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Natural Law, Assumptions, and Humility

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Abstract

This review of Natural Property Rights *celebrates Eric Claeys's efforts to resuscitate natural law as a viable approach to property law. Although readers unlikely to be convinced that natural law is the way to best understand property rights, Claeys succeeds in breathing new life into natural law.* Natural Property Rights*' emphasis on use as property law's fundamental value creates space to reconceptualize the rights of property owners and the place of non-owners within a just theory of property rights. The main critiques of* Natural Property Rights *offered in this review center around the choice to prioritize rights over duties and the logically inconsistencies involved in Claeys's attempts to defend the justice of non-Indian claims to land that had belonged to Indian nations.*

I. INTRODUCTION

As I read *Natural Property Rights*, the image that formed in my head was of the author, Professor Eric Claeys, dressed in a wool jacket and fedora, bent over a small desk, furiously writing his defense of natural law using a vintage ink pen, dusty books piled high on all sides, with the scene lit only by a lonely kerosene lamp. This image might have come to mind because Claeys's work draws heavily on somewhat older examples and sources, but it is more than that. Though a new book, *Natural Property Rights* is almost an aged prize-fighter, wearily trying to bring back the glory days, facing off against the arrogance and energy of the more

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youthful idea that property rights are creatures of the state. John Locke returning to the ring, resting on much less solid ground. In Claeys's case, the "youthful" antagonists come in the form of the deconstruction of property by legal realists and law and economics scholars.[1] *Natural Property Rights* tries valiantly to slay the collective insights of the past century, the collective wisdom that sees property as socially constructed, and to avoid the pitfalls of an earlier failed effort to resuscitate natural law.

Claeys succeeds in constructing a nuanced defense of natural law as a rough structure for understanding property rights, and *Natural Property Rights* should be applauded for that achievement. Rather than treating the Lockean provisos of necessity and sufficiency as afterthoughts, Claeys foregrounds these concepts, providing a balance to property claims that otherwise can suggest that the rights of property owners trump all other considerations. The book also does a laudable job pushing "use"—not the "thingness" of property nor mere utilitarian concerns—as the basis of property law. Claeys and other scholars have promoted use before, but *Natural Property Rights* highlights the logical payoffs that come with putting "use" first.[2] Claeys's version of use-centered natural law, in contrast with ownership or exclusion-centered understandings of natural law, cannot be struck down for being outdated or inattentive to the claims of non-owners.[3] Though this review argues that Claeys's effort to elevate natural law at times suffers from a reliance on unexamined conservative assumptions, *Natural Property Rights* steps around, rather than through, many of the political minefields found in contemporary property theory debate. While few property scholars are likely to be fully convinced, Claeys's well-developed and richly textured argument takes natural law out of the dustbin of history, resuscitating it as a viable and potentially illuminating way of looking at property law.

II. HEAVY ON USE

The central thesis of *Natural Property Rights* is that natural law provides a workable framework for judging the wisdom and

1. Eric Claeys, Natural Property Rights 147–48 (Sept. 17, 2021) (unpublished manuscript) (on file with the Texas A&M Journal of Property Law); *see also* Eric R. Claeys, *Natural Property Rights: An Introduction*, 9 TEX. A&M J. PROP. L. 415 (2023) [hereinafter "Claeys, *Introduction*"].

2. Claeys, *supra* note 1, at 112; *see also* Claeys, *Introduction*, *supra* note 1, at 419–21.

3. Claeys, *supra* note 1, at 123.

appropriateness of various property rules.[4] That may seem like a relatively minor claim, but both Claeys and his primary audience—fellow property law scholars—know it is anything but. As Claeys observes, "[n]atural property rights have come in for a lot of criticism for more than a century."[5] Claeys's "reclamation project"[6] faces an uphill battle given that the "skeptical view" on natural law-centered approaches to property "came to be settled wisdom in the English-speaking world by the end of the twentieth century."[7] Natural law theories are largely dismissed out of hand, treated as a relic of an earlier era, much as the notion the earth is flat is no longer treated seriously even though a few oddballs still favor them. To meet the challenge of reviving natural law as an appropriate foundation for property law, Claeys attempts to lower the goal posts and shift the discussion.

First, since it is a heavy lift to bring back natural law, *Natural Property Rights* largely avoids the complications that would come from a fully fleshed-out theory of law.[8] Second, to resuscitate natural law as a credible theory, Claeys has to distinguish his version of natural law from the owner as an isolated individual standing against the whole world concept developed by Robert Nozick.[9] Claeys addresses natural law skepticism by pushing use, rather than dominion or independence, as property law's foundational concept.[10]

On the first point, Claeys walks a fine line between asserting the value of natural law and admitting the limitations of natural law's prescriptions. For Claeys, "[n]atural property rights do not supply direct or detailed answers . . . but they do supply general guidance."[11] In other words, natural property rights supply the moral foundations for reasoning about particular property policies and institutions, and those foundations guide and constrain practical reasoning.[12] Natural rights are valuable, Claeys argues because they "supply the baselines by which people may decide whether particular thing design doctrines seem legitimate."[13] But even Claeys acknowledges that these baselines are not

4. Claeys, *supra* note 1, at 16–23; *see also* Claeys, *Introduction*, *supra* note 1, at 419–21.
5. Claeys, *supra* note 1, at 28.
6. *Id.*
7. *Id.* at 29.
8. *Id.*
9. *Id.*; *see also* Claeys, *Introduction*, *supra* note 1, at 439–40.
10. Claeys, *supra* note 1, at 29; *see also* Claeys, *Introduction*, *supra* note 1, at 420.
11. Claeys, *supra* note 1, at 22.
12. *Id.*
13. *Id.* at 289; *see also id.* at 75 ("natural rights help focus reasoning about people's rights and responsibilities toward others. Even though natural rights have limits, they

always controlling.[14] Ordinarily, property rights "should be structured as seems likely to put resources to productive uses," Claeys suggests, before adding, "provisos, for necessity and sufficiency, justify doctrines that operate as safety valves, vehicles to relieve pressure on property rights when they deny others just access to owned resources."[15] Put together, the baseline and the provisos start to blend with property theory debates about core versus periphery, exclusion versus governance, and conservative versus progressive.[16] If natural law is similarly complex, similarly bound by duality, what pay-off does it offer?

Claeys's answer to questions regarding natural law's utility is both dogmatic and pragmatic. Dogmatically, natural law provides appropriate baselines because it is natural.[17] This tautology—best captured by the claim that "natural property rights can be justified and structured consistent with basic principles of natural law"—is only partly resolved by Claeys's elevation of human flourishing as property law's guiding principle and of "use" as property law's foundation.[18] "Use" performs some heavy lifting in Claeys's version of natural law: "[u]se-facilitation justifies rights as strong as property rights . . . when someone puts a resource to a morally productive use, he is entitled to that use's being exclusive."[19] Use-facilitation also "justifies [property rights] being stable and uniform."[20] Property rights in the form in which they are familiar in the United States are justified because of their simplicity and clarity, but their justification derives from natural law's interest in use.[21] The version of natural law advanced by Claeys sees use as the foundational (largely unqualified) good: "[n]atural law-based rights justify property

do create presumptions in scenarios that recur regularly.").

14. *Id.* at 75.

15. *Id.* at 22; *see also id.* at 259 ("It is easy to reconcile ownership to the necessity proviso and the two requirements for natural property rights. The necessity proviso, adverse possession, and other similar doctrines give a system of property law safety valves; they relieve problems that arise when it seems likely that ownership will restrict the rights of non-owners to acquire or use valuable resources. It seems much harder to reconcile ownership to the sufficiency proviso."); *see also* Claeys, *Introduction*, *supra* note 1, at 420.

16. Claeys, *supra* note 1, at 259; *see also* Claeys, *Introduction*, *supra* note 1, at 419–20.

17. Claeys, *supra* note 1, at 198.

18. *Id.* The sentence following the quoted language tellingly explains, "[p]roperty rights coordinate how people use things for survival or flourishing, consistent with the correlative interests that other people have in using similar things for their own projects for survival or flourishing." *Id.*; *see also* Claeys, *Introduction*, *supra* note 1, at 420.

19. Claeys, *supra* note 1, at 183.

20. *Id*.

21. *Id.* at 232–34.

rights by their tendencies to help people put resources to valuable uses."[22] Claeys is not alone in thinking of use as the value from which the justifications for private property rights flow, nor in pushing for a more use-centered theory of property. But use enjoys unique pride-of-place in Claeys's understanding of natural law. Use provides the linchpin for rejecting not only consequentialist takes on property rights[23] but also consent-based views of property rights.[24]

Even Claeys knows "use" and natural law itself can only go so far. For pragmatic reasons or because reason itself supports pragmatism and contextual thinking, Claeys acknowledges the limits of his own use-centered version of natural law.[25] As noted in *Natural Property Rights*, the property rights of an individual must be "structured consistent with the rights of others and the legitimate priorities of the whole community" in order for property rights to be legitimate.[26] Though his theory is primarily about property rights as opposed to ownership obligations ("there is no principled way to promote the well-being of a community without securing and protecting the rights of all of its members"[27]), Claeys acknowledges the importance of egalitarian concerns.[28] If the necessity proviso or the sufficiency proviso is not met, "the reasons that usually justify natural property rights *prima facie* cease to justify them . . . [and] the interests of people who are not the proprietor equal or override the interests of the property claimant."[29] Claeys chooses to resolve the status of the provisos with respect to property rights themselves by characterizing the question of when the provisos are triggered as a line-drawing problem.[30] It is a clever move, one that in theory reserves the line-drawing question for another day, but doing so leaves unanswered the problem of what happens to a natural law theory of property if accurate line-drawing would make the provisos swallow the whole.[31] In

22. *Id.* at 316.

23. *See id.* at 93 ("Natural law-based natural rights theories do make consequences relevant to practical reasoning. But such theories also limit reasoning about consequences, in ways that differentiate them from consequentialist theories."); *see also* Claeys, *Introduction*, *supra* note 1, at 423–24.

24. *See* Claeys, *supra* note 1, at 131 ("Although consent may factor significantly in other justifications for natural property rights, it is not a fundamental requirement for a natural property right grounded in natural law. Fundamentally, any action should be judged by whether and how much it helps people survive or flourish.").

25. *Id.* at 123.

26. *Id.* at 28.

27. *Id.* at 94.

28. *Id.* at 34; *see also* Claeys, *Introduction*, *supra* note 1, at 430–31.

29. Claeys, *supra* note 1, at 133.

30. *Id.* at 135.

31. *Id.*

other words, though framed as a line-drawing problem, the provisos threaten to bring down the entire natural rights apparatus Claeys constructs if other theorists can justifiably claim that we live in a world better thought of in terms of the provisos than of use-based ownership rules.[32]

Claeys is at his most pragmatic when laboring to pull his version of natural law out from behind the shadow of Nozick's ownership-trumps-all presentation of natural law. Indeed, much of *Natural Property Rights* can be read as a lament that mainstream property law scholars latch onto Nozick's version of natural law and that Novick put forward an easily debunkable version of natural law. Claeys complains, "[s]ome modern authorities assume a strawman portrait of rights, they lampoon it, and through the ridicule they make other normative views about property seem inevitable. . . . they attribute to all natural rights-based accounts of property features possessed only by some."[33] A natural rights-based version of natural property rights, Claeys argues, need not take the form pushed forward by Nozick; it can be both more nuanced and more dependent on context.

Claeys's use-based version of natural law resists essentializing impulses or a facile assumption that natural law necessarily involves a heavy thumb on the scale in favor of owners. Having internalized Nozickian natural rights, "[s]ome cases and many scholarly works assume that natural property rights confer on their holders broad autonomy . . . that natural rights entitle people to protection of their property, no matter what the effects of those rights on others."[34] Claeys struggles to push back against the dominance of Nozick's version of natural law, observing that "many lawyers and scholars attribute to natural rights features extremely different from the features attributed to them in this book."[35] Rather than natural rights necessarily leading to clear rules and ownership enjoying a trump card regardless of context, Claeys argues

32. To his credit, Claeys acknowledges the difficulties involved in any line-drawing exercise, writing of the second proviso, "the sufficiency proviso raises line-drawing questions even more vexing than those raised by the necessity proviso." *Id.* at 137. But in describing the conditions necessary to meet the sufficiency proviso, Claeys offers a fairly limited version of when it is triggered: "There must be opportunities to work, the local currency must be stable, and there must be enough resources to go around that people who own relatively few resources have reasonable prospects of acquiring what they need for survival or flourishing. When these conditions are satisfied, however, the opportunities to acquire new resources and hold them securely satisfy the proviso." *Id.* at 260.

33. *Id.* at 218.

34. *Id.* at 198.

35. *Id.*

that a use-based version of natural rights "makes reasoning about conventional property rights and exclusion messy, qualified, and context-dependent."[36] It is, to put it a bit too casually, a vision of natural property rights on the defensive and looking for friends.

Property scholars over the 20th century, led by the legal realists, largely defeated natural rights-centered approaches and have almost defeated property itself as a separate area of law.[37] Property rights were inseparable from duties, context ruled all, and everything was and is socially constructed. Indeed, with few exceptions, such a characterization of property continues to dominate, with all rules, no longer tied to some higher value, subject to some sort of utilitarian calculus. The form that such calculus takes differs along political lines—with conservatives favoring efficiency and progressives pushing other justice reasons—but most property law scholarship today tends to have an unblinking eye trained on consequences and context.[38] *Natural Property Rights* reads as an effort to salvage a natural law-based approach to property rights by making natural rights palatable for scholars writing in a post-legal realism world. It rejects Nozick, but that rejection itself poses problems that are largely unaddressed by Claeys: How can there be multiple forms of natural law if "natural law" exists independent of the state? Does the fact that scholars can imagine different versions of "natural law" demonstrate that faith in natural law-based arguments is misplaced? What gain results from calling something a "natural law" theory of property as opposed to something more honest, like "a use-centered property" or a "neo-Lockean theory of property"?

Whatever label might best describe it, Claeys's property law theory ultimately can be swallowed, in part because the dogmatic discussion of the natural origins of property rights is balanced by pragmatic acceptance of limitations on the independence of owners.[39] Scholars who rather quickly discounted "natural law" discussions of property rights in the past will have to come to terms with the fact that Claeys's version of natural property rights is more nuanced and more contextual than earlier accounts of natural property rights. While an individual can still dismiss the stereotypical isolated owner version of natural rights fairly quickly as either a relic of a bygone era or as overly reliant on unexamined assumptions regarding the nature of ownership, Claeys succeeds in presenting a more attractive—and more viable—version of

36. *Id.* at 219.
37. *Id.* at 321.
38. *Id.* at 438.
39. *Id.* at 21, 36.

natural property rights. Few people are likely to be convinced by Claeys's vision, but by anchoring natural property rights in use and admitting greater space for context to matter, the idea of natural property rights is no longer laughably thin.

III. UNFOUNDED ASSUMPTIONS

One of the weaknesses of *Natural Property Rights* is its reliance on unsupported (and in some cases unsupportable) conservative assumptions. The attractiveness of "use" as the foundation for a natural rights theory of property risks some of the book's assumptions about the nature of use and belonging being glossed over. That would be a mistake. Exploring these unfounded assumptions reveals the limits of Claeys's overarching defense of natural rights as the appropriate lens through which to judge property rules and undercuts the notion that politics and property rights are severable. This section will unpack two sets of assumptions (A) the assertion that rights matter more than duties and (B) the argument that Indian land rights matter less than colonial claims.[40] Ultimately, the superiority of rights assumption is problematic but not damning. The assumptions regarding Indian land claims, however, do not survive close analysis, and proponents of a natural rights-based understanding of property should, at long last, jettison such assumptions.

A. *Rights and Duties*

As the title suggests, *Natural Property Rights* is primarily about rights, not duties. While the inclination to focus on rights finds support in popular understandings of property, for academics writing in the post-legal realist world, such a focus amounts to a political choice that relies on unfounded assumptions. Hohfeld famously paired rights and duties.[41] More recently, progressive property scholars have called attention to the myriad obligations of ownership, arguing that property can only be understood when obligations are taken into account.[42] In other words, though property rights provide owners with justifiable expectations regarding how others will relate to them and their property, the property

40. *Id.* at 43, 207.

41. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

42. See Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 115–26 (2013) and Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917, 927–32 (2010), for summaries of progressive property scholarship.

also bears a host of obligations. When the stereotypical form of ownership is a yeoman farmer staking a claim on the plains, the imagined world in which rights dwarf duties does not seem far-fetched or in need of justification. But in a more densely packed world, replete with overlapping interests and interactions, rights prioritization seems dated. At the very least, the facile assumption that rights are paramount must give way to the complexity of property law. Businesses are subject to anti-discrimination laws, homes to inspections by the state, and even owners of raw land often must care for it in ways prescribed by the state. As Hohfeld argued, rights and duties are, or at least seem, inexorably intertwined.[43]

Claeys repeatedly asserts that rights should enjoy pride of place.[44] As he explains, "[i]n natural law theories, capacities to reason and flourish are fundamental, and both duties and rights follow from the obligations that people have to try to flourish."[45] He further explains "Even so in practice, it makes sense to focus politics and social life more on the rights than on the duties."[46] And though he spends time acknowledging the academic work connecting rights to duties, Claeys argues that "[i]n political practice, however, natural rights get more emphasis than duties, and justly so."[47] The problem with the argument is that it risks confusing what is for what should be. In other words, even if Claeys is right that society in practice emphasizes rights, that is a choice that may not be justified, or it may be justified only for members of society who enjoy the benefits of property but run counter to the needs of those who experience those same rights as commands. For Claeys (and it should be acknowledged, for most property scholars), rights are first; "[p]roperty declares rights, and it supplies substantive principles for structuring those rights."[48] But putting rights first—and making rights the starting assumption when it comes to property has consequences, especially when coupled with the rhetorical heft of labeling something "natural."

The following brief passage from *Natural Property Rights* highlights this well. Claeys writes, "natural rights supply a theory of politics and social morality with points of reference and only that. Natural rights mark off claims to which people are entitled as persons."[49] The problem is that the humility of the first sentence's idea that natural rights supply

43. Hohfeld, *supra* note 41, at 710, 716.
44. Claeys, *supra* note 1, at 25.
45. *Id.* at 44.
46. *Id.*
47. *Id.* at 73.
48. *Id.* at 352.
49. *Id.* at 58.

on "points of reference" sits awkwardly next to the arrogance and reach of the second sentence's assertion that "natural rights mark off claims" that individuals are entitled to by virtual of their humanity.[50] Which is it? Does a natural rights-based theory supply mere points of reference, or does it mark off claims, rights which owners are entitled to have respected as some form of inherent right? Prioritization of rights in property theory is not necessarily wrong but is an assumption that must be justified and, just as importantly, the consequences of prioritizing rights should be acknowledged. Similarly, it is hard to square the supposed limits of natural rights as providing mere points of reference with the broad reach of natural law suggested by Claeys, that "a rights-based political program focuses government on relatively modest goals. Governments should not pursue visions of the common good that require extensive sacrifice; they should promote the common good understood as securing to citizens opportunities to acquire basic life goods."[51] Charitably, this reads like an overreach, but the sort of overreach those inclined to be nervous about "natural law" arguments likely feared. After all, it is hard to see why an emphasis on protecting the rights of property owners is more "natural" than, for example, John Rawls's maximin principle.[52] Both derive from reason, even though they suggest different conclusions about rights versus duties or the reach of government.[53] While it may seem "natural" to emphasize rights over duties and rights over the state, to Claeys, to others, such conclusions can seem unnatural and only superficially supported by reason.

The downsides of the assumption that property law should place rights, not duties, at the center are perhaps best illustrated by the way Claeys presents the *State v. Shack* case in Chapter 7. In *State v. Shack*, the New Jersey Supreme Court famously allowed medical and legal professionals working for the government to enter private property in order to reach migrant workers employed by the landowner.[54] The court could have based its holding on the rights of invited guests or on landlord-tenant law but instead framed its decision more expansively.[55] The property owner's right to exclude had to give way to the right of legal aid and medical health workers to visit migrant workers on the farm because "[p]roperty rights serve human values. They are recognized to that end

50. *Id.*
51. *Id.* at 75.
52. *Id.* at 66; *see also* Claeys, *Introduction*, *supra* note 1, at 430.
53. Claeys, *supra* note 1, at 66–67.
54. 277 A.2d 369, 374 (N.J. 1971).
55. *Id.* at 372.

and are limited by it."[56] Such evocative language, not surprisingly, made the case a favorite among progressive property scholars and an outlier among conservatives.[57] But the political posturing that surrounds *State v. Shack* still does not explain Claeys's fairly odd reading of the case. For Claeys, the case is not about migrant rights or even their equal human dignity but instead represents a denial of the property owner's freedom of expression.[58] Claeys writes:

> Legal Services Corporation lawyers and welfare case workers encouraged migrant workers to complain about mistreatment by the farmers who employed them; farmers denied that they were mistreating their workers, and they accused the organizers of being grandstanders and socialists. If Tedesco derived use from making sure that his land expressed only his political views, his interests in use might have entitled him to autonomy—to stop his own land from being used as a staging ground to incite criticism of him and those views.[59]

There are so many assumptions contained in this characterization of the case that it is hard to know where to start. Somehow "legal aid lawyers and welfare case workers" get transformed into manipulative "grandstanders and socialists" who convince migrant workers to complain about mistreatment. Never mind the studies and reporting that consistently finds that farmers, in fact, do hire migrant workers in part because they are vulnerable to poor working conditions and less likely to complain about mistreatment.[60] Instead, in Claeys's worldview, the workers' complaints are manufactured, and Tedesco's employment practices are expressions of "his political views." His "use" rights in such expressive conduct—never mind its effect on others or the laws that he might be violating in the process—trumps the rights of outsiders to talk with workers about conditions on his farm. Possible oppression has been rebranded as political expression as if this case was about free speech; Claeys's assumption that rights precede duties has allowed his version of natural property rights to slide into the same space

56. *Id.*

57. *See* Rosser, *supra* note 42, at 154–56 (discussing differences in progressive and conservative reactions to the case).

58. *See generally* Claeys, *supra* note 1.

59. *Id.* at 211.

60. Daniel Costa, *The Farmworker Wage Gap Continued in 2020*, ECONOMIC POLICY INSTITUTE (July 20, 2021), https://www.epi.org/blog/the-farmworker-wage-gap-continued-in-2020-farmworkers-and-h-2a-workers-earned-very-low-wages-during-the-pandemic-even-compared-with-other-low-wage-workers/ [https://perma.cc/4UFS-EAD7].

presumably occupied by Nozick's ownership-centered conception of natural law.[61]

The assumption that property rights matter more than duties enjoys popular support. Put differently, while most property scholars think of property through a post-Hohfeld lens, popular conceptions of property tend more towards Blackstone's "despotic dominion."[62] But one can observe the popularity of property rights, including an emphasis on rights, without committing the fallacy of assuming away the question of whether rights truly are superior to duties. After observing that "people's social practices with property seem much more regular and structured than skeptics suggest," Claeys argues that "[t]hose practices count heavily against skeptics' claims."[63] Yet, the conclusion does not necessarily follow the observation. One could counter that to insist on duties in spite of a popular emphasis on rights shows a basic disdain for the knowledge contained in the ways property operates in practice, a classic example of how academic arguments can become divorced from reality. Indeed, conservative property scholars frequently score points by arguing that their version of property rights is a better fit with how people experience property and offers greater predictability.[64] But Claeys's insistence that practice counts against the views of skeptics is hard to square with some of the lattice work supporting his efforts to bring back natural law as a legitimate way of looking at property. Like Locke before him, Claeys uses the imagined utopia of virgin land to explain how people come to have ownership of real property: "[t]o establish a focal case for a natural right to use land, the claimant must 'make use of' it, but then also 'enclose' it to communicate his property claims."[65] In practice, it happens only rarely that land is open for appropriation along the lines assumed."[66] The entire theory is based on an ahistorical—or at least a moment in time and place that existed, if at all, well before recorded history— utopia, a fictional world, not the world as it is. If even the theory's building blocks are tied to assumptions far removed from the actual experience of property and certainly removed from the way real property is acquired today in the United States, it is unclear why a skeptical view of the prioritization of rights should be discounted.

61. Claeys, *supra* note 1, at 210–11; *see also* Claeys, *Introduction*, *supra* note 1, at 439–40.
62. Claeys, *supra* note 1, at 178.
63. *Id*. at 196.
64. *Id.*
65. *Id.* at 139.
66. *Id*.

B. *Indian Land Claims*

If property rights derive from natural law, there is no justifiable reason why the land rights of Indians should be less than the land rights of colonists. Yet, that, combined with an odd argument about whose interests count, is precisely the argument Claeys offers in Chapter 7. It is an unnecessary argument, one that ignores the racism of the material used for support and that assumes away the Indian claims to land. It also sits uncomfortably and ironically alongside Claeys's nativist argument that natural law supports governments not recognizing or giving less protection to the property rights claims of outsiders.[67] Somehow, inexplicably, Claeys makes the United States government and non-Indian citizens the rightful claimants of the land despite the fact that Indian nations used and controlled the entire continent prior to its discovery and conquest.[68] The argument relies on mental contortions, assumptions about use and about whose perspective matters that run squarely into the might of history. Despite the fact that Locke used a fictional and all too convenient account of Indian land claims to significant effect in his labor theory of property, scholars today should distance themselves from his account rather than rationalize it. Claeys's work would be stronger if he either cut his discussion of Indian land rights entirely or if he admitted the obvious without qualification: that, but for eurocentrism, any robust theory of natural rights, even a theory emphasizing use, would count the dispossession of the continent as a violation of the natural rights of Indians rather than a case study in support of natural law. If it is a case study, it is a case study in racism or violence as the basis of property rights and does not further a highbrow natural law theory of property rights.

The principal problem in *Natural Property Rights*' discussion of Indian versus property rights is Claeys's implicit assumption that the natural or objective perspective is that of non-Indians. Consider the following passage: "no community may violate the property rights of people who are not members in it. But there is a difference between violating outsiders' rights and granting them substantive legal rights identical to the rights enjoyed by insiders."[69] In Claeys's description, the members who matter, the insiders, are U.S. citizens. But imagine applying the same logic but from the vantage point of the tribes who fully occupied the continent before the arrival of Europeans (e.g., colonists, settlers,

67. *Id.* at 214.
68. *Id.* at 217–18.
69. *Id.* at 214.

and refugees). In that case, according to Claeys's own phrasing, colonists would have no right to violate the property rights of the original inhabitants and would not be entitled to the same legal rights enjoyed by Indians.[70] Instead, Claeys assumes away the question of who counts as an insider—the institutions that matter are those of the U.S. government, despite the fact that from the perspective of nations that held the land first the United States is the outside force.[71]

It is worth taking a slight detour to illustrate the pervasiveness of assumptions that privilege non-Indian perspectives using a brief exchange during a Supreme Court oral argument. In 2003, the Court held that the United States had a trust obligation to repair a fort that belonged to the White Mountain Apache Tribe but that had been used by the U.S. government as a school.[72] The exchange between Robert Brauchli, the attorney for the tribe, and Justice Scalia is below:

> Mr. Brauchli: "The United States has no retention of ownership whatsoever. They have a use easement, and that's all they have. A very limited right. And the benefit is what Congress said, and Congress said, we're going to take this fort, which we established to kill Apaches and imprison them, and we're going to give it to the White Mountain Apache Tribe. And they gave it, and it has value . . . ."
> Justice Scalia: "I thought the fort was to protect white settlers. But . . . you can describe it the way you like."
> Mr. Brauchli: "Well, it was to protect white settlers."
> Justice Scalia: "Okay."
> Mr. Brauchli: "But from my clients' viewpoint, it was established to conquer them. So that's what I'm here for, my client."
> Justice Scalia: "Yes, I understand."[73]

Perhaps not surprisingly, a Supreme Court justice's worldview starts with and prioritizes white settlers. But academics need not be so parochial.

Claeys's efforts to reconcile natural law with the assumed superiority of non-Indian land claims ultimately are overly forced and unconvincing. After first acknowledging that "[n]atural law required the United States not to injure the natural rights of the members of Native American tribes," Claeys goes on to argue that natural law "did not require the United States to let Native Americans decide whether to relinquish their land."[74] It is hard to square these positions. If the United States can

70. *Id.* at 215–16.
71. *Id.*
72. United States v. White Mountain Apache Tribe, 537 U.S. 465, 478–79 (2003).
73. Transcript of Oral Argument at 38, United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003) (No. 01–1067).
74. Claeys, *supra* note 1, at 217; Claeys, *Introduction*, *supra* note 1, at 439–40.

dictate whether Native Americans choose to relinquish or retain their land, how is that not a deprivation of tribal land rights? What is the special sauce in natural law that Europeans have that Indians do not that allows them to legitimately take land away from tribes and insist on the resolution of competing claims through colonial courts? Elsewhere, starting with unnecessarily charged language ("[s]emi-nomadic ways of life may not be to everyone's taste"),[75] Claeys concedes the fact that different land use patterns "deserve respect, and they entitle people presumptively to rights to the exclusive and continued use of land to pursue them."[76] But this concession ultimately counts for very little, with Claeys falling back on tired justifications for conquest.

Repeating arguments made centuries earlier by John Locke and by John Marshall, Claeys argues that Indians did not use the land intensively enough; therefore, Europeans could rightly take land from Indian nations.[77] Natural law, Claeys argues, gives rights to those who put land "to productive uses."[78] There were "pronounced" differences,[79] the chapter argues, between how Indians and Europeans used the land and, based on those differences, "the United States and its citizens had at least some plausible ground to say that land could be put to uses far more valuable to human life than the semi-nomadic uses to which Native Americans put them."[80] Frankly, this argument would be less troubling if *Natural Property Rights* applied the same logic consistently to other groups. If outside groups can claim land because a nation is underutilizing land resources, perhaps immigrants from densely populated and relatively impoverished countries today, such as Haiti or El Salvador, should have superior claims to land than large ranchers in Texas, farmers in Iowa, or billionaires in Montana. If "as a matter of natural law the United States and its member states would have had legitimate authority to disregard Native American claims of exclusive authority over the land in dispute" because the land was underused by Indian nations,[81] the same is arguably the case today when it comes to a large

75. Claeys, *supra* note 1, at 216. One may, for example, also observe that factory work or the permanent slum dwelling common to some of those fleeing Europe for the New World likewise "may not be to everyone's taste." Or even that that the rat race today of those living in suburban tract homes "may not be to everyone's taste." The observation about semi-nomadic life, however accurate, is unnecessary and carries with it echoes of the biases that have harmed Indians since contact.

76. *Id.*

77. *Id.* at 216–28.

78. *Id.* at 215.

79. *Id.*

80. *Id.* at 216.

81. *Id.* at 217.

percentage of the public and private land in the United States. But that seems far-fetched, and it is hard to believe that Claeys is really arguing that a wave of small farmers and other land users from other countries should have a right to take the continent. Instead, the argument is limited to unique terms as a one-off: white people can dispossess Indians because they are Indians.

Indeed, strikingly absent from Claeys's natural law justification for the taking of the continent are many of the reasons given in *Johnson v. M'Intosh*. According to Marshall, Europeans considered the continent open for the taking in part because "the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency."[82] Marshall calls the Indians "heathens" and "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest."[83] The racism is inseparable from his language of use. Immediately after calling Indians "fierce savages," Marshall argued that "[t]o leave them in possession of their country, was to leave the country a wilderness."[84] Indians lost the land not because of reason-based natural law but because of colonial violence and power: "Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed."[85] The legal justification for taking land offered in *Johnson v. M'Intosh*, the doctrine of discovery, is remarkably thin and looks to conquest and racist views of Indians for support.[86] When Marshall, nine years later, revisits the justifications for asserting the superiority of non-Indian claims to land and authority in *Worchester v. Georgia*, he largely abandons the fiction of discovery.[87] Marshall instead adopts a realist's perspective, "power, war, conquest, give rights, which, after possession, are conceded by the world," implicitly acknowledging the injustice of settler colonialism.[88]

Natural Property Rights carries into the present day the racist notion that the continent was open for the taking and that non-Indians had a right to claim the land under the theory that they could put the land to

82. Johnson v. M'Intosh, 21 U.S. 543, 573 (1823); *see also id.* at 589 ("Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.").

83. *Id.* at 577, 590.

84. *Id.* at 590.

85. *Id.*

86. *See generally* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 317 (1990).

87. 31 U.S. 515, 543 (1832).

88. *Id.*

more productive use. Not only does Claeys bizarrely suggest the United States would have had to provide generous compensation for taking tribal land—a position which assumes the U.S. government should have the power of eminent domain over the land belonging to other nations and peoples—but he goes on to argue that "natural law principles might have authorized U.S. governments to dispossess Native American tribes of some of the land they occupied."[89] The assumption that complex land disputes involving tribes and non-Indians "needed to be resolved and settled by the political branches of the governments of the United States and its states" does not survive even cursory scrutiny.[90] Outside governments ordinarily do not get to decide the terms on which they can rightly claim the land of peoples they encounter, nor do they get to decide what counts as adequately productive use of the land to justify individual or collective rights in land. Claeys admits, as he must, that "at the end of the day, United States policy toward Native American tribes was almost certainly unjust,"[91] but even in so doing, the reader is left puzzled by the "almost certainly" language. It is almost as if the shadow of Locke's ode to natural property rights is so all-encompassing that even obvious truths about the dispossession of the continent and the denial of Indian land rights are obscured and qualified.

More pointedly, none of this is needed. A practical reason-based theory of natural property law stands on better ground without trying to justify conquest. Indeed, admitting that Locke was overly dismissive of Indian land rights would contribute to a logically cohesive defense of natural law. Extensive scholarship rejects the flawed notion that Indians did not believe in property rights and did not have systems for the enforcement of property rights.[92]

What one does with such history and the contemporary significance of such attention to property rights is a matter of some contention,[93] but the idea that Indians did not understand property rights, including rights in land, does not survive scrutiny. No wonder placing limits on the expansion of settlement into Indian territory was a central government

89. Claeys, *supra* note 1, at 217.

90. *Id.* at 218.

91. *Id.*

92. *See* TERRY L. ANDERSON AND BRYAN LEONARD, UNLOCKING THE WEALTH OF INDIAN NATIONS 3 (Terry L. Anderson ed., 2016); ROBERT J. MILLER, RESERVATION "CAPITALISM": ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 9 (2012).

93. *See* Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?,* 71 STAN. L. REV. 791, 830–39 (2019) (critiquing proposals, built in part on traditional recognition of property rights by Indian nations, to privatize Indian land as a means to promote economic development on reservations); EZRA ROSSER, A NATION WITHIN: NAVAJO LAND AND ECONOMIC DEVELOPMENT 129–32 (2021) (same).

concern during the colonial period and in the early republic.[94] The British and later the United States recognized that unchecked movement by settlers and land speculators threatened to incite Indian wars.[95] If the land were unclaimed or thought of as unowned by Indian tribes, such prohibitions on expansion would not be necessary.[96] Though Locke imagined the continent as unclaimed, colonial governments at the time knew better.

IV. HUMILITY AND ACCOUNTABILITY

Natural Property Rights, in some respects, is remarkably humble and unassuming. Whether born out of the recognition that many readers would recoil from strongly worded assertions of the superiority of a natural law theory of property or based on a genuine belief that natural law guidance only extends so far, Claeys argues that natural law can be valuable even if its reach is limited.[97] Such a position—the assertion that property theory need not address everything and that precision on every issue is not a precondition of validity—makes sense strategically given the general skepticism of most property theorists to natural law-based arguments. At one point, Claeys explicitly asks for the benefit of the doubt: "*If* one construes natural law and rights charitably, and *if* one sets the right expectations for a general theory of property, none of these objections raise serious questions about natural law-based natural property rights."[98] Read negatively, Claeys could be simply trying to set a low bar against which to judge his natural law-based theory. But that is hardly fair to the author and arguably demands too much of any particular theory of property.

Though Claeys might resist such a characterization, his understanding of the role theory can and should play is oddly "utilitarian," for lack of a better word. By acknowledging that natural law provides general guidance but is imprecise when it comes to details, Claeys allows space, even within a natural law bounded property system, for political contestation and meaningful social demands to be imposed on property owners. Partly this reflects the difference between Claeys's version of

94. *See, e.g.*, Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs*, 69 B.U. L. REV. 329, 354 (1989) (discussing the Royal Proclamation).

95. *Id.* at 361.

96. *Id.* at 356.

97. Claeys, *supra* note 1, at 16–18; *see also* Claeys, *Introduction*, *supra* note 1, at 419–21.

98. Claeys, *supra* note 1, at 29 (emphasis in original).

natural property rights and the Nozickian strawman version of natural law. But it arguably also embodies a certain humility about the practical role of theory. Claeys writes:

> Natural law is good enough for government work. Principles of natural law do not give people really precise guidance, but they do supply as much guidance as can reasonably be expected from a general normative theory. When people develop social norms, natural rights, interests, and basic natural law principles focus them on what those norms should accomplish. When public authorities make laws and policies, those rights, interests, and principles give them the same guidance. When decision makers start to fill in the details of the rules they want to make, however, the rights, interests, and principles also lead them to consider many contextual factors—among others, relevant empirical information, possible effects of different policies, and local preferences.[99]

Such a limited and closely checked understanding of the place of theory is refreshing in property law. Too many theoretical works (and scholars) seem to imagine that the world will be magically transformed once a new way of thinking about property is embraced; that theory alone can reconcile competing demands and usher in a new day in which incentives, justice, and distribution are made right.

Even though *Natural Property Rights* is a book-length attempt to resuscitate natural law as a legitimate way of understanding property, Claeys's major claim is that natural law provides meaningful guidance to policymakers. The theory need not be perfect nor have an answer for every minute question. Crucially, Claeys is not arguing that his theory is uniquely limited compared to other visions of property law rather he argues that "[e]very theory of politics and social morality will have its limits, and any such theory only needs to be precise enough to be good enough for government work."[100] It is worth repeating the metrics Claeys adopts for judging the value of property theory—*good enough for government work*—because such a yardstick is too often barely visible in highly theoretical works. Perhaps because most scholars heavily discount natural law, Claeys focuses on the big picture, stepping over the petty infighting that besets theoretical debates within and across more mainstream property theory camps. Pejoratively, "good enough for government work" may not be a particularly exacting standard, but what matters (or should matter) when it comes to property theory is how the theory shapes society. In the end, Claeys's version of natural law can

99. *Id.* at 77.
100. *Id.* at 149.

provide guidance to policymakers. Less clear and more subject to debate is whether natural law provides the right sort of guidance for a just society.

V. CONCLUSION

Natural Property Rights is a worthwhile read for property scholars in large part because it breathes new life into an old theory. Most readers likely will not be convinced that natural law is the best way to think about property concepts or to set policy, but Claeys succeeds in showing that natural law should not simply be laughed out of the room. Reconciliation of natural law with many of the other theories animating property scholarship is likely impossible. But there is space for these theories to move forward in parallel, learning from each other and acknowledging the strengths of alternative visions. Through the attention paid to the provisos, Claeys's version of natural property law speaks to some of the egalitarian concerns that drive the work of other theorists.

Similarly, unlike the strawman version of natural rights that is critiqued throughout *Natural Property Rights*, Claeys admits that the consequences of rules matter and must be taken into account. Some of the assumptions made in the book—especially those that relate to Indian nations—do a disservice to the overall argument, even if Locke also made the same assumptions centuries ago. Ultimately, no theoretical account of property escapes the pull or reach of politics, but *Natural Property Rights* does a good job removing the straw man of natural law and replacing it with a legitimate alternative that even those who leave unconvinced can respect. In doing so, Professor Claeys's work makes a real contribution that deserves celebration.