Texas A&M Journal of Property Law

Volume 9
Number 4 *Fall 2021 Symposium: Natural Property Rights*

Article 1

5-28-2023

Natural Property Rights: An Introduction

Eric R. Claeys
George Mason University School of Law, eric.claeys@gmail.com

NATURAL PROPERTY RIGHTS: AN INTRODUCTION

Eric R. Claeys†

Abstract

This Article introduces a symposium hosted by the Texas A&M University Journal of Property Law. The symposium is on a forthcoming book, and in that book the author introduces and defends a theory of property relying on labor, natural rights, and mine-run principles of natural law. Parts I and II of the Article preview the main claims of the book, summarizing part by part and chapter by chapter.

The rest of the Article illustrates how the theory introduced in the book applies to a contemporary resource dispute. The Article studies an ongoing lawsuit styled Campo v. United States*, now pending in federal court. In* Campo*, oyster producers are suing the United States for inverse condemnation. The class plaintiffs seek $1.6 billion in just compensation for the U.S. Army Corps of Engineers having (allegedly) killed oysters they were raising when it diverted water from the Mississippi River through a spillway into the Gulf Coast.*

The Campo *case repays study for two reasons. Labor and natural rights are already at play in the* Campo *litigation. The U.S. government moved to*

DOI: https://doi.org/10.37419/JPL.V9.I4.1

† Professor of Law, Antonin Scalia Law School, George Mason University. Member, James Madison Society, Princeton University. Please send comments to eric.claeys@gmail.com.
The editors of the Texas A&M Journal of Property Law organized a symposium far bigger and far-ranging than I could have hoped for; I thank them for their efforts and their enthusiasm. The Institute for Humane Studies and Texas A&M University both supported the symposium financially; I thank both institutions for their generosity and their support for academic inquiry. Saurabh Vishnubhakat and Vanessa Casado Pérez saw far earlier than I did how to convince this Symposium's other contributors to participate; I thank them for their entrepreneurship.

I thank Bethany Berger, John Lovett, and Joe Schremmer for helpful comments and criticisms on this Article. I thank Ryan Seidemann for helping me learn points of Louisiana law covered in Parts III through VIII. I thank Antonin Scalia Law School for research support as I wrote this Article.

Finally, whether or not he wants the credit, Richard Helmholz inspired me to write this article. During an early manuscript workshop on the book I preview here, Helmholz asked me to give an example of a resource dispute on which natural rights could shed helpful light. The more I thought about the question, the more convinced I became that the question needed an answer in a published article, and Parts III through VIII of this Article answer his question. I may have taken Helmholz's question too seriously. But a similar question motivated him to write R.H. HELMHOLZ, NATURAL LAW IN COURT (2015), *see id.* at vii, x, so at least I'm in good company.

dismiss the plaintiffs' claims to property in oysters, and when the presiding judge denied that motion he relied in part on natural rights and the labor theory John Locke introduced in his Second Treatise of Government*. Separately, the underlying dispute fairly tests any general theory of property. The dispute raises questions about: whether oysters should be private property; whether people should be allowed to claim private property in coastal water bottoms; how property in oysters and water bottoms should be reconciled with public interests in shoreline protection; why have an institution like eminent domain; and how nuisance law should apply to a government-sponsored water diversion into coastal areas. If a theory of property can shed helpful light on all of those issues, it applies broadly enough to constitute a general theory of property, and the theory introduced in this Article satisfies that standard. Along the way, this Article also shows how a labor- and rights-based property theory differs from justifications for property and regulation influential in contemporary law, policy, and scholarship.*

I. INTRODUCTION

A. *Why Natural Property Rights?*

In this Issue, the Texas A&M University Journal of Property Law is publishing a symposium about Lockean labor theory. I am finishing up a book about labor and property, and I hope that the book will be published shortly after this Symposium. I thank the Journal editors for hosting this symposium, and I thank them even more for giving my book a hearing and a vigorous critique before publication.

The book is titled *Natural Property Rights*. Legal property rights should be structured to secure natural rights to labor, I argue, and to secure specifically natural rights understood consistent with traditional principles of natural law.[1] To many readers, those claims should seem straightforward. Property has long had a close connection with natural rights. John Locke made respectable rights-based liberalism. To justify liberalism, Locke relied heavily on natural rights,[2] labor,[3] and property.[4] Inquiring readers may want to know what a natural right to property is, how it might be justified, and what sorts of guidance it supplies to property law in practice. Or, how labor and natural property rights apply in different situations that interest lawyers and legal scholars. *Natural Property Rights* takes these questions up. So do many of the Articles in this Symposium.

But some readers will surely wonder: Why another book on property and natural rights? Some lawyers and scholars assume that natural property rights fell into desuetude—properly—a long time ago. Others grant that labor, natural rights, and principles of natural law all shaped political and legal thought 300 to 500 years ago. Among those who grant that much, however, many suspect that labor, natural rights, and natural

1. ERIC R. CLAEYS, NATURAL PROPERTY RIGHTS (forthcoming, Cambridge Univ. Press 2023); *see also* Eric Claeys, Natural Property Rights (Sept. 17, 2021) (unpublished manuscript) (on file with the Texas A&M Journal of Property Law).

2. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT II.ii.4–5, at 269–70 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). In this Article, when I cite the *Two Treatises*, I cite Laslett's edition even when other sources cite other editions. Laslett's edition seems a definitive reference. Among other reasons, it reprints the *Two Treatises* as they were printed by the publisher of the (influential) fourth edition of the *Two Treatises*. Because the *Two Treatises* have been reprinted in many different editions, however, citations to the *Two Treatises* in this Essay are meant to be accessible no matter what edition of the Treatises a reader has. Citations here to the *Two Treatises* are by Treatise volume (II), chapter (ii), and section (4) and then last to the pages in Laslett's edition (269).

3. *See id.* II.v.27–37, at 285–95.

4. *See id.* II.ix.124, at 350–51.

law cannot shine helpful light on contemporary resource disputes. And if you browse ahead in this Symposium, you will find other contributions voicing those doubts.

This Article takes all these themes up. The Article has three main goals. First, it introduces labor, natural law, and natural rights. Second, since *Natural Property Rights* is not out yet, this Article also previews the book. The preview is definitely for readers interested in learning more about a labor- and rights-based approach to property. But the preview is also for the participants in this Symposium. To prepare their contributions to this Symposium, participants read a draft of the book manuscript current as of fall 2021. Since the book remains in progress, this Article gives this Symposium's authors a published summary of the main claims on which they will comment.

Finally, this Article takes the bull by the proverbial horns. I hope to address the doubts that natural rights are unconvincing and that they do not shine helpful light on contemporary law and policy. These doubts are held strongly and widely, and no single work can address them fully. But I try hard in the book to assuage the doubts, and I try here as well.

To assuage those doubts in this Article, I illustrate how Lockean labor theory and natural rights apply to a dispute now being litigated in federal court. The case is styled *Campo v. United States*. *Campo* is an eminent domain lawsuit by two Louisiana residents and two Louisiana companies on behalf of a class of Louisiana oyster producers.[5] The plaintiffs are suing the U.S. government for an inverse condemnation (allegedly) perpetrated by the U.S. Army Corps of Engineers.[6] Lockean labor theory has a lot to say about the issues raised in that lawsuit.

B. *Four Claims about Natural Property Rights*

Let me start by previewing *Natural Property Rights*. The book has four parts, and each part demonstrates a separate claim.

Part One of *Natural Property Rights* introduces natural rights and natural law. Natural law and rights provide satisfying normative foundations, Part One argues, for law and public policy. Natural rights can be justified on many different grounds, and they can be structured in many different analytical forms. But one form should be familiar from American organic documents—like the U.S. Declaration of Independence[7] and

5. Complaint at ¶¶ 4, 6–9, 12, Campo v. United States, 157 Fed. Cl. 584 (2020) (No. 20-44L).

6. *See id.* ¶¶ 10, 58–59.

7. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

various[8] American state[9] constitutions.[10] In those documents and in the family of normative theories on which they rely, the most basic justification for any law or government policy is its tendency to help people flourish rationally. And just laws and policies make fundamental the tendencies of laws and policies to cultivate the flourishing of people as individual actors, not the flourishing of a broad community of people. A "natural law" theory makes rational human flourishing fundamental. A "natural rights" theory holds that the flourishing of individual people comes before the flourishing of broad communities. (When I refer to "natural rights" in the rest of this Article, I mean natural rights in the sense described in this paragraph unless I specify otherwise.)

Part Two of *Natural Property Rights* introduces property, it justifies the institution, and it marks off just limits on property rights. Natural property rights help people acquire reasonable shares of resources that are not themselves people or attributes of personhood. Natural property rights entitle people not only to acquire such resources but also to put them to uses likely to help them flourish. In this Article and throughout *Natural Property Rights*, I define "productive uses" as uses of resources that produce preservation or flourishing. Productive use means what Locke means by labor on resources,[11] and such use is central to a labor-based natural rights theory.

When a property right is justified in relation to labor-based natural rights, it contains four elements. The first is *productive use* or *labor*, as just explained. Would-be proprietors must also (and second) *communicate* their *claims* to appropriate resources. Since every person is entitled to acquire and use resources, people who want to use resources exclusively owe others a responsibility to broadcast their intentions, and the claim communication requirement expresses that requirement. Although productive labor and claim communication establish prima facie property rights, such rights can and should be overridden when one or both of two provisos apply—one for *sufficiency* and another for *necessity*. So justified, natural property rights are usufructs—rights not to be interfered with in productive uses of resources, subject to limits respecting use-rights others justly establish.

8. VA. CONST. art. I, §§ 1–15.

9. PA. CONST. art. I, § 1.

10. MASS. CONST. arts. I-X; Phillip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993); *See also* THOMAS G. WEST, THE POLITICAL THEORY OF THE AMERICAN FOUNDING (2017).

11. *See* Eric R. Claeys, *Productive Use in Acquisition, Accession, and Labour Theory*, *in* PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 13–20 (James E. Penner & Henry E. Smith eds., 2014).

Natural property rights do not supply cookie-cutter formulas for conventional property rights in practice. Natural property rights and natural law principles create a framework in law and policy-making analogous to a standard blueprint for building a house. A blueprint can be modified, but it supplies a standard design. Natural property rights supply that sort of guidance to property law, and Part Three of *Natural Property Rights* shows why and how. Specifically, Part Three shows how natural property rights focus legal reasoning and policy-making on four choices. Should resources in the real world be protected by private property, assigned to a public commons, or covered by some intermediate strategy? How should the *res* or "things" that drive property law be designed around the real-world resources covered by property law? When resources are covered by private property, should they be covered by (limited) rights of exclusive use or (broad) rights of ownership, exclusive control, and exclusive authority to dispose? And when broad rights of ownership cover resources, when and with what limits should the law recognize lesser property rights—estates and future interests, or security interests, servitudes, and encumbered fees simple?

When property rights are instituted in law, they are protected not only by property law but also by other complementary fields. Part Four of *Natural Property Rights* studies four such fields—torts, police regulation, eminent domain, and the legislative process. In all of these fields, property rights can be protected (or limited) in different disputes. Natural property rights supply guidance to lawyers and legal officials as they develop statutes or various doctrines.

C. *The Contributions of* Natural Property Rights *to Contemporary Scholarship*

I hope that *Natural Property Rights* gives lawyers and scholars a distinctive perspective to consider on property. The labor theory introduced in the book certainly seems distinctive in relation to other normative property scholarship. In American legal scholarship, two justifications for property deserve pride of place—law and economics,[12]

12. *See, e.g.*, THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY (2010); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347–59 (1967); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

and Progressive property.[13] Natural rights resemble theories in both families in some respects but challenge each in others.[14]

Natural rights converge with Progressive property on "why" questions but differ sharply on "how" questions.[15] The natural rights theory I introduce relies on the same basic normative justification as the one relied on in many Progressive theories—whether and how well property helps people flourish. In practice, however, Progressive property scholarship often recommends for officials to select the policy that seems most likely to help parties flourish.[16] In those same situations, natural rights recommend that policymakers try to institute rights—ones reasonably likely to help parties decide for themselves how to flourish.

Conversely, natural rights converge with many law and economic accounts of property on "how" questions, but they tackle "why" questions differently. The best economic scholarship on property justifies the institution on indirect-consequentialist grounds. In those accounts, property consists of a broad right to exclude, subject to override when different public and private interests suggest overrides would be efficient.[17] Natural law justifies practical reasoning similar to indirect-consequentialist reasoning. That being so, as James Penner and Henry Smith recognize natural rights "might well have a tendency to converge with economic theories" of property.[18] When law and economics scholars make normative arguments about efficiency, however, they raise challenging questions about whether efficiency can give law the moral authority it needs to coerce people.[19] Modest practitioners of law and economic

13. *See* Gregory S. Alexander et al., *Symposium on Progressive Property*, 94 CORNELL L. REV. 743 (2009). *See also* Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CAL. L. REV. 107 (2013).

14. *See* Eric R. Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N.C. L. REV. 413 (2017).

15. *See id.* at 460–75.

16. *Accord* Thomas W. Merrill, *The Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. J. 1, 23 (2014) (describing what I am calling Progressive property as a family of theories recommending "some kind of 'just cause' limitation on the right to exclude, without courts or some other agency of government passing judgment on whether owners have sufficiently good reasons for managing their property the way they do.").

17. *See* MERRILL & SMITH, *supra* note 12; *see also* Demsetz, *supra* note 12; *see also* Ellickson, *supra* note 12; *see also* Rose, *supra* note 12; s*ee also* Daniel B. Kelly, *Law and Economics*, *in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 85 (Andrew S. Gold et al. eds., 2020).

18. James E. Penner & Henry E. Smith, *Introduction*, *in* PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW, *supra* note 11, at xv, xxi.

19. *See, e.g.*, Jules L. Coleman, *The Grounds of Welfare*, 112 Yale L.J. 1511 (2003); Frank I. Michelman, *Ethics, Economics, and the Law of Property*, *in* NOMOS XXIV: ETHICS, ECONOMICS, AND THE LAW 3 (J. Roland Pennock & John W. Chapman eds., 1982).

analysis recognize that limitation. As Robert Ellickson acknowledges, "discussion[s] of the costs and benefits of alternative systems of property [are] circular unless one has identified some foundational property entitlements that precede the decision on the [property] system."[20] Natural rights supply the "foundational . . . entitlements" economic analysis needs to get up and running.

In more general American normative legal scholarship, works are often classified in one of two broad families—deontology, and consequentialism.[21] Natural rights offer a distinctive perspective in these classifications as well.[22] Natural rights are "deontological" in the sense that, when governments act for citizens, they should protect citizens as individual rights-holders first and as members of broader communities second.[23] But theories that are "deontological" in that sense can ground law on different basic foundations. Some of the best-known deontological theories are Kantian; they find normative concepts associated with Kantian theory to be the most basic elements in normative reasoning.[24] Natural law-based natural rights theories rely on different foundations; in them the most basic source of normative value consists of human flourishing.

As for consequentialism, natural rights theories are consequentialist in a weak sense. That is because (again) natural law-based natural rights facilitate practical reasoning similar to utilitarian indirect-consequentialism. Strictly speaking, however, such theories are not consequentialist. More basic principles—freedom and flourishing—determine which

20. Ellickson, *supra* note 12, at 1326 n.34.

21. *Compare, e.g.*, LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002), *with* Coleman, *supra* note 19, and Joseph William Singer, *Something Important in Humanity*, 37 HARV. CIV. RTS. CIV. LIB. L.J. 103 (2002) (both reviewing KAPLOW & SHAVELL, *supra*).

22. See Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889, 892–916 (2009), for natural law theory's supplying a "third way"; *see also* Douglas J. den Uyl & Dennis Rasmussen, *The Perfectionist Turn*, 30 SOC. PHIL. & POL'Y 69 (2013). What I am calling here "natural rights theories" and "natural law-based natural rights theories" could also be called "perfectionist theories of rights" or "rights-based perfectionist theories." *See* ADAM J. MACLEOD, PROPERTY AND PRACTICAL REASON 20–31 (2015); *see also* DOUGLAS B. RASMUSSEN & DOUGLAS J. DEN UYL, NORMS OF LIBERTY: A PERFECTIONIST BASIS FOR NON-PERFECTIONIST POLITICS (2005).

23. In one famous formulation, "deontological" theories make individual right lexically prior to the common good. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 28–31 (1971); Samuel Freeman, *Utilitarianism, Deontology, and the Priority of Right*, 23 PHIL. & PUB. AFF. 313 (1994).

24. *See* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (1785) (Lewis White Beck trans., 1985); *see also* CHARLES FRIED, RIGHT AND WRONG 7–9 (1978); BARBARA HERMAN, THE PRACTICE OF MORAL JUDGMENT (1993); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (2d ed., 2012).

consequences count, whether particular consequences contribute or detract from social welfare, and how consequences need to be tallied when they affect different people differently.

D. *Property, Natural Rights . . . and Oysters*

That is enough to introduce *Natural Property Rights* and its main intentions. Let me switch course and explain why this Article is going to go on at length about oysters.

The lead plaintiffs in *Campo* are suing to recover compensation for oysters allegedly killed by the U.S. Army Corps of Engineers. The Corps operates a spillway in the Mississippi River, west and upriver of the city of New Orleans. In 2019, the Corps and the spillway's governing commission opened the spillway to prevent flooding in New Orleans and other cities along the Mississippi River.[25] But the river runs with fresh river water, Gulf Coast water is briny, and oysters thrive in briny water.[26] So when the Corps opened the spillway, the lead plaintiffs allege, in the next several months the river diversions inflicted at least $1.6 billion of damage on oysters and oyster breeding grounds managed by class plaintiffs.[27]

Campo repays study here for several reasons. First, the key opinion in *Campo* thus far invokes labor and natural rights. To date, the presiding judge, the Honorable Ryan Holte, U.S. Court of Federal Claims, has made one published ruling, an order handed down on December 23, 2021 (here, "the December 2021 *Campo* opinion" or "the December 2021 opinion"). That opinion denies a motion for partial dismissal by the United States.[28] The United States had argued that the plaintiffs could not claim "private property" in oysters, on the ground that oysters are inherently public resources under controlling Louisiana statutes.[29] The December 2021 opinion begins: "In his 1690 Second Treatise of Government, John Locke famously noted 'the labour of his body, and the work of his hands, we may say, are properly his.'"[30] And in the opinion, a natural right to labor supports a legal conclusion that the plaintiffs have property in oysters and in breeding grounds they lease from Louisiana.

Next, the *Campo* dispute raises a host of issues that fairly test a normative theory of property. To run all the main legal issues in *Campo* to

25. Campo v. United States, 157 Fed. Cl. 584, 591, 601 (2021).
26. *See id.* at 591.
27. Complaint, *supra* note 5, ¶¶ 74–75.
28. *See Campo*, 157 Fed. Cl. at 618.
29. *See id.* at 591.
30. *Id.* at 587–88 (quoting LOCKE, *supra* note 2, II.v.27, at 287) (emphasis removed).

ground, one would need to study more than half of the policy issues studied in *Natural Property Rights*. The lawsuit fairly questions why resources might remain in a public commons or be convertible to private property. As we will see, however, one cannot answer questions about legal property in oysters without knowing more about whether oyster producers have legal property in the beds on which they grow oysters. And if the *Campo* plaintiffs do have private property, in oysters or the growing beds, the litigation will turn to consider whether and in what conditions those property rights might be taken. Labor and natural rights shed helpful light on all of those questions.

Next, *Campo* and the resource dispute it presents illustrate the character of labor-based natural rights. Natural rights do confirm and support Judge Holte's conclusion in the December 2021 opinion. But that opinion might lead some lawyers or scholars to suspect that natural rights operate like one-way ratchets—that they always justify and never limit property. Labor-based natural rights do not work that way. As this Article shows, labor, natural law, and natural rights help justify three important legal limits on property. Labor justifies the recognition and maintenance of public commons, for resources that seem unfit for labor and best used in common. Natural law justifies the institution of eminent domain if and when a government determines that it needs to convert resources held privately into common resources. And natural rights justify broad doctrines that help settle whether the Corps' diversions might have constituted inverse condemnations. Such rights justify doctrines in eminent domain "takings" law analogous to principles of nuisance in tort.

Last but by no means least, *Campo* illustrates fairly and vividly how a natural rights regime differs from contemporary property law. Throughout contemporary law, authorities tend to apply relatively interventionist utilitarian principles to property law and property-related public law. The principles applied make property rights seem afterthoughts, entitlements people may get if they do not detract overmuch from government's promoting broad social policies. Labor and principles of natural law justify limits on natural property rights. But the limits are narrower, structured to apply when necessary to secure the rights of all. *Campo* illustrates this insight three times over—in the fields of law establishing broad public reservations on property in coastal water bottoms, in justifications for eminent domain, and in the principles of nuisance law that settle whether water diversions inversely condemn property rights.

E. *Overview*

This Article is organized as follows. Part II of this Article restates the main claims of *Natural Property Rights*, part by part and chapter by chapter. The rest of the Article then studies the policy issues raised by the *Campo* suit.

Part III introduces *Campo* and shows how river diversion projects threaten oyster production. It summarizes the *Campo* litigation and the December 2021 opinion. Part III also makes clear how this Article does and does not critique the December 2021 opinion. In *Natural Property Rights*, I study natural law and rights for normative payoffs but not jurisprudential payoffs, and this Article follows suit. In other words, for the purposes of this Article, I am not interested in whether Judge Holte reasoned well or poorly as a lawyer when he relied on natural rights as grounds relevant to the legal merits of the U.S. government's dismissal motion. I suspect that issue constitutes a sideshow, and Part III explains why. As *Natural Property Rights* does, this Article focuses primarily on whether natural rights and labor could help conscientious officials resolve the oysters-versus-shoreline dispute as a matter of public policy.

Part IV supplies the moral context for this Article's critiques of the relevant laws and policies. Part IV applies *Natural Property Rights*'s broad claims about labor and natural rights to oyster production.

Part V shows how labor justifies substantive property rights in law. Labor justifies natural rights in oysters raised by oyster producers to maturity, Part V shows, and it also justifies limited property in the water bottoms that oyster producers lease from Louisiana regulators.

Assume that the *Campo* class plaintiffs have property in raised oysters, leased water bottoms, or both. Even if they do, they have a long way to go to show that their inverse-condemnation claims are likely to succeed on the merits. Parts VI, VII, and VIII study several other important policy issues raised by the plaintiffs' claims. As Part VI explains, all of the issues set to be litigated in *Campo* illustrate vividly how private property interacts with various public law doctrines, and I study the relevant doctrines in this Article to illustrate the range and character of natural property rights.

As Part VII shows, rights in private property are often subject to substantive legal limits associated with public health, safety, and welfare. In the *Campo* dispute, Louisiana and the federal government have serious public interests in the lives and property rights of people who dwell along the Mississippi River. Part VII explains why. The Part also shows how those interests might be advanced—with common law doctrines

about public commons, with statutes subordinating private property in coastal resources to public needs, or with hold harmless clauses in government leases to coastal water bottoms.

Part VIII surveys the eminent domain issues that follow if Campo and his co-plaintiffs have private property (not limited by the substantive interests studied in Part VII). Part VIII shows how and why a system of property protecting labor also justifies an institution like eminent domain. Part VIII also shows how a system of property protecting labor also justifies principles of nuisance—the principles that seem most likely to settle whether Campo and the other plaintiffs have suffered inverse condemnations. Part IX concludes.

II. *NATURAL PROPERTY RIGHTS*: A PREVIEW

A. *Part One: Natural Law and Rights*[31]

1. Chapter 1: Natural Law and Rights in Contemporary Property Law and Theory

Rights and labor are staples in property law. Canonical common law cases—like the duck case,[32] the fox case,[33] the whale case,[34] and the Native American title case[35]—rely on natural rights in the course of legal reasoning. Constitutional property guarantees assume that natural rights exist. The Constitution of Virginia, my home state, recognizes "inherent rights of which [all people] cannot, by any compact, deprive or divest their posterity," and two of those rights constitute the rights "of acquiring and possessing property."[36] This Symposium is hosted by Texas A&M University School of Law. Texas's Constitution protects property against "be[ing] taken, damaged, or destroyed for applied to public use" without just compensation.[37] These, and other similar guarantees like them, were instituted against a "higher law" background.[38]

31. Each subsection in this Part corresponds to a chapter in *Natural Property Rights*.
32. *See* Keeble v. Hickeringill (1707) 103 Eng. Rep. 1127; 11 East 574.
33. *See* Pierson v. Post, 3 Cai. Rep. 175 (N.Y. 1805).
34. *See* Ghen v. Rich, 8 F. 159 (D. Mass. 1881).
35. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).
36. VA. CONST. art. I, § 1.
37. TEX. CONST. art. I, § 17.
38. On "higher law" constitutionalism, see Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365 (1927). For examples of the "higher law" background of eminent domain limitations, see VanHorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 28 F. Cas. 1012 (D. Pa. 1795) (No. 16,857); Gardner v. Newburgh, 2 Johns. Ch. 162 (N.Y. Ch. 1816); J.A.C. Grant, *The "Higher Law" Background*

With sources like those, inquiring minds might ask any of three questions. Descriptively, whatever one thinks of natural rights and natural law on the merits, to the extent that they did affect property rights, how did they affect property rights? Normatively, is a system of property law grounded in natural law and rights a just and satisfying system? And jurisprudentially, if one finds satisfying a rights-based account of property, how might natural rights affect legal reasoning about property and related fields? *Natural Property Rights* focuses on the second of those questions, the normative one. The book explains how labor justifies and structures natural rights to property, and it argues that labor-based property rights are just and satisfying. In focusing on normative issues, of course, the book abstracts from historical or descriptive and from jurisprudential issues. If labor, natural law, and natural rights can justify property persuasively, I assume, descriptive and jurisprudential questions should be relatively easy to answer.

The normative argument in *Natural Property Rights* is Lockean but not necessarily Locke's in every particular. As Locke does, the book justifies property as a natural right, and specifically as a natural right securing and facilitating labor. *Natural Property Rights* understands labor consistent with principles of natural law, such that "labor" consists of intelligent and purposeful activity producing goods useful for human survival and flourishing.[39] When the book turns to particular property doctrines, however, it relies considerably on natural law arguments relied on by Sir William Blackstone[40] and New York Chancellor and Justice James Kent.[41] When it justifies natural property rights, the book relies not only on Locke's theory of labor but also on Grotius[42] and Pufendorf's[43] claims about property and occupancy.

Most important, *Natural Property Rights* is probably grounded on Thomistic normative foundations, and not foundations closer to Locke's own understanding of natural law.[44] Mainline law and philosophy

of the Law of Eminent Domain, 6 WIS. L. REV. 67 (1931).

39. *See* LOCKE, *supra* note 2, I.ix.86, at 205 (grounding "Man's Property in the Creatures . . . upon the right he had, to make use of those things, that were necessary or useful to his Being"); *id.* II.v.26, at 286 (grounding property in men's "reason to make use of [the world] to the best advantage of life, and convenience.").

40. *See* 1–4 WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND (1765-69).

41. *See* 1-4 JAMES KENT, COMMENTARIES ON THE LAWS OF THE UNITED STATES (1826-30) (1971).

42. *See* HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES (Francis W. Kelsey trans., 1962) (1625).

43. *See* SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO (Charles Henry Oldfather & W.A. Oldfather trans., 1934) (1672).

44. *See* THOMAS AQUINAS, SUMMA THEOLOGIAE (1274),

scholarship portrays Locke as a forerunner of modern libertarian political theorists.[45] But there exists a serious minority view, and in that view Locke is better understood as an after-runner of earlier natural law theorists.[46] I find that minority view more convincing, and I rely on in it in *Natural Property Rights*. That being so, the book's case for Lockean property relies on a mine-run account of natural law.[47] Regardless, in this Symposium Article, I follow Judge Holte's lead and portray the rights-based theory I introduce in *Natural Property Rights* as a Lockean theory.

Natural Property Rights focuses primarily on working out the theory it introduces. It justifies natural property rights, and it shows how such rights inform the practice of property. In the course of the argument, however, the book compares the justifications it introduces with three other perspectives familiar from property scholarship.

One alternative consists of what I call property "pragmatism." When I refer to pragmatism in the book, I do not mean some variation on philosophical pragmatism.[48] I mean instead a general disposition[49] evident among many lawyers,[50] judges,[51] and scholars[52] who study property

https://www.newadvent.org/summa/ [https://perma.cc/T8TP-JPGM].

45. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

46. *See, e.g.*, STEPHEN BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY: FROM GROTIUS TO HUME 125–49 (1991); Eric R. Claeys, *The Private Society and the Liberal Public Good in John Locke's Thought*, 25 SOC. PHIL. & POL'Y 201, 208–11 (2008); Adam Mossoff, *Saving Locke from Marx*, 29 SOC. PHIL. & POL'Y 283, 294–307 (2012); Thomas G. West, *The Ground of Locke's Law of Nature*, 29 SOC. PHIL. & POL'Y 1 (2012).

47. *See, e.g.*, JACQUES MARITAIN, THE RIGHTS OF MAN AND NATURAL LAW (1944); C. ADAM SEAGRAVE, THE FOUNDATIONS OF NATURAL MORALITY: ON THE COMPATIBILITY OF NATURAL RIGHTS AND THE NATURAL LAW (2014); HENRY B. VEATCH, HUMAN RIGHTS: FACT OR FANCY? (1985); CHRISTOPHER WOLFE, NATURAL LAW LIBERALISM (2006).

48. *See, e.g.*, CHARLES S. PEIRCE, PRAGMATISM AS A METHOD OF RIGHT THINKING: THE 1903 HARVARD LECTURES ON PRAGMATISM (Patricia Ann Turrisi ed., 1997); MARGARET JANE RADIN, REINTERPRETING PROPERTY 1–2 (1993).

49. Observed also by Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1851–53 (2007).

50. Consider how the reporters of the first Restatement of Torts restated nuisance law and how Property Law was rewritten in the first Restatement of Property. *See* RESTATEMENT (FIRST) OF TORTS § 821–28 (AM. L. INST. 1939); *see also* RESTATEMENT (FIRST) OF PROPERTY § 1–5 (AM. L. INST. 1936).

51. See, e.g., Kelo v. City of New London, 545 U.S. 469 (2005) and Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency, 535 U.S. 302 (2002), for leading cases about eminent domain.

52. *See, e.g.*, BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 26–27 (1977); MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES (2008); Thomas C. Grey, *The Disintegration of Property*, NOMOS XXII: PROPERTY 69 (1980); Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158 (2002); Walton H. Hamilton & Irene Till, *Property*, *in* 11 ENCYCLOPEDIA OF THE SOC. SCIS. 528 (Edwin R.A. Seligman & Alvin Johnson eds., 1959); Frank I. Michelman, *Property, Utility, and Fairness: Comments*

law. As meant here, "pragmatic" approaches recommend that resource disputes be resolved by whatever policies seem most appropriate on the facts of particular disputes. Property rights and categories contribute relatively little to such policies or the analyses that justify them. In pragmatic analysis, property seems less the object of an individual right and more a social institution requiring a balancing of a wide range of utilitarian interests. Lockean natural property rights make dispute management context-sensitive. Not as context-sensitive as pragmatists want, but still sensitive to a considerable degree to local uses, use-conflicts, economics, geography, and other relevant factors. But such rights also supply a "big picture" often missing from pragmatist analyses. The rights in a Lockean system limit what a government may justly do in the name of "social" goals. That is because a rights-based account of property puts front and center issues about whether a system of property seems just.

Another alternative comes from what I call "egalitarian" perspectives on property. Jean-Jacque Rousseau famously attributed envy and inequality to ownership,[53] and Pierre-Joseph Proudhon famously equated property with theft.[54] Concerns like these loom large in contemporary scholarship on property. John Rawls's maximin principle promotes egalitarian goals,[55] and in *The Right to Private Property* Jeremy Waldron worries that "there is no right-based argument" that can justify "a society in which some people have lots of property and many have next to none."[56] Contemporary Progressive property shares these egalitarian commitments.[57] These concerns deserve serious respect, and the sufficiency and necessity provisos on property rights accord them that respect. But a rights-based theory can address those concerns and still justify private property—including the broad managerial authority associated with fees simple and absolute ownership. Egalitarian

on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1167 (1967).

53. *See* JEAN-JACQUES ROUSSEAU, *Discourse on the Origin and Foundations of Inequality Among Men*, *in* THE FIRST AND SECOND DISCOURSES 77, 141–58 (Roger D. Masters & Judith R. Masters trans., 1964).

54. *See* PIERRE-JOSEPH PROUDHON, WHAT IS PROPERTY? AN INQUIRY INTO THE PRINCIPLE OF RIGHT AND OF GOVERNMENT 13 (1840) (Donald R. Kelley & Bonnie G. Smith ed., 1993).

55. RAWLS, *supra* note 23, at 152–57.

56. JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 5 (1988); *see also* JOHN CHRISTMAN, THE MYTH OF PROPERTY: TOWARD AN EGALITARIAN THEORY OF OWNERSHIP (1994**);** G.A. COHEN, SELF-OWNERSHIP, FREEDOM, AND EQUALITY (1995); STEPHEN R. MUNZER, A THEORY OF PROPERTY (1990); LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE (2002); THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014).

57. *See, e.g.*, JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009).

concerns can be addressed, I argue, with safety valves releasing the pressure that ownership sometimes puts on easy access to property.

Finally, *Natural Property Rights* considers law and economic perspectives on property. Law and economic analysis sheds helpful light on property-design questions. Property rights give people incentives to invest in resources, to improve them, and to make them more productive. They also let owners exchange resources for other products they value more. And when different uses of resources conflict with each other, property rights help proprietors minimize externalities from those conflicts.[58] Although these arguments are important, by themselves they do not justify property on grounds that are fully satisfying. Efficiency, wealth, and other criteria associated with economic analysis raise difficult questions, most of all whether they can justify the coercion distinctive of law and legal ordering.[59]

2. Chapter 2: Natural Law, Interests, and Natural Rights

Chapter 1 previews *Natural Property Rights*'s main claims, and it relates those claims to the expectations that most academic readers will bring to the book. Chapter 2 starts making the case for the book's main claims.

Specifically, Chapter 2 introduces natural law, natural rights, and the specific senses I mean for both. There cannot be a natural right to property unless natural law exists and gives people binding reasons for action. Today, however, to many, natural law seems "nonsense upon stilts."[60] And those who are not that skeptical toward natural law suspect that it is indeterminate, that it seems "an empty vessel into which one can pour almost anything."[61] To make things even more complicated, the concept of "natural rights" means different things in different contexts and to different audiences.

Chapter 2 of *Natural Property Rights* tries to anticipate and head off such confusion. The chapter introduces the book's mine-run natural law

58. *See, e.g.*, R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Demsetz, *supra* note 12; Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). *See also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (8th ed. 2011); MERRILL & SMITH, *supra* note 12; THOMAS J. MICELI, THE ECONOMIC THEORY OF EMINENT DOMAIN (2011); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (5th ed. 2019).

59. *See* Penner & Smith, *supra* note 18; *see also* Coleman, *supra* note 19; *see also* Michelman *supra* note 19; *see also* Ellickson, *supra* note 12.

60. 2 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 501 (John Bowring ed., 1838).

61. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 573–74 (1972).

theory, and it explains what natural rights are when they are justified and structured consistent with such a theory.

We can illustrate the basics of such a theory with some passages from Locke's *Second Treatise*. Early in chapter 6 of the *Second Treatise*, Locke assumes that human affairs are regulated by a "law of Reason." [62] "Law, in its true Notion, is not so much the Limitation as the direction of a free and intelligent Agent to his proper Interest, and prescribes no further than is for the general Good of those under that Law," Locke argues.[63] "Could [those under Law] be happier without it, the Law, as an useless thing would of it self vanish."[64]

Those passages accord with mine-run principles of natural law. "Natural law" consists of a set of principles that guide practical action. The overarching goal of those precepts is to help people attain what is objectively "Good" for them, and what is good for them is what is likely to make them objectively "happy." Natural law is "natural" because its precepts are discernible by "reason," and because its normative features follow from an innate capacity people have to be "happy." Natural law is "law" inasmuch as people have reasons and obligations to pursue courses of actions that seem likely to contribute to their goods or happiness. Chapter 2 of *Natural Property Rights* introduces an understanding of natural law in that general family and distinguishes theories in this family from other and better-known normative theories—Kantian or deontological on the one hand, and consequentialist on the other hand.[65]

Many contemporary lawyers and theorists are familiar with natural law, but they assume that natural law is incompatible with natural rights. Since natural law grounds positive law in its tendency to help people flourish, some assume that natural law authorizes positive laws that let legal officials tell citizens how best to flourish.[66] If political leaders may order subjects to do what will help everyone flourish—as King

62. LOCKE, *supra* note 2, II.vi.57, at 305.
63. *Id.*
64. *Id.*
65. *See supra* notes 21, 22, 23, and 24 and accompanying text.
66. In contemporary property scholarship, the Progressive property movement exhibits these tendencies. *Compare* Gregory S. Alexander, PROPERTY AND HUMAN FLOURISHING 3 (2018), *and* SINGER, *supra* note 57, *with* Claeys, *supra* note 22, at 892. But the tendencies come out even more strongly in other theories of law and politics—especially the new Catholic "integralist" movement. *Compare* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022), *with* James M. Patterson, *Uncommonly Bad Constitutionalism*, LAW & LIBERTY (Apr. 28, 2022), https://lawliberty.org/book-review/uncommonly-bad-constitutionalism/ [https://perma.cc/2C42-JZJ2].

Solomon decided what was best for the baby presented to him[67]—subjects do not have freedom consistent with meaningful rights. Furthermore, since the "law" in natural law focuses on duty, natural law may seem inconsistent with "rights talk."[68]

But people do not need to follow those expectations when they interact with each other in social life or politics. Even though flourishing supplies a basic justification for action, when people argue about social policies or laws they tend to abstract from flourishing. People appeal instead to middle-level normative concepts—especially interests and rights that they have in flourishing in distinct spheres of life. Chapter 2 studies a few basic pairs of rights and interests from beyond property: the right of bodily security and related interests in autonomy, being free from disease, and associating; the right to practice a trade; and partnership rights and the interests they further in commercial association.

3. Chapter 3: Natural Law, Natural Rights, and Practical Reason

Chapter 2 addressed a few common impressions of natural law and rights, particularly the ones that make "natural" theories of morality seem indeterminate. In other portraits, natural law and rights seem too determinate, so determinate that they seem extreme or even ludicrous. Impressions like those tarnish labor theories of property. In a recent essay, Mark Lemley doubts that "you can make an apple your property by investing labor in picking it from a tree—and I wouldn't advise you to try it with the next apple tree you come across unless you want to be arrested or shot."[69] Lemley's argument captures how many contemporary lawyers and scholars understand natural law and rights. But the argument is misconceived, and it is misconceived because it attributes to mine-run natural law theories features they do not possess.

To begin with, the argument attributes to labor and natural rights a feature that legal philosophers call the "copy" view of morality. Under the copy view, whenever a moral theory prescribes that A is good, it must always recommend A in practice.[70] In Lemley's hypothetical, if apple picking is valuable labor, then the law must entitle apple pickers to keep whatever apples they pick. But moral theories do not need to rely

67. *See* 1 *Kings* 3:16–28.

68. *See generally*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF LEGAL DISCOURSE (1991).

69. Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328, 1339 (2015).

70. *See, e.g.*, JOHN FINNIS, NATURAL LAW AND RIGHTS 25–29 (2d ed. 2011); Mark C. Murphy, *Natural Law Jurisprudence*, 9 LEGAL THEORY 241, 243 (2003).

on the copy view. Locke himself certainly rules it out. When Locke refers to property legislation, he describes it as a "great art of government," requiring legislators to exercise "wise and godlike" judgment.[71] Neither art nor wisdom would be necessary if legislation copied precepts of morality directly into law.

In other words, labor supplies what Locke calls "the great Foundation of Property,"[72] but there are huge gaps between that foundation and what government officials need to fill in in practice. In philosophical scholarship, "practical reason"[73] helpfully describes that field of discretion or "applied" reasoning from morality to law and policy.

Chapter 3 introduces the concept of practical reason. The Chapter also introduces three concepts important in practical reason. "Specification" covers reasoning in which people decide how to apply broad principles of morality to specific recurring disputes. "Determination" covers the reasoning by which people choose specific laws and government policies to institutionalize what morality recommends. And "focal" or "core" cases describe the paradigm examples for which laws and policies are implemented. To show how practical reasoning works, Chapter 3 studies speed limits and "snow dibs," customary and time-limited property rights that some cities recognize in shoveled-out parking spaces during snowstorms.[74]

B. *Part Two: Property's Foundations*

Chapters 2 and 3 introduce the concepts and foundations for natural rights, but they say barely anything about property. Part Two applies Chapter 2 and 3's lessons to property.

1. Chapter 4: Property and the Interest in Using Things

Chapter 4 introduces property as a distinct sphere of law and social morality. The word "property" takes on different meanings in different contexts. In one usage, "property" is coextensive with all of the rights a person may claim. Locke uses the term that way when he uses

71. LOCKE, *supra* note 2, II.v.42, at 298.
72. *Id.* II.v.44, at 298.
73. *See* Eric R. Claeys, *Intellectual Property and Practical Reason*, 9 JURIS. 251, 275. *Cf.* MACLEOD, *supra* note 22; Joseph W. Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899 (2009).
74. *See* Flores v. Lackage, 938 F. Supp.2d 759, 763–66 (N.D. Ill. 2013). I have studied dibs systems in Claeys, *supra* note 73, at 268–69.

"Property" as a synonym for the rights people may claim in their "Lives, Liberties and Estates."[75]

In another usage, however, "property" refers to rights and responsibilities that people may hold in relation to one another regarding "things." Locke uses the term this way throughout Chapter 5 of the *Second Treatise*. There, the term refers to rights in "thing[s]" and in particular to rights to resources of "the Earth" or "that which God gave to Mankind in common."[76]

Natural Property Rights studies property in that latter, more specific sense. Chapter 4 explains what property covers when it refers to a field of law and social morality enforcing obligations for "things." Following on Penner's work,[77] Chapter 4 argues that a resource is a "thing" and a fit candidate for property if it is "separable." A resource is separable if it is only contingently associated with whoever is exercising rights over it, if it is not essentially connected to any specific person. That sense explains why land, water, minerals, plants, animals, taxicab medallions,[78] and other intangible resources are all property. It explains why the liberty to use one's faculties[79] and reputation are clearly "personal" rights. That sense also explains why property in body parts[80] and the use of identity[81] are both dubious property rights, and why slavery constitutes a corruption of property rights.

Not only does Chapter 4 demarcate the field of property, it introduces the normative interest that all property rights serve. Property rights serve an interest that people have in using separable resources. That interest follows from people's more basic rights and imperatives to survive and to flourish. To survive and flourish, people are entitled to acquire reasonable shares of separable resources—and then to use what they have acquired for survival or flourishing.

75. LOCKE, *supra* note 2, II.ix.123, at 350. *See also* JAMES MADISON, *Property, in The National Gazette, Mar. 29, 1792*, *in* MADISON: WRITINGS 515–17 (Jack Rakove ed., 1999).

76. LOCKE, *supra* note 2, II.v.25, at 286.

77. *See* J.E. PENNER, THE IDEA OF PROPERTY IN LAW 105–27 (1997).

78. *But see* Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. REG. 125 (2013).

79. *See* Keeble v. Hickeringill, 11 East 574, 103 Eng. Rep. 1127 (K.B. 1707); Pierson v. Post, 3 Cai. Rep. 175, 178 (N.Y. 1805).32.

80. *See* Moore v. Regents of Univ. of California, 793 P.2d 479 (Cal. 1990).

81. *See* Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).

2. Chapter 5: The Natural Right to Property

The interest introduced in Chapter 4 justifies a natural right to property—at least, one justified and consistent with mine-run natural law principles. Not all natural rights start from those principles. In other rights theories, natural rights confer broad autonomy on their holders. When property rights are simple autonomy rights, legal officials do not need to think hard or long when they figure out how best to institutionalize rights. Lemley uses a justification like that as a foil in his hypothetical: Once labor entitles a picker to apples, autonomy entitles him to all the apples he picks no matter who owns the tree.[82]

Here, however, the hypothetical is misconceived for another important reason. The hypothetical suggests that a property right consists of a sweeping and context-insensitive autonomy right. When a natural property right is justified consistent with natural law, however, it is sensitive to context to people's interests in use. As Chapter 4 showed, property rights apply to resources that could just as easily be owned by any person as any other person. So anyone who wants to claim priority over a resource must justify that claim, with arguments that are convincing enough to warrant the use of self-help and force.[83] In the hypothetical, some grower already owns the grove where the apple tree is planted. That assumed fact makes the apple-picking seem immoral and aggressive. But it begs the question why the person who claims conventional property in the grove is morally entitled to that property. So a theory of labor must justify not only the right to pick unowned apples but also the rights to the exclusive use of apple trees and groves.

Many contemporary lawyers and scholars doubt that labor theory can supply the justification needed. Hanoch Dagan speaks for many when he concludes that labor is "fraught with difficulties"[84] as a justification for property. Right after the best-selling U.S. property law casebook introduces labor theory, it concludes that most versions of the theory are "deficient in one respect or another."[85] But those doubts are misplaced. Labor can indeed justify natural property rights—with practical reason (Chapter 3), from the interests (Chapter 4) people have in

82. *See* Lemley, *supra* note 69, at 1339.

83. Though, *pace* Lemley, not lethal force. *See* M'Ilvoy v. Cockran, 9 Ky. 271, 274–75 (1820).

84. HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY 1 (2021) (citing WALDRON, *supra* note 56, GOPAL SREENIVASAN, THE LIMITS OF LOCKEAN RIGHT IN PROPERTY (1995), and MICHAEL HARDT & ANTONIO NEGRI, ASSEMBLY: HERETICAL THOUGHT (2017)).

85. JESSE DUKEMINIER ET AL., PROPERTY 14 (8th ed. 2014) (citing CAROL M. ROSE, PROPERTY AND PERSUASION (1994)).

using reasonable shares of a community's resources for their own projects for flourishing.

When these interests are considered and weighed in different situations, they identify four elements for property rights—two requirements and two provisos. The first requirement consists of productive use or labor. Assume that a field with trees is not yet owned, and that someone starts cultivating the trees with a view toward producing fruit from them. Other things being equal, the cultivation helps justify a property right. The tree grower has started producing a good that helps people survive and enjoy tasty food. Property protects her finishing what she has started.

Productive labor is necessary but not sufficient for a property right. People besides the tree-grower could have used the grove and the trees. As a concession to everyone's equal opportunities to labor, the grower must "put a distinction between [labored-on resources] and others."[86] She must broadcast to others that she is already laboring in her field and means to keep doing so. That notice signposts to them that they should start investing their effort and their purposeful activity in other resources. To broadcast her labor and her intentions, the grower must communicate her appropriation claim in conventions that are familiar to the people she expects to respect her claims.

Other things being equal, when a grower broadcasts her uses and claims, she completes her entitlement to a property right. When natural rights are justified consistent with natural law, however, they are only ever prima facie rights. In the grove hypothetical, the cultivator may justly claim a right to the exclusive use of trees only as long as two other unstated conditions continue to be satisfied. First, the necessity proviso must not apply. People's interests in laboring are neither as urgent nor as valuable as their interests in survival and their interests in avoiding the total destruction of their property. So the grower's property rights are always impliedly contingent on there not being an urgent and unexpected need to use anything in the grove to prevent death, serious injury, or the total destruction of property. The necessity proviso expresses that implied condition.[87]

Second, the sufficiency proviso must not apply. Every person's right to labor is qualified by a correlative responsibility to respect others'

86. LOCKE, *supra* note 2, II.v.28, at 288.

87. For necessity cases in doctrine, see Vincent v. Lake Erie Transp. Co., 124 N.W.2d 221 (Minn. 1910); Ploof v. Putnam, 71 A. 188 (Vt. 1908). Locke qualifies property rights by a "charity" proviso, LOCKE, *supra* note 2, I.iv.42, at 170, corresponding to the necessity proviso.

equal opportunities to labor. If the grower wants to tell others to find other trees to tend, her direction has force morally only if there are (Locke's words) "enough, and as good" trees and fields available for others.[88] If there are not, others may justifiably scale back property to ensure that they have reasonable shares of resources to labor on.

Chapter 5 illustrates with basic doctrines for acquiring *res nullius*, separable resources capable of private use or appropriation but not yet owned. So the Chapter goes over the basic rules of acquisition and occupancy for land, water, and personal articles, and it covers the fox case, the whale case, and other hard acquisition or occupancy cases.[89] Labor theories seem unconvincing in large part because they have been lampooned in hard hypotheticals about spray-painted driftwood, tomato juice poured in seas,[90] and ham sandwiches left in cement.[91] Chapter 5 also studies these hypotheticals; it shows to what extent each is instructive and uncharitable.

3. Chapter 6: The Conceptual Structure of Property

Assume that the grower in the hypothetical has a natural right in relation to the grove. What precise conceptual structure does that right take? Property is often assumed to confer a sweeping right to exclude—like a fee simple absolute—and many assume that a natural right justifies that right to exclude.[92] Analytically, however, a natural property right does not need to confer such a right. Strictly at the level of natural right, when labor "begin[s] a title of Property . . . the spending [of labor] upon our uses bound[s] it."[93] In other words, analytically, a property right consists of a usufruct—in the hypothetical, a right like a profit to pick fruit off of trees on someone else's grove.[94]

88. LOCKE, *supra* note 2, II.v.27, at 288; *id.* II.v.33, at 291.

89. *See* Johnson v. M'Intosh, 21 U.S. 543 (1823); Pierson v. Post, 3 Cai. Rep. 175, 178 (N.Y. 1805); Ghen v. Rich, 8 F. 159, 159 (D. Mass. 1881).

90. NOZICK, *supra* note 45, at 175.

91. *See* Jeremy Waldron, *Two Worries About Mixing One's Labour*, 33 PHIL. Q. 43 (1983).

92. This assumption is made in, *e.g.*, WALDRON, *supra* note 56, at 8; MURPHY & NAGEL, *supra* note 56; and SINGER, *supra* note 57, at 29–30. On rights to exclude, *see, e.g.*, PENNER, *supra* note 77, at 68; Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2066 (2014); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998); and Henry E. Smith, *Property As the Law of Things*, 125 HARV. L. REV. 1691, 1693 (2012).

93. LOCKE, *supra* note 2, II.v.51, at 302.

94. *See* JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 1.9 (2022).

Chapter 6 explains how natural rights are structured analytically. Conceptually, a focal instance of property: (1) covers a resource that is separable as explained in Chapter 4; (2) vests in the proprietor an *in rem* immunity and claim-right in relation to that resource;[95] (3) makes that immunity and claim-right conventional, by assigning institutional status to it; and (4) structures the immunity and claim-right as seems likely to facilitate productive labor on the resource and other resources commonly proximate to it.

That concept performs several important roles in property law and policy. Doctrinally, the concept identifies the form of property as fundamental as an atom is in chemistry. The concept explains why easements, other servitudes, usufructuary water rights, and security interests are all property. None of these legal interests confer authority as sweeping as a fee simple. Yet all of them are clearly property rights, and the concept introduced in Chapter 6 explains why. [96] Usufructuary rights can justify fees simple and other sweeping property rights. But those rights are formed from usufructs as complex molecules are formed out of atoms. And the elements of the natural rights—particularly the labor-facilitating function—specify when sweeping rights may and may not be justified.

Chapter 6 illustrates with easements, with customary rights like the snow dibs studied in Chapter 3, and (especially) with water rights. Since rights to exclude[97] and the "bundle of rights" metaphor[98] are both associated with analytical property theory, Chapter 6 studies the strengths and limits of those models of property.

4. Chapter 7: Property, Natural Law, and Nozick

The account of property developed in Chapters 4, 5, and 6 accords closely with the understandings of natural law and natural rights informing many American constitutions and legal source materials. Today, however, "natural rights" are understood in different senses. Modern usages are informed by at least two associations. Mid-twentieth century, property scholars assumed that the only theories of natural rights worth considering were German will-based natural rights

95. On immunities and claim-rights, see Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 35 (1913). On in remness, see PENNER, *supra* note 77, at 23–31.

96. *See* Eric R. Claeys, *Property, Concepts, and Functions*, 72 B.C. L. REV. 1 (2019).

97. *See, e.g.*, Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954); Merrill, *supra* note 92.

98. *See, e.g.*, MUNZER, *supra* note 56, at 15–36.

theorists.[99] Today, scholars assume that "natural rights" refer mainly to libertarian rights justified along lines sketched out by Robert Nozick in *Anarchy, State, and Utopia*.[100] These latter accounts of natural rights seem to link property entirely to autonomy, not at all to productive and sociable use. And thanks to those accounts, some think that, "[i]f entitlement is a matter of natural right," property rights should be covered by the maxim "*fiat justitia, ruat caelum*" ("Let justice be done though heaven falls") and should be "superior to all manipulations of the state in the interest of social welfare."[101]

The rights justified in Chapters 4, 5, and 6 do not possess the features of Nozickean rights, and Chapter 7 explains why. The Chapter illustrates with four topics. The fox and whale cases[102] show how natural law facilitates reasoning about the effects of rights. The Native American title case shows why natural property rights are not universalizable in every respect, why they might not entitle people from one jurisdiction to protection under the civil property laws in another jurisdiction.[103] The *jus abutendi*, the right to destroy property, may be a feature of a Nozickean right but it is not strictly required for a natural law-based natural right.[104] And the same goes for the right claimed by the land owner in the criminal trespass case *State v. Shack*, a farm owner who sought to exclude a Legal Services Corporation attorney and a public assistance caseworker trying to meet migrant workers who resided on his farm.[105]

C. *Part Three: Property Law*

As justified in Part Two, natural property rights are usufructs. And if natural rights are usufructs, it seems hard to parlay them into most conventional property rights. The grower in the apple-grove hypothetical is entitled not to (mere) usufructs but to the broad managerial authority associated with a fee simple. The gap between the usufructs and legal

99. *See* RICHARD R. POWELL, THE LAW OF REAL PROPERTY § 2.05 (1949).

100. *See supra* note 45. *See, e.g.*, RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY 11–14 (1998); RADIN, *supra* note 48, at 108–10; SINGER, *supra* note 57, at 171–74; Alexander, *supra* note 57, at 753 & n.17; Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEG. ANAL. 459, 497–99 (2009).

101. RADIN, *supra* note 48, at 108.

102. *See* Ghen v. Rich, 8 F. 159, 159 (D. Mass. 1881); Pierson v. Post, 3 Cai. Rep. 175, 175 (N.Y. 1805).

103. *See* Johnson v. M'Intosh, 21 U.S. 543 (1823); *see also supra* text accompanying note 35.

104. *See, e.g.*, Eyerman v. Mercantile Trust Co., 524 S.W.2d 210, 213–17 (Mo. App. 1975); Lior Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005).

105. 277 A.2d 369 (N.J. 1971).

ownership raises fair egalitarian questions, the ones that motivate Progressive property scholarship.[106] That gap also raises questions about why ownership is desirable and how conventional property rights should be structured, questions front and center in law and economic scholarship on property.[107] Both sets of questions are taken up in Part Three of *Natural Property Rights*.

1. Chapter 8: Justifying Ownership

Chapter 8 takes up the most obvious question, how usufructuary natural rights can justify conventional ownership rights. This is the question Locke takes up in Chapter 5 of his *Second Treatise*: In principle, how does "any one . . . ever come to have *Property* in any thing . . . exclusive of all the rest of" mankind?[108]

As Chapter 8 explains, in many situations, the law secures rights to labor through a paradoxical strategy: For some resource, extinguish the natural rights that track the sufficiency proviso, and vest in proprietors sweeping authority to manage and dispose of the resource. That is the authority that runs with the institution of ownership.[109]

Chapter 8 recounts four typical situations where this strategy seems likely to help people exercise their rights to labor. Often, private and exclusive authority reduces the likelihood that people in the same community will fight over who gets to use resources and how.[110] Often, resources are managed more prudently if each person owns a small share of them exclusively than if all share in all of the resources as co-tenants.[111] Often, private and exclusive authority encourages investment and production, and when owners trade their surplus they (Locke) "over-ballance the Community" of goods that holds as a matter of natural right.[112] And often, exclusive authority gives people the privacy they need to pursue their own distinct chosen projects for flourishing.[113] Chapter 8 illustrates with mine-run doctrines about ownership: the

106. *See* sources cited *supra* notes 56 and 57.

107. *See* Merrill, *supra* note 100; *see also* sources cited *supra* note 12.

108. LOCKE, *supra* note 2, II.v.25, at 286.

109. As delineated by A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107, 112–16 (A.G. Guest ed., 1961).

110. This justification goes back to ARISTOTLE, POLITICS bk. II, ch. 5, at 30–34 (Carnes Lord trans., 2d ed. 1984). Locke gets at the same idea when he describes "the Fancy and Covetousness of the Quarrelsom and Contentious." LOCKE, *supra* note 2, II.v.34, at 291.

111. This justification goes back to AQUINAS, *supra* note 44, II-II, Q. 66, art. 2.

112. LOCKE, *supra* note 2, II.v.40, at 296.

113. *See, e.g.*, JAMES MADISON, *Property, in The National Gazette, Mar. 29, 1792*, *in* MADISON: WRITINGS 515–17 (Jack Rakove ed., 1999).

exclusive authority marked off by trespass and other property torts; the authority reinforced by injunctions and compensatory-damage doctrines; and the authority to assign away property rights.

2. Chapter 9: Limiting Ownership

Again, however, ownership raises egalitarian concerns. Ownership extinguishes rights that people seem to have in resources by virtue of the sufficiency proviso—like the inchoate rights of the apple picker in the hypothetical. The justifications studied in Chapter 8 recognize those concerns. Because those four justifications are all designed for typical cases, they constitute only prima facie justifications. Chapter 9 traces principled limits on different justifications for ownership, and it shows how property doctrine accommodates those limits.

Each of the four elements of natural property rights helps mark off limits on ownership in practice. The claim communication requirement requires proprietors to signpost their intentions to use a resource exclusively. What if a would-be owner neglects claim communication? Institute safety-valve doctrines like adverse possession. Ownership is supposed to facilitate labor more than usufructs do. What if ownership does not live up to those expectations in some unusual but recurring and foreseeable scenario? Institute more safety valves, like the exceptions that entitle non-owners to property in improvements they mistakenly install on others' lots or the doctrines establishing various forms of common property. What about emergencies, when non-owners need to commandeer owned property temporarily? Another safety valve for the necessity doctrine in law. What if the people who do not themselves have surplus resources cannot earn enough to buy what they need for subsistence or advancement? More safety valves—for common carriage, for easements that entitle people to traverse land to gather what they need for sustenance, or for well-tailored public assistance programs.

3. Chapter 10: Designing Property Rights

Ownership is far from the only institution that a system of property law needs to supervise. Property law must also perform a subtler but even more basic function; it must give people guidance how to structure the "things" or *res* that generate legal rights and duties. In the hypothetical, when the apple-picker is excluded from the apple he wants to pick, he is excluded by a legal duty obligating him not to enter the grove. But

why are the apple and the tree in the same conventional package as the grove, other trees in the grove, and any fixtures in the grove? Locke begs the same question in Chapter 5 of his *Second Treatise*. In one passage he asserts, "As much Land as a Man Tills . . . Improves, . . . and can use the Product of, so much is his Property."[114] Why do the land, the plants, and the produce all comprise one single article of property?

Although this issue matters hugely in property law, it has not been studied with anywhere near the attention it deserves.[115] Chapter 10 calls the relevant problem a problem of "thing design." Property law institutes rights and responsibilities in relation to *res*, and before it can assign any rights or responsibilities it needs to declare what those "things" are and how many resources they cover. Sometimes, a *res* in law corresponds neatly to what clearly seems one single resource in the real world—say, one single animal. Sometimes, however, a *res* at law consolidates what might seem several distinct resources—as the doctrine of confusion does when it (temporarily) merges property in heads of livestock into two or more herds.[116] And doctrines defining "real estate" perform the same function when they consolidate soil, trees, fruit, fixtures, and airspace into discrete groves and lots.

Natural property rights supply legal officials with the guidance they need to design different *res*. The productive labor and claim communication requirements supply the basic justifications for *res* design doctrines. Those same requirements also facilitate practical reasoning about specific resources and *res*. Chapter 10 illustrates with doctrines: about confusion; about personal goods pre- and post-improvement; about land and all the resources associated with it via the *ad coelum* and *ratione soli* maxims; and the ways in which rights in land and water flow are structured in different jurisdictions.

4. Chapter 11: Dividing Property Rights

Chapter 10 shows how property consolidates resources into *res*, and Chapters 8 and 9 show how natural rights justify and limit the rights that accrue with ownership. Once a system of property has worked out the full bundles of rights that run with ownership of different *res*, it can then recognize lesser rights. In the hypothetical, what might once have been

114. LOCKE, *supra* note 2, II.v.32, at 290.

115. For three (partial) studies of the problem, *see generally* Merrill, *supra* note 100; Michelman, *supra* note 19, at 8–21; Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S454 (2002).

116. *See, e.g.*, Earl C. Arnold, *The Law of Accession of Personal Property*, 22 COLUM. L. REV. 103, 119–20 (1922).

a fee simple could be broken down into a series of profits (to enter the grove, and then to pick and remove apples) and a fee simple encumbered by those profits. If the apple picker has a profit to pick apples, then the fee simple constitutes a tenement servient to the profit. And fees simple and rights of absolute ownership can also be held concurrently, broken out into leases and reversions, subdivided into present estates and future interests, or made servient to security interests.

Chapter 11 studies these various lesser property rights. The Chapter calls all of the rights "component" rights because they compose a fee simple or absolute ownership when they are reunified. Natural property rights can justify component rights. As with the doctrines studied in Chapters 8, 9, and 10, natural property rights lay the moral foundations for component rights. Component rights facilitate labor. Often in practice, an owner and some other people seem better-positioned to labor, all of them for their individual projects, if each has distinct rights in the same resource.

Like the justification for ownership, however, the justification for component rights can only ever be a prima facie justification. The claim communication requirement and sufficiency proviso justify principled limits on component rights. Claim communication justifies doctrines that make component rights familiar and understandable to third parties—notice requirements, recordation requirements, and the *numerus clausus* principle. The sufficiency proviso justifies doctrines that purge component rights when such rights seem likely to fragment property too much or leave a resource effectively unusable later. Chapter 11 illustrates (respectively) with doctrines authorizing the terminating of running covenants, and with the dreaded Rule Against Perpetuities.

D. *Part Four: Property in Law and Policy Generally*

Part Three studies how property rights get implemented as rights, and it shows how norms associated with property law guide the development of those rights. In law, however, property law relies on and interacts with many complementary other fields of law. Part Four studies some of the more important interactions—with the law of torts, the police power, the eminent domain power, and the power to legislate.

1. Chapter 12: Property Rights, Duties, and Harms

In law, substantive rights are often not protected by legal rights. Instead, rights tend to be protected by prohibitions. "Prohibitory" laws

apply not to right-holders but to the people who hold duties correlative to rights. Prohibitory schemes declare those duties. They direct duty-holders to respect the duties, they make clear that breaches of duties constitute harms in law, and they supply recourse when right-holders suffer legal harm. In the grove hypothetical, the tort of trespass prohibits anyone besides the grove owner from entering the grove without her consent. The grower's property in her grove entitles her to substantive legal rights of exclusive control. But those substantive legal rights are not protected by specific rights in doctrines. They are protected instead by legal duties not to trespass and by the torts and remedies doctrines that give owners and occupants recourse for trespasses.

Chapter 12 defends that general approach. The Chapter makes two main claims. First, although it may sound counterintuitive to secure rights through doctrines that focus on duties and harms, that strategy makes a lot of practical sense. Duty-based legal systems let courts and other government actors conserve resources. They can declare duties to deal with the most serious threats to property rights, and they can leave owners and occupants to decide when they have been harmed so severely that they need recourse. In such systems, however, legal duties are derivative of moral judgments about the scope of rights.

Chapter 12 illustrates using mine-run nuisance disputes and the "train sparks" contributory negligence doctrine.[117] The Chapter also compares and contrasts a rights-based system of property with law and economic accounts of property. Leading law and economic accounts tend to be extremely skeptical that legal systems can institute satisfying systems of rights, duties, and harms.[118] Those law and economic critiques beg really important conceptual and normative questions, and Chapter 12 summarizes the main problems begged in the critiques.

2. Chapter 13: Property, Regulation, and the Police Power

In most of *Natural Property Rights*, I rely on common law cases and critique common law doctrines. And that focus is where it should be. In most jurisdictions in the United States and the broader "Anglosphere," property rights originate first in the common law and are still creatures of private law in many respects. That said, property rights are also

117. *See generally* LeRoy Fibre Co. v. Chicago, M. & St. P. R. Co., 232 U.S. 340 (1914).

118. *See* POSNER, *supra* note 58, §§ 3.6–3.9, at 63–81; *see also* Coase, *supra* note 58. *But see* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001) (criticizing on economic grounds skepticism of harm-benefit distinctions frequently expressed in law and economics scholarship).

objects of public oversight. And many readers assume that government has broad discretion to regulate property via its police powers.

Chapter 13 studies the interplay between natural property rights and police regulation. The Chapter introduces and defends a normative theory of police regulation.[119] In that theory, a government "regulates" property rights if it institutes positive laws that align people's conventional and substantive property rights with their property rights. Randy Barnett coined a definition of regulation whereby a regulation "makes regular" laws.[120] As Chapter 13 explains, when a government regulates property, just regulations make legal property rights regular in relation to natural property rights.

In this understanding, exercises of the police power "regulate" when they accomplish any of three different goals. Some regulations make natural rights determinate in practice. Well-designed speed limits regulate driving in this sense, and so do well-drawn conveyancing laws. Some regulations prevent harm to rights; they prohibit activities likely to interfere with rights. Well-drawn anti-pollution laws regulate property rights in that sense. And some regulations secure average reciprocities of advantage;[121] those regulations forcibly coordinate how proprietors use their resources to generate benefits common to all of them. Party wall laws regulate property to secure reciprocities of advantage, and so do statutes that force people who hold oil and gas rights to pool their rights.

These three goals justify government regulation. If a policy satisfies the requirements associated with one or more of these goals, a government may legitimately restrain how proprietors use their property—even if the restraint is backed by force and even if the restraint seems to otherwise restrict property rights. Because the models set criteria that governments must satisfy to regulate, however, they also limit

119. *See generally* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2003); *see also* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 107–45 (1986). The theory resembles understandings of the police power influential in nineteenth-century American constitutional law. *See, e.g.*, THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (2d ed. 1871); Santiago Legarré, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745 (2007). In *Natural Property Rights*, however, I sidestep questions whether the theory of the police power I defend represents the only understanding of the police power in U.S. history or in relevant constitutional clauses. I focus on defending the theory on its normative merits.

120. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 112 (2001).

121. That phrase is associated with Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), and Jackman v. Rosenbaum Co., 260 U.S. 22, 30 (1922).

regulation. If an act of government does not satisfy the requirements associated with any of these models, the act may not be justified as a bona fide police regulation. The act might constitute a just exercise of some other government power (eminent domain or taxation) but not of the power to regulate.

Like the views introduced in Chapter 12, the account of the police power introduced in Chapter 13 encounters serious skepticism—in leading cases[122] and pragmatist studies by scholars[123] on property and the police powers. Chapter 13 addresses that skepticism and it studies many of the hard police powers cases that contribute to it.

3. Chapter 14: Property, Takings, and the Eminent Domain Power

The police power, the power of taxation, and many other government powers all apply with equal force to personal rights and property rights alike. But one government power applies only to property. That power is the eminent domain power. The eminent domain power tests the limits of any account of property—much as the powers to conscript military draftees and to compel vaccinations test the limits of individual rights to liberty. Chapter 14 takes up the issues that eminent domain raises about property.

Chapter 14 makes three claims.[124] First, a theory of natural rights can justify government's condemning property. When eminent domain seems inconsistent with natural rights, that impression just goes to show how influential the Nozickean model of rights is. When natural rights are justified consistent with natural law, every individual's individual rights are subject to implied limits. Citizens relate to one another much as partners do in a partnership. A partnership serves all the partners, but to do so a partnership may call on partners to contribute capital for common projects. By analogy, in some situations government may justly make calls on citizens to surrender property for common projects.

Second, that justification imposes principled limits on eminent domain. If a government means to take property to secure the rights of all citizens, the condemned property must be put to uses that serve all citizens' rights. That requirement justifies public use limitations, as long as

122. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

123. *See* Michelman, *supra* note 52; Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

124. *See* Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877 (2005).

"public use" is construed relatively strictly. In addition, eminent domain requires just compensation. Since eminent domain constitutes a special exception to the project of securing property rights, when government condemns property it should hold condemnees harmless.

Third, many disputes that seem to raise "eminent domain" issues really raise two sets of issues. Some of the issues are about eminent domain in its narrow, rights-justified sense, and the issues left over are about the scope of the police power. In the most important of these disputes, governments get authority to "condemn" property not pursuant to the eminent domain power but the police power, and specifically the power to secure to affected owners average reciprocities of advantage. Chapter 14 illustrates with a famous constitutional challenge to a mill act, *Head v. Amoskeag Manufacturing Co.*,[125] and it traces the implications for contemporary disputes in which developers get municipal authorities to condemn private property for commercial or real estate development.

Chapter 14 also addresses skepticism similar to the skepticism discussed in Chapters 12 and 13. The 1954 U.S. Supreme Court decision *Berman v. Parker* held that the eminent domain power is coterminous with the police power, and that the "purposes" justifying action under either power are "neither abstractly nor historically capable of definition."[126] And in the 2005 case *Kelo v. City of New London*, the Court suggested it was impossible to distinguish between "public purposes" that justify police regulation and "public uses" necessary for eminent domain.[127] But the eminent domain and police powers do not need to be conflated, at least not if a citizenry and its elites want their government to secure rights. Chapter 14 shows how to keep the eminent domain and police powers separate. And, how those two powers complement one another in disputes in which government condemns property.

4. Chapter 15: Property and Contemporary Policy

Chapter 15 concludes *Natural Property Rights*. It brings together all of the lessons from Chapters 4 through 14. To do so, the chapter applies *Natural Property Rights*'s lessons to issues in contemporary law and policy, and especially to problems that need to be addressed by legislation.

But the *Campo* case illustrates *Natural Property Rights*'s claims and implications as well as any of the issues studied in Chapter 15 of the

125. 113 U.S. 9 (1883); *see* EPSTEIN, *supra* note 119, at 170–75.
126. 348 U.S. 26, 32 (1954).
127. *See* Kelo v. City of New London, 545 U.S. 469, 477–84 (2005).

book. That is why we can turn to the *Campo* case in the rest of this Article. Part III gives readers the background for the case, and it goes through the December 2021 opinion.

III. *CAMPO V. UNITED STATES*: A CASE STUDY

A. *The Bonnet Carré Spillway*

In *Campo*, the plaintiffs are asking the U.S. Court of Federal Claims to hold that the U.S. Army Corps of Engineers inversely condemned property rights when it diverted water into the Bonnet Carré spillway. The spillway sits on the Mississippi River, more than 30 miles west and upstream of New Orleans. The spillway is a release valve; the Corps diverts water from the Mississippi River through it when the river seems dangerously likely to overflow near New Orleans. When the spillway is opened, overflow water runs in a floodway six miles to Lake Pontchartrain (north of New Orleans), into Lake Borgne and nearby marshes, and ultimately into the Gulf of Mexico.[128]

The spillway was authorized by a 1928 act of Congress, passed in response to four large floods in the nineteenth century and another one in 1927. The spillway was built (with construction ending in 1932) at a spot at which the 19th-century floods had already opened crevasses in the Mississippi River.[129] The Corps operates the spillway, and the decision whether to open it is made by a local commission advised by the Corps District Engineer for New Orleans.[130] The spillway has been opened at close to full capacity on several occasions—1937, 1945, 1950, 1973, 1979, 1983, 1997, and 2011.[131]

B. *Oyster Production*

Although the Bonnet Carré spillway protects lives and property around New Orleans, when it is open it threatens oysters in the Gulf Coast. Adult oysters thrive in water with salinities from 9 to 13 parts per

128. *See* Campo v. United States, 157 Fed. Cl. 584, 589 (2021).

129. *See* New Orleans District, *Bonnet Carré Spillway Overview*, U.S. ARMY CORPS OF ENG'RS, https://www.mvn.usace.army.mil/Missions/Mississippi-River-Flood-Control/Bonnet-Carre-Spillway-Overview/ [https://perma.cc/VS9F-3ZEH].

130. *See Campo*, 157 Fed. Cl. at 590.

131. *See* New Orleans District, *Historic Operations of the Bonnet Carré Spillway*, U.S. ARMY CORPS OF ENG'RS, https://www.mvn.usace.army.mil/Missions/Mississippi-River-Flood-Control/Bonnet-Carre-Spillway-Overview/Historic-Operation-of-Bonnet-Carre/ [https://perma.cc/Z2CS-SVP5]; *see also* Complaint, *supra* note 5, ¶ 57.

thousand, and Gulf Coast water is usually that briny.[132] Since the Mississippi is a fresh-water river, whenever water is diverted from the spillway it lowers salinity levels in the parts of the Gulf Coast where it comes out. One study forecast that diversions lower Gulf Coast salinity levels to six parts per thousand.[133]

Those diversions jeopardize commercial oyster production. Louisiana owns the portions of the Gulf Coast within its territorial jurisdiction, and that ownership entitles the state not only to the water[134] but also to the subsurface bottoms beneath the gulf.[135] Although the Louisiana Constitution stops the state from alienating its ownership of state water bottoms,[136] the state may grant limited rights over the water bottoms and by statutes it has done so. Statutes authorize the state Department of Wildlife and Fisheries ("DWF") to lease water bottoms to oyster producers.[137] (In what follows, I'll call such leases "oyster leases," as the relevant statutes do.[138]) Oyster leases usually run for 15-year terms, and as of 2016 the rent for a lease was three dollars per acre.[139]

Oyster fishermen lease coastal bottoms because they can raise more oysters on bottoms they tend. Oysters can be raised by a process not that different from ordinary agricultural farming, and this sort of oyster production is sometimes called "oyster farming."[140] The analogue to fertilized soil is called "cultch"—a hard substrate made from oyster reefs, small rocks, limestone, and concrete. The analogues to crop seeds are "seed" oysters, which oyster producers "plant" on the water bottoms they lease and the cultch they lay. Planted oysters take up to five years to grow to maturity and be ready for proverbial "harvesting."[141]

132. *See Campo*, 157 Fed. Cl. at 590.
133. *See id*. at 590–91.
134. *See* LA. STAT. ANN. § 9:1101 (2022).
135. *See* LA. STAT. ANN. § 56:3(A) (2022).
136. *See* LA. CONST. art. IX, § 3 (2022).
137. *See* LA. STAT. ANN. § 41:1225 (2022). For an overview of the state oyster leasing program, *see* Avenal v. State, 886 So. 2d 1085, 1095–96 (La. 2004).
138. *See*, *e.g.*, LA. STAT. ANN. § 56:434(B) (2022).
139. *See* Campo v. United States, 157 Fed. Cl. 584, 589 (2021).
140. *See, e.g.*, *id.* at 589–90, 611; *Avenal*, 886 So. 2d at 1095–96; James Burling, *On Oysters, Property, John Locke, and the Court of Federal Claims:* Campo v. United States, FEDSOC BLOG (Jan. 25, 2022), https://fedsoc.org/commentary/fedsoc-blog/on-oysters-property-john-locke-and-the-court-of-federal-claims-campo-v-united-states [https://perma.cc/B8M7-WZ5W].
141. *See Campo*, 157 Fed. Cl. at 589.

C. *The 2019 Spillway Opening*

In 2019, the Corps and the responsible local commission opened the Bonnet Carré Spillway for a total of 123 days, from mid-February through mid-April, and then again from mid-May through mid-July. Louisiana state officials, including the Governor, admitted that the opening of the spillway had lowered salinity levels in state oyster beds and increased mortality rates for seeded oysters.[142]

D. *The* Campo *Lawsuit and the December 2021 Opinion*

Campo and the other plaintiffs brought a federal inverse condemnation action in federal court in 2020. They sued for just compensation for at least $1.6 billion in just compensation.[143] The plaintiffs argued that they had suffered inverse condemnations of their rights to the use of their oyster leases, and also of their rights to oysters they were raising or were imminently about to raise.[144]

The United States moved to dismiss the plaintiffs' complaint in part.[145] The dismissal motion focused on dismissing whatever claims the plaintiffs were making for just compensation in Louisiana oysters.[146] Louisiana Revised Statutes § 56:3 provides that:

[t]he ownership and title to . . . the beds and bottoms of . . . lagoons, lakes, sounds . . . connecting with the Gulf of Mexico within the territory of or jurisdiction of the state, including all oysters . . . either naturally or cultivated, and all oysters in the shells after they are caught or taken therefrom, are and remain the property of the state.[147]

Under § 56:3, the lawyers for the United States argued, "the oysters are still not the property of the oyster lessees, even after they've been harvested."[148]

142. *See id.* at 591. *See* Boyce Upholt, *A Louisiana Spillway Helps Flood-Proof New Orleans. It's Killing Mississippi's Local Seafood Industry*, THE COUNTER (Sept. 16, 2019), https://thecounter.org/mississippi-oyster-die-off-bonnet-carre-spillway/ [https://perma.cc/3UAB-6XQM].

143. *See* Complaint, *supra* note 5, ¶¶ 73–74.

144. *See id.* ¶¶ 72–74.

145. *See* United States's Motion to Dismiss in Part, Campo v. United States, 157 Fed. Cl. 584 (2020) (No. 20-44L).

146. *See id.* at 1, 8; *see also Campo*, 157 Fed. Cl. at 591.

147. LA. REV. STAT. § 56:3 (2022).

148. *Campo*, 157 Fed. Cl. at 602 (quoting statements made by counsel for the United States during oral argument).

The December 2021 *Campo* opinion denied that motion.[149] The opinion concluded that Campo and the other "plaintiffs have several" classic property rights in oysters—"including rights to exclude, destroy, use, possess, . . . alienate, and enjoy the fruits of selling . . . oysters."[150] To support that conclusion, the opinion consulted many ordinary sources of positive law, especially Louisiana sources on oysters[151] and U.S. Supreme Court eminent domain cases.[152]

But the December 2021 opinion also consults Locke. As Locke had, the opinion "ascrib[es] 99 percent of the value of property to labor."[153] The government's argument, "that plaintiffs lack property rights in the oysters," the opinion insists, "runs counter to the Lockean foundation of the Fifth Amendment Takings Clause." "[P]laintiffs' 'blood, sweat and toil,'" the opinion concludes, "when 'mixed' with the water bottoms [and] seed oysters confirms plaintiffs have quintessential Lockean property rights in the oysters."[154]

Although the December 2021 opinion settled important issues, in the context of the *Campo* litigation, the opinion was strikingly limited. The opinion only settled that Louisiana law entitles the plaintiffs to private property in the oysters they raise. The U.S. government did not question in any way the just compensation claims the plaintiffs were making for interference with their oyster leases. In addition, because the dismissal motion focused heavily on § 56:3, the December 2021 opinion does not settle whether any of the plaintiffs' claims have been waived or subordinated by other statutes or legal provisions. In Louisiana, many oyster leases include boilerplate language holding the state harmless for damage caused to oyster production by state- and federally-sponsored coastal protection measures.[155] The opinion does not say whether the plaintiffs' leases include such clauses. If the plaintiffs' leases do include

149. *See id.* at 584.
150. *Id.* at 613.
151. *See id.* at 609–14. Because Louisiana is a civilian jurisdiction, case law from it is not as binding on courts as parallel case law is in common law jurisdictions. Louisiana court decisions applying statutes do not control the reasoning of later courts applying those same statutes as much as would statutory precedents in common law jurisdictions. Louisiana courts apply a principle of *jurisprudence constante* that has less binding force than stare decisis. *See id*. at 595 (quoting Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 79 So. 3d 246, 256 (La. 2000), opinion corrected on reh'g, 782 So.2d 573 (La. 2001)). Judge Holte was right to note the character of civilian judicial reasoning and also not to dwell overlong on it in his legal analysis.
152. *See id.* at 611–12 (discussing Murr v. Wisconsin, 137 S. Ct. 1933 (2017); Horne v. Dep't of Agric., 576 U.S. 350 (2015)).
153. *Id.* at 614 (*citing* LOCKE, *supra* note 2, II.v.40, at 296).
154. *Id.* at 615.
155. *See* Avenal v. State, 886 So.2d 1085, 1096–98 (La. 2004).

such clauses, Judge Holte will need to determine whether they apply. Separately, the parties did not brief the applicability of Louisiana Revised Statutes § 56:423, the statute that recognizes and authorizes the creation of oyster leases. In the December 2021 opinion, Judge Holte specifically instructed the parties to discuss § 56:423 in upcoming status reports.[156] Most important, the December 2021 opinion did not address whether the plaintiffs' property was inversely condemned ("taken" in constitutional substance without a formal eminent domain proceeding).

E. *This Article's Study of* Campo

The *Campo* lawsuit raises a host of interesting issues in property law and policy. Before proceeding, however, I want to explain which issues this Article will cover and highlight a few it will avoid covering. *Natural Property Rights* is written primarily for scholars interested in property law and policy, and this Symposium convenes scholars very much representative of the book's target audience. That being so, in the rest of this Article, I consider whether Lockean labor theory sheds helpful light on the normative issues driving the *Campo* lawsuit. In this Article, then, I study the precise issue settled in the December 2021 opinion—private property in oysters—but I also consider many other issues germane to the *Campo* plaintiffs' inverse condemnation claims.

Given that focus, however, this Article sidesteps some interesting jurisprudential questions. Today, some may find it ill-seeming to invoke natural law or rights in legal argument, and people so disposed may wonder whether the December 2021 opinion reasoned in a manner unbecoming of a twenty-first-century judicial opinion.[157] I may come back to those questions in later scholarship. But I suspect that this concern is overwrought. I strongly suspect that modern lawyers still "do" natural law, and if I am right then a court does not go out of bounds when it consults natural law in its legal reasoning.

Several cases confirm my suspicion,[158] and the December 2021 opinion cites and relies on two of them. In the 1984 decision *Ruckelshaus v.*

156. *See Campo*, 157 Fed. Cl. at 618 n.27.

157. *See* STUART BANNER, THE DECLINE OF NATURAL LAW (2021). In relation to *Campo*, *compare* Ryan M. Seidemann, *What Is an Oyster?*, 69 LA. B.J. 486 (2022) (politely dubious about reliance on natural rights) *with* Burling, *supra* note 140 (supportive of reliance on Locke and natural rights).

158. A third, not mentioned in text, is Palazzolo v. Rhode Island, 533 U.S. 606 (2001). In that case the wetlands regulation Palazzolo was challenging was on the books when Palazzolo acquired the land in dispute from a predecessor. Rhode Island argued that Palazzolo's notice of the regulation at transfer waived any eminent domain claim he had.

Monsanto Co.,[159] a Court majority described trade secrets as fitting "a notion of 'property' that . . . includes the products of an individual's 'labour and invention,'" and it cited passages from Blackstone's *Commentaries on the Laws of England* and Locke's *Second Treatise* invoking natural law.[160] In the 2015 decision *Horne v. Department of Agriculture*,[161] another Court majority distinguished contrary precedents—on oyster catching, even—on the ground that the oysters in those cases were not "the fruit of the growers' labor" as were the raisins allegedly taken in *Horne*.[162] Now, when the Court majorities that decided *Horne* and *Ruckelshaus* invoked labor, maybe they also crossed lines. I do not think so. It would take me far afield from this Article's main claims to explain why, so I hope readers will accept the following summary as a substitute for a thorough argument.

In mine-run natural law theories, most of the reasoning and argument conducted by lawyers relies on positive law. As John Finnis explains, "[t]he tradition of natural law theorizing is not concerned to minimize the range and determinacy of positive law"; its "concern . . . has been to show that the act of 'positing' . . . is an act which can and should be guided by 'moral' principles and rules."[163] Competently-designed positive law carries the natural law into effect, by reducing the natural law's general prescriptions to specific directives.[164] Ordinarily, then, practicing lawyers carry the natural law into effect by applying positive law—as discerned using ordinary methods of legal interpretation.

Natural lawyers consult the natural law while working with positive law in one or both of two scenarios. They may consult natural law to help settle questions not clearly settled by ordinary methods of legal interpretation. (That is how labor was used in *Horne* and in some passages of the December 2021 opinion.) They may also consult it to identify the purposes that controlling positive law sources are designed to further. (As in *Ruckelshaus* and in other passages of the December 2021 opinion.) When natural lawyers appeal to natural law in those scenarios, however, the natural law neither undermines nor displaces positive law.

Responded Justice Anthony Kennedy for the Court: "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle." *Id.* at 627.

159. Ruckelshaus v. Monsanto, 467 U.S. 986 (1984), *cited in* Campo, 157 Fed. Cl. at 614.

160. *See id.* at 1003 (citing 2 BLACKSTONE, *supra* note 40, at *405; Locke, *supra* note 2).

161. Horne v. Dep't of Agric., 576 U.S. 350 (2015), *cited in* Campo, 157 Fed. Cl. at 611.

162. *Campo*, 157 Fed. Cl. at 611 (quoting Leonard v. Earle, 141 A. 714, 716 (Md. App. Ct. 1928)).

163. FINNIS, *supra* note 70, at 290.

164. *See* AQUINAS, *supra* note 44, at I-II Q. 95, art. 2.

In the former scenario, modern-day, natural law-skeptical lawyers would say that legal sources are not decisive; the natural law supplies reasons for decision analogous to what modern-day lawyers would call "policy arguments." In the latter scenario, the natural law gives context and focus to controlling statutory language; that guidance resembles the guidance modern-day lawyers get from consulting background understandings, intentions, or purposes in the course of statutory interpretation.

Jurisprudentially, then, the December 2021 opinion did not go out of bounds simply because it consulted labor and natural rights. But that response still begs the most important normative question. It was indeed problematic for the December 2021 opinion to rely on labor and natural rights if those concepts are as "fraught with difficulties"[165] as they are portrayed as being in property scholarship. That is why this Article focuses on the normative case for labor and natural rights. And why, in the rest of this Article, I apply such a theory to the dispute in *Campo*. The rest of this Article shows how labor theory supplies coherent guidance to the policy issues underlying *Campo*. Along the way, this Article considers two sorts of objections. I try to anticipate objections that reasonable policy-makers would anticipate if they were trying to set policy about Louisiana shoreline protection or Gulf Coast oysters. I also restate and apply in context the criticisms made most often and forcefully against Lockean labor theory.

IV. THE MORAL CONTEXT FOR NATURAL RIGHTS IN OYSTER PRODUCTION

Assume someone wants to know whether it is a good idea for Campo and other oyster producers to hold some sort of property in relation to Gulf Coast oysters. Or, if you like, assume that someone wants to know whether it is a good idea for the U.S. Army Corps of Engineers to protect New Orleans and other similarly-situated Louisiana cities—without paying off Gulf Coast oyster producers for damages caused incidentally by spillway diversions. Either way, why might it be worthwhile to consult labor or natural rights? I have two answers in the alternative.

A. *Labor and Legitimate Authority*

The first answer is philosophical: Labor legitimates property law.[166] Whenever a government enforces its laws and policies, it backs them up

165. DAGAN, *supra* note 84, at 1; *see supra* notes 84 and 85 and accompanying text.
166. *See, e.g.,* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS OF LAW AND MORALITY 3–27 (1st

with the threat of government-sponsored violence. And when a government reserves the power to use violence, it raises basic questions of legitimate authority. Criminals in a syndicate have no convincing justifications for taking the lives, liberties, or property of their targets.[167] Governments need correspondingly-convincing justifications when they take or threaten the same rights while carrying out their basic functions.

That challenge applies in *Campo* as it does anywhere else. The underlying lawsuit implicates at least three sets of pre-political rights. Campo and class plaintiffs are entitled to rights to raise and sell oysters without inappropriate interference. Louisianans who might want to catch oysters should be presumed to have rights to appropriate oysters not yet accounted for. Last, Louisianans who live in New Orleans and other Mississippi River-adjacent cities are entitled to enjoy their lots securely. To secure those rights, the Louisiana and U.S. governments should have free rein to maintain the Mississippi River's shoreline.

Those three sets of rights need to be reconciled. All of the right-holders must enjoy equal opportunities to exercise their rights. A normative legal theory has legitimate authority if it reconciles those rights in a manner that seems reasonably convincing and satisfying. So a property right in oysters, and a water-diversion policy, possess legitimate authority if they seem consistent with a broader project to secure the rights of all the affected Louisianans on equal terms.

B. *Labor and Pragmatic Policy-Making*

Some readers may disagree that the most urgent function of a normative legal theory is to endow law with legitimate authority. In law and in legal theory, many sources encourage judges and regulators to resolve disputes in the model of Bruce Ackerman's "scientific policymaker."[168] This is the model I call "pragmatist" in *Natural Property Rights*. In this model, adjudication and regulation are relatively apolitical. Judges and regulators get broad discretion, to assign rights and responsibilities as seems desirable in different recurring disputes.

ed. 1979).

167. *See* SAINT AUGUSTINE, THE CITY OF GOD, bk. IV § 4 (Marcus Dods trans., 1871), www.gutenberg.org/files/45304/45304-h/45304-h.htm [https://perma.cc/FS6U-FK6E]. Locke gets at the same issues when he contrasts the state of nature, *supra* note 2, II.ii, at 269-78, with the state of war, *id.* at II.iii, at 278–82. *See also* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

168. *See* ACKERMAN, *supra* note 52, at 10–20, 23–40.

As the last Section suggested, this model is troubling because it avoids fundamental questions about moral and political legitimacy. But for readers who find the model satisfying, I have an alternative answer to my "why" question. That answer relies on indirect-consequentialist reasoning. Even if one wants government officials to exercise wide discretion, it is unrealistic to expect them to use that discretion effectively. Even if an official does not grant that natural law principles are just and right, those principles may still supply helpful and resilient rules of thumb.

It is reasonable to suspect that, in practice, judges and regulators may not use broad discretion productively. Since everyone's capacity for reasoning is limited,[169] even the most well-meaning judges and regulators can make mistakes when they decide how resources should be used. Since people pay more attention to their own resources and interests than they do to others',[170] judges and regulators can end up applying broad discretion in ways that favor their own class interests or the class interests of the most forceful and influential parties who appear before them. And since people often seek to conform to prevalent opinions,[171] well-meaning judges and regulators sometimes miss what is really best for the parties and resources before them and instead do what elite opinion recommends.

Even on apolitical, pragmatic grounds, then, a system of property law may "work" more often if it relies on extremely indirect reasoning than if it trusts government officials to decide each resource dispute on its own merits. In the indirect approach, a system of property law identifies basic ways in which human activity seems morally valuable or valueless. That is the contribution of basic principles of natural law. The indirect approach also marks off broad spheres of discretion for people to exercise. That way, people can use their own talents and self-love to pursue goods they find satisfying. And officials can perform a more manageable role; they can secure the spheres of discretion that people rely on when they pursue their own projects. Those are the contributions of natural rights.

169. *See* THE FEDERALIST NO. 10, 104-107 (1787) (James Madison) (George W. Carey & James McClellan eds., 2002); *see generally* Friedrich A. Hayek, *The Use of Knowledge in Society, in* 35 THE AMERICAN ECONOMIC REVIEW 519 (1945).

170. *See* Madison, *supra* note 169, at 106; *see* Hayek, *supra* note 169, at 519.

171. *See* Madison, *supra* note 169, at 104–07; *see also* THE FEDERALIST NO. 49, 259-263 (1788) (Alexander Hamilton) (George W. Carey & James McClellan eds., 2002).

C. *Oyster Production As Labor*

In both accounts, philosophical and pragmatic, labor is key. When labor is justified consistent with natural law, it does not mean what the United States and Judge Holte suggested it might mean—"blood, sweat, and toil" on a particular resource.[172] So justified, labor is sensitive to context and to the just interests of other people. As A. John Simmons explains, "labor" consists of "purposive activity aimed at satisfying needs or supplying the conveniences of life."[173] People can and do pursue all sorts of different projects to survive or thrive, and the projects that gratify some people may not gratify others at all. But all people are capable of acting intelligently and purposefully. They are capable of pursuing projects that will help them survive or thrive somehow. Since surviving and thriving are good, and since people have rights to do what is good, they have rights to labor.

Oyster production illustrates the philosophical dimensions of labor. For some people, oyster production is simply and intrinsically morally valuable. Some people like producing things, they exhibit important virtues when they produce things, and they excel morally by practicing those virtues. But oyster production can also constitute morally valuable labor even when the producers dislike raising oysters. The production remains valuable as long as it helps customers survive or flourish. Oysters provide sustenance. For some eaters, they constitute a tasty treat. For other people, oysters are valuable because they produce pearls and pearls are pretty to look at.[174] Although oyster-eating can devolve into gluttony, and the enjoyment of pearls can devolve into greed, oyster gourmands and pearl admirers both deserve the benefit of the doubt. In a rights-based theory of politics, people are presumed to be free to pursue those pastimes that please them for "*any* advantage of life."[175] Since people can be trusted to enjoy oysters responsibly, we can trust and expect that the production of oysters is valuable as well.

But oyster production also illustrates nicely why, even on apolitical and pragmatic grounds, it is advantageous to focus policy on labor. Ideally, conscientious scientific policymakers would need to assess why oyster producers were raising oysters and whether they got gratification from doing so. They would need to ask similar questions about all

172. Campo v. United States, 157 Fed. Cl. 584, 615 (2021).
173. A. JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS 273 (2020).
174. *See* LOCKE, *supra* note 2, II.v.47, at 300 (suggesting that it is rational for people to acquire metals and stones, "pleased with [their] colour.").
175. *Id.* II.v.31 at 290 (emphasis added).

of the prospective customers of oyster producers. They would then need to weigh the costs and benefits of oyster production against the costs and benefits of living near the Mississippi River. Even if the officials could tally all of the relevant costs and benefits without error, they would need to figure out how to reconcile costs and benefits that seemed incommensurable. Labor does not eliminate those challenges, but it does finesse many of them. When labor and rights focus government policy-making, officials only need to determine whether different activities seem intelligent and purposeful activity reasonably likely to help people survive or flourish. Oyster-raising, oyster-consuming, and land use all seem such activities. All generate rights. So instead of trying to identify optimal levels of oyster production and riparian land conservation, officials only need to reconcile rights.

V. PRIVATE PROPERTY IN RAISED OYSTERS AND IN COASTAL WATER BOTTOMS

The labor just studied in the last Section justifies two categories of natural property rights. When oyster producers raise oysters from seed, the raising constitutes labor and it justifies property in the oysters. When oyster producers improve water bottoms to raise oysters, the improvements also constitute labor, and that labor justifies property in the water bottoms. Now, those natural rights are subject to principled limits, corresponding to interests of Louisiana and federal authorities, to protect the correlative rights of people besides oyster producers. But limits like those do not extinguish natural rights. The limits only confirm that natural rights are always qualified by duties and limits respecting the correlative rights of others. So this Part studies the natural rights to property in oysters and water bottoms; the limits on those rights can be traced in Parts VI, VII, and VIII.

A. *Labor and Property*

When people labor, they exercise natural rights of liberty. But natural property rights differ from the many natural rights that inhere in people's broad rights of liberty. As subsection II.B.1 explained (summarizing Chapter 4 of *Natural Property Rights*), because the resources covered by property are not tied closely to any specific individual's person, in principle anyone may appropriate and use them. To establish property in an ownable resource, the would-be proprietor must establish a closer connection to the resource than anyone else. As subsection II.B.2 explained (Chapter 5 of the book), productive labor and claim

communication establish that connection. Productive labor brings the resource into the scope of the claimant's value-creating projects. Claim communication gives others fair notice that they will interfere with a laborer's value creation and that they had better look for other resources to use for their own projects.

B. *Raised Oysters*

We can start with the oysters, the focus of the December 2021 *Campo* opinion. In the right conditions, oyster production establishes property rights. Assume that a seed oyster isn't yet the property of any person or entity. As Section IV.C showed, when oyster producers raise seed oysters to maturity, their raising constitutes morally valuable labor. As Locke puts it, the raising "does not lessen . . . the common stock of mankind" by taking seed oysters away from others. Rather, the raising "increases" that stock by increasing the store of "provisions serving to the support of humane life."[176] Oyster fishermen would have grounds to be concerned if a competitor took wild oysters that they might themselves have caught. But fishermen cannot justly complain that they were denied access to oysters someone else raised from seed. So the raising satisfies the first requirement of a natural property right; it labors to produce goods likely to contribute to human survival or flourishing.

Oyster producers must also satisfy the claim communication requirement. To satisfy that requirement, when they raise seed oysters, they must do so in ways that preserve the "distinction"[177] between their own production and parallel oyster farming or harvesting. Assume for the moment that oyster producers raise seed oysters in some location that is suitably distant from the waters where oyster fishermen can catch wild oysters from other producers' bottoms and from public waters. Assume also that the producers broadcast clearly that their oyster farms are off-limits to oyster catchers, energy companies, and others. On that assumption, oyster producers communicate their property claims, and they become entitled to natural rights in relation to the seed oysters they are raising.

C. *The "Lien" Objection to Labor (As Applied to Oysters)*

Richard Epstein suggests that labor theory does not justify natural rights as broad as producers would need to own oysters in law. When

176. *Id.* II.v.37, at 294.
177. *Id.* II.v.28, at 288.

someone labors on an unowned resource, Epstein argues,[178] the laborer may never acquire more than the equivalent in morality to an equitable lien[179] or the equitable interest an improver holds in the value she creates from improving someone else's raw materials mistakenly but honestly.[180]

This critique helps clarify how labor is structured—or, at least, how it is structured when it is justified consistent with natural law. In principle, "[t]he measure of Property" is indeed "set, by the Extent of Mens Labour, and the Conveniency of Life."[181] And according to that "measure," oyster producers are entitled only to the improvements they have made to seed oysters.

In another respect, however, this critique is not charitable. The critique suggests that labor theory neither fits nor justifies the broad property rights that oyster producers enjoy in practice. For that suggestion to have force, however, theories of labor and rights must rely on the "copy" view of morality studied and refuted in Chapter 3 of *Natural Property Rights*. Since labor-based rights are usufructs, the suggestion runs, labor can never justify more than equitable liens. But positive law property rights do not need to copy directly off of usufructuary natural rights. Those usufructs supply (Locke again) the "measures" on which legal officials should rely when they decide whether positive law property rights are doing what they should do. And positive law rights of absolute ownership might secure labor better than positive law usufructs could. This reasoning is practical—again, it applies what Locke calls the "great art of government."[182] But through such reasoning, oyster producers might be able to parlay moral usufructs in oysters into legal rights of ownership.

And the practical case for absolute ownership is easy to see. Assume (with Locke) that a mature oyster contributes 100 times more to human survival and flourishing than a seed oyster.[183] From the standpoint of

178. *See* Richard A. Epstein, *Possession As the Root of Title*, 13 GA. L. REV. 1221, 1225-30 (1979).

179. *See, e.g.*, Timmer v. Gray, 395 N.W.2d 477 (Minn. App. 1986).

180. *See, e.g.*, Isle Royale Mining Co. v. Hertin, 37 Mich. 332, 337 (1877); Wetherbee v. Green, 22 Mich. 311, 312–13 (1871). Cases about mistaken encroachments and improvements are discussed in Chapters 9 and 10 of *Natural Property Rights*. Chapter 10 studies mistaken improvements to show how the *res* corresponding to different articles change depending on the relative contributions of the mistaken improver and the owner of the raw input. Chapter 9 shows how mistaken encroachment and improvement doctrines limit the scope of absolute ownership.

181. LOCKE, *supra* note 2, II.v.36, at 292.

182. *Id.* II.v.42, at 298; s*ee supra* note 71 and accompanying text.

183. *See* LOCKE, *supra* note 2, II.v.40, at 296.

claim communication, it seems really impractical to separate the seed from the contribution from oyster-raising.

The productive labor requirement and the sufficiency proviso reinforce the same conclusion. Chapters 8 and 9 of *Natural Property Rights* explain why, and in the course of so doing they also address the main concerns that egalitarian critics have of property rights. When a system of property law denies everyone but an oyster producer access to the seed oysters she is raising, the system may seem to extinguish rights of access that others might have in the seed oysters. In most conditions in practice, however, absolute ownership performs a role that Nozick calls "satisf[ying] the intent behind the [sufficiency] proviso."[184] Most people do not want to bother raising their own oysters. When producers seed oysters to maturity, they expand the store of oysters available for others to acquire in purchases. So in Locke's terms, in most conditions in practice, the "Property of labour" in oyster production "should be able to over-ballance the Community of" rights of access in immature oysters.[185] And if or when that forecast breaks down in practice, as Chapter 9 of *Natural Property Rights* shows property law lets officials add safety valves to deal with the breakdowns.

In the December 2021 *Campo* opinion, Judge Holte concluded that raised oysters were the property of Campo and his co-plaintiffs because their "'blood, sweat, and toil' [had been] missed with the oysters and this mixture is why [the] plaintiffs are paid when they sell oysters."[186] As Epstein's critique suggests, the justification for property is a little more complicated than that. A fully-developed justification needs to explain why oyster producers like Campo may parlay usufructuary rights in the oysters they have raised into legal rights of absolute ownership. But that case can be made, and it seems quite reasonable. So whatever Louisiana law says about property in oysters,[187] the law should hold that oyster producers keep absolute ownership in oysters they raise from seed.

184. NOZICK, *supra* note 45, at 177.

185. LOCKE, *supra* note 2, II.v.40, at 296 (emphasis removed).

186. Campo v. United States, 157 Fed. Cl. 584, 615 (2021).

187. In my opinion, the most relevant Louisiana statutes do not support the United States's argument that raised oysters remain public property of the state of Louisiana. Some Louisiana statutory provisions could be read to suggest that result if they were read in isolation. *See* LA. CIV. CODE ANN. art. 3413 (2022) (declaring that wild shellfish in states of natural liberty belong to the state of Louisiana); LA. STAT. ANN. § 56:3(A) (2022) (reserving to Louisiana and the oversight of the state Wildlife and Fisheries Commission all oysters). But other provisions suggest that Louisianans may establish and exercise property over oysters they enclose privately and raise; *see* LA. CIV. CODE ANN. art. 3415 (declaring that enclosed wild animals constitute private property); LA. CIV. CODE ANN. art. 3417 (declaring that domesticated animals constitute private property); LA. STAT. ANN. §

D. *Private Property in the Use of Coastal Water Bottoms*

The last two Sections supplied the background one would need to evaluate the moral merits of the issues raised by the U.S. government's partial dismissal motion in *Campo*. But the *Campo* plaintiffs have other claims to press—most notably, claims to just compensation for interference with their oyster leases.[188] And as Section B suggested, as a matter of natural right, whatever claims the plaintiffs have to property in oysters is probably intertwined anyway with whatever property rights they hold in their leases.

Coastal water bottoms test labor theory more than oysters do. Water bottoms fall between two obvious and homey paradigms about property. On one hand, as Judge Holte noted, water bottoms resemble farmland. On that analogy, if "[a]s much Land a Man Tills, Plants, Improves, Cultivates, and . . . use[s] the Product of, so much is his Property,"[189] the same conclusions seem to follow for water bottoms and cultch.

On the other hand, water bottoms are also parts of coastal waters. And intuitively, coastal waters seem bad candidates for private property. Locke trades on those intuitions in his *Second Treatise*; he assumes in passing that oceans constitute "great and still remaining Common[ses] of Mankind."[190] As Chapter 5 of *Natural Property Rights* recounts, Nozick tests labor theories by whether someone may appropriate a sea by pouring radioactive tomato juice into it. It is thus reasonable for readers to wonder (with Nozick) whether, when oyster producers raise seed oysters on cultivated sea beds, they do not "come to own the" seed oysters and beds and instead "foolishly dissipate[]" the seed oysters and their labor.[191]

Examples like these help decision makers make judgments. Different arguments seem more or less persuasive in different contexts, and paradigm cases illustrate which arguments seem most persuasive in particular settings. But when a new case does not fit into the best-known

56.3(B) (anticipating that oysters may be reduced to private property, taken, and sold "as otherwise permitted in this Title"); LA. STAT. ANN. § 56:423(A) (entitling oyster lessees to "enjoy the exclusive use of . . . all oysters and cultch grown or placed" on coastal water bottoms leased from the state). In my reading, when all of these provisions are construed *in pari materia*, *see* LaBauve v. Louisiana Wildlife and Fisheries Comm'n, 444 F. Supp. 1370, 1380 (E.D. La. 1978), Louisiana law entitles oyster producers to property in the oysters they raise from seed—subject to conditions studied *infra* Parts VI and VII.

188. *See* Complaint, *supra* note 5, ¶¶ 68–70.

189. LOCKE, *supra* note 2, II.v.32, at 290.

190. *Id.* at 289.

191. NOZICK, *supra* note 45, at 175. This challenge (and the discussion that follows in text) are taken up in Claeys, *supra* note 1, at ch. 5.

paradigms, it doesn't follow that morality has nothing to say about that case. Existing paradigms supply points of reference on which decision makers may rely when they develop policies for new hard cases.

The paradigm for big bodies of water highlights a concern discussed in Chapter 9 of *Natural Property Rights*: In the right conditions, the productive labor requirement and the sufficiency proviso can justify carveouts from private property for public commons. Oceans should remain commons because they can be used concurrently for a wide range of productive uses—especially fishing, travel, and transportation. But the requirements for natural property rights can still justify property in water bottoms. That is why Judge Holte's analogies to ordinary farming are also helpful. As ordinary farmers labor on farmland, so too oyster producers labor productively when they raise oysters. And if producers need to make cultch for oyster production, it follows that they labor productively when they lay cultch on water bottoms.

Of course, to complete prima facie claims to natural rights in water bottoms, oyster lessees must also satisfy property's claim communication requirement. But it seems quite likely that oyster lessees satisfy that requirement. As the December 2021 opinion explains, as a general practice oyster lessees "are required to mark their plot[s], so, unlike commercial fishers, [other] oyster growers may discern what oysters are within their exclusive" authority.[192] That practice tracks the key Louisiana statute governing oyster leases, Louisiana Revised Statute § 56:423. Section 56:423(B) requires that, to have actions for damages, oyster lessees must "record[] and mark" their leases after they "obtain" them.[193] "Record[ation]" and "mark[ing]" require in law what is required in morality—providing reasonable notice of one's claims of exclusive use over a resource to the people who stand to be excluded by the claims.

At that point, there seems to be a conflict in principle. The sufficiency proviso and the productive labor requirement seem to counsel against private property, while the productive labor and claim communication requirements seem to counsel in its favor. But that conflict does not show that labor theory is incoherent or incapable of supplying guidance. The conflict requires more practical reason.[194] In context, authorities should institute limited property rights in water bottoms, taking into account the considerations favoring property in water bottoms and public commons status for the water sitting over the bottoms.

192. Campo v. United States, 157 Fed. Cl. 584, 611 (2021).
193. LA. STAT. ANN. § 56:423(B) (2022).
194. LOCKE, *supra* note 2, II.v.42, at 298.

Section 56:423 and companion provisions institute what seems a satisfying compromise. Those statutes establish oyster leases. The leases institute in Louisiana law a "semicommons," a regime in which a resource is deemed to be a public resource for some specific uses and a subject of private property for other uses.[195] Oyster leases protect and encourage the labor of oyster producers. But such leases do so in ways that leave coastal waters free for other private uses (energy exploration and production) and public uses (fishing and transportation).

Now, an oyster lease is an unusual property arrangement, and a system of law needs to fill in many details to make such an arrangement useful in practice. In moral terms, however, that detail work constitutes determination. Natural rights supply the guidance lawyers may reasonably expect if they identify the goals of laws and policies—as (Chapter 3 of *Natural Property Rights*) natural rights to travel, life, and property guide legislative reasoning about speed limits. The productive labor and claim communication requirements give guidance (Chapter 10) on the precise scope and time limits on the *res* someone can acquire in a water bottom. Among other things, they suggest that the lien objection be decisive for water bottoms even though it is not decisive for property in oysters. Because water bottoms are subject to many public uses, when oyster producers improve water bottoms, they should be entitled only to the exclusive use of their improvements and not to total ownership of the bottoms.

Labor and claim communication also justify water bottom property coming in the form (Chapter 11) of a lease. Neither mandates that oyster producers get leases. But labor (and sufficiency) justify limited property rights, and a lease is a convenient institution for assigning limited rights. And claim communication justifies clear rights, and leases provide a regular and clear model for organizing limited rights.

VI. *CAMPO*, NATURAL RIGHTS, AND PUBLIC LIMITS ON PROPERTY

As Part V showed, labor entitles oyster lessees to natural rights in the use of the water bottoms they improve and to the seed oysters they raise. But those lessons will almost certainly provoke two further worries.

I'll call the first worry the "one-hit wonder" view. This worry expresses a concern some lawyers and scholars have about labor theories of property. In this worry, the only doctrines that labor can justify relate

195. *See* Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields,* 29 J. LEGAL STUD. 131, 131–33 (2000).

to the acquisition of private property from unowned but ownable resources.[196] If labor is only good for that one "hit," it cannot supply helpful guidance on any of the remaining issues left to be litigated in *Campo* after the December 2021 opinion.

The other worry is the "one-way ratchet" view mentioned in this Article's introduction.[197] This view expresses a concern that many lawyers and scholars have about rights-based justifications for property. By definition, the worry goes, natural property rights can only ever "turn" in the direction of more property rights, never in the direction of limits on property.[198] If natural property rights work like one-way ratchets, when the December 2021 opinion held that Campo and the other plaintiffs have property in the oysters they raised, it all but decided the lawsuit for them.

Although neither of these worries is convincing, both repay careful study. At a minimum, if we study how natural rights apply to the other topics likely to be litigated in *Campo*, we'll appreciate much better how they relate to practice. Labor-based natural rights apply beyond the fox and whale cases and their modern-day analogues, but when they apply they justify not only property rights but government powers to act on property.

More than that, the same studies show how rights-based justifications differ from the justifications for property doctrines most influential in contemporary law and policy. The topics we'll turn to all bring private property into contact with public law. Like most other fields at the interface of property and public law, these fields are influenced heavily by what I've called here "pragmatist" points of view, ones that encourage judges and regulators to develop property law ad hoc and through utilitarian interest-balancing under relatively interventionist premises.[199] The two worries we'll discuss here help justify such pragmatism. If both worries are well-founded, labor theory is too narrow, rights-based justifications are too rigid and too extreme, and pragmatist interest-balancing seems sensible and even inevitable by default.

196. In casebooks, Lockean labor theory is usually introduced with acquisition and treated only there. *See, e.g.*, DUKEMINIER ET AL., *supra* note 85, at 14–15; THOMAS W. MERRILL ET AL., PROPERTY: PRINCIPLES AND POLICIES 60 (4th ed. 2022).

197. *See supra* Section I.D.

198. *See, e.g.*, WALDRON, *supra* note 56, at 3–4 (arguing that all rights-based justifications for property suffer from serious limitations); Alexander, *supra* note 57, at 753 & n.17 (attributing to classical liberal theories of property a "strikingly thin" account of social obligation and government power, and citing NOZICK, *supra* note 45, for this claim).

199. *See supra* notes 50–52 and accompanying text.

But labor is not that narrow, and rights are not that rigid and extreme. In what follows, I hope to show how labor and natural rights reconcile property in oysters with public interests in coastal conservation and shoreline protection. In the course of doing so, however, I also hope to show that public limits on property are more focused and rights-protective in a rights-based regime than they are in a pragmatist regime. And the differences we'll see in the laws and policies about coastal conservation and shoreline protection fairly illustrate general differences between rights-based strategies and pragmatist strategies. In the rest of this Article, then, we'll turn from the issues closest to the merits of the December 2021 opinion. We'll turn to issues about public commons and eminent domain that will get litigated if the *Campo* case proceeds to trial.

VII. PUBLIC LIMITS ON PROPERTY IN OYSTERS AND COASTAL WATER BOTTOMS

A. *Public Interests Lingering in Campo*

The place to start is with the substantive public interests that Louisiana and the U.S. government were trying to advance when they opened the Bonnet Carré spillway in 2019. If the state and the federal government had any such interests, those interests could limit the property rights of Campo and the other plaintiffs—even if (as the December 2021 opinion ruled) they pleaded facts sufficient to claim constitutional "private property" in the oysters they were raising. In federal eminent domain law, rights in private property may be limited by background state law and proprietors' reasonable expectations under that law.[200] Under relevant background state law, private property may be subject to public servitudes, and it may get displaced altogether by public commons.

The December 2021 opinion does not settle these issues; it focuses on the prior question whether the plaintiffs may claim any private property at all in Louisiana oysters. And since the U.S. government's dismissal motion and the opinion focus on property in oysters, both leave open the same substantive issues as those issues apply to oyster leases.

In contemporary law, these interests are addressed by many different doctrines, and different jurisdictions pursue different goals with those doctrines. But one approach deserves pride of place. This is the approach associated with the 1984 decision *Matthews v. Bay Head*

200. *See, e.g.*, Cedar Point Nurseries v. Hassid, 141 S. Ct. 2063, 2079 (2021); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028–29 (1992).

Improvement Association, by the New Jersey Supreme Court.[201] Under this approach, when some private resource is arguably subject to public limits, courts consider whether the resource is subject to some public trust.[202] And to decide whether a resource is indeed subject to a public trust, *Matthews* holds, "particular circumstances must be considered and examined before arriving at a solution that will accommodate the public's right and the private interests involved."[203]

Under *Matthews*, private property seems insecure. Private property gets protected only if, after balancing all of the relevant private and public utilities on the specific facts of a dispute, a court decides it seems on net socially beneficial to recognize such property. But if the one-hit wonder view is valid, theories of labor cannot offer any alternative. And if the one-way ratchet view is valid, natural rights go too far in the opposite direction; they entitle proprietors to be free from any limits on their property. Are those the only alternatives?

B. *Public Interests in the Mississippi River's Shoreline*

No. When the Corps opened the Bonnet Carré spillway, it did so to keep the Mississippi River's shoreline intact. Louisiana and the U.S. government have interests in the integrity of the river's shoreline. Although those interests are public interests, they can be understood as interests "public" in a sense harmonious with individual rights. Louisiana can act to protect the collective rights of residents who hold property along the Mississippi River. Those residents have rights to their persons and their property, and the state may justly pursue policies to secure those rights. Every lot of land along the Mississippi River constitutes a resource on which someone may labor for some distinct project. But all of that labor would be jeopardized if the Mississippi River's shoreline collapsed or if the river flooded shoreline properties. Louisiana may justly pursue policies securing the rights of citizens with shoreline land. Similarly, the federal government may protect the collective rights of people who might travel up or down the river.

To protect those various rights, Louisiana and federal agencies may pursue policies that stop: the Mississippi River from flowing over its banks; shoreline property from getting flooded and ruined; and the River's shoreline from collapsing. Private property near the Mississippi

201. 471 A.2d 355, 358 (N.J. 1984).

202. *See id.* at 360–63; *see also* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970).

203. *Matthews*, 471 A.2d at 365.

River, then, may justly be subject to limits correlative to that just authority. Those limits should seem reasonably incidental to the promotion of legitimate state and federal public interests.

C. *Public Servitudes Limiting Property in Oysters and Oyster Leases*

Now, to carry those interests and limits into effect, legislators, regulators, and judges must develop many specific rules and policies. But most of that development consists of further determination.[204] Labor, natural rights, and natural law give property the guidance it needs as long as they identify the main substantive goals that government officials should address when they work out the proper scopes of public interests in shorelines. The precise rules they settle on are just if they seem reasonable determinations of those substantive goals.

In *Campo*, at least three different legal institutions help determine those substantive public interests. The first consists of background doctrines that (like the public trust doctrine) leave private property subject to public servitudes. In background federal subconstitutional law, navigable waters are public commons, and the federal government has the authority to maintain their common status. Under the same law, lands submerged beneath navigable waters are subject to federal navigation servitudes.[205] In Anglo-American common law, land submerged beneath public water bodies is owned by the sovereign and held with the expectation that it be kept open for public uses.[206] When coastal water bottoms are opened up for private leases, they might be subject to public servitudes. Those servitudes might limit lessees' opportunities to complain if authorities rerouted Mississippi River water over leased water bottoms.

204. *See supra* notes 73–74 and accompanying text.

205. *See* MERRILL ET AL., *supra* note 196, at 277–80; JACQUES B. GELIN & DAVID W. MILLER, THE FEDERAL LAW OF EMINENT DOMAIN § 2.5, at 86–97 (1982).

206. *See* Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892) (recognizing the public trust doctrine); Arnold v. Mundy, 6 N.J.L. 1, 1 (1821) (holding that states own the land submerged beneath tidal waters); *see also* Martin v. Waddell's Lessee, 41 U.S. 367, 417–18 (1842) (deferring to Arnold). *See generally* Harrison C. Dunning, *The Public Right to Use Water in Place*, 4 WATERS & WATER RIGHTS 29–1 to 29–3 (Robert E. Beck ed., 1991); JOSEPH K. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS AND THE SOIL AND SHORES THEREOF 15–68 (1826).

D. *Statutory Limits on Property in Oyster Leases and Lease-Raised Oysters*

I do not know whether any such servitudes exist. If they do exist, I do not know whether they institute limits on nearby coastal bottoms along the lines just described. But Louisiana authorities might not have known either. And in case no public servitudes institute the limits I just described, Louisiana authorities might have taken other steps to make clear that any private property oyster lessees had in oyster leases should be exposed to the possibility that Mississippi River water would be diverted over their water bottoms.

Such limits might be instituted legislatively—in the Louisiana statutes that recognize rights to produce oysters on state-owned coastal water bottoms. Louisiana's legislature seems to have done so, in § 56:423, the section that authorizes oyster leases.[207] Section 56:423 subordinates the leases it authorizes. Lessees have no recourse for damage caused by energy exploration in coastal waters, nor for damage caused by state or federal actions deemed "coastal protection" measures.[208]

E. *Contractual Limits on Property in Leases and Lease-Raised Oysters*

The same limits might be established by executive action—when Louisiana regulators negotiate and sign oyster leases. And in previous disputes like *Campo*, Louisiana authorities have included in oyster leases hold harmless clauses. Past clauses have held Louisiana authorities harmless for claims of oyster damage from diversions of fresh water conducted for "management, preservation, enhancement, creation, or restoration of coastal wetlands, water bottoms or related renewable resources."[209]

In *Campo*, the lawyers and Judge Holte will need to assess whether § 56:423's subordination clause covers the Bonnet Carré spillway diversions directed by the Corps and the spillway commission.[210] They will also need to assess whether the leases of Campo and any other lead or class plaintiffs include hold harmless clauses and (if so) whether such

207. *See* LA. STAT. ANN. § 56:423(A) (2022); *supra* note 193 and accompanying text.

208. LA. STAT. ANN. § 56:423(A)(1)–(2) (2022). Section 56:423(A)(1) directs readers to LA. STAT. ANN. § 49:214.2 (2022) for the statutory definition of "integrated coastal protection." The provisions of § 56:423 discussed in text also subordinate oyster leases to the legal rights of energy producers who drill for oil and gas in coastal waters.

209. Avenal v. State, 886 So. 2d 1085, 1097 (La. 2004) (quoting a hold harmless clause in the leases of parties to the lawsuit).

210. *See supra* note 156 and accompanying text.

clauses waive the plaintiffs' rights to complain about the 2019 Bonnet Carré spillway diversions. Regardless, the doctrines discussed here seem effective positive law vehicles to secure natural property rights. They also show that the one-way ratchet and one-hit wonder views are overwrought. And they also confirm that a government can vindicate legitimate public interests without leaving property exposed to ad hoc utilitarian interest-balancing.

VIII. EMINENT DOMAIN, RIVER DIVERSIONS, AND COSTAL WATER BOTTOMS

Assume Part V was right, and that the *Campo* plaintiffs should be entitled to private property in the oysters they have raised and their leases. Assume also no issues flagged in the last Part are relevant. In other words, assume that the plaintiffs' claims to private property are not overridden by any common law public servitudes, any statutory subordination clauses, or any lease hold harmless clauses. On those assumptions, *Campo* raises important questions about eminent domain, its justifications, and its scope.

A. *Eminent Domain and Campo*

If the United States condemned property in *Campo*, it did so by taking oysters and servitudes incidental to the plaintiffs' oyster leases. If the discharges of Mississippi River water constituted inverse condemnations, for constitutional purposes the discharges took property in any oysters damaged or killed. When the *Campo* plaintiffs entered into oyster leases, the bundles of rights they received included sticks for the use and enjoyment of the water over the coastal bottoms they were leasing.[211] And under Louisiana law[212] and federal law,[213] lessees may claim takings when a government interferes with the use of a lease.

Those legal issues raise important moral issues. Can eminent domain be reconciled to natural rights? If so, when may a government exercise the power of eminent domain consistent with natural rights? And, in a

211. *Accord* LA. STAT. ANN. § 56:423(A) (2022) (entitling lessees to the exclusive use of the "water bottoms.").

212. *See, e.g.*, McCraine v. Voyellesland Farms, Inc., 177 So.3d 811, 814–15 (La. App. 2015) (restating Louisiana law to the effect that a lessee is entitled to property in crops grown on the leased land while the lease is in effect, and applying that law to a crawfish lease).

213. *See, e.g.*, United States v. 131.68 Acres of Land, More or Less, Situated in St. James Parish, 695 F.2d 872, 874–75 (5th Cir. 1983) (holding that the victim of an eminent domain condemnation was entitled to just compensation for crops grown on a crop lease).

dispute like *Campo*, what guidance do natural rights give on the question whether the U.S. government took oysters or oyster lease servitudes?

B. *Justifying Eminent Domain*

It is reasonable to wonder whether a theory of natural rights can justify eminent domain. It should not, not if natural rights operate like one-way ratchets. If "natural rights" mean broad rights of autonomy, then the rights should be "superior to all manipulations of the state in the interest of social welfare"[214] and eminent domain should be inconsistent with the rights.

But eminent domain was introduced and justified by treatise writers who subscribed to natural rights.[215] And as Chapter 14 of *Natural Property Rights* shows, natural rights do not need to consist of autonomy rights *ruat caelum*. Natural rights can be justified instead as rights structured to serve the interests of their holders, on terms giving others equal opportunities to exercise their concurrent rights to pursue their own interests. As Chapter 9 of *Natural Property Rights* shows,[216] in some conditions the best way to facilitate labor on resources is to establish common regimes over those resources. If the government may justly establish commons for some resources, it should also have authority to expand commons or create new ones.

But that justification limits eminent domain in the course of justifying it. Eminent domain cannot be exercised justly without paying just compensation. Before property is condemned, it is valid in law. Vested property rights protect proprietors' expectations that they may continue labor they have started with their property. When governments condemn vested property rights, they should protect the labor conducting pursuant to the rights. One protection comes from having the government compensate condemnees for what it takes.[217]

The other main protection is a limitation, that condemnations be only for public uses. And under that limitation, "public uses" should be

214. RADIN, *supra* note 48, at 108; *see supra* note 101 and accompanying text.

215. *See, e.g.*, Grotius, *supra* note 42, at 796–97. For a list of the main theorists who introduced eminent domain, see Arthur Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596, 596 n.1 (1942).

216. And, as this article has suggested. *See* discussion *supra* Sections III.C and VII.

217. *See* Olson v. United States, 292 U.S. 246 (1934); *see also* EPSTEIN, *supra* note 119, at 182–94. Just compensation may and should be reduced for any implicit in-kind compensation that condemnees might have received from government actions incidental to the policies precipitating the condemnations. *See id.*, at 195–215. I am not aware of any such in-kind compensation in the diversions that precipitated *Campo*.

understood relatively narrowly and literally. As Chancellor James Kent put it, "eminent domain . . . gives to the legislature the control of private property for public uses, and public uses only."[218] When a government converts private property to public uses, it calls on the property in a manner similar to that in which a partnership calls on its partners for capital. When a partnership issues a capital call, however, it must use the capital raised for genuine partnership business. By analogy, when a government condemns property, the condemned property must be used by the entire public in a relatively strict sense—by being open for use in a commons, by being held by the government, or by being held by a private entity subject to common carrier duties of access.[219]

That justification could apply in the context of the Mississippi River diversions that led to the *Campo* suit. Assume that the Mississippi River was likely to overflow in 2019 and that it did threaten Mississippi riparians' persons and property. The account of eminent domain sketched here recognizes the just interests of all of the parties with stakes in the diversions. The public use requirement ensures that Louisiana and the Corps were acting in trust to secure the rights of Louisianans. The just compensation requirement ensures that the plaintiffs get compensation roughly approximating the labor they had put into their oyster beds. Since the eminent domain power authorizes Louisiana and the U.S. government to condemn, however, both may justly and legally take actions securing the persons and property of Louisianans.

C. *Eminent Domain, Individual Rights, and the Common Good*

That account offers a fresh perspective on eminent domain. When lawyers and scholars think about justifications for eminent domain, they often assume a stark dichotomy. On one hand, if property rights exist, such rights restrict government action. (Think again of the *fiat justitia*,

218. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 275 (1979) (1826).

219. *See* EPSTEIN, *supra* note 119, at 166–69; Claeys, *supra* note 124. The cases that test the concept of public use hardest are projects in which a government condemns private property to expedite the assembly of some private project that promises to produce great economic value. *See, e.g.,* Kelo v. City of New London, 545 U.S. 469, 479–82 (2005). In my opinion, those cases should not be evaluated as eminent domain disputes. If the laws that authorize such projects are going to accord with natural property rights, they must constitute police regulations securing an average reciprocity of advantage, *see supra* subsection II.D.14; *see also* Claeys, *supra* note 124, at 886–92, 919–28. The eminent domain challenge in *Campo* presents a much clearer public use. If the Bonnet Carré spillway diversion is indeed an inverse condemnation, the public is using the killed oysters and the now-useless water bottoms in the course of protecting the Mississippi River and the shoreline along it.

ruat caelum maxim.[220]) On the other hand, property guarantees and eminent domain limitations should not shackle legitimate government action. In one of his more memorable passages, Justice Oliver Wendell Holmes warned, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[221] That warning captures well the spirit behind a lot of scholarly commentary on eminent domain.[222]

And once again, oyster production inverse condemnation litigation illustrates vividly. Some judicial decisions about water pollution and oyster production construe relevant eminent domain doctrines in ways that make it extremely difficult for oyster producers to recover.[223] And in the most discursive account in legal scholarship on oyster leases and river diversions, Robert Rogers argues that, even if river diversions "inevitably harm some private parties, [they] do far greater good by preserving thousands of miles of coastal wetlands that would otherwise be relinquished to the sea."[224]

The contrasts that Holmes and Rogers draw are unconvincing. To begin with, those contrasts assume a false dichotomy, between a pragmatist approach on one hand and an extreme theory of rights on the

220. *See* RADIN, *supra* note 48, at 108.

221. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). Read in its entirety, *Pennsylvania Coal Co*. is not as deferential toward government policies as this passage suggests. Pennsylvania Coal Co. presented a constitutional challenge to a law prohibiting coal mining beneath or near inhabited residential homes. The Court concluded that the law exceeded the scope of Pennsylvania's police powers and affected what would now be called a regulatory taking. *See id.* at 415. And Justice Holmes walked back the statement quoted in text: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416. Still, the passage quoted in text is quoted routinely in decisions rejecting regulatory taking challenges to state laws and policies. *See, e.g.*, Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (2017); Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 335 (2002).

222. *See, e.g.*, Haar & Wolf, *supra* note 52; Michelman, *supra* note 52; Sax, *supra* note 123.

223. *See, e.g.*, Avenal v. United States, 100 F.3d 933 (Fed. Cir. 1996) (rejecting an inverse condemnation claim similar to the one pressed in *Campo*, and doing so by relying on the U.S. Supreme Court's deferential balancing test from Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978)); Johnson v. City of Suffolk, 851 S.E.2d 478 (Va. 2020) (upholding a judgment granting demurrer to an inverse condemnation claim, and doing so by construing narrowly the state doctrines that might have entitled oyster lessees to property in oysters they were raising or in the exclusive use of the water bottoms they were leasing).

224. Robert L. Rogers, III, *Turning River Water Into Gold: Why Oyster Harvesters Should Not Be Permitted to Cash in on Changes in Salinity Caused By the Caernarvon Water Diversion Project*, 22 VA. ENVTL. L.J. 53, 55 (2003).

other hand. Since the rights-based theory seems beyond the pale, the "government hardly could go on" view seems inevitable and necessary by default. Yet that view assumes priors often associated with relatively interventionist utilitarian theories. In Rogers' framing, if a social policy does "greater good" for the community than it causes "harm [to] private parties," the policy may and should be pursued irrespective of the effects on the private parties. The good of the community takes priority over the rights of individual members. When the common good takes priority the community owes little or nothing to the individuals who suffer from common projects.

Natural Property Rights introduces a third possibility. That alternative relies (again) on the model of a partnership. William Blackstone uses that model to justify and describe eminent domain. In the model, when a government condemns property "[t]he public is . . . considered as an individual, treating with an individual for an exchange."[225] Blackstone conceded that governments may legitimately "compel . . . individual [proprietors] to acquiesce" in the exercise of the eminent domain power.[226] So individual rights are subordinate to the common good. But Blackstone also anticipated arguments like Rogers's, "that the good of the individual ought to yield to that of the community."[227] Blackstone rejected those arguments because "the public good is in nothing more essentially interested, than in the protection of every individual's private rights."[228] Eminent domain preserves that balance between "private rights" and the "public good," Blackstone concluded, "[n]ot by absolutely stripping the [condemnee] of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained."[229]

This account of rights and the public good deserves consideration much more thorough than it gets. Another famous eminent domain case

225. 1 BLACKSTONE, *supra* note 40, at *135. As Section II.A.1 warned, *Natural Property Rights*'s justification for property is Lockean but not necessarily Locke's. The account of eminent domain introduced here and in *Natural Property Rights* illustrates the difference. Locke himself acknowledged that government may exercise the power of eminent domain. But the only limit he recognized on the power was a requirement that property be condemned only with consent, by which he meant with electoral representation. *See* LOCKE, *supra* note 2, II.xi.137–38, at 359–61. In the account I introduce, takings must also be compensated with just compensation, and they may not be ordered unless the taken property is be used directly by the public. Blackstone's account of eminent domain justifies both of those limitations.

226. 1 BLACKSTONE, *supra* note 40, at *135.

227. *Id.*

228. *Id.*

229. *Id.*

proclaims that eminent domain stops governments "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[230] Natural rights express the sense behind that passage while still justifying the institution of eminent domain. In a rights-based account, government may condemn property for genuine public projects. But if property rights have vested, and if government policies genuinely condemn property, the public good (or fairness, or justice) require that the government respect private property while pursuing public projects. Eminent domain lets governments promote the public good. To ensure that public projects really promote the common good, however, they need to focus on genuine public uses, and they need to hold harmless the proprietors whose projects get disrupted by condemnations.

D. *Natural Rights, Inverse Condemnations, and Government-Sponsored Nuisances*

If labor and natural rights can justify the institution of eminent domain, can they also guide reasoning about constitutional "takings"? This question repays study as well. As *Campo* shows, coast users and the authorities that oversee coastal-protection policies will want to know the answer. But the question also tests a normative theory of property in important and revealing ways.

To be satisfying, a normative property theory must identify what sorts of conduct constitute wrongs toward the rights it justifies. As Chapter 12 of *Natural Property Rights* recognizes, many modern authorities are skeptical that property law can distinguish clearly between rights in property and wrongs to property. That skepticism comes out most forcefully in discussions of the law of nuisance. Eminent domain law relies heavily on nuisance law. Sometimes nuisance principles inform whether government actions constitute takings, and sometimes they inform whether government regulations are not takings because they are instead legitimate exercises of the police power. Because modern law and authorities are committed to pragmatist views, however, they doubt that nuisance law is coherent.[231] Nuisance law is frequently associated with the Latin maxim *Sic utere tuo ut alienum non laedas*, or

230. Armstrong v. United States, 364 U.S. 40, 49 (1960), quoted in, *e.g.*, Arkansas Fish & Game Comm'n v. United States, 568 U.S. 23, 31 (2012); Palazzolo v. Rhode Island, 533 U.S. 606, 618 (2001); Dolan v. City of Tigard, 512 U.S. 374, 384 (1994).

231. *See* Stewart E. Sterk, *The Inevitable Failure of Nuisance-Based Theories of the Takings Clause: A Reply to Claeys*, 99 NW. U. L. REV. 231 (2004); Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329 (1995).

"use one's own property in such a way as not to injure the property of another." Modern commentators assume that "*Sic utere* gets you nowhere" whenever there exist "incompatible . . . uses" of conflicting resources.[232]

Campo illustrates these broader themes because in it the plaintiffs are making an inverse-condemnation claim.[233] Inverse condemnations occur most often when a government agent commits what would otherwise be a tort against a proprietor. In a water diversion case like *Campo*, the most analogous tort would be a nuisance against the plaintiffs' use of coastal bottoms and waters.[234] Since many authorities doubt that nuisance law is coherent, if natural rights can supply helpful guidance about the nuisance issues in *Campo*, they should be able to supply helpful guidance on many other property torts as well.

As Chapter 12 of *Natural Property Rights* explains, nuisance law performs two complementary functions. As a property doctrine, the field declares and works out the details of substantive legal rights to use and enjoy real estate. As a tort, nuisance gives proprietors recourse when their neighbors wrongly take some of those substantive rights.

When modern authorities express skepticism toward nuisance, they do so because they assume that it is impossible to delineate clear "rights," "harms" to rights, or "benefits" that come from exercising rights. Justice Antonin Scalia's opinion in the 1992 regulatory takings case *Lucas v. South Carolina Coastal Council* is instructive: To justify the Court's general "hands off" approach to regulatory takings challenges, Scalia argues that terms like "harm" and "benefit" "come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate."[235]

As Chapters 12 and 13 *Natural Property Rights* explain, however, those views are not charitable toward rights-based justifications for nuisance or regulation. In *Lucas*'s portrait, when nuisance law considers

232. DUKEMINIER ET AL., *supra* note 85, at 779.

233. "Inverse condemnation" proceedings are brought by property holders, and in them the holders complain that governments take their property in substance without instituting formal eminent domain proceedings. *See* United States v. Clarke, 445 U.S. 253, 255–58 (1980); *see also* JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 6.03[2] (2008).

234. *See, e.g.*, Arkansas Game & Fish Comm'n, 568 U.S. 23 (2012); EPSTEIN, *supra* note 119, at 38–39, 48–51, 66–67 (citing Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871), Eaton v. B.C. & M. R.R., 51 N.H. 504 (1872), and Richard v. Wash. Terminal Co., 233 U.S. 654 (1913)).

235. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1024 (1992); *supra* subsection II.D.12; The same tendencies are also expressed clearly in Carpenter v. Double R Cattle Co., 701 P.2d 222, 227–28 (Idaho 1985); Prah v. Maretti, 321 N.W.2d 182, 187–91 (Wis. 1982); RESTATEMENT (SECOND) OF TORTS §§ 825–28 (AM L. INST. 1979).

whether one use "harms" or "benefits" another, the "rights" at issue are extremely specific rights. These rights might be called "fine-print" rights.[236] Fine-print rights consist of specific entitlements to use a resource for a specific use—say, use of a lot for a residence, a factory, or a farm, or even use for one of those uses at a specific intensity. When legal rights consist of fine-print entitlements, disputants can and often do disagree whether rights are harmful or beneficial. A factory's owners and customers find its ore production beneficial; the factory's neighbors find those operations harmful.

But assume that nuisance law is ordered consistent with natural property rights. Then, the substantive use rights it protects are designed much more generally—maybe as "large-print" rights. Large-print rights consist of general spheres of discretion, and they are structured as seems likely to give right-holders the broadest discretion possible and consistent with the rights of all. And the discretion that large-print rights vest in right-holders entitles them to decide which fine-print rights they want to exercise.

When nuisance law focuses on large-print property rights, those rights are much cruder and more homogeneous than fine-print rights would be. But with crudeness comes simplicity. It is easier for governments to develop and enforce large-print rights than it would be for fine-print rights. And, important for nuisance law and related fields, concepts like "harm" make much more sense when harm is keyed to large-print rights. Harms consist of acts that deprive right-holders of more discretion than seems consistent with the discretion everyone is entitled to when all hold the discretion that runs with large-print rights. A factory seems harmful not because its smoke bothers neighbors. It is harmful instead because the smoke hits the neighbors where they live, it makes it hard for them to enjoy their lots as they had planned, and it does so to a greater degree than typical and productive land uses in the relevant locale.

In ordinary land-use/pollution disputes, nuisance instructs judges and fact-finders to take two rough cuts to determine whether a land use seems noxious.[237] In the first cut, the law presumes noxious any low-

236. I borrow David Brink's distinction between fine- and large-print rights. *See* David O. Brink, Two Conceptions of Rights (Aug. 4, 2021) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3899252).

237. The *locus classicus* for this approach is an opinion by Baron Bramwell in Bamford v. Turnley (1862) 122 Eng. Rep. 27, 32–34. For two works applying Bramwell's framework to nuisance, see Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights,* 85 NOTRE DAME L. REV. 1379, 1398–1430 (2010) and Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian*

level physical invasions that might annoy a land user. That presumption secures autonomy to proprietors; it frees proprietors to decide for themselves how to use their properties without worrying about outside interference. When people put their properties to productive uses, however, many uses generate low levels of pollution. In the second cut, judges and fact-finders set tolerance levels keyed to the locality in which the plaintiff and defendant both hold property. Those levels excuse pollution that seems objectively tolerable to local proprietors. Pollution is "objectively tolerable" if it seems likely that, to hypothetical, reasonable proprietors in the locality, the pollution could be borne and if it seems incidental to productive uses of property in which many local proprietors engage. These tolerance levels are often called "live and let live" rules.[238] They extinguish technical rights to exclude, but they do so in expectation that people can put their properties to better use if everyone waives the technical rights to complain about relatively trivial pollution by neighbors.

E. *River Diversions As Inverse Condemnations*

Now, it would take a lot to adapt the principles sketched in the last Section to apply to a river diversion dispute like *Campo*. Among other things, the private property in an oyster lease on a coastal water bottom is much weaker and more qualified than the property an occupant has in fast land. Still, the principles in the last Section identify the issues that nuisance law should address. Even if the principles need to be adapted substantially to apply to property in water bottoms, surely they apply somehow. And those principles identify serious challenges for oyster producers.

In particular, oyster production raises hard questions at what the last Section called the "second cut." In a dispute like *Campo*, what kinds of pollution seem reasonably incidental to typical and productive uses of a coastal gulf? And would hypothetically reasonable users of the Gulf Coast find large quantities of fresh water annoying?

It would take a lot of empirical information to answer those questions, and I will withdraw and revise everything I am about to say if and when relevant empirics come to light. But this general approach is important for two reasons. First, the approach identifies the empirical facts that constitute valuable and relevant information; it poses questions for

*Con*straints, 8 J. LEGAL STUD. 49 (1979).

238. *Bamford*, 122 Eng. Rep. at 33; *see also* RESTATEMENT (SECOND) OF TORTS § 822 cmt. j.

empirics to answer. Separately, the approach helps justify presumptive rules of thumb—rules of decision for judges or other officials to rely on in the absence of complete empirical data. That being so, I suspect that most uses of coastal bottoms and waters are not as threatened by fresh river water as oyster production is. If that suspicion is right, it points towards a moral judgment. Even if river diversions do in fact interfere with oyster production, oyster production seems, in the context of coastal waters, the analogue to a hyper-sensitive use of property.[239] One famous nuisance case refused to grant an injunction to a residential owner who wanted to stop a flour mill from operating in an industrial section of Detroit. Chief Justice Thomas Cooley warned that:

[o]ne man's comfort and enjoyment with reference to his ownership [of property] cannot be considered by itself distinct from the desires and interests of his neighbors, as otherwise the wishes of one might control a whole community, and the person most ready to complain might regulate to suit himself, the business that should be carried on his neighborhood.[240]

Oyster production might stand in relation to other uses of the Gulf Coast as that resident stood in relation to Detroit factories. And if oyster production is indeed a hyper-sensitive use of coastal water bottoms, then the *Campo* plaintiffs should not have grounds for an inverse condemnation claim.

That recommendation is important in its own right; it shows that natural rights can indeed supply helpful guidance to a moderately complex public resource-management dispute. But the recommendation is also interesting theoretically; it differs in interesting ways from the judgments made most often in support of coastal protection policies today. Again, the standard argument for coastal protection is a pragmatist one: Even if government-sponsored diversions "inevitably harm some private parties, [they] do far greater good by preserving thousands of miles of coastal wetlands that would otherwise be relinquished to the sea."[241] If a coastal protection measure inflicts some sort of loss on private parties, the argument assumes, the measure automatically harms those parties and calls for utilitarian balancing.

Rights-based justifications for property can and sometimes do deny claimants compensation for damage they suffer. When they do so,

239. *See* Rogers v. Elliott, 15 N.E. 768 (Mass. 1888); Carter v. Johnson, 26 Cal. Rptr. 279, 280–81 (Ct. App. 1962); RESTATEMENT (SECOND) OF TORTS § 821F cmt. d.

240. Gilbert v. Showerman, 23 Mich. 448, 453 (1871).

241. *See* Rogers, *supra* note 224; *see also supra* notes 221–224 and accompanying text.

however, the rationale is not that the greater good excuses the damage. Rather, not all damage suffered by rights-holders constitutes justified "harm" to rights. In a regime of rights, a "harm" consists of an act that inflicts losses disproportionate in comparison with the losses reasonably incidental to the legitimate and ordinary exercise of rights. If a government inflicts losses without inflicting a harm in that sense, eminent domain guarantees do not come into play. Not because the private parties' rights get outweighed by greater social goods. Rather, because the losses are too specialized and idiosyncratic, not consistent enough with the free exercise of rights.

IX. CONCLUSION

I hope that this Article has delivered what the introduction promised. I hope that Part II introduced the argument of *Natural Property Rights*. I also hope that the rest of this Article illustrates how labor and natural rights apply to a broad cross-section of topics important in property law and policy. I hope that the case for property made takes the sting out of many of the most familiar skeptical criticisms of property. So when *Natural Property Rights* comes out, buy a copy and see what you think!

Now, *Natural Property Rights* and this Article raise more questions than they have answered. That is where this Symposium's participants come in. They have all given labor, natural rights, and natural law a second look. Some of the participants are sympathetic, others not so much, but all of them have raised fair and perceptive issues for discussion. I encourage you to read the contributions of this Symposium's other authors and see what *they* think.