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Time for a Change: A Call to Reform Louisiana's Intertemporal Conflicts Law (Law of Retroactivity of Laws)

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Time for a Change: A Call to Reform Louisiana's Intertemporal Conflicts Law (Law of Retroactivity of Laws)

*J.-R. Trahan**

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Many, if not most, of the authorities cited in this paper were originally written in some foreign language (French, Italian, Portuguese, Spanish, or Latin). For most of these authorities, there is, as yet, no published English translation. And for some of those for which there is such an English translation (notably, the French versions of the early Louisiana Civil Codes), the translation is wretchedly inadequate. It has been necessary, therefore, to translate the materials in the former category for the first time and to translate those in the second category anew. Unless otherwise indicated, the translations are my own.

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I. INTRODUCTION

Conflicts of laws in time¹ are as old as written laws them-

1. A "conflict of laws in time" arises when certain events take place at the "limit" of the temporal duration of two successive and incompatible laws (at the time, in other words, when the latter abrogates or amends the former), in such a fashion that it is unclear by which of the two laws those events ought to be governed. Paul Roubier, *Le Droit Transitoire (Conflits des Lois dans le Temps)* § 1, at 3 & 4 (2d ed. 1960) [hereinafter Roubier, *Transitoire*]. See 1 Arturo Alessandri Rodriguez & Manuel Somarriva Undurraga, *Curso de Derecho Civil: Parte General & Las Personas* § 326, at 246 (1945); 1 César Augusto Abelenda, *Derecho Civil: Parte General* § 165, at 153 (1980); Eugène-Louis Bach, *Conflits de Lois dans le Temps*, in 2 Dalloz Guide Juridique 144-1, 144-1 [§ 1] (1992) [hereinafter Bach, *Conflits II*]; Eugène-Louis Bach, *Conflits de Lois dans le Temps*, in 3 Dalloz Répertoire de Droit Civil [§ 1], at 1-2 (1996) [hereinafter Bach, *Conflits I*]; Eugène-Louis Bach, *Contribution à l'Étude du Problème de l'Application des Lois dans le Temps*, 68 *Revue Trimestrielle de Droit Civil* 405, 406-07 [§§ 2-3] (1969) [hereinafter Bach, *Contribution*]; 1 C. Massimo Bianca, *Diritto Civile: la Norma Giuridica—I Soggetti* §§ 84-85, at 119 (1982); Thierry Bonneau, *La Cour de Cassation et l'Application de la Loi dans le Temps* §§ 3-4, at 2 (1990); 1 Guillermo A. Borda, *Tratado de Derecho Civil: Parte General* § 165, at 180 (1987-88) [hereinafter Borda, *Tratado*]; Guillermo A. Borda, *Portée et Limitations du Droit Transitoire*, in 2 *Mélanges en l'Honneur de Paul Roubier* 75, 88-89 [§ 9] (1961) [hereinafter *Portée*]; Michael E. Coney, *Temporal Conflicts of Law: A Theory of Retroactivity 1* (1977) (unpublished Master of Civil Laws thesis, Louisiana State University Law Center) (on file with Professor Emeritus Robert Anthony Pascal, LSU Law Center); Gérard Cornu, *Droit Civil: Introduction—Les Personnes—Les Biens* §§ 365 & 368, at 124 (4th ed. 1990); Pierre-André Côté & Daniel Jutras, *Le Droit Transitoire Relatif à la Réforme du Code Civil*, in *La Réforme du Code Civil [Québécois]* § 6, at 939 (1993); Françoise Dekeuwer-Défossez, *Les Dispositions Transitoires dans la Législation Civile Contemporaine* § 1, at 2 (1977); Ignacio Galindo Garfias, *Derecho Civil: Primer Curso: Parte General* § 69, at 160 (10th ed. 1990); Eduardo García Máynez, *Introducción al Estudio del Derecho* § 198, at 388-89 (38th ed. 1986); Jacques Ghestin & Gilles Goubeaux, *Traité de Droit Civil: Introduction Générale* § 330, at 293 (3d ed. 1990); Fayez Hage-Chahine, *Les Conflits dans l'Espace et dans le Temps en Matière de*

selves.² The ancient Greeks undoubtedly were aware of these conflicts, for several of their greatest thinkers, Plato included, devoted parts of their works on political theory to proofs that new laws must always be directed toward "the future."³ The Romans were no strangers to these conflicts either. During the

Prescription §§ 1 & 2, at 2 & 3 (1977); François Heleine, *Petit Vade-Mecum Des Étapes de Déroulement des Règles de Conflit de Droit Transitoire*, 96 *La Revue du Notariat* 367, 367-68 (1993); Jacques Héron, *Étude Structurale de l'Application de la Loi dans le Temps*, 84 *Revue Trimestrielle de Droit Civil* 277, at 278 [§ 1] (1985); Patrice Level, *Essai sur Les Conflits de Lois dans le Temps: Contribution à le Théorie Générale du Droit Transitoire* § 1, at 1 (1959); 1 Philippe Malaurie & Laurent Aynès, *Cours de Droit Civil: Introduction à l'Étude de Droit* § 631, at 203-04 (2d ed. 1994); 1 Gabriel Marty & Pierre Raynaud, *Droit Civil: Introduction Générale à l'Étude du Droit* § 105, at 184-85 (2d ed. 1972); 1 Henri Mazeaud et al., *Leçons de Droit Civil: Introduction à l'Étude du Droit* § 137, at 212-13 (François Chabas rev., 10th ed. 1991); Giuseppe Ugo Rescigno, *Disposizioni Transitorie* § 2, in 13 *Enciclopedia del Diritto* 219, 221-22 (1964); 1 Georges Ripert & Jean Boulanger, *Traité Élémentaire de Droit Civil de Planiol* § 227, at 109 (5th ed. 1950); 1 Rafael Rojina Villegas, *Compendio de Derecho Civil: Introduccion, Personas & Familia* 41-42 (21st ed. 1986) [hereinafter Rojina, *Compendio*]; 1 Rafael Rojina Villegas, *Derecho Civil Mexicano: Introduccion y Personas* 269, 269 (2d ed. 1975) [hereinafter Rojina, *Derecho*]; Boris Starck, *Droit Civil: Introduction* § 476, at 197 (1972); Paul Tavernier, *Recherches sur l'Application dans le Temps des Actes et des Règles en Droit International Public* 16-17 (1970); 1 Victorio Pescio Vargas, *Manual de Derecho Civil: Titulo Preliminar delCodigo Civil* § 95 (1978); Arnoldo Wald, *Curso de Direito Civil Brasileiro—Parte Geral* § 44, at 109 (4th ed. 1975). See also 1992 S.Q. ch. 57, reprinted in Marjolaine Gaudet, *Codes Civils Comparés et Dispositions Transitoires XXXV* (1993) ("The object of the provisions of this Title is to govern conflicts of laws of legislation resulting from the coming into force of the Civil Code of Québec . . .").

In Louisiana, as in all other American jurisdictions, questions regarding which of two successive laws to apply are almost always treated under the rubric "retroactivity of laws." This rubric is technically deficient, for, as we will see, many of the intertemporal conflicts phenomena that are collected under it involve not retroactivity, properly so called, but rather other temporal effects, for example, immediate effect or postactivity. See *infra* text accompanying notes 129-137 and at pp. 56-60. To lump these phenomena under the rubric "retroactivity" makes no more sense than to lump all sources of juridical relations under the rubric "juridical act." See La. Civ. Code art. 1757 (obligations arise not only from juridical "acts" but also from juridical "facts").

2. The reference here to *written laws* is not an accident: by making the reference, I intend to signal an important limitation on the scope of this paper. By "written laws," I mean, of course, "legislation" broadly conceived, so as to include not only statutes, but also administrative regulations and court rules, see 1 Jean Chevallier & Eugène-Louis Bach, *Droit Civil: Introduction à l'Étude du Droit* 13 (10th ed. 1989); Ghestin & Goubeaux, *supra* note 1, § 232, at 199; 1 Marty & Raynaud, *supra* note 1, § 78, at 145-46; Alex Weill & François Terré, *Droit Civil: Introduction Générale* § 124, at 126-27 (4th ed. 1979), as opposed to "custom," which is not written, see Weill & Terré, *supra* this note, § 74, at 88; 1 Marcel Planiol & Georges Ripert, *Traité Élémentaire de Droit Civil* § 10, at 5 (12th ed. 1939), and "jurisprudence," which is not law, see La. Civ. Code art. 1 cmt. (b). Though changes in custom or in jurisprudence can present interesting intertemporal conflicts problems, see Roubier, *Transitoire*, *supra* note 1, § 7, at 23-29, those problems are not, at present, my concern. This paper is concerned exclusively with intertemporal conflicts problems produced by changes in legislation.

3. Plato, *Theaetetus* 178, reprinted in 7 Plato in Twelve Volumes 135 (Harold North Fowler trans., 1967) ("For when we make laws, we make them with the idea that they will be advantageous in after time; and this is rightly called the future."). Plato's argument is explained and critiqued in 1 Ferdinand Lassalle, *Théorie Systématique des Droits Acquis: Conciliation du Droit Positif et de*

Republican Period, Cicero, in what would become one of his most famous orations, denounced Verres, a former Urban Praetor, for having applied certain provisions of his Edict to a case that had arisen during the term of his predecessor.⁴ And a few centuries later, the Co-Emperors, Theodosius and Valentinian-Caesar, issued a constitution to the Praetorian Prefect affirming the "certainty" of the principle that "laws . . . regulate future matters and have no reference to such as are past, unless express provision is made for past time."⁵ More recently, but still a good while back (at least by American standards of measuring time), the drafters of Louisiana's first Civil Code devoted several articles to the topic, the cornerstone of which provided that "[l]egislation provides only for the future; it can have no retroactive effect."⁶ Conflicts of laws in time, then, are nothing new.

What is new is the frequency with which these conflicts arise. During the course of this century alone, the increase in the number of judicial cases that involved such conflicts has been dramatic: whereas the Louisiana courts handled only fifty or so such cases between 1900 and 1910, they handled over twelve hundred of them between 1988 and 1998.⁷ The cause of this development is no mystery: the exponential growth in new legislation during that same period.⁸ Since the end to this explosion of legislation is nowhere in sight, the number of intertemporal conflicts cases can only be expected to rise.

Because intertemporal conflicts of laws are and will continue to be commonplace, it is imperative, now more so than ever, that Louisiana's "intertemporal conflicts law" be adequate to the task. By intertemporal conflicts law, I mean that body of legal principles whose sole purpose is to govern the resolution of

la Philosophie du Droit 25-26 & n.1 (J. Bernard et al. trans., 1901). See also Wald, *supra* note 1, § 44, at 109-10 (noting the Socratic-Platonic argument).

4. 1 Cicero, *The Verrine Orations* bk. 1, chs. 41-43, at 233-43 (L.H.G. Greenwood trans., 1966). Cicero's condemnation of retroactivity is noted in Dekeuwer-Défosse, *supra* note 1, § 6, at 5; Roubier, *Transitoire*, *supra* note 1, § 8, at 30-31; Wald, *supra* note 1, § 44, at 109-10, & § 45, at 115-16.

5. *The Code of Justinian* bk. 1, tit. 14, law 7, par. 1, in 12 S.P. Scott, *The Civil Law* 87 (1932). The constitution of Theodosius and Valentinian-Caesar regarding retroactivity is noted in Dekeuwer-Défosse, *supra* note 1, § 6, at 6; Roubier, *Transitoire*, *supra* note 1, § 9, at 32-35; Wald, *supra* note 1, § 45, at 115-16.

6. *Digest of the Civil Laws Now in Force in the Territory of Orleans* prelim. tit. art. 7 (1808).

7. These figures, I must confess, are rough estimates. They reflect the results I obtained by posing the following query on Westlaw: "da(aft ____ & bef ____) & ((retroactiv! retrospectiv! prospectiv!)/s (law legislation act section article paragraph provision))" This query is, at once, too broad (it retrieved some cases that didn't present retroactivity-of-laws issues) and too narrow (it missed some cases that presented retroactivity-of-laws issues). Even so, the query is sufficient to serve my purpose here, namely, to provide some basis for comparing the frequency of intertemporal conflicts cases at the beginning of this century with the frequency of those cases at the end of this century.

8. Dekeuwer-Défosse, *supra* note 1, § 2, at 2-3; Ghestin & Goubeaux, *supra* note 1, § 331, at 294; 1 Malauric & Aynès, *supra* note 1, § 631, at 204. See also Bonneau, *supra* note 1, § 1, at 1 ("[T]he mutation of contemporary society is effectuated at a cadence of extraordinary rapidity. It is that which one calls 'the acceleration of history.'").

conflicts of laws in time (or, if one prefers, to manage transitions between successive laws) and whose domain extends across all of the various fields of laws without restriction.⁹ In Louisiana, these principles are to be found in Article 6 of the Civil Code¹⁰ and Section 2 of Title 1 of the Revised Statutes¹¹ and in the jurisprudence and the doctrine that have grown up around them.¹²

9. The expression "intertemporal conflicts law" or "intertemporal law" is just one of two expressions that civil law scholars typically use when referring to this body of legal principles. The other is "transitory" law. The trouble with this alternative expression is that a good number of authors use it in a rather different sense, namely, to refer to the special "transition rules" that may be found in this or that particular piece of legislation. To avoid confusion, it seems better to use the other expression.

10. "In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretative laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary." La. Civ. Code art. 6.

11. "No Section of the Revised Statutes is retroactive unless it is expressly so stated." La. R.S. 1:2 (1987).

12. Some readers, in particular, those who are products of the American system of legal education, may be surprised that I have not included here the various provisions of the federal constitution that restrain the legislature's power to tamper with already-established juridical interests, in particular, the Contracts Clause, the Takings Clause, and the Due Process Clause, as well as the comparable provisions of the state constitution. In the American legal mind, the law of "retroactivity of laws" is inextricably tied to these constitutional provisions.

Though these constitutional provisions admittedly have some connection with the temporal effects of new legislation, they are not, however, part of the intertemporal law, properly so called. Two of the provisions—the Contracts Clause and the Takings Clause—are of limited scope: the former applies only to new laws that pertain to "contract law"; the latter, only to new laws that pertain to "property law." And none of the three—not even the Due Process Clause—has as its *sole* purpose the resolution of conflicts of laws in time. The real thrust of each of these provisions is in other directions (for example, the protection of private property against governmental encroachment); to the extent that they regulate successions in laws at all, they do so indirectly and only as an incident to their primary functions.

Still one might object that, in an American jurisdiction such as Louisiana, the intertemporal law, properly so called, cannot truly be understood in isolation from these "time conscious" constitutional provisions. That law and these constitutional provisions, the argument might run, form an ensemble or network, the various parts of which are interdependent and complimentary: each presupposes the existence of the other and of the limitations on temporal effects created by the other. Because that is so, the argument might continue, it is impossible to gain a clear understanding of this or that part, for example, the intertemporal law, without examining the whole in its entirety.

As late as 1987, one could have said, with complete confidence and without qualification, that this objection lacked merit. Before that time Louisiana's intertemporal law was not at all dependent upon the "time conscious" provisions of the federal or state constitution. The intertemporal law developed independently of these constitutional provisions—indeed, preceded them historically, for they formed part of Louisiana's civil law before Louisiana was assimilated into the United States. It is inconceivable, then, that the persons who originally developed that law "presupposed" either the existence or the effects of these constitutional provisions. And so that law stood alongside the constitutional provisions as a separate and completely independent source of temporal-effects directives. Perhaps in recognition of this fact, the courts routinely analyzed separately issues arising under the intertemporal law, on the one hand, and issues arising under these constitutional provisions, on the other.

The question that I wish to explore is whether this law is "up" to doing the job. My thesis is that it is not. The problem, in short, is that the current intertemporal conflicts law exhibits a number of serious deficiencies of juridical technique.¹³ The legislation in which that law is grounded is, in part, to blame, for it reflects several lapses of formulative technique, among them apparent antinomies, equivocation, and inefficacy. The lion's share of the blame, however, must be allocated to the interpretation that the courts have placed on that legislation. The jurisprudence is guilty not only of innumerable lapses of formulative technique, such as indeterminacy, disharmony, inefficacy, and inaccuracy, but also of several lapses of political technique, in other words, the results to which the jurisprudential rules lead are, in many instances, politically undesirable. To put it bluntly and in terms that no one can possibly misunderstand, Louisiana's current intertemporal conflicts law is "broke," so broke, in fact, that it needs to be "fixed," the sooner the better.

The plan for this paper is as follows. Part II contains what, in my judgment, is an indispensable prologue to the evaluation of intertemporal conflicts law rules, namely, an exposé of the extra-legal "foundation" for and "function" of that law. Part III provides a detailed exposition of Louisiana's current intertemporal conflicts law. In that Part, I examine not only the legislation in which it is grounded (Subpart A), but also the interpretation that the jurisprudence has placed upon that legislation (Subpart B). Part IV sets forth a thorough critique of that law, one that points up its numerous deficiencies of formulative and political technique. In Part V, I summarize my conclusions regarding those defects and, on that basis,

The situation changed somewhat in 1987. In that year the legislature, acting on a recommendation of the Louisiana Law Institute, revised all of the articles of the Preliminary Title to the Civil Code, including that which pertained to the temporal effects of laws. To judge from the comments to the new legislation, the drafters admittedly did view the intertemporal law against the backdrop of the "time conscious" constitutional provisions and, beyond that, were counting on those constitutional provisions to supplement and, to some degree, to correct the intertemporal law. See, e.g., La. Civ. Code art. 6 cmt. (c) ("According to a well-settled rule of statutory interpretation, procedural and interpretative laws apply both prospectively and retroactively unless they violate vested rights or obligations of contracts.").

That does not mean, however, that the intertemporal law and the "time conscious" provisions of the federal and state constitutions are now so interdependent that one can't understand one apart from the other. Whatever the drafters of the revised intertemporal law may have had in mind, it was not to combine the two into a single body of law or to make each of them dependent on the other. To judge from the text of the new legislation and the very same comments that allude to the constitution, the drafters evidently intended to retain the prior analytical distinction between the intertemporal law, on the one hand, and the "time conscious" constitutional provisions, on the other, so that, in any given "intertemporal conflicts" case, the analysis of issues raised under the one would have to be conducted separately from the analysis of issues raised under the other. The post-revision jurisprudence has certainly maintained this distinction. See, e.g., *Segura v. Frank*, 630 So. 2d 714 (La. 1994).

13. For the definition of this term of art as well as of the terms of art used to designate the two components of juridical technique, namely, "formulative" technique and "socio-political" technique, see *infra* note 113.

begin to sketch a picture of the intertemporal conflicts law of which Louisiana now stands in need.

II. FOUNDATION AND FUNCTION OF INTERTEMPORAL CONFLICTS LAW

Before one can begin to critique this or that body of intertemporal conflicts law, one must, of course, understand *why* we need (or at least want) an intertemporal conflicts law or, to put it another way, just *what* that law is supposed to accomplish for us. To gain this understanding, one must ask and answer two fundamental questions. The first concerns the "foundation" of intertemporal conflicts law,¹⁴ that is, what are the interests, values, sentiments, and aspirations, be they social or individual, that are at stake in intertemporal conflicts and that demand to be recognized through and protected by this law.¹⁵ The second concerns the "function" of intertemporal conflicts law,¹⁶ that is, what is this law to do with these interests, values, sentiments, and aspirations.¹⁷ This part of the paper is devoted to an exploration of these questions.

A. *Foundation: Identification and Representation of Interests*

Most judges, lawyers, and even legal scholars, when they contemplate conflicts of laws in time, are prone to view the interests at stake in those conflicts from the sole standpoint of those whom the application of the new law would adversely affect. From this perspective stems the common notion that the *raison d'être* of intertemporal law is to provide "juridical security" for those who have acted in reliance on the old law.¹⁸ Consider, for example, the Louisiana

14. Level, *supra* note 1, § 77, at 138. On the "foundation" of law in this sense, see Jean Dabin, *La Philosophie de l'Ordre Juridique Positif* § 21, at 74 & n.1, & § 78-79, & § 22, at 79-83 (1929) [hereinafter *Philosophie*]; 1 Marty & Raynaud, *supra* note 1, §§ 9-29, at 15-52.

15. Level, *supra* note 1, § 77, at 138 & n.108 ("the foundations" of intertemporal conflicts law are "the extra-judicial elements that . . . serve as the bases—the 'infrastructure'—of the rule of conflict, even though the characteristics of these elements are not necessarily unique to the transitory law"); see generally 1 François Gény, *Science & Technique en Droit Privé Positif* § 39, at 111 (1914) [hereinafter 1 Gény, *Science & Technique*] (noting that all legal rules are grounded in "emotions, sentiments, or tendencies (desires, inclinations, passions), beliefs or wishes, instincts or habits, in short, psychological realities that translate themselves into needs or interests (economic, moral, religious, etc.)").

16. On the "function" of law in this sense, see Dabin, *Philosophie*, *supra* note 14, § 23, at 84-95; Claude Du Pasquier, *Introduction à la Théorie Générale et à la Philosophie du Droit* §§ 10-11, at 19-20 (5th ed. 1979); 1 Mazeaud et al., *supra* note 1, §§ 5-10.1, at 20-29.

17. See Level, *supra* note 1, § 77, at 138 & n.108; see generally Du Pasquier, *supra* note 16, §§ 10-11, at 19; 1 Gény, *Science & Technique*, *supra* note 15, § 39, at 111; 1 Marty & Raynaud, *supra* note 1, § 29, at 50-51; Mazeaud et al., *supra* note 1, § 5, at 20; Paul Roubier, *Théorie Générale du Droit* § 33, at 283-90 (2d ed. 1951) [hereinafter *Roubier, Théorie*]; Starck, *supra* note 1, §§ 30-42, at 10-15.

18. On the "juridical security" justification for restrictions on the plenary application of new laws, see 1 Augusto, *supra* note 1, § 165, at 154; 1 Alessandri & Somarriva, *supra* note 1, § 331,

Supreme Court's explanation of the purpose behind Louisiana's anti-retroactivity rule:

There would be no security for private persons if their rights, their fortunes, their personal status, the effects of their acts and of their contracts, could be questioned or modified or suppressed at any moment because the law-maker had changed his mind.¹⁹

at 248; Bach, *Conflicts II*, *supra* note 1, § 11, at 144-3; 1 Bianca, *supra* note 1, § 85, at 119; Gabriel Baudry-Lacantinerie, *Traité Théorique et Pratique de Droit civil* § 12, at 15 (Julien Bonnacese, *Supp. II* 1925) [hereinafter Bonnacese]; 1 Borda, *Tratado*, *supra* note 1, § 138, at 156; 1 Ambroise Colin & Henri Capitant, *Cours Élémentaire de Droit Civil Français* § 50, at 51-52 (Léon Julliot de La Morandière ed., 11th ed. 1947); Adriano De Cupis, *Istituzioni di Diritto Privato* § 8, at 16 (2d ed. 1980); Dekeuwer-Défossez, *supra* note 1, § 129, at 159; Rafael de Pina & Rafael de Pina Vara, *Diccionario de Derecho* 314, 314 (15th ed. 1988) (entry for "irretroactividad"); 1 Rafael de Pina, *Elementos de Derecho Civil Mexicano: Introduction-Personas-Familia* 110 (7th ed., 1975); Galindo, *supra* note 1, § 72, at 163; Ghestin & Goubeaux, *supra* note 1, § 339, at 300; Héron, *supra* note 1, § 33, at 300-01; 1 Louis Josserand, *Cours de Droit Civil Positif Français* § 80, at 60 (3d ed., 1938); Level, *supra* note 1, §§ 78-79, at 139-41; 1 Marty & Raynaud, *supra* note 1, § 106, at 187; 1 Mazeaud et al., *supra* note 1, § 138, at 213; 1 Pescio, *supra* note 1, § 103, at 334; 1 Planiol & Ripert, *supra* note 2, § 240, at 100; 1 Ripert & Boulanger, *supra* note 1, § 260, at 123; Roubier, *Transitoire*, *supra* note 1, § 50, at 223; Starck, *supra* note 1, § 479, at 198; Tavernier, *supra* note 1, at 171 & 173; 1 Arturo Valencia Zea, *Derecho Civil: Parte General y Personas* § 84, at 184 (12th ed. 1989); Wald, *supra* note 1, § 44, at 111; Weill & Terré, *supra* note 2, § 165, at 169; *Diccionario Jurídico Mexicano* vol. I-O, at 1825 (2d ed. 1988) (entry for "irretroactividad de la ley").

19. Manuel v. Louisiana Sheriff's Risk Management Fund, 664 So. 2d 81, 84 (La. 1995) (quoting 1 Marcel Planiol, *Treatise on the Civil Law* § 240, at 173 (La. St. L. Inst. trans. 1959)). See 1 Alessandri & Somarriva, *supra* note 1, § 331, at 248 (paraphrasing Planiol with approval); 1 Pescio, *supra* note 1, § 103, at 334 (quoting Planiol with approval); 1 A.N. Yiannopoulos, *Louisiana Civil Law System: Coursebook* § 40, at 67 (1977). See also Bach, *Conflicts II*, *supra* note 1, § 11, at 144-3 ("[I]nsecurity would hang over the social body if, after the subjects of the law had acted conformably or contrarily to the law that was imposed on them, their conduct could be appreciated . . . by the application of a later law whose existence one could not have known of nor maybe even foreseen."); 1 Bianca, *supra* note 1, § 85, at 119 ("The principle of non-retroactivity corresponds to an elementary requirement of certainty on the part of those at whom the norm is directed. They ought to be able to count on the legal discipline in force so that they can know what the juridical effects of their acts will be."); De Cupis, *supra* note 18, § 8, at 16 ("the principle of non-retroactivity . . . satisfies a need for certainty and juridical stability"); Héron, *supra* note 1, § 33, at 300 ("Security is compromised because the new law destroys the effects of the old law, the only one that the subjects of the law could have known . . ."); 1 Mazeaud et al., *supra* note 1, § 138, at 213 ("Individuals regulate their activities and accomplish the acts of juridical life by taking account of the legislation in force at the times at which they act. It is necessary, then, that each know the conditions that he must respect and the rules that he must follow, so that the envisioned act will be regular and valid."); 1 Ripert & Boulanger, *supra* note 1, § 260, at 123 ("Juridical activities would no longer be freely deployed if it was necessary to take into account not only the current law, but also a future law that cannot be known."); Weill & Terré, *supra* note 2, § 165, at 169 ("There would be, in fact, no security for particular persons if, although a law is in force and they have conformed themselves to its dispositions, one could put in question the acts passed by them in conformity with the legal prescriptions.").

This explanation, of course, tells only half the story, for while it correctly notes that the application of the new law would undermine security, it doesn't explain why that's undesirable. The other half of the story, however, is hardly a mystery. Juridical security is important for at least four interdependent, yet conceptually distinct, reasons.

First, juridical security is a basic requirement of "justice,"²⁰ one of the principal values on which the legal order is (or ought to be) based.²¹ Justice suffers, nearly everyone would agree, when the government "changes the rules on the players in the middle of the game" or, to speak less metaphorically, when individuals find that their acts, though perfectly legitimate when they were performed (under the old law), now carry with them various undesirable consequences (under the new law) of which they had no prior notice.²² But just why subjecting an actor *post hoc* to new rules that carry negative consequences smacks of injustice is difficult to explain. Perhaps it's because implicit in every command (of which law is one example) is a representation by the commander that if the commandee obeys the command, then he will be rewarded in some fashion, at the very least, through the "negative" reward of avoiding sanctions. To deprive the commandee of that reward after he has faithfully complied with the command is to "deny him his due," which, of course, is the antithesis of justice.²³

20. 1 Augusto, *supra* note 1, § 165, at 154; 1 Colin & Capitant, *supra* note 18, § 50, at 52; Héron, *supra* note 1, § 34, at 301; Level, *supra* note 1, § 78-79, at 139-41; 1 Marty & Raynaud, *supra* note 1, § 106, at 187; Código Civil de Venezuela [Ann.] art. 3, nn. 47, at 149 (1989).

21. On the role that the value of justice plays in the legal system as a whole, see generally Jean Dabin, *Théorie Générale du Droit* §§ 337-350, at 386-400 (3d ed. 1969) [hereinafter Dabin, *Théorie*]; 1 Gény, *Science et Technique*, *supra* note 15, § 16, at 49-50; Roubier, *Théorie*, *supra* note 17, § 23, at 211-26, & § 37, at 325-28.

22. 1 Augusto, *supra* note 1, § 165, at 154 ("a natural and empirical sentiment of justice imposes the necessity that the laws reign over only the juridical relations that spring up in the future"); 1 Colin & Capitant, *supra* note 18, § 50, at 52 ("[T]his altogether rational principle of non-retroactivity is . . . conformed to the most elementary equity . . ."); Level, *supra* note 1, § 79, at 141 ("[J]ustice and the good are not satisfied when an act is found to produce unforeseeable consequences, which could not possibly be lacking in the case of retroactivity."); 1 Marty & Raynaud, *supra* note 1, § 106, at 187 ("It [the foundation of the anti-retroactivity rule] is first of all a consideration of justice: while the new law was not yet promulgated, the interested parties knew only the old law; it was in consideration of this old law that they acted. If one were to make the effects of the new law extend back before its promulgation, then one would betray the confidence that the parties placed in the only law that they knew."); Código Civil, *supra* note 20, art. 3, § 47, at 149 ("The principle of anti-retroactivity of the laws is imposed as a requirement of the dictates of justice, equity, and prudence, inasmuch as no one could be obliged to perform the act of social life without submitting himself at that moment to actualizing the rules of law sanctioned by the Legislative Body . . .").

23. Justinian, *Digest* 1.1.10, *reprinted in* 2 *The Civil Law* 211 (S.P. Scott trans. & ed., 1973) ("Justice is the constant and perpetual desire to give to every one that to which he is entitled. (1) The precepts of the law are the following: to live honorably, to injure no one, to give to every one his due.") (attributed to Ulpian). See also Dabin, *Théorie*, *supra* note 21, § 302-310, at 349-59; Du Pasquier, *supra* note 16, § 221, at 216; 1 Jacques Leclercq, *Le Fondement du Droit et de la Société*

Second, juridical security is important for the psychological health of individuals. As one scholar has observed,

from the psychological point of view . . . , retroactivity is manifested under the form of frustration. Certain conduct had received a certain quality by virtue of the regime then in force. Putting into question by . . . the new law of that which seemed to be settled by the effect of the old laws . . . brings about a certain deception among individuals.

. . .
[O]n the psychological plane . . . the action of the law on the past risks giving rise among individuals to a sentiment of frustration or deceived hope.²⁴

One need not have a degree in psychology to understand that this sentiment is inimical to psychological well-being.

Third, juridical security is important for social stability.²⁵ Plenary application of new laws erodes confidence in and therefore respect for the rule of law itself.

[F]or the law to keep the confidence of the citizens—this confidence that forms the best part of its force—it is indispensable that acts passed under its aegis subsist . . . no matter what may happen later on. If it were otherwise, . . . juridical life would be deprived of security, so much so that, at the end of the account, the authority of the law itself would be ruined. No one would believe in it any longer. The regime of the arbitrary would be substituted for that of the legal order.²⁶

§ 27, at 157-58 (1947) [hereinafter *Fondement*]; Roubier, *Théorie*, *supra* note 17, § 23, at 213-14; 2 St. Thomas Aquinas, *Summa Theologica* pt. 2 of 2d pt., Q. 58, art. 1, at 1434-35 (Fathers of the English Dominican Province trans. 1947).

24. Level, *supra* note 1, § 36, at 59. See also 1 Augusto, *supra* note 1, § 165, at 154 (if past relations, rights, and duties were completely vulnerable to new laws, "one would live under the sign of fear"); Héron, *supra* note 1, § 33, at 300 ("does one not have occasion to be irritated when one is subtracted from the general rule so as to be made the object of an arbitrary decision?", which is the effect of evaluating past behavior under a new standard); Roubier, *Transitoire*, *supra* note 1, § 50, at 224 (retroactivity, rather than "appeasing and diminishing the conflict born from the change of legislation, carries it "to a point that's particularly agonizing and irritating").

25. Bonneau, *supra* note 18, § 12, at 25; de Pina & de Pina, *supra* note 18, at 314; Galindo, *supra* note 1, § 72, at 163; Ghestin & Goubeaux, *supra* note 1, § 339, at 300; Héron, *supra* note 1, § 33, at 300; 1 Jossierand, *supra* note 18, § 80, at 60; Level, *supra* note 1, § 79, at 142; Weill & Terré, *supra* note 2, § 165, at 169-70.

26. 1 Jossierand, *supra* note 18, § 80, at 60. See de Pina & de Pina, *supra* note 18, at 314 (paraphrasing Jossierand with approval); 1 de Pina, *supra* note 18, at 110-11 (same). See also Ghestin & Goubeaux, *supra* note 1, § 339, at 300 ("By permitting acts accomplished in conformity with the law then in force to be contested, retroactivity risks enfeebling in a general fashion respect for legal rules."); Héron, *supra* note 1, § 33, at 300 ("[R]espect for the law finds itself enfeebled, since a party can hope that his disobedience [of today's law] will be profitable to him tomorrow or, conversely, can fear that his submission to it will soon bring reproach . . ."); Weill & Terré, *supra* note 2, § 165, at 169-70 ("If an individual who has obeyed the order of the law could be disquieted under the

A loss of respect for the rule of law brings with it, of course, a concomitant decline in obedience to the law. This danger is particularly pronounced with respect to those who experience the "sentiment of frustration or deceived hope" that was described earlier.²⁷ Individuals who feel they've been deceived—cheated—by an unanticipated change of laws are more likely than others to believe themselves justified in blocking or at least frustrating the reform represented by the new law. If the deceit is particularly obnoxious, they may even agitate by extra-legal means for more fundamental social, political, or economic change and, in extreme cases, by resort to arms.²⁸

Fourth, juridical security is important for economic well-being.²⁹ As one scholar has explained,

[T]he rule of non-retroactivity . . . is justified, in a word, by a *clear economic interest*. Human transactions, in fact, need security if they're to be developed and extended. When someone accomplishes a juridical act, he has the right to demand that the validity of his act will always be appreciated in conformity with the laws under which he accomplished it. It is necessary that his projections not be tricked by a change in the will of the legislator. Without this [assurance], he will hesitate to act; prudence will counsel him to abstain.³⁰

One can put the same point another way. Uncertainty regarding the legal consequences of economic activity (an uncertainty that plenary application of the

pretext that a later law [requires it], the law would lose all its force . . ."); *see generally* Bach, *Conflicts II*, *supra* note 1, § 11, at 144-3 (plenary application of new laws carries with it "the risk of arbitrariness against which the rule of law must . . . be safeguarded"); Bonnacase, *supra* note 18, § 12, at 25 (Retroactivity "only sows disorder because it makes social life and social relations rest on the most absolute instability. To make laws retroact is manifestly to go against the very end of the law, since the law has no other function and no other reason for being than to realize social harmony. Now, one who says 'social harmony' says before all 'stability.' If it is impossible for anyone to know what the juridical requirements of tomorrow will be with respect to the past, the whole entire society is endowed with a kind of paralysis. . ."); *Diccionario*, *supra* note 18, at 1825 (plenary application of new laws is "antijudicial" in the sense that it is inconsistent with the basic "orientation" of the law, which is "to eliminate arbitrariness in social relations").

27. *See supra* note 24 and accompanying text.

28. *See* Ghestin & Goubeaux, *supra* note 1, § 339, at 300 ("On the social plane, the principle of non-retroactivity is a factor of order. . . . It [retroactivity] is in any case socially inopportune by virtue of the foreseeable chain reactions to which it can lead and by virtue of the hostility to reform that it risks hardening."); Level, *supra* note 1, § 79, at 142 (noting the need for a careful "management of the concrete elements of the past that assures the cohesion of the social milieu—a factor of order—, outside of which no reform can bring about any benefit").

29. 1 Colin & Capitant, *supra* note 18, § 50, at 51; 1 Valencia, *supra* note 18, § 84, at n.1.

30. 1 Colin & Capitant, *supra* note 18, § 50, at 52. *See also* Weill & Terré, *supra* note 2, § 165, at 169-70 ("If an individual who obeyed the order of the law could be disquieted under the pretext that a later law [requires it] . . . , no one would any longer dare to execute the orders of the law for fear of later seeing their acts, though they had been done legitimately, criticized by a new and unknown law.").

new law heightens) adds yet another risk of loss that rational economic actors will factor into their investment decisions. In some instances at the margins, this risk of loss may be so great as to discourage investment. The global macroeconomic effect of this diminished investment will, at least in the long run, be a smaller "pie," that is, less wealth-creation than would otherwise (without this additional risk) have been realized.

There are, however, still other interests at stake in intertemporal conflicts of laws, interests that, though commonly overlooked, are nonetheless nothing to sneeze at. These other interests come into view when one shifts one's perspective from that of those whom the application of the *new* law would adversely affect to that of those whom the application of the *old* law would adversely affect.

One of these other interests is that of "social progress." As the society itself evolves, the law—an instrument of social order—evolves (or, at least, should evolve) along with it, adapting itself to the society's new economic, political, and cultural circumstances.³¹ It seems reasonable to assume, then, that new laws (at least in the usual case) are "better" than the old in the sense that they are "more adapted to the requirements of modern [societies]" or, at the very least, more in tune with contemporary sentiments regarding what those requirements are and how they can best be satisfied.³² By contrast, the old law, it seems reasonable

31. 1 Domenico Barbero, *Sistema Istituzionale del Diritto Privato Italiano* § 40, at 96 (4th ed. 1955) ("The incessant evolution of social conditions requires a parallel evolution of the normative order."); Bonneau, *supra* note 1, § 1, at 1 ("Created by social forces, it [the law] is born in a fight. . . . Since these forces evolve, the law changes. Thus, the rule of law has an essentially provisional character. It participates in the evolution of the society."); Dekeuwer-Défossez, *supra* note 1, § 5, at 5 ("[T]he succession of laws in time has a sociological dimension. Some laws are modified in order to bring them into harmony with more advanced mores."), & § 197, at 234 ("[T]he legislator responds to the challenges of post-industrial society: social mutations imperiously require profound and frequent reforms."); Level, *supra* note 1, § 79, at 141 ("[S]ocial progress . . . demands that the amelioration of the conditions of human beings be obtained in such a way and to such an extent that the resistance of the traditional frameworks within the social milieu has no role other than to safeguard the principle of orderly evolution . . ."); Tavernier, *supra* note 1, at 173 ("[T]he law ought to be able to be adapted to the changing conditions of life . . . and that is why the necessity of adaptation must, in certain circumstances, get the upper hand over the requirements of security . . ."); Diccionario, *supra* note 18, at 1826 ("[T]he evolution of a juridical system requires new norms that satisfy in a better manner the changing economic, political, and cultural requirements of a community. These new norms contribute to the elimination of social practices and institutions that are considered unjust or inconvenient.").

32. 1 Alessandri & Somariva, *supra* note 1, § 332, at 248 ("the new law should necessarily be reputed to be better than the old"); Bach, *Conflits I*, *supra* note 1, § 179, at 19 ("the new law should necessarily be reputed to be better than the old"); Bach, *Conflits II*, *supra* note 1, § 23, at 144-5 ("the new law ought to be reputed to be better than the old, since the legislator had believed the change of law necessary"); 1 Colin & Capitant, *supra* note 18, § 57, at 56 ("Every new law ought to be presumed better than the old; for, to what end does one modify the law if not to ameliorate it?"); Dekeuwer-Défossez, *supra* note 1, § 129, at 159 ("the new law . . . is, in principle, considered to be better than the old"); Ghestin & Goubeaux, *supra* note 1, § 354, at 311 (referring to the "superiority of the new law"); 1 Marty & Raynaud, *supra* note 1, § 106, at 188 ("if he [the legislator]

to assume, is "worse" in the sense that it is (or is perceived to be) maladapted to modern social requirements and, therefore, dysfunctional to at least some extent. For these reasons, then, the society has a strong interest in the most fulsome possible application of the new law and the most limited possible application of the old.³³

Another such interest is that of "social justice." If the government is properly fulfilling its mission, then each new law should be more "just" than the old one it replaces or, to put it another way, more conducive to the realization of the common good.³⁴ "Since it comes later in time, it must be presumed to be more just than the prior law. If the Legislative Power had not considered it to be so, it would not have written it."³⁵ Because that is so, "justice requires . . . that the iniquities contained in the old law not survive the law that served to sustain them and not make a check, in the name of [preventing] harm to interests, to the progress realized by the new

has consecrated a reform, it is because the new law is better"; 1 Mazeaud et al., *supra* note 1, § 138, at 213 ("the new law is supposed to realize an improvement by relation to the old law"); 1 Planiol & Ripert, *supra* note 2, § 243 *bis*, at 101 ("new laws . . . are presumed to be better than those that they replace"); 1 Silvio Rodrigues, *Direito Civil: Parte Geral* § 12, at 29 (6th ed. 1976) ("the new law is supposed to be better than the old—that's why one innovates . . ."); Starck, *supra* note 1, § 489, at 202 ("the new law is, by hypothesis, *better* than the old (if not, why would the old law have been modified?)"); Tavernier, *supra* note 1, at 173 ("[T]he application of the new law . . . is favor[ed] [by the] imperatives of progress, the new law being thought to be better and more adapted to the requirements of modern [communities] . . . than the old law."); Weill & Terré, *supra* note 2, § 163, at 168 ("the new law is presumed to be better than the old"), § 165, at 169 ("every new law . . . represents social progress"), & § 171, at 177 (the new law puts an end to "situations that the legislator has judged to be bad").

33. 1 Alessandri & Somarriva, *supra* note 1, § 332, at 248 ("the new law should necessarily be reputed to be better than the old and, for that reason, be applied immediately"); Bach, *Conflicti I*, *supra* note 1, § 179, at 19 ("the new law should necessarily be reputed to be better than the old and should, as a result, be applied immediately"); Dekeuwer-Défossez, *supra* note 1, § 4, at 4 (noting the "necessity of rapidly putting to work norms considered to be better than those that preceded them") & § 129, at 159 (including among the "imperatives of the transitory law" the need to "assure a rapid application of the new law, which is, in principle, considered to be better than the old"); 1 Marty & Raynaud, *supra* note 1, § 106, at 188 ("if he has consecrated a reform, it is because the new law is better and there is, then, an interest in applying it to the greatest possible number of difficulties"); Starck, *supra* note 1, § 489, at 202 ("since the new law is, by hypothesis, *better* than the old . . ., one could not delay its application for years or decades"); Weill & Terré, *supra* note 2, § 163, at 168 ("since the new law is presumed to be better than the old, it is necessary to strive to apply to the maximum of facts and acts").

34. 1 Borda, *Tratado*, *supra* note 1, § 138, at 156. *See also* 1 Augusto, *supra* note 1, § 168, at 164; 1 Mazeaud et al., *supra* note 1, § 138, at 213; Wald, *supra* note 1, § 44, at 111.

35. 1 Borda, *Tratado*, *supra* note 1, § 138, at 156. *See also* 1 Augusto, *supra* note 1, § 168, at 164 ("the new law . . . is presumed to be more just by virtue of its being more in accord with the exigencies of progress and of new social sentiments"); 1 Mazeaud et al., *supra* note 1, § 138, at 213 ("the new law is supposed . . . to correspond more to the ideal of justice"); Wald, *supra* note 1, § 44, at 111 ("the legislator has a duty to improve the laws—to realize progress in the sense of equality and justice").

law."³⁶ The only way to assure that that does not happen, of course, is to give the new law the "greatest ambit of application possible."³⁷

Still another such interest is that of the "unity" of the law.³⁸ "[E]very time that one maintains the competence of the old law, one thereby consecrates a duality of legislation: the new law is applied to certain difficulties, the old law to others."³⁹ This "competition" of laws is undesirable for at least four reasons.

First, it produces "inequality." "If pre-existing juridical situations continued to be governed by the old law, one would end up with the inadmissible result that persons in the same situation would be submitted to different rules."⁴⁰ Consider, for example, the government's decision in 1979 to replace the old "head and master" rule, under which the husband alone was authorized to manage community property, with the "equal management" rule, under which "[e]ach spouse alone may manage . . . community property unless otherwise

36. Level, *supra* note 1, § 79, at 141. See also 1 Borda, *Tratado*, *supra* note 1, § 169, at 188 ("There will be cases in which the injustice that results from the old law would be so shocking to the new juridical conscience that it would be necessary to procure the disappearance of every vestige of it from the old regime."); Héron, *supra* note 1, § 37, at 37 (noting that, in extremely rare cases, "[t]he opprobrium thrown onto the old text justifies sacrificing all those who profited from it"); Wald, *supra* note 1, § 44, at 11 ("The new law ought to have some influence on the ulterior consequences of facts or of relations of law that were produced during the reign of the prior law, for the sake of social progress . . .").

37. 1 Borda, *Tratado*, *supra* note 1, § 138, at 156 ("[I]t is evident . . . that society has an interest in the new law's having the greatest ambit of application possible."). See 1 Augusto, *supra* note 1, § 168, at 164 ("no less valid and worthy of respect . . . is the value of justice, which leads to conferring on the new law . . . a relation with the major part of powers and impotencies, that is, of rights and duties."); 1 Mazeaud et al., *supra* note 1, § 138, at 213 ("The need of justice renders the application of the new law urgent. This application ought to be as large as possible so that the situations that the legislator wanted to condemn through the new law will disappear."); Tavernier, *supra* note 1, at 173 (the "imperative" to "realiz[e] justice" may require that "certain rules, by virtue of the end that they pursue, climb farther back into the past than others"); see also de Pina & de Pina, *supra* note 18, at 315 ("rigorous and sharp anti-retroactivity would imply, in certain circumstances, the maintenance of iniquitous situations"); de Pina, *supra* note 18, at 111 (same).

38. Dekeuwer-Défossez, *supra* note 1, § 129, at 159 (including among the "imperatives of the transitory law" the need to "realize the unity of the legislation applicable at any given moment, in a particular country, to all juridical situations of the same kind"); 1 Marty & Raynaud, *supra* note 1, § 106, at 188 (the "duality of legislation" that results from applying the old law to certain cases "is certainly unfortunate and it is necessary to strive to reduce it to a minimum.").

39. 1 Marty & Raynaud, *supra* note 1, § 106, at 188. See also Roubier, *Transitoire*, *supra* note 1, § 70, at 345 ("[S]hortly after several successive laws were to appear on the subject, one would quickly end up with a competition of laws that would be applied to situations of the same nature and of an identical name."); Bach, *Conflicts II*, *supra* note 1, § 23, at 144-3 (paraphrasing Roubier with approval); 1 Planiol & Ripert, *supra* note 2, § 243 *bis*, at 101 ("the unity of legislation in a country can be assured only if there's no concurrent application of two laws to similar situations").

40. 1 Ripert & Boulanger, *supra* note 1, § 233, at 11. See also Starck, *supra* note 1, § 489, at 202 ("This rule [the immediate application of the new law] is easily justified by the necessity of equality of all before the law . . ."); Dekeuwer-Défossez, *supra* note 1, § 129, at 159 ("unity of legislation is a factor of equality among citizens").

provided by law."⁴¹ Had the old law remained in force with respect to marriages that had been celebrated while that law was in effect, one would have ended up with a situation in which some wives (those whose marriages were celebrated after the new law's effective date) had full management powers over community while others (those whose marriages were celebrated before the new law's effective date) had none.

Second, it is "administratively inefficient." Keeping the old law around for the purpose of governing pre-existing juridical situations greatly complicates the task (and therefore increases the cost) of discovering and applying the applicable law. To discharge his or her professional responsibilities competently and ethically, every judge and every lawyer who is assigned or takes on a case that falls within a "dual" legal milieu must, of course, be (or become) familiar with two sets of laws: Not only that, but in each such case, the judge or lawyer must be careful to determine precisely when the juridical situation from which the case arises came into being. In those instances in which the parties dispute that moment in time, the issue must, of course, be tried, consuming still more time, money, and other resources.⁴²

Third, it foments "transactional insecurity." Though it may seem paradoxical at first, it is nonetheless true that retaining the old law to govern pre-existing juridical situations can have the effect of undermining public confidence in the security of their transactions.⁴³ Here's how. The average citizen, who is lucky if he even knows the current law, normally proceeds on the perhaps unrealistic but nevertheless understandable assumption that the current law is the only law. As long as he encounters juridical situations that postdate the enactment of the new law, he'll do fine: his expectations will be fulfilled. But as soon as he encounters a juridical situation that antedates the enactment of the new law—which will happen sooner or later—he could find himself in trouble: his expectations may well be frustrated by rules the existence of which he was never even aware. And from that point forward, he'll always worry about what other surprises the "law

41. La. Civ. Code art. 2346.

42. Bach, *Conflicts II*, *supra* note 1, § 23, at 144-5 ("[T]he unlimited survival of the old law would lead to practical difficulties. . . . [I]f one did not adopt the principle of the general application of the new law, one would too often end up with the result that for juridical relations of the same nature, different laws would be concurrently competent."); Ghestin & Goubeaux, *supra* note 1, § 356, at 311-12 ("The maintenance of different regimes by virtue of their date of acquisition ends up creating a confusion that is prejudicial to juridical order. Uniformity is a factor that's indispensable for simplification [of the law] and, as a result, for knowledge [of the law] . . .").

43. See 1 Alessandri & Somarriva, *supra* note 1, § 332, at 248 ("We live . . . under the regime of the unity of legislation. It is inconceivable that different laws can simultaneously regulate juridical situations of the same nature, because it would constitute a danger for juridical commerce. The immediate effect is justified . . . , then, by a necessity of juridical security."); Dekeuwer-Défossez, *supra* note 1, § 129, at 159 ("the unity of legislation is a factor . . . in juridical security"). See also Roubier, *Transitoire*, *supra* note 1, § 70, at 345 ("This competition [of simultaneously applicable laws] would inevitably provoke an inextricable confusion in juridical relations."); Bach, *Conflicts II*, *supra* note 1, § 23, at 144-3 (paraphrasing Roubier with approval).

of the past" may hold in store for him. The change from the "head and master" rule to the "equal management rule" again provides a useful illustration. Imagine, if you will, a young lady who from time to time turns up at garage sales in search of antique furniture. On several of these occasions she buys furniture from married women who act alone and, as far as she can tell, without the assent of their husbands. As it turns out, all of these women happen to have been married after the new law—the equal management rule—went into effect. Not surprisingly, she has never encountered any problems with any of these transactions, at least none that stem from the incapacity of the sellers. But then one day she buys furniture from an older woman, one who was married while the old law—the head and master rule—was still in effect. Not surprisingly, the young lady doesn't think to ask if the seller's husband has consented to the sale. A short time later, however, the husband brings suit against her, seeking to recover the furniture on the ground that the sale, since he had not consented to it, was invalid. Needless to say, the young lady will be surprised and, thereafter, considerably less confident of the powers of her would-be sellers. The trouble, then, is this: the maintenance of the old law sets a trap for the unwary citizen, one that, once sprung, undermines confidence in the security of transactions.⁴⁴

Finally, it is inconsistent with the "signs of the times." In the contemporary period, the unity of legislation, in the minds of most legislators, is both "natural" and seemingly "ineluctable."⁴⁵

[O]ne cannot lose sight of the character of modern society, founded on a regime of legislation, in which legislation is considered, not as a simple reflection of mores and customs, but as something that has the power to reform these mores and customs according to an ideal supplied by clarified public opinion. This submission [of mores and customs] to the regime of legislation has, for a direct consequence, the unity of law in a country. The legislator who undertakes to make a certain order, chosen by him, to reign in juridical relations cannot tolerate the competition of another law. The legal regime, in a given sovereignty, tends, by the very force of things, to be a unitary regime, and it is to assure this unity of the legislation that it is necessary to apply the law immediately.⁴⁶

44. Roubier, *Transitoire*, *supra* note 1, § 70, at 346 ("[T]here would be a trap for juridical commerce in the partial maintenance, for certain situations, of soon-forgotten prior laws."); Bach, *Conflicts I*, *supra* note 1, § 180, at 19 (paraphrasing & quoting Roubier).

45. Bach, *Conflicts II*, *supra* note 1, § 23, at 144-5 ("To explain the principle of the general application of the new law, one also invokes the ineluctable unity of legislation.")

46. Roubier, *Transitoire*, *supra* note 1, § 70, at 345-46; Bach, *Conflicts I*, *supra* note 1, § 180, at 19 (paraphrasing & quoting Roubier with approval). *See also* Bach, *Conflicts II*, *supra* note 1, § 23, at 144-5 ("In fact, the legislator who intends to promote a certain juridical order and, on this occasion, to do an innovative work, would not be able to tolerate the obstacle that the survival of the law would represent. Otherwise said, the general application of the new law . . . would represent the general tendency in our days, which is to hasten the application of new laws . . .").

Every intertemporal conflict, then, involves a "collision" of seemingly irreconcilable interests. Weighing in favor of the application of the old law is the interest of "juridical security," which guarantees individual justice, promotes the psychological health of individuals, stabilizes the society, and enhances economic development. Weighing in favor of the application of the new law are the interests of "social progress," "social justice," and "unity of law," the last of which promotes equality, administrative efficiency, and transactional security and is in keeping with the spirit of the times. From one class of juridical situations to the next and, to some extent, even within each class of juridical situations, these interests may well and undoubtedly often will vary in weight.

B. Function: Reconciliation of Interests

The function of the intertemporal law, like that of all law, is to resolve conflicts among competing social and individual interests in a way that promotes the common good.⁴⁷ In the case of the intertemporal law, those interests include, as we have seen, juridical security, social progress, social justice, and unity of law.⁴⁸

Regarding precisely what balance should be struck in any given case or any given class of cases, one would be hard-pressed to draw any firm conclusions: it's a question on which reasonable persons may well disagree. One can, nevertheless, draw some firm conclusions regarding *how* the balance should be struck (or, to be still more precise, how it should *not* be struck). First, any

47. See Dabin, *Théorie*, *supra* note 21, §§ 194-199, at 225-33 (noting that the task of the law is to choose among, to prioritize, the various "orders of human interests that the common goods covers"); Du Pasquier, *supra* note 16, §§ 10-11, at 19 ("The role of the law, then, is to assure the peaceable coexistence of the human group or, as one often says, to harmonize the activities of the members of society." This harmony "is realized by an *equilibrium* between opposing interests, between conservative and innovative tendencies, between authority and liberty, etc."); I Géný, *Science & Technique*, *supra* note 15, § 39, at 111 (the "supreme mission of the positive law" is to effect an "equilibrium of interests"); I Marty & Raynaud, *supra* note 1, § 29, at 50-51 (noting various "equilibrium" theories of the function of law, including that which "takes into consideration the two-fold individual and social end" of man and "puts the accent on the common good, harmonizing and even integrating the interests of the individual and the collectivity"); Mazeaud et al., *supra* note 1, § 5, at 20 ("Every society tends toward certain ends, individual or collective These ends are numerous and often contradictory. Between them the law makes a choice"); Roubier, *Théorie*, *supra* note 17, § 33, at 283-90 (suggesting that the end of law is to establish an "equilibrium" among competing imperatives of social life, with a view to attaining the "common good").

48. See Dekeuwer-Défossez, *supra* note 1, § 197, at 234, & § 200, at 236-37 ("The transitory system is one of the most important elements in the resolution of this contradiction [that between the imperatives of security and justice], for it is this system that realizes the transitions that are indispensable to the continued evolution of the law. . . . It is necessary, then, to make choices so as to establish a certain equilibrium between liberty and equality, contradictory and equally imperious needs. A compromise between the necessity of rapid reforms and that of the continuity of the law as between the aspirations of civil equality and individual liberty, the transitory law appears as an ensemble of equilibria.").

approach to striking the balance that systematically undervalues (or ignores altogether) either the collective interests or the individual interests in play is, for that reason alone, technically defective. Second, any approach to striking the balance that systematically excludes the consideration of the non-material interests in play, for example, the "moral" interests of individual and social justice, is, for that reason alone, technically defective. Unless one takes *all* of the interests at stake into account—the collective as well as the individual and the moral as well as the material—, one's conclusion regarding what's best for all—the common good—will almost certainly end up skewed.

III. EXPOSITION OF LOUISIANA'S INTERTEMPORAL CONFLICTS LAW

A. Legislation

In Louisiana, as in other jurisdictions within the French civil law tradition, the legislature has enacted legislation that is designed to resolve a broad range of intertemporal conflicts of laws. Unlike those other jurisdictions, however, Louisiana has not one, but two such pieces of legislation. One is Article 6 of the Civil Code; the other, Title 1, Section 2 of the Revised Statutes.

The content of Article 6 can be boiled down to two seemingly straightforward rules. First, *the legislature may accord to new pieces of legislation whatsoever temporal effects it desires*. That this is so the text of Article 6 itself makes clear. According to that article, substantive laws apply prospectively "[i]n the absence of contrary legislative expression," and procedural and interpretative laws apply both prospectively and retroactively "unless there is a legislative expression to the contrary." Applying this first rule, then, is a matter of discerning legislative intent.⁴⁹ Second, *if it's unclear just what temporal effects*

49. One must be careful not to misunderstand the phrase "contrary legislative expression," as it's used in Article 6. Relying on the usual denotation of the term "expression," one might be tempted to assume that deviations from the "usual rules" of Article 6 (substantive statutes apply prospectively only, whereas procedural and interpretative statutes apply both prospectively and retroactively) are permitted only where the legislature "expressly" calls for it, for example, where the legislature includes in the new legislation a clause such as this: "This legislation shall be applied retroactively." It would be a mistake, however, to yield to this temptation.

Deviations from the usual rules are in order not only where the legislature "in express terms, declared such to be their intention," but also where the legislature "used words which give unavoidable implication to such intention." That was the conclusion of the doctrine and the jurisprudence that had grown up around the predecessor to Article 6—Article 8 of the Civil Code of 1870. Yiannopoulos, *supra* note 19, § 40, at 70 (quoting *State ex rel. Howard Kenyon Dredging Co. v. Miller Cravity Drainage Dist. No. 3*, 193 La. 915, 926, 192 So. 529, 533 (1940)). And there's no indication in Article 6 that the legislature, by substituting that article for old Article 8, intended to reject that conclusion. Indeed, the comments to the articles indicate that, if anything, the legislature acknowledged that that conclusion was sound. See La. Civ. Code art. 6 cmt. (b) ("a substantive law applies prospectively only, unless it expressly or impliedly provides that it shall be applied both prospectively and retroactively") & cmt. (d) ("the new law may, in principle, apply retroactively even in the absence of express language to that effect"). Since the enactment of Article

the legislature intended to accord to a new piece of legislation, then those effects are determined as follows: if the legislation is "substantive," then it applies prospectively only; if the legislation is "procedural" or "interpretative," then it applies both prospectively and retroactively.⁵⁰ Applying

6, the jurisprudence, not surprisingly, has stayed the course. See, e.g., *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So. 2d 809, 815 (La. 1992) (noting that a lower court had relied on certain facts "to imply a legislative intent of retroactive application"); *Udley-James of Louisiana, Inc. v. Louisiana Dep't of Facility Planning & Control*, 593 So. 2d 1261, 1265 (La. App. 1st Cir. 1991) (finding that statute "does not expressly provide for retroactive application and its wording does not imply retroactive intent"); *Winstead v. Ed's Live Catfish & Seafood*, 554 So. 2d 1237, 1241 (La. App. 1st Cir. 1989) ("the principle of non-retroactivity of existing legislation admits three exceptions: . . . laws that the legislature has expressly or impliedly declared to be retroactive"); *Industrial Risk Insurers v. NOPSI*, 735 F. Supp. 200, 202 (E.D. La. 1990) ("a statute may be applied retroactively . . . where the laws are expressly or impliedly intended by the legislature to be applied retroactively").

Though the gap between the common connotation of the phrase "contrary legislative expression" and the meaning of that phrase as it's used in Article 6 has, in practice, caused little (if any) confusion thus far, one would hope that the legislature, when it next revises the article, will close the gap, that is, will replace that phrase with one whose common denotation coincides more precisely with its real meaning. "A legal terminology [for a civil code] must be, above all, precise and exact." Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 La. L. Rev. 1088 (1988). See also Alexandre C. Angelesco, *La Technique Législative en Matière de Codification Civil* §§ 212-213, at 497-500 (1930) (the language of a civil code must be marked by "*la clarté et . . . la précision*," in opposition to "*l'incertitude*"); François Gény, *La Technique Législative dans la Codification Civile Moderne*, in 2 *Le Code Civil: Livre du Centenaire* 987, 996 (1904), reprinted & translated as *The Legislative Technic of Modern Civil Codes*, in *Science of Legal Method* 498, 507 (Joseph H. Drake et al. eds. & Ernest Bruncken trans., 1969) [hereinafter Gény, *Technique*] ("Everyone will agree without difficulty in recognizing that a 'good law' or a 'good code' must, above all, present the qualities required of every literary work that is addressed to the intelligence and the will rather than to the imagination or the emotions: unity, order, precision, and clarity."). To cast legislation in terms that "no longer convey the intended meaning of the legislated law . . . is a sloppy way to write a civil code." Robert Anthony Pascal, *Of The Civil Code and Us*, 59 La. L. Rev. 3067 (1998) (26th John H. Tucker, Jr., Lecture in Civil Law, March 19, 1998). See also Edmond Sallé de la Marnière, *Eléments de Méthodologie Juridique* § 16, at 38 (1976) (legislation "ought to be sufficient in itself" to convey its meaning; requiring the interpreter to consult other authorities to determine its meaning produces "inconveniences" that present "a certain danger for the security of juridical commerce"); Jeremy Bentham, *General View of a Complete Code of Laws*, in 3 *The Works of Jeremy Bentham* 267 (John Bowring ed., 1962) (from Chapter 33, entitled "Of the Style of the Laws") ("The desirable object of the laws in regard to style is, that it may be such that at every moment in which they ought to influence the conduct of a citizen, he may have presented to his mind an exact idea of the will of the legislator . . . This idea will not have been correctly conveyed in the mind— . . . 2. When they [the words] present only part of the idea intended to be conveyed; 3. When instead of this idea they present another altogether different [idea]; . . .").

50. The immediate source of this rule seems to have been the Louisiana jurisprudence, in particular, *Lott v. Haley*, 370 So. 2d 521, 523 (La. 1979), and *Ardoin v. Hartford Accident & Indem. Co.*, 360 So. 2d 1331, 1338 (La. 1978). In those cases, the supreme court, drawing upon what it called "civilian tradition," concluded that then Article 8 of the Civil Code—the text of which forbade retroactivity without exception—should nevertheless be interpreted so as to allow for a number of exceptions, in particular, exceptions for "interpretative" and "procedural" laws.

This interpretation is questionable. To see why, one need only conduct a bit of legal archaeology.

the second rule requires a judgment regarding not legislative intent, but statutory classification.

The content of Title 1, Section 2 can likewise be reduced to two propositions. First, *the legislature may accord to new Revised Statutes whatsoever temporal effects it desires*. That is the point of the proviso in Section 2 that new revised statutes can't be retroactively applied "unless it is expressly so stated." Thus, under the first rule of Section 2, as under that of Article 6, legislative will is determinative, provided it is evident.⁵¹ Second, *if it's less than entirely clear*

Article 8 of the Civil Code of 1870 was derived from Article 8 of the Civil Code of 1825. Nothing in the text of the new article indicates that the legislature of 1870 intended to change the law (the new article is a verbatim copy of the old). The same is true of the new article's legislative history. That this is so is hardly surprising, given the purposes of the revision of 1870. As Judge Wisdom once observed,

[t]he limited purpose of the 1870 revision was to delete the articles relating to slavery and to integrate the codal amendments since 1825. Adoption of the 1870 Code therefore did not, either in itself or in terms, indicate any intention to change the unamended articles of the Code of 1825.

Shelp v. National Surety Corp., 333 F.2d 431, 438 (5th Cir. 1964). See also A.N. Yiannopoulos, *The Civil Codes of Louisiana*, in Louisiana Civil Code XXV, XXXIV (A.N. Yiannopoulos ed., 1999); James J. Morrison, *The Need for a Revision of the Louisiana Civil Code*, 11 Tul. L. Rev. 213, 228 (1937); John H. Tucker, *Source Books of Louisiana Law*, 6 Tul. L. Rev. 280, 295 (1932). Among those "unamended articles" was Article 8.

Article 8 of the Civil Code of 1825 was, in turn, derived from Article 7 of the Digest of 1808. Though nothing in the text of the new article indicates that the legislature of 1825 intended to change the law (the new article is a verbatim copy of the old), the new article's legislative history does. In the Digest of 1808 Article 7 was followed by an Article 8, which read as follows:

Nevertheless a law explanatory or declaratory of a former law may regulate the past, without prejudice, however, to final judgments, to transactions and to awards or arbitrations which have acquired the force of final judgments.

Reflected in this article (itself a verbatim copy of Article 2, paragraph 2 of the *Projet du Gouvernement* of the French Civil Code) was the traditional civil law principle that "interpretative laws" are exempt from the general ban against retroactivity. This article, unlike Article 7, was suppressed on the express recommendation of the redactors. Their rationale for suppressing the article, which was before the legislature when it enacted the new code, was this: "No law ought to regulate the past, not even explanatory or declaratory laws." *Projet of the Civil Code of Louisiana of 1825*, in 1 Louisiana Legal Archives 2 (1937). If one makes the reasonable assumption that the legislature concurred in the redactors' judgment on this point (why else would the legislature have agreed to suppress the article?), then the purpose behind the suppression of Article 7 is clear: the legislature wanted to eliminate the theretofore existing exceptions to the ban on retroactivity. See generally Symeon C. Symeonides, *An Introduction to the Louisiana Civil Law System* 467 (6th ed. 1991).

Looking at this evidence, one can come to one and only one possible conclusion: Article 8 of the Civil Code of 1870 imposed an *absolute* ban on retroactivity. That is so because (i) the legislature of 1825 intended to eliminate the traditional civil law exceptions to the ban on retroactivity that were still recognized in the Digest of 1808 and (ii) the legislature of 1870 did not intend to change the law on this point.

51. Whether Section 2 (in contrast to Article 6) means what it says, that is, whether it requires an "express" dispensation from the usual rule (i.e., no retroactivity), is unclear. The texts of the two pieces of legislation are certainly different: whereas Article 6 requires that the dispensation be

that the legislature intended to accord retroactive effect to a new revised statute, then that statute cannot be retroactively applied. Thus, the second rule of Section 2, unlike its Article 6 counterpart, imposes a blanket prohibition against retroactivity in cases in which the legislature has not expressed its intent, a prohibition that admits of no exceptions.

Though the two rules in each of these pieces of legislation appear to have quite different functions—one applies when the legislature expresses its intent, the other when it does not—they are, in fact, fundamentally related. Both of the rules, not just the first, are connected with legislative “intent,” though in rather different ways. How the first rule is connected with legislative intent is so obvious that it requires no comment. Though the connection between the second rule—a default rule—and legislative intent is not so obvious, it is nevertheless certain. The connection is signaled by several of the comments to Article 6, which describe each of the elements of the default rule—that which concerns “substantive laws” as well as that which concerns “procedural” and “interpretative” laws—as a “well-settled rule of *interpretation*.”⁵² This understanding of the default rule is firmly rooted in civil law doctrine, particular that of France:

[T]he principle of non-retroactivity . . . is placed at the head of the dispositions of the Code Civil in order to indicate to its *interpreters* what should be the field of application of the laws

[I]t is principally to the judge, as *interpreter*, that [A]rticle 2 of the Code Civil [the French default rule] is applied. That article is placed under a rubric which furnishes some general indications for the solution of judicial litigation. . . .: the judge must always *interpret* the law in the sense of an exclusion of any effect on the past.⁵³

evidenced by a “clear legislative expression,” Section 2 requires that the dispensation be “expressly so provided.” The courts, however, have not drawn any distinction between the two. See, e.g., *LIGA v. Guglielmo*, 276 So. 2d 720, 724 (La. App. 1st Cir. 1973). It is possible, then, that an “unavoidable implication” of legislative intent is good enough for Section 2, just as it’s good enough for Article 6.

52. La. Civ. Code art. 6 cmt. (b) (the default rule for substantive laws) & cmt. (c) (the default rule for procedural and interpretative laws). See also *State ex rel. Howard Kenyon Dredging Co. v. Miller Gravity Drainage Dist. No. 3*, 193 La. 915, 926, 192 So. 529, 533 (1940) (describing Article 8 of the Civil Code of 1870 as a “sound rule of construction”); Yiannopoulos, *supra* note 19, § 40, 69 (noting that the question to which Article 8 of the Civil Code of 1870 is addressed—“whether a certain law . . . should be applied to pre-existing facts and relations”—is “a matter of statutory interpretation”).

53. Level, *supra* note 1, § 73, at 133 & § 68, at 120. Other pertinent French law authorities include Bach, *Conflicts I*, *supra* note 1, at 11 (“the rule of non-retroactivity of laws is an interpretative rule”); Bach, *Conflicts II*, *supra* note 1, § 16, at 144-3 (“the rule of non-retroactivity is a rule of interpretation”); 1 Colin & Capitant, *supra* note 18, § 51, at 52 (“[T]he prohibition pronounced by article 2 is addressed only to judges: it does not bind the legislator; it aims at only the interpretation of the laws, not their confection.”); Weill & Terré, *supra* note 2, § 166, at 171 (“[T]he prohibition of article 2 is addressed to the judges: it aims at the interpretation of the laws. When a judge must

Now, if one recognizes that the aim of interpretation is to uncover the "intent" of the legislature, then these descriptions of the default rule as a "rule of interpretation" can mean one, and only one, thing: the rule is based on what, in the absence of evidence to the contrary, one must "presume" is the legislature's intent. To put it another way, the default rule is supposed to reflect what a reasonable legislator would, as a general rule, "intend" with respect to the temporal scope of new legislation.

These two pieces of legislation, it is fair to say, raise as many questions as they answer. It is not at all clear how the quite different default rules of Article 6 and Section 2 are to be reconciled or harmonized with each other. Nor is it clear precisely what the concepts in terms of which Article 6 and Section 2 are cast mean. Neither statute, for example, bothers to define the critically important term "retroactive." And Article 6 provides no clue to the meaning of the terms "substantive," "procedural," and "interpretative."

B. Interpretation⁵⁴

1. Legislative Antinomy

The courts have addressed and, in the opinion of most observers, have resolved the first of the questions that the legislation leaves unanswered,

fix the domain of application of a new law, article 2 forbids him to give to this law a retroactive effect."); Count Vareilles-Sommières, *Une Théorie Nouvelle sur la Rétroactivité des Lois*, 22 *Revue Critique de Législation et de Jurisprudence* § 54, at 492 (1893) ("Article 2 of the Code Civil means that, every time that it's not certain that the law ought to be retroactive, one ought to keep oneself from rendering it so. It is a commandment that is addressed to the judges, to all those who are charged with executing the laws as well as to all those who interpret them."). See also 1 Barbero, *supra* note 31, § 41, at 97 ("It is in these cases [those for which the legislature fails to set up transitory dispositions] that the interpreter avails himself of the principle of 'non-retroactivity.'") (Italy); 1 Borda, *Tratado*, *supra* note 1, § 172, at 189 (referring to the rules of Civil Code article 3 as "interpretative rules") (Argentina).

54. Those readers who have been trained in the civilian tradition may well be somewhat surprised at the content of this section of the paper, which is devoted exclusively to an examination of the pertinent jurisprudence. In particular, they may find it strange that a section entitled "Interpretation" says not word one about the *doctrinal* (as opposed to the *jurisprudential*) interpretation of the controlling legislation. In most, if not all, civil law systems, law students are taught that doctrine stands alongside jurisprudence as an "indirect," "secondary," "subsidiary," or "persuasive" source of law, see La. Civ. Code art. 1 cmt. (b); 1 Barbero, *supra* note 31, §§ 27 & 28, at 80; 1 Borda, *Tratado*, *supra* note 1, §§ 64-66, at 80-83, & §§ 81-82, at 101-03; Ghestin & Goubeaux, *supra* note 1, §§ 226-227, at 192-95; 1 Malaurie & Aynès, *supra* note 1, §§ 835-837, at 259-60; 1 Marty & Raynaud, *supra* note 1, § 111, at 197-99, § 119, at 215-18, & § 127, at 236-37; 1 Mazeaud et al., *supra* note 1, § 63, at 117; Starck, *supra* note 1, § 115, at 49, & §§ 119-26, at 51-54; Alberto Trabucchi, *Istituzioni di Diritto Civile* n° 10, at 21-23 (32d ed. 1991); Wald, *supra* note 1, §§ 22-23, at 62-65; Weill & Terré, *supra* note 2, § 119, at 121-22; Yiannopoulos, *supra* note 19, § 35, at 52-53, & § 36, at 57-58, and, further, that the world of "interpretation" comprises two hemispheres—jurisprudential and doctrinal, see 1 Borda, *Tratado*, *supra* note 1, §§ 190-191, at 205-07; Jean Carbonnier, *Droit Civil: Introduction* § 24, at 60-61, & at 277 (20th ed. 1991); 1 Chevallier

& Bach, *supra* note 2, at 28-31; 1 Colin & Capitant, *supra* note 18, § 32, at 33-35, & § 36, at 38-41; 1 Josserand, *supra* note 18, § 86, at 64-65, & §§ 89-90, at 69-71; Garcia, *supra* note 1, § 170, at 329-30; 1 Mazeaud et al., *supra* note 1, §§ 93-94, at 149-51; 1 Ripert & Boulanger, *supra* note 1, § 145, at 64. To the civilian mind, then, a resumé of "interpretation" that covers the jurisprudence but ignores the doctrine is like a football game that ends at halftime.

Here, however, it is appropriate to restrict the discussion of "interpretation" to the jurisprudential interpretation alone. The reason is two-fold.

First, there's not much "doctrinal interpretation" to speak of. There's no treatise on the subject. No monograph and, what's even more surprising, not a single periodical article has ever been devoted to it. That's not to say that there's *no* doctrinal writing on the subject at all. A few authors have written periodical articles on the "retroactivity" of this or that new piece of substantive legislation, *see, e.g.*, Winston R. Day, *Applicability of the New Mineral Code to Existing Mineral Rights*, 22d Annual Institute on Mineral Law: Louisiana State University Law School Institute of Continuing Legal Education 205 (Thomas A. Harrell ed., 1975); Lee Hargrave, *Constitutional Law, Developments in the Law, 1980-81*, 42 La. L. Rev. 596, 601-02 (1982); Cynthia Samuel, *The Retroactivity Provisions of Louisiana's Equal Management Law: Interpretation and Constitutionality*, 39 La. L. Rev. 347 (1979); Charles Joseph Duhé, Jr., Comment, *Retroactive Application of the Louisiana Products Liability Act: A Civilian Analysis*, 49 La. L. Rev. 939 (1989); others, in the course of reviewing this or that new piece of legislation in treatises or articles, have commented on the "retroactivity" problems that implementation of that legislation would raise, *see, e.g.*, A.N. Yiannopoulos, Property § 10, at 17-22, in 2 Louisiana Civil Law Treatise (3d ed. 1991); William Crawford, *Developments in the Law, 1987-1988—Torts*, 49 La. L. Rev. 543, 543-44 (1988); Thomas Galligan, *The Louisiana Products Liability Act: Making Sense of it All*, 49 La. L. Rev. 629, 630-38 (1989); John Kennedy, *A Primer on the Louisiana Products Liability Act*, 49 La. L. Rev. 565, 587-88, 607-10 (1989); H. Alston Johnson, *Developments in the Law, 1983-1984—Legislation—Procedure and Interpretation*, 45 La. L. Rev. 341, 343-44 (1984); Katherine Shaw Spaht et al., *The New Forced Heirship Legislation: A Regrettable "Revolution"*, 50 La. L. Rev. 409, 474-75, 480, 483, 492-99 (1990); Katherine Shaw Spaht, *Revisions of the Law of Marriage: One Baby Step Forward*, 48 La. L. Rev. 1131, 1153 (1988); Katherine Shaw Spaht, *Developments in the Law, 1984-1985—Persons*, 46 La. L. Rev. 613, 621-25 (1986); Katherine Shaw Spaht, *Developments in the Law, 1982—Persons*, 43 La. L. Rev. 535, 538-39 (1982); Symeon Symeonides, *Developments in the Law, 1984-1985—Property*, 46 La. L. Rev. 655, 691-93 (1986); Symeon Symeonides, *One Hundred Footnotes to the New Law of Possession and Acquisitive Prescription*, 44 La. L. Rev. 69, 80 n.30; 108 n.71; 118 n.78 (1983); Leslie L. Inman, Note, *Insurance—Direct Action Against Insurer—Louisiana Acts 541, 542 of 1950*, 25 Tul. L. Rev. 290 (1951); and several of the textbooks used in introductory civil law courses in law schools around the state include brief sections on "retroactivity," Alain Levasseur, *An Introduction to the Louisiana Civil Law System* 418-54 (1996); J.-R. Trahan, *A Supplement to Symeon Symeonides' An Introduction to the Louisiana Civil Law System* 60-84 (2d ed. 1997); Symeonides, *supra* note 50, 465-88; Yiannopoulos, *supra* note 19, § 40, at 67-70. But in most of this writing, the subject of retroactivity itself—what it is and when it's permissible—is treated only in passing and then, more often than not, in a cursory fashion. Not surprisingly, then, most of this writing fails even to identify, much less to propose solutions to, the questions that Louisiana's intertemporal law legislation leaves unanswered. The *only* notable exceptions are (i) Professor Yiannopoulos' monograph *Louisiana Civil Law System*, *see supra* note 19, in which the author briefly summarizes (without endorsing) the so-called "acquired rights" theory, which, until recent years, had held sway in all other civil law jurisdictions and systems, and (ii) a thesis written by Michael E. Coney, then a candidate for a Master of Civil Laws degree at the LSU Law Center, entitled *Temporal Conflicts of Law: A Theory of Retroactivity*, *see supra* note 1, in which the author attempts to rework Louisiana's intertemporal conflicts law along the lines proposed by Paul Roubier, the acknowledged "father" of modern civilian intertemporal conflicts law doctrine.

namely, the apparent antinomy between the default rules of Article 6 and Section 2. According to the courts, the "conflict" between Article 6 and Section 2 is "apparent, not real."⁵⁵ That is so, the courts have reasoned, because the scope of Section 2, properly "interpreted," is limited to "substantive" legislation.⁵⁶ So understood, Section 2 says nothing about the temporal effects of procedural or interpretative legislation; rather, it merely restates the rule of Article 6 with respect to the temporal effects of substantive legislation.⁵⁷ For the courts, then, the legislature's apparently bivocal response to our first question is, on closer examination, a univocal response—that given in Article 6.

2. Absence of Definitions

a. Retroactivity

Prior to the 1950s, no Louisiana court had ever ventured to offer a definition of retroactivity or a statement of the criteria for distinguishing retroactive from nonretroactive applications. In most cases that involved intertemporal problems, there was no need for it: the parties agreed that the new statute, if applied to their case, would operate retroactively. But even in those few cases in which there was a need for it, that is, where the parties disputed whether the proposed application of the statute in question was retroactive, the courts failed to meet the need. Typical of these cases is *State v. Alden Mills*.⁵⁸ Responding to the appellant's

Second, the few (that is, the *two*) doctrinal works that have explored the fundamentals of intertemporal conflicts law have (regrettably) had little, if any, practical impact to date. Though the jurisprudence has cited and, in some instances, even incorporated certain minor elements of Professor Yiannopoulos' work on the temporal effects of laws, *see, e.g.*, *Segura v. Frank*, 630 So. 2d 714, 724 (La. 1994) (citing Yiannopoulos' explication of interpretative laws), it has altogether ignored the most important elements of that work, in particular, his explication of the *meaning* of and *criterion* for retroactivity. The fate of Mr. Coney's work has been even more unfortunate. Until now, at least, knowledge of its existence has been limited to a handful of professors at the LSU Law School. Because my objective in this paper is to evaluate the intertemporal conflicts law that's now in force *in fact*, that is, what a comparativist might call the "law in practice" in contradistinction to the "law on the books," an examination of these doctrinal works would be out of place here.

55. *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So. 2d 809, 816 (La. 1992); *see also* *Manuel v. Louisiana Sheriff's Risk Management Fund*, 664 So. 2d 81, 85-86 (La. 1995).

56. *Manuel*, 664 So. 2d at 86; *Segura v. Frank*, 630 So. 2d 714, 721 n.16 (La. 1994); *see also* *Smith*, 609 So. 2d at 816.

The stated rationale for this interpretation of Section 2 is fealty to civilian tradition. According to the courts, a literal reading of Section 2 would be "inconsistent with the civilian principles consistently adhered to in our jurisprudence." *Smith*, 609 So. 2d at 816 n.12.

57. *See* *Keith v. United States Fidelity & Guar. Co.*, 694 So. 2d 180, 183 (La. 1997) ("[T]he jurisprudence has generally construed the two provisions [Article 6 and Section 2] as being co-extensive"); *Smith*, 609 So. 2d at 816 (same); *see also* *Segura*, 630 So. 2d at 721 n.16 ("[T]he general rule of prospective application applies only to substantive laws as distinguished from merely procedural or remedial laws, which will be given retroactive effect in the absence of language showing a contrary intention").

58. 202 La. 416, 12 So. 2d 204 (1943).

contention that the lower court's judgment rested on a prohibited "retroactive application" of a new statute, the court, instead of laying down a definition of retroactivity, simply repeated the old nostrum, derived from American law sources, that "a proposed application of a statute is not retroactive merely because it would draw upon antecedent facts for its operation."⁵⁹ Having done that, the court proceeded to rule in favor of the appellant on other grounds,⁶⁰ thereby mooting the question whether the statute, as applied, indeed operated retroactively.

In the late 1950s, however, a few of the state's appellate courts, including the supreme court itself, finally made some effort to fill the gap.⁶¹ The most important in the short line of cases that came of this effort was *Henry v. Jean*.⁶² Because of its significance, the case merits a fairly detailed discussion.

The facts were as follows. Back around the turn of the century, a certain couple had several children out of wedlock. At the time, the methods whereby such illegitimate children⁶³ might be legitimated were limited: legitimation by unilateral notarial act⁶⁴ and legitimation by subsequent marriage of the natural parents plus a formal acknowledgement of the child by both parents in either a pre-nuptial notarial act or in the act of marriage itself.⁶⁵ Neither the man nor the woman ever executed such a unilateral notarial act and, though they eventually married and even informally acknowledged their illegitimate children as their own, they made no such formal acknowledgement. In the course of time the now married couple produced still another child, this one, of course, legitimate. Still later, after the man's death, the legislature altered the law of legitimation, establishing yet another method whereby it could be accomplished, namely, by the subsequent marriage of the natural parents plus *informal* acknowledgement of the child.⁶⁶ When the woman later died, a dispute arose between the older children, on the one hand, and youngest child, on the other, regarding whether the former were entitled to share in the woman's succession.

59. 12 So. 2d at 206 (quoting *Cox v. Hart*, 260 U.S. 427, 435, 43 S. Ct. 154, 157 (1922)).

60. *Id.* at 206-11.

61. See *Henry v. Jean*, 238 La. 314, 115 So. 2d 363, 367 (1959); *Stokes v. Aetna Casualty & Sur. Co.*, 232 So. 2d 328, 332 (La. App. 1st Cir. 1970); *Henry v. Jean*, 112 So. 2d 171, 174 (La. App. 1st Cir.), *aff'd*, 238 La. 314, 115 So. 2d 363, 367 (1959); *Brown v. Indemnity Ins. Co.*, 108 So. 2d 812, 815 (La. App. 2d Cir. 1959).

62. 238 La. 314, 115 So. 2d 363, 367 (1959).

63. See La. Civ. Code art. 180 (1870) ("Illegitimate children are those who are born out of marriage.").

64. *Id.* art. 200 ("A natural father or mother shall have the power to legitimate his or her natural children by an act passed before a notary and two witnesses, declaring that it is the intention of the parent making the declaration to legitimate such child or children . . .").

65. *Id.* art. 198 ("Children born out of marriage . . . may be legitimated by the subsequent marriage of their father and mother, whenever the latter have legally acknowledged them for their children, either before their marriage by an act passed before a notary and two witnesses, or by their contract of marriage itself.").

66. *Id.* art. 198 (as amended by 1944 La. Acts No. 50) ("Children born out of marriage . . . are legitimated by the subsequent marriage of their father and mother, whenever the latter have formally or informally acknowledged them for their children, either before or after the marriage.").

Though the disputants agreed that the older children could succeed only if they could be classified as legitimate, the disputants disagreed regarding whether the older children should be so classified. The youngest child, relying on the law of legitimation as it stood when the older children were born, contended that those children were illegitimate. The older children, relying on the law of legitimation as it stood at the time of the woman's death, contended that they were legitimate (by virtue of their parents having married after their births and having informally acknowledged them). To rebut the older children's contention, the youngest child argued that to apply the new law of legitimation to their dispute would be to apply it retroactively, in particular, would attach to acts that had occurred prior to the effective date of the new law—the marriage and informal acknowledgement—a juridical effect that those acts did not have under the law in force at the time—the legitimation of children born prior to the marriage. The district court ruled for the older children.

The court of appeal affirmed that judgment. It did so, the judges explained, because “we do not believe that the judgment . . . could be considered as giving retroactive effect to the statute.”⁶⁷ In support of its conclusion, the court offered up the following definition of retroactivity, one drawn from a recent decision of another Louisiana court of appeal:⁶⁸

A retrospective or retroactive law is defined as one which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty or attaches a new disability with respect to transactions or considerations already passed.⁶⁹

Applying the new law of legitimation to this case, the court went on to explain, did not have that effect:

Now, no vested rights were had by any of the heirs to the succession of [the woman] until the time of her death during the year 1949. . . . Prior to the death of Coralie Lewis, none of the children had any vested rights in her succession. . . . No vested rights were taken away from the legitimate child . . . , as he had no vested rights until the death of his mother.⁷⁰

The supreme court, in turn, affirmed the court of appeal's judgment. It did so because, in its estimation, the new law, as applied to that case, “was not retroactive or retrospective.”⁷¹ The court's rationale largely replayed that of the court of appeal. First, the court noted that

67. 112 So. 2d at 174.

68. *Brown v. Indemnity Ins. Co.*, 108 So. 2d 812 (La. App. 2d Cir. 1959).

69. *Henry*, 112 So. 2d at 174 (quoting *Brown*, 108 So. 2d at 815).

70. *Id.*

71. *Id.*

if the statute under consideration undertook to take away or impair vested rights acquired under existing laws, created a new obligation or imposed a new duty or disability with respect to transactions or considerations already passed, it would have to be classified as retrospective or retroactive in its operation.⁷²

Second, the court insisted that the new statute, as applied to this case, did not meet this criterion:

[T]he legitimations resulting from the enactment of the statute have not accorded to the persons legitimated any rights in the succession of persons who died before the passage of the Act, their right of inheritance being governed by their legal status at the instant of death, at which time the right of inheritance vests.

Moreover, the law did not take away or impair any vested rights in other persons. Nor did it do any other thing which would make it retroactive or retrospective. Defendant [the youngest child] had no vested rights in the succession of his mother until she died in 1949 and hence, legitimation of his brothers and sisters by Act 50 of 1944 could take nothing from him.⁷³

With these decisions, the courts, it would seem, finally supplied Louisiana's intertemporal conflicts law with what it had long lacked: a definition of or a criterion for retroactivity. This definition or criterion, which seems to be indistinguishable from that associated with what civilians know as the "theory of acquired rights,"⁷⁴ can be boiled down

72. *Id.* at 367.

73. *Id.*

74. This theory, it's fair to say, dominated civilian intertemporal conflicts law until the early part of this century. The leading works on the theory include 10 Philippe Antoine Merlin, *Répertoire Universel et Raisonné de Jurisprudence* 1-90 (5th ed. 1826) (entry for "effet rétroactif") and 8 Friedrich Carl de Savigny, *Traité de Droit Romain* §§ 383-400, at 363-528 (Charles Guenoux trans. 1851). See also 1 Alessandri & Somarriva, *supra* note 1, §§ 340-42, at 252-55; 1 Augusto, *supra* note 1, § 166, at 155-56; Bach, *Conflicts I*, *supra* note 1, §§ 34-36, at 5; Bach, *Contribution*, *supra* note 1, § 4, at 408-10; 1 Barbero, *supra* note 31, § 42, at 97-98; 1 Bianca, *supra* note 1, §§ 84-85, at 119-20 (1982); Bonneau, *supra* note 18, §§ 91-119, at 107-38; Carbonnier, *supra* note 54, § 131, at 226-27; 1 Chevallier & Bach, *supra* note 2, § 4, at 22-23; 1 Luis Claro Solar, *Explicaciones de Derecho Civil Chileno y Comparado* §§ 114-15, at 64-65 (2d ed. 1978); Bonneau, *supra* note 1, §§ 13-93, at 19-80; Borda, *Tratado*, *supra* note 1, §§ 139-41, at 156-59; Borda, *Portée*, *supra* note 1, §§ 1-2, at 75-77; Coney, *supra* note 1, at 12-15; Côté & Jutras, *supra* note 1, §§ 11-62, at 940-57; Pierre-André Côté, *La Crise du Droit Transitoire Canadien*, in *Mélanges Louis-Philippe Pigeon* 177, 181-82 (1989); Cornu, *supra* note 1, §§ 369-72, at 125-26; De Cupis, *supra* note 18, § 8, at 16; Dekeuwer-Défossez, *supra* note 1, § 10, at 8-11; de Pina & de Pina, *supra* note 18, at 315; 1 de Pina, *supra* note 18, at 111; 1 Gonzalo Figueroa Y., *Curso de Derecho Civil* § 67, at 179-80 (1975); Galindo, *supra* note 1, § 74-75, at 166-69; García, *supra* note 1, § 199-201, at 390-92; Ghestin & Goubeaux, *supra* note 1, § 333, at 295-96; Hage-Chahine, *supra* note 1, §§ 355-56, at 240-41; 1 Josserrand, *supra* note 18, § 78, at 58-59; Level, *supra* note 1, §§ 35-47, at 57-85; Malauric & Aynès,

to two propositions: if the statute, as applied, would have the effect of depriving someone of a vested right, then the proposed application is retroactive; if the statute, as applied, would not have that effect, then the proposed application is prospective.⁷⁵

The *Henry* court, it's to be regretted, did not bother to define the term "vested right." Even so, the definition is not in doubt. In a number of other decisions, the courts have defined "vested right" and its antonym, "mere expectancy," in the following terms.⁷⁶ "A right is vested when 'the right to enjoyment, present or prospective, has become the property of some particular

supra note 1, §§ 638-41, at 206-08; 1 Jorge Mario Magallón Ibarra, *Instituciones de Derecho Civil: Introduction* 135-38 (1987); 1 Marty & Raynaud, *supra* note 1, § 106, at 185-86; 1 Mazeaud et al., *supra* note 1, § 140, at 214-15; 1 Francesco Messineo, *Manual de Derecho Civil & Comercial: Introduction* § 5, at 90-91 (Santiago Sentis Melendo trans., 1979); 1 Pescio, *supra* note 1, § 105, at 336-41; 1 Planiol & Ripert, *supra* note 2, §§ 214-42, at 100-01; Rescigno, *supra* note 1, § 2, at 222; 1 Ripert & Boulanger, *supra* note 1, §§ 235-38, at 111-13; 1 Rojina, *Compendio*, *supra* note 1, §§ 2-4, at 42-45; 1 Rojina, *Derecho*, *supra* note 1, at 270-76; Roubier, *Transitoire*, *supra* note 1, §§ 22-27, at 89-124; Tavernier, *supra* note 1, at 233-53; Trabucchi, *supra* note 54, § 11, at 25-26 n.1; 1 Valencia, *supra* note 18, § 86, at 187-80; Vareilles-Sommières, *supra* note 53, §§ 19-53, at 451-68; Wald, *supra* note 1, §§ 46-47, at 119-34; Yiannopoulos, *supra* note 19, § 40, at 68; *Código Civil*, *supra* note 20, art. 3, nn.47-51, at 149-51 (1989); *Diccionario*, *supra* note 18, at 1824, 1826-27.

That the *Henry* courts ended up embracing this theory is amusing, at least for those who delight in historical irony. Let me explain. From the standpoint of a civilian, the *Henry* decisions are at once both "decadent" and "retrograde": decadent, in the sense that the courts which rendered them looked to *common law*, rather than *civil law*, sources to guide them in their interpretation of a rule of civil law origin (then Civil Code article 8), and retrograde, in the sense that the courts made this "mistake" after they had supposedly made their "turn" back to the civil law, after, that is, the so-called "civil law renaissance." And yet, despite their regressive decadence, the courts ended up with a theory identical to what was then and, for a century and a half prior thereto, had been the dominant *civil law* theory of retroactivity.

75. The *Henry* court's definition of or criterion for retroactivity will sound familiar as well to students of American constitutional law, in particular, the due process clauses of the 5th and 14th amendments to the United States Constitution. The approach that the federal courts have traditionally employed to determine whether a proposed retroactive application of a new statute violates "due process" requirements goes by the same name, that is, "vested rights." It may be tempting, then, to assume that the two theories—that used by the *Henry* court and that which is associated with the due process clauses—are the same.

That assumption, however, is at best only *half true*. Insofar as the *content* of the two theories is concerned (e.g., the abstract definition of "vested right" and the catalogue of rights that qualify as "vested"), they are, in fact, largely indistinguishable. But insofar as their *function* is concerned, they are quite different. The function of the "civil law" vested rights theory is to enable one to determine whether a proposed application is "retroactive" in the first place. The function of the "due process" vested rights theory, by contrast, is to enable one to determine whether a proposed application of a statute, which one has already determined (on *some other* basis) would be a "retroactive" application, is permissible. Thus, whereas the former theory serves to distinguish retroactivity from non-retroactivity, the latter serves to distinguish permissible retroactivity from impermissible retroactivity.

76. This definition, it should be noted, has been developed in the context of *constitutional*, rather than *statutory*, retroactivity analysis. It seems fair to assume, however, that the term has the same meaning in both contexts. See *Coney*, *supra* note 1, at 12.

person or persons as a present interest."⁷⁷ This definition can be analyzed into two parts. First, a vested right is a *property* right or, as civil law scholars prefer to put it, a *patrimonial* right.⁷⁸ According to the classical notion of patrimony, a patrimonial right is one that is "susceptible of pecuniary evaluation"⁷⁹ or, to put it another way, to which a dollar value can readily be attached.⁸⁰ Second, a vested right is a *present* right. That means that a right cannot

77. *Terrebonne v. South Lafourche Tidel Control*, 445 So. 2d 1221, 1224 n.9 (La. 1984) (quoting *Tennant v. Russell*, 214 La. 1046, 1052, 39 So. 2d 726, 728 (1949)); *DOTD v. McClendon*, 552 So. 2d 1220, 1221 (La. App. 5th Cir. 1989).

78. Regarding the interchangeability of the expressions "property right" and "patrimonial right" in the Louisiana jurisprudence, see *Malek v. Yekani-Fard*, 422 So. 2d 1151, 1153 (La. 1982) ("All rights that are susceptible of pecuniary evaluation are property in the sense that they are guaranteed by the legal order and form a part of a person's patrimony.") (quoting A.N. Yiannopoulos, *Property*, in 2 Louisiana Civil Law Treatise § 1, at 3 (2d ed. 1980)).

79. Yiannopoulos, *supra* note 19, § 74, at 128.

80. Carbonnier, *supra* note 54, § 166, at 302 ("He who says patrimonial says pecuniary. . . . [I]t is appropriate to include among the patrimonial rights only the rights susceptible of a pecuniary evaluation. Those that, by their nature, are repugnant to being appreciated in money remain outside of it. These are the extra-patrimonial rights. . . ."); 1 Chevallier & Bach, *supra* note 2, at 40-41 ("It results from the classic analysis of patrimony that it can include only those things and rights that are appreciable in money and that, since they can be ceded or transmitted, can respond for debts. Now, alongside these rights there are others that are not susceptible of pecuniary evaluation and that cannot be ceded. The rights that remain outside the patrimony are called extra-patrimonial rights.") 1 Colin & Capitant, *supra* note 18, § 122, at 106 ("The patrimonial rights . . . constitute prerogatives that end up, in the final analysis, procuring for their holders some satisfactions that are pecuniary or, at the very least, appreciable in money."); Cornu, *supra* note 1, § 40, at 27 ("One names 'patrimonial rights' the right that carry, for their holders, an advantage that is appreciable in money. Patrimonial rights have, principally, a pecuniary interest. They constitute economic values. . . . Whatever may be their object . . . , patrimonial rights have, either directly or by evaluation, a monetary expression. They represent a money-value. Every right of this type is worth so much: it is money."); Ghestin & Goubeaux, *supra* note 1, § 205, at 167 ("The criterion of distinction has then been found: patrimonial rights are those that can be evaluated in money; the rights that rebel against this conversion into money are outside of the patrimony."); 1 Josserand, *supra* note 18, § 648, at 374 ("The patrimony is a notion of an essentially pecuniary kind; the rights that do not have pecuniary signification remain outside the patrimony . . . , extra-patrimonial rights that remain outside of commerce and outside of juridical transactions."); 1 Malaurie & Aynès, *supra* note 1, at 69 ("All riches that form the object of a private appropriation fall within the patrimony of a person: the patrimony is the ensemble of rights and obligations that appertain to a person and have a pecuniary value."); 1 Marty & Raynaud, *supra* note 1, § 287, at 465 ("The patrimony is the ensemble of rights and obligations of a person that have an economic and pecuniary value. Thus, the rights that have a character that is not at least principally pecuniary do not form part of the patrimony . . . , the rights that one unites under the qualification extra-patrimonial."); 1 Mazeaud et al., *supra* note 1, § 289, at 397 ("The patrimony comprises only rights of pecuniary value, to which, for this reason, one reserves the qualification of patrimonial rights, by opposition to right not pecuniary . . . , so-called extra-patrimonial rights."); Starck, *supra* note 1, § 333, at 137-38 ("One designates as 'the patrimony' the ensemble of rights and obligations of a person (physical or artificial), rights and obligations that have a pecuniary expression, an economic value, and that, in addition, find themselves in juridical commerce."); Weill & Terré, *supra* note 2, § 363, at 354 ("The patrimony is a notion of the pecuniary order; the rights that have no pecuniary value remain outside the patrimony . . . , to which, for that reason, one reserves the qualification extra-patrimonial.").

be considered vested unless it is “absolute, complete and unconditional, independent of a contingency.”⁸¹ If the interest in question is a “mere expectancy of future benefit,” then the interest “does not constitute a vested right.”⁸²

For better or for worse, whatever certainty *Henry* might have created with respect to the meaning of “retroactivity” proved to be short-lived. With the passage of time the courts allowed the waters surrounding that notion to become muddied once more. It’s not that the courts overtly rejected *Henry*’s definition of retroactivity; they did not. But they did ignore it. Instead of *Henry*’s definition of retroactivity, the courts, with no objections from the doctrine, employed what can most charitably be described as an “intuitive” approach to identifying retroactivity.⁸³ This intuitive approach reigned supreme for many years, so long, in fact, that one might have been tempted to conclude that the *Henry* definition had died the death of desuetude.⁸⁴

81. *Tennant*, 214 La. at 1052, 39 So. 2d at 728; *McClendon*, 552 So. 2d at 1221.

82. See *authorities collected supra* note 81.

83. See, e.g., *Lirette v. Union Texas Petroleum Corp.*, 467 So. 2d 29, 33 (La. App. 1st Cir. 1985) (noting that “[a] statute is not retroactive merely because it is applied to the continuation of a pre-existing contract” and then concluding, without further explanation, that the proposed application was not retroactive); *Drew v. Louisiana Dep’t of Corrections*, 374 So. 2d 129, 130 (La. App. 1st Cir. 1979) (noting that “a statute does not operate retroactively merely because it relates to antecedent events” and then resolving the intertemporal issue on another basis, thereby mooting the question whether the proposed application was truly retroactive); *Churchill Farms, Inc. v. Louisiana Tax Comm’n*, 338 So. 2d 963, 966 (La. App. 4th Cir. 1976); *Louisiana Ins. Guar. Ass’n v. Guglielmo*, 276 So. 2d 720, 724 (La. App. 1st Cir. 1973); see also *Patrick’s Cafe, Inc. v. Red River Parish Police Jury*, 315 So. 2d 27, 30 (La. 1975) (Summers, J., dissenting) (noting that “a statute is not rendered retroactive in application merely because it draws upon antecedent facts for its operation” and then concluding, without further explanation, that the proposed application was not retroactive); *State v. Cleveland*, 246 La. 668, 685, 166 So. 2d 267, 273 (1964) (McCaleb, J., dissenting) (noting that “a statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends are drawn from a time antecedent to its enactment” and then concluding, with little additional analysis, that the proposed application was not retroactive).

By proceeding in this “intuitive” fashion, the Louisiana courts, at that juncture, were in good company. It appears that their counterparts in France and Québec were doing the same. See *Côté & Jutras, supra* note 1, § 13, at 941 (noting that the “acquired rights” theory, which the Quebecois courts applied for a number of years, entails “more intuition and impressionism than a reasoned and methodical approach”); *Level, supra* note 1, § 44, at 74 (suggesting that “the traditional solutions” of the French jurisprudence have been “given intuitively and without doctrinal justification”).

84. To be sure, the Louisiana courts often mentioned “vested rights” in post-*Henry* intertemporal conflicts cases. But in those cases the courts used the vested rights doctrine to resolve a different issue and to perform a different function than did the *Henry* court. For the *Henry* court, the vested rights doctrine forms part of the solution to what I’ve called the “civil law” retroactivity issue, where it serves as a criterion for *distinguishing retroactive from prospective applications* of legislation. In the post-*Henry* cases, the vested rights doctrine forms part of the solution to the constitutional (due process) retroactivity issue, where it serves as a criterion for *distinguishing permissible from impermissible retroactive applications* of legislation.

But then came *Segura v. Frank*.⁸⁵ Back in 1970 the legislature created the Louisiana Insurance Guaranty Association (LIGA),⁸⁶ whose mission, in effect, was to serve as the surety for insolvent member insurers with respect to their unpaid claims. As originally enacted, the statute included a provision—Section 1386(1)—that required unpaid claimants to “exhaust” their rights against “other insurers,” that is, insurers other than the insolvent insurer who, in addition to the insolvent insurer, had issued policies that covered their claims, before pursuing LIGA.⁸⁷ Interpreting the exhaustion requirement narrowly, the courts concluded, as early as 1980, that the requirement “was designed to apply to ordinary insurance coverage and not to uninsured motorist [UM] coverage.”⁸⁸ Within this legal milieu, Segura and Frank each took out an automobile insurance policy, Segura from American Manufacturers Mutual Insurance Company and Frank from Dixie Lloyds Insurance Company. Segura’s policy included a UM rider. A short while later, on March 12, 1990, Frank’s car struck Segura in a pedestrian crosswalk, causing her to sustain personal injuries. That summer (1990) the legislature amended Section 1386(1) so as to “require[] an injured claimant to first exhaust his UM coverage before recovering against LIGA.”⁸⁹ Segura evidently took no notice of the amendment. A few months later, on December 20, 1990 Dixie Lloyds, Frank’s insurer, became insolvent and was liquidated. And so, when plaintiff filed suit on March 4, 1991, Segura sued LIGA as Dixie Lloyd’s successor. LIGA met the suit with an exception of prematurity. Relying on the amended version of Section 1386(1), LIGA contended that Segura had to exhaust her rights against American under the UM rider of her policy before she could make demand on LIGA. Segura opposed the exception, arguing that the original version, not the amended version, of Section 1386(1) governed her rights against LIGA. That was so, she argued, because to apply the amended version of that statute to her case would be to apply it retroactively, a result that was prohibited. Rebutting that argument, LIGA took the “position that the 1990 amendment would not operate retroactively in the present cases.”⁹⁰ LIGA’s reasoning should sound familiar: the proposed application was not retroactive because Segura could not have had “a vested right in a cause of action against LIGA until Dixie Lloyds was declared insolvent, which occurred after the amendment’s effective date.”⁹¹ Unpersuaded by that argument, the supreme court ruled for Segura. The trouble with LIGA’s reasoning, the court explained, was that it

85. 630 So. 2d 714 (La. 1994). *Segura* was consolidated with another, similar, case—*Rey v. Guidry*—for purposes of review. To avoid taxing my readers’ patience, I’ve omitted any reference to that other case.

86. La. R.S. 22:1375-1394 (1995 and Supp. 1999).

87. *Id.* § 1386(1).

88. *Hickerson v. Protective Nat’l Ins. Co.*, 383 So. 2d 377, 379 (La. 1980).

89. *Segura*, 630 So. 2d at 720.

90. *Id.* at 722.

91. *Id.* at 721.

fail[ed] to take into account the amendment's effects *on the existing rights and obligations* of the UM insurer[]. Those rights and obligations arose not on the date of insolvency, nor on the date[] of the accident[], but on the dates the UM policies were issued.⁹²

Explaining itself further, the court noted how those "existing rights and obligations" differed under the new and original versions of the statute:

[A]t the time[] the American . . . UM polic[y] w[as] issued, La. R.S. 22:1386 . . . limited the UM insurers' liability under those policies to claims in excess of a tortfeasor's liability insurance coverage even in the event of the insolvency of the tortfeasor's insurer. If, however, the 1990 amendment . . . is applied, under those same policies the UM insurers would be primarily liable for plaintiffs' claims against Dixie Lloyds.⁹³

For these reasons, the court concluded that the amendment "would operate retroactively in these cases."⁹⁴

The *Segura* court's analysis, it's fair to say, bears all the hallmarks of a vested-rights approach to the definition of retroactivity. To be sure the court did not, as did the *Henry* court, offer up a formal definition of retroactivity in those terms. But the court's analysis clearly presupposes such a definition. Underlying that analysis were the following assumptions: (i) whether a proposed application of a new statute is retroactive or prospective depends on its effect on "existing rights and obligations" and (ii) if it would alter those "rights and obligations," it is retroactive; if it would not, it is prospective.⁹⁵ Those assumptions correspond, as we have seen, to the basic postulates of the vested-rights approach.

Though *Segura* certainly showed that the "vested rights" approach is not yet dead, that decision should not be taken as a sign that the courts, at long last, have embraced that approach whole-heartedly. To the contrary, at the same time as and immediately after *Segura* was decided, the Louisiana courts, the supreme court included, continued to use the "intuitive" approach of years past. The vast majority these cases, like all of those that preceded *Segura*, can be characterized as Delphic, in the sense that the courts simply asserted, without any explanation whatsoever, that the proposed application was or was not retroactive. At least one of those cases, however, was different. In it the supreme court, for the first

92. *Id.* at 722 (emphasis added).

93. *Id.* at 723.

94. *Id.*

95. Perhaps the clearest indication that this understanding underlay the *Segura* analysis appears in the court's statement of LIGA's argument. As the court states it, that argument rests on an identification between retroactive effect and the deprivation of "vested rights." See *supra* text accompanying notes 66 and 67.

time ever, left behind a few clues from which one can reconstruct, to at least some extent, the principles that sometimes drive the intuitive approach.

That case is *Manuel v. Louisiana Sheriff's Risk Management Fund*.⁹⁶ A consortium of insurers issued a liability insurance policy to a sheriff's department. During the policy period, a sheriff's deputy, while on duty, drove his car into Manuel's car, causing Manuel to sustain personal injuries. Manuel then filed suit against the sheriff's department and its insurers. Up until this point in time, Louisiana law had imposed no duty upon insurers to settle third-party claims, such as Manuel's, in good faith and, in particular, had not required that insurers make or pay such settlements within any particular period of time. But while the suit was pending, the legislature changed the law, imposing a general "good faith" duty to settle third-party claims on insurers and, in particular, requiring that an insurer, to discharge this duty, must (among other things) pay such a settlement within 30 days of the date on which it is reduced to writing. Sometime later, the insurers and Manuel reached a settlement agreement, which was promptly reduced to writing. Due to footdragging by some (though not all) of the insurers, Manuel did not receive his check by the 30-day deadline. Manuel then sued the insurers, seeking to recover statutory penalties for their breach of the new law. In their defense, the insurers made a predictable protest: the new law was inapplicable to them because (i) to apply the new law to them would be to apply it retroactively, inasmuch as the event that gave rise to Manuel's claim and, with it, the insurers' duty to settle, arose before the new law took effect and (ii) the new law was substantive. The supreme court, however, rejected that argument, reasoning that its first premise (unlike its second) was flawed. In its analysis of the temporal effects problem, the court focused its attention on the conduct that the particular statutory provision on which Manuel had based his penalty suit had proscribed:

The cause of action that gave rise to this litigation was *the failure to pay within 30 days*. Given the facts of this case, the statute is being applied only prospectively, i.e. after its 1990 effective date. It is of no consequence that the insurance policy and the accident predate that statute, *since the conduct which exposes the defendants to liability occurred after the statute became law*.

. . .

Although the statute was enacted after the insurance policy was issued and after the date of the accident, the event which grants the plaintiffs a cause of action is the failure to pay the settlement within 30 days, and this happened after the enactment of the statute.⁹⁷

96. 664 So. 2d 81 (1995).

97. *Id.* at 87 (emphasis added) and 87-88.

Having found that the proposed application of the statute was prospective, the court ruled that the statute could be applied to the insurers, notwithstanding that it was "substantive."

The supreme court's analysis of the retroactivity problem presented in *Manuel* rests on the intuition that, whatever else retroactivity means, it must have something to do with the timing of the particular act or other event to which that statute attaches juridical consequences—what civil law scholars call the "presupposition" (*presupposé, supuesto*), "hypothesis" (*hypothèse, ipotesis*), or "juridical facts" (*faits juridiques, Tatbestand*).⁹⁸ And this "something," to judge from the *Manuel* court's analysis, can be described in two complimentary propositions. First, where the presupposed or hypothetical act or event occurs after the effective date of the new statute, the proposed application cannot be considered retroactive. Second, where the presupposed or hypothetical act or event occurs before the effective date of the new statute, the proposed application may and, under some circumstances, should be considered retroactive.

This understanding of retroactivity recalls the theory that, in civil law circles, is known as the "theory of the completed act," an early alternative to the "vested

98. Modern civil law doctrine holds that every juridical rule worthy of the name, regardless of its official form, has the same "logical structure," namely, a "permanent relation between a presupposition (or hypothesis) and a juridical effect: if such and such a fact envisioned abstractly is realized, then such and such a legal consequence results (or does not result, depending on the content of the rule) from it." Héron, *supra*, note 1, at 279; see also Hans Kelsen, *General Theory of Law and State* 45-46 (Anders Wedberg trans. 1945) ("The rule of law . . . is a hypothetical judgment attaching certain consequences to certain conditions. . . . [T]he rule of law . . . connects two facts with one another as condition and consequence. The condition is here the 'cause,' the consequence the 'effect.'"). It follows, then, that every true juridical rule can be recast as a conditional proposition, that is, a proposition in the form of "If A, then B." A is the presupposition or hypothesis and B, the consequence or effect. See 1 Barbero, *supra* note 31, § 5, at 58; Julio C. Cueto-Rúa, *Judicial Methods of Interpretation of the Law* 106 (1981); Dabin, *Théorie, supra* note 21, § 60, at 73-74; Georges Del Vecchio, *L'Homo Juridicus et l'Insuffisance du Droit comme Règle de la Vie* (1935), reprinted in *Justice-Droit-État: Études de Philosophie Juridique* 225, 229-31 (1938); Du Pasquier, *supra* note 16, §§ 112-15, at 89-93 (5th ed. 1979); Garcia, *supra* note 1, § 8, at 13-14; §§ 87-98, at 169-85; § 198, at 388-89; Kelsen, *supra* this note, at 45 & 46; Henri Motulsky, *Principes d'une Réalisation Methodique du Droit Privé* §§ 16-17, at 18-20 (1948); Pierre Pescatore, *Introduction à la Science du Droit* §§ 127-29, at 192-97 (1960); François Rigaux, *Introduction à la Science du Droit* 13-15 (1974); 1 Ernest Roguin, *La Science Juridique Pure* § 58, at 82-84, & § 72, at 101-02 (1923).

Consider this rather simple example. In its official form, the rule of Civil Code article 2315 is worded as follows: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Recast in conditional form, the rule would be worded something like this: "If a man, through his act, causes damage to another, then the latter has the right to compel the former, through juridical process, to compensate him for that damage." The presupposition or hypothesis is set out in the clause "a man, through his act, causes damages to another . . ."; the consequence or effect, in the clause "the latter has the right to compel the former, through juridical process, to compensate him."

rights" theory.⁹⁹ According to the proponents of this theory, "what matters is to find out not if a right has been acquired, but if an act has been *realized* during the reign of the old law, because laws operate directly on acts by assigning juridical consequences to them."¹⁰⁰ For that reason, the theory "sustains that acts completed while the old law was in effect are governed by that law, [whereas] those completed after the imposition of the new law are governed by that law."¹⁰¹

b. Typology of Legislation

As for the distinction between "substantive" legislation, on the one hand, and "procedural" and "interpretative" legislation, on the other, that lies at the heart of the Article 6 default rule, the courts have made at least some attempt to illuminate it. According to the courts, substantive legislation either "establish[es] new rules, rights, and duties or change[s] existing ones"¹⁰² or "impose[s] new duties, obligations or responsibilities upon parties";¹⁰³ procedural legislation "prescribe[s] a method for enforcing a previously existing substantive right and relate[s] to the form of the proceeding or the operation of laws";¹⁰⁴ and

99. 1 Barbero, *supra* note 31, § 42, at 98-99; 1 Bianca, *supra* note 1, § 85, at 120-21; 1 Borda, *Tratado*, *supra* note 1, § 166, at 182; Borda, *Portée*, *supra* note 1, § 2, at 77-78; Francesco Galgano, *Diritto Privato* § 3.1, at 54 (7th ed. 1990); Galindo, *supra* note 1, § 76, at 169; Level, *supra* note 1, § 48, at 80-81; 1 Marty & Raynaud, *supra* note 1, § 106, at 186; 1 Messineo, *supra* note 74, § 5, at 91; Rescigno, *supra* note 1, § 2, at 223; 1 Claro, *supra* note 74, § 116, at 65; 1 Rojina, *Derecho*, *supra* note 1, 277; Roubier, *Transitoire*, *supra* note 1, § 29, at 134-45; Trabucchi, *supra* note 54, § 11, at 25-26; 1 Valencia, *supra* note 18, § 87, at 190-92 (1989); Vareilles-Sommières, *supra* note 53, §§ 3-18, at 445-51 (1893); *Diccionario*, *supra* note 18, at 1827.

100. Galindo, *supra* note 1, § 76, at 169.

101. Borda, *Tratado*, *supra* note 1, § 166, at 182. See also 1 Barbero, *supra* note 31, § 42, at 99 (describing the theory of the "completed act" in these terms: "Non-retroactivity [is used here] . . . in the sense that, given a certain act, its juridical consequences remain those that were connected to the act by the law in force at that time at which the act was completed. . . . [T]he principle of retroactivity is violated when one pretends to reevaluate an act that was completed during the reign of the old law by deriving consequences from it on the basis of the new law."); 1 Bianca, *supra* note 1, § 85, at 120 ("According to this theory [the completed fact], . . . the principle of non-retroactivity of laws provides that the new law cannot be applied to juridical relations that came to an end before it came into force and not to juridical relations that were produced before then and are still alive . . ."); Trabucchi, *supra* note 54, § 11, at 26 n.1 ("According to this tendency, known as [the theory of] the *completed act* or *facta praeterita*, the new legislation . . . does not touch the act in itself, which is already completed.").

102. *Aucoin v. State Dep't of Transp.*, 712 So. 2d 62, 67 (La. 1998); *Keith v. United States Fidelity Guar. Co.*, 694 So. 2d 180, 183 (La. 1997); *Manuel*, 664 So. 2d at 86; *Chance v. American Honda Motor Co., Inc.*, 635 So. 2d 177, 178 (La. 1994); *Segura v. Frank*, 630 So. 2d 714, 723 (La. 1994); *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So. 2d 809, 817 (La. 1992).

103. *Manuel*, 664 So. 2d at 86.

104. *Keith*, 694 So. 2d at 183; *Segura*, 630 So. 2d at 723; see also *Manuel*, 664 So. 2d at 86 ("Procedural laws address the methods for enforcing an existing right or relate to how a law operates.").

interpretative legislation “merely establish[es] the meaning that the interpret[ed] statute had from the time of its enactment”¹⁰⁵ or “clarifies pre-existing law.”¹⁰⁶

Further elucidating the distinction between “substantive” and “interpretative” legislation, the courts have identified a number of factors that may, depending on the circumstances, influence the classificatory determination, some of which are indicative or others of which are contra-indicative of “interpretative” character. Among those in the former class are (i) “ambiguity in the original version of the statute,” what one can call the “interpreted statute”¹⁰⁷ and (ii) a “prompt legislative response”¹⁰⁸ to “a recent construction of a statute [the interpreted statute] by the supreme court.”¹⁰⁹ Among those in the latter class are (i) the new statute changes the “settled law”;¹¹⁰ (ii) the parties’ “reliance” on “the line of jurisprudence interpreting the [interpreted] statute”;¹¹¹ and (iii) the new statute was but one small part of a comprehensive legislative reform package that was predominantly substantive.¹¹²

IV. CRITIQUE

Louisiana’s current intertemporal law is flawed. To some extent, the legislation itself is to blame. The principal culprit, however, is the interpretation that has been placed upon that legislation, in particular, the jurisprudential interpretation.

In this Part of the paper, I will identify and explicate the technical deficiencies of, first, the legislation, and second, the jurisprudence.

A. Legislation

The legislation on which Louisiana’s intertemporal law is built reflects several lapses of sound juridical technique, to be more precise, formulative technique.¹¹³

105. *Smith*, 609 So. 2d at 817; see also *Aucoin*, 712 So. 2d at 67; *Keith*, 694 So. 2d at 183; *Manuel*, 664 So. 2d at 86; *Segura*, 630 So. 2d at 723; *Ardoin v. Hartford Accident & Indem. Co.*, 360 So. 2d 1331, 1339 (La. 1978); *Gulf Oil Corp. v. State Mineral Bd.*, 317 So. 2d 576, 591 (La. 1974).

106. *Smith*, 609 So. 2d at 817.

107. *Barron v. State Dep’t of Pub. Safety*, 397 So. 2d 29, 31 (La. App. 2d Cir. 1981).

108. *Segura*, 630 So. 2d at 725; *Smith*, 609 So. 2d at 820.

109. *Barron*, 397 So. 2d at 31, cited with approval in *Smith*, 609 So. 2d at 818; see *Gulf*, 317 So. 2d at 590-91.

110. *Segura*, 630 So. 2d at 724; *Smith*, 609 So. 2d at 820.

111. *Segura*, 630 So. 2d at 725; *Smith*, 609 So. 2d at 820-21.

112. *Segura*, 630 So. 2d at 724; *Smith*, 609 So. 2d at 821.

113. Juridical technique, in the broadest sense of the term (the sense in which I use it here), refers to “the entire process of the elaboration of the law,” Jean Dabin, *La Technique de l’Élaboration du Droit Positif* § 3, at 36-41 (1935) [hereinafter Dabin, Technique]. See also 2 Henri de Page, *de l’Interprétation des Lois* 34-35 (1925); 3 François Gény, *Science et Technique en Droit Privé Positif* § 183, at 23; § 178, at 1-3; § 188, at 33-36 (1921) [hereinafter 3 Gény, Science], or,

Three of these lapses can be qualified as "stylistic," namely, (i) the apparent antinomy between the two pieces of that legislation, namely, Article 6 and Section 2, (ii) an equivocation in the use of the term "substantive" in the default rule of Article 6, and (iii) the superfluity of (or, viewed from a different perspective, the equivocation or disharmony introduced by) the exception to the anti-retroactivity rule that Article 6 creates for "procedural laws." One other defect, which can perhaps best be described as a deficiency in "efficacy," is that the legislation fails to make provision for all of the various kinds of temporal effects that reasonable legislators, as a matter of good policy, would want to attribute to legal rules.

1. Style

a. Antinomy¹¹⁴

That the legislation from which Louisiana's intertemporal law springs appears, on its face, to set out inconsistent rules regarding the permissible

in other words, "the ensemble of means and procedures, of whatsoever nature they may be—material or intellectual—, whereby the law is 'realized,'" Dabin, *Technique*, *supra* this note, at 348. See *a Iso Du Pasquier*, *supra* note 16, §§ 173-75, at 162-64 (including under the rubric "juridical technique" both "political technique" and "juridical technique" in the narrow sense); Roubier, *Théorie*, *supra* note 17, § 10, at 86-7 (explaining the broad sense of "juridical technique"). So understood, juridical technique entails two distinct, yet interrelated, processes. One, which can be called *socio-political technique*, involves "the choice between competing ideas of the common good that are called upon to provide the substantive foundation of the law." Dabin, *Technique*, *supra* this note, § 3, at 36. See also 2 de Page, *supra* this note, at 39-40 (describing what he calls *technique réelle* or *technique sociologique*, which is "more intimately attached to the substance of the law" and which "emanates from the fundamental synchronization of the individual and the collective and from the necessity of stabilizing and organizing this synchronization conformably to situations . . ."); Du Pasquier, *supra* note 16, § 174, at 163 ("The determination of the results to be attained, that is, the conditions of the social order that it's a question of realizing, falls to juridical policy."); Roubier, *Théorie*, *supra* note 17, § 10, at 87 ("[W]hen it is a question of studying what ought to be the content and the end of the rule of law," one is concerned with "juridical policy"). The other, which can be called *formulative technique*, involves the choice between the alternative forms available for expressing this idea, Dabin, *Technique*, *supra* this note, § 3, at 36. See also 2 de Page, *supra* this note, at 39 (describing what he calls *technique formelle* as "[t]he first . . . is the work of the pragmatic intelligence, designed to facilitate rationality, to endow it in a fashion with algebraic signs and synthetic formulas that are susceptible of rendering its use more rapid and its application more expeditious. . ."); Du Pasquier, *supra* note 16, § 175, at 163 ("The ensemble of procedures whereby the law transforms into clear rules and practices the directives of juridical policy has received the name of *juridical technique*."); Roubier, *Théorie*, *supra* note 17, § 10, at 87 ("[W]hen it is a question of studying the exterior aspect that the rule of law presents," one is concerned with "juridical technique."), or, to put it another way, the "putting into form of juridical rules the substance of which is transmitted to the technician of the law by the technician of juridical policy." Dabin, *Technique*, *supra* this note, at 57.

114. One of the most basic elements of sound formulative technique is "harmony." 3 Gény, *Science*, *supra* note 113, § 223, at 210; Edmond Sallé de la Marnierre, *Eléments de Méthodologie Juridique* § 17, at 39-41 (1976). That means, at a minimum, that legal rules must not contradict each

temporal effects of new legislation is, in itself, certainly just cause for criticism. Though foolish consistencies may be the hobgoblins of small minds, one can hardly characterize the consistency of legal rules as foolish. For those who believe that legislation can never be understood on its own terms, that is, without the aid of jurisprudence or doctrine, this variance, of course, is of little concern.¹¹⁵ But for those who believe, as do I, that one should be able to get a fair idea of what "the law" is merely by reading the legislation, this variance represents a serious technical failure.

*b. Equivocation*¹¹⁶

As it's used in the Article 6 default rule, the term "substantive" is equivocal. It has one referent when used in the rule "procedural, as opposed to *substantive*, laws may be retroactively applied"; it has quite another when used in the rule "interpretative, as opposed to *substantive*, laws may be retroactively applied." This equivocation, though elusive, is not at all difficult to illustrate. The equivocation is clearly presented in at least two classes of cases.

The first kind of case involves "procedural but not interpretative" legislation. Suppose that the legislature enacts a new statute that sets up a special delay period—30 days—for filing the answer to the petition in products liability cases. The preamble to the act in which the new statute is set out indicates that the purpose of the statute is to "carve out a new exception to the general rule of article 1001 of the Code of Civil Procedure," which sets up a 15-day delay period. One can certainly justify classifying this new statute as "procedural": it concerns the staging of litigation, which is procedure *par excellence*. But under the circumstances, one could not possibly justify classifying it as "interpretative": nothing suggests that the legislature, by enacting the statute, intended to explain any previously-existing legislation. Now, if one classifies the statute as procedural, then one also classifies it, by exclusion, as non-substantive, inasmuch as substantive is the antithesis of procedural. At the same time, however, if one classifies the statute as non-interpretative, then one also classifies it, by exclusion, as substantive, inasmuch as substantive is the antithesis of

other. As Portalis, the principal author of the *Projet du Gouvernement* of the French *Code Civil*, once commented, "it would be a great evil if there were to be contradictions in the maxims that govern men." Paul Foriers, *Les Antinomies en Droit*, reprinted in 2 *La Pensée Juridique* de Paul Foriers 439, 448 (1982). See also 3 Gény, *Science*, *supra* note 113, § 223, at 210 ("The [juridical] construction must be homogenous and coherent. This implies . . . that its diverse parts are in harmony with each other . . .").

115. That is so because, as we have seen, the jurisprudence has resolved the apparent antinomy between the two laws. See *supra* text accompanying notes 55-57.

116. Equivocation represents a defect in formative "style." See Jeremy Bentham, *General View of a Complete Code of Laws*, in 3 *The Works of Jeremy Bentham* 207 (John Bowring ed., 1962) (from Chapter 33, entitled "Of the Style of the Laws") ("Defects of style may be referred to four heads: . . . equivocality . . .").

interpretative. Thus, this statute is, at once, "substantive" for purposes of one part of Article 6 yet "non-substantive" for purposes of another part.

The second kind of case involves "interpretative but not procedural" legislation. Suppose that the legislature enacts a new statute that limits the "general damages" recoverable in a "products liability action" to twice the value of the "actual damages." Shortly after the statute takes effect, the question arises whether this limitation applies to actions for loss of consortium brought by the spouses or children of the victims of defective products (as opposed to actions brought by the victims themselves). Though all five of the state's intermediate appellate courts, relying on the legislative record, have answered the question in the affirmative, the supreme court, by a vote of 4 to 3, answers it in the negative. In a special legislative session called just days later for the purpose of "correcting the court's vicious error," the legislature amends the original statute to provide as follows: "The limitations of this provision apply to all actions that arise out of the use of defective products, including actions for loss of consortium." During the floor debate on the amendment, legislator after legislator rails against the court for "knowingly circumventing the will of the people" as expressed in the original bill. Under the circumstances, one would be on firm ground in arguing that the amendment was "interpretative": evidence that the legislature believed it was merely bringing to light its understanding of the original statute abounds. But one would be hard pressed to argue that the amendment was "procedural": everyone agrees that the extent of a tortfeasor's duty to repair the injuries he's caused is a matter of substantive law. Now, if one classifies the amendment as interpretative, then one also classifies it, by exclusion, as non-substantive, inasmuch as substantive is the antithesis of interpretative. At the same time, however, if one classifies the amendment as non-procedural, then one also classifies it, by exclusion, as substantive, inasmuch as substantive is the antithesis of procedural. Thus, this legislation is, at once, "substantive" for purposes of one part of Article 6 yet "non-substantive" for purposes of another part.¹¹⁷

117. One might ask (as have some of those who reviewed drafts of this paper) whether the "stylistic" flaw under examination here is of any consequence. After all, whether a particular law is "procedural but substantive in the sense of not being interpretative" or "interpretative but substantive in the sense of not being procedural," the result is the same: the law is retroactively applied. About that, surely no one could get confused. For that reason, one might argue, the equivocation is, practically speaking, a non-problem.

I disagree and for two reasons. First, this argument rests on an erroneous assumption about the proper scope of legal criticism, in particular, criticism of legislation, namely, that the only deficiencies of formulative technique worth identifying, criticizing, and solving are those that have "practical" consequences. To write legislation well the draftsman must, among other things, employ "good style." And this "good style," I would insist, is not only an instrumental good, that is, a good that is desired for the sake of something else (here, communicability), but also a good in itself, that is, a good desired for its own sake. Now, surely no one would deny that equivocation is bad style. And if that's true, then each and every equivocation should be found out, condemned, and eliminated, even where the risk that the equivocation will breed confusion is one in a million.

c. Superfluity,¹¹⁸ Equivocation,¹¹⁹ or Disharmony¹²⁰

The exception to the anti-retroactivity rule that Article 6 carves out for "procedural" laws is problematic, though the nature of the problem is somewhat difficult to pinpoint. There would seem to be three alternative possibilities. First, the exception is superfluous, in the sense that it purports to address a problem that, in reality, is non-existent. Second, the exception presupposes a definition of "retroactive" that is at odds with the jurisprudentially-established definition(s) of that term. This problem, in turn, leads to either of two others. One, the more obvious, is that it creates still more uncertainty (as if that were possible) regarding the meaning of the term "retroactive." The other, and the more serious, is that this definition of the term "retroactive" is out of kilter with the absolute prohibition on the retroactivity of substantive law rules that one finds in the default rules of Article 6 and Section 2.

If one were to ask the defenders of the procedural laws exception for an example of a case in which the "retroactive" application of procedural legislation is appropriate and necessary, one would probably receive an answer like the following. Imagine that a person buys a consumer product from a retailer. After using the product for a short while, he discovers that the product has a latent

Second, this argument rests on an erroneous assumption about the magnitude of the (practical) risk of confusion that this equivocation presents. Consider this example. Soon after the supreme court renders a controversial decision regarding a certain statute that creates a "presumption," the legislature amends the statute, altering the wording of the presumption. A few months later, a case to which either the old or the new statute might possibly be applied comes before the supreme court. The lawyer for one of the parties contends that the new statute ought to be applied, arguing that it constitutes a "procedural" law and, for that reason, applies retroactively. Finding that the law is "substantive," the supreme court rejects that argument. Not long after that decision, a client shows up in an attorney's office with a problem. When the attorney hears the story, he realizes that the disposition of the case will turn on the recently-changed presumption, in particular, that his client could prevail if and only if the "new" presumption applies. Recalling that the new statute followed close on the heels of a supreme court decision interpreting the old statute, the attorney wonders whether the new statute might not be interpretative and so, sends his law clerk off to the library to do some quick research. A few minutes later, the law clerk returns to inform him that "the supreme court has said the new law is 'substantive.'" Hearing that news, the attorney assumes (erroneously, of course) that the interpretative-law argument "won't hunt." He then gives the client the bad news and sends him on his way. Though this scenario is admittedly unlikely, who would dare to suggest it's impossible? Indeed, given the level at which lawyers and judges normally "think" about intertemporal conflicts matters, it's a miracle something like this hasn't happened yet. But then who's to say it hasn't?

118. Good juridical technique requires economy of expression. Useless and unnecessary words "only serve to weigh down the sense of the grammatical construction." Alexandre C. Angelesco, *La Technique Législative en Matière de Codification Civile* § 328, at 776 (1930). Particularly undesirable is redundancy of expression: wherever it occurs, it cannot help but breed confusion. *Id.* See also Bentham, *supra* note 116, at 268 ("The faults opposed to brevity . . . are—1. Repetition in terms.").

119. See *supra* note 116.

120. See *supra* note 113.

defect. When he complains to the retailer, the retailer's representative tells him, "Tough luck." And so the consumer files a "redhibition" suit against the retailer.¹²¹ At the time, the Code of Civil Procedure places no restraints on the timing of dispositive motions, for example, motions for summary judgment. Before the retailer files his answer, however, an amendment to the Code of Civil Procedure takes effect, one that requires each litigant to file dispositive motions within 90 days of the date on which the defendant files his answer. The retailer then files his answer. Just over four months later, the consumer thereafter files a motion for summary judgment on the issue of whether the retailer knew of the defect at the time of the sale. The retailer objects to the motion, citing the new law. The consumer rebuts the objection by arguing that to apply the new law to this litigation would be to apply it retroactively. And so, but for the procedural laws exception to the general anti-retroactivity rule, the new law supposedly could not be applied.

There's just one problem with this example: it's difficult, if not impossible, to see in what sense the application of the new law might be considered "retroactive." It certainly is not "retroactive" in either of the senses in which the Louisiana jurisprudence has thus far used the term.

The application of the new law in our hypothetical case would not be "retroactive" in the sense in which Louisiana's courts have *formally* defined that term. The formal definition, it will be recalled, is this: a proposed application of a new law is retroactive if and only if it deprives someone of a "vested right." Surely no one could contend that applying the new summary judgment rule to the consumer would deprive him of a vested right. The jurisprudence, as we will see below, has consistently ruled that no one has a vested right to any particular procedure.¹²²

Nor could the application of the new law in our hypothetical case be considered "retroactive" in the sense in which the Louisiana courts (sometimes) seem to understand that term when they approach intertemporal conflicts problems "intuitively." In those cases, the meaning of that term is (sometimes) tied to the timing of the events that form the presupposition or hypothesis of the new law. If those events occurred before the new law took effect, then the application is retroactive; if they occurred after the new law took effect, then the application is prospective. The new law in question in the hypothetical case, stated in conditional form, is "If a litigant does not file his dispositive motion(s) within 90 days of the date on which the defendant files his answer, then the other litigant may, in the event that the first litigant thereafter brings such a motion, demand that the court refuse to hear it." The presupposition or hypothesis of this rule evidently contains three elements: (i) the defendant files an answer and (ii) during the next 90 days (iii) the litigant fails to file his

121. See La. Civ. Code art. 2520.

122. See *infra* text accompanying note 170.

dispositive motion.¹²³ In the hypothetical case, all three of these events occurred *after* the new rule took effect. And so, to apply the new rule to that case would not be to apply it retroactively, at least not in this second sense of the term “retroactive.”¹²⁴

It should be clear, then, that the assumption on which the defense of the procedural laws exception rests—that one can’t achieve the “right” results in typical intertemporal conflicts cases that involve procedural laws without requiring that such laws be retroactively applied—is false. The truth is that one can and will attain these results simply by being consistent, that is, by applying to intertemporal conflicts in procedural laws the same principles that one applies to intertemporal conflicts in substantive laws, including the anti-retroactivity rule. There is simply no need for a special exception to these principles for procedural laws.

To be sure, one might be able to salvage the procedural laws exception, in the sense of providing some justification for hanging on to it, if one could devise a definition of retroactivity that is substantially more expansive than either of those that the jurisprudence has adopted. But precisely how that definition should be formulated is anything but clear. Perhaps one could do it this way. Start with the notion that “retroactivity” consists of “changing the rules” once a “player” has initiated a new “juridical game” or, to use more traditional civil law terminology, changing any part of the juridical milieu that constitutes a “juridical situation”¹²⁵ after a juridical actor has entered into that

123. Actually one can make a good argument that the 90-day delay is part of the consequence or effect rather than the presupposition or hypothesis. See *infra* text accompanying notes 257-259.

124. For the application of this rule to be considered “retroactive” in this sense, a quite different factual scenario would be required, namely, one in which the order of (i) the effective date of the new rule and (ii) the defendant’s delay in filing dispositive motions is reversed. Thus, the necessary sequence of events would be this: (i) the plaintiff files suit, (ii) the defendant files his answer, (iii) the defendant fails to file dispositive motions within 90 days thereafter, (iv) the new rule requiring that such motions be filed by that deadline takes effect, and (v) without further delay the plaintiff, relying on that new rule, contends that the defendant has forfeited his right to bring such motions.

125. The term “juridical situation” refers to the situation that a given “juridical subject” (that is, a person) finds himself in vis-a-vis a given juridical rule. Du Pasquier, *supra* note 16, § 131, at 106; Ghestin & Goubeaux, *supra* note 1, § 168, at 126. Each such situation presents itself to us “as . . . a complex of rights and duties.” Paul Roubier, *Droits Subjectifs et Situations Juridiques* 52 & 53 (1963). The variety of these situations is “infinite.” Roubier, *Transitoire*, *supra* note 1, § 39, at 181. They include

in the law of persons, . . . the situation of spouses; those of divorced or separated spouses; those of legitimate children, illegitimate children, and adoptive children; those corresponding to diverse incapacities; those of tutors, curators, judicial counsels, etc.; in the law of things, those of owner, usufructuary, the beneficiary of an active or passive servitude, mortgage creditor, etc.; in the law of obligations, those of creditor and debtor, seller and buyer, lessor and lessee, insurer and insured, tortfeasor and victim, etc.; in the law of successions, those of legitimate heir, irregular successor, universal legatee, legatee under universal title, legatee under particular title, beneficial heir, coheirs, reservatory heir, etc.

Id. at 181-82. The concept “juridical situation,” then, is a broad, catch-all category designed to cover all of the juridical phenomena at which legislation can possibly take aim. It can mean, among other

situation.¹²⁶ Then treat "litigation," from the moment at which the petition is first filed until the time at which the last petition for review is rejected, as a single juridical "situation," one that should be treated, for purposes of retroactivity analysis, as an undivided whole. And then draw the inevitable conclusion: once the plaintiff files suit, the juridical milieu that constitutes that situation—the entirety of the procedural law—is then frozen in place, so that, to replace any part of it with a new procedural law would be to apply that law retroactively.

Though this salvage job is a pretty good one, it comes at a price and a high one at that. If one adopts this definition, then, unless one is prepared to tolerate an equivocation in the use of the term "retroactive," one must be prepared to apply the definition to all intertemporal conflicts cases, not just those that involve procedural laws. And there begins the trouble. To start with, one encounters the problem of coming up with a criterion for determining where one "substantive" situation or game starts and another ends. If one can somehow overcome this problem or, instead, chooses to ignore it, then one immediately comes upon another: how to square this definition of retroactivity with the notion that the anti-retroactivity rule as applied to substantive legislation admits of no exceptions. Consider this little brain-teaser. If "litigation" is a single, undivided juridical situation, then why not (i) executory contracts, such as leases or loans, (ii) ownership, or (iii) tutorship? Surely persons in these settings find themselves in the face of a juridical milieu no less comprehensive, interconnected, and self-contained than that which constitutes the juridical situation of litigation. But if that is so, then once a juridical actor has entered into such a situation, be it an executory contract, ownership, or tutorship, the juridical milieu that constitutes that situation—which would be the entirety of contract law, ownership law, or tutorship law, respectively—would be frozen in place, so that, to replace any part of that milieu with a new law would be to apply that law retroactively. Now, if the ban on the retroactive application of substantive legislation is absolute, then any such "replacements" ought to be prohibited. But that is simply not so, that is, the courts have consistently ruled that new laws regarding certain aspects of contractual, ownership, or tutorship situations can, at least under some circumstances, be applied to already-established situations of these kinds.¹²⁷ And no one, at least not these days, would question that those results are correct. The bottom line, then, is this: if one wants to adopt an expansive definition of retroactivity in order to save the procedural laws exception, then one must be

things, (i) a certain juridical *status*, (ii) a certain juridical *capacity*, (iii) a certain *right* together with its correlative *duty*, or (iv) a certain juridical *relationship* between two or more persons.

126. This account of retroactivity is not one that I conjured up out of thin air. It is a simplified version of a theory floated by the French scholar Julien Bonnecase in the early 20th century, a theory that, though brilliantly innovative, was in short order rejected by the rest of French doctrine. See Bonnecase, *supra* note 18, §§ 11 through 247, at 13-280. For a critical appraisal of Bonnecase's theory, see Roubier, *Transitoire*, *supra* note 1, § 29, at 141.

127. See *infra* note 248 (contracts), text accompanying notes 177-182 (ownership), & text accompanying notes 208-211 (tutorship).

prepared to carve out similar exceptions for a variety of substantive laws. To my mind, the game is not worth the candle.¹²⁸

2. *Efficacy: Underinclusiveness*

Louisiana's current intertemporal law legislation takes aim at two and only two of the possible temporal effects that might be attached to any piece of legislation: retroactivity and prospectivity. This restriction on the reach of the legislation is reflected in the second sentence of Article 6, which provides that certain types of legislation apply "both prospectively and retroactively."¹²⁹ No other alternatives are contemplated.

But there is at least one other possibility. Alongside the application of the law *after* its enactment (prospectivity) and the application of the law *before* its enactment (retroactivity), one can also imagine "the application of the law *after* its abrogation."¹³⁰ Consider this example. Suppose that the law now prohibits the manufacture of highly toxic chemicals within one mile of the city limits of major metropolitan areas. Though the legislature now wants to extend this "buffer zone" to two miles, it also wants to protect those who presently own manufacturing facilities that, though permissible under the old law, would be banned under the new law. And so the legislature provides that the new law "shall not be applied to manufacturing activities at any facility already in existence on the effective date hereof that shall be located within two miles but without one mile of the city limits of any major metropolitan areas." By virtue of this provision, after the new law (buffer zone of two miles) takes effect, the old law (buffer zone of one mile) will nevertheless continue to govern some juridical situations. Known in countries within the French civil law tradition as the "survival of the law"¹³¹

128. The perceptive reader will have noticed that, throughout this discussion, I have avoided attributing the decision to recognize the procedural-laws exception to the drafters of Article 6. There is a reason for that. Though it is true that the drafters of that article codified the procedural-laws exception (which, up until then, had not been codified), it would be unfair, not to mention inaccurate, to say that they were the ones who "recognized" it. Let me explain.

The legislature's mandate to the drafters of the Preliminary Title of the Civil Code, as I understand it, was a limited one: simply bring the law "up to date" or, to be more precise, bring the law "on the books" into line with the "law in practice." Louisiana Civil Code XXXV-XXXVI (A.N. Yiannopoulos ed., 1999). When the drafters turned their attention to former Article 8, they discovered just such a breach between the law on the books and the law in practice. Whereas Article 8 purported to prohibit retroactivity across the board and without exception, the jurisprudence regularly made a number of exceptions to that rule, among them, that for procedural laws. And so the drafters, in revising Article 8 (renumbered as Article 6), altered it so that it would reflect these jurisprudentially-created exceptions.

It should be clear, then, that if anyone is responsible for the decision to "recognize" the procedural-laws exception, it is the courts, not the drafters of Article 6.

129. La. Civ. Code art. 6.

130. Côté, *supra* note 74, at 182.

131. Bach, *Contribution, supra* note 1, § 5, at 411, & §§ 52-56, at 458-64; Bach, *Conflicts I*,

or "postactivity"¹³² and in Italy and Latin America as "ultractivity,"¹³³ this temporal effect carries the more colorfully metaphorical label "grandfathering" in the United States.

The binary typology—retroactive v. prospective—ignores this "fundamental dimension of the effect of law in time."¹³⁴ Postactivity

is in no fashion taken into account by the traditional method. That method concerns itself solely with the application of the law *before* its effectivity (retroactivity) and shows no interest at all in the application of the law *after* its abrogation (survival).¹³⁵

It's no use objecting that the binary typology, to the extent that it prohibits "retroactivity" of the new law, implicitly "takes care" of postactivity. Postactivity of the old law cannot be reduced to a mere side effect of nonretroactivity of the new law. Consider, once again, the "toxic chemical manufacturing" hypothetical. Surely no one would suggest that to apply the new law (buffer zone of two miles) in such a way as to stop future manufacturing activities at the exempted facilities would be to apply that law "retroactively." To the contrary, such an application would be "prospective," for it would prohibit those activities only during the period of time *after* the effective date of the new law. Thus, the reason that the new law will not be applied to the facilities in question is not the standard prohibition against retroactivity, but rather the special dispensation that the legislature made in favor of those facilities, whereby the old law, despite its having been repealed, nevertheless remains applicable to them.¹³⁶

supra note 1, § 40, at 5, & §§ 229-259, at 23-26 (France); Bach, *Conflicts II*, *supra* note 1, §§ 30-45, at 144-7 through 144-10 (France); Bonneau, *supra* note 1, § 95, at 82 (France); 1 Colin & Capitant, *supra* note 18, § 57, at 56 (France); Côté, *supra* note 74, at 182 (Québec); Dekeuwer-Défossez, *supra* note 1, § 11, at 13; § 16, at 23; & § 17, at 25 (Belgium); Ghestin & Goubeaux, *supra* note 1, § 334, at 297; §§ 354-357, at 310-12; & §§ 371-375, at 332-37 (France); Hage-Chahine, *supra* note 1, § 357, at 242 (Lebanon); Level, *supra* note 1, § 28, at 44; § 41, at 68; & § 95, at 169 (Belgium); 1 Marty & Raynaud, *supra* note 1, § 106, at 188 (France); Garcia, *supra* note 1, § 203, at 394 (Mexico); Pescio, *supra* note 1, § 101, at 332 (Chile); 1 Planiol & Ripert, *supra* note 2, § 242, at 101 (France); 1 Ripert & Boulanger, *supra* note 1, § 230, at 110, & §§ 266-271, at 125-27 (France); Roubier, *Transitoire*, *supra* note 1, § 3, at 11-12; § 28, at 124; § 29, at 138-40; & §§ 77-78, at 381-93 (France); Tavernier, *supra* note 1, at 14 & 72 (Algeria); Código Civil, *supra* note 20, § 118, at 178 (Venezuela).

132. Starck, *supra* note 1, § 491, at 203.

133. Francesco Galgano, *Diritto Privato* § 3.1, at 54 (7th ed. 1990) (Italy); M.G. Pace, *Il Diritto Transitorio* § 146, at 506 (1944) (Italy); 1 Augusto, *supra* note 1, § 167, at 162 (Argentina).

134. Côté, *supra* note 74, at 182.

135. *Id.*

136. Nor can postactivity be reduced to or conflated with the phenomenon of "delayed" or "deferred" effect, which occurs when the legislature specifies that the new law shall not take effect until some date after what would otherwise and normally be the effective date. Dekeuwer-Défossez, *supra* note 1, §§ 81 & 83, at 104-05; Bach, *Conflicts I*, *supra* note 1, § 229, at 23. The distinction comes down to this:

That Louisiana's intertemporal legislation, owing to its exclusive focus on retroactivity and prospectivity, fails to take postactivity into account is, to say the least, odd. The legislature certainly has the power (within constitutional limits, of course) to specify expressly or by clear implication that legislation shall have any one or more of *three* temporal effects: retroactivity, prospectivity, and postactivity. One would think that, if any one or more of them is worth addressing, then they should all be addressed. And yet the legislature has chosen to address only the first two.

This omission becomes all the more puzzling when one considers the general purpose behind legislation that sets forth temporal-effects default rules, such as those of Article 6 and Section 2. That purpose, once again, is to produce temporal-effects results that are consistent with those that a reasonable legislator in all likelihood would have desired, results based on this legislator's judgment regarding the proper balance to be struck between the interests that would be served by plenary application of the new, presumably better, law and those that would be threatened by a *post hoc* displacement of the old law. Is it not conceivable that, at least with respect to some juridical situations, the judgment of a reasonable legislator might be that the individual interests dependent on the old law so outweigh the collective interest represented by the new law that, not only should the new law not be retroactively applied, but the old law should be postactively applied? To ask the question is to answer it. One can think of several examples of juridical situations in which "grandfathering" is so common as to be considered the general rule (for example, existing income-generating activities in the context of tax law and existing land uses in the context of land-use planning law). Because that is so, any set of temporal-effects default rules whose scope is limited to retroactivity and prospectivity, that is, that makes no provision for postactivity, is necessarily incomplete.¹³⁷

The delay of the effective date concerns all juridical situations, even those that are created after the new law, whereas the survival of the old law can take aim at only those that began under the old law and, sometimes, only some of those situations. Further, the delay of the effective date always involves a determinate term [set out] within the law itself, for example, "the first day of the fourth month that will follow its promulgation" or, more simply, "January 1, 1971." The survival of the old law, on the contrary, comes to an end only with the [end of the] situations that are regulated by that law. Thus, the survival of certain dispositions that were in place before the law of December 14, 1964, which concerned the tutelage of minors, will die out only when the last . . . child who was born before this law [the new one] took effect attains majority.

Dekeuwer-Défossez, *supra* note 1, § 83, at 104-05.

137. Let me make it clear that this criticism is not directed at Article 6 or Section 2 in itself. Each of those laws was designed to handle just two of the possible temporal effects of laws, namely, retroactivity and prospectivity. And that's just fine. The problem is that we don't have *another law* (or laws) that is (or are) designed to handle the other possible temporal effect of laws, namely, postactivity. Unless and until the legislature gives us such a law, the ensemble of intertemporal law legislation will be incomplete or, in other words, will be unable to provide satisfying solutions to all of the different intertemporal conflicts problems that might possibly arise.

B. Interpretation

The interpretation that the jurisprudence has placed on the legislation from which Louisiana's intertemporal law springs reflects numerous lapses of sound juridical technique. Most of these lapses can be described as deficiencies of formulative technique; others, as deficiencies of socio-political technique.

For purposes of analysis, it will be useful to divide the discussion of this interpretation into three parts. The first will be devoted to the courts' resolution of the apparent antinomy between Article 6 and Section 2; the second, to the interpretation given the terms that the legislation uses to describe the varying temporal effects of new laws, namely, "retroactive" and "prospective"; the third, to the interpretation given the terms that the legislation uses to describe the different types of laws, namely, "substantive," "procedural," and "interpretative."

1. Resolution of the Apparent Antinomy

The courts' resolution of the apparent antinomy between Article 6 and Section 2, though now well established, is nonetheless technically defective. The problem is that no one who is trained in the art of resolving legislative antinomies would ever guess how the courts have proposed that the conflict be resolved, at least not if one confined one's attention to the legislation itself. Let me explain.

The resolution of legislative antinomies is usually accomplished by resort to either or both of two related, yet conceptually distinct, principles. The first is the ancient maxim of statutory construction *specialia generalibus derogant* (special dispositions derogate from general dispositions).¹³⁸ The second is the principle of "implied abrogation."¹³⁹ Abrogation is implied (or tacit) "when the new law contains provisions that are contrary to, or irreconcilable with, those of the former law."¹⁴⁰ The principle underlying implied abrogation is this: in the event of a conflict between two successive expressions of legislative will, the more recent ought to control.¹⁴¹ The scope of implied abrogation varies with the scopes of

138. See Cornu, *supra* note 1, § 360, at 123; 1 Josserand, *supra* note 18, § 76, at 57; 1 Mazeaud et al., *supra* note 1, § 110, at 166; Chiam Perelman, *Logique Juridique: Nouvelle Rhétorique* 89 (2d ed. 1979); Weill & Terré, *supra* note 2, § 177, at 184-85.

139. On the subject of implied abrogation in general, see 1 Charles Aubry & Charles Rau, *Droit Civil Français* §§ 88-89, at 148-51 (Paul Esmein & André Ponsard eds., 7th ed. 1964); 1 Gabriel Baudry-Lacantinerie, *Précis de Droit Civil* §§ 43-44, at 28-29 (Paul Guyot ed., 14th ed. 1926); Carbonnier, *supra* note 54, § 127, at 220-21; 1 Colin & Capitant, *supra* note 18, § 63, at 61; Cornu, *supra* note 1, §§ 358-361, at 123; 1 Josserand, *supra* note 18, § 76, at 57; 1 Malaurie & Aynès, *supra* note 1, § 563, at 195-96; 1 Mazeaud et al., *supra* note 1, § 83, at 134; 1 Ripert & Boulanger, *supra* note 1, § 220-223, at 107; Starck, *supra* note 1, § 113, at 49; 1 Marty & Raynaud, *supra* note 1, § 104, at 182-83; Weill & Terré, *supra* note 2, § 157, at 159-60; Yiannopoulos, *supra* note 19, § 43, at 76-77.

140. La. Civ. Code art. 8, ¶ 2.

141. 1 Baudry-Lacantinerie, *supra* note 139, § 44, at 28; Carbonnier, *supra* note 54, § 127, at 220; 1 Josserand, *supra* note 18, § 76, at 57; Weill & Terré, *supra* note 2, § 157, at 159; Yiannopoulos, *supra* note 19, § 43, at 76.

the successive pieces of legislation. If the new legislative provision is addressed to only part, but not all, of the domain to which the old legislative provision was addressed (scenario 1), then the scope of the abrogation is nearly always limited. In such a case, the old legislative provision remains in force except in the special sub-domain to which the new legislative provision is addressed.¹⁴² But if the old law addressed only part, but not all, of the domain to which the new legislative provision is addressed (scenario 2), then the result is not quite so clear. The more likely possibility is that the legislature intended for the old special rule to remain in place as an "exception" to the new general rule.¹⁴³ But there's another possibility: that the legislature intended for the new general rule to overrule the old special rule.¹⁴⁴ To determine what effect the new law has on the old in such a case, one has no choice but to attempt to reconstruct the legislature's "intent."¹⁴⁵

Applying these principles to the problem presented by the antinomy between Article 6 and Section 2, one might possibly arrive at either of two conclusions. One is that Section 2 carves out an exception to Article 6, an exception confined to the revised statutes (as opposed to other legislation). The other is that the legislature, through the enactment of Article 6, impliedly repealed Section 2.

If one takes the maxim *specialia generalibus derogant* as one's guide, then one arrives at the former alternative conclusion. Because Article 6 applies to all legislation whereas Section 2 applies to a subset of legislation, namely, the revised statutes, the former can be viewed as a "general" disposition and the latter, as a "special disposition." So understood, the latter carves out an exception to the former.

But if one takes the principle of implied abrogation as one's guide, then the result is far less clear. Though it might appear, at first glance, that this problem involves a type 2 implied abrogation scenario (in that Article 6—the broader provision—was enacted after Section 2—the narrower provision), the situation is considerably more complicated than that. When Section 2 was first enacted, the predecessor to Article 6—Article 8—was already in place. As former Article 8 had been interpreted by the jurisprudence, it established rules identical to those now established by Article 6. It would seem, then, that the implied abrogation scenario to which the enactment of Section 2 originally gave rise was not type

142. 1 Baudry-Lacantinerie, *supra* note 139, § 44, at 28; Cornu, *supra* note 1, § 360, at 123; 1 Josserand, *supra* note 18, § 76, at 57; 1 Marty & Raynaud, *supra* note 1, § 104, at 182; 1 Mazeaud et al., *supra* note 1, § 83, at 134; Weill & Terré, *supra* note 2, § 157, at 160.

143. 1 Aubry & Rau, *supra* note 139, § 88, at 149; 1 Baudry-Lacantinerie, *supra* note 139, § 44, at 29; Cornu, *supra* note 1, § 361, at 123; 1 Josserand, *supra* note 18, § 76, at 57; 1 Marty & Raynaud, *supra* note 1, § 104, at 182; 1 Mazeaud et al., *supra* note 1, § 83, at 134; Weill & Terré, *supra* note 2, § 157, at 160; Yiannopoulos, *supra* note 19, § 43, at 77.

144. 1 Aubry & Rau, *supra* note 139, § 88, at 149; 1 Baudry-Lacantinerie, *supra* note 139, § 44, at 29; 1 Mazeaud et al., *supra* note 1, § 83, at 134; Weill & Terré, *supra* note 2, § 157, at 160; Yiannopoulos, *supra* note 19, § 43, at 77.

145. 1 Aubry & Rau, *supra* note 139, § 88, at 149; 1 Mazeaud et al., *supra* note 1, § 83, at 134; Weill & Terré, *supra* note 2, § 157, at 160.

2 but type 1 (in that Section 2—the narrower provision—was enacted after former Article 8—the broader provision). Because that is so, one can argue that, at least at that time, Section 2 impliedly abrogated former Article 8 in part.¹⁴⁶ But that does not end the inquiry. When the broader provision—originally instantiated in Article 8—was later reenacted in the form of new Article 6, a new implied abrogation scenario—a type 2 scenario—was created. What effect, if any, the emergence of this scenario had on the original relationship between Section 2 and its Civil Code counterpart is, of course, a matter of legislative intent. If one takes seriously the first comment to Article 6,¹⁴⁷ then it might seem that the legislature had no intention to alter that relationship. It is just as likely, however, that the legislature intended new Article 6 to replace all the theretofore existing legislation regarding the temporal effects of legislation, not only former Article 8, but also Section 2.

How these questions should ultimately be resolved is largely beside the point. The point is that, no matter how one resolves them, one ends up with a resolution for the antimony between Article 6 and Section 2 that is at odds with that proposed by the courts.

146. That was not, of course, the conclusion the courts reached. Not long after the enactment of Section 2, the courts ruled that it, like then Section 8 (the text of which admitted of no exceptions to the anti-retroactivity rule), admitted of numerous unstated exceptions. *See, e.g., Lott v. Haley*, 370 So. 2d 521, 523 (La. 1979).

That construction of Section 2 flouts not only the principles discussed in the text, but also several other standard principles of legislative construction. The first is the maxim *ubi lex non distinguit, nec nos distinguere debemus* (one shouldn't draw distinctions where the law itself does not): the court's resolution of the antimony introduces into Section 2 distinctions that the text of that statute does not draw, namely, a distinction between substantive legislation, on the one hand, and procedural and interpretative legislation, on the other. The second is the argument *ab inutilitate* (an interpretation that renders a statutory provision superfluous or redundant of another ought to be resisted): the court's resolution of the antimony makes Section 2 redundant of Article 6 and, therefore, renders the former utterly superfluous. Though these principles of construction are, at best, mere generalizations, the courts ought to follow them unless something in the text or legislative history of the legislation or some imperative of the common good justifies putting them aside.

It's less than apparent what in the text or legislative history of Section 2 or what imperative of the common good justifies a departure from these general rules here. The courts have certainly never bothered to explain the departure, except to say that to read Section 2 literally, that is, so as to prohibit retroactivity entirely, would be "inconsistent with . . . civilian principles." *See, e.g., St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So. 2d 809, 816 n. 14 (La. 1992). This rationale is not convincing. As even a passing glance at the annotated edition of the Revised Statutes reveals, Section 2 was based not only on Article 8 of the Civil Code of 1870, but also on the statutes of several common-law jurisdictions, namely, Arizona, California, Kentucky, and Pennsylvania. That section, then, is a juridical half-breed, part civilian and part common. Though background "civilian principles" are undoubtedly relevant in the interpretation of statutes of that kind, they are not necessarily *determinative*. To interpret such a statute properly, one must consider background principles associated with *both* of its "parents," the common law as well as the civil law.

147. La. Civ. Code art. 6, cmt. (a) ("This provision . . . reproduces the substance of Article 8 . . . and accords with Louisiana jurisprudence interpreting the source provision. It does not change the law.").

2. Interpretation of Terminology of Temporal Effects

a. General Critique

The jurisprudence must be condemned, first of all, for the vice of inconsistency, a serious formulative-technical deficiency.¹⁴⁸ In the few cases in which they've bothered to define the term at all, the courts have ended up developing two definitions of "retroactive," definitions that are profoundly different. One describes retroactivity in terms of effects upon "vested rights"; the other, in terms of effects upon "completed acts."

As long as both of these definitions are recognized, courts will be free to choose one or the other as it may suit their fancy. Under these circumstances, the legislative restrictions on retroactivity fail to impose effective constraints on the discretion of judges and, as a result, make predicting their behavior next to impossible.

b. Critiques Pertaining to Particular Definitions

Each of the interpretations of the term "retroactive" that the jurisprudence and the doctrine have developed has problems of its own. I will consider, first, those associated with the "vested rights" theory and, then, those associated with the "completed act" theory.

i. Vested Rights

a) Deficiencies of Formulative Technique

1) Style

i) Vagueness¹⁴⁹

The notion of vested rights is, in practice, so vague and ill-defined as to be nearly useless. This is, of course, old news. For decades American legal

148. See *supra* note 116.

149. Sound juridical technique demands that the conceptual constructions in terms of which legal rules are cast be clear and precise. Dabin, *Technique*, *supra* note 113, at 111 ("[W]ith a view to obtaining rules that are sufficiently easy to handle . . . , he [the jurist] will aim at delimiting, in a precise and clear manner and without recoiling, if need be, from employing artifices, the concepts that . . . intervene in the composition of rules. . . . [T]he man of the law has no rest as long as he has not succeeded in defining or, at the very least, in narrowing to the extreme the circle of the indeterminate . . ."); 3 Gény, *Science*, *supra* note 113, § 257, at 462 ("Above all else, it is necessary to aim at a language that's extremely precise. For the law, whose essential objective is to establish a firm regulative order that's capable of protecting all interests, must seize social realities forcefully and must contain them within fairly rigid frameworks, in order to avoid, as much as possible, uncertainties and hesitations."); Gény, *Technique*, *supra* note 49, at 987, 996 ("Everyone

scholars, who encountered the notion within the anti-retroactivity doctrine that grew up under the Due Process Clause, have subjected it to relentless criticism.¹⁵⁰ On the assumption that there's no point beating a dead horse, one might be tempted to pass over this criticism without further discussion. But that would be a mistake. Judging from recent jurisprudence, one would have to conclude that the news of the death of vested rights has not yet reached the courts: in decision after decision, the courts continue to invoke the notion of vested rights,¹⁵¹ at least in connection with constitutional retroactivity analysis. For that reason, the news needs to be broadcast once again.

will agree without difficulty in recognizing that a 'good law' or a 'good code' must, above all, present the qualities required of every literary work that is addressed to the intelligence and the will rather than to the imagination or the emotions: unity, order, precision, and clarity. . . . Legal definitions should . . . aim . . . at describing the legal ideas to which the statute refers in firm outlines so as to show clearly to what the rule applies.") That means, among other things, that those concepts cannot be vague or uncertain. Jeremy Bentham, *On Logic and Grammar as Applied to Legislation*, reprinted in Mary P. Mack, *Jeremy Bentham: an Odyssey of Ideas* 446 (1963) ("Appendix B") ("Of every instance of uncertainty on the part of the rule of action, expressive of the will of the constituted authorities in the state, one effect is—a correspondent degree of insecurity and sense of insecurity. . . . Uncertainty, in the case where it has for its seat the political rule of action, is at its maximum in the case where that same rule . . . has no determinate set of words belonging to it."). For this reason, the lawmaker must "apply himself to fixing, *ne varietur*, the sense of the words that he employs, by distinguishing each one from the others, in such a fashion as to assure to each of them, as much as possible, a clearly specific bearing." 3 Gény, *Science*, *supra* note 113, § 257, at 463.

The trouble with insufficiently differentiated concepts is obvious: though the determination that this or that phenomenon fits the concept appears to "drive" decisions, it in fact "follows" them, serving as a mere conclusion for decisions that have been driven by other (usually unexpressed) considerations. Far from illuminating the true basis for decisions, rationales that invoke vague and uncertain concepts "mask" it. Hargrave, *supra* note 54, at 601-02. This masking effect is, to say the least, undesirable. In the case of a relatively unsophisticated decision-maker, the mask may be so effective as to conceal the true basis for the decision even from himself. Unaware of what he's really doing, the decision-maker may end up unwittingly basing his decision on prejudices of which he may be more or less conscious. A relatively sophisticated decision-maker, by contrast, may use the mask in a deliberate effort to conceal the true basis for the decision, a basis of which he is fully conscious. In either event, the real rationale behind the decision remains hidden from view, effectively insulating the decision from meaningful criticism and making it difficult, if not impossible, to predict how the decision-maker will behave in the future.

150. See, e.g., John Scurlock, *Retroactive Legislation Affecting Interests in Land* 6 (1953); James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 *Corn. L. Rev.* 87, 114 (1993); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 *Harv. E. Rev.* 692, 696 (1960); Bryant Smith, *Retroactive Laws and Vested Rights*, 5 *Tex. L. Rev.* 231, 246 (1927); Comment, *The Variable Quality of a Vested Right*, 34 *Yale L.J.* 303, 307-09 (1925).

151. Within 1998 alone the courts have already done it no fewer than six times. See *Aucoin v. DOTD*, 712 So. 2d 62 (La. 1998); *Kimball v. Allstate Ins. Co.*, 712 So. 2d 46 (La. 1998); *Fields v. Lofton*, 712 So. 2d 268 (La. App. 1st Cir. 1998); *Succession of Mexic*, 712 So. 2d 223 (La. App. 4th Cir. 1998); *Boone v. State*, 709 So. 2d 300 (La. App. 3d Cir. 1998); *Genusa v. Dominique*, 708 So. 2d 784 (La. App. 1st Cir. 1998).

The boundaries of the concept "vested rights" are radically indeterminate, so much so that one cannot say with any assurance whether a given juridical interest falls within or without that category.¹⁵² That notion

is somewhat akin to the nebulous concept "proximate cause." It appears that reference to the phrase "vested rights" . . . has produced doubt and confusion as to the precise grounds on which the decisions rest. . . . [N]o clearly definable guidelines have been provided by which the bench and bar may reliably or accurately determine the circumstances under which a right, status or condition will be protected under the concept of "vested rights."¹⁵³

In other words, "[n]o one . . . has ever given an entirely satisfactory definition of 'vested rights,'" with the result that "the distinction [between vested rights and mere expectations] seems to fall for lack of an adequate criterion."¹⁵⁴

152. 1 Alessandri & Somarriva, *supra* note 1, § 341, at 254; Bach, *Contribution*, *supra* note 1, § 4, at 409; Bach, *Conflicts I*, *supra* note 1, § 36, at 5; 1 Barbero, *supra* note 31, § 42, at 97-98; 1 Bianca, *supra* note 1, § 85, at 120; 1 Borda, *Tratado*, *supra* note 1, § 140, at 158-59; Côté & Jutras, *supra* note 1, § 13, at 941; Day, *supra* note 54, at 222; Dekeuwer-Défosses, *supra* note 1, § 10, at 9; Galindo, *supra* note 1, § 74, at 167; Ghestin & Goubeaux, *supra* note 1, § 335, at 298-99; Hage-Chahine, *supra* note 1, § 356, at 241; Level, *supra* note 1, § 44, at 73; 1 Marty & Raynaud, *supra* note 1, § 106, at 186; 1 Pescio, *supra* note 1, § 105, at 338-39; 1 Planiol & Ripert, *supra* note 2, § 241, at 100; 1 Ripert & Boulanger, *supra* note 1, § 237, at 112; Roubier, *Transitoire*, *supra* note 1, § 36, at 167-68; Starck, *supra* note 1, § 483, at 199-200; Tavemier, *supra* note 1, at 243, 245, 251-53; Trabucchi, *supra* note 54, at 25 n.1; Wald, *supra* note 1, § 47, at 131-32; Weill & Terré, *supra* note 2, § 169, at 176; Enciclopedia Jurídica Omeba 1001, 1004 (Manuel O. y Florit et al. eds., 1977) (entry entitled "Retroactivity and Non-Retroactivity of Juridical Norms").

153. *Stokes v. Aetna Cas. & Sur. Co.*, 232 So. 2d 328, 338 (La. App. 1st Cir. 1969).

154. Yiannopoulos, *supra* note 19, § 40, at 68. See 1 Alessandri & Somarriva, *supra* note 1, § 341, at 255 ("Despite all the definitions it is, then, in many cases impossible to give a single and certain criterion by means of which to distinguish acquired rights from simple expectations."); Bach, *Contribution*, *supra* note 1, § 4, at 409 n.12 ("[T]his distinction . . . has the fault of not furnishing any criterion."); 1 Barbero, *supra* note 31, § 42, at 97-98 ("The gravest difficulty [with the acquired rights theory] is that of delimiting the very concept of 'acquired right.' . . . [T]he theory has had to make do (and sometimes lost itself in) distinctions that are sometimes difficult to perceive and other times inconclusive . . ."); 1 Bianca, *supra* note 1, § 85, at 120 ("This theory [acquired rights] is reproached for the uncertain delimitation of the notion of acquired right . . ."); Ghestin & Goubeaux, *supra* note 1, § 335, at 299 (bemoaning the "absence of any specific criterion [for] the notion of acquired rights"); 1 Marty & Raynaud, *supra* note 1, § 106, at 186 ("[N]o one has been able to give a satisfactory definition of acquired right."); 1 Pescio, *supra* note 1, § 105, at 338 & 339 ("No one has ever been able to give a definition of 'acquired right.' . . . [T]he distinction, as presented, has the defect of not supplying any effective criterion."); 1 Planiol & Ripert, *supra* note 2, § 241, at 100 ("No one has ever been able to give a satisfactory definition of 'acquired right.' . . . [T]his distinction, as presented, has the fault of not furnishing any criterion."); Enciclopedia, *supra* note 152, at 1004 ("[I]t is not possible to find a valid criterion whereby one can objectively determine what is an acquired right."); see also 1 Borda, *Tratado*, *supra* note 1, § 140, at 159 ("If one cannot make clear on the intellectual plane what kind of thing this equivocal concept of acquired rights is, then it serves no purpose to speak of it and no such character can play a role in the science of the law."); Côté & Jutras, *supra* note 1, § 13, at 941 ("The notion of acquired right, which is at

ii) *Inaccuracy*¹⁵⁵aa) *Phenomenological Adequacy*

Yet another serious problem with the vested rights theory is what one might call its "phenomenological fit," that is, the degree of correspondence between the concepts in terms of which it operates, on the one hand, and the phenomena of which it must take account, on the other.¹⁵⁶ That theory, clearly enough, views intertemporal conflicts problems through the lens of threats to "rights," more precisely, rights that have been fully realized (vested rights) and rights that have not yet been fully realized (expectations).¹⁵⁷ The trouble with such a theory

the heart of the [traditional] system, itself constitutes a fuzzy notion"); 1 Ripert & Boulanger, *supra* note 1, § 237, at 112 ("[I]n the jurisprudence the expression 'acquired right' has no precise sense"); Roubier, *Transitoire*, *supra* note 1, § 36, at 168 ("[T]he authors [who champion the acquired rights theory] have so much trouble furnishing . . . a clear definition of acquired rights Thus understood, acquired right is no more than a pavilion that covers every kind of merchandise"); Tavernier, *supra* note 1, at 245 & 252 ("[T]he notion of acquired right . . . is susceptible of receiving divergent and sometimes even contradictory interpretations It is . . . difficult to build a juridical framework on so fuzzy a notion and to make of the distinction . . . between acquired rights and simple faculties or expectations the *summa divisio* of the transitory or intertemporal law."); Wald, *supra* note 1, § 47, at 131-32 ("The difficulty arise[s] . . . because acquired right has been given a new sense, one that is broad. It is in this acceptance that acquired right cannot be defined; one can only enumerate the diverse cases it embraces. This is the central and up to now insuperable difficulty of the theory of acquired rights: . . . it is transformed into an incomprehensible metaphysical concept, without any utility. . . . [I]t has no utility, for it resolves nothing while falsifying the givens of the problem.") & at 133 ("In truth . . . the notion of acquired right does not pass beyond a metaphysical solution, a verbal solution, a tautological explanation, as when we explain that opium makes one sleepy because it has dormative value.").

155. Sound juridical technique demands that the terminology used in the rules of any given body of law be "accurate." The terminology is accurate when the term chosen to represent a particular idea (i) represents that idea rather than some other and (ii) represents all, rather than merely part, of that idea. Bentham, *supra* note 116, at 207 ("This idea [that of the legislator] will not have been correctly placed in the mind [of the citizen]— . . . 2. When they [the words] present only part of the idea intended to be conveyed; 3. When instead of this idea they present another altogether different; . . ."). After all, the words and formulas of the text serve to express juridical "concepts . . . or notions, which are the sole intermediaries by means of which juridical realities can be expressed." 3 Géný, *Science*, *supra* note 113, 258, at 465-56. It is imperative, of course, that those concepts or notions "grasp hold of these realities as nearly as possible." *Id.* at 466. And that can happen only when the terminology chosen to express the concepts or notions is "the most apt to translate the essential elements of the rule of law." *Id.*

156. See generally Edmund Husserl, *Ideas: General Introduction to Pure Phenomenology* § 66, at 175-76 (W.R. Boyce Gibson trans., 1962) ("faithful expression of the clearly given" begins, but cannot end, "when we have settled how the word is to be applied so as to fit the intuitively apprehended essence").

157. 1 Alessandri & Somarriva, *supra* note 1, § 340, at 252-54; 1 Augusto, *supra* note 1, § 166, at 156; Bach, *Conflicts I*, *supra* note 1, § 34, at 5 & § 52, at 7; 1 Barbero, *supra* note 31, § 42, at 98; Bonneau, *supra* note 1, §§ 54-55, at 51-53 & § 72, at 63-64; 1 Borda, *Tratado*, *supra* note 1, § 139, at 157; 1 Colin & Capitant, *supra* note 18, § 58, at 56-57; 1 Chevallier & Bach, *supra* note 2, at 22-23; 1 Claro, *supra* note 74, § 114-115, at 164-65 & § 117, at 65; Dekeuwer-Défosse, *supra* note

is this: not all intertemporal conflicts problems can be readily reduced to threats to "rights," properly so called, at least not without more or less distorting the phenomena. That is so because

legislation does not have as its exclusive, or even principal, object to confer or to withdraw rights. Legislation [also] poses rules of conduct: it requires, authorizes or prohibits certain behavior or attaches certain consequences to them; it intervenes in order to determine the aptitude to exercise or enjoy rights; it organizes procedures, manages institutions¹⁵⁸

This description of legislation holds true not only in the "public law" arena (for example, constitutional law and penal law), but also in the "private law" arena, including the "civil law":

Even in the private law and in the part of this law—the civil law—that remains closest to the fundamental and individual life of man—, there are numerous rules, such as those that regulate civil status, the status of married persons, the control of the paternal power, to give some

1, § 10, at 8; 1 Figueroa, *supra* note 74, § 67, at 178-80; Garcia, *supra* note 1, § 199, at 390-91; Ghestin & Goubeaux, *supra* note 1, § 333, at 295; Hage-Chahine, *supra* note 1, § 355, at 240; 1 Josserand, *supra* note 18, § 78, at 58-59; 1 Marty & Raynaud, *supra* note 1, § 106, at 185-86; 1 Mazeaud et al., *supra* note 1, § 140, at 214-15; 1 Messineo, *supra* note 74, § 4, at 90-91; 1 Pescio, *supra* note 1, § 105, at 336-41; 1 Ripert & Boulanger, *supra* note 1, § 236, at 112; Roubier, *Transitoire*, *supra* note 1, § 23, at 95-98; Starck, *supra* note 1, § 482, at 199; 1 Valencia, *supra* note 18, § 86, at 187-88; Wald, *supra* note 1, § 46, at 120-21; Weill & Terré, *supra* note 2, § 169, at 175-76; Enciclopedia, *supra* note 152, at 1002.

158. Bach, *Contribution*, *supra* note 1, § 4, at 410; Bach, *Confits I*, *supra* note 1, § 36, at 5 (same). See also 1 Alessandri & Somarriva, *supra* note 1, § 343, at 256 (some legislation, instead of affecting subjective rights, concerns "situations such as those of minors, interdicts, and prodigals"); Roubier, *Transitoire*, *supra* note 1, § 39, at 181 (same). See generally Jean Dabin, *Le Droit Subjectif* 51-52 (1952) ("If subjective right has its place in the law, not everything in the law is reduced to subjective right. In other words, the objective law . . . is not the simple sum of subjective rights . . . with their logical counterpart: the obligation to respect them. . . . The truth is, on the contrary, that 'subjective right does not cover all the law.');" Ghestin & Goubeaux, *supra* note 1, § 171, at 129 ("It is admitted today that rights do not constitute the whole of juridical matter. . . . [I]t is recognized by most that certain rules, such as those that concern the organization of the public powers or of the penal law, give birth to juridical situations that cannot be reduced to a network of rights."); Marty & Raynaud, *supra* note 1, § 137, at 256-57 ("If the individual exists and pursues his ends in the midst of society, this network of individual activities nevertheless does not express the whole of social reality. There are, then, some rules that one must recognize create juridical situations that are not reducible to arrangements of subjective rights. In this category are, for example, the rules on the organization of the public powers or those of the penal law. . . ."); Weill & Terré, *supra* note 2, § 69, at 84 ("The doctrine, in speaking of rights, has erred in not putting into evidence . . . that these pretended rights are only some complex ensembles—juridical situations of individuals in relation with each other, situations that involve as much limitations, conditions, and duties, as liberty, power, or rights.").

examples, that are not susceptible of being reduced to a simple network of subjective rights¹⁵⁹

Thus, to attempt to describe all retroactivity in terms of threats to vested rights is rather like trying to describe all crime in terms of threats to property. Though it can be done,¹⁶⁰ it comes at a high price: by forcing many of the phenomena into categories that don't really fit, one inevitably and necessarily ends up denaturalizing those phenomena.

bb) Oversimplified Typology of Temporal Effects

In their interpretation of Louisiana's intertemporal law legislation, the Louisiana courts have assumed, without analysis, that all of the temporal effects that a new law might possibly produce can be placed in either of two complimentary categories: "retroactive" and "prospective." For the courts, then, these two categories exhaust the universe of possible temporal effects of a new law. This binary typology implies either of two things: (i) that, over against the temporal-effect phenomenon called "prospectivity," there's one and only one other kind of non-prospective temporal-effect phenomenon or (ii) that, if there's more than one such phenomenon, the distinctions between them are immaterial for the purposes of intertemporal law.

The first of these alternative implications—that there's only one other kind of temporal effect that is non-prospective—is patently false. Indeed, it is possible to identify no fewer than three different non-prospective temporal-effect phenomena. The first, which has been termed "extreme retroactivity"¹⁶¹ or "retroactivity of maximum degree,"¹⁶² occurs when the new law (as applied) alters the creation, extinction, or effects of juridical situations that had already come to an end before the new law's effective date or would call into question the creation of a juridical situation that, although still in existence on the new law's effective date, was created before that date. The second, which has been termed "pure retroactivity"¹⁶³ or "retroactivity of medium degree,"¹⁶⁴ occurs

159. 1 Marty & Raynaud, *supra* note 1, § 137, at 256-57. See also Dabin, *supra* note 158, at 52 ("[A] crowd of rules of law, and not only of the public or administrative law, but of the private law, set out some prescriptions, prohibitions, or dispositions to which no active subject corresponds . . . : it is thus with the rules of organization (public powers, tutelage, civil status), the rules fixing the conditions for validity, of efficacy, of the proof of facts and of juridical acts, or still the rules posed in the interest of the public in general.").

160. In the case of a theory of crime, one could, for example, conceptualize crimes against the person as threats to the body *qua* property.

161. Rescigno, *supra* note 1, § 2, at 223-24.

162. 2 Miguel A. Torres & Manuel P. Gonzalez, *Diccionario de Derecho Civil* § 5, at 550 (1984); Wald, *supra* note 1, § 44, at 112.

163. Rescigno, *supra* note 1, § 2, at 224.

164. 2 Torres & Gonzalez, *supra* note 162, § 4, at 550; Wald, *supra* note 1, § 44, at 112.

when the new law (as applied) alters the *past* effects (those that accrued before the new law's effective date) of a juridical situation that, although created before that date, is still in existence on that date.¹⁶⁵ The third, which one might call (following the Latin motif) "ambiactivity,"¹⁶⁶ occurs when the new law (as applied) alters the *future* effects (those that will accrue only after the new law's effective date) of a juridical situation that, although created before that date, is still in existence on that date.

An illustration may serve to drive home these distinctions. Suppose that Pascal, a landowner, and Olide, a farmer, enter into two successive leases of a one-arpent tract of farmland: on March 1, 2000 Pascal leases Olide the parcel for a rent of \$100/month and for a term of one year; on March 1, 2001 Pascal leases Olide the parcel for \$100/month and for a term of one year. When the two leases are executed, the law imposes no restrictions on the magnitude of rents of farmland. But at the end of the regular legislative session of 2001, the legislature enacts a law that places a ceiling on rents of farmland of \$50/month/arpent, the effective date of which is September 1, 2001. By that time, of course, the first lease has long since been "finished." The second lease, however, is still "in progress": six months have passed and six more are still to

165. Some schemas, in particular, those developed by certain Venezuelan scholars, lump the first two kinds of non-prospective temporal effects into a single category labelled "second grade" or "grave" retroactivity. See *Codigo Civil*, *supra* note 20, art. 3, § 53, at 151.

166. I use the expression "ambiactivity"—formed by combing the Latin prefix *ambi*, meaning "both," with the Latin word *actio*, meaning action—because this temporal effect, strictly speaking, is neither purely retroactive nor purely prospective in the etymological senses of those words. On the one hand, this effect falls on juridical situations that were formed under the old law and, not only that, on rights and duties ("effects" of juridical situations) that were conceived under the old law. To that extent the effect seems to involve retroactivity (backward action). On the other hand, this effect falls on rights and duties that do not become executory—in other words, the performance of which is not due—and therefore are not truly realized until after the new law takes effect. To that extent the effect seems to involve prospectivity (forward action). This effect, then, is at once partly (but not purely) retroactive and partly (but not purely) prospective, to speak etymologically.

By choosing this expression, I part company with European and Latin American scholars, who have variously referred to this temporal effect (i) in terms that connote retroactivity, such "impure retroactivity," "retroactivity of minimum degree," "attenuated retroactivity," Rescigno, *supra* note 1, § 2, at 224; 2 Torres & Gonzalez, *supra* note 162, § 4, at 550; Wald, *supra* note 1, § 44, at 112; *Codigo Civil*, *supra* note 20, art. 3, § 53, at 151-52, or (ii) in terms that connote non-retroactivity, such as "immediate effect," Roubier, *Transitoire*, *supra* note 1, § 3, at 10-11. The trouble with those labels, in my view, is that they are potentially confusing, especially to the uninitiated. One who knows little of contemporary civil law theories regarding intertemporal conflicts, upon encountering these terms, might assume that they are used in a juridical, rather than an etymological, sense and then, without further analysis, conclude that this temporal effect is or is not proscribed (depending on whether the author whose work he's reading labels the effect as "impure retroactivity" or the like or "immediate effect" or the like). The use of these labels, then, permits, if it does not invite, readers to beg the very question that must be answered here, namely, whether this temporal effect should be characterized as retroactive in the juridical sense of the word. See Wald, *supra* note 1, § 47, at 133 ("It would always be good to remember, however, that that which some call the immediate effect is, for others, not that but rather minimum retroactivity.").

go. If the new law were now to be applied so as to "reduce" the rents that Olide owed and paid or, in the case of the second half of the term of the second lease, still owes but hasn't yet paid, the new law would produce a variety of different non-prospective temporal effects.

First, if applied to the rents owed and paid under the first lease (which, as a practical matter, would require Pascal to refund half of that rent) the new law would have an "extremely" or "maximal" retroactive effect. That is so because those rents represent the "effects" of a juridical situation that came to an end before the new law's effective date, namely, the first lease.

Second, if applied to the rents owed and already paid under the second lease (which, as a practical matter, would require Pascal to refund half of the rent paid during the first six months of the lease term), the new law would have a "pure" or "moderate" retroactive effect. Those rents represent the "past" effects of a juridical situation that was created under the old law but was still in existence when the new law took effect, namely, the second lease.

Third, if applied to the rents owed but not yet paid under the second lease (which, as a practical matter, would allow Olide to pay and require Pascal to accept future rental payments of one-half the agreed-upon sum), the new law would have an "ambiactive" effect. Those rents represent the "future" effects of a juridical situation that was created under the old law but was still in existence when the new law took effect, namely, the second lease.

Contrary to the second alternative implication of the "prospective v. retroactive" antithesis—that there's no material difference between these different types of non-prospective temporal-effect phenomena—, these distinctions do (or at least *should*) matter. To understand why that's true, one has only to recall the analysis of the competing interests at stake in the typical intertemporal conflict case.¹⁶⁷ First, every such conflict involves a collision of competing interests: on the one hand, the progressive interests—those that favor the plenary application of the new law—and, on the other hand, the conservative interests—those that favor the continued application of the old law. Any solution to such a conflict therefore necessarily and inevitably entails a "balancing" (reconciliation) of these competing interests. Second, the reason for maintaining the old law is that it's unfair, not to mention inimical to economic development in the long run, to "change the rules" on the players in the middle of the game. Thus, equity and economic well-being demand that persons' reasonable expectations be respected. Now, if these propositions are true, then it stands to reason that (i) as the strength of the adversely-affected person's expectations changes, so does the "weight" of the "conservative" interest side of the scale and (ii) as the weight of that side declines, the scale begins to tilt the other way, that is, in favor of the "progressive" interests. This conclusion is significant here, for the strength of the expectations threatened by temporal effects phenomena other than pure prospectivity are not the same. To the contrary, as one moves from

167. See *supra* notes 18-48 and accompanying text.

maximal retroactivity to ambiactivity, one encounters expectations of *ever decreasing* strength.

The "rent-control" hypothetical makes this point clear. Consider, first, what would happen if the new law were applied in such a way as to reduce the rents owed and already paid under the first lease (the lease that terminated long ago)—the case of "maximal" retroactivity. This application of the new law would frustrate the lessor's expectation that he can keep (and, therefore, use as he will) all of the rent that he already and long ago collected. That expectation will undoubtedly be "firm," and with good reason. The risk that he might possibly be compelled to give up all or part of that money is, at this juncture, remote. To be sure, it's not impossible. For example, it might turn out that the lessee lacked contractual capacity for some reason (minority, insanity, etc.) or that his consent to the lease was vitiated for some reason (error, fraud, duress), in which case the lessee might be able to "nullify" the lease and, in the (very unlikely) event that the rent exceeded the value of the use of the land, get some sort of refund. Or it might turn out that the lessee, who, at the time he made the rental payments, was on the verge of bankruptcy, has since been declared bankrupt, in which case his creditors might be able to recover part of those payments. But these scenarios are so unlikely that the lessor is entitled not to worry about them.

Next, consider what would happen if the new law were applied in such a way as to reduce the rents owed and already paid under the second lease (the lease that's still running)—the case of "moderate" retroactivity. This application of the new law would frustrate the lessor's expectation that he can keep (and, therefore, use as he will) all of the rent that he already, but not so long ago, collected. That expectation will likewise be "firm," though not quite as firm as the first. In addition to the "compulsory return" risks that he faced in connection with the first lease, he now faces at least one other: an action to dissolve the lease for impossibility of performance. Imagine that, just as the second half of the lease term begins, some freakish event (for example, a hurricane, a war, a collision between the earth and an asteroid) occurs, effectively preventing the lessee from paying the rent. The lessee will then be entitled to bring an action to dissolve the lease on grounds of impossibility of performance, in which event he will be able to demand restoration of the rent already paid, less the value that he received for the use of the land during the first six months. This risk, though certainly real, is remote for at least two reasons: (1) the unlikelihood that the freakish event will occur and (2) the unlikelihood that the court will find that the rent exceeded the use value of the land. And so, though the lessor has more to worry about here than he did in connection with the first lease, he still need not worry much.

Finally, consider what would happen if the new law were to be applied to reduce the rents owed but not yet paid under the second lease—the ambiactivity scenario. This application of the new law would no doubt frustrate the lessor's expectation that he will eventually receive all of the rent that is still outstanding. But this expectation is considerably less "firm" than the first two. Why?

Because the lessor now faces several additional risks. The first is the "heightened" risk of an effective action to dissolve the lease for impossibility of performance. The risk that the lessee will bring such an action is no greater here than it was in the second scenario: the likelihood that a freakish event will occur is the same. But now the risk that the action, if brought, will be successful, that is, will be able to force the lessor to forfeit the rent, is much greater. That is so because, with respect to the rent that has not yet been paid, the lessor cannot demand a setoff in the amount of the use value of the land: the lessee owes no use value for that which he hasn't yet used. The second, and more significant, is the risk that the lessee, for whatever reason, simply won't pay. In that event, of course, the lessor could try to realize his expectation by (i) suing the lessee to enforce the lease, that is, to compel him to pay the rent or (ii) leasing the land to someone else. But both alternatives are fraught with uncertainties: the first, because (i) the cost of suing the lessee (attorney fees, court costs, etc.) may be too high, (ii) the lessee may be insolvent, or (iii) the lessee may be judgment-proof (e.g., if he attained a bankruptcy judgment discharging him from his liabilities) and, the second, because the lessor can't be sure he'll even be able to find a new lessee, much less one who'd be willing to pay so high a rent. Thus, the still outstanding rent from lease #2, unlike the rent collected under lease #1 or lease #2, is anything but "in the bag."

2) *Harmony*¹⁶⁸

i) *Internal Disharmony*

Defining retroactivity in terms of "vested rights" has the inevitable consequence of reducing the second rule of Article 6—that procedural and interpretative legislation may be retroactively applied—to a conceptual muddle. That this is so becomes clear when one considers the relationship between vested rights, on the one hand, and procedural or interpretative legislation, on the other.

If one can take seriously certain propositions that the courts routinely put forward regarding the nature of that relationship,¹⁶⁹ then it would seem that legislation of that kind cannot, as a logical matter, threaten vested rights. Consider, first, the implications of this standard jurisprudential statement regarding procedural legislation and vested rights: "no one has a vested right in

168. See *supra* note 114.

169. As a general rule one ought to take seriously what others say, if for no other reason than that it's courteous, not to mention moral, to give others the benefit of the doubt. But when the speaker, immediately after making a statement, flatly contradicts it, then one is entitled to make an exception.

With respect to the standard jurisprudential statements regarding procedural and interpretative laws that I'm about to examine, such an exception may be in order. As I will point out below, *see infra* text at pp. 61-62 & notes 171 & 173, the courts often make statements about procedural and interpretative laws that cannot be squared with their statements about the meaning of retroactivity.

any given mode of procedure."¹⁷⁰ Now, if that is true, then for a change in procedural legislation to deprive anyone of a vested right would, by definition, be impossible.¹⁷¹ Next, consider the implications of the standard jurisprudential account of the interplay between interpretative legislation and vested rights. The "theory" behind interpretative legislation, as Judge Rubin once explained it, is as follows:

Interpretative laws do not establish new rules; they merely determine the meaning of existing laws and may thus be applied to facts occurring prior to their promulgation. In these circumstances, there is an apparent rather than real retroactivity, because it is the original rather than the interpretative law that establishes rights and duties.¹⁷²

If that is true, then a new interpretative law, just like a new procedural law, "cannot properly be said to divest vested rights."¹⁷³

Once one understands that, the problem with defining retroactivity in terms of "vested rights" comes into bold relief. If a retroactive application is one that deprives someone of a vested right and if new procedural or interpretative

170. *Producers Oil & Gas Co. v. Nix*, 488 So. 2d 1099, 1102 (La. App. 2d Cir. 1986); *see also Terrebonne v. South Lafourche Tidal Control Levee Dist.*, 445 So. 2d 1221, 1224 (La. 1984) ("there is no vested right to a particular remedy (which means the procedure used in effectuating substantive rights)"); *Adams v. Adams*, 673 So. 2d 624, 635 (La. App. 1st Cir. 1996) ("Because the statute addresses the mode or means of the trial, it is a procedural matter, which does not affect any vested rights . . ."); *DOTD v. McClendon*, 552 So. 2d 1220, 1221 (La. App. 5th Cir. 1989) ("there is no vested right to a particular remedy"), *overruled on other grounds by DOTD v. Stern*, 570 So. 2d 513, 515 (5th Cir. 1990) (en banc).

171. This inference contradicts an ineluctable implication of another proposition about procedural legislation that the courts are wont to repeat. The other proposition is this: the constitution forbids that procedural legislation be applied retroactively "so as to divest . . . [a] vested right." *Cole v. Celotex*, 599 So. 2d 1058, 1063-64 (La. 1992); *see also Terrebonne v. South Lafourche Tidal Control Dist.*, 445 So. 2d 1221, 1224 (La. 1984); *Lott v. Haley*, 370 So. 2d 521, 523 (La. 1979); *Hargrave*, *supra* note 54, at 601. The implication is that, but for this prohibition, procedural legislation *could possibly be applied* in such a way as to deprive persons of vested rights.

If and when the courts decide to stop talking gibberish when it comes to issues of intertemporal law, they'll have to choose one proposition or the other. They can't have it both ways.

172. *Laubie v. Sonesta Int'l Hotel Corp.*, 752 F.2d 165, 168 (5th Cir. 1981) (Rubin, J.) (citing *Ardoin v. Hartford Acc. & Indem. Co.*, 360 So. 2d 1331, 1338 (La. 1978) & *Yiannopoulos*, *supra* note 19, § 43, at 68). *See also Manuel v. Louisiana Sheriff's Risk Management Fund*, 664 So. 2d 81, 86 n.9 (La. 1995); *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So. 2d 809, 818 (La. 1993).

173. *Segura v. Frank*, 630 So. 2d 714, 724 (La. 1994); *Ardoin v. Hartford Accident & Indem. Co.*, 360 So. 2d 1331, 1338-39 (La. 1978); *Gulf Oil Corp. v. State Mineral Bd.*, 317 So. 2d 576, 591 (La. 1975).

If you half way pay attention to other things the courts sometimes say about interpretative laws, then this inference—that interpretative legislation can't divest vested rights—will leave you baffled. Consider this example: the constitution forbids that interpretative legislation be applied retroactively "so as to divest a person of a vested right." *Smith*, 609 So. 2d at 816 & n.11 & 819. The implication of this proposition is that, in the absence of the prohibition, interpretative rules *could possibly be applied* in such a way as to deprive persons of vested rights. Now, which is it?

legislation cannot possibly deprive anyone of a vested right, then a retroactive application of such legislation is, as a logical matter, impossible. And if that is true, then Article 6, to the extent that it authorizes retroactive applications of such legislation, is a waste of legislative breath.

ii) External Disharmony

Defining retroactivity in terms of "vested rights" has the inevitable consequence of bringing much of Article 6 into conflict with higher-ranking norms, namely, several provisions of the federal and state constitutions. That this is so becomes clear when one considers the interplay between that limitation, as the courts routinely formulate it, and several of the rules of Article 6.

The constitutional requirement of "due process," the courts have concluded, prohibits the legislature from according "retroactive effect" to legislation in any and every case in which doing so would threaten vested rights. As the state supreme court recently explained,

since the application of legislative enactments has constitutional implications under the due process . . . clauses of both the United States and Louisiana Constitution, even where the Legislature has expressed its intent to give a new a substantive law retroactive effect, the law may not be applied retroactively if it would . . . disturb vested rights.¹⁷⁴

Now, if one sets this limitation alongside the rules of Article 6, while defining retroactivity in terms of vested rights, one ends up with a host of results that are nothing short of astonishing. Those results, which I'll illustrate shortly, can be summed up as follows: both the first rule of Article 6—that the legislature may specify that legislation, including substantive legislation, shall be accorded retroactive effect—and the second rule of Article 6—that procedural and interpretative legislation apply retroactively as a matter of course—necessarily and inevitably violate due process.

Consider, first, the problem with the first rule of Article 6. Imagine that the legislature has just enacted a statute that everyone would agree should be classified as substantive. If Article 6 means what it says, then the legislature should be able to accord that statute retroactive effect. But is that *ever* permissible, constitutionally speaking? In other words, can one conceive of even a *single instance* in which the legislature might possibly, at one and the same time, accord retroactive

174. *Keith v. United States Fidelity & Guar. Co.*, 694 So. 2d 180, 183 (La. 1997). *See also Smith*, 609 So. 2d at 816 n.11 ("no law can be retroactively applied so as to divest a party of a vested right as this would violate the due process clause of the state and federal constitutions"); *Cole*, 599 So. 2d at 1063 ("statutes enacted after the acquisition of . . . a vested property right . . . cannot be retroactively applied so as to divest the plaintiff of his vested right . . . because such a retroactive application would contravene the due process guarantees"); Hargrave, *supra* note 54, at 601 ("remedial or procedural statute cannot apply retroactively if they divest a vested right"); La. Civ. Code art. 6, cmt. (b).

effect to such a statute without trampling on someone's due process rights? If one defines retroactivity in terms of vested rights, then the answer must be "no." Why? Because for the statute to be "retroactively applied," as we've defined the term retroactive, that statute must necessarily deprive someone of a vested right. And if the statute does that, it's necessarily unconstitutional as applied.

Next, consider the problem with the exception to the second rule of Article 6. Imagine that the legislature has just enacted a statute that everyone would agree should be classified as procedural or interpretative. If Article 6 means what it says, then that statute must be accorded retroactive effect as a matter of course. But is that *ever* permissible, constitutionally speaking? In other words, can one conceive of even a single instance in which such a statute might have that effect without, at the same time, violating someone's due process rights? If one defines retroactivity in terms of vested rights, then the answer must be "no." Why? Because for the statute to be "retroactively applied," as we've defined the term retroactive, that statute must necessarily deprive someone of a vested right. And if the statute does that, it's necessarily unconstitutional as applied.

3) Correspondence¹⁷⁵

One of the most serious defects of the vested-rights theory is its "explanatory impotence," or, to use the lexicon of juridical technique, the lack of "correspondence" between the solutions it dictates and the solutions arrived at by the courts.

175. No body of law can be considered technically sound unless there is a "complete correspondence" between the solutions to which that body of law, if given a straightforward interpretation, would seem to lead and the concrete solutions at which those charged with applying that law arrive. 3 Gény, *Science*, *supra* note 113, § 223, at 209-10 ("Concepts that form juridical constructions must be exactly adapted to the positive realities of the living law. It is necessary that the construction cover all the rules that relate to each other, in such a fashion that there is a complete correspondence between the solutions given in fact and the conceptual garb in which they are dressed up. Otherwise, the process bankrupts its mission: the process becomes false and pernicious."). If, in order to make those concrete solutions "fit" the conceptual constructions in terms of which the rules are cast, those constructions must be stretched and contorted if not deformed, then, provided that those solutions adequately translate the juridical policy behind the body of law, those constructions should be replaced with others with which those solutions have a better fit. As Gény once observed, when a new situation arises and it appears useful, for purposes of governing that situation, to put our [established] abstract analytical procedure into question, it would be better to have fresh recourse to a new construction, rather than to cause the intellectual molds to burst due to an abusive use of them that would poorly match their effective contours.

Id. at 211. See generally Robert Anthony Pascal, *Of The Civil Code and Us*, 59 La. L. Rev. 301, 307 (1998) (26th John H. Tucker, Jr., Lecture in Civil Law, March 19, 1998) (to cast legislation in terms that "no longer convey the intended meaning of the legislated law . . . is a sloppy way to write a civil code."). It would be "better" to do so because anytime the law on the books is out of sync with the law in practice—whenever, in other words, the law on the books is not "sufficient in itself" to describe the law in practice—the security of juridical commerce is threatened. de la Marnierre, *supra* note 114, § 16, at 38 (legislation "ought to be sufficient in itself" to convey its meaning; requiring the interpreter to consult other authorities to determine its meaning produces "inconveniences" that present "a certain danger for the security of juridical commerce").

As we will soon see, one can isolate a number of cases of "non-retroactivity" that seem to involve the deprivation of vested rights as well as a number of cases of "retroactivity" that don't seem to involve the deprivation of vested rights.¹⁷⁶

i) Non-Retroactivity Despite the Loss of Vested Rights

The vested rights criterion, rigorously applied, is at an utter loss to explain a number of intertemporal conflicts cases in which the courts have found no retroactivity.¹⁷⁷ Nowhere is the truth of this proposition better demonstrated than in the realm of real rights.

Consider this illustration. X, a real estate developer, purchases a tract of rural swampland, which he hopes to develop into an industrial mall. At the time of the sale, no law stands in the way of this kind of development. Shortly after the sale, however, the government enacts a "wetlands protection law," one that forbids any commercial or residential development that might have a "significant adverse impact" on the ecology of wetlands areas. X's tract of land qualifies as such an area. For X, of course, the application of the new law would mean a substantial loss of his *usus* rights¹⁷⁸ over his property, rights that, at least before the enactment of the new law, were fully "vested" elements of his patrimony.¹⁷⁹ Prior to the enactment of the new law X could have dealt with these *usus* rights as he wished, for example, could have sold them along with the rest of his rights or could have ceded them to someone else in the form of a usufruct or a lease. If rights such as this aren't vested, then no rights are. Thus, it would seem that if retroactivity is defined in terms of vested rights, then the new prohibition cannot be applied to already-established wetlands owners, such as X.

It is doubtful, however, whether the courts would reach that conclusion. In a number of cases in which the courts have had to consider the temporal effects of new laws that restrict the prerogatives of ownership, the courts have ruled that such laws, as applied to existing owners, do not operate retroactively. Illustrative

176. Roubier, *Transitoire*, *supra* note 1, § 36, at 170-71 ("We have seen . . . that laws can be retroactive without impinging on acquired rights; we now see some laws that impinge on acquired rights without being retroactive."); Tavernier, *supra* note 1, at 245 ("[T]here are some cases of retroactivity without an attack on acquired rights."); Wald, *supra* note 1, § 47, at 133 ("In reality laws can be retroactive without violating acquired rights . . . and can violate acquired rights without being retroactive.").

177. 1 Galindo, *supra* note 1, § 74, at 168; Ghestin & Goubeaux, *supra* note 1, § 333, at 296; 1 Marty & Raynaud, *supra* note 1, § 106, at 186; Roubier, *Transitoire*, *supra* note 1, § 36, at 169; Wald, *supra* note 1, § 47, at 1332.

178. In the civil law as in classical Roman law, ownership is understood to comprise three distinct real rights (that is, rights in things), namely, *usus* (the right to apply the thing to this or that purpose), *fructus* (the right to take the natural or civil fruits that the thing produces), and *abusus* (the right to dispose of the thing, both physically and juridically). See La. Civ. Code art. 477 (defining "ownership").

179. For the definition of "patrimony," see *supra* notes 78-80 and accompanying text.

of this genre of cases are those that involve "rezoning." Take, for example, the case of *Ransome v. Police Jury of Parish of Jefferson*.¹⁸⁰ Ransome acquired a certain tract of land with the intention of putting up a restaurant on it. Soon after the sale, Ransome began construction of the restaurant. At the time of the sale and at the moment when construction began, the tract was subject to no particular zoning restrictions. But before Ransome could complete construction, the police jury, at the urging of several of Ransome's neighbors, enacted a new zoning ordinance that classified as "residential" all land within the subdivision in which Ransome's lot was situated. Ransome then sued the police jury, seeking to have the new ordinance declared unconstitutional as applied to his lot. Among the various theories that Ransome advanced in support of his claim was that "the zoning ordinance would be retroactive if applied to [his] property."¹⁸¹ The supreme court, however, disagreed. In the court's estimation, "the prohibition against the establishment of a place of business in the [residential] district is prospective and not retroactive," for "the ordinance prohibits the establishment of places of business in the residential district only after the effective date of the ordinance itself."¹⁸² Whatever else one might say about this decision, one cannot say that it is consistent with the "vested rights" theory.

ii) *Retroactivity Without the Loss of Vested Rights*

The vested rights criterion, rigorously applied, is unable to explain a number of intertemporal conflicts cases in which the courts have found retroactivity. Those cases can be grouped into the following categories: those that involve (i) conditional rights, (ii) progressive juridical situations, (iii) the formal validity of testaments, (iv) null juridical acts, and (v) extra-patrimonial rights.

aa) *Conditional Rights*

The "vested rights" would seem to offer conditional rights no protection against threats posed by new legislation.¹⁸³ By definition, a conditional right cannot be an "acquired right," properly so called.¹⁸⁴ That is so because "the conditional right is . . . in suspense and depends on an event whose realization is uncertain."¹⁸⁵ Indeed, unless and until that event occurs, the "ultimate enforceability" of the "right" is plagued by "uncertainty."¹⁸⁶

180. 216 La. 994, 45 So. 2d 601 (La. 1950).

181. *Id.* at 998, 45 So. 2d at 602.

182. *Id.* at 1000, 45 So. 2d at 602.

183. Level, *supra* note 1, § 44, at 74; Roubier, *Transitoire*, *supra* note 1, § 36, at 169; Wald, *supra* note 1, § 47, at 132-33.

184. Roubier, *Transitoire*, *supra* note 1, § 36, at 169.

185. *Id.*

186. 1 Saül Litvinoff, *The Law of Obligations* § 5.8, at 93, in 5 Louisiana Civil Law Treatise

The courts, however, have consistently ruled that conditional rights deserve as much protection from the effects of new laws as do unconditional rights. Consider, for example, the early case of *Town v. Syndics of Morgan, Dorsey & Co.*¹⁸⁷ A partnership executed a note in favor of a certain creditor. To secure the indebtedness represented by the note, Dorsey, one of the partners, endorsed it. Under the law that was then in force, this creditor, by virtue of the endorsement, was entitled to a preference over other creditors of the partnership with respect to the assets of Dorsey's estate. Sometime later, but before the note had come due, the government changed the law, eliminating the preference. The partnership then defaulted on the note, as well as on its other obligations, prompting the partnership's creditors to assert their rights against the assets of the partners' individual estates. Relying upon the old law, the creditor that held the note claimed a preference over the other partnership creditors. Those other creditors, relying on the new law, denied that the first creditor was entitled to such a preference. Though the court acknowledged that the preferred creditor's preference was a merely conditional right, inasmuch as it was "depend[ent] on a future and uncertain event" (the maker's failure to pay), the court ruled that the new law was without power to alter that right.¹⁸⁸ As the court explained,

[W]hether the law, at the time the obligation was contracted, or that in force when the condition took place, should govern the rights of the parties, is not a difficult question [T]he right which results from the engagement is deemed to be acquired from the time of the contract.¹⁸⁹

And so the court applied the old law.¹⁹⁰ Though this result makes sense in terms of political technique, the "vested rights" theory is at a loss to explain it.

bb) Interests Related to Progressive Juridical Situations

Certain juridical situations can be described as "progressive," in the sense that they are "in the process" of creating or extinguishing rights or duties or juridical relations. Consider, for example, a case of acquisitive prescription of land. While the prescriptive period is still running, one can say that the prescriber is "in the

(1992). See also Alain A. Levasseur, *Louisiana Law of Obligations in General: A Précis* 62 (3d ed. 1996); 1 Marty & Raynaud, *supra* note 1, § 164, at 296; Yiannopoulos, *supra* note 19, § 319, at 144.

187. 2 La. 112 (1830).

188. *Id.* at 113.

189. *Id.*

190. See also *United States ex rel. Myra Clark Gaines v. City of New Orleans*, 17 F. 483 (E.D. La. 1883) ("Our jurisprudence is settled that, in conditional obligations, the law which exists at the time the obligation was contracted, and not that which exists when the condition takes place, governs the rights of the parties."), *rev'd on other grounds by City of New Orleans v. United States ex rel. Gaines's Adm'r*, 131 U.S. 220, 9 S. Ct. 755 (1889).

process" of creating a real right, namely, ownership of an immovable, and that, for the time being, he has only a right-in-becoming. Next, consider the situation of an estranged husband and wife who have lived separate and apart for four months. As the clock continues ticking, one can say that the spouses are "in the process" of terminating their juridical relation—marriage—as well as their mutual rights and duties and, further, that those rights are only rights-in-ceasing.

Insofar as interests related to such situations are concerned, the vested rights criterion affords no protection against threats posed by new laws.¹⁹¹ Consider, again, the example of acquisitive prescription of land. Suppose that, when the would-be prescriber first takes possession of the land (without title), (i) he is married to the owner of the land and (ii) a certain statute provides that marriage suspends prescription. Later on, after twenty-nine years have passed, the government repeals that statute, thereby eliminating marriage as a cause for the suspension of prescription. Can the new law be applied to this juridical situation in such a way as to permit the husband to count the past twenty-nine years toward the satisfaction of the thirty-year delay requirement? If "retroactivity" is defined in terms of "vested rights," then the answer should be "yes." Just as the husband's right-in-becoming is not a vested right, so the interest that the wife derived from the suspension rule was not a vested right. And so, one would have to conclude that to apply the new law to this situation would *not* be to apply it retroactively.

That the jurisprudence would countenance such a result seems most unlikely. Though the courts have rarely, if ever, wrestled with this kind of problem in the context of acquisitive prescription, they have wrestled with it in the context of the prescription of non-use. And the results in those cases make it clear that the suspension of prescription cannot be erased after the fact without retroactivity. Take, for example, the case of *Mire v. Hawkins*.¹⁹² Several persons, all of them minors, received a number of mineral servitudes. For over a decade thereafter, none of these persons exercised his servitude rights. At the time, the law provided that prescription did not run against minors. About four years later, however, the government changed the law to provide that "prescription with regard to mineral interests was not suspended or interrupted by reason of minority." When the decade was up, several persons with interests opposed to those of the minor servitude holders contended that the servitude had been extinguished through the prescription of non-use. The minors opposed this contention, arguing that prescription had been suspended throughout their minority. Countering that argument, the minors' opponents, in reliance on the new law, maintained that the minors were not entitled to claim the benefit of suspension under the old law. The minors disagreed, arguing that to apply the new law to them would be to apply it retroactively and that, as a substantive law, the new law could not be so applied. Though the court ruled for the minors' opponents, it was not because the court

191. Hage-Chahine, *supra* note 1, § 356, at 241; Level, *supra* note 1, § 44, at 74-75; Roubier, *Transitoire*, *supra* note 1, § 36, at 170.

192. 177 So. 2d 795 (La. App. 3d Cir. 1965) (Tate, J.)

rejected their argument that the new law, as applied to their case, operated "retroactively." To the contrary, the court ruled as it did because it concluded that the government had intended for the new law to be retroactively applied.¹⁹³ This characterization of the effect of the new law, though certainly understandable and perhaps even defensible on some other basis, cannot be defended by means of the "vested rights" theory.

cc) Formal Validity of Testaments

It is well settled that "succession rights do not vest until the death of the decedent."¹⁹⁴ Before that time, the decedent's heirs and legatees (if any) enjoy, at most, a mere expectation of rights. Their rights, in other words, are still rights-in-becoming.

Because that is so, the vested rights criterion cannot protect legatees from adverse changes in the law regarding the prerequisites for testamentary validity that intervene in the interim between the execution of the testament and the death of the decedent.¹⁹⁵ Take this example. Suppose that the would-be testator, T, some years before his death, executes a testament in which he leaves a universal legacy to his child, A, but nothing to his child, B. The reason that T makes the legacy to A and not to B is that T suspects that B had spread some nasty rumors around town regarding T's paramour. T, however, is mistaken: the real source of the rumors was A. At the time, the law provides that a donation *mortis causa* can be nullified for fraud or duress, it cannot be nullified for error. A few years later, but before T's death, the government amends the law of testaments to provide that legacies which result from error are null. Can the new law be applied to this juridical situation in such a way as to void the legacy and, therefore, strip the A of the bequest? If "retroactivity" is defined in terms of "vested rights," then the answer would be "yes." To apply the new law in this fashion would not be to deprive the legatees of any vested rights, but to defeat his mere expectations.¹⁹⁶

The courts, however, would never embrace such a result. Consider the recent case of *Succession of Dowling*.¹⁹⁷ Dowling, an elderly attorney in poor health,

193. *Id.* at 799-801.

194. *Succession of Doll v. Doll*, 593 So. 2d 1239, 1255 (La. 1992); *Henry v. Jean*, 238 La. 314, 325-26, 115 So. 2d 363, 367 (La. 1959).

195. 1 Galindo, *supra* note 1, § 74, at 168; Roubier, *Transitoire*, *supra* note 1, § 36, at 170.

196. One cannot escape this box by shifting the focus of analysis from the legatees to the testator, that is, by inquiring whether the testator had a vested right to *make out his testament in the form that he chose*. A vested right, it will be recalled, is first and foremost a patrimonial right. Now, whatever interest a testator may have in the formal validity of his testament can hardly be considered patrimonial. To see why, one has only to ask whether this interest produces any of the effects associated with patrimonial rights: Is this interest one that the testator could have sold or donated to another? One that the testator's creditors could have seized in the event he failed to pay his debts to them? One that the testator's heirs could have inherited? Each of these questions demands a negative response.

197. 633 So. 2d 846 (La. App. 4th Cir. 1994).

executed a testament in which he left sizeable bequests to both his secretary and his associate. At the time, the law provided that a legacy could be nullified for "undue influence," provided that the legatee or third person who had pressured the testator into making the bequest had done so *at the moment at which the disposition was made*, and that the standard of proof with respect to undue influence was clear and convincing evidence. Sometime later Dowling died. After the succession proceedings got under way, one of Dowling's heirs challenged the testament on the ground that it was the product of undue influence, in particular, that of the secretary and associate. By that time, however, the government had changed the law to provide that a legacy could be nullified for undue influence regardless of the time at which the pressure had been brought to bear upon the testator and to lower the applicable standard of proof to a mere preponderance of the evidence where a confidential relationship existed between the legatee and the testator. The challenger maintained that, at the very least, the new standard-of-proof rule, which the challenger characterized as "procedural," should be applied. The legatees opposed that proposal, arguing that the new standard-of-proof rule was inseparable from the other new rule, that is, that which altered the timing rule for undue influence and, further, that to apply these new rules to such a case, that is, one in which the testament was confected before the new law, would be to apply them retroactively. That would be impermissible, the legatees further argued, because the new timing rule was substantive. The court sided with the legatees. Agreeing with the legatees that the new rules, as applied to the case, would operate "retroactively,"¹⁹⁸ the court ruled that "the law as it existed at the time the testator's will was confected . . . applies in this case."¹⁹⁹ This result, though probably "right" as a matter of political technique, cannot be reconciled with the "vested rights" theory.²⁰⁰

dd) Interests Related to Null Juridical Acts

If retroactivity is defined in terms of vested rights, then no obstacle should stand in the way of the *post hoc* validation of null juridical acts.²⁰¹ That is true whether the nullity in question is absolute or relative. Consider, for example, one who loses a wager during an illegal poker game. After his loss, but before

198. *Id.* at 855 n.6.

199. *Id.* at 855.

200. I recognize that, since the change in laws involved in this case occurred after Dowling's death, the result in this case *might* be explained on the theory that Dowling (or perhaps his legatees) acquired a "vested right" in connection with his testament *at the moment of his death*. But that is *not* how the court explained the result. The court described the applicable law not as "the law in effect at the time of Dowling's death," but rather as "the law in effect at the time of Dowling's testament." For the court, then, the critical moment for determining what, if any, interests Dowling had that deserved to be protected from the ravages of new laws was not the moment of his death, but the moment at which he made out his testament.

201. Roubier, *Transitoire*, *supra* note 1, § 36, at 170.

he has paid, the government changes the law, legalizing all poker games. Can this new law be applied to the loser's situation in such a way as to validate what, at the time, was an absolutely null act? If retroactivity is defined in terms of vested rights, it's hard to see why not. A null juridical act, by definition, produces *no* effects, that is, creates no rights, duties, or relations. Thus, there would be nothing for the new law to divest. Again, consider a child of sixteen years who places a telephone order for the "Best of Motley Crüe" collection in response to an ad in *Rolling Stone*. After the sale has been completed, the government changes the law, reducing the age of majority to 14. Can this new law be applied to the loser's situation in such a way as to validate what, at the time, was an absolutely null act? If retroactivity is defined in terms of vested rights, it's hard to see why not. Insofar as the seller is concerned, the application of the new law, far from depriving him of any rights, would simply confirm the rights that the contract was supposed to give him. Insofar as the minor is concerned, the contract, as a null juridical act, supposedly produced *no* effects. The minor, therefore, has nothing to lose.²⁰²

These results, however, find no support in the jurisprudence. It is well settled that a new law cannot validate a juridical act that, under the law in force at the time of its execution, was absolutely null. Consider, for example, *Lieber v. Caddo Levee District Board of Commissioners*.²⁰³ Back in the 1950s, the Department of Highways purchased a servitude over a tract of land for the purpose of extending a highway. Under the law in force at that time, however, the Department was prohibited from purchasing any interest in land less than full ownership. Sometime later the government changed the law, authorizing the Department to "acquire any use of the property or the full ownership of it." When a dispute later arose over the validity of the servitude agreement, the Department, citing the new law, contended that it was valid. The court,

202. One might object, however, that this analysis ignores what one might call the "nullification" rights of those whom nullity adversely affects. Consider, again, the wager hypothetical. Should the winner demand that the loser pay off, the loser can bring an action to have his "promise to pay" (which is the essence of every wager) declared absolutely null. Or, consider, once again, the sale-to-a-minor hypothetical. If he wants to, the minor can sue the seller for the return of the purchase price on the ground that the sale was relatively null. These litigious rights, which the application of new laws legitimizing gambling or reducing the age of minority (as the case might be) would eliminate, constitute "vested rights," it can be argued. This was, in fact, the position taken by the adherents of the doctrine of "acquired rights" in Europe. See Roubier, *supra* note 1, § 36, at 170.

This objection is not persuasive. For one thing, this supposed "vested right" is one of "singular content": an acquired right which has no object other than to bring about the recognition of the fact that nothing has been acquired! *Id.* Furthermore, when one considers the purpose behind the retroactivity rule as it's understood by the proponents of the vested rights theory—to protect reasonable expectations born of the old law—, one is hard-pressed to find any justification for protecting this "right." It goes without saying that one who enters into an absolutely or relatively null act does so, not in reliance on the law that renders that act null, but rather in the hope that that law (if the actor is even aware of it at all) will *not* be invoked. Thus, even if nullification rights can be considered "vested," it's difficult to understand why they ought to be protected.

203. 660 So. 2d 188 (La. App. 2d Cir. 1995).

however, disagreed. According to the court, to apply this new law to the servitude agreement, which the court, relying on the old law, described as "absolutely null," would be to apply the law retroactively. Because the new law was substantive, the court ruled, the new law could not be so applied.²⁰⁴

Equally well settled is the rule that a relative nullity cannot be validated via an after-the-fact change in the law. Among the many cases that stand for this proposition is *Freeman v. Freeman*.²⁰⁵ A husband and wife, after first having obtained a judicial separation and then having reconciled, allegedly formed a joint venture or partnership with respect to certain of their assets. At the time, however, the law imposed upon spouses an incapacity to contract with each other. Sometime later the government changed the law, eliminating this incapacity. A short time after that the wife filed for divorce. When the wife demanded her half of the partnership property, the husband, citing the old law, argued that the partnership agreement was invalid, in particular, was relatively null. In rebuttal, the wife, citing the new law, contended that her partnership agreement with her husband was valid. The court sided with the husband. To apply the new law so as to legitimize the relatively null agreement, the court reasoned, would have been to apply that law retroactively. And that, the court concluded, was impermissible.²⁰⁶

The results in *Lieber* and *Freeman* and similar cases,²⁰⁷ though perhaps politically justifiable, cannot be explained in terms of the "vested rights" theory. In all of these cases the courts refused to use new legislation to validate null juridical acts, notwithstanding that so validating those acts would not have threatened any vested rights.

ee) Interests Related to Status

Laws regarding status give rise to a multitude of juridical interests. Take for example the status of minor. Absent certain unusual circumstances that are of no interest to us here, every minor is subjected to the authority of his parent or, if he has none living, the authority of his tutor and, for a wide variety of purposes, can act juridically only with the approval and participation of his parent or tutor. But when the minor reaches the age of majority, he is released from parental or tutorial authority (as the case might be) and, from that point forward, can act juridically on his own.

The interests to which this or that status gives rise, which can be substantial, are open to the vagaries of new laws under the vested rights criterion.²⁰⁸ That

204. *Id.* at 193.

205. 430 So. 2d 673 (La. App. 2d Cir. 1983).

206. *Id.* at 678-79.

207. *Cf. Morris v. Friedman*, 663 So. 2d 19, 23-24 (La. 1995) (refusing to apply new legislation regarding "detrimental reliance" so as to render enforceable a promise that, under prior law, was unenforceable).

208. Roubier, *Transitoire*, *supra* note 1, § 36, at 170.

is so because those interests qualify as faculties or expectations rather than as vested rights.²⁰⁹ Consider, for example, the interests that tutorship creates in favor of the tutor (for example, the right to make decisions regarding the minor's domicile, discipline, education, religious formation, and property). After a tutorship has already been established in favor of one person (say, a grandparent), can a new law that establishes a different regime of preference for tutors (say, an aunt or uncle) be used to force the replacement of the original tutor by a new one? If retroactivity is defined in terms of vested rights, then the answer has to be "yes." The interest that a particular person has in serving or continuing to serve as tutor can hardly be considered a vested right. If this interest qualifies as a "right" at all, it is an extra-patrimonial right or, in more common terms, not a "property" right.²¹⁰ Nor does the interest that the minor has in a particular person's serving or continuing to serve as his tutor rise to the level of a vested right. Though this interest is undoubtedly significant, it does not qualify as a "right," properly so called, and, in any event, is indisputably extra-patrimonial.²¹¹ The "vested rights" theory, then, presents no obstacle to applying new tutorship laws to already-established tutorships.

The courts, however, have at least on some occasions shielded existing tutorships from the effects of new tutorship laws. Take the recent case of *In re Sanches*.²¹² After having been married for several years, during which they produced a single child, the Sancheses obtained a divorce. The court granted custody of the child to both parents jointly, designating Mrs. Sanches as the domiciliary parent. Sometime later, Mrs. Sanches died. In her testament, Mrs. Sanches expressed her wish that, in the event of her death, her brother, Roger Fleshman, be appointed as tutor over her child's property. The law in force at

209. *Id.*

210. Starck, *supra* note 1, § 168, at 76 ("One will range . . . among these extra-patrimonial rights of a familial character the power of a tutor in regard to his pupil."). See also Carbonnier, *supra* note 54, § 166, at 302 (extra-patrimonial rights include "not only the public and political rights of the individual, but also certain private rights (for example, the rights that constitute parental authority, the actions that protect the status of persons . . .)"); 1 Chevallier & Bach, *supra* note 2, at 41 (extra-patrimonial rights include "family rights that flow from marriage or from filiation, such as rights attached to parental authority . . ."); 1 Colin & Capitant, *supra* note 18, § 122, at 105 (extra-patrimonial rights include "family rights," that is, "those that result from the quality of spouse, parent, . . . or child"); Cornu, *supra* note 1, § 61, at 32 ("The relations of a personal order among members of the family form the framework of certain extra-patrimonial rights," among them "the authority of parents over the persons of their children," which entails the "rights of custody, surveillance, and education."); 1 Jossierand, *supra* note 18, § 648, at 374 (extra-patrimonial rights are "such as family rights (paternal power and marital power)"); 1 Marty & Raynaud, *supra* note 1, § 144, at 266 (extra-patrimonial rights "are given to a person to protect his physical and moral individuality, his family life, his social life: thus, . . . the rights of the head of the family . . ."); 1 Mazeaud et al., *supra* note 1, § 289, at 397 (extra-patrimonial rights include the rights of "status" and "filiation"); Weill & Terré, *supra* note 2, § 363, at 354 (extra-patrimonial rights include "the rights of parents over the person and things of their child").

211. See authorities collected *supra* note 210.

212. 619 So. 2d 799 (La. App. 1st Cir. 1993).

that time, however, reserved to the "parent dying last" the exclusive right to appoint the child's tutor, not only with respect to the child's person, but also with respect to the child's property.²¹³ Relying on that law, Mr. Sanches appointed himself tutor over the child for all purposes, including the administration of the child's property. When Mr. Sanches applied to the court for confirmation, Fleshman opposed him. A few years later the government amended the law to authorize each parent to designate a tutor to administer any property that the child might receive by virtue of an inheritance from that parent.²¹⁴ Though it is not clear whether Mrs. Sanches' brother tried to invoke this new law in support of his opposition, the court of appeal made it clear that any such attempt would have been futile. According to the court of appeal, to apply this new law to such a case would be to apply it retroactively. Since it was a substantive law, the court of appeal further explained, the new law could not be so applied.²¹⁵ That result, though probably correct as a matter of political technique,²¹⁶ simply cannot be squared with the "vested rights" theory.

4) *Efficacy*²¹⁷

To define "retroactivity" in terms of "vested rights" is, at least at first glance, an odd, if not bizarre, choice. Judging from its etymology—it comes from the Latin *retro*, meaning backward, and *actio*, meaning action—, one would have to say that "retroactivity" refers to some *temporal* phenomenon, in

213. La. Civ. Code art. 258.

214. La. Civ. Code art. 258 (as amended by 1992 La. Acts. No. 680).

215. *Sanches*, 619 So. 2d at 801 n.1.

216. See *infra* text accompanying notes 278-281.

217. Formulative technique can be described as a practical art, for it entails the adaptation of means to ends. Dabin, *Technique*, *supra* note 113, § 3, at 36-41; Du Pasquier, *supra* note 16, § 175, at 163; Roubier, *Théorie*, *supra* note 17, § 10, at 87. The means are juridical rules; the end, the balance of interests struck by policy-makers through the exercise of socio-political technique. Du Pasquier, *supra* note 16, § 175, at 163 ("[T]he jurist must elaborate rules that are adequate to the end that juridical policy has assigned to him . . ."); Roubier, *Théorie*, *supra* note 17, § 10, at 87-88 ("Juridical technique has a vaster object, for it comprehends, in reality, the study of the ensemble of means whereby the end that has been glimpsed by juridical policy is translated into the state of a rule. . . . [T]he complete field of technique . . . is the art of the juridical means that should permit one to attain the end sought by juridical policy."). Because that is so, the juridical technician must, of necessity, be concerned with how well the means—the juridical rules—"work" in practice, that is, the extent to which they produce results that are consistent with the chosen socio-political end. Du Pasquier, *supra* note 16, § 175, at 163 ("[T]he jurist must . . . render those rules [the juridical rules he proposes] realizable and efficacious by adapting them to the milieu that they must govern . . ."); 3 Gény, *Science*, *supra* note 113, § 223, at 210 ("Even if it possesses the preceding qualities, which are attached to its intrinsic structure, the juridical construction can play its proper role and give useful results only if it corresponds, in some measure, to the practical needs and interests that remain the substantial foundation of the law. This extrinsic quality, which ties the means to the end, shows itself to be indispensable for the efficacious play of every technical process."). It follows, then, that for a body of law, such as the intertemporal law, to satisfy the demands of sound formulative technique, that body of law must be efficacious.

particular, to the application of legislation *in the past*. Now, what, if any, connection the deprivation of vested rights has with "time" is anything but clear.²¹⁸

Indeed, to the extent that the deprivation of vested rights is undesirable at all, it would seem to be so regardless of *when* the deprivation occurs.²¹⁹ Consider, for example, a law that prohibits workers from forming a union to bargain for them collectively. Even if that law is to operate only in the future, so that it leaves in place whatever collective-bargaining agreements the workers' union have already hammered out with management, one could still fault it for depriving the workers of a "vested right."

It would seem, then, that by defining retroactivity in terms of vested rights, one "confounds here, in large measure, the question of justice [or wisdom or efficiency] and that of retroactivity."²²⁰ When a new law takes away vested rights, the problem is not so much (or invariably) "retroactivity" as it is "iniquity, which is another thing altogether, for retroactivity is not always iniquitous and iniquity most often is not retroactive."²²¹

b) Deficiencies of Socio-Political Technique²²²

1) Introduction

The vested rights theory often dictates results that are politically unacceptable, that inhibit, rather than foster, the realization of the common good.²²³ That this theory has that effect is no accident. As I will demonstrate below, the theory is inextricably bound up with two socio-political philosophies that, at their very foundations, are ontologically and ethically dubious. Those philosophies are "individualism" and "economism."

218. See 1 Borda, *Tratado*, *supra* note 1, § 141, at 159, & § 148, at 166; Côté, *supra* note 74, at 181; Hage-Chahine, *supra* note 1, § 356, at 241; Level, *supra* note 1, § 36, at 60-61; Vareilles-Sommières, *supra* note 53, § 48, at 465.

219. See Côté, *supra* note 74, at 181.

220. Vareilles-Sommières, *supra* note 53, § 48, at 465.

221. *Id.* See also 1 Borda, *Tratado*, *supra* note 1, § 148, at 166 (the acquired-rights criterion "confounded retroactive laws with laws that affect acquired rights and made of this confused idea the base of the legal system"); Dekeuwer-Défossez, *supra* note 1, § 10, at 9 ("[T]he notion of acquired rights is not specifically transitory: the attack on acquired rights is the work of iniquitous, unjust, or illiberal laws as well as of retroactive laws."); Level, *supra* note 1, § 36, at 59 ("[T]he theory of acquired rights confounds iniquitous, unjust or illiberal laws with retroactive laws.") & § 46, at 74 (quoting Vareilles-Sommière's critique with approval); Roubier, *Transitoire*, *supra* note 1, § 29, at 136 ("[I]f there are some particularly sacred rights that the legislator would do well not to touch . . . , that is an altogether different question from the question of the non-retroactivity of the laws: there are some laws that are iniquitous outside of any retroactivity.").

222. For the definition of the expression "socio-political technique," see *supra* note 113.

223. See *supra* note 47 and accompanying text.

2) Discussion

i) Individualism

The criterion of "vested rights" is intimately tied to the politico-philosophical movement variously known as individualism or liberalism,²²⁴ whose basic tenet is that individual liberty, narrowly and negatively understood as freedom from state constraint, ought to be maximized, even at the expense of what many would consider to be legitimate collective interests.²²⁵ When retroactivity is defined in this fashion, "the question is envisioned solely from the point of view of the individual, whose subjective rights are opposed to the powers of the government."²²⁶ This way of envisioning the question

leads one to search out those domains that adhere so closely to the heart of man that the deception [of hopes] which results from the attacks that the new makes upon them implies a [societal] sclerosis . . . [and to identify] those "sacred rights" . . . which, when put into question by the new law, lead to "undermining the foundation of every human society" [T]he field of application of the new law . . . [is restricted] in the measure in which it threatens that which liberal individualism considers to be essential values.²²⁷

224. Bach, *Contribution*, *supra* note 1, § 4, at 410; Bach, *Conflicts I*, *supra* note 1, § 36, at 5; Bonneau, *supra* note 1, § 5, at 3-4; § 14, at 20; § 83, at 70-71; Côté & Jutras, *supra* note 1, § 14, at 941; Dekeuwer-Défossez, *supra* note 1, § 10, at 8; Ghestin & Goubeaux, *supra* note 1, § 333, at 296; Hage-Chahine, *supra* note 1, § 356, at 240; Level, *supra* note 1, § 35, at 58; 36, at 59-62; 37, at 62-63; Roubier, *Transitoire*, *supra* note 1, § 23, at 98; § 27, at 120; § 29, at 144; Weill & Terré, *supra* note 2, § 169, at 175.

I use the term "liberalism" here in its European, as opposed to its American, sense. See Saul Litvinoff & W. Thomas Tête, *Louisiana Legal Transactions: The Civil Law of Juridical Acts 106 n.1* (1969). Americans might prefer to call it "libertarianism."

225. Du Pasquier, *supra* note 16, §§ 231-235, at 223-261; Leclercq, *Fondement*, *supra* note 23, at 209-11; Jacques Maritain, *The Rights of Man and Natural Law 7-8* (Doris Anson trans., 1943); 1 Marty & Raynaud, *supra* note 1, § 12, at 24-25 & § 27, at 48-49; Roubier, *Théorie*, *supra* note 17, § 25, at 229-30, & § 26, at 231-32; André Vincent, *La Synthèse Cosmogénétique de Teilhard de Chardin et le Droit*, 10 *Archives de Philosophie du Droit* 33, 35-36 (1965); Wald, *supra* note 1, § 44, at 112 & 114-15. See also Congregation for the Doctrine of the Faith, *Instruction on Christian Freedom and Liberation* § 13 (Mar. 22, 1986), reprinted in *Liberation Theology: A Documentary History* 461, 465 (Alfred T. Hennelly ed., 1990); Pope Paul VI, *Octogesima Adveniens* §§ 26 & 35 (May 14, 1971), reprinted in *Catholic Social Thought: The Documentary Heritage* 265, 274-75, 277 (David J. O'Brien & Thomas A. Shannon eds., 1992); Pope Paul VI, *Populorum Progressio* § 26 (Mar. 26, 1967), reprinted in *Catholic Social Thought*, *supra* this note, at 240, 246; Pope Pius XI, *Quadragesimo Anno* § 88 (May 15, 1931), reprinted in *Catholic Social Thought*, *supra* this note, at 42, 62.

226. Dekeuwer-Défossez, *supra* note 1, § 10, at 8.

227. Level, *supra* note 1, § 36, at 60.

Thus, the non-retroactivity rule itself is understood as an "essential" means of "protecting the liberty of man against legislation."²²⁸

One can question whether it is appropriate to ground intertemporal law on a concept that was and still is imbued with this philosophy. For one thing, this philosophy is now and has for some time been *passé*.²²⁹ In the course of the twentieth century, liberalism has given way to a variety of other politico-philosophical movements, known collectively (in Europe, at least) as the "social doctrines."²³⁰ The common denominator of these movements is to place greater emphasis on the collective interest vis-a-vis individual interests and to require that, at least in some instances, the collective interest be put first.²³¹ To be sure, the end of the century has witnessed something of a renaissance of liberalism,²³² sometimes referred to as neo-liberalism, but most of the persons who identify with this movement recognize the legitimacy of "social" constraints on individual rights to a degree that their predecessors would have found intolerable.²³³

Aside from the desirability of remaining philosophically *au courant*, there are other good reasons to reject the philosophy in which the vested rights doctrine is rooted. The first is that classic liberalism stands in the way of what most people would agree constitutes social progress. Indeed, it was this insight that led to the simultaneous decline of liberalism and rise of the "social doctrines": the growing conviction among political philosophers and social scientists that genuine political and social progress is impossible without the sacrifice of existing rights.²³⁴ Illustrations of this principle are not difficult to

228. Wald, *supra* note 1, § 44, at 112; Weill & Terré, *supra* note 2, § 165.B, at 169.

That the concept of vested rights is linked to liberalism should hardly come as a surprise. That concept took shape in the 19th century, a time at which classic liberalism, which had inspired and then, in turn, been reinforced by a series of liberal revolutions (the American and French among them), was still in its ascendancy. Bonneau, *supra* note 1, § 14, at 20; § 83, at 70-71; Level, *supra* note 1, § 35, at 58. See also Weill & Terré, *supra* note 2, § 163, at 168.

229. Bonneau, *supra* note 1, § 5, at 4; Du Pasquier, *supra* note 16, § 290, at 270; Litvinoff & Tête, *supra* note 224, at 106 n.1; Wald, *supra* note 1, § 44, at 112-15.

230. Bonneau, *supra* note 1, § 5, at 4 & § 83, at 71; Weill & Terré, *supra* note 2, § 165, at 169. See also 1 Colin & Capitant, *supra* note 18, § 5, at 5-6; Wald, *supra* note 1, § 44, at 112-15. Weill & Terré, *supra* note 2, §§ 62-64, at 65-67. The expression covers movements as diverse as "New Deal liberalism" and the "Catholic worker" movement in the United States, "social democracy" on the Continent, and "Fabian socialism" in Britain.

231. See Bonneau, *supra* note 1, § 5, at 3, & § 83, at 71; Wald, *supra* note 1, § 44, at 114-15. See also 1 Marty & Raynaud, *supra* note 1, §§ 28-29, at 49-52; Roubier, *Théorie*, *supra* note 17, § 27, at 240-52 & § 30, at 266-71 & § 33, at 283-90. Some movements (e.g., state communism) call for a more or less complete "subordination" of individual to collective interests, 1 Marty & Raynaud, *supra* note 1, § 28, at 49-50; Roubier, *Théorie*, *supra* note 17, § 27, at 240-52, whereas others seek an "equilibrium" between or a "harmonization" of individual and collective interests, 1 Marty & Raynaud, *supra* note 1, § 29, at 50-52; Roubier, *Théorie*, *supra* note 17, § 30, at 266-71 & § 33, at 283-90.

232. See, e.g., Michael Novak, *The Catholic Ethic and the Spirit of Capitalism* (1993).

233. *Id.* at 132-36.

234. Bonneau, *supra* note 1, § 83, at 71; 1 Borda, *Tratado*, *supra* note 1, § 138, at 155; § 169,

come by. Few today would deny that the elimination of slavery, the prohibition of child labor, the institution of minimum standards for food and drug quality, and the elimination of restrictions on the power of women to acquire and to transfer property, just to take a few examples, were progressive social developments. Those developments, however, came with a price: persons privileged under prior law (for example, slave holders, employers, manufacturers, and males) lost some of their theretofore-existing rights.

The second is that classic liberalism is philosophically flawed. That this is so becomes clear once one understands the view of human being that lies at the bottom of that movement. For liberalism man is, in his essence, nothing but an individual, one who is radically isolated from others and whose interests are radically distinct from those of others.²³⁵ The proper end of man is essentially egoistical: it consists of the realization or actualization of the individual will or, in other words, the fulfillment or satisfaction of individual desire.²³⁶ Human society is nothing but a more or less voluntary aggregation of autonomous individuals;²³⁷ human institutions, such as government, are nothing but artifacts—creations—of these autonomous individuals.²³⁸ As such, these institutions are limited to performing the specific functions that individuals have entrusted to them, which, in the view of most liberals, consist of (i) protecting individual interests, (ii) reconciling or arbitrating among those interests when they are incompatible, and (iii) providing services that individuals cannot readily provide for themselves.²³⁹ Except to the extent necessary to fulfill these objectives, those institutions have no business interfering with individual will or desire.²⁴⁰ They certainly have no business doing so in order to pursue some “common good” (apart from that which might be attained by the performance of these limited functions). Indeed, the common good, to the extent that this notion

at 187-88; § 177, at 192; 1 Colin & Capitant, *supra* note 18, § 59, at 58; Côté & Jutras, *supra* note 1, § 14, at 941; Ghestin & Goubeaux, *supra* note 1, § 333, at 296; 1 Marty & Raynaud, *supra* note 1, § 106, at 186; Roubier, *Transitoire*, *supra* note 1, § 29, at 145; Starck, *supra* note 1, § 480, at 198; Tavernier, *supra* note 1, at 308; Wald, *supra* note 1, § 44, at 111; Weill & Terré, *supra* note 2, § 165, at 170, & § 171, at 177.

235. Jacques Dagory, *La Liberté Libérale: Faculté de Juger ou Volonté de Puissance?*, 33 *Archives de Philosophie du Droit* 383, 385 (1988); Pascal, *supra* note 175, at 308; Pope Paul VI, *supra* note 225, §§ 26 & 35, reprinted in *Catholic Social Thought*, *supra* note 225, at 274-75 & 277; Vincent, *supra* note 225, at 35-36.

236. Dagory, *supra* note 235, at 385; Du Pasquier, *supra* note 16, § 290, at 270; Lukas K. Sosoe, *Individual ou Communauté: La Nouvelle Critique de Libéralisme Politique*, 33 *Archives de Philosophie du Droit* 77, 82 & 87 (1988); Pope Paul VI, *supra* note 225, § 35, reprinted in *Catholic Social Thought*, *supra* note 225, at 277; Vincent, *supra* note 225, at 35-36.

237. Dagory, *supra* note 235, at 385; Pascal, *supra* note 175, at 307-08; Sosoe, *supra* note 236, at 87-88; Vincent, *supra* note 225, at 36.

238. Du Pasquier, *supra* note 16, § 232, at 223-24; 1 Marty & Raynaud, *supra* note 1, § 12, at 23-24; Weill & Terré, *supra* note 2, § 24, at 31-32.

239. 1 Marty & Raynaud, *supra* note 1, § 12, at 24; Weill & Terré, *supra* note 2, § 24, at 31-32; see also Dabin, *Théorie*, *supra* note 21, § 190, at 221.

240. Dabin, *Théorie*, *supra* note 21, § 190, at 221.

is intelligible at all, can be nothing but the coincidence (altogether accidental and always shifting) of the interests of individuals.²⁴¹

This understanding of human being is, to say the least, reductionistic. As we have already noted, human being has, at once, both an individual *and a social* dimension, neither of which can be reduced to the other.²⁴² Any view of human being that ignores the "social" element in the ontology of man is necessarily incomplete and, to that extent, distorted. Liberalism is such a view of human being.

Linked, as it is, to a politico-philosophical system that is both opposed to progress and ontologically suspect, the vested rights criterion, one might say, "does what comes naturally." Not surprisingly, it "has not been able . . . to abstract itself from the liberalism and the individualism and especially the subjectivism that inspire it."²⁴³ As a result, it "does not always propose to the problem of the application of the law in time solutions that proceed from a purely intellectual and objective analysis, that is, a disinterested analysis."²⁴⁴ To the contrary, those solutions are at once conservative and individualistic.²⁴⁵

241. Pascal, *supra* note 175, at 308; Sosoe, *supra* note 236, at 82 & 87.

242. Support for this view of human being, which is indeed widespread, cuts across the politico-philosophical spectrum. Here's a random, though fairly representative, sampling: (1) classical Greek philosophy: 1 Frederick Copleston, *A History of Philosophy: Greece and Rome* 223 (1993) (analysis of Plato's notion of "society"); Aristotle, *Politics* bk. 1, §§ 1-2, 1252a-1252b (Benjamin Jowett trans.), *reprinted & translated in* 9 *Great Books of the Western World* 445, 446-47 (Robert Maynard Hutchins ed., 1978); (2) Thomism & neo-Thomism: St. Thomas, *supra* note 23, pt. 1 of 2d pt., Q. 94, art. 2, at 1009-10, & Q. 95, art. 4, at 1016; Dabin, *Théorie*, *supra* note 21, § 15, at 19-20; Maritain, *supra* note 225, at 5-6; Pascal, *supra* note 175, at 308-09; Second Vatican Council, *Gaudium et Spes* §§ 24-25 (Dec. 7, 1965), *reprinted in* *Catholic Social Thought*, *supra* note 225, 166, 180-81; *Catéchisme de l'Église Catholique* §§ 1879-1880, at 394 (1993); (3) neo-Marxism: Theodor W. Adorno, *Society* (F.R. Jameson trans.), *reprinted in* Stephen E. Bronner & Douglas M. Kellner, *Critical Theory and Society: A Reader* 267 (1989); (4) existential phenomenology: Martin Heidegger, *Being and Time* § 26, at 154-63 (John Macquarrie & Edward Robinson eds., 1962); (5) communitarianism: Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* 251-76 (1993); Amitai Etzioni, *The Spirit of Community* 14-18 (1993); Michael J. Sandel, *Liberalism and the Limits of Justice* 173-83 (1982); Sosoe, *supra* note 236, at 77.

243. Bach, *Conflicts I*, *supra* note 1, § 36, at 5.

244. Bach, *Contribution*, *supra* note 1, § 4, at 410. *See also* Côté & Jutras, *supra* note 1, § 14, at 941 ("[T]he system of acquired rights is characterized . . . by a *prejudice* in favor of the old law.") (emphasis added).

245. Cornu, *supra* note 1, § 369, at 125; Côté & Jutras, *supra* note 1, § 14, at 941.

I use the term "conservatism" here in its original sense, that is, an effort to maintain the political, social, or economic *status quo*. The effect of this conservatism can, of course, be anything but "conservative" in the other, more modern (American) sense, that is, as "favoring free enterprise." Everything depends on the policy content of the "status quo" that the conservative wants to maintain.

Consider, for example, the frustrating experience that the Louisiana Association of Business & Industry has had with Louisiana's contemporary vested-rights-dominated intertemporal law. During the mid-1990s, LABI succeeded in getting enacted all manner of legislation that benefits business at the expense of consumers, workers, tort victims, welfare moms, and tree-huggers, just to name a few. LABI has had considerably less success, however, in getting this legislation applied to juridical situations that arose in whole or in part under the prior legislation. Why? Because the courts,

the criterion consistently frustrates efforts at political, social, or economic reform, regardless of the urgency of the social problem that has called forth the reform effort, and just as consistently tips the balance of interests in favor of the individual and against the collective.²⁴⁶ Indeed, the vested rights theory seems to ignore altogether the collective interests that are undeniably at play in every intertemporal conflict of laws, in particular, those that favor the plenary application of the new law.

That the vested rights theory ignores these interests is evident in several of the hypothetical cases that we examined earlier.²⁴⁷ Take, for example, the "rent control" hypothetical. Pascal, a landowner, and Olide, a farmer, enter into a lease of a one-arpent tract of farmland: on March 1, 2001 Pascal leases Olide the parcel for \$100/month and for a term of one year. When the lease is executed, the law imposes no restrictions on the magnitude of rents of farmland. But at the end of the regular legislative session of 2001, the legislature enacts a law that places a ceiling on rents of farmland of \$50/month/arpent, the effective date of which is September 1, 2001. At that time, of course, the second lease is still "in progress": six months have passed and six more are still to go. Olide, relying on the new law, thereafter reduces the amount of his monthly rental payment to \$50. Pascal, relying on the old law, demands that Olide continue to pay \$100/month. An action ensues. Pointing out that the lease was executed while the old laws was still in force, Pascal contends that to apply the new law to this case would be to apply it retroactively. For his part Olide, noting that Pascal's right to demand the rent for October through December matured only after the new law took effect, argues that to apply the new law would be to apply it prospectively.

applying Louisiana's "conservative" intertemporal law, have refused to allow it, in other words, have insisted that the old law rather than the new law govern those situations. In so doing, the courts "conserved" (albeit it for only a while) the (relatively) "liberal" (in the sense of "social democratic") *status quo* that the "progressive" (in the sense of "favoring free enterprise") LABI "reformers" (in a "restorationist" sense) wanted to change.

246. See Ghestin & Goubeaux, *supra* note 1, § 333, at 296 ("[T]he theory of acquired rights gives too great a place to juridical conservatism and puts the brakes on progress or, in any case, the evolution that the legislator has desired."); see generally Dekeuwer-Défossez, *supra* note 1, § 3, at 4, & § 8 (suggesting that the vested rights criterion favors subjective rights over the common good); Weill & Terré, *supra* note 2, §§ 168-169, at 174-75 (noting that the vested rights criterion puts the accent on individual interests created under the old law).

Just so that there will be no misunderstanding, I should make clear the sense in which I use the terms "collective interest" and "common interest." It has been observed, correctly in my view, that the term "interest" and its various derivatives are often (perhaps even ordinarily) associated with the "positivist tradition," within which they serve to designate "a subjective advantage or preference, without concern for its justification in terms of the ontologically[-]indicated good." Pascal, *supra* note 175, at 309. But that is not the only possible usage of the term. Here, it's used as it was by Dabin, that is, as a modern synonym for "good." See Dabin, *Théorie*, *supra* note 21, § 187, at 218 ("[T]here is a public 'interest' or a public 'good,' which is the interest and the good of the public . . . [t]he 'whole' of the public . . .").

247. See *supra* text at pp. 57-60.

In a case such as this the politically preferable result, most persons (but admittedly not all) would probably agree, is to apply the new law.²⁴⁸ Applying the new law will admittedly frustrate Pascal's expectation that he would eventually receive all of the rent that is still outstanding. But this expectation is, relatively speaking, not all that firm. That is so because Pascal's right to it is subject to scores of contingencies, any one of which might limit that right or destroy it altogether, for example, the risk of an action by Olide to dissolve the lease for incapacity, vice of consent, or impossibility of performance; the risk that Olide won't pay voluntarily; the risk that Olide may become insolvent or obtain a discharge in bankruptcy, and so on. At the same time, however, applying the law will further the collective interest in social progress. If the government takes the momentous step of enacting a rent control law, it can only be because the public perceives that property owners have taken unfair advantage of lessees or, to put it another way, that lessees are the victims of social injustice. Further, legislation of this kind reflects a popular judgment that the community as a whole will be better off if the cost of rental property is reduced (even if that means, as it most assuredly would, that the available stock of such property would decline). On balance, the collective interests in progress and in assuring social justice together with the individual interests of lessees may well outweigh the community's economic interest in the maximization of the stock of rental property and the individual interests of lessors.

The trouble is that the vested rights theory simply can't be squared with this result. If one takes that theory seriously and applies it faithfully, that is, without distorting the pertinent categories (vested right and expectation), then one has no choice but to conclude that the old law, not the new law, must be applied. The argument goes like this. First, as soon as Pascal and Olide signed the lease, Pascal acquired the right to receive (and Olide the correlative duty to pay) each and every one of the twelve monthly rental payments, including those for October, November, and December. True, his right with respect to all of those payments was subject to a suspensive term, namely, the arrival of the first of each month within the lease period. But that a right is subject to a term merely means that the obligor's *performance* is suspended, put off until a later date; it does not mean that the obligee's right does not yet exist. Second, if the new law

248. I base this prediction about political preference on my reading of American "rent control" cases. If one can assume that what really drives controversial court decisions are the political, social, and economic values of the judges (as any American Realist worth his salt would argue), then Americans (or at least American *judges*) evidently believe that, on balance, it's a good idea to apply rent control laws to existing leases. In case after case, American courts have turned back constitutional challenges to the immediate application of such laws. *See, e.g.,* *People v. H&H Properties*, 201 Cal. Rptr. 687, 689-90 (App. 1984); *Huard v. Forest St. Housing, Inc.*, 316 N.E.2d 505, 507-08 & n. 6 (Mass. 1974); *Albigese v. Jersey City*, 316 A.2d 483, 488-89 (N.J. Sup. Ct. 1974); *91 E. BWAY Corp. v. Pippo Toy Co.*, 58 N.Y.S.2d 484, 488 (N.Y. Mun. Ct. 1945). The Louisiana courts are no exception. *See, e.g.,* *Probst v. Nobles*, 223 La. 685, 688, 66 So. 2d 609, 610-11 (1953); *West v. Schuber*, 81 So. 2d 436, 439-40 (La. App. Orl. 1955).

is applied in such a way as to reduce Olide's rental payments for the months of October, November, and December, then Pascal's will be divested of his right to the full rental payment for each of those months. Therefore, to apply the new law in that way would be to apply it retroactively. This outcome, though the inexorable result of the vested rights theory, is, as we have seen, politically unpalatable.

ii) *Economism*

Yet another charge of political-technical deficiency can be brought against the vested rights theory: the vested rights theory is "economistic." By economism (sometimes called simple materialism), I mean the tendency to define the "end" of man in terms that are primarily, if not exclusively, economic or, in other words, the notion that the acquisition of "more stuff" is the most important, if not the only, unqualified human good.²⁴⁹ Like liberalism, this tendency or notion is ontologically flawed, though for a different reason. Economism is, first of all, reductionistic, in that it tends to deny the existence of the only truly distinctive dimension of human being—the spiritual—²⁵⁰ or, what is just as bad, treats that dimension of human being as if it were some "superfluous phenomenon" that springs from and is determined by the material dimension of human being.²⁵¹ Not only that, but economism "reverses" the natural human order by "plac[ing] the spiritual and the personal (man's activity, moral values and such matters) in a position of subordination to material reality."²⁵²

Just why the vested rights theory is economistic has less to do with its links to liberalism than with the rather narrow definition of "rights" on which it is based. A right qualifies as a vested right, we learned earlier,²⁵³ if and only if

249. See 2 Jacques Leclercq, *Les Droits et Devoirs Individuels* § 12, at 77 (3d ed. 1955) [hereinafter *Droits*] (describing "materialism" as "a reaction against spiritual values" that "opposes the cult of the machine and of production to spiritual development" and "the society in which everyone goes to heaven to that in which everyone eats until he's satisfied"); § 9, at 50 ("Under the influence of materialism and of the absorption of social life . . . by economics, one is accustomed more and more to size up everything in terms of monetary equivalents . . ."); & § 41, at 223 ("What can be the end of such [economistic] societies? Every human end, every human interest, other than to gain money is without relation to the social end. If men work in the service of society . . ., the society can engage them and pay them only so that they will add back money. Men are put at the service of capital . . ."). See generally Pope John Paul II, *Laborem Exercens* § 7 & § 13 (Sept. 14, 1981), reprinted in *Catholic Social Thought*, *supra* note 225, at 360-61 & 368-70 (discussing "economism" and its links to common and dialectical materialism).

250. 2 Leclercq, *Droits*, *supra* note 249, § 53, at 276 ("It is true that a materialist doctrine necessarily impoverishes man, since it denies in him the essential and the central thing in favor of that which there is in him that is less noble.").

251. See *id.*

252. *Id.* See also 2 Leclercq, *Droits*, *supra* note 249, § 53, at 276 (noting that materialism elevates the "less noble" side of human nature above that which is "essential" and "central").

253. See *supra* notes 76-82 & accompanying text.

it has definitively and irrevocably become the "property" of this or that person or, to put it in more technical terms, if and only if the right has become part of someone's "patrimony." Now, a patrimonial right, as we also learned earlier,²⁵⁴ is defined as a right "that is susceptible of pecuniary value" or "to which a dollar value can readily be attached." So defined, the category of "vested rights" is necessarily limited to those that register on the "economic" scale. And it is those rights, and only those rights, that the vested rights theory protects.

The "vested rights" theory's exclusive focus on economic well-being is not without practical political consequences. To the contrary, this focus can and often does lead to politically undesirable results, as cases involving "status" readily illustrate. After the death of his parents, a child, C, is placed under the tutorship of his grandfather, G. At the time the law establishes a regime of preference for tutors that favors grandparents over aunts and uncles. Some years later, the government alters the regime of preference, putting aunts and uncles ahead of grandparents. Relying on the new law, the court ousts the grandfather as tutor, replacing him with the minor's aunt. Surely no one who favors the well-being of children could defend foisting this kind of wrenching change of life on such a minor. It would be bad enough if all that the minor had to fear was the devastating loss—now for the second time—of his most fundamentally important relationship (that with his "parent") and of his home. But there would undoubtedly be other disadvantages as well, for example, abrupt changes in discipline, education, religion, or use of property, brought on by the inevitable differences between his grandfather's and his aunt's preferences on these matters. This possibility, if realized, not only would turn his world upside down, but also would adversely affect the interests of a number of other persons, in particular, his grandfather. The trouble is, however, that none of these interests—not those of the grandfather, not even those of the child—constitute "patrimonial" rights. If they are rights at all, which one may doubt, they are at most what civilian theorists call "extra-patrimonial" rights. As such, they lie outside the protective umbrella of the vested rights theory.

3) Summary

For these reasons, the vested rights theory is incapable of satisfying the basic *desideratum* of sound socio-political technique: identifying and then striking the right balance (the one that promotes the common good) among the interests at stake in such controversies. Thanks to its links to liberalism, it ignores or underestimates the value of collective interests. And thanks to its economistic bias, it ignores or underestimates the value of interests, such as extra-patrimonial rights, that cannot be reduced to dollar terms.

254. See *supra* note 80 & accompanying text.

*ii. Completed Acts**a) Deficiencies of Formulative Technique**1) Vagueness*

One of the principal, if often overlooked,²⁵⁵ deficiencies in the “completed acts” theory is the indeterminacy inherent in the notion of the “structure” of juridical rules on which it rests. As we pointed out earlier,²⁵⁶ this theory pegs retroactivity to the time or times at which the acts or other events that compose the “presupposition” or “hypothesis” (as opposed to the “consequence” or “effect”) of the new law occur. The problem, in short, is this: it is often, if not invariably, uncertain just what acts or events should be considered part of the presupposition. The uncertainty arises on two different fronts: (i) the dividing line between the presupposition and the consequence and (ii) the dividing line between the presupposition and what might be called the “background” or “setting” of the presupposition, that is, those acts or events that, though not part of the presupposition, nevertheless must have taken place in order for the presupposed acts or events to have taken place.

i) Presupposition v. Consequence

Sometimes it’s hard to tell for sure whether a particular act or other event is an element of the presupposition or an element of the consequence. The problem is particularly acute in cases of statutes that prescribe some sort of delay.

Suppose that the legislature, in response to complaints regarding the behavior of overly-eager adjusters employed by liability insurance companies, enacts the following statute: “In connection with any actual or potential claim that a third party may have against a liability insurer, no representative of that insurer, including but not limited to an adjuster, shall contact that third party until 30 days have elapsed since the date of the accident or other event out of which the claim arose.” Upon first reading this statute, one might be tempted to conclude that its presupposition includes not only the “accident or other event” from which the claim arose, but also the expiration of the delay of “30 days.” After all, the statute provides that the first contact cannot be made until *after* both of these events, including the expiration of the delay, have occurred. A closer analysis, however, suggests another possibility. Another term for the presupposition, was

255. Of the French and Latin American scholars who have commented on the “completed acts” theory, hardly any have noted this rather obvious problem. One (and perhaps the sole) exception is Jacques Héron, but even he seems not to have appreciated the true magnitude of the problem. See Héron, *supra* note 1, §§ 70-73, at 322-23.

256. See *supra* notes 98-101 & accompanying text.

we learned earlier,²⁵⁷ is "hypothetical," a term which suggests that the presupposition ought to include only those events that are contingent or uncertain to occur. The "accident or other event" fits this description, for those events might or might not have occurred. The delay, however, runs "inexorably" from the moment at which the "accident or other event" occurred: "it's running has nothing hypothetical about it: it is absolutely certain that the delay is going to run up to the end."²⁵⁸ All that the adjuster has to do is to "wait."²⁵⁹ For this reason, it might make more sense to place the delay not in the presupposition, but in the consequence, where it will function as a sort of "suspensive term" on the adjuster's power to contact the third party. This possibility, like the first, seems reasonable. But because the dividing line between presupposition and consequent is so unclear, it's difficult to know which is preferable.

ii) *Presupposition v. Background*

Sometimes it's hard to tell for sure whether a particular act or other event is an element of the presupposition or just part of what one might call the "background" of that presupposition. This problem, which can be called a problem of "infinite regression," is not unlike the notorious problem of the same name associated with the doctrine of "proximate cause" in Anglo-American tort law. The "consequence" of a particular law can be seen as simply the last link in a causal chain of events that extends backward in time to the Big Bang itself. The challenge is to figure out just how far back up this chain the "presupposition" extends or, to put it another way, which of the events in this chain marks the first element of the presupposition. Two of the cases we examined earlier, *Henry v. Jean* and *Manuel v. Sheriffs' Risk Management Fund*,²⁶⁰ illustrate the problem well.

At issue in *Henry v. Jean*²⁶¹ was whether certain children who had been born out of wedlock and who, therefore, had originally been illegitimate, were entitled to share in the inheritance of their mother's estate alongside their mother's legitimate child. To establish that they had this right, these children had to prove that, though they had been born illegitimate, they had somehow acquired legitimate status later on. Their claim to legitimation was based on a "new" law, one that created a new mode for the legitimation of an originally illegitimate child, namely, the subsequent marriage of the child's biological parents plus the parents' formal or informal acknowledgement of that child. The law was "new" in the sense that it had not been enacted until *after* the parents of the originally illegitimate children had married each other and had acknowledged them.

257. See *supra* text accompanying note 98.

258. Héron, *supra* note 1, § 72, at 322.

259. *Id.*

260. See *supra* text accompanying notes 61-75 & 96-97.

261. 238 La. 314, 115 So. 2d 363 (La. 1959).

Determining the content of the presupposition of the law (or, better, network of laws) on which the originally illegitimate children staked their claim to inherit is downright dicey. For the consequence of that law to have been triggered, that is, for their right to share in their mother's estate to have arisen, several events must necessarily have occurred beforehand. The ones to which the particular law of legitimation on which the originally illegitimate children relied mentions at least three—the mother must have died, she must have acknowledged the children, and she must have married their biological father—and arguably a fourth as well—the mother must have given birth to the children out of wedlock. A moment's reflection, however, will reveal that the law necessarily "presupposes" still others, in other words, events without which those referred to in the law would never have occurred, for example, the mother must have had sexual relations with the biological father. But for those relations, there would never have been a birth. But why stop there? The chain of necessarily "presupposed" events certainly does not. Indeed, if one wanted to be rigorously logical about this exercise, one would have to add still more events, starting with the births of the biological parents themselves, proceeding through the births of their ancestors (both human and nonhuman), and ending with the birth of creation itself. Surely no one would maintain that the presupposition extends back that far, but reasonable persons might well disagree regarding how far back it does extend.

A similar problem appears in *Manuel v. Sheriffs' Risk Management Fund*.²⁶² At issue in that case was whether a consortium of liability insurers that had failed to pay a third-party claimant in a timely fashion was liable for statutory penalties. The claimant's demand for penalties was based on a "new" law that imposed on insurers a duty to settle third-party claims in good faith and, beyond that, provided that an insurer breached that duty when it failed to pay a settlement within sixty days of the date on which it had been reduced to writing. The law was "new" in the sense that it had taken effect only after the insurer had issued the policy, the incident out of which the claim had arisen had occurred, and the claimant had put in his claim with the insurer.

Determining the content of the presupposition of the law on which the third-party claimant founded his demand for penalties is problematic. For the consequence of that law to have been triggered, that is, for the consortium of insurers to have incurred liability for penalties, several events must necessarily have occurred beforehand. The ones to which the particular law on which the third-party claimant relied mentions at least two—the reduction of a settlement to writing and failure to pay the settlement—and arguably a third as well—a delay of sixty days. A moment's reflection, however, will reveal that the law necessarily "presupposes" still others, in other words, events without which those referred to in the law would never have occurred; namely, the claimant must have presented a claim to the insurer, the insured must have done something to the claimant that fell within the scope of the policy, and the insurer must have

262. 664 So. 2d 81 (La. 1995).

issued the insured the policy. But, of course, that's not all, for these events, too, necessarily presuppose others, which, in turn, necessarily presuppose others, and so on back to the beginning of time. Though one can say, with some confidence, that the presupposition does not include all of these events, one cannot say with great confidence that it includes these or those but not other events.

To solve this problem, one might be tempted to propose a "textualist" solution, that is, the presupposition consists only of those events to which the text of the new law in question (that is, the new code article or the new section of the revised statutes) expressly refers. Although this solution seems reasonable at first glance, it proves to be problematic upon close analysis.

The flaw in this approach, in short, is that it rests on a naive, if not flat out erroneous, assumption about the redaction of "laws," namely, that each article or section contains a complete statement of the presupposition (and consequence) of a distinct legal rule. The trouble with the assumption is three-fold. First, the divisions among laws, that is, the division of codes into books, titles, chapters, and articles or the division of a revised statute into titles, sections, and paragraphs is, to a large extent, arbitrary. In most, if not all, cases it would have been possible for the legislator to have divided the laws up differently, in particular, to have used fewer or more divisions and subdivisions or to have used a single, relatively lengthy article or section in place of several shorter articles or sections or *vice-versa*. Second, legislative drafters, sometimes by accident, but often deliberately, fail to word articles of codes or sections of revised statutes in such a way that each one is "self-contained." To be sure, some articles or sections provide a comprehensive statement of all of the "presupposed" facts on which their operation depends. But most, for example, the articles in highly systematized codes, expressly refer to only a few (if any) of those presupposed facts and depend, for the completion of the presupposition, upon other articles or sections within the pertinent legislative milieu.²⁶³ Third, some articles or sections do not establish legal rules at all, in the sense of norms whose structure is "if this or that event occurs, then this or that juridical effect shall follow," but rather establish definitions of or criteria for juridical concepts set out in other articles or sections.²⁶⁴ These three observations about the drafting of legisla-

263. See Du Pasquier, *supra* note 16, § 112, at 90 (noting that there are some articles "where one does not find, at first glance, the two elements [of a legal rule] that we just put to light"); Motulsky, *supra* note 98, § 17, at 19 ("[M]ost often, the article entails only one of the two parts, the presupposition or the juridical effect, or sometimes just some scattered elements that are designed, when duly completed, to form one or the other."); Pescatore, *supra* note 98, § 128, at 196 ("It can be that the complete legal rule must be derived from the reunion of two or of several articles . . ."); see also Dabin, *Théorie*, *supra* note 21, § 60, at 74 ("[R]ules of law are not always separated and independent, but very often on the contrary are chained to each other and form themselves into a series . . .").

264. Du Pasquier, *supra* note 16, § 112, at 90 (noting that some articles or sections "seem rather to specify the bearing of other rules or the sense of terms employed elsewhere"); Motulsky, *supra* note 98, § 17, at 19 (noting that many articles or sections "merely amplify one of the factors that composes the presupposition" of the rule set out in some other article); Pescatore, *supra* note 98, §

tion make it clear that "the logical structure of the rule of law is altogether independent from its redaction."²⁶⁵ It follows, then, that one cannot necessarily limit the search for the "presupposition" of this or that legal rule to the text of a single article of a code or section of a title within the revised statutes.

It would appear, then, that the uncertainty inherent in determining the scope of the presupposition cannot be cured by recourse to the expedient of textualism. In this instance, the proposed cure could well be worse than the disease. Without the cure, however, the disease rages undiminished.

2) *Inaccuracy*

The "completed act" theory can be faulted on yet another score, namely, that the conceptual apparatus in terms of which it is constructed fails to jibe with many of the phenomena that it is required to explain. This lack of correspondence becomes apparent in two types of cases: those that involve (i) juridical situations that, at the moment at which the new law takes effect, are still in the process of being created or destroyed (in technical terms, *facta pendentia*) and (ii) juridical situations that, at the moment at which the new law takes effect, have already been created, but are still in the process of producing their juridical effects.

i) *Inaptitude for Resolving Intertemporal Conflicts that Involve Juridical Situations in Course of Formation or Extinction (Facta Pendentia)*

Thanks to its focus on "completed" acts, the "completed act" theory is less than ideally suited for those intertemporal conflicts cases in which the events that constitute the presupposition are "dispersed" in time, that is, where some of those events occur before and others occur after the new law takes effect. In such cases, though the events that occurred before the effective date may fairly be regarded as complete, the same cannot be said of the events that occurred thereafter or, perhaps even more importantly, of the ensemble of events as a whole. The trouble, in such a case, is to know whether these events should be considered in isolation or in their ensemble. Regarding how this often critically

128, at 196 (noting that definitional articles, far from setting forth complete rules themselves, merely form "trunks" of the presupposition).

265. Motulsky, *supra* note 98, § 17, at 19; see also Cueto-Rua, *supra* note 98, at 106 ("Ordinarily, however, written general rules of law, as given by the legislator to the judges for application to cases, are not complete, or fully written, at the very outset, i.e., usually both parts of the norm are not enacted at the same time."); Du Pasquier, *supra* note 16, § 112, at 90 ("[A]n article of law is not necessarily identical to a rule of law."); Pescatore, *supra* note 98, § 128, at 195 ("It is necessary to emphasize . . . that an article of law does not always represent a rule of law . . .").

important question should be resolved, the completed acts theory provides no clear guidance.²⁶⁶

Consider this example. Before his death, D makes out an olographic testament²⁶⁷ in which he leaves all of his estate to T, his best friend. After D executes the testament, but before he dies, the legislature alters the law on testamentary form, requiring that all testaments be witnessed and notarized. D then dies. After T petitions the court for the probate of the testament, A, D's healthy 30-year old son, intervenes in the proceedings, seeking to annul the testament on the ground that it violates the new law. T, noting that the testament was valid under the law that was in force at the moment of its execution, argues that to apply the new law so as to invalidate the testament would be to apply it retroactively. Is T correct?

To answer that question by resort to the "completed act" theory, one must first identify the elements of the presupposition. Recast in conditional form, the law upon which T relies looks like this: If the decedent executes a valid testament in which he makes a bequest to N and if the testator then dies, then the property designated in the bequest belongs to and must be delivered to N. The presupposition, then, has two elements: (i) execution of a testament and (ii) death of the testator. Here, these elements were dispersed in time: whereas the former occurred while the old law was in force, the latter occurred while the new law was in force. If one can consider each of these acts in isolation from the other, then one might say that since the former—the execution of the testament—was completed while the old law was in effect, to apply the new law to that act would be to apply it retroactively. In that event, the testament would be valid and T would win. But if the "act" that must be "completed" for purposes of gauging the temporal effect of the new law is the whole of the presupposition in its ensemble, then since that act was not complete when the new law took effect (D had not then died), to apply the new law to that act would not be to apply it retroactively. In that event, the testament would be invalid and T would lose. Which of these constructions of the facts one should choose the completed acts theory does not and, indeed, cannot say.

One might object, however, that this problem could be easily solved in either of two ways. First, focussing on the first element of the presupposition (that which occurred before the change of laws), treat cases in which the elements of the presupposition are dispersed in time as "completed act" cases, that is, as cases in which the pertinent act was *completed before the effective date* of the new law. To apply the new law to such a case, then, would be to apply it retroactively. Second, focussing on the last element of the presupposition (that which occurred after the change of laws), treat cases in which the elements of the

266. 1 Borda, *Tratado*, *supra* note 1, § 166, at 182; Roubier, *Transitoire*, *supra* note 1, § 29, at 136-37.

267. An olographic testament is one that is written, dated, and signed in the testator's own hand. It requires neither witnessing nor notarization. La. Civ. Code art. 1588.

presupposition are dispersed in time as “uncompleted act” cases, as cases in which the pertinent act was *not completed before the effective date* of the new law. To apply the new law to such a case, then, would be to apply it prospectively.

If only it were that easy. Though either of these proposed solutions would admittedly be sufficient to solve the dispersion problem, neither of them, as we’ll see below,²⁶⁸ is politically acceptable in all cases.

ii) *Inaptitude for Resolving Intertemporal
Conflicts that Involve Juridical Situations
in Course of Effect*

Still another difficulty with the “completed act” theory is that it is ill-suited for resolving intertemporal conflicts associated with juridical situations that are in course of effect, that is, that are still producing effects at the moment at which the new law intervenes. In such situations “the study of acts no longer teaches us anything, because it is the very destiny of the juridical situation . . . that is in question.”²⁶⁹

Take this example. H and W, husband and wife, adopt an infant child, C, whose biological parents are B and G. At the time, the law provides that an adopted child has no right to alimony from his biological parents. A few years later, H and W die in an automobile accident, after which C ends up in an orphanage. The government then changes the law to provide that an adopted child, upon the death of his adoptive parents, may demand alimony from his biological parents. The state, relying on the new law, then files suit on C’s behalf against B and G, demanding that they contribute to his support. B and G, relying on the old law, refuse to pay. In their view, to apply the new law so as to permit C to obtain alimony would be to apply that law retroactively. Is that contention correct?

Before addressing that question, it might be helpful to consider how this juridical situation differs from most of those that we have heretofore analyzed with the help of the “completed act” theory. Here the question is not whether some past act is now to be considered valid or invalid (for example, the execution of a testament) or some other past event to be invested with or divested of juridical consequences, so that this or that juridical situation that arose in the past will now be upset (for example, the juridical situation of testamentary successor). The question, rather, is what effects a certain juridical situation that was validly constituted under the old law and whose validity is not now in doubt—the situation of the adopted child and his biological and adoptive parents—will produce from this point forward in time: will the effects be those

268. See *infra* text at pp. 92-97.

269. Roubier, *Transitoire*, *supra* note 1, § 29, at 136.

specified under the old law (the biological parent owes no alimony) or those specified under the new law (the biological parent owes alimony)?

What relevance, if any, the occurrence of "completed acts" has to the resolution of intertemporal conflicts cases of this kind is not at all clear. In such cases the hub around which the intertemporal conflict revolves is not so much this or that past act that may or may not have given rise to a certain juridical situation as it is the juridical situation itself or, to be still more precise, the rights and duties that this continuing juridical situation produces while it endures.

To see just how inappropriate it would be to apply the completed acts theory to such cases, one has only to give it a try and then evaluate the result. Consider, once again, the adoption hypothetical. Let's start, as always, by identifying the elements of the presupposition of the new law, that is, the one that accords orphaned adopted children a right of alimony against their biological parents. Those elements include: (i) the adoption itself and (ii) the death of the adoptive parents. Here both of those events occurred before the new law took effect. It would appear, then, that the pertinent "act" (whether that means these two events considered in isolation or in their ensemble) was completed while the old law was still in force. To apply the new law to this child and his biological parents, then, would be to apply it retroactively. And, since this law is undoubtedly substantive, Article 6 would rule such an application out of bounds.

Though one can certainly question this result on grounds of political technique, my concern, at present, is with something else, namely, the subtle, yet undeniable lapse of formulative technique that this result reflects. The problem is that it seems arbitrary to peg the applicability of a new law of this kind to the moment in time at which the events that form its presupposition occurred. What's needed in a case such as this is a temporal-effects rule that's tied to rights and duties, not acts, that tells us under what circumstances the rights and duties that spring from an ongoing juridical situation can and can't be altered, not under what circumstances, if at all, the acts that formed that situation can be attacked. In short, the "fit" between the completed act theory and intertemporal conflicts of this kind is less than perfect.

One might suppose, however, that this problem, like that of the dispersion of facts, could be easily solved in much the same manner. First, treat cases of ongoing juridical situations as "completed act" cases, that is, as cases in which the pertinent act (understood as the act that created the situation) was *completed before the effective date* of the new law. To apply the new law to such a case, then, would be to apply it retroactively. Second, treat cases of ongoing juridical situations as "uncompleted act" cases, that is, as cases in which the pertinent act (understood as the realization or maturation of the effects) was *not completed before the effective date* of the new law. To apply the new law to such a case, then, would be to apply it prospectively.

These solutions, though beguiling thanks to their simplicity, simply won't do. Each of them, as we'll see below,²⁷⁰ produces results that are politically unacceptable in at least some cases.

b) Deficiencies of Political Technique

Unlike the vested rights theory, the completed act theory is not rooted in any particular socio-political philosophy (such as individualism or collectivism). The latter theory, then, is not predestined, as is the former theory, to produce results that are politically unacceptable.

And nevertheless the completed acts theory (at least the simplistic and unsophisticated version of it that the Louisiana courts have used on occasion) does, in some instances, produce such results. In those cases in which the theory presents few formulative-technical difficulties, namely, those that concern the creation or extinction of juridical situations (as opposed to the effects of ongoing juridical situations) and in which all of the elements of the presupposition occur either before or after the effective date of the new law, the theory rarely runs into political trouble. The same cannot be said, however, of the theory's performance in cases in which the elements of the presupposition are dispersed in time or that involve juridical situations in course of effect.

1) Cases Complicated by Dispersion of the Facts

To solve the formulative-technical problems that arise from attempts to apply the completed acts theory to cases in which the elements of the presupposition of the new rule are dispersed in time, one might be tempted, as we have seen, to select one of two simple alternatives: (i) focussing on the first element of the presupposition (the one that occurs before the effective date of the new law), treat such a case as one in which the pertinent act was already completed under the old law; (ii) focussing on the last element of the presupposition (the one that occurs after the effective date of the new law), treat such a case as one in which the pertinent act was not yet completed under the old law. Unfortunately, neither of these solutions will produce politically acceptable results in all cases.

Consider this "products liability" hypothetical. X, a manufacturer, makes a widget according to a certain design and then sells it to a retailer who, in turn, sells it to Y, a consumer. Up until this point in time, the law has imposed liability upon the manufacturers of defective products on the basis of negligence alone (for example, negligent design or negligent manufacture). But now the government alters the law of products liability, instituting, for the first time, a system of strict products liability. A few days after the new law takes effect, Y, while using the widget, injures himself. Y then brings suit against X, seeking to recover damages for personal injuries. Among Y's theories is that X is

270. See *infra* text at pp. 92-97.

strictly liable for those damages on account of defective design and defective manufacture. X then moves for summary judgment on Y's strict liability claims. His theory is that since the old law of negligence was in force when he designed and manufactured the product (the first element of the presupposition of the new law²⁷¹), to apply the new law of strict liability to this case would be to apply it retroactively. Y opposes the motion, arguing that since the injury (the last element of the presupposition of the new law) did not occur until after the effective date of the new law, to apply that new law to this case would be to apply it prospectively.

Though reasonable persons might well disagree, the better result here, as a matter of political technique, is to apply the new law. To be sure, applying the new law here would adversely affect interests that were created under and in reliance on the old law. Chief among those interests are the investment-backed expectations of X. When he designed and manufactured the widget, he undoubtedly did so with knowledge of and in reliance on the old law, under which he was entitled to a relatively favorable standard of liability. Had he known that he would one day face a relatively unfavorable standard of liability, he might well have behaved differently, for example, purchased more liability insurance, altered the design, or not manufactured anything at all. Even so, the apparent injustice that would be visited upon X were the new law to be applied here is not nearly so severe as it might at first appear. The truth is that X, had he been vigilant, could have protected himself after the new law took effect. For example, he might have taken out additional liability insurance, issued appropriate warnings to the consumers of his products, or even recalled his products. Another interest that application of the new law might well affect adversely is the community's interest in generating new wealth. One should not ignore the negative repercussions that applying the new law here would have upon future investment in the product-manufacturing sector of the economy. If investors know that the standards of liability are subject to change at any time, they might be less willing to make the investment. But this problem, too, should not be exaggerated. It is possible, for example, that investors might be able to obtain insurance against the risk of such unanticipated changes in the law.²⁷² By contrast, failure to apply the new law here would have a significant adverse effect on a number of the interests that found expression in the new law. Perhaps the most important is the community's interest in progress. The new legislation reflects the judgment of the community that the quality of life for all (for everyone is a consumer) will be enhanced if manufacturers of consumer goods are held to higher standards of care and, beyond that, if victims of

271. The new law, stated in conditional form, might be worded like this: "If A (i) either (a)(1) manufactures a product according to a (2) defective design or (b) (1) mismanufactures a product in such a way as to render it (2) defective and (ii) that product causes (iii) damage to B, then B may obtain compensation from A."

272. Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv. L. Rev. 509, 533-50 (1986).

defective consumer goods are better assured of receiving compensation for their injuries. On balance, then, the scale of interests probably tips in favor of applying the new law.

Only one of the alternative "dispersed fact" solutions set forth above²⁷³ will bring about this politically desirable result. It is the latter, namely, that which treats dispersed-facts cases as if the pertinent act was not yet complete at the time when the new law took effect. The former alternative, namely, that which treats dispersed-fact cases as if the pertinent act was complete on the new law's effective date, would require the opposite result—the application of the old law.

Now, consider, once again, the "testate succession" hypothetical that I posed earlier.²⁷⁴ Before his death, D makes out an olographic testament in which he leaves all of his estate to T, his best friend. After D executes the testament, but before he dies, the legislature alters the law on testamentary form, requiring that all testaments be witnessed and notarized. After T petitions the court for the probate of the testament, A, D's healthy 30-year old son, intervenes in the proceedings, seeking to annul the testament on the basis of the new law. T, noting that the testament was executed while the old law was still in force (the first element of the presupposition of the new law²⁷⁵), argues that to apply the new law to this case would be to apply it retroactively. A counters that argument by contending that since D did not die (the last element of the presupposition of the new law) until after the new law took effect, to apply the new law to this case would be to apply it prospectively.

Though one can certainly disagree with this position as a matter of policy, most civil law jurisdictions, Louisiana and France included, have long preferred to apply the old law in situations that involve changes in the law of testamentary validity.²⁷⁶ This judgment, one must suppose, rests on some intuitive judgment regarding how that balance of interests should properly be struck in such cases. It is undeniable that the testator who goes to the trouble of preparing a testament in conformity with the law then in force thereby acquires a significant "reliance" interest under the old law, one that application of the new law would destroy. And it is likely that the motives which lie behind changes in the law of testamentary validity typically have less to do with high-minded concerns about progress and social justice than with protecting the individual interests of legatees and heirs. Under these circumstances, one might well conclude that the balance of interests tips in favor of applying the old law.

273. See *supra* text at pp. 89-90.

274. See *supra* text at p. 89.

275. The new law, stated in conditional form, might be worded as follows: "If A (i) drafts, dates, and signs a testament in his own hand; has the testament (ii) witnessed and (iii) notarized; and (iv) dies without altering the testament, then A's named legatees shall be entitled to his property on the terms and conditions outlined in that testament."

276. See *supra* text accompanying notes 194-200; see also Roubier, *Transitoire*, *supra* note 1, § 63, at 294-95.

To arrive at this politically desirable result, one must select the former of the alternative "dispersed fact" solutions, namely, that which treats dispersed-fact cases as if the pertinent act were complete on the new law's effective date. The latter alternative, namely, that which treats dispersed-facts cases as if the pertinent act were not yet complete at the time when the new law took effect, dictates a politically undesirable result—the application of the new law.

Now that we've worked through these hypotheticals, it's time to take stock of how the two alternative solutions to the "dispersed fact" dilemma performed. In connection with the first hypothetical, the former alternative produced a politically undesirable result, while the latter alternative produced a politically desirable result. In connection with the second hypothetical, the former alternative produced a politically desirable result, while the latter alternative produced a politically undesirable result. It is clear, then, that the completed act theory, in its original and unsophisticated form, can't guarantee results in "dispersed fact" cases that are acceptable as a matter of political technique.

2) Cases Complicated by Juridical Situations in Course of Effect

To solve the formulative-technical problems that arise from attempts to apply the completed act theory to cases that involve juridical situations in course of effect, one might be tempted, as we have seen, to select one of two simple alternatives: (i) focusing on the event that gives rise to the juridical situation (which will occur before the effective date of the new law), treat such a case as one in which the pertinent act was already completed under the old law; (ii) focusing on the date on which the effects of the juridical situation come to fruition (which will occur after the effective date of the new law), treat such a case as one in which the pertinent act was not yet completed under the old law. Unfortunately, neither of these solutions will produce politically acceptable results in all cases.

Let's start our examination of this problem by calling to mind yet again the "rent control" hypothetical that we considered earlier.²⁷⁷ Pascal, a landowner, and Olide, a farmer, enter into a lease of a one-arpent tract of farmland: on March 1, 2001 Pascal leases Olide the parcel for \$100/month and for a term of one year. When the lease is executed, the law imposes no restrictions on the magnitude of rents of farmland. But at the end of the regular legislative session of 2001, the legislature enacts a law that places a ceiling on rents of farmland of \$50/month/arpent, the effective date of which is September 1, 2001. At that time, of course, the second lease is still "in progress": six months have passed and six more are still to go. Olide, relying on the new law, thereafter reduces the amount of his monthly rental payment to \$50. Pascal, relying on the old law, demands that Olide continue to pay \$100/month. An action ensues. Pointing out

277. See *supra* text at pp. 57-60.

that the lease was executed while the old law was still in force, Pascal contends that to apply the new law to this case would be to apply it retroactively. For his part Olide, noting that Pascal's right to demand the rent for October through December matured only after the new law took effect, argues that to apply the new law would be to apply it prospectively.

As we concluded earlier,²⁷⁸ the preferable result in a case such as this, politically speaking, is to apply the new law. That is so because the collective and individual interests behind the new law, including the interests of social progress and social justice, outweigh the collective and individual interests created under the old law, such as the interest in maximizing available rental stock.

This politically acceptable result, it's clear to see, can be produced only if the latter of the two solutions to the "situation in course of effect" problem posed earlier is selected. Under that solution, it's the production or maturation of the effects that constitutes the critical act for purposes of the completed act theory. Here, that act did not occur until after the new law took effect. By contrast, the other solution, which assigns the "critical act" role to the event that originally gave rise to the situation, demands the politically undesirable result—the application of the old law.

Now, consider the following curatorship hypothetical regarding tutorship that I posed earlier,²⁷⁹ which, for present purposes, should perhaps be reconceived as an effects-of-minority problem. Suppose that the tutor whom the court appoints for the minor according to the old law is his grandfather. A few years later, after the minor has settled into life with this his new "father figure," the government changes the law to require that the minor's nearest collateral relative be appointed his tutor. C's aunt, A, then petitions the court to terminate G's tutorship and to appoint her tutor in place of G. G opposes the petition, arguing that since C's tutorship was created under the old law, that law ought to determine who serves as C's tutor. A, on the other hand, argues that because C's minority is an ongoing juridical situation, one that continues to subject C to the authority of a tutor and will continue to do so until he reaches majority, the new law ought to control from this point forward.

The preferable political result, few would disagree, is to maintain the status quo, that is, to continue to apply the old law. One must suppose that the government had some good reason for altering the law, perhaps a growing public perception that a child's aunts and uncles, on the whole, are better equipped financially, physically, and mentally to handle the challenges of child-rearing than are the child's grandparents. But be that as it may, the collective interest in realizing this rather *de minimis* advantage in tutorship competency as quickly as possible pales in comparison to the individual interests that children such as

278. See *supra* note 248 & accompanying text.

279. See *supra* text at p. 83.

C would already have staked on the old law. As we noted earlier,²⁸⁰ to foist this kind of wrenching change of life on such a minor could be emotionally devastating: in addition to losing his close relationship with his first tutor, he would undoubtedly lose other relationships, for example, those with his friends at church and school and then would be required to make the difficult adjustment to a new style of discipline and direction. Here, balancing up the competing interests is a "no brainer": the interests protected by the old law predominate.²⁸¹

To achieve this result, of course, one must select the former of the two solutions to the "situation in course of effect" problem posed earlier.²⁸² Under that solution, the event that originally gave rise to the situation is determinative. Here, that event occurred while old law was still in force. The latter solution, on the other hand, by hinging the determination on the timing of the production or fruition of the situation's effects, would require the politically undesirable result—the application of the new law.

Let's now compare the results of the two hypotheticals to see how well the two alternative solutions to the "situation in course of effect" problem fared. In connection with the first hypothetical, the former alternative produced a politically undesirable result, while the latter alternative produced a politically desirable result. In connection with the second hypothetical, the former alternative produced a politically desirable result, while the latter alternative produced a politically undesirable result. For these reasons, the completed act theory, in its original and unsophisticated form, can't guarantee politically defensible results in cases of this kind.

3. *Interpretation of Terminology of Typology of Laws*

As we have seen, the legislation (at least the preeminent part of it—Article 6) hinges the temporal effects of a new law on that law's classification, in particular, on whether the law is substantive, procedural, or interpretative. The interpretation that the jurisprudence and, to a lesser degree, the doctrine have placed upon these terms leaves much to be desired. The deficiencies in this interpretation spring from lapses in formulative technique.

a. Substantive v. Procedural

To date the courts' efforts to delineate the boundaries of the complementary categories "substantive" and "procedural," it seems fair to say, have largely failed. The trouble is that the boundaries, as described by the courts, are simply too "fuzzy" to be of much use either to judges or to lawyers. In any case in

280. See *supra* text accompanying notes 212-216.

281. See Roubier, *Transitoire*, *supra* note 1, § 29, at 136-37.

282. See *supra* text at pp. 89-90.

which it's worthwhile to raise the categorization question, those descriptions are too indeterminate to force the judge to resolve the question one way or the other. And, as a result, lawyers have great difficulty predicting how, in such a case, the judge's categorization decision will come out.

To see just how fuzzy the lines are does not require much effort: one has only to compare the definitions of "substantive" law and "procedural" law. As we observed earlier,²⁸³ the former "either establish[es] new rules, rights, and duties or change[es] existing ones" or "imposes new duties, obligations or responsibilities upon parties," whereas the latter "prescribe[s] a method for enforcing a previously existing substantive right and relate[s] to the form of the proceeding or the operation of laws." For anyone who understands the English language it should be patently obvious that these two definitions "overlap" to a considerable degree. Consider, for example, a new law that, for the first time, permits litigants in a certain class of civil cases to demand a trial by jury. No one would deny that such a law fits the definition of "procedural" law: it clearly "relates to the form of the proceeding" and concerns a "method for enforcing a previously existing substantive right" (namely, the right to bring suit). But does that law not, at the same time, fit the definition of "substantive" law: doesn't it clearly "establish [a] new rule[]" and, what's more, "establish [a] new . . . right[]" (namely, the right to elect a jury trial)? Or imagine a new law that requires, for the first time, that litigants submit in writing proposed "findings of fact and conclusions of law" immediately in advance of trial (as is now required in federal court). This law, too, fits the definition of "procedural" law: it clearly relates to the form of the "proceeding" and concerns a "method for enforcing a previously existing substantive right" (namely, the right to bring suit). But does this law not, as well, fit the definition of "substantive" law: doesn't it "establish [a] new rule[]" and "impose new duties, obligations or responsibilities upon parties" (namely, the duty to prepare and submit the required documentation)? Indeed, if the truth be told, *every conceivable procedural law fits the jurisprudential definition of substantive law.*

One might object, however, that this argument puts too much emphasis on the courts' verbal formulas considered in the abstract—that if one looks, instead, at how the courts use them in practice, one would find that the courts are able, with little difficulty, to keep the categories distinct. If only that were true.

Anyone who doubts it should consider the recent case of *Chance v. American Honda Motor Co.*²⁸⁴ At issue was the applicability of a new prescriptive statute—one that extended the original prescriptive period—to a claim that, at the moment at which the new law took effect, had already prescribed under the original prescriptive statute. The effect of so applying the new law would have been to "revive" the prescribed claim, for the new prescriptive period, reckoning from the date on which the claim had originally

283. See *supra* text accompanying notes 102-106.

284. 635 So. 2d 177 (La. 1994).

accrued, had not yet run.²⁸⁵ Though a majority of the supreme court ultimately concluded that the old law rather than the new law should be applied, the members of that majority could not agree on the appropriate rationale. A plurality of three justices, led by Justice Marcus, concluded that the amendment was substantive and that, since the legislature had not indicated otherwise, Article 6 forbade applying the amendment retroactively.²⁸⁶ Justice Marcus explained his rationale as follows:

Although prescriptive statutes are generally procedural in nature, the revival of an already prescribed claim presents additional concerns. For while the defendant does not acquire anything during the running of the prescriptive period, once the time period has elapsed, the legislature grants the defendant the right to plead the exception of prescription in order to defeat the plaintiff's claim. *Because the defendant acquires the right to plead the exception of prescription, a change in that right constitutes a substantive change in the law as applied to the defendant.*²⁸⁷

To support his conclusion that the amendment produced a "substantive change" in the law, Justice Marcus cited the definition of "substantive" law found in *St. Paul Fire & Marine Ins. Co. v. Smith*:²⁸⁸ "Substantive laws either establish new rules, rights, and duties or change existing ones."²⁸⁹ Justice Hall, joined by Chief Justice Calogero, agreed with the plurality's proposed result, but rejected the plurality's proposed rationale.²⁹⁰ For Justice Hall, the characterization of a statute as "substantive" or "procedural" has nothing to do with its effect on pre-existing rights:

The majority opinion correctly states the settled jurisprudential rule that prescriptive statutes are procedural and thus generally retroactively applied. Yet, the majority then implies that because the retroactive application of the instant amendment would deprive certain defendants of their right to plead the peremptory exception of prescription, the amendment in question must be reclassified as substantive. I respectfully disagree with this step in the majority's line of reasoning. . . .

The amendment at issue is to a prescriptive statute and is thus a procedural one, despite that applying it retroactively may upset vested rights. . . .

285. *Id.* at 179.

286. *Id.* at 177.

287. *Id.* at 178 (citation omitted) (emphasis added).

288. 609 So. 2d 809 (La. 1992).

289. *Chance*, 635 So. 2d at 178 (quoting *Smith*, 609 So. 2d at 817).

290. *Id.* at 179 (concurring opinion).

According to Justice Hall, the solution to this “problem” (that is, a procedural statute that, as applied, would deprive someone of a vested right) lies not under Article 6 (which, in his view, is impotent to solve the problem), but rather under the “due process” clauses of the federal and state constitutions:

Louisiana courts have consistently dealt with the latter problem by applying a well-settled exception to the general rule that amendments to procedural laws are retroactively applied; under that exception, even amendments to procedural laws are not retroactively applied if doing so would unconstitutionally disturb vested rights.²⁹¹

Because, in his view, the right to file an exception of prescription is a “vested right” and because applying the amendment to Article 3492 in this case would deprive Honda of that vested right, Justice Hall concluded that the constitutions prohibited the courts from so applying that amendment.²⁹²

This decision provides conclusive proof (as if any were needed) that the jurisprudential definitions of “substantive” and “procedural” are profoundly malleable, so malleable, in fact, that even the judges themselves can’t say for sure into which of those categories any particular piece of legislation *must* be placed. Both the plurality and the concurring minority were able, evidently in good faith, to justify their respective characterization determinations by reference to one definition or the other. It would seem, then, that *even in practice* the line between the two categories is hopelessly blurred.²⁹³

b. Substantive v. Interpretative

In their efforts to delineate the boundaries of the complementary categories “substantive” and “interpretative,” it must be admitted, the courts have met with “relative” success. As we noted earlier, they have identified several factors that are indicative and several others that are contra-indicative of “interpretative” character.²⁹⁴ These lists of factors, one would suppose, are better than nothing. Thanks to them, drawing the substantive-interpretative line is perhaps a tad easier than drawing the procedural-substantive line (at least at the level of conceptual

291. *Id.* at 180 (citation omitted).

292. *Id.*

293. One might object, of course, that one group or the other—the plurality or the concurring majority—got it wrong. And, from my perspective, that’s entirely true: the plurality blundered. Underlying that opinion is the assumption that the categories of procedural and substantive are “relative” rather than “absolute,” that is, one-and-the-same statute can be procedural *as to one person* and *substantive* as to another. That assumption not only finds no support in the text of Article 6 (or its predecessors), but also is utterly inconsistent with the history of that article. But that the plurality erred does not undermine my critique of the jurisprudential account of the substantive-procedural dichotomy, that is, that it’s too blurred to be of any real use. To the contrary, that three supreme court justices were so easily led astray tends to prove my point.

294. See *supra* text accompanying notes 107-112.

formalism). Still, the boundary between substantive, on the one hand, and interpretative, on the other, remains frustratingly fuzzy. The trouble is three-fold.

The first problem is that some of the courts' factors are, to put it kindly, not terribly helpful. Consider, for example, the requirement that the interpreted law have been "ambiguous." Since the definition of "ambiguous" is "susceptible of more than one reasonable interpretation," one is entitled to ask when, if ever, this requirement would *not* be satisfied. Just try to imagine a case in which a lawyer would even think to make the "interpretative laws" argument, much less devote time and energy to it, in which there had not been considerable disagreement, prior to the enactment of the new law, regarding the meaning of the purported interpreted statute. It's a task fit for Sisyphus.²⁹⁵

The second problem is that a few of the courts' factors are just plain wrong, either as a matter of law or as a matter of legal theory. Let's start with the requirement that the new law not have changed "settled law." If by the term "law" as used in the expression "settled law" the courts meant "the interpreted statute," this requirement would, of course, be open to the charge of circularity: to determine whether the new law "changes settled law" one must first determine whether the statute is substantive or interpretative. But that doesn't seem to be what the courts mean by "law" here. Consider, for example, this interesting passage in *Smith*, which first announced this supposed requirement:

[T]he amendment . . . does not merely overrule a single decision of this court . . . with which the legislature disagreed, but rather an established line of jurisprudence Indeed, by the time the legislature enacted this amendment, the law had become well-settled under *Brooks*, *Fontenot*, and their progeny The well-settled nature of this line of jurisprudence is evidenced by the large number of appellate, as well as federal, cases which have applied the apportionment rules as defined not only by *Brooks*, but also by *Fontenot*. As we have recognized, [a] statute that changes *settled law* relative to substantive rights only has prospective effect.²⁹⁶

To the same effect is this passage from *Segura*, in which this supposed requirement formed the linchpin of the court's rationale:

[P]rior to the 1990 amendment . . ., the *Hickerson* court's interpretation . . . had been *the law of this state* for over a decade. For these reasons,

295. For various acts of defiance against the Greek gods, Sisyphus was condemned to "ceaselessly rolling a rock to the top of a mountain, whence the stone would fall back down of its own weight." Albert Camus, *The Myth of Sisyphus and Other Essays* 88 (Justin O'Brien trans., 1955).

296. *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So. 2d 809, 820 (La. 1992) (citations omitted) (quotations omitted).

we concluded the 1990 amendment changed settled law relative to American's and Allstate's substantive rights²⁹⁷

If these passages mean what they say, then the courts understand the term "law," as used in the expression "settled law," to mean not so much the original legislation itself as *the established jurisprudential interpretation of that legislation*. That, however, is not what "law" is. In Louisiana, as in other civil law systems within the French tradition, the only official sources of law are "legislation" and "custom."²⁹⁸ Jurisprudence, including even established jurisprudence (or, as the civilians call it, *jurisprudence constante*²⁹⁹), isn't on the list. And its omission from the list is not the result of an oversight.³⁰⁰

Next, let's consider the notion that the parties' "reliance" on the established jurisprudence militates against qualifying the law as interpretative. To see what's wrong with this notion it suffices to recall my critique of the rationale of the majority opinion in *Chance*, which appears in the margins of the discussion of that opinion.³⁰¹ That rationale, it will be recalled, rests on the flawed assumption that the categories of procedural and substantive are "relative" rather than "absolute," that is, one-and-the-same statute can be procedural *as to one person* (the one whose vested rights are not threatened by the statute) and substantive *as to another* (the one whose vested rights are threatened by the statute) rather than only one or the other *as to everyone*. The "reliance" factor rests on a similar and likewise flawed assumption, namely, that the categories of interpretative and substantive are "relative" rather than "absolute," that is, one-and-the-same statute can be interpretative *as to one person* (the one who "relied" on the prior interpretation) and substantive *as to another* (the one who did not "rely") rather than only one or the other *as to everyone*. That assumption (like the one at work in *Chance*) not only finds no support in the text of Article 6 (or its predecessors), but also is utterly inconsistent with the history of that article.

The third and most profound problem is that the courts' recitation of factors stops well short of what's really needed. For one to be able to determine, with some measure of reasonable assurance, whether a particular thing fits into a certain class, one must know what are, to use the language of introductory logic, the "necessary and sufficient conditions" for so classifying such a thing. Necessary conditions are those that must be satisfied if the thing is to be *eligible*

297. *Segura v. Frank*, 630 So. 2d 714, 725 (La. 1994) (emphasis added).

298. La. Civ. Code art. 1 ("The sources of law are legislation and custom.").

299. N. Stephan Kinsella, *A Civil Law to Common Law Dictionary*, 54 La. L. Rev. 1265, 1278 (1994); Yiannopoulos, *supra* note 19, §35, at 53 & 55-56; Harriet Spiller Daggett et al., *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 Tul. L. Rev. 12, 15-26 (1937); *Johnson v. St. Paul Mercury Ins. Co.*, 256 La. 289, 296, 236 So. 2d 216, 218 (1970), *rev'd on other grounds by Jagers v. Royal Indem. Co.*, 276 So. 2d 309 (La. 1973).

300. La. Civ. Code art. 1, cmt. (b). *See also* Symeonides, *supra* note 50, at 268 (relating—via an ostensible hypothetical problem—part of the legislative history of new Article 1).

301. *See supra* note 293.

for admission to the class; sufficient conditions, those that, if satisfied, will justify actually admitting it to the class. What the courts have provided thus far is, at most, a list of the necessary conditions for classifying statutes as interpretative (an ambiguity in the interpreted statute, a prompt legislative response to an interpretative controversy, etc.). That's good, but it's not enough. All that those conditions permit one to do is to make the "negative" determination that this or that candidate for admission to the class of interpretative laws is or is not *excluded from the class*: if the candidate fails to meet even one of those conditions, it's excluded from the class, that is, it's substantive, not interpretative, whereas if the candidate meets all of those conditions, it's not excluded from the class, that is, it may be, but is by no means certainly, interpretative. Those conditions do not permit one to make the "affirmative" determination that this or that candidate for admission to the class of interpretative laws *belongs to the class*: even if the candidate meets all of the conditions, one can't be sure that it's interpretative; it still might be substantive. To be sure of that, of course, one needs a list of *sufficient* conditions for "interpretativeness." Unless and until the courts or the legislature come up with one, the interpretative-substantive boundary will remain unfixed.

The courts themselves have even acknowledged this problem. In a welcome (if all too rare) display of candor, the supreme court, in *St. Paul Fire & Marine Ins. Co. v. Smith*,³⁰² made the following observation:

The suggested distinction between interpretative legislation "clarifying," and substantive legislation "amending" or "changing," existing law is an obscure one. There is "no bright line between substantive laws which change existing standards and interpretative laws which change existing standards by redefining and returning to their ostensible 'original' meaning." In the same vein, we have described the line between this intention of the lawmaker to "clarify" existing laws and the enactment of new substantive provisions as tenuous³⁰³

One would have hoped that the justices, having confessed the sin, would have made the appropriate penance, namely, would have "brightened up" the line by positing a clear definition of "interpretative law" or, in other words, setting out a list of necessary *and sufficient* conditions for classifying a particular law as interpretative. This hope, however, was not fulfilled. To the contrary, the justices merely trotted out the established necessary conditions for making such a classification and, upon finding that most of those conditions were not satisfied, ruled that the statute before it was not interpretative.³⁰⁴

302. 609 So. 2d 809 (La. 1992).

303. *Id.* at 819 (citations omitted).

304. Out of fairness to the justices, one must acknowledge that it was not *necessary* for the court to provide such a definition or list of conditions, given the court's conclusion that the statute in question was non-interpretative. Indeed, had the court done so, its statements, technically speaking,

V. CONCLUSION

A. *The Past and the Present*

For many years now, Louisiana has been stuck with an intertemporal conflicts law that can't do the job. The problem, as we have seen, stems from an unfortunate failure of juridical technique.

1. *The Legislation*

The problem starts in the legislation itself, which exhibits a few lapses in formulative technique. First, there's the apparent antimony between Article 6 and Section 2, which set out seemingly contradictory directives regarding the permissible temporal effects of new laws. Then there's the equivocation in the use of the term "substantive" in Article 6. Finally, there are the multiple breakdowns in efficacy. The legislative scheme as a whole fails even to recognize, much less to provide for, any temporal effects phenomena other than retroactivity and prospectivity, for example, what we've called "postactivity." And the exception to the anti-retroactivity rule that Article 6 carves out for "procedural laws" raises concerns on two fronts: it (i) fails to stand in the way of results that reasonable legislators would find unacceptable and (ii) attacks a problem that, on close analysis, turns out to be chimerical.

2. *The Interpretation*

The real problem, however, lies in the interpretation of this legislation, in particular, the jurisprudencetal interpretation. This interpretation can be faulted on at least three counts.

First, though it's an admittedly minor annoyance, the courts' handling of the apparent antinomy between Article 6 and Section 2 is less than fully satisfying. The results of this effort are difficult to square with established interpretative norms and fly in the face of accepted principles regarding the scope of implied abrogation.

Second, the interpretation that the courts (and to some extent the doctrine) have placed on the legislative terminology of temporal effects, in particular, the term "retroactive," is deficient in countless respects. In most judicial opinions, of course, there's no interpretation to be found: the court somehow manages to apply the rule of Article 6 or Section 2, as the case might be, without ever defining or setting up a criterion for retroactivity. On those all too rare

would have amounted to *obiter dicta*. Still one could hardly have charged the court with unwarranted judicial activism had it taken the initiative to close (at least in some small measure) the "circle of the indeterminate" that surrounds the category of interpretative laws. See Jean Dabin, *Technique*, *supra* note 113, at 111.

occasions on which the courts have bothered to define that term or, failing that, have at least given some hint of how they understand it, the results have hardly been salutary. Through those decisions, the courts, no doubt unwittingly, have ended up with two rather different definitions of retroactivity, one tied to the notion of "vested rights" and the other, to the notion of "completed acts." Neither definition has much to commend it.

The vested rights theory is an affront to sound juridical technique. First, there are the problems of formulative technique. Plagued by radical indeterminacy and guilty of distorting and oversimplifying the phenomena it is supposed to describe, it constitutes a case study in bad style. Not only that, but it makes a mess of the exceptions to the anti-retroactivity rule that Article 6 creates in favor of procedural and interpretative laws, reducing them to near nonsense and bringing them into conflict with the provisions of the federal and state constitutions that require due process. Perhaps more disturbing, the theory is at an utter loss to explain a good measure of the established jurisprudence. Finally, the theory, on close analysis, turns out to have only a tenuous connection with the very task that intertemporal law must perform, namely, to fix the temporal boundaries of successive laws.

The vested rights theory's assault on juridical technique does not end there. To these deficiencies of formulative technique, the theory adds a few deficiencies of socio-political technique. Rooted, as it undoubtedly is, in radical individualism, the theory ignores or at least improperly undervalues the collective interests at stake in intertemporal conflicts, in particular, the community's interest in promoting social progress and social justice. And thanks to its links to economism, the theory improperly privileges material over "spiritual" interests, that is, interests that can't be reduced to monetary terms. As a result of its associations with these deviant socio-political philosophies, the theory tends to produce results that reflect an improper balance or equilibrium of interests, one that fails to serve the common good.

The completed acts theory, though admittedly an improvement over its counterpart, nevertheless will not win any awards for juridical technique. Like the vested rights theory, it exhibits several formulative deficiencies. For one thing, it suffers from indeterminacy at a number of levels. But worse than that, it is, by nature, ill-suited to handle certain common classes of intertemporal conflicts cases. It's not cut out for "dispersed fact" cases, that is, those in which the "act" in question in fact consists of multiple acts, some of which antedate and others of which postdate the new law's effective date. Nor does it work in cases that involve juridical situations "in course of effect," that is, ongoing situations that are neither coming into or going out of existence. To these problems with the theory there are no sure solutions. The easiest and perhaps most obvious solutions—to treat dispersed fact cases and cases of juridical situations in course of effect either as instances of completed acts or as instances of uncompleted acts—flunk the test of socio-political technique.

The third and final flaw in the interpretation concerns the terminology that the legislation, in particular, Article 6, uses to describe the categories of laws to

which different temporal effects may be attached, namely, substantive, interpretative, and procedural laws. It is at this point, perhaps, that one finds the most profound breakdown in juridical technique. The definitions that the courts have so far supplied for these terms are indeterminate in the extreme and, still worse, even overlap to a significant degree. As a result, predicting into which of these categories the courts will place a particular law is not far from outright gambling.

B. The Future

If Louisiana's intertemporal conflicts law is "broke," then it must, of course, be "fixed." The question is "How?" Drawing upon the technical critique set forth above, one can, I think, begin to formulate an answer to that question. At the very least, one should be able to come up with a rough sketch of what the "fixed" law will look like.

1. The Legislation

The sketch of this "fixed" law begins with the legislation itself. To start off, the legislature needs to eliminate the embarrassing antimony between Article 6 and Section 2. Precisely how the antinomy is resolved—by the formal abrogation of Section 2 or by a legislative affirmation that Section 2 means what it says—is of secondary importance. The important thing is for the legislature to put an end to its Doublespeak.

Beyond that, the legislature should reconsider its decision to except procedural laws from the general anti-retroactivity rule of Article 6. This exception, as I demonstrated above,³⁰⁵ produces a multitude of problems, among them that it leaves the courts with no choice but to resolve a good number of intertemporal conflicts cases on constitutional grounds and puts Louisiana out of step with the rest of the civil law world. Furthermore, because the courts and the doctrine seem to be unwilling or unable to sharpen up the lines that divide procedural from substantive laws, this exception, understandably enough, generates a fair amount of litigation, litigation that, but for the exception, would not exist. These inconveniences, of course, might be worth tolerating if the exception were essential to the realization of some important public good. But, as I demonstrated earlier,³⁰⁶ that is not the case. The truth is that the exception is unnecessary.

If the exception for procedural laws in Article 6 is retained, then the legislature or, in default thereof, the courts and legal scholars, should work to eliminate the equivocation in the meaning of the term "substantive" as it's used in that exception and the complimentary exception for "interpretative" laws.

305. See *supra* text accompanying notes 116-128.

306. See *supra* text at pp. 42-43.

Though the risk that this equivocation will cause confusion is slight, it is nonetheless real. The solution is simple enough: retain "substantive" as the correlative of "procedural" and then find a new correlative for "interpretative," perhaps something like "originative" (to indicate that the law, instead of interpreting the rule of another law, originates a new rule of law) or, more simply, "noninterpretative."

Finally, the legislature may wish to consider supplementing Article 6 (and Section 2, if it is retained) with another law to address the temporal effects phenomenon that the current legislative scheme ignores, namely, postactivity. At this juncture, however, such an enterprise is probably premature. The trouble is that the doctrine on postactivity, at least domestic Louisiana doctrine, is still at what can be charitably described as a "primitive" stage. Unlike their counterparts in some countries abroad, Louisiana civil law scholars have not even begun to consider, much less started to form, a consensus on either (i) the socio-political question of when, if at all, postactivity ought to be mandated (or permitted) or (ii) the formulative technical question of how rules mandating (or permitting) postactivity should best be framed. Legislative action should probably be deferred until that consensus develops.

2. *The Interpretation*

The sketch of the "fixed" law continues with the interpretation of the legislation. This part of the sketch requires considerably more work than the other. Unfortunately the work demanded here is more difficult.

For the jurisprudential component of Louisiana's intertemporal conflicts law to be fixed, two things *must* happen. First, the courts, either on their own or with the help of legal scholars or under legislative order, must settle on a *single* definition of or criterion for retroactivity. Maintaining multiple definitions of the term (as the courts now unwittingly do) not only is intellectually sloppy, but also breeds uncertainty. Second, the courts must then *use* that definition, that is, recite it and apply it. The present situation, wherein the courts (and sometimes scholars) routinely state (or worse yet, merely assume) that this or that proposed application of a new statute is "retroactive," without explaining what that term means (and, one suspects, without having any clear idea of what it means), can no longer be tolerated.

But not just any definition of or criterion for retroactivity will do. What is needed is a definition or criterion that both overcomes the technical deficiencies from which the vested rights and completed acts theories suffer and has no serious technical deficiencies of its own. That means, among other things, that the new definition or criterion must—

- (1) be relatively free of vague and uncertain terms;
- (2) mesh conceptually with the entirety of the legislation, including, in particular, the exceptions to the anti-retroactivity rule established in

Article 6 (not to mention the time-related provisions of the federal and state constitutions);

(3) be capable of explaining *all* of the existing jurisprudence that is socio-politically sound;

(4) be sufficiently nuanced to permit one to draw distinctions among the different varieties of non-prospective temporal effects, in particular, that between maximum and moderate retroactivity, on the one hand, and ambiactivity, on the other;

(5) be sufficiently sophisticated to recognize and then to allow appropriate treatment of the most complex intertemporal conflicts phenomena, in particular, "dispersed fact" cases and cases that involve "juridical situations in course of effect";

(6) be either socio-politically neutral (if that's possible) or, at least, be tied to a socio-political philosophy that recognizes all of the dimensions of human being (individual and collective, material and spiritual) and is directed toward the attainment of the common good;

(7) produce results that, if not in all cases then at least in the overwhelming majority of cases, are acceptable as a matter of socio-political technique or, in other words, that bring about an equilibrium among the competing interests in play that is conducive to the common good.

To be sure, these *desiderata* are themselves a bit "vague and uncertain." But they at least reveal, if only in outline form, what a workable definition of retroactivity looks like.

Yet one more task lies before the courts and legal scholars: to clarify the distinctions among the categories of laws to which different temporal effects are attached, namely, substantive, procedural, and interpretative laws. The first step belongs to the courts. They must say "no more" to the practice of unthinkingly and uncritically repeating the established "boilerplate" definitions of these terms, definitions that, as we have seen, border on the meaningless and, at least in the case of the definition of interpretative laws, reflect a fundamental misunderstanding of Louisiana's law of sources of law. Having repudiated those definitions, the courts, with the aid of doctrine, must develop new definitions or criteria that draw relatively sharp lines around each of the categories. To do that, of course, the courts and legal scholars must do something that they have thus far been unwilling or unable to do, namely, specify not just the necessary but also the *sufficient* conditions for membership in each of the categories.

...

The tasks that I've just outlined, especially those that entail addressing the difficulties in the jurisprudence (as opposed to those in the legislation), may seem daunting. And they are. But the good news is, we're not alone. Legal scholars, courts, and in some instances even legislatures in various civil law jurisdictions abroad have devised a number of alternative approaches to resolving intertem-

poral conflicts of laws.³⁰⁷ These approaches, in my judgment, successfully avoid most, if not all, of the problems that beset Louisiana's current intertemporal conflicts law. If we take those approaches as our own point of departure, we should have no trouble meeting the challenge that now faces us—creating a new intertemporal conflicts law that is “up” to the job.

307. See, e.g., Código Civil de la República Argentina art. 3 (Argentine legislation); Decreto-Lei n° 4.657, art. 6 (Sept. 4, 1942) (*Lei de Introdução ao Código Civil Brasileiro*), reprinted in D.O. (Sept. 9 & 17, 1942) (Brazilian legislation); Travaux de la Commission de Réforme du Code Civil 326-27 (1948-49) (proposed French legislation); 1992 S.Q. ch. 57, reprinted in Gaudet, *supra* note 1, at XXXV (Québécois legislation).

To those who are disappointed that I have not explored the solutions to intertemporal conflicts of laws that are to be found in these and other sources, I simply say “be patient.” As the Teacher once said, “To every thing there is a season, and a time to every purpose under the heaven: . . . a time to break down and a time to build up; . . .” Ecclesiastes 3:1 & 3 (KJV). Now is the time to “break down.” There will be plenty of time to “build up” in the future.