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**THE FUTURE OF NATURAL PROPERTY LAW: COMMENTS ON ERIC CLAEYS'S
NATURAL PROPERTY RIGHTS**

Christopher Serkin[†]

Abstract

Professor Eric Claeys is among the most thoughtful modern proponents of natural property rights. His new book, provided to conference participants in draft form, is typical of his rigorously analytical approach. It is an impressive articulation of a natural rights-based account of property. It significantly advances the debate over natural rights and should be taken seriously even by those who do not find it entirely convincing.

There are real-world political stakes in abstract-seeming questions of property theory because natural rights are often deployed to limit government regulation of property. Natural rights contrast with positivist accounts that locate the content of property rights in the substance of positive law. Where property rights come from the State, the State has broad authority to reconfigure those rights. Natural rights theorists, like Claeys, want property to be a bulwark against regulation and so insist that property has a pre-political core.

That core is deeply contested, however. For rights to be “natural,” they must apply widely, if not universally, accepted, or at least be derivable in the abstract. To operate at this level, they generally underdetermine the substantive content of property law. Reasoning from natural rights, therefore, often devolves into contingent consequentialist or utilitarian arguments that look anything but natural.

Often, natural law is deployed to rationalize existing legal doctrines and rights. But this can sometimes feel like a bit of a failure of imagination, assuming aspects of law are necessary or inherent when in fact, they may be quite contingent. If natural law reasoning can defend even dramatically different substantive property rights, it becomes worryingly thin as a justificatory enterprise. It risks sliding into outcome-driven and conclusory analyses.

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[†] Elizabeth H. & Granville S. Ridley, Jr. Chair in Law. My thanks to Jim Ely, John Lovett, Robert Mikos, Ganesh Sitaraman, and Dan Sharfstein for comments, encouragement, and cautions. This Article is a thought experiment set in a fictional future of my creation. Many of the citations are invented from that perspective is well. Any sources with future dates and many of the statutes do not actually exist.

One way to explore the limits of natural rights reasoning is to see whether natural rights reasoning could be used to defend a radically different set of property institutions. Instead of looking anthropologically at different communities around the world or historically at different property arrangements in our own legal history, it is perhaps interesting—or at least entertaining—to consider how natural rights theorists in the future might defend a transformed property law. What follows, then, is a thought experiment—an Article from the perspective of a fictional future. It is intended to explore whether natural law actually imposes limits on the substantive content of imagined property rights of the future. If not, it should serve as a caution for the use of natural law to justify the property regime we have today.

DEFENSE OF A NATURAL LAW OF PROPERTY

Kristofer Serkin¹
December 1, 2454

Few topics in modern law have been quite as controversial as property. This is not surprising given how rapidly real property has shrunk since the last polar ice caps melted. But recent attacks on our property regime based on idiosyncratic views of individual autonomy are dangerous because they threaten to undermine the rights that inhere, by reason of natural law, in the institution of property.

Property promotes the survival of the human race. All property law and doctrine must, ultimately, be justified by its impact on the species.² During the Period of Expansion,³ legal theorists tended to focus more on individuals than on the species as a whole.⁴ As a result, some Expansion-era theorists advocated giving individual people control over resources to vindicate values like “freedom” and “autonomy.”⁵ When the

1. Elizabeth H. & Granville S. Ridley, Jr. Chair in Law, Colony 12.

2. See, e.g., *State v. Shack*, 277 A.2d 369 (N.J. 1971) (“Property rights serve human[ity]. . .”).

3. Recent anthropological work dates the period of expansion from approximately 1250 AD to 2075 AD, before the coastal inundation of 2076 and the Great Northern Drought from 2090–2125. See Tonya Smith, *The Rise, Fall and Further Fall of the Old Empires*, 1674 J. POL. HIST. 452, 465 (2421).

4. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, SECOND TREATISE, Chap. V (Peter Laslett ed., 2d ed., Cambridge Univ. Press 1967) (1690) (articulating labor theory of property); see also Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

5. See JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT* (3rd ed. 2008; Augmented Reality ed. 2278); see also Eric R. Claeys, *Labor, Exclusion, and Flourishing in*

prominent 21st Century legal philosopher Eric Claeys discussed the value of autonomy, he was focused on the property arrangement that allocated to individuals control over resources in the world.⁶

While these theorists fetishized the individual in their account of property, the broader felicitic goal was to encourage industry and investment at a time when the human population and resources were both expanding, and when extinction-level events were uncommon.⁷ Humanity could afford some slippage between the interests of individuals and of the survival of the species, because they were aligned often enough.

Of course, in the current Period of Contraction, we understand better the existential dangers of such individual-focused accounts.⁸ Nevertheless, neo-Claeysians still promote their view that individual exclusion instead of the stabilization of society and the propagation of the species should shape the law of property.⁹ These fights arise in a number of well-settled property doctrines that neo-Claeysians, in particular, seek to change.

Consider, first, the right to shade, one of the most fundamental property rights.¹⁰ It is, of course, a background principle of property law that one who is caught outside during the day has a property interest in the

Property Law, 95 N.C. L. REV. 413, 417 (2017).

6. Eric Claeys, Natural Property Rights 420 (Sept. 17, 2021) (unpublished manuscript) (on file with the Texas A&M Journal of Property Law); *see also* Eric R. Claeys, *Natural Property Rights: An Introduction*, 9 TEX. A&M J. PROP. L. 415 (2023) [hereinafter “Claeys, Introduction”].

7. Indeed, a long tradition of theorists, from Locke to Bentham, focused on giving individuals the right to reap where they had sown in order to encourage cultivation. *See generally* LOCKE, *supra* note 4; *see generally* JEREMY BENTHAM, *THE THEORY OF LEGISLATION* (1871). When Demsetz documented the rise of the fur trade among Native Americans, the same reasoning applied. *See generally* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

8. *See, e.g.*, JACOB SMITH, *HOW THE WEST WAS LOST* (2410) (arguing that the focus on individual rights contributed to many societies’ inability to address the threats of climate change and ecosystem collapse); CHATGPT SCHOLAR, *FROM PROPERTY WRONGS TO PROPERTY RIGHTS* 137 (2437) (noting how the Expansion-era quixotic focus on some people’s rights ignore the rights of many excluded people including racial minorities and people from other “countries”); *see also* Epsilon Zukerberg, *From Castles to Catastrophe*, 1697 J. POL. HIST. 101, 122 (2443) (arguing that concern about protecting people’s home’s from regulation and expropriation somehow extended to protecting industry’s rights to destroy the planet).

9. Trevor Smith, *Was Eric Claeys Merely Great or Actually the Best?*, 12 J. CLAEYS THEORY 237, 249 (2448).

10. *See* WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND ch. 1 (George Sharswood ed., 1893) (1765) (describing the communal rights prior to private rights, noting: “Thus the ground was in common . . . yet whoever was in the occupation . . . *for shade*, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force . . .”) (emphasis added).

nearest available shade.¹¹ Difficult questions sometimes arise when more people seek shade than the shade-giving tree or outcropping can provide. Current shade law will then allocate that shade on a last-come basis, ensuring that people who have benefitted the most from it already must be the first to move on.¹² While this comports with all natural intuitions, it can result in complicated interactions in specific circumstances, for example where the person leaving returns moments later, becoming the new last-comer.¹³ How long must the person stay away before being able to return? What should count as last-in-time depends in part on the nature of the shade and, perhaps, the time of day and the nearest alternative source of shade. But these disputes at the margins do not undermine the fundamental property right to shade.

Now, the Claesyians would disrupt this natural order of things by focusing, instead, on the rights of the owner of the underlying land to control the shade, even if they have done nothing to create the shade and even acted to eliminate shade, say by cutting down trees in blatant disregard of the Canopy Law.¹⁴ The Claesyians' view appears to be that the landowners should have the right to selectively grant or deny access because it protects their autonomy and ability to decide for themselves how best to use the land. They argue, implicitly, that shade belongs to the landowner, perhaps through some application of accession.¹⁵ Or, more radically, they appear to argue at times that "shade" is not an ownable resource at all because it is dynamic and shifts in location or is not sufficiently a "thing."

These views may have seemed intelligible at one time. If it were possible to be outside during the day without a fully charged safety suit, the

11. *Id.*; *Smith v. Musk*, 137 Vt.85 1423, 1427 (2309) ("Even in global capitals like Burlington, where indoor space is abundant, the right to shade, whether from buildings or vegetation, supersedes other property rights.") (citing *Ploof v. Putnam*, 81 Vt. 471 (Vt. 1908) (recognizing right of a ship in a storm to access a dock)).

12. *Bezos v. Musk*, 43 Ohio.33 2419 (2327) ("Are we to judge the timing by when the torso is placed in the shadow, the last foot, the hand, or some other body part? And does the shadow's penumbra count? As we have explained, in all such inquiries, we are governed overall by principles of equity to ensure that the person who needs the shade the most is given priority, while still recognizing the value of a clear rule."); *cf. also* David I. Walker, *Financial Accounting and Corporate Behavior*, 64 WASH. & LEE L. REV. 927, 961 (2007) (defining "first in, first out" (FIFO) approach to corporate accounting).

13. *See, e.g.*, *Musk v. Smitherene*, 549 Vt.85 224, 227 (2314) (children playing tag); *Smythe v. Bezos*, 440 Vt.87 663 (2309) (person fainting and rolling out of the shade involuntarily).

14. VT. STAT. ANN. § 104 (2454) (imposing an affirmative obligation to "take every possible action to protect any viable tree").

15. Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459, 459 (2009).

shade would be a less valuable commodity than it is today. But the demise of the ozone layer and the solidification of the heatstroke line south of Virginia make the shade a precious resource.¹⁶ Just as the value of husbandry increased with the fur trade, the value of the shade has increased with the physiological limit of sunscreen.¹⁷ Shade is simply too valuable to be owned by the *landowner* instead of by the people who are actually outside and thus able to put the resource to protective use. So long as people must sometimes be outside during the day—whether to fix machinery or defend our outposts against the Quebecois boar mutants—rights to shade must be allocated to best promote the survival of the species.

A similarly dangerous opposition has arisen to the right to farm. Humanity depends upon agriculture and so the need for a system to promote the cultivation of food is self-evident. Given the thin strip of arable land between approximately 44° north and 46° north, maximal cultivation at all times is critical to feeding the world's population of 4 billion people.

Historians have detailed how individual “farmers” used to own land, and the exclusive right to plant crops on it.¹⁸ Farmers who chose not to grow food but instead to grow flowers or raise cows were allowed to make that choice for themselves.¹⁹ In other systems, collective farmers worked together to produce food but under the control of some central government in ways that disincentivized individual work.²⁰ Against these kinds of anachronistic arrangements, the benefits of the national crop registration system are obvious.

Having registered the precise GPS location and date of a particular seed planting, it is easy for anyone else to know where the right to plant has already been claimed. Identifying new places to plant is as easy as

16. See EDWARD RUBIN, *THE HEATSTROKE LINE* (2017) (supposedly cli-fi novel that nevertheless accurately predicted the trajectory of the climate crisis).

17. See Commodore Smith, *Filtering the Evidence on Nano-Screens*, 76 J. CLIMATE STUD. 437 (2002) (surveying studies and finding theoretical limit of SPF 875).

18. See DENVER MUSK, *FORTY ACRES, A MULE, AND A WHOLE LOT OF WORK: THE HISTORY OF FARMING IN AMERICA* (2017); see also AMANDA LITTLE, *THE FATE OF FOOD: WHAT WE'LL EAT IN A BIGGER, HOTTER, SMARTER WORLD* (2019) (overly optimistically predicting that advances in technology would save the human species from a population-level extinction event).

19. See Christopher Serkin, *What Property Does*, 75 VAND. L. REV. 891, 905 (2022) (“If a farmer plants hemp instead of corn, she reaps the rewards if hemp succeeds, and suffers the costs if corn would have been the better choice.”).

20. See, e.g., Michael Heller & Christopher Serkin, *Revaluing Restitution: From the Talmud to Postsocialism*, 97 MICH. L. REV. 1385, 1400 n. 32 (1999) (citing Josef Burger, *Politics of Restitution in Czechoslovakia*, 26 E. EURO. Q. 485 (1993) and describing the importance of collective farming in parts of the former Soviet Union, a “country” that existed prior to the Pan Asiatica Colony 7).

pulling up the GIS maps that every state maintains and looking for uncultivated land.²¹ Of course, anyone who finds that plants have died or that a particular claimed plot is not actually being cultivated may file for replanting.²² Jurisdictions vary by climate on whether the replanting rights vest immediately upon filing, or whether actual notice to the original planter is required. Some places, where the growing season is longer, allow the original planter the first opportunity to replant.²³ Others allow the replanter to replant immediately to ensure maximum production.²⁴ Even in those cases, the original planter retains the right to prove that the crop was adequately cared for, which would entitle them to a share of the value of the replanted crop.²⁵ Natural law will not determine such details. But the general approach to a planting registry makes property rights clearer than any alternative and so benefits everyone.²⁶

The idea of assigning planting or replanting rights to the *landowner* seems guaranteed to ensure that some valuable land for food production will go unused and that someone wanting to produce food may have trouble finding land for growing. If arable land expanded north of Vermont or South of Massachusetts, or if the population of the United States were to shrink dramatically, then the right to farm might be allocated differently. But that, of course, is science fiction and not a basis on which to base a property regime in the real world.

Finally, Claeysians have a truly idiosyncratic commitment to some fiction of atemporal property, what they call “perpetual and indefinite management authority.”²⁷ In their view, once rights to any resources are

21. See gisexample.com for a sample of an Augmented Reality GIS map.

22. See, e.g., 27 VT. STAT. ANN. § 223(a)(2) (2420) (codifying common law procedures to establishing replanting rights).

23. See *id.*

24. See ME. STAT. § 104 (early vesting rule where growing season is short in the southern part of the state).

25. See *Smithton v. Smithee*, 23 N.H.46 599 (2401) (“Equity treats a replanter as a kind of involuntary bailee of the original planter, holding the seeds’ potentiality while assuming the obligations of care, water, light and shade. The equitable outcome is to divide the resulting crops between the two.”).

26. Even Claeys himself seemed to recognize the natural rights justification for such comprehensive titling systems. See Claeys, *supra* note 6, at 141 (“If titling and recordation systems make property in land clearer than common law occupancy tests do, they help land occupants satisfy the claim communication requirement more effectively than the common law can. If clear land claims make legal property rights more secure, they indirectly facilitate its productive use.”).

27. See Zac Smith, *Property Should Last Forever and Ever and Ever and Ever*, 13 J. CLAEYS THEORY 127 (2449).

allocated, they remain in place without any termination date.²⁸ They do not have the built-in expiration of ten years for habitations and five years for land that naturally inheres in property. They would treat real property more like chattels, which presumptively remain with their possessors, even though land has no natural obsolescence or lifespan.

For the Claeysians, people should be allowed to retain a claim to resources regardless of productive use and regardless of whether they still value the resources more than others. Claeysians claim, counterintuitively, that allowing such squatting on resources encourages people to put them to use.²⁹ They would rely on “voluntary transactions” (i.e., the cooperation of owners) to reallocate under-used resources.³⁰ Such a regime may have been sustainable in the Period of Expansion but is obviously impossible today. The reallocation and regular auctioning of property is the best way to ensure that it is always in the hands of the person who values it the most.

A simplified version of such a system might have fatal defects if it prohibited long-term planning,³¹ but the futures market for auction options allows people to lock in rights beyond their natural expiration by sharing the proceeds of the property.³² And, of course, the options are callable, preventing too much lock-in.³³ There may be nothing “natural” or inevitable about the particular duration of property interests, nor the terms of the conveyances that reallocate them. But the basic expiration of real property interests is central to our conception of ownership by cabining perpetual interests.

28. See *id.* at 132 (“Property should last forever and ever and ever and ever.”); see also Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L. Q. 667, 695–96 (1986).

29. Ilya Smith, *Don't Re-bundle: Re-sell!*, 14 J. CLAEYS THEORY 64, 79 (2450) (“Claeys teaches that the assignment and protection of property rights that depend upon productive use of the resource allows the law to recognize that property rights can last ‘forever and ever and ever and ever.’” (quoting Smith, *supra* note 27, at 132)).

30. See *id.* at 80 (“When a government protects owners’ rights to be left alone on their lots, it empowers them to decide for themselves how to use their lots for their own chosen life goals. The freedom that follows from such rules encourages careful and productive management of land.”) (quoting Claeys, *supra* note 6, at 11)).

31. HANOCH DAGAN, *A LIBERAL THEORY OF PROPERTY* 64 (2021) (“Indeed, the temporal extension, which typifies property rights, follows quite closely from property’s autonomy-enhancing *telos*.”).

32. See, e.g., 27 VT. STAT. ANN. § 400 *et seq.* (identifying factors for assessing real interests in property, including “legitimate, investment-backed plans” that will exceed the property duration before coming into fruition, and setting statutory rate for dividing proceeds).

33. See, e.g., 27 VT. STAT. ANN. § 404(b) (where new owner calls options, the price shall be the discounted present value of the expected fruition).

Of course, the Claeysians have a political agenda. Since property reallocation auctions are the principal mechanism for securing public funding, the real motivation here is simply to limit government. Without auction proceeds, governments would likely have to rely on some kind of productivity or income tax, or maybe an annual property tax or tithe regardless of owners' ability to pay.³⁴ The distributional consequences could be severe.

Claeysians are not inured to such consequentialist arguments. Indeed, they, too, are focused on institutional designs that they claim will produce the best outcomes. But property is made of stiffer stuff. A natural right to property cannot be readjusted simply because it is more convenient. Natural rights—like the right to shade and the right to farm—cannot simply be changed because some other regime may produce marginally better outcomes in some narrow instances. For rights to be natural, they must be, if not universal, at least not so dependent on specific conditions in the world that they devolve into purely consequentialist reasoning under the guise of inevitability.

The stakes are high. We cannot allow flawed political institutions to tinker with rights and interests that implicate the very survival of the species. What regulations might the coastal commissions in Tennessee and New Mexico adopt, for example, given the politics of those states? Would they allow the coal factories to restart and the oil derricks to begin pumping again? Would they allow people to build in ways that erode the final barriers that hold back the seas? Just as the Rockies are the principal bulwark against the Pacific Ocean, reaching all the way to Arkansas, natural property rights are the principal bulwark against government changing and reallocating resources in ways that threaten our very survival.

Property is not simply a contingent set of relations that justify any particular distribution of rights and resources. Natural rights persist as the structural undergirding of property even as the world changes. The Claeysians cannot co-opt the language of natural property rights to argue for their radical transformations. So even if the warlike Canadians succeed in their renewed efforts to find the sunken wreckage of New York City, its spoils will always belong to the Lenape people as required by natural law.³⁵ That is the strength of property.

34. See, e.g., HENRY GEORGE, OUR LAND AND LAND POLICY 198 (1898).

35. But see Claeys, *supra* note 6, at 207 (discussing *Johnson v. M'Intosh*, 21 U.S. 543); see also Claeys, *Introduction*, *supra* note 6, at 440.