial attention to the Fugitive Slave Act in this context—and then, while I was crafting this response, two important articles appeared. A student note explored the Act's implications for the public rights doctrine, noting that the Act authorized non-Article III federal commissioners to finally adjudicate "an individual's liberty and a slaveholder's asserted property right." Scott Jones, Note, The Fugitive Slave Act of 1850: A Public-Rights Paradox, 135 Yale L.J. 1768, 1811 (2026). And a forthcoming law review article suggests that Justice Curtis's opinion in *Murray's Lessee* was motivated partly to vindicate the Fugitive Slave Act's adjudicatory provisions. Ryan C. Williams, *Murray's Lessee*, Non-Article III Adjudication, and the Fugitive Slave Act of 1850, 102 Notre Dame L. Rev. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=7541683 [https://perma.cc/L8FY-S7W8].

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distinguishing away contrary evidence on all sides, you should start to wonder if the framework is all that plausible in the first place.

I. PRIVATE LAND CLAIMS AND THE LAW OF THE PAST

I suspect, once I start diving into the technicalities of nineteenth-century land law, readers' attention may flag. So I'll start with some broader reflections on what this exchange says about the role of history in constitutional adjudication. This topic has already seen enormous discussion as the Court has increasingly turned to history to resolve constitutional disputes.[25] But I think our conversation helpfully frames this abstract methodological question within a specific case study—always a more comfortable place for a historian.

Will Baude and Steve Sachs articulated one influential version of this interrelationship in what they term as the "law of the past."[26] Ordinary law, they observe, routinely forces courts to look to the past, invoking the example of a dispute over a historic deed.[27] Originalism merely replicates this process for legal doctrine more generally. Like investigating the meaning of a deed, judges and lawyers engage in a "highly limited version of the historical inquiry—one that uses limited evidence in limited ways, and one that can resolve controversies even in the face of occasional uncertainty."[28] They then proceed to prescribe evidentiary rules for such an inquiry, noting that doctrine involves an "extraordinarily narrow slice of any society's intellectual life" and focuses on "internal legal sources" like cases and treatises.[29]

Whether the public rights doctrine fits this frame strikes me as unclear. I understand the argument that authoritative texts are binding until altered; I also understand the significance of practice, especially in instances when doctrine has not yielded an answer. But, as best I can tell, the current public rights doctrine does not rest on these sources; it stems, rather, from a single 1856 Supreme Court decision, *Murray's Lessee*, that did not purport to ground the doctrine in thorough consideration of text or even

[25] For an overview of a vast and sprawling literature, see generally Jack M. Balkin, Memory and Authority: The Uses of History in Constitutional Interpretation (2024).

[26] William Baude & Stephen E. Sachs, Originalism and the Law of the Past, 37 Law & Hist. Rev. 809, 810 (2019).

[27] Id. at 811.

[28] Id. at 813.

[29] Id. at 813–14.

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original understandings.[30] I recognize that the current jurisprudential moment risks flattening everything before 1900, and certainly prior to the Civil War, into a vague legal "ye olden times,"[31] but 1856 was not 1789,[32] and I have not encountered much evidence in my research to suggest that this doctrine has deep eighteenth-century roots. We should, of course, try to interpret judicial decisions as faithfully as possible, but courts can and have developed the doctrine since then, as they may lawfully do within our system in which the most recent, not the oldest, precedent governs. In short, the claim that *Murray's Lessee* is our law—instead of the Court's more recent precedents applying the doctrine—seems thin.

In my original article, however, I bracketed this question, and I'll do that again here. Instead, assuming that this history *is* relevant or dispositive, how do we reconstruct it? Baude and Sachs suggest that this sort of historical inquiry is just "ordinary lawyering," which is simply the latest in a long line of efforts to try to wall off the kind of historical research that legal scholars do from the academic discipline of history.[33] In one sense, their claim that legal scholars are interested in a specific kind of historical inquiry is banally true, since all historical research necessarily privileges certain sources and questions over others. The more questionable extension is their attempt to bootstrap this accurate statement about *scope* into a claim about *method*. I think this extrapolation is wrong in ways my dispute with Nelson helps to concretely underscore.

Both Nelson and I engaged in precisely the sort of research that Baude and Sachs called for: an exploration using the era's "internal legal sources," including treatises and many court cases. But it was also strikingly different from the deed research that I teach in property law and that Baude and Sachs invoke as the paradigmatic example of "ordinary law." What makes deed research a targeted inquiry is that the doctrine itself deems certain legal instruments and historical moments highly relevant, if not dispositive, to the dispute.[34] Moreover, although the adversarial nature of the process makes it difficult for judges to say, "it

[30] See Ablavsky, supra note 3, at 281.

[31] The turn toward history and tradition has exacerbated this periodization problem, as Justice Barrett has acknowledged. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2162–63 (2022) (Barrett, J., concurring).

[32] See generally Alison L. LaCroix, The Interbellum Constitution: Union, Commerce, and Slavery in the Age of Federalisms (2024) (stressing the significant constitutional innovations and developments of the first half of the nineteenth century).

[33] Baude & Sachs, supra note 26, at 810.

[34] Id. at 813–15.

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depends," it also provides some comfort. Judges don't have to decide truth; they merely have to pick between two conflicting answers.[35] And if the history is ambiguous, then they don't have to rely on it at all.[36]

Writing my original article was qualitatively different. First, the evidentiary base was enormous, with potentially hundreds of relevant Supreme Court cases, alongside dozens of complex statutes. Many of the sources did not squarely address the separation-of-powers question however construed. Moreover, the goal here was to provide a full and faithful reconstruction of an entire body of law at a moment in time. As both Nelson's original article and his response underscore, the project itself mandated the large scope of the inquiry.

Now, to be sure, interpreting a single deed might sometimes involve a full-scale investigation into all of property law, though, as Baude and Sachs seem to suggest, that is exceptional, not ordinary, law. Even so, I would distinguish the more familiar lawyerly role of making sense of a chain of common law precedents from the work of reconstructing an entire jurisprudence. The latter required assembling a mass of fragmentary and often conflicting evidence into a coherent narrative about a particular historical moment, as well as trying to grasp how and why people in the past framed the arguments the way that they did, and then how and what changed over time. This work is not what we usually do in law schools, but it is historians' bread and butter. It is, to borrow a phrase, "ordinary history."

I am neither a legal philosopher nor a constitutional theorist. Others in those fields have forcefully critiqued Baude and Sachs's vision of the role of history in constitutional interpretation.[37] My point here is narrower: I think my dispute with Nelson challenges their claim that focusing solely on internal legal questions with a carefully policed set of sources somehow renders the search for the law of the past into the sort of "ordinary law" that any well-taught 1L can accomplish. Nor do I think

[35] See id. at 816, 818–19.

[36] Cf. Gamble v. United States, 139 S. Ct. 1960, 1969 (2019) (relying on precedent rather than "ambiguous historical evidence" to resolve constitutional dispute (quoting Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 479 (1987) (plurality opinion))).

[37] See, e.g., Balkin, supra note 25, at 240–53; Jonathan Gienapp, Against Constitutional Originalism: A Historical Critique 227–38 (2024); Charles L. Barzun, The Positive U-Turn, 69 Stan. L. Rev. 1323, 1371 (2017); Guha Krishnamurthi, False Positivism: The Failure of the Newest Originalism, 46 BYU L. Rev. 401, 405–06 (2021); Darrell A.H. Miller, Originalism's Selection Problem, 33 Wm. & Mary Bill Rts. J. 375, 382 (2024); Joseph Blocher & Brandon L. Garrett, Originalism and Historical Fact-Finding, 112 Geo. L.J. 699, 728 (2024).

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that Nelson and I are engaged in two fundamentally different projects. I think we are trying to do the same thing and genuinely disagree about the results.

This disagreement raises another and for me more pressing question: Is this exercise really how we want to resolve current-day legal disputes? Again, I credit Nelson for his willingness to delve into the complexities of nineteenth-century land law, but I know that he, too, believes that this material is quite arcane and technical.

On the one hand, it tickles me to think that how an obscure federal official handled, say, Jesuit land rights outside of the tiny village of Kaskaskia in the Illinois Territory in 1810 might shape sweeping questions of structural constitutional law now. History is significant for reasons not limited to its doctrinal importance. On the other hand, as readers may soon conclude themselves, this inquiry also seems an absurd way to make legal decisions, veering on parody. Chief Justice Roberts fed faculty lounge conversations for years when he dismissed the relevance of much legal scholarship by deriding a mythical article on "the influence of Immanuel Kant on evidentiary approaches in eighteenth-century Bulgaria."[38] And yet, by making current doctrine turn on the finer technical points of nineteenth-century administrative schemes, Roberts and his colleagues have turned his sarcasm into serious business. Other than relocating from Sofia to Sainte Geneviève, Missouri, or Natchitoches, Louisiana, is parsing the finer distinctions on how nineteenth-century Americans differentiated perfect and imperfect titles in what can only be described as a convoluted ad hoc system really so much better?

Perhaps practicality and administrability are beside the point if jurisprudence mandates this approach. But I don't think most lawyers and judges share that uncompromising view. They favor an approach to law that actually functions and so think questions of workability are relevant in assessing legal methods.

[38] See Judicial Conference of the Fourth Circuit Court of Appeals, A Conversation with Chief Justice Roberts, at 30:47 (C-SPAN, June 25, 2011), https://www.c-span.org/program/public-affairs-event/a-conversation-with-chief-justice-roberts/255002 ("Pick up a copy of any law review that you see, and the first article is likely to be the influence of Immanuel Kant on evidentiary approaches in eighteenth-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar."). But see Orin S. Kerr, The Influence of Immanuel Kant on Evidentiary Approaches in 18th-Century Bulgaria, 18 Green Bag 2d 251, 251 (2015) ("Kant's influence, in all likelihood, was none.").

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I am especially concerned about transparency and accessibility if we make doctrine turn on such fine points of legal history. The entry costs to understanding the disagreement between Nelson and me are high, since it requires lots of background knowledge. There are, maybe, three or four historians in the entire country writing today who have dug into the private land claims, and they haven't focused closely on the doctrinal aspects;[39] I identified only one other legal scholar who has written specifically on the topic.[40] In other words, you could count on one hand the number of people who can assess this question without spending months digging into the material. I suspect that, like Henry Adams, few others wish to spend that time.

Of course, the point of scholarship is to make this evidence accessible *without* replicating this deep dive, which was why I wrote the original article. Moreover, as Baude and Sachs assert, judges must routinely decide cases "in light of *other* people's discoveries," whether in history or macroeconomics or microbiology.[41] But I find that response unpersuasive for two interrelated reasons. First, while other disciplines supply legally relevant facts about the world, they are not themselves sources of law; no one argues that, if biologists make a new discovery tomorrow, judges must therefore apply a new set of doctrines. By contrast, if the law of the past is binding, then scholars unpacking that law are not just unearthing new evidence; they are dictating law's content. This power is why judges and lawyers in recent years have argued much more about history than they have about, say, gene editing.

Second, and relatedly, other disciplines have an internal infrastructure to adjudicate disagreements through peer review, journal acceptance, and the other ordinary structures of scholarly dispute. Law seemingly has some of those structures, too. But the problem is that, while economists and biologists largely decide what constitutes economics and biology within their fields, scholars don't decide the law; officials, and especially judges, do. So much of legal debate, and especially about the content of

[39] See, e.g., María E. Montoya, Translating Property: The Maxwell Land Grant and the Conflict Over Land in the American West, 1840–1900, at 19–20 (2002); Julia M. Lewandoski, Small Victories: Indigenous Proprietors Across Empires in North America, 1763–1891, at 71 (Summer 2019) (Ph.D. dissertation, University of California, Berkeley) (on file with author).

[40] M.C. Mirow, The Supreme Court, Florida Land Claims, and Spanish Colonial Law, 31–32 Tul. Eur. & Civ. L.F. 181, 182–83 (2017). Laura Gómez has also written about the private land claims, but not from a doctrinal perspective. Laura E. Gómez, Manifest Destinies: The Making of the Mexican American Race 123–38 (2d ed. 2018).

[41] Baude & Sachs, supra note 26, at 816.

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the law, thus happens in the shadow of, and sometimes directly within, litigation. All scholarship has normative stakes, but here the work's implications are immediately and obviously legible in ways that I think distort how disputes work in other disciplines.

What is especially odd about this sort of debate is that it demands that lawyers engage in and assess what is not really their field. The problem here is not disagreement, which is the lifeblood of scholarship; it is what the argument is about. Economists care about, and so fight about, economics; biologists argue over biology. Lawyers debate law, as they should. While their contentions often map on to political divisions, lawyers sincerely disagree over what constitutes law and how it should be decided. Moreover, the narrowness of the legal inquiry that Baude and Sachs highlight is valuable because it allows judges and lawyers to concentrate on a handful of legally dispositive issues and evidence. My students can readily read a judicial opinion, understand the competing interpretations of a statute, contract, deed, or precedent, and reach their own conclusions about what the legally correct outcome is.

But the logic of historical debate pushes in a different direction, no matter how much we might attempt to police its boundaries—toward ever deeper, wider, and more specialized explorations of *more*, not less, evidence, as my disagreement with Nelson reveals. It is almost touching, when I teach legal history, how much my law students want to replicate doctrinal approaches in assessing history: when I give them excerpts from full-length historical monographs, some (masochistically) ask for the entire book so that they can determine whether they "trust" the author. But I ruefully tell them, shy of replicating the entire research project themselves, that they must rely on the author's account of the past, even if they don't need to credit the author's interpretations. This is why, when historians argue, it tends to be over questions of narrative, emphasis, and methods rather than adjudicating specific pieces of evidence.

As a consequence, most of the evidence and context for the debate between Nelson and myself is effectively walled off from "ordinary" judges, lawyers, and legal scholars. In response, many will likely throw up their hands, casting as too academic and abstruse a debate that is, ironically, over the foundations of key recent Supreme Court decisions. More worrying are those who will proclaim a clear winner. Lawyers care a lot about law, and so if you tell them history is dispositive to law, they'll read history in ways that comport with the kind of law they favor. Though both Nelson and I want to get the private land claims right, I'm not

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convinced anyone else does. This has already happened, as Nelson notes: scholars on both sides of debates over public rights have invoked our research and either endorsed or distinguished away our conclusions based primarily on their prior views of administrative law rather than serious engagement with the history of private land claims.[42]

I worry, then, that my disagreement with Nelson reveals where the emphasis on the law of the past ultimately leads us—making law less accessible, less transparent, and even more reliant on supposedly expert opinions. For outside observers, even knowledgeable lawyers and judges, law becomes functionally indistinguishable from augury, in which the scholar cuts open the sheep and reads law in the entrails. Maybe this is the approach to law that we want or that we think law mandates, but I am skeptical on both counts.

II. WERE IMPERFECT RIGHTS VESTED?

And yet, despite my skepticism, let's now venture down into the rabbit hole once again—because, again, I think the history deserves to be taken seriously. As Nelson notes, he and I agree about much of how the system to adjudicate private land claims operated, so I want to focus on where we disagree. One core disagreement is whether imperfect land rights were *vested*. In my original article, I argued that they were, if only because Chief Justices Marshall and Taney used that term to characterize imperfect titles.[43] Consequently, I suggested, "Congress subjected vested rights to private property to non-Article III tribunals."[44] But in the very next paragraph, I anticipated that critics would "quibble with these conclusions": "We could argue that, when Chief Justice Marshall and other commentators said that imperfect land rights were vested rights to property, they were employing different definitions of the terms."[45]

This is, in fact, what Nelson argues. We agree, as I read it, that nineteenth-century jurists and commentators understood the private land

[42] Nelson, supra note 8, at 668 n.30.

[43] Ablavsky, supra note 3, at 321; Delassus v. United States, 34 U.S. (9 Pet.) 117, 133 (1835) (Marshall, C.J.) ("The sovereign who acquires an inhabited territory, acquires full dominion over it, but this dominion is never supposed to divest the vested rights of individuals to property."); Fremont v. United States, 58 U.S. (17 How.) 542, 558 (1855) (Taney, C.J.) ("[A]s between [the claimant] and the government, he had a vested interest in the quantity of land mentioned in the grant.").

[44] Ablavsky, supra note 3, at 347.

[45] Id.

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claims as property; the relevant question is whether they were vested. Nelson dismisses Taney's language describing them as vested rights because he did not have to decide whether the interests were "'vested' in the sense that operated even as against Congress and that would *require* judicial adjudication under the framework described in my earlier article."[46]

Grappling with this question requires delving further into the nature of imperfect land rights under the private land claims. The term "imperfect" here is deceptive, since to modern readers it might imply incomplete—in other words, not vested. But this reflects the unfamiliarity of these private land claims, a form of property more common to nineteenth-century land law than to today—further underscoring the challenge of reconstructing long-distant law. What made the imperfect titles *imperfect* was that the government had not yet conferred the present possessory interest in the land. Instead, the imperfect titles were *future* interests in government land. They could be analogized, perhaps, to a remainder following a life estate or leasehold, or a possibility of reverter following a fee simple determinable. Or, if this reference to the estates brings up too many dreary memories of bar prep, perhaps they could be analogized to a bond: an entitlement that gives the holder a right to governmental property in the *future*. As these analogies hopefully help illustrate, the property that potentially "vested" in cases of the imperfect rights was not the land itself (as it was in the case of the perfect rights): it was the future interest, an independent form of ownership that, like a bond, could itself be bought and sold. But as these analogies suggest, future interests could easily be vested rights to property that "operated even as against Congress."[47]

Were these future interests vested? I'm not sure that there's a way to adjudicate this question outside of the nineteenth-century statements *saying* that they were vested. When I discussed my original article with Lawrence Friedman, he responded that there had been no such thing as vested rights.[48] For my purposes, the fact that people spoke and wrote about vested rights was enough to give them reality, but I took his point to be what my digging confirmed: that, for all the considerable discussion

[46] Nelson, supra note 8, at 677.

[47] Id.

[48] I suspect Friedman's views reflected his disagreement with a prior generation of legal scholars, especially Edward Corwin, who placed enormous emphasis on vested rights. See Edward S. Corwin, The Basic Doctrine of American Constitutional Law, 12 Mich. L. Rev. 247 (1914).

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around the sanctity of vested rights, figuring out what amounted to "vesting" was hazy and manipulable.[49] In other words, because there was no formal doctrine of vested rights, especially within federal law, it is hard to resolve this question under the positive law of the time.

Nonetheless, Nelson, citing Ann Woolhandler, invokes a version of "vested" that echoes with many of the understandings of the time: that a claimant held enough of an ownership interest that Congress could not legally invalidate it.[50] In my read, the imperfect rights readily met that standard under most of the discussions of the era. Nelson and I agree the transfer of sovereignty did not alter the claimants' property rights, with one caveat.[51] A prior sovereign could have invalidated a grant if it wished. By entering the treaties, the United States forswore that freedom: it was now legally obligated to honor the grants to the same extent that they would have been valid under the law of the prior sovereign at the time of transfer. In this sense, the property right "operated even as against Congress." That was not because the claimant's property interest changed—the not-yet-canonical bundle of sticks remained the same—but because the law now limited the government's ability to alter the earlier grant. Some in Congress said as much: "[U]nder the Constitution of the United States and under the treaty, this bill cannot take away those rights, whether inchoate or merely equitable, which may exist in any one," one senator observed during the debate over the 1851 California Land Act.[52]

[49] See Ablavsky, supra note 3, at 349–50.

[50] Nelson, supra note 8, at 677–78, 695 (citing Ann Woolhandler, Public Rights, Private Rights, and Statutory Retroactivity, 94 Geo. L.J. 1015, 1031 (2006)).

[51] See id. at 680–91.

[52] Cong. Globe, 31st Cong., 2d Sess. 429 (1851) (statement of Sen. Joseph Underwood). This statement reflected widespread consensus during the debate over the California Land Law, with similar views expressed by both the bill's proponents and opponents. See id. at 361 (statement of Sen. Thomas Ewing) ("We do not attempt by legislation to affect the title of anybody whose title is secured by treaty. The treaty is a paramount law, and we cannot touch it, and do not propose to touch it."); id. at 362 (statement of Sen. Thomas Hart Benton) ("Every lawyer will tell you that the treaty is the paramount law of the land, and this act cannot deprive a man of his property. The Supreme Court tells you so . . . ."); id. at 363 (statement of Sen. John P. Hale) ("I take it to be clear that it is admitted by everybody, learned and unlearned, that if there be grants of land valid at the time we took this land by the treaty, they are preserved by the treaty, the laws of the United States, and the Constitution, and it is not competent for us to disturb them."); id. at 429 (statement of Sen. John M. Berrien) ("By the stipulations of the treaty we have bound ourselves to protect private property."); see also United States v. Clarke, 41 U.S. (16 Pet.) 228, 231–32 (1842) ("That Spain had the power to make grants . . . is a settled question. If the act was binding on that government, so it is on this, as the successor of Spain."); United States v. Moreno, 68 U.S. (1 Wall.) 400, 404 (1863) ("That cession [of California] did not impair the rights of private property. They were consecrated by the law of

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As I read Nelson, he agrees with much of this characterization, but nonetheless makes some distinctions. First, he quotes the language from *Chouteau*, which also appeared in my original article, noting that the treaties only imposed a "political obligation to perfect" inchoate claims, which could not be enforced by "any action of the judicial tribunals."[53] But this is just another way of saying, as we will discuss, that the claims were not judicially cognizable. The treaties did not perfect the imperfect claims on their own; otherwise they would have been perfect claims. But, as I was at pains in my original article to underscore, whether a claim was *perfect* was conceptually distinct from the question of whether it was *vested*. That the treaties did *not* perfect inchoate claims on their own does not demonstrate that the inchoate rights were not vested rights to property: again, future interests need not become possessory to be property interests. What made these "equitable rights" vested property rights was that they "counted as a species of property" and that "the United States [had] an obligation to respect those rights."[54] Those are Nelson's words describing them, not mine.

But, Nelson suggests, because the obligations in the treaties ran to the *sovereign*, rather than to the individual, they were not vested in the same sense as other property entitlements.[55] If Congress had eliminated these rights—under, say, the last-in-time principle governing treaties—it would have violated international law, but not domestic.[56] In other words, though there might have been an obligation to honor these rights, it was not a legally binding obligation at least as to these claimants.

I anticipated this objection in my original piece:

> [W]e could attempt to hive off the entire body of private land claims as sui generis, uniquely tied to foreign relations law and the treaty power.

nations, and protected by the treaty. . . . A right of any validity before the cession was equally valid afterwards . . . ."). The Senators also recognized that the relevant judicial precedent encompassed imperfect titles, too. See Cong. Globe, 31st Cong., 2d Sess. 375 (1851) (statement of Sen. John M. Berrien) ("The decisions of the Supreme Court of the United States . . . in regard to inchoate titles—titles not carried into complete execution and not rendered perfect by a compliance with all the terms of the grant—[are] that these titles, nevertheless, give a right of property . . . . That court has therefore recognized an inchoate title as giving a right which was protected by the treaty . . . .").

[53] Nelson, supra note 8, at 681 (quoting Chouteau v. Eckhart, 43 U.S. (2 How.) 344, 375 (1844)).

[54] Id. at 682.

[55] Id. at 681.

[56] Id. at 684–86.

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> Defending this conclusion, though, would require some difficult contortions. We would have to explain why so few at the time made this distinction and instead consistently analogized the private land claims to other kinds of land rights. We would also have to clarify why, if the treaty power simply authorized federal authority, nineteenth-century jurists spent so much time and attention parsing the distinction between perfect and imperfect rights. We would further have to come up with a convincing reason why, when the *Murray's Lessee* court crafted the category of public rights, the sole example it cited was an exception.[57]

I think these responses hold, but it is worth elaborating on them.

First, Nelson's view requires taking sides in a complex historical argument about the status of international law within U.S. law that was shifting in this period. Others have explored, and debated, this history much more fully and expertly than either of us—but I read that literature to suggest that the sharp divide that Nelson traces between international law and domestic public law was not realized until later in the nineteenth century.[58] Indeed, a number of originalists have turned to the language in these very treaties to elucidate the meaning of the Fourteenth Amendment's Privileges or Immunities Clause.[59]

[57] Ablavsky, supra note 3, at 348.

[58] See Marco Basile, The Splintering of American Public Law, 92 U. Chi. L. Rev. 1529, 1539–58 (2025) (noting the overlap between international and constitutional law in public law throughout much of the antebellum United States). For interventions in what has become a large and sprawling debate, see David M. Golove & Daniel J. Hulsebosch, A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition, 85 N.Y.U. L. Rev. 932, 1065–66 (2010); Anthony J. Bellia Jr. & Bradford R. Clark, The Law of Nations as Constitutional Law, 98 Va. L. Rev. 729, 738–39 (2012); Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 822–23 (1997); Stewart Jay, The Status of the Law of Nations in Early American Law, 42 Vand. L. Rev. 819, 832 (1989); Carlos M. Vázquez, Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position, 86 Notre Dame L. Rev. 1495, 1500–01 (2011).

[59] See, e.g., Kurt T. Lash, The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art, 98 Geo. L.J. 1241, 1285–87 (2010); Christopher R. Green, Incorporation, Total Incorporation, and Nothing But Incorporation?, 24 Wm. & Mary Bill Rts. J. 93, 111–15 (2015); David R. Upham, The Meanings of the "Privileges and Immunities of Citizens" on the Eve of the Civil War, 91 Notre Dame L. Rev. 1117, 1124 & n.42 (2016); Randy E. Barnett & Evan D. Bernick, The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment, 95 Notre Dame L. Rev. 499, 537 (2019). I am indebted to Jud Campbell for this point.

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Second, Nelson's view implies that, under the law of the time, treaties could not vest private rights, nor would the legal obligation run to individuals. But that was not true.[60] Perhaps what Nelson means is that the treaties were not self-executing, but the most famous case about self-executing treaties is, as Nelson himself notes, a case involving the security of private land claims under Spanish law.[61] So at least *some* of the treaties were self-executing—and the question of treaty self-execution in the early United States is *also* the subject of a large and complicated scholarly debate.[62]

Third, and more fundamentally, I question Nelson's unstated assumption that the *source* of the legal obligation to recognize the private land claims affects the question of whether they were *vested*. The source certainly mattered for whether they were judicially cognizable, as I will discuss shortly. But I don't read this distinction to mean that people at the time thought Congress had the legal right to simply disregard the prior land claims; in fact, many people at the time said the opposite.[63] Nelson emphasizes[64] that the Supreme Court subsequently held as a matter of constitutional law that Congress could overrule the treaties under the last-in-time principle,[65] but that decision merely put treaties on the same

[60] United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) ("[W]here a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress . . . ."); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 627 (1813) ("[W]e are well satisfied that the treaty of 1794 completely protects and confirms the title of Denny Fairfax . . . ."); Orr v. Hodgson, 17 U.S. (4 Wheat.) 453, 464 (1819) ("[T]he treaty [Jay's treaty] applies to this title . . . and gives it the same legal validity as if the parties were citizens.").

[61] Nelson, supra note 8, at 679 n.77 (discussing *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 83, 88 (1833)).

[62] For scholars who emphasize the judicial enforceability of treaties under early American law, see David Sloss, The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties, 24 Yale J. Int'l L. 129, 136–37 (1999); Carlos Manuel Vázquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Int'l L. 695, 695–96 (1995); Martin S. Flaherty, History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land," 99 Colum. L. Rev. 2095, 2099 (1999). For the contrary position, see Curtis A. Bradley, The Treaty Power and American Federalism, 97 Mich. L. Rev. 390, 394 (1998); Michael D. Ramsey, Executive Agreements and the (Non)Treaty Power, 77 N.C. L. Rev. 133, 138 (1998); John C. Yoo, Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding, 99 Colum. L. Rev. 1955, 1958–59 (1999).

[63] See Ablavsky, supra note 3, at 290; supra note 52 and accompanying text.

[64] Nelson, supra note 8, at 684–86.

[65] See The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1871) ("[A]n act of Congress may supersede a prior treaty."); Whitney v. Robertson, 124 U.S. 190, 195 (1888) ("The duty

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footing as statutes—which Nelson would surely concede *can* vest property rights.

Nor does it seem meaningful that legal obligation under the treaties formally ran to another country. This argument hinges on an appealing but deceptive analogy: if a treaty is akin to a contract, then it makes sense to think of the claimants here as outside of contractual privity.[66] But property is not contract: property rights are famously *in rem*, against all the world. The federal government's role here is not as a contracting party—the government is not usually in the business of contractually promising to honor individual property rights—but as a sovereign that determines the validity of particular property interests. In defining those interests, federal law, including the Fifth Amendment, largely defines property based on the laws of *other* sovereigns—usually those of the states, but in this instance, Spanish, French, or Mexican land law.[67] In my read, then, the relevant question is whether the federal government had legally bound itself to recognize these property interests—which, Nelson himself seems to concede, it had.[68]

More generally, I think Nelson is conflating right with remedy here: asking not whether Congress was legally obligated to honor the private land claims, but what remedies were available to disgruntled claimants. But even now, judicial enforceability is not the touchstone of the existence of a legal right; it was even less so in the less-realist antebellum era. *Luther v. Borden*, nearly contemporaneous with *Murray's Lessee*, did not excise the requirement to have a republican form of government from the Constitution by declining to have the Supreme Court assess it.[69] Even so, it's not clear to me that the divide was actually that stark, since, as Nelson's original article observed, federal sovereign immunity might have made it difficult for *any* claimant to recover against the

of the courts is to construe and give effect to the latest expression of the sovereign will. . . . [S]o far as the provisions of the act were in conflict with any treaty, they must prevail in all the courts of the country . . . .").

[66] Although even under this analogy, claimants could be analogized to third-party beneficiaries, a doctrine that was just developing at the time. See Lawrence v. Fox, 20 N.Y. 268, 274–75 (1859); Anthony Jon Waters, The Property in the Promise: A Study of the Third Party Beneficiary Rule, 98 Harv. L. Rev. 1109, 1115–16 (1985).

[67] See, e.g., Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .").

[68] Nelson, supra note 8, at 682.

[69] See Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849).

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government.[70] Now, we would consider such cases as ripe for challenge under the Takings Clause, but the idea of regulatory takings was still nascent in this period.[71] Even so, more recent jurisprudence has emphasized that land rights recognized through treaties constitute "property" protected under the Fifth Amendment.[72]

Distinguishing the imperfect land rights because they originated in treaties also proves too much. After all, the validity of the perfect land titles hinged on the same sources of law as the imperfect titles. But the law of the time clearly considered the perfect titles to be vested rights to property.[73]

In a lengthy footnote, Nelson anticipates this problem and attempts to explain the distinction by stressing that domestic U.S. law already made perfect land rights property.[74] But once again, what Nelson really means is *not* that the imperfect land rights were not property—their property status was very clear under the era's law.[75] Rather, as he acknowledges, the meaningful distinction between the perfect and imperfect rights was not whether their validity was rooted in international law; it was whether they could be enforced in court—whether they were "judicially cognizable."[76]

A similar conflation appears in Nelson's discussion of the debate around Legaré's opinion concerning the 1836 Missouri land claims confirmation statute, which, in the interest of space, I will discuss only briefly. In my read, the existence of this debate almost self-evidently underscores what I said in my original article: there was widespread disagreement and contention about the private land claims.[77] Legaré himself acknowledged as much. "[I]t is apparent that there has been, for twenty years past, great conflict of opinion, and the most active discussion

[70] See Caleb Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 582–85 (2007).

[71] Beginning in the late nineteenth century, the Court entertained (but declined to endorse) regulatory takings claims. See, e.g., Mugler v. Kansas, 123 U.S. 623, 664, 668–69 (1887). Not until the early twentieth century did the modern regulatory takings doctrine begin to take shape and subsequently develop over time. See Pa. Coal Co. v. Mahon, 260 U.S. 393, 413, 415 (1922); Pa. Cent. Transp. Co. v. New York City, 438 U.S. 104, 124, 136–38 (1978).

[72] See United States v. Sioux Nation of Indians, 448 U.S. 371, 417–24 (1980).

[73] See Ablavsky, supra note 3, at 315–16.

[74] Nelson, supra note 8, at 696 n.134.

[75] Ablavsky, supra note 3, at 289, 318–20.

[76] Nelson, supra note 8, at 696 n.134.

[77] See Ablavsky, supra note 3, at 318–20.

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and litigation, on all the points involved," he noted.[78] He was therefore quite modest in tendering "my opinion, and I am bound to give it as it is, right or wrong."[79]

My original goal was not to settle this debate but to use it to try to make sense of *why* nineteenth-century jurists found the private land claims so challenging. Nelson, however, resolves this "great conflict of opinion" by casting all parties as arguing *within* his framework. When people disagreed with Legaré, Nelson suggests that they implicitly rejected *both* Legaré's conclusion that the private land claims were not property *and* his conclusion that they fell within congressional adjudication.[80] That's what the congressional Committee on Private Land Claims did in 1842, after all.[81]

The problem, as Nelson himself notes, was the "longstanding practice[] of Congress," which, as the 1842 Committee pointed out, had been using "boards of commissioners" to decide "private right[s] to property" for fifty years—and continued to do so even after both the Committee and Legaré's report.[82] The 1842 Committee, in other words, did seem to share many aspects of Nelson's framework, and it seemed just as bewildered as him that Congress had diverged from it for a half century.

For this half century of congressional practice to have been "consistent" with Nelson's framework,[83] in other words, there would have to have been universal, if unstated, agreement with Legaré about the nature of the private land claims and implicit congressional rejection of the Supreme Court decisions that the Committee cited. This seems a wildly improbable interpretation.[84] The better read, in my view, is that the answers to the questions that Legaré flagged—were the private land claims property, and did they fall within Congress's power to adjudicate?—were all over the place and did not run tidily together. In other words, even though a constitutional cloud had long hung over Congress's practice, Congress persisted.

[78] Mo. Land Claims, 3 Op. Att'ys Gen. 720, 723 (1841).
[79] Id.
[80] Nelson, supra note 8, at 695.
[81] Id. at 694 (citing S. Rep. No. 27-440, at 7 (1842)).
[82] Id. (emphasis omitted) (quoting S. Rep. No. 27-440, at 7).
[83] Id. at 695.
[84] Indeed, only four months before the report that Nelson cites, the same Committee issued a report that described the private land claims as "private property" but nonetheless urged Congress to enact a bill to resolve disputes in the ways that the subsequent report criticized. S. Rep. No. 27-258, at 2–4 (1842) (emphasis omitted).

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The Supreme Court, too, seemed to bless this outcome by describing the private land claims as property *and* nonetheless subject to congressional adjudication, as I stressed in the original article.[85] Nelson frames this as agreement with Legaré's conclusion by noting that the Court agreed with Legaré that the private land claims were different from other kinds of property rights because they were not judicially cognizable.[86] But my original article did not argue that the Court did not distinguish the private land claims; indeed, it emphasized that the Court did.[87] For Nelson to be correct, though, the Court would have had to distinguish the private land claims on the same grounds that Legaré advanced—that the private land claims were not property or not vested. In fact, as I stressed in my original article, it disagreed on both of those points.[88] Once again, we see that the true basis for differentiating the private land claims was neither of these traits, but whether the claims were judicially cognizable.

In other words, I think it is ultimately this question of "judicial cognizability" that divides Nelson and me, not the question of vesting. At least as I read him, Nelson concedes that Congress believed itself bound by law to honor valid prior land grants, even if no court would force them to do so. He acknowledges that the imperfect land rights were *not* a privilege that Congress could revoke. Since this issue of judicial cognizability strikes me as the true basis for our disagreement, let's turn to it now.

III. JUDICIAL COGNIZABILITY

If imperfect private land claims *were* vested rights to property, their history would seem to contradict Nelson's claim that "[w]hen the government wished to take direct and adverse action against someone's core private rights"—which encompassed vested rights to property—"an exercise of 'judicial' power was necessary."[89] But Nelson now argues that the "operation of th[is] framework could have been limited to interests

[85] See Ablavsky, supra note 3, at 319–20 (first citing Soulard v. United States, 29 U.S. (4 Pet.) 511, 512 (1830); and then citing Menard's Heirs v. Massey, 49 U.S. (8 How.) 293, 307 (1850)).

[86] Nelson, supra note 8, at 695.

[87] Ablavsky, supra note 3, at 324 ("[I]mperfect private claims differed from other imperfect land claims in that they could be resolved only through Congress . . . .").

[88] Id. at 320–22.

[89] Nelson, supra note 70, at 572.

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that were judicially cognizable."[90] In other words, in response to my critique, he carves out a new exception to his earlier position: it operated only with respect to "*judicially cognizable* vested rights," a phrase that shows up eleven times in his response[91] but appeared nowhere in his original article.

The question, then, is how sweeping Nelson's newly announced exception is. Returning to the original language of *Murray's Lessee* is helpful here, since it introduced this rather clunky language of "judicial cognizance" into the debate.[92] Here is the Court's key quote elaborating what subsequently became known as the public rights doctrine:

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider [C]ongress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time[,] there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which [C]ongress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of [C]ongress whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful.[93]

In other words, *Murray's Lessee* made judicial cognizability the core of the test for whether Congress could subject rights to administrative adjudication. Limiting the application of Nelson's framework to *judicially cognizable* vested rights thus strips his framework of much of its resolving power. Instead of the relevant question being whether something was a core private right, as Nelson originally suggested, the test is now whether it was a *judicially cognizable* private right. But it's

[90] Nelson, supra note 8, at 695.

[91] Id. at 661, 698 & n.136, 709, 712, 713, 718, 726 n.226 (emphasis added).

[92] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856).

[93] Id.

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hard to say that adds much to our understanding, since that's pretty much what *Murray's Lessee* already said.

This then begs the question: What determined whether a right was judicially cognizable? If Congress historically had the power to render vested rights administratively adjudicable by declaring them judicially noncognizable, then this limitation doesn't seem like a limitation; it seems like a drafting requirement.

Nelson anticipates the concern that this test is "circular"—that is, that imperfect land rights were not judicially cognizable simply because Congress and the courts deemed them not to be judicially cognizable.[94] This critique might be valid, he suggests, "if there were no external logic to ideas about which property interests were and were not judicially cognizable, and if imperfect titles in the ceded territories therefore should have been treated like other property interests for purposes of the framework."[95] He continues:

> But while a different Court might have reached different conclusions, there are doctrinal explanations for the distinctions that the Court drew. The idea that the relevant imperfect titles were not judicially cognizable reflected the Court's view that Congress was in charge of the mechanisms for confirming those titles, which in turn reflected the Court's understanding of the nature of international obligations and the role that domestic U.S. law gives the political branches in deciding how (and perhaps even whether) to carry out those obligations.[96]

I agree with nearly[97] everything in this paragraph, but I am unpersuaded that requiring "external logic" provides much of a limitation on either Congress or courts. Of course there were doctrinal explanations for what the Court did; providing doctrinal explanations is, after all, largely what a Supreme Court opinion is. But coming up with defensible doctrinal explanations for legal distinctions doesn't seem to me a constraint. It seems more like an essential lawyerly skill that I expect all my law students to master. If Congress decided to make patents,[98] SEC fines,[99] or

[94] Nelson, supra note 8, at 696.

[95] Id.

[96] Id.

[97] As discussed in Part II above, I quibble with the "whether," beyond some sort of legal realist sense that Congress can flout its legal obligations if it chooses.

[98] Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373 (2018).

[99] SEC v. Jarkesy, 144 S. Ct. 2117, 2131 (2024).

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rights in bankruptcy[100] judicially noncognizable—to pick just a few of the rights at issue in recent disputes over the public rights doctrine—I bet smart judges could offer plausible doctrinal explanations for treating them differently, too. In fact, we know that there are such explanations, because they were proffered by Justices in those cases.[101]

Here's the fundamental challenge as I see it. The appeal of Nelson's original article, in my read, was that it avoided the current messiness and subjectivity of the public rights doctrine by grounding the issue in something concrete and essential about the legal rights at issue. Nelson persuasively suggested that whether something was a vested right to property in the nineteenth century reflected the "nature of the legal interests being adjudicated."[102] By contrast, whether a right was "judicially cognizable" was arguably more amorphous and less dependent on some core aspect of the interest itself. If pressed as to why nineteenth-century judges, lawyers, and Congress thought that the private land claims were not judicially cognizable absent congressional action, I would point to a mixture of path dependence as well as their sense that perfecting titles was a political, rather than judicial, responsibility.

But these were not essential characteristics of private land claims' nature as property. Whether the private land claims "*should* have been treated like other property interests"[103] seems to me unanswerable as a historical question; as we have seen, some people at the time thought the answer was yes, but practice and Supreme Court precedent were otherwise.[104] But the answer to whether the private land claims *could* have been treated like other property interests seems much clearer: yes. We know this was the answer partly because Congress sometimes opted to do

[100] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) (plurality opinion).

[101] See, e.g., *Oil States Energy Servs.*, 138 S. Ct. at 1376 ("[H]istory does not establish that patent validity is a matter that, 'from its nature,' must be decided by a court." (citation omitted)); *Jarkesy*, 144 S. Ct. at 2163–64 (Sotomayor, J., dissenting) ("The practice of assigning the Government's right to civil penalties for statutory violations to non-Article III adjudication had been so settled that it became an undisputable reality of how our Government has actually worked." (internal quotation marks omitted) (citation omitted)); *N. Pipeline Constr. Co.*, 458 U.S. at 72–74 (plurality opinion) (rejecting United States's argument that broad scope of federal authority over bankruptcy justified a non-Article III tribunal); id. at 117–18 (White, J., dissenting) (arguing that the "specialized" nature of bankruptcy sufficed to justify a non-Article III court).

[102] Nelson, supra note 70, at 613.

[103] Nelson, supra note 8, at 696 (emphasis added).

[104] See supra text accompanying notes 77–88.

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just that.[105] But, more broadly, one thing I feel confident asserting, having written an entire book about early American land law, is that the private land claims closely resembled many of the forms of land rights that swirled around the early United States.[106] In other words, there was nothing essential about the private land claims' character as property—in their "nature"—that made them judicially noncognizable. Courts could easily have assimilated them into well-established domestic property law rules with no additional legislation. The reason they didn't, and really the only meaningful difference between them and other property rights, was their *source*.

Is this difference enough to distinguish the private land claims away and render this history irrelevant to the history of public rights? On the one hand, property law routinely defines entitlements differently based on their source. On the other hand, once we move beyond the inquiry of whether the law considers a right to be "property" and instead peer behind it to consider the *source* of that property entitlement, then the potential distinctions are endless. Congress could establish an administrative tribunal to adjudicate all claims to stolen property, perhaps, or maybe just all property devised by a will.

These examples conflict with long-standing custom and practice, and maybe, at the end of the day, that is the primary constraining principle. If a form of property right has historically fallen within courts, then Congress cannot remove it to administrative agencies.[107] This distinguishes away the private land claims, though it also has the effect, like other arguments based on prior practice, of freezing the law. All novel forms of property could be theoretically subject to administrative adjudication: Congress could establish an Article I crypto tribunal. Opponents would surely argue that crypto is akin to Nelson's "normal" nineteenth-century property interests, and litigants would have the familiar battle over historical analogies and levels of generality, but I am skeptical that they could point to anything *essential* that differentiates such property from other assets that are not "judicially cognizable."

[105] See Ablavsky, supra note 3, at 294–95 (noting examples of federal statutes which directed private land claims to Article III courts).

[106] See Gregory Ablavsky, Federal Ground: Governing Property and Violence in the First U.S. Territories 19, 21, 39, 46, 79–80, 84, 98–99, 102, 104 (2021).

[107] Cf. SEC v. Jarkesy, 144 S. Ct. 2117, 2146–47 (2024) (Gorsuch, J., concurring) ("[P]ublic rights are a narrow class defined and limited by history.").

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Ultimately, what I think Nelson's newly announced exception attempts to do is add an additional element—judicial cognizability—to his original definition of property. If the private land claims weren't judicially cognizable, he implies, then they weren't property in the true sense in the first place. I see two problems with this approach. First, it effectively smuggles the *Murray's Lessee* test back into the framework that Nelson proposed to clarify that notoriously ambiguous case, thus adding very little to our understanding of the case and its application. Second, though I am dubious of all efforts to define some essence of property, it is especially hard to argue that Nelson's version of property was that of nineteenth-century jurists and lawyers given that they routinely recognized that private land claims were both *property* and *judicially noncognizable*. In short, I read Nelson's revised test to implicitly support what I suggested in my original article: that the more relevant line of precedent "focuses more on congressional intent and entanglement with a 'public regulatory scheme' than on strict categorization."[108]

IV. THIRD PARTIES AND CALIFORNIA

Finally, I will briefly address Nelson's points about the effects on third parties and the California Land Act of 1851.[109]

You will search in vain for a reference to Nelson's work in my discussions of these topics in my original article—and that is because, as the citations reveal, my disagreements here were with others. Will Baude and Jerry Mashaw, for instance, had asserted, based on the language of the statutes, that the confirmations of the private land claims had no effect on "third part[ies]."[110] We can debate what exactly that language meant, but, as I was careful to note, the confirmations *did* have meaningful effects on multiple property holders who were not parties to the specific dispute between the claimant and the federal government. First, the confirmations bound all subsequent claimants who were in privity with the federal government.[111] These are arguably not third parties—because of the relationship of privity—but this rule was nonetheless highly consequential: because the federal government distributed nearly all of

[108] See Ablavsky, supra note 3, at 348 (footnotes omitted).

[109] California Land Act of 1851, ch. 41, 9 Stat. 631.

[110] See Baude, supra note 21, at 1543–44; Jerry L. Mashaw, Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829, 116 Yale L.J. 1636, 1717 (2007).

[111] Ablavsky, supra note 3, at 306.

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the land in the West, most property owners traced their title to the federal government.[112]

Second, and probably more in line with what Baude and Mashaw had in mind, the commissioners' decision to recognize one imperfect title over another imperfect title effectively invalidated the other title, even if they were not party to the proceeding.[113] This issue came up repeatedly in the case law and discussions, and the courts expressly recognized and acknowledged this consequence.[114] In this sense, then, these commissions' decisions had preclusive effects on at least some third parties.

Nelson dismisses this evidence, however, because all the rights involved were imperfect rights—which I never disputed—and instead demands evidence that "nonjudicial confirmation of imperfect claims could abrogate claims of pre-existing vested rights that were judicially cognizable but that the rights holders had never had an opportunity to present in court."[115] In other words, once again, what is doing the work here is the distinction between rights that were "judicially cognizable" and those that were not.

Even under this standard, however, my article cited cases that met that standard, as Nelson's response itself suggests.[116] These facts were presented in many of the later California cases, which upheld the

[112] Id.

[113] Id. at 307–08.

[114] Id. One practical example of how this operated: in her forthcoming book, the historian Rachel Shelden traces the litigation around the land grants involving the New Almaden mine. Rachel Shelden, The Political Supreme Court: A Forgotten History (forthcoming 2026) (on file with author). During that litigation, one set of claimants hired the former Attorney General Jeremiah Black at enormous expense—an estimated $180,000, the largest retainer of the era—to *both* advance their claim in front of the commission *and* work to invalidate *another* claim in a separate proceeding. The claimants, in short, were willing to pay large sums because of the preclusive effects of these outcomes. Id. (manuscript of ch. 8 at 28–31, 37).

[115] Nelson, supra note 8, at 714.

[116] Nelson notes the robust effect of confirmation embraced by Justice Stephen Field that I described in my original article but suggests that it was "compatible with the framework described in [his] earlier article" because, once confirmed, courts could determine their priority with respect to other titles. Id. at 692. But of course, this concession necessarily implies that "nonjudicial confirmation of imperfect claims" would, in fact, "abrogate claims of pre-existing vested rights" as long as their origin postdated the original imperfect claim: indeed, I see it as a recognition that confirmation *did* sometimes have preclusive effect on other parties. Id. at 714. The question of priority is misleading, since this question can occur in *any* conflict between two property interests. See, e.g., Baskurt v. Beal, 101 P.3d 1041, 1044 (Alaska 2004) (deciding priority between two conflicting titles based on state recordation statute).

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confirmations of the commissions against such judicially cognizable vested rights as the state's public trust easement.[117] And I quoted the Ninth Circuit's reasoning on this point: "When the confirmees had submitted their claims to the commissioners, the court reasoned, 'they were entitled to believe that adverse claims to their lands had been eliminated.'"[118]

These cases were decided under the California Land Act of 1851, which presents a more significant problem for Nelson than for me. In my view, because many nineteenth-century commentators thought that imperfect land claims were vested rights to property, their routine administrative adjudication alone prior to the Act undercuts Nelson's framework. I was interested in the Act as a historian intrigued by conceptual and institutional change over time. One novel aspect of the 1851 Act was that it explicitly subjected perfect titles to administrative adjudication, too.[119] But for Nelson, this change poses yet another challenge to his framework to fend off. Because he concedes that the perfect titles *were* vested rights to property, he thus has to explain the 1851 Act away, too.

He does so in precisely the way that I predicted: by emphasizing the *other* key innovation of the 1851 Act, which provided optional de novo review of the commissions' rulings in Article III courts.[120] He notes that, though I noted both of these novel features, I did not expressly connect them even though, in his reading, they "are linked": the constitutionality of encompassing the perfect titles *required* the availability of federal court review.[121]

Perhaps. I did not connect the two because, as far as I saw in the historical record, no one made that argument. I am always hesitant to offer constitutional explanations and arguments for past law that no one at the

[117] Ablavsky, supra note 3, at 339–43.

[118] Id. at 343 (quoting United States ex rel. Chunie v. Ringrose, 788 F.2d 638, 646 (9th Cir. 1986)). Nelson would likely respond that these more extreme applications of the doctrine reflected the 1851 Act's forfeiture provisions discussed more fully below—although, of course, that is not what the Ninth Circuit said—but I am not sure that this meaningfully distinguishes the effect of confirmation upon third parties.

[119] Id. at 330.

[120] See id. at 347 ("We could claim that the advent of de novo court review cured any constitutional defects, even though this did not occur until the United States had already been addressing these claims for over sixty years.").

[121] Nelson, supra note 8, at 718.

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time voiced but that conveniently make prior developments align with an interpreter's "way of thinking."[122]

Consider the extensive congressional debates over the Act. Here, Nelson's investigation convinced me that my original article overclaimed in one respect: I elided some of the context in Senator Berrien's quote that the commissioners' decisions could be final in minor claims.[123] I am not persuaded that Berrien was necessarily limiting his comments solely to decisions in favor of claimants, for the simple reason that he did not say so, but I accept Nelson's point that the context makes the meaning ambiguous. Even if limited solely to confirmations of a perfect right, such rulings could potentially have consequences for parties other than the United States if, as many feared, they would be read as something more "than a relinquishment of [federal] title"[124]—which, of course, is what happened—but that question was highly contentious during the debates, and Berrien was eager to limit that potential interpretation.

I nonetheless remain struck by the near-complete absence of any discussion of the appellate role of the federal courts in this debate. The challenge here is that both Nelson and I are engaged in the fraught task of arguing from silence, which we read differently. Nelson finds the omission of any discussion unsurprising because, in his telling, the bill's provision of appellate review resolved any potential separation-of-powers concerns.[125] Perhaps—an explanation that has the benefit of being unfalsifiable. I personally find this read of the silence unconvincing. The debate over the California Land Act was not a short, minor consideration of the land commissions. It was, rather, the most sustained and prolonged airing of constitutional arguments about the private land claims in Congress that I found in my research, with extensive disagreements about the scope and limits of federal power.

Indeed, the debate over the California Land Act was so rich and interesting because, in a sense, it proved Nelson right: Congress clearly had significant separation-of-powers concerns about adjudicating the private land claims through the boards of commissioners. There was lots of discussion about the merits and legality of their adjudications; about the legal effects of the confirmations or rejection of title; about the

[122] Id.

[123] See Cong. Globe, 31st Cong., 2d Sess. 426 (1851) (statement of Sen. John M. Berrien); Ablavsky, supra note 3, at 334; Nelson, supra note 8, at 721.

[124] Cong. Globe, 31st Cong., 2d Sess. 428 (1851) (statement of Sen. Isaac P. Walker).

[125] Nelson, supra note 8, at 720.

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availability of juries; and about the possibility of having separate federal court proceedings to adjudicate title between private claimants.[126] And yet, nowhere in that extensive debate about the legality of this process did anyone articulate that the availability of federal court review of the commissions' decisions was at all relevant to the question of their legality—even as they *did* point to the significance of federal court adjudication of disputes among claimants. Nelson quotes Senator Gwin's bare summary of the bill on behalf of the drafting committee that courts would be involved.[127] He does not quote Senator Gwin's statement that this judicial oversight remedied the concerns that emerged during the debates about the commissions' ruling on perfect as well as imperfect titles—because no such statement was made.[128] Instead, what the senators defending the bill said was something quite different: they said this adjudication was acceptable because, as I discussed in my article at length, it did not implicate "private right."[129]

This is a fascinating argument given the context of the debates of the public rights doctrine, and I spent quite a bit of time unpacking it in my original article. But my conclusion remains the same now as it was then: the definition that they were deploying was "strikingly ambiguous."[130] In part, I think, what they were struggling with was the core dilemma that the private land claims presented. Because the claims involved the federal public domain, and because the adverse party was formally the United States, they *felt* like familiar questions of governmental discretion—hence how Berrien could assert that, in a dispute between the United

[126] See Ablavsky, supra note 3, at 331–35 (chronicling the debate).

[127] Nelson, supra note 8, at 720 n.205 (quoting Cong. Globe, 31st Cong., 2d Sess. app. at 58 (1851) (statement of Sen. William Gwin)).

[128] Nelson argues that Senator Benton *did* invoke his framework in another debate over a prior, failed bill to address both California and New Mexico private land claims through the then-conventional method of having boards of commissioners report on the land claims to Congress for confirmation. Id. (quoting Cong. Globe, 30th Cong., 2d Sess. 255 (1849) (statement of Sen. Thomas Hart Benton)). As the context makes clear, Benton's objection about the "confounding of the legislative power with the judicial power" concerned Congress's "legislative action in passing upon judicial questions concerning titles"—the practice that, Benton expressly acknowledged, was what had happened in Louisiana and elsewhere. Cong. Globe, 30th Cong., 2d Sess. 255 (1849) (statement of Sen. Thomas Hart Benton) ("[T]he committee have copied an old plan which has been heretofore used . . . ."). If Benton *was* voicing Nelson's framework, then, the problem was the same as with the 1842 Committee on Private Land Claims: that objection could not account for the fifty years of settled practice that preceded it. See supra text accompanying notes 82–83.

[129] See Ablavsky, supra note 3, at 331–33.

[130] Id. at 334.

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States and the claimant, "[n]o question of private right arises there."[131] But of course, there *was* a private right to property involved in such a contest—the right of the claimant. And so they went in circles trying to untangle this puzzle.

Ultimately, I read the debate over the California Land Act as demonstrating the more straightforward conclusion that there *was* a debate rather than some universally accepted set of constitutional principles. There is no question that Congress was concerned about the sort of separation-of-powers concerns that Nelson flagged. But I think it takes a very determined reader to delve into the mass of competing views, arguments, and definitions they aired and emerge with a coherent framework.

In my view, this perspective helpfully frames the Supreme Court's decision, nearly four decades later, in *Botiller*.[132] The reason I thought *Botiller* such a watershed is that it collapsed what had been, consistently, the *key* dichotomy in the private land claims jurisprudence: the divide between perfect and imperfect claims.[133] Indeed, notwithstanding the fact that the statute itself pretty clearly lumped the two categories together, litigants kept insisting on the difference, and they routinely got courts—most significantly, the California Supreme Court in *Minturn*—to agree.[134] Whatever else *Botiller* represented, then, it marked an important jurisprudential change.

I am thus not sure whether Nelson needs to argue that *Botiller* is consistent with his framework: it would also be plausible to argue that a Supreme Court decision in 1889 got it wrong, in the same way that Nelson presumably thinks that some of the twentieth-century public rights decisions were wrongly decided. Of course, setting out to defend a "traditional" nineteenth-century framework requires flattening the questions of conceptual shift and evolution that historians find so interesting, since change undercuts this perspective. But fitting *Botiller* into Nelson's framework presents a hard lift.

It seems odd to rehearse the facts of *Botiller* a third time, so let me just reconstruct the reasoning. The case squarely presented the question of whether the 1851 California Land Act required the submission of perfect

[131] Cong. Globe, 31st Cong., 2d Sess. 351 (1851) (statement of Sen. John M. Berrien).

[132] Botiller v. Dominguez, 130 U.S. 238 (1889).

[133] See Ablavsky, supra note 3, at 337–38 (describing *Botiller* as a "major, even radical, remaking of private-land-claims jurisprudence").

[134] See Minturn v. Brower, 24 Cal. 644, 663–68 (1864).

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titles to the boards of commissioners—and if so, whether Congress had that authority.[135] The Court answered yes to both questions.[136]

In explaining its conclusions, the Court started with the block quote in Nelson's response, observing that, under the 1851 Act, the claimant could defend a perfect claim in either the boards of commissioners or, on appeal, in the federal courts.[137] The Court then went on an extended discussion underscoring the lack of "any injustice, any want of constitutional power, or any violation of the treaty" in the "means" that the United States employed.[138] It was here, as I quoted in my original article, that the Court said that requiring a claimant to "present his demand to a tribunal possessing all the elements of judicial functions, with a guarantee of judicial proceedings," made no legal difference.[139] I did not discuss in my original article what followed: a lengthy rehearsal of how Congress had adjudicated the private land claims in Florida, Louisiana, and elsewhere, and the tediousness of this process.

> The wisdom, therefore, of the present act in regard to the land claims in California is manifest by a comparison with those earlier statutes in which Congress undertook to do the same thing which it desired to do in the act of 1851, but which failed for want of a clear, satisfactory and simple mode of doing it, by bringing all the parties before a tribunal essentially judicial in its character, whose decisions should be final without further reference to Congress.[140]

I read the tenor of the opinion as highly functionalist, focused on the nature of the boards of commissioners as "possessing all the elements of judicial functions" or as "essentially judicial in its character."[141] Indeed, that is the upshot of some of the language that Nelson himself quotes: "What difference can it make, then, that the party who is supposed to possess all the evidences which exist to support his claim is called upon to come before a similar tribunal and establish it by a judicial

[135] *Botiller*, 130 U.S. at 242–43.
[136] Id. at 250.
[137] Nelson, supra note 8, at 719 (quoting *Botiller*, 130 U.S. at 249).
[138] *Botiller*, 130 U.S. at 250.
[139] Id.; Ablavsky, supra note 3, at 338.
[140] *Botiller*, 130 U.S. at 251–52.
[141] Id. at 250, 252. I don't think there can be any meaningful debate that these descriptions referred to the boards of commissioners rather than to the federal courts. They would both be extremely weird ways to describe an Article III court.

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proceeding?"[142] Similar tribunal to what? "[A] court of justice," according to the prior sentences,[143] making it clear to me that the "tribunal" that the Court is referring to is the boards of commissioners. If that reading is correct, then the Court's conclusion that it "did not make a constitutional difference," in Nelson's words, whether the claimant had to try their land titles in a conventional court or before the boards of commissioners seems to cut to the very core of his framework.[144]

Now it is *possible* that the Court thought that this was all permissible *only* because of the availability of de novo court review. And maybe that's what the Court meant with its brief phrase "with a guarantee of judicial proceedings," as Nelson suggests[145]—or perhaps this phrase referred to the court-like rules of procedure that governed the boards of commissioners, whose "judicial character" the Court kept harping on.

Either way, it strikes me as odd once again that an issue that in Nelson's telling was *essential* to and *dispositive* of the constitutional question merited no clearer or firmer discussion than, at best, an "ambiguous"[146] six-word aside in the over three pages that the Court devoted to the question, recounting in depth the history of the adjudication of the private land claims and the novelty of the California approach. Sure, read in a certain way, the opinion can be pushed not to contradict Nelson's framework; read another way—one I find more natural—it significantly challenges it. Either way, I would be more persuaded if, instead of being potentially consistent with it, the opinion had affirmatively *voiced* the framework that Nelson claims was employed in the past.

One additional oddness is Nelson's confidence that the existence of federal court review as provided under the 1851 Act would cure any constitutional defect in subjecting the claims to administrative adjudication. In my read, the Act's structure still violates current doctrine governing non-Article III tribunals. First, the federal court review proceeded in equity, not in law,[147] and so there was no jury trial right. This would arguably violate the Supreme Court's latest articulation of the Seventh Amendment right to a jury trial, which says that Congress cannot

[142] Id. at 250; see Nelson, supra note 8, at 720.
[143] *Botiller*, 130 U.S. at 249.
[144] Nelson, supra note 8, at 720.
[145] *Botiller*, 130 U.S. at 250; Nelson, supra note 8, at 719 n.201. Nelson's language here is strikingly equivocal: "the right to de novo review in the regular courts may well have been part of the 'guarantee' that the Court had in mind." Id.
[146] Nelson, supra note 8, at 719 n.201.
[147] California Land Act of 1851, ch. 41, §§ 9–10, 9 Stat. 631, 632–33.

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deprive litigants of a jury trial in cases that would have traditionally occurred at law—as an ejectment action very much was.[148] Second, my understanding of the current law governing Article I "adjuncts" to Article III courts—as this reading would render the boards of commissioners—is that they lack the authority to enter final judgments, which can be issued only by Article III courts.[149] By contrast, the decisions of the boards of commissioners *were* final and binding if they were not appealed.[150]

Finally, as I noted in my original article, many in Congress were very concerned about the provisions for forfeiture if claims were *not* submitted to the commission.[151] I did not delve deeply into this orthogonal question in my prior piece, but people at the time thought that this aspect of the law raised complicated constitutional questions. Some flatly asserted that any provision for forfeiture would be unconstitutional, leading others to argue—implausibly, as Nelson notes[152]—that the law did not effect a forfeiture at all.[153]

Nelson argues that those objections were wrong, since provisions like statutes of limitations or recordation statutes could require property owners to undertake certain actions under pain of forfeiture.[154] I am less confident dismissing arguments that people in the past made about the law of their own era. After all, as the bill's opponents noted, there was a significant difference both practically and legally between recordation and adjudication: this was "a bill to try [a claimant's] title instead of only registering it," Benton complained.[155] Could Congress, upon penalty of

[148] See SEC v. Jarkesy, 144 S. Ct. 2117, 2128 (2024) (holding that the Seventh Amendment protects all claims that are "legal in nature" (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53 (1989))).

[149] See Baude, supra note 21, at 1554–55 (discussing the doctrine of "adjuncts"); United States v. Raddatz, 447 U.S. 667, 683 (1980) (finding that delegation to a magistrate judge, an adjunct to the district court, "does not violate Art. III so long as the ultimate decision is made by the district court").

[150] See California Land Act of 1851 § 13, 9 Stat. at 633 (describing the commissioners' power to "finally reject[]" a claim, subject to appeal in federal district court).

[151] See Ablavsky, supra note 3, at 333 (recounting the debate over forfeiture).

[152] See Nelson, supra note 8, at 722–23.

[153] Cong. Globe, 31st Cong., 2d Sess. 363–64 (1851) (statement of Sen. Thomas Ewing) ("There is nothing in it at all unconstitutional. If it attempted to forfeit the title of an individual who did not present his claim, and declare that upon his failure to present it his title should be forfeited, it would be unconstitutional . . . ."); see Ablavsky, supra note 3, at 333.

[154] Nelson, supra note 8, at 723.

[155] Cong. Globe, 31st Cong., 2d Sess. 364 (1851) (statement of Sen. Thomas Hart Benton). I am deferential to Nelson on the nineteenth-century law of forfeiture, which he has spent more time unpacking than I have. See generally Caleb Nelson, The Constitutionality of Civil

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forfeiture, require every land title in Ohio to undergo administrative review—or, in a more modern context, subject every holder of, say, a Bored Ape NFT to such an adjudication?[156] I don't pretend to know the answer to these questions either then or now, but I find the argument that the California Land Law was categorically different from a recordation statute significant enough to make the question hard.

CONCLUSION

In the end, as much as I appreciate and value Nelson's willingness to take my arguments and evidence seriously and thoughtfully—consideration I have attempted to repay—I am unsure how much our conversation will move the proverbial scholarly ball forward. As I have described, I had anticipated most of the counterarguments in my original article and attempted to offer responses there. I am unsurprised that Nelson wasn't persuaded then, and I doubt that he or those sympathetic to his account will be persuaded now that we've rehearsed these questions at greater length—though I do appreciate his concession that the private land claims fit poorly into his original taxonomy and required the construction of a new exception.

For myself, I remain equally unmoved by Nelson's reply, and for a simple reason: I think he set himself a very difficult task in defending a "coherent" nineteenth-century legal framework.[157] I would submit that, if it takes 30,000 words to explain away all the contradictory evidence involving one purported "pocket" of law, perhaps it was not that coherent to start with. It is always simpler to argue for complexity and nuance, which is a more congenial home for a historian anyway. But I also think that it is truer. Baude and Sachs suggest that historical uncertainty and

Forfeiture, 125 Yale L.J. 2446 (2016). Nonetheless, the Land Act was clearly not an instance of what scholars described as "asset forfeiture"—that is, in which the property itself was misused in some way. Id. at 2507–08; Stefan D. Cassella, Asset Forfeiture Law in the United States § 4-1 (2d ed. 2013). So the relevant question, as Benton flagged, was whether this provision was analogous to forfeiture under the era's state recordation statutes for failure to register title or under state law for failing to file a claim with the probate court. It is striking to me that here—where the *disanalogies* with other forfeiture provisions seem striking and were discussed at the time—Nelson, otherwise so eager to make distinctions, seems to think the similarities so obvious as to require no elaboration.

[156] This might also be unconstitutional by exceeding Congress's enumerated powers, but the point here is that such stringent and sweeping forfeiture provisions start to resemble adjudication outside of Article III in ways that distinguish them from other forfeiture laws.

[157] See Nelson, supra note 70, at 564.

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complexity are not problems for judges, because, even if the history is ambiguous or silent, they can plug the holes from other sources.[158] Though such incompleteness is an inevitable feature of litigation, it is hard to say that is a virtue rather than a necessary evil resulting from the core judicial value of finality.

But Nelson and I aren't rendering judgment; we don't face the same constraints in making the fullest and best account of past law. Here, for all Nelson's efforts to fend off critiques by insisting that they are "consistent" with his account, I don't find his reconstruction an especially plausible rendering of this past. In Nelson's defense, I suspect this messy history would defy most efforts to retroactively and artificially tidy an area where historical actors themselves bemoaned the existence of so much confusion and disagreement.

Thus far, I've presented the divide between Nelson and me in descriptive terms. When Nelson presented his reply to my students, however, I was struck by how his views were undergirded by his normative commitment—especially an anxiety about the civil-libertarian implications of expanding the scope of administrative adjudication. I admire Nelson's commitment, which I broadly share. I am neither a federal courts nor an administrative law scholar but a strange nerd who fell into this project because, unlike Henry Adams, I have a fondness for arcane land law. I therefore didn't come to it with strong, well-developed views about the inherent desirability of administrative versus judicial adjudication. Outside the specific context of nineteenth-century property law, Nelson has thought about these questions much more than I have, and so I give his better-informed normative conclusions quite a bit of credence.

Nonetheless, I do think my original article had normative implications that are worth teasing out. Although I focused on the "internalist story" of the private land claims,[159] I tried to gesture toward some broader normative questions they raised. As I dug into the material, the realist in me found the most normatively attractive solution in what I described as the ascendant late nineteenth-century perspective: "a functionalist approach that focuses on the adequacy of procedural safeguards rather than on formalist classifications."[160] I also stressed how the origins of the private land claims lay in colonialism. "The doctrine of private land

[158] See Baude & Sachs, supra note 26, at 816.
[159] Ablavsky, supra note 3, at 286.
[160] Id. at 349.

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claims," I observed, "arose in large part to paper over the powerful dissonance between the nation's ostensible fealty to property rights and the nineteenth-century realities of conquest."[161] *How* the private land claims facilitated dispossession is a complicated topic—my read is that it had much to do with the process and expense of navigating an alien legal system, coupled with intense extralegal pressure of white settlers.[162] But it left a legacy that continues to be keenly felt, especially in the U.S. Southwest where battles over Mexican land grants persist.

I did not come away from this research persuaded that courts did better than administrative tribunals in restricting this process of dispossession. The U.S. Supreme Court, for instance, issued what I consider travesties like *Barker v. Harvey*, whose formalist logic belied what was, in effect, an effort to strip all ownership from Native peoples in California through fiat.[163] Ultimately, my read was that the initial characterization of the *nature* of these ownership interests—rather than which tribunal heard them, which was, Nelson and I agree, downstream of this decision—drove many of the outcomes. This, of course, fit with a long-standing tradition of limiting certain kinds of property interests by categorizing them as lesser.[164] Nelson's interpretation of the jurisprudence, in fact, throws this view into even sharper relief, since he sets aside the quotations from Chief Justice Marshall and others who emphasized the solidity of these property rights.[165] To defend the distinction between court and agency adjudication, Nelson must necessarily present entitlements subject to administrative adjudication as inferior, *abnormal* forms of property—which was historically entangled with Anglo-Americans' dismissive views of Spanish, French, and especially Mexican law and people.

This is not to suggest that the choice between courts and administrative tribunals *never* mattered. My read on the literature about late nineteenth-century immigration litigation, for instance, suggests that it was

[161] Id.

[162] Cf. Richard Griswold del Castillo, The Treaty of Guadalupe Hidalgo: A Legacy of Conflict 72–74 (1990) ("[M]ost Californio landholders lost their lands because of the tremendous expense of litigation and legal fees."); Christopher David Ruiz Cameron, One Hundred Fifty Years of Solitude: Reflections on the End of the History Academy's Dominance of Scholarship on the Treaty of Guadalupe Hidalgo, 5 Sw. J.L. & Trade Am. 83, 96 (1998) ("[T]he [1851] Act's true evil lay in its formality, which ensured delay, which in turn ensured costly litigation.").

[163] Barker v. Harvey, 181 U.S. 481 (1901); see also Ablavsky, supra note 3, at 342.

[164] See, e.g., Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

[165] See Nelson, supra note 8, at 674–81.

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significant when the federal government successfully shifted cases out of the federal courts, where immigrants often prevailed, into administrative fora, where they did not.[166] But I am not sure that it was the formalist distinction between courts and agencies that drove these divergences as opposed to *features* of these administrative courts.

There is also a striking parallel between this history and the modern landscape. According to Adam Cox and Emma Kaufman, separation-of-powers formalists like Nelson would shunt those who hold "new property" rights—mostly "poor people of color," they observe—into supposedly inferior administrative tribunals while reserving supposedly superior justice of Article III courts for those holding rights analogous to nineteenth-century property.[167] There is a certain elegant, horrible historical symmetry to this. Nineteenth-century Latine people—who, as present-day activists state it, had the border cross them—lost property when their interests failed procedural or formalist hurdles to translate it into U.S. law. Twenty-first-century noncitizens, many of them also Latine and often in these same borderlands regions, increasingly lose their rights to liberty under similar logic.

Nelson understandably brackets my original broader musings about property, but I think they speak to this normative question.[168] If, at the end of the day, your principal concerns are civil-libertarian anxieties over abuses of state power, then I am skeptical that the nineteenth-century United States has great answers to offer.[169]

Ironically, this view leads me ultimately to agree with Nelson about the irrelevance of the private land claims. Not, of course, if we want to understand nineteenth-century American law and how it defined public rights, or why property ownership in the United States looks the way that

[166] See, e.g., Erika Lee, At America's Gates: Chinese Immigration During the Exclusion Era, 1882–1943, at 47–51 (2003) (noting Chinese immigrants' success in federal courts in contrast to immigration officials, whose anti-Chinese bias led to the "strictest interpretation possible" of grounds for restriction); Lucy E. Salyer, Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law, at xvi (1995) ("Frustrated by the courts' inability to protect American society from the intrusion of 'undesirable' aliens, exclusionists sought to remove jurisdiction to hear immigrant cases from the courts and to place sole discretion over immigration policy in the hands of administrative officials.").

[167] See Adam B. Cox & Emma Kaufman, The Adjudicative State, 132 Yale L.J. 1769, 1811, 1816–17 (2023).

[168] Ablavsky, supra note 3, at 349 ("Even as the United States sang paeans to inviolate ownership, it was crafting one of the largest schemes of state-sponsored coercive dispossession in world history . . . .").

[169] See, e.g., Steven Hahn, Illiberal America: A History (2024).

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it does, or why parts of the Chicano rights movement were built around fighting over Mexican land grants—I think the private land claims offer important lessons there. But in the narrow sense of shaping current doctrine, I am dubious that we are either jurisprudentially or normatively obligated to look to this sprawling, complicated morass to build current law. I have long been drawn to Justice Blackmun's quote that "[t]here is nothing magical in the reasoning of judges long dead."[170] Apropos of his point, maybe two scholars wading deeply into a wildly unfamiliar body of doctrine and debating the finer points of its meaning is not the best way to resolve significant questions of public law today.

[170] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting).