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Balancing the Inequities in Applying Natural Property Rights to Rights in Real or Intellectual Property

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**BALANCING THE INEQUITIES IN APPLYING NATURAL PROPERTY RIGHTS
TO RIGHTS IN REAL OR INTELLECTUAL PROPERTY**

Lolita Darden[†]

Abstract

*Eric Claeys's book, *Natural Property Rights*, introduces a Lockean-based theory of interest-based natural property rights. Central to Claeys's theory are the concepts of justified interests and productive use. A justified interest, Claeys writes, exists when an individual demonstrates a stronger interest in a resource than anyone else in the community and uses the resource productively in a manner that is "intelligent, purposeful, value-creating, . . . sociable," and leads to survival or flourishing. Claeys's theory demonstrates "how a standard justification for property gets implemented in practice" and how a community's "goods" build on the individual's goods.*

Claeys's community "goods" focus, however, is antithetical to a Lockean private property ownership theory, which prioritizes an individual's interest, except for the provisos—no waste and enough and as good. Although Claeys adequately addresses the differences between his and Locke's theories, Claeys's regard for both community and individual interests causes one to question whether his theory is truly Lockean-based.

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Claeys's book consists of four parts: Natural Law and Natural Rights (Part I), Property's Foundations (Part II), Property Law (Part III), and Property in Law and Policy Generally (Part IV). This Article addresses Parts I and II and explores the defenses and justification for Claeys's interest-based natural property rights theory under a Lockean framework.

This Article also addresses the defects in a Lockean natural rights theory, including Claeys's application of that theory. Locke's theory focuses on the natural rights of a specific community. Such a focus often disfavors people situated in out-of-power positions, for example, a land ownership dispute between indigenous people and recent immigrants that have organized themselves under laws that do not recognize the existing rights (natural or otherwise) of the indigenous people. Yet, both Claeys and Locke contend that natural rights emanate from a divine source (God) that intended humankind to use the things of nature for its survival and flourishing. But, when fundamentally different views exist concerning a resource's ownership or productive use, rights conflicts arise. These conflicts often result in one community's natural rights trampling another's. This Article introduces a balancing interest test as a possible resolution to this conflict. The proposed balancing interest test seeks to maximize the common good in the most equitable way by finding an equitable mean between conflicting interests. Finally, this Article explores whether Claeys's theory can justify natural property rights in intellectual property, specifically patents.

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I. INTRODUCTION

Professor Eric Claeys's book, *Natural Property Rights*, presents a normative justification for property rights viewed from a natural law, natural rights perspective. Claeys introduces an interest-based theory of natural property rights. While Claeys developed his theory using a Lockean approach to natural law and natural rights, the theory includes elements that deviate from a purely Lockean perspective but addresses frequent criticisms of Locke's property theory—the conversion of commonly owned resources to private property and denying community access to the claimed resource.

Eric Claeys's book, *Natural Property Rights*, introduces a Lockean-based theory of interest-based natural property rights.¹ Central to Claeys's theory are the concepts of justified interests and productive use.² A justified interest, Claeys writes, exists when an individual demonstrates a stronger interest in a resource than anyone else in the community and uses the resource productively in a manner that is “intelligent, purposeful, value-creating, . . . sociable,” and leads to survival or flourishing.³ Claeys's theory demonstrates “how a standard justification for property gets implemented in practice” and how a community's “goods” build on the individual's goods.⁴

Claeys's community “goods” focus, however, is antithetical to a Lockean private property ownership theory, which prioritizes an individual's interest, except for the provisos—no waste⁵ and enough and as

1. Eric Claeys, *Natural Property Rights* 147–48 (Sept. 17, 2021) (unpublished manuscript) (on file with the Texas A&M Journal of Property Law) (Professor Claeys uses unfair competition doctrine to concretize an early part of his conceptual project, but he does not offer examples that apply his natural property rights framework to business organizations.); *see also* Eric R. Claeys, *Natural Property Rights: An Introduction*, 9 TEX. A&M J. PROP. L. 415 (2023) [hereinafter “Claeys, *Introduction*”].

2. Claeys, *supra* note 1, at 102–15; *see also* Claeys, *Introduction*, *supra* note 1, at 420.

3. Claeys, *supra* note 1, at 128; *see also* Claeys, *Introduction*, *supra* note 1, at 420.

4. Claeys, *supra* note 1, 25, 43.

5. This proviso prohibits the accumulation of more resources than one can use to prevent spoilage. Waste refers not only to “spoiled food, but the energy used gathering it.” *See* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 300 (1988).

good.⁶ Although Claeys adequately addresses the differences between his and Locke's theories, Claeys's regard for both community and individual interests causes one to question whether his theory is truly Lockean-based.

These remarks focus primarily on the first half of the monograph, which addresses: (1) Natural Law and Natural Rights and (2) Property Law's Foundations. This Article explores whether Claeys's interest-based natural property rights theory can be justified under a Lockean framework of natural law and natural rights. Part II begins with a brief overview of Locke's theory and is followed by a discussion of whether Professor Claeys's theory is Lockean-based (Part III). One significant difference between Claeys and Locke's theories is Claeys's attempt to balance community and individual interests, which may lead to shared use of a resource.⁷ However, under a pure Lockean property rights theory, the first to appropriate the resource through labor is vested with exclusive rights. The remarks in Part III discuss whether the varying focus of the two theories are reconcilable. In Part IV, this paper addresses the defects of a Lockean natural rights theory, including Claeys's application of that theory. Both Claeys and Locke's theories focus on the natural rights of a specific community. Such a focus often disfavors people situated in out-of-power positions, for example, a land ownership dispute between indigenous people and recent immigrants that have organized themselves under laws that do not recognize the existing rights (natural or otherwise) of the indigenous people. Yet, both Claeys and Locke contend that natural rights emanate from a divine source (God) that intended humankind to use the things of nature for its survival and flourishing. But, when fundamentally different views exist concerning a resource's ownership or productive use, rights conflicts arise. These

6. JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 27 (Jonathan Bennett ed., 2017) (1690) (man owns himself and his labor, so when man adds his labor to a thing, his labor accords him a natural property right in the thing transformed by his labor); *see also* Nikos Koutras, *From Property Right to Copyright: A Conceptual Approach and Justifications for the Emergence of Open Access*, 12 ERASMUS L. REV. 139, 142 (2019) ("Locke puts forward a more individualistic notion of property ownership than does Aristotle. Specifically, in his *Second Treatise on Government*, J. Locke, *Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government* (John Wiley & Sons, 2014), Locke provides an answer to the question, by what right can an individual claim to own one part of the world when, according to the Bible, God gave the world to human beings in common? In this work, Locke argues that individuals own themselves and thus their own labour. Accordingly, he argues that individual property rights are natural rights Following this argument, it is plausible that when individual labours and the outcome of this work is the creation of tangible objects, those objects become his property.").

7. Claeys, *supra* note 1, at 39–44.

conflicts often result in one community's natural rights trampling another's. To resolve the disparate treatment of people and communities in out-of-power positions, this Article, in Part V, introduces a balanced-interest test aimed at resolving inequitable and unjust application of natural rights theories. The proposed balanced-interest test seeks to maximize the common good in the most equitable way by finding an equitable mean between conflicting interests. Finally, Part VI explores whether Claeys's proposed theory justifies natural property rights in intellectual property, specifically patents.

II. OVERVIEW OF LOCKE'S CONCEPTION OF NATURAL PROPERTY AND NATURAL RIGHTS

A. *Locke's Definition of Natural Rights*

While there is a vast amount of scholarship in law⁸ and philosophy⁹ discussing Locke's theory of natural law and natural rights, this paper provides a high-level overview of Locke's views. This writer also understands there is extensive debate regarding the foundations of Locke's natural law and natural rights theory, particularly with respect to the divine law origins ascribed to Lockean theory.¹⁰ Locke's theory of natural law and natural property rights, and that of many other classical and modern thinkers, turns on the belief that God gave the earth to mankind in common along with the right to use the things nature has provided for their subsistence.¹¹ It is Locke's theistic view that pervades modern

8. ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY (2011); see also James W. Byrne, *The Basis of the Natural Law in Locke's Philosophy*, 10 CATH. L. 55 (1964), <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1473&context=tcl> [<https://perma.cc/7KXS-X5C9>]; Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L. J. 246 (2018), <https://openyls.law.yale.edu/handle/20.500.13051/10311> [<https://perma.cc/B58D-6H4Z>]; Adam D. Moore, *A Lockean Theory of Intellectual Property Revisited*, 49 SAN DIEGO L. REV. 1069 (2012); Glynn S. Lunney, Jr., *A Natural Right to Copy*, Legal Studies Research Paper Series, Research Paper No. 19-42 (Aug. 20, 2019), <https://ssrn.com/abstract=3438625> [<https://perma.cc/2Y3W-CWWH>]; Hughes, *supra* note 5.

9. See JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988); see also STEPHEN BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME (1990); see also John W. Lenz, *Locke's Essays on the Law of Nature*, 17 PHIL. & PHENOMENOLOGICAL RSCH. 105 (1956), <https://www.jstor.org/stable/2104691> [<https://perma.cc/7PPX-39ZQ>].

10. See MERGES, *supra* note 8; see also WALDRON, *supra* note 9; see also BUCKLE, *supra* note 9.

11. See LOCKE, *supra* note 6, § 25. It should also be noted that natural law is different from divine law. As one commentator writes, "Natural law can be discovered by reason alone and applies to all people, while divine law can be discovered only through God's special revelation and applies only to those to whom it is revealed and whom God

scholarship and provides the basis for natural property rights under the theory that the law of nature provides humankind with certain inalienable rights that civil society has an obligation to protect.¹² Since the “law” of nature creates obligations that humankind must obey, it is that obligation to obey that demands further explanation under Locke’s theory of natural law, and natural rights as used by Claeys to support his theory of natural property rights.

From a Lockean natural rights perspective, law “is a rule of action prescribed by a superior.”¹³ “[I]n creating the universe,” God, “impressed upon matter ‘laws of action’ as a clockmaker does upon his clock.”¹⁴ Locke’s view of natural law is that God created humankind and imposed on us all rules of conduct that we must obey.¹⁵ Natural law, according to Locke, is natural because it emanates from God. Locke deemed the natural law to be natural to man because “God [gave] man, in the faculties of sense[,] reason[, and experience] the means by which it can be known.”¹⁶ So, the natural law, Locke believes, exists or can be discovered by the use of the senses, reason, and experience, making it a naturally occurring part of man’s being or existence. Locke called this ability to know the natural law by reason a “dictate of right reason.”¹⁷ One scholar writes that “God’s will, the ultimate basis of the law, is revealed in the capabilities inherent in man’s nature.”¹⁸ It should be noted that while Locke’s early works ground knowing and understanding the natural law through reason, his latter works say reason alone is insufficient.¹⁹

According to Locke, “[t]he chief characteristic of the law of nature . . . is its binding force.”²⁰ We, humankind, must follow the natural law, not

specifically indicates are to be bound.” Alex Tackiness, *Locke’s Political Philosophy*, STAN. ENCYC. PHIL. (Oct. 6, 2020), <https://plato.stanford.edu/entries/locke-political/#Natu-LawNatuRigh> [<https://perma.cc/RF7D-U6VK>]. By contrast, other commentators state that if “Locke speaks of a law of nature after the critical evaluation of human knowledge contained in the Essay, He merely means that the laws of the universe itself express the will of the Creator, who arbitrarily willed that the universe be governed by this set of laws, which can be naturally known to us by the pleasure and pain attached to the respecting or disrespecting of their observance.” Byrne, *supra* note 8, at 63.

12. See Byrne, *supra* note 8, at 58.

13. Robert P. Burns, *Blackstone’s Theory of the Absolute Rights of Property*, 54 CIN. L. REV. 67, 70 (1985); see also LOCKE, *supra* note 6.

14. See *id.* at 70.

15. See LOCKE, *supra* note 6, §§ 38–39.

16. Lenz, *supra* note 9, at 105.

17. BUCKLE, *supra* note 9, at 140.

18. See Lenz, *supra* note 9, at 105.

19. See Byrne, *supra* note 8, at 55; see also JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING BOOK I: INNATE NOTIONS §§ 6–14 (Jonathan Bennett ed., 2017) (1793).

20. See Lenz, *supra* note 9, at 105.

because of fear of punishment from an omnipotent, omniscient God, but because the law flows from the “rational apprehension of what is right.”²¹ In other words, God has given humankind the natural law to indicate what is expected of them.²² Locke’s expectation concerning mankind’s behavior and obligations under the natural law has particular relevance to the questions raised in Part IV of this Article.

A natural right, unlike a natural law, is not binding but is exercised at the discretion of each person and all must respect it once asserted. Thomas Paine describes these rights as “animal rights,” with the right to exercise these rights residing within each human being.²³ So, natural rights were believed to be those rights that existed independently of government²⁴ and are grounded in the fact that human beings have free, unencumbered rights to use and acquire a resource or thing for their survival or flourishing.²⁵

B. *The State of Nature*

In Locke’s state of nature, persons “are perfectly free to order their actions, and dispose of their possessions and themselves, in any way they like . . . subject only to the limits set by the law of nature.”²⁶ Locke’s state of nature is also a “state of equality.” A state where no one person has “more power and authority” than anyone else.²⁷ Locke cautions that in this state, although persons may freely govern their own actions without restraint, there is a law that “creates obligations for everyone.”²⁸

21. *Id.* at 106 (citing JOHN LOCKE, *ESSAYS ON THE LAWS OF NATURE* § 185 (W. Von Leyden ed., Oxford Clarendon Press 1954) (1676)); *see also* LOCKE, *supra* note 6, § 183.

22. *See* Lenz, *supra* note 9, at 107.

23. Campbell, *supra* note 8, at 252 (citing *Common Sense [Thomas Paine], Candid and Critical Remarks on Letter 1, Signed Ludlow, PA. J. & WKLY. ADVERTISER*, (June 4, 1777), at 1).

24. *Id.* at 252–53, n.15 (citing 1 THOMAS RUTHERFORD, *INSTITUTES OF NATURAL LAW* 36 (Cambridge, J. Bentham 1754) (“Another division of our rights is into natural and adventitious. Those are called natural rights, which belong to a man . . . originally, without the intervention of any human act.”)).

25. *Id.* at 252.

26. *See* LOCKE, *supra* note 6, § 4; *see also* Moore, *supra* note 8, at 1075 (describing Locke’s state of nature “as that state where the moral landscape has yet to be changed by formal property relations . . . all anyone has in this initial state are opportunities to increase his material standing.”); *cf.* Lunney, *supra* note 8, at 5–6 (criticizing Locke’s description of the “state of nature” as being an “idealized” state from which he (Locke) derived a set of idealized natural rights; and criticizing Locke’s framing of “natural rights,” finding Locke’s description to be “merely descriptive” and lacking “any normative or persuasive significance.”).

27. *See* LOCKE, *supra* note 6, § 4.

28. *Id.* § 6.

That law being reason; reason teaches that “because we are all equal and independent, no-one ought to harm anyone else in his life, health, liberty, or possessions.”²⁹

Locke’s assumption about the state of nature gives rise to natural rights. He assumed “that the state of nature was a condition in which all humans were equally free from subjugation to one another—in which individuals had no common superior.”³⁰ During the founding of this country, “Americans understood natural liberty to be the freedom of individuals in the state of nature.”³¹ According to Locke’s natural law theory, every human being has a natural right to life, liberty, and property independent of any laws humans create.³² These natural rights, Locke believed, emanated from the natural law based on God’s command that humankind use things in the state of nature for survival and flourishing. Locke teaches that the right to private interests in things stems from one’s investment of a portion of themselves, i.e., their labor which one exclusively owns, into transforming the thing from one state to another.³³ It is this investment of labor that leads to private ownership, as discussed in the next section.

C. *Property Ownership Under a Lockean Theory*

Taking Locke’s view of the divine as the source of natural law and natural rights, Locke believed that God gave the earth and everything in it to humankind—that is, God gave the earth to humankind, in common, for its use, enjoyment, and improvement for life.³⁴ In his *Second Treaties of Government*, Locke writes that all things belong to the commons³⁵ for

29. *Id.*

30. Phillip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 918, n.37 (1993).

31. *Id.* at 918; *Id.* at n.37 (“Though I have said . . . that all Men by Nature are equal, I cannot be supposed to understand all sorts of Equality . . . the Equality I there spoke of, as proper to the Business in hand, being that equal Right that every Man hath, to his Natural Freedom, without being subjected to the Will or Authority of any other Man.” (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 322 (Peter Laslett ed., 2ed. 1967))). Hamburger wrote, “Americans frequently declared that individuals in the state of nature were equally free. According to the 1776 Virginia Declaration of Rights, for example, ‘all Men are by Nature equally free and independent.’” *Id.* at n.37 (quoting Va. Del. of Rights § 1 (1776)).

32. Tackiness, *supra* note 11.

33. Claeys, *supra* note 1, at 122.

34. LOCKE, *supra* note 6, §§ 25, 32; see also Hughes, *supra* note 5, at 297.

35. LOCKE, *supra* note 6, § 24. The common includes “the earth and all its fruits’ which God gave to humankind.” Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1542 n.53 (1993). The common, according to Gordon, includes not only the physical

humankind to share for their survival and flourishing.³⁶ No individual, Locke says, has a basic right—a private natural right—to exclude others in their enjoyment of the things in the commons as those things exist in their natural state.³⁷ Because of this right to use the things of nature for subsistence, classical and modern thinkers (Aquinas, Grotius, Pufendorf, and others) believed all persons had a natural right, as a right to property, in the things in the commons to use and appropriate them to support basic human needs.³⁸ So, in principle, they believed commons property to be available to every member of a community to use for surviving and flourishing without exception.

But, as Locke writes, although God “*has given [humankind] all things richly[,]*” “it cannot be supposed [H]e meant it should always remain common”; rather, he intended that each man take as “much as he may by his labour fix a property in.”³⁹ Locke believed God commanded humankind to subdue the earth “improve it for the benefit of life.”⁴⁰ If one is to “subdue” the elements of the commons “to make them better for the benefit of life,” (e.g., take fruit or animals from the common for sustenance),⁴¹ there must be some way for her to create a private right in the things taken. Locke answers this question by drawing a distinction between joint ownership of the elements of the commons and an individual’s sole and natural property right in their own person.⁴²

realm and all that existed (e.g., land, seas, mountains) or that which is “continually in the process of coming into existence without the assistance of humankind (deer, fish, acorns).” *Id.* at 1558. A person may validly own property as long as she does not waste the property owned or destroy any portion of the common that belongs to others. *Id.* at n.53. Malla Pollack writes that under Locke’s property theory the “‘common’ requires two elements: (i) no individual has a right to exclude all others; and (ii) each member of the commonality has a claim right to be included in the common - a right not to be excluded.” Malla Pollack, *The Owned Public Domain: Excluded – Or the Supreme Court Chose the Right Breakfast Cereal in Kellogg v. National Biscuit Co.*, 22 HASTINGS COMM’NS & ENT. L.J. 265, 280 (1999).

36. LOCKE, *supra* note 6, § 25.

37. *Id.* § 26. In the article *Property Right in Self-Expression*, Wendy J. Gordon writes “[T]hese duties are imposed by God and are discernable by reason.” Gordon, *supra* note 35, at 1541. She goes on to state that “[s]ince all humanity is equal in the state of nature, the duties we owe others are also the duties they owe us, and the rights I have against others they have against me.” *Id.* at 1541, n.45.

38. LOCKE, *supra* note 6, § 24; see also Bret Boyce, *Property as a Natural Right and as a Conventional Right in Constitutional Law*, 29 LOY. L.A. INT’L & COMP. L. REV. 2017, 202 (2007).

39. LOCKE, *supra* note 6, §§ 30, 33.

40. *Id.* § 31.

41. *Id.* § 25.

42. *Id.* § 27.

Under Locke's theory, everyone has "a [p]roperty in his own person."⁴³ Because one owns one's person, an individual, thus, owns those things that are an extension of that individual. According to Locke, one's labor falls into the category of things that extends a person's sphere of ownership beyond the individual's physical existence. Locke believed that "[t]he labor⁴⁴ of [one's] body and the work of his hands . . . are strictly his,"⁴⁵ and adding that labor to a thing transfers something of that person to the thing, bringing the thing within the purview of one's personal ownership. Locke's view on this point is consistent with his view of the state of nature discussed earlier.⁴⁶ No individual has a priority claim over the person of another or the work of that other's body or hands.⁴⁷ When a person expends energy, effort, or labor in taking something from the commons in the state that nature provided it (e.g., picking apples from a tree), that person purposefully interacts with the thing by exerting labor or work in the taking. When one "mixes" his/her labor with a thing, the thing becomes the private property of the laboring individual.⁴⁸ A more precise understanding of Locke's theory would be that when one purposefully adds their effort to or does work on a thing, they add to that thing something that they exclusively own: their energy generated by the labor or work of their hands or body, thus, making the thing an extension of themselves.⁴⁹ Consequently, the thing becomes their property because of the effort applied in gathering, possessing, or making it, provided the provisos, waste, and sufficiency are not violated.⁵⁰ For example, if I pick apples from a tree and store them away for my use, they are my property. All other persons have a duty to "leave

43. *See id.* at § 26.

44. George H. Smith defines labor as "rational and purposeful activity." George H. Smith, *Smith explains Locke's ideas about how we should interpret a philosophic text, and the relationship between labor and private property*, LIBERTARIANISM.ORG (Oct. 23, 2015), <https://www.libertarianism.org/columns/john-locke-hermeneutics-labor> [<https://perma.cc/DW3S-LNFJ>]. Smith further explains labor to be a "type of purposeful human action, one that links property (moral dominion) in one's person to property in external goods." *Id.*

45. LOCKE, *supra* note 6, § 27; *see also* Hughes, *supra* note 5, at 297.

46. *See* LOCKE, *supra* note 6, § 27.

47. *Id.*

48. *See* Gordon, *supra* note 35, at 1545 (Gordon summarizes Locke's labor theory as follows: "If you take the objects I have gathered, you have also taken my labor, since I have attached my labor to the objects in question. This harms me, and you should not harm me. You therefore have a duty to leave these objects alone. Therefore, I have property in the objects."); *see supra* note 6 and accompanying text.

49. Effort or labor means, for example, gathering fruit or nuts from the common or cultivating commonly owned land. *See* LOCKE, *supra* note 6, § 28.

50. *Id.*

these [apples] alone,”⁵¹ as they have been transformed to a different state by my labor, something that I exclusively own. Scholars call this purposeful interaction and the exertion of labor and work Locke’s labor-mixing theory of property ownership.⁵²

Under a Lockean theory, one becomes an owner of an unowned resource by mixing labor with the resource, which results in the resource being endowed with something that belongs exclusively to the laborer.⁵³ From a Lockean perspective, however, private property rights attach only if doing so does no harm to the commons.⁵⁴ Additionally, the resource may be claimed if it is of a type that (or others of its kind) exists in abundance in nature—as in there would be “enough and as good left for others.”⁵⁵ Scholars argue that the sufficiency provision of “enough, and as good as . . . cannot be fulfilled in a morally compelling way because the commons of tangible goods is inherently scarce.”⁵⁶ Locke counters this criticism with the advent of money, which allows for buying and trading to provide the resources needed for survival or flourishing.⁵⁷

There are many scholars that argue that Locke’s labor-mixing theory is incoherent and insufficient to establish private rights in tangible or intangible property.⁵⁸ For example, Professor Epstein argues that Locke’s theory may explain why the first possessor has some special interest in a resource, but it does not explain why s/he is entitled to the robust form of absolute ownership that is routinely conferred upon her/him.⁵⁹ Some even argue that Locke’s theory of private ownership of the things of the commons actually swallows up or depletes the

51. See Gordon, *supra* note 35, at 1545.

52. See MERGES, *supra* note 8.

53. See LOCKE, *supra* note 6, § 26; see also MERGES, *supra* note 8; but see Waldron, *supra* note 9, 1573–75 (questioning Locke’s notion of ownership by labor).

54. See Helga Varden, *The Lockean ‘Enough-and-as-Good’ Proviso: An Internal Critique*, 9 J. MORAL PHIL. 410 (2012) (Varden discussing the indeterminacy of property rights under a Lockean theory in order to comply with the proviso of enough and as good).

55. See LOCKE, *supra* note 6, § 33. But see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 149–82 (“Someone whose appropriation otherwise would violate the proviso [of enough and good as] still may appropriate provided he compensates the others so that their situation is not thereby worsened.”).

56. See Benjamin G. Damstedt, Note, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine*, 112 YALE L.J. 1179, 1181, 1185 (2003).

57. See LOCKE, *supra* note 6, §§ 36–37.

58. See WALDRON, *supra* note 9, at 184–89; see also Dan L. Burke & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1597 (2003).

59. See Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL’Y 711, 734 (1989).

commons.⁶⁰ Others argue that utilitarian arguments better explain the portion of natural (property) rights than the natural rights theory does.⁶¹ Still, others argue that a resource “transformed” by the mixing of one’s labor with it is still common property and should remain available to the commons. Claeys’s interest-based theory addresses many of these critiques.

As the next section discusses, Claeys’s interest-based rights theory attempts to find a balance between community rights and individual rights. Because of the differing focuses of Claeys’s theory and Lockean theory, this paper assumes that the Lockean framework is sufficient to support a rights-based interest in private property but addresses whether Claeys’s theory is truly Lockean based.

III. JUSTIFICATION OF NATURAL PROPERTY RIGHTS UNDER CLAEYS’S INTEREST-BASED THEORY

A. *Making the Link Between Locke and Claeys*

An alternative way of looking at Locke’s labor-mixing theory is through the lens of what Claeys calls productive use. Productive use “focuses on a claimant’s conduct in relation to the resource being claimed.”⁶² Productive use requires the use of a resource in a manner that “consists of activity that is intelligent, purposeful, value-creating, . . . [and] sociable.”⁶³ In productively using a resource, a rights-claimant must identify not only a particular interest in a resource but also a function and use of the resource that will be for their survival or that of someone else’s.⁶⁴ The concept of productive use aligns with the basic natural law underpinnings of a Lockean theory, particularly since Locke believed that God expected humankind to work to improve the things of nature for their benefit.⁶⁵ Locke writes in his *Second Treatise on Government* that “God gave the World to Men . . . for their benefit, and the greatest Conveniences of Life they were capable to draw from it, it cannot be supposed he meant it should always remain uncultivated.”⁶⁶ Waldron

60. See Damstedt, *supra* note 56, at 1181.

61. See Epstein, *supra* note 59, at 730.

62. Claeys, *supra* note 1, at 130.

63. *Id.* at 128.

64. Claeys defined productive use as including uses that are intelligent, purposeful, value-creating, and sociable, but excludes uses that are wasteful and those that are purely for generating capital. *Id.* at 127–28; see also Claeys, *Introduction*, *supra* note 1, at 420.

65. *Id.* at 122–27

66. LOCKE, *supra* note 6, § 34.

interprets Locke's point to mean that "[p]roductive use or labor is virtuous but idleness is not."⁶⁷

My view is that it is not the "mixing" of labor alone that transforms a resource into a private property interest, but the appropriation of the resource coupled with its productive use, as Claeys defines that phrase, which creates the private property interest. It is the productive use that transforms a resource into a state different from that in which it was found in nature and is used to support one's or another's survival or flourishing. The basic truth upon which Locke and Claeys's theories rest is that the things of nature were intended to be used by humankind for its survival or benefit, which creates a natural right to property permitting the use and appropriation of the thing as private property. As Robert Merges writes, "to make use of the great gift" given to man by the divine, "humans must take hold of things and consume them."⁶⁸ In other words, "they must appropriate them out of the original commons."⁶⁹ The inability to appropriate a resource and use it for its intended purpose—mankind's survival—would frustrate the underlying purpose of the thing and the reason for its creation: that it be used to sustain life.

It is the act of appropriation and productively using the resource (i.e., the picking of the apples for sustenance) that transforms a commonly owned resource into a different state from that in which it originally existed. Merges explains that "common ownership . . . is the default state; appropriation comes about through effort, which is required to alter the default state."⁷⁰ This explanation of Locke's labor-mixing theory is consistent with Claeys's productive use requirement.

The underlying right in Locke's theory is the right to life or the right to sustain life, which requires the appropriation of certain resources to accomplish that goal. It is this natural right to the things of the commons that gives rise to a special natural right to use the things of nature for survival or flourishing. A special natural right creates an individual private interest in the resource. Technically, however, a special natural right is not "natural" because they are not rights that a person is endowed with simply because of their humanity. These special natural rights are natural as a special right defined by the relationship between the resource and the necessity to appropriate it for the higher purpose of survival or subsistence.⁷¹ In other words, the natural right is the right

67. See WALDRON, *supra* note 9, at 147.

68. MERGES, *supra* note 8, at 34.

69. *Id.*

70. *Id.* at 35.

71. See WALDRON, *supra* note 9.

to life. To sustain that life, a special natural right exists to use the things of nature to fulfill the natural right, and when one appropriates and productively uses a resource for survival, the natural law obligates others to respect the private property right that attaches to the resource.⁷² As James Wilson, a lawyer, and often-forgotten founding father, wrote, “life, and whatever is necessary for the safety of life, are the natural rights of man. Some things are . . . so plain, that they cannot be proved.”⁷³ It follows then that there is a right to property in those things supplied by nature for the use of one’s survival and preservation, as long as the use does not worsen the community. Under Claeys’s theory, this special natural right in a resource arises when one justifiably uses the resource for survival or flourishing, although Claeys calls the right a natural right which is consistent with Locke’s view. Since one’s labor is the exclusive property of the laborer, by adding one’s effort or labor, or through productive use, to change a resource from its natural state as provided in the state of nature to something else, this provides, Merges writes, “the solid ground on which legitimate appropriation and [private interests] are built.”⁷⁴

IV. REVIEW OF CLAEYS’S PROPOSED THEORY FROM A LOCKEAN PERSPECTIVE

A. *Usufruct Versus Exclusive Ownership*

One seemingly major difference between Locke’s theory and Claeys’s theory is that after expending effort to transform a resource, under Locke’s view, the laborer obtains an exclusive private right to the resource to the extent that the laborer has not taken more than they can use and has left enough and as good for others.⁷⁵ Conversely, under Claeys’s theory, the laborer may obtain, at minimum, a private interest in the resource in the form of a usufruct.⁷⁶ Under Locke’s theory,

72. See Adam Mossoff, *Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory*, 29 J. SOC. PHIL. & POL’Y 283, 290–91 (2012); Cf. Varden, *supra* note 54, at 414 (questioning the right to unilaterally acquire rights in a resource subject to the proviso of enough and as good).

73. Peter C. Myers, *From Natural Rights to Human Rights—And Beyond*, 197 HERITAGE FOUND (SPECIAL REPORT) 5 (2017), https://www.heritage.org/sites/default/files/2017-12/SR-197_0.pdf [<https://perma.cc/M58X-EYNS>].

74. MERGES, *supra* note 8, at 35.

75. LOCKE, *supra* note 6, ch. V. It is generally known that rights of ownership under Locke were limited by the “waste” and “enough and as good” provisos (hereinafter “proviso”) prior to the invention of the concept of money, or other form of value that does not waste, as a means of storing, expanding and ultimately trading value. *Id.*

76. Claeys, *supra* note 1, at 169–70; see also Claeys, *Introduction*, *supra* note 1, at

exclusive private property rights vest in the laborer once s/he has invested effort in altering the resource's state, provided that the laborer has appropriated no more than its fair share of the resource as limited by the provisos. When exclusive rights vest in the laborer, it could be argued that the community's position is worsened because of the loss of a resource, but Claeys's theory addresses this concern. Claeys's theory addresses the concern of removing a resource from the commons due to appropriation by labor mixing and quite possibly makes a stronger case for natural rights than Locke does. Claeys's proposed theory does not necessarily grant a rights-claimant an exclusive property right to a resource but, at minimum, a usufruct to use the resource for their or someone else's survival.⁷⁷ (It should be noted that exclusive ownership has a place under Claeys's theory, and I certainly support exclusive ownership under certain circumstances).⁷⁸ However, the granting of less than an exclusive right of ownership under Claeys's theory is a significant departure from a Lockean theory, which raises the question of whether Claeys's theory is really Lockean based or whether it raises a different natural property rights theory altogether.

B. *Interest-Based Rights Theory*

Claeys presents the proposed theory as a rights-based natural property rights theory.⁷⁹ More specifically, it is an interest-based rights theory, that focuses on the rights of people and, in particular, the rights and policies that help people flourish and survive within their respective communities.⁸⁰ Interests, as defined in the proposed theory, focus moral reasoning on what is good for individuals. More specifically, an interest is "a stake that a person has in a distinguishable component of his well-being."⁸¹ Yet, Claeys says that "[a]lthough the interest is attributable to an individual, it has to be structured in a manner consistent with the interests of all other persons in the [community]," making "the interest self-regarding and considerate of the correlative interests of others [in the community]."⁸²

438.

77. Claeys, *supra* note 1, at 169–71.

78. *Id.* at ch. 8; *see also* Claeys, *supra* note 1, at 441–42.

79. Claeys, *supra* note 1, at 43–44; *see also* Claeys, *Introduction*, *supra* note 1, at 419.

80. Claeys, *supra* note 1, at 19, 41; *see also* Claeys, *Introduction*, *supra* note 1, at 419–20.

81. Claeys, *supra* note 1, at 53.

82. *Id.* at 55.

Claeys uses the analogy of a partnership to illustrate how an interest-based system would work to satisfy the interests of an individual and their community simultaneously, as an individual partner has the self-interest of maximizing their gain but as a member of the community is also interested in the well-being of the partnership, both legally and monetarily.⁸³ The obligations to choose actions that align with the community good, Claeys says, “are tied up with people’s obligations to realize the better parts of their natures.”⁸⁴ Consequently, although the interests focused on in Claeys’s theory are those of the individual, the rights-based focus does not prevent the community or policymakers from implementing policies that also focus on the interests of the community and the common good.⁸⁵ For example, under the proposed theory, the community or individual interests in a resource are open to reassessment on an ongoing basis.⁸⁶ If a subsequent claimant presents an interest as strong as or stronger than that of the right-claimant, the new right-claimant may be granted a priority right or at least a usufruct to use the resource, resulting in a shared use, provided the new rights claimant can present a justified interest based on local norms.⁸⁷

Interests, specifically justified interests, form the cornerstone of Claeys’s proposed theory.⁸⁸ As Claeys writes, “Interests mark off different topics for which people may be entitled to rights, and interests [may] justify those rights.”⁸⁹ While interests cannot lead to rights without justifications, justifications, as defined in the book, ground property in principles of flourishing and survival.⁹⁰

Justified interests allow members of a community that have an interest at least as strong as the right-claimant to present evidence rebutting the right-claimant’s interest.⁹¹ Anytime during the right-claimant’s productive use of the resource, any interest bearer is free to come forward with evidence of a superior claim or a claim that is as strong as the right-

83. *Id.* at 54–55.

84. *Id.* at 63.

85. See Claeys, *supra* note 1, at 75; see also Claeys, *Introduction*, *supra* note 1, at 473–76.

86. See Claeys, *supra* note 1, at 91 (dibs illustration), 119–20 (stronger interest by another).

87. *Id.*

88. See Claeys, *supra* note 1, at 55–56; see also Claeys, *Introduction*, *supra* note 1, at 420, 436–37.

89. Claeys, *supra* note 1, at 18.

90. See generally *id.* at chs. 4–5; See generally Claeys, *Introduction*, *supra* note 1, at 422.

91. Claeys, *supra* note 1, at 128.

claimant's claim.⁹² So, members of the public are not made worse off by the use. The recognition of other interests in the resource and permitting shared access to the resource alters the western view of property ownership.⁹³ Instead of ownership under Blackstone's absolute rights or the Bundle of Rights theory, the interest holders under Claeys's theory may only hold a usufruct in the resource.

C. *Divergence of Claeys's Theory from a Purely Lockean Perspective*

The most frequent complaint directed to a Lockean system is how to remove a resource from the commons that all have a right to use without worsening the community's position relative to the state of nature. Claeys's concepts of justified interest and productive use address these concerns. Justified interests allow members of a community having an interest at least as strong as the right-claimant to also be granted a right to productively use the resource.⁹⁴ Anytime during the right-claimant's productive use of the resource, any interest bearer is free to come forward with evidence of a superior claim or a claim that is as strong as the right-claimant's claim.⁹⁵ So, members of the public are not made worse off by the use. By contrast, as Waldron writes, under a Lockean theory, once private rights attach, the right-claimant has the right to make sole use of the resource with exceptions for its family and compliance with the provisos.⁹⁶ Claeys's theory does not have these limitations that limit the rights of others to make a claim of rights in a resource.

It seems, however, that an underlying premise of Claeys's theory is that all persons that can present a justified interest in using separable and unowned resources may do so unless another person can demonstrate a stronger interest-based claim justified by local norms.⁹⁷ This differs significantly from a Lockean perspective, which vests exclusive rights in the first to use or possess a resource, provided the use or appropriation does not violate the provisos of waste, enough, and as good.⁹⁸ It seems that under Claeys's theory, a second comer need not

92. *Id.* at 128–29.

93. *See* Burns, *supra* note 13, at 70–72 (discussing Blackstone's concept of property ownership).

94. *See* Claeys, *supra* note 1, at 128–29.

95. *Id.*

96. *See* WALDRON, *supra* note 9, at 157–62.

97. *See* Claeys, *supra* note 1, at ch. 4; *see also* Claeys, *Introduction*, *supra* note 1, at 434–37.

98. Some scholars argue that Locke's theory of property rights incurs two problems of indeterminacy: the first concerns specification, particularly in specifying the extent of individuals' rights and obligations in view of scarcity and of trade, and second, concerns

show violation of the provisos to claim an interest in the resource. One simply needs to present a stronger interest-based claim justified by local norms than that of the rights-claimant. Claeys's effort to center his theory in a rights-based natural law framework is an attempt, in my view, to redirect the common view of natural rights away from an individualistic focus to one that is more inclusive of other interests, particularly those of the community.⁹⁹ In this regard, Claeys's theory departs from a Lockean theory of natural property rights.¹⁰⁰

While Claeys's theory justifies a theory of natural property rights in the use and ownership of certain resources, albeit not from a Lockean view, nagging questions persist concerning the validity of natural rights theories in general, whether they are Lockean or otherwise based. The concern arises when natural rights philosophies disregard or devalue the natural rights or interests of persons that are not members of the natural rights framer's community. These questions, discussed below, raise pragmatic issues that may be outside the scope of Claeys's book but are worth considering as contemporary thinkers and scholars such as Professor Claeys continue to write in this area.

D. *Concerns Regarding the Validity of Natural Rights in Application*

Several questions need to be addressed regarding the validity of a theory of natural property rights, whether from a Lockean perspective or under Professor Claeys's theory. The first—who is the recipient of natural rights? All men or only members of a specific community? Claeys's work appears to focus on the interests of members of specific communities, which may find support from a historicist perspective that defines rights as being “a function of cultural and environmental variables unique to particular communities.”¹⁰¹ Yet, natural rights are rights

how to apply Locke's principles to particular cases, particularly in applying the enough and as good proviso in specific cases when scarcity exists. See Varden, *supra* note 54, at 416–17. Varden argues that “[t]he result is that Locke fails to show how the normative idea of labour subject to the proviso [enough and as good] can give rise to fixed property in natural resources (rightful unilateral acquisition of property).” *Id.* at 417.

99. *But see* MERGES, *supra* note 8, at 91 (arguing that an appropriator claiming property rights under Locke's theory in compliance with the proviso “is not acting in a strictly self-regarding fashion; the needs and future claims of others count in the equation as much as the appropriator's own needs.”). However, Claeys's theory accounts for community interests without having to resort to determining whether compliance with the provisos was violated.

100. See Koutras, *supra* note 6, at 142 (“Locke puts forward a more individualistic notion of property ownership than does Aristotle.”).

101. See *Natural Law Transformed into Natural Rights*, BRITANNICA, <https://www.britannica.com/topic/human-rights/Defining-human-rights> [<https://perma.cc/6HQD->

that all humans possess by virtue of their being human.¹⁰² As Grotius writes:

God was the founder and ruler of the universe . . . the Father of all mankind. [He] willed [humankind] to be of one race and to be known by one name He had given them the same origin, the same structural organism, the ability to look each other in the face, language too, and other means of communication, in order that they all might recognize their natural social bond and kinship. He had drawn up certain laws . . . written in the minds and on the hearts of every individual, where even the unwilling and the refractory must read them.¹⁰³

Critics of natural law will likely argue that Grotius only intended these statements to apply to believers. Grotius, however, expressed in *De Jure Belli Ac Pacis* that the natural law would still exist “*etiamsi daremus Deum non esse*,” which translates roughly to “even if we were to say there is no God.”¹⁰⁴ Taking this statement in the light of modern understanding of humanity, natural law, and natural property rights should apply to all human beings without exception as to origin, status, race, ethnicity, or gender.

Second, regarding “interests,” what is the criteria for evaluating competing interests, and how does one decide what is most important in evaluating competing interests? Without a standard for evaluating interests, it is too easy in this 21st Century to use a natural rights model to continue to support the “interests” and positions of those in authority and power. Instead, “[u]nlike the rights created by human governments, natural rights [should] not differ from person to person or society to society.”¹⁰⁵ For example, take the case of *Johnson v. M’Intosh*,¹⁰⁶ a 19th-century case referenced in Claey’s book, where the Supreme Court had to decide an issue that implicated natural property rights. Mr. Johnson and other British citizens claimed title to property conveyed to them by the Piankeshaw Indians prior to the American Revolution. Defendants

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102. See *id.* (“Locke argued in detail, mainly in writings associated with the English Glorious Revolution (1688-89), that certain rights self-evidently pertain to individuals as human beings (because these rights existed in the hypothetical ‘state of nature’ before humankind entered civil society.”)); see also J. Janewa Osei-Tutu, *Humanizing Intellectual Property: Moving Beyond the Natural Rights Property Focus*, 20 VAND. J. ENT. & TECH. L. 207, 226–27 (2017); Jack Donnelly, *Human Rights as Natural Rights*, 4 HUM. RTS. Q. 391, 391 (1982).

103. HUGO GROTIUS, MARE LIBERUM 5–6 (Alex Struik 2021).

104. HUGO GROTIUS, DE JURE BELLI AC PACIS loc. 139 (2010) (ebook); see MARE LIBERUM, *supra* note 103, at 22.

105. See Myers, *supra* note 73, at 1.

106. *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

claimed a right to the property based on a land grant from the United States government. Plaintiffs contended that their title ran directly from the Native Americans who owned the property, making their claim superior to the Defendants' title. The issue was whether a claim to land purchased by Mr. Johnson and other British citizens from Piankeshaw Indians presented a valid claim against M'Intosh, who purchased 11,560 acres of the land originally purchased by Johnson from Congress.¹⁰⁷ Specifically, Justice Marshall expressed the issue in the case as "the power of Indians to give, and of private individuals to receive, a title which can be sustained in the courts of this country."¹⁰⁸ Marshall goes on to state:

As the right of society to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands especially, is and must be admitted to depend entirely on the law of the nation in which they lie; it will be necessary, *in pursuing this inquiry, to examine not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.*¹⁰⁹

Against this backdrop, based on theories of international law and various treaties, the Supreme Court upheld the lower court's decision in favor of M'Intosh, opining that the Piankeshaw Indians were not actually able to convey the land because they never "owned" it, at least in the sense recognized by the laws of the American government.¹¹⁰ The Court went on to state that "the United States, then, has unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold and assert in themselves the title by which it was acquired. They, [the United States], maintain, as all others have maintained, that *discovery* gave an exclusive right to extinguish the Indian title of occupancy either by purchase or by conquest . . ." ¹¹¹ Although the Court recognized some rights of the Native peoples, it completely ignored a potential natural rights argument in favor of its civil laws, laws which are supposed to ensure that the natural rights of individuals are

107. *Id.* at 560.

108. *Id.* at 572.

109. *Id.* (emphasis added).

110. *Id.* at 603.

111. *Id.* at 587 (emphasis added).

protected.¹¹² This decision illustrates how the law of the people in power is used to ignore that of those in out-of-power positions.

This case highlights the problem of applying a natural rights theory and the civil laws based on or emanating from those natural rights when conflicting cultures and beliefs attach to a resource. The Native People organized themselves in relation to the land differently than did those holding Eurocentric notions of property ownership. The Piankeshaw likely hunted the land, appropriated things from the land, and built temporary or permanent dwellings on the land—things that, under Locke's theory, would vest in them a property interest in the land. Although the Court addressed the natural rights of the Native American sellers, it was clear that when deciding to apply the positive law of the new America, the Court employed reasoning that favored the history and traditions of the party in power.

This default in favor of the party in power questions the very notion of natural law and natural rights.¹¹³ If natural rights actually exist, the question becomes how to implement a natural rights theory without prejudicing the party in the weaker position (or one that is an outsider to the particular community in power), as it is very likely that the non-dominant party's position will not prevail in a system designed by and for those in power. In *M'Intosh*, the Court had a choice. It could follow the natural law, which defined and justified the legal doctrine of first possession or the positive law; yet, the Court decided to follow a line of reasoning that favored those of equal power positions to avoid conflict between them, thus, creating a rule "that discovery gave title to the government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession."¹¹⁴ Justification for the view that the discovery of land bestowed ownership in the discoverer despite possession by native people

112. See LOCKE, *supra* note 6, § 138; see also GORDON, *supra* note 35, at 1554 (citing Locke's *Two Treatises of Government* § 135, Gordon writes, "Locke's argument suggests that government exists only to enforce natural law, and that it is constrained by its precepts."); Carol Rose in her article entitled *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 85 (1985), argues that "tucked away in the case was a first-possession argument that Marshall passed over." This first possession right arguably would have given the Indians possession and ownership under a natural rights theory, but not necessarily a Eurocentric natural rights theory. According to Rose, the defendants argued that "[t]he Indians . . . could not have passed title to the opposing side's predecessors because, '[b]y the law of nature,' the Indians themselves had never done acts on the land sufficient to establish property in it."

113. See BRITANNICA, *supra* note 101 (explaining natural rights vest in human beings because they are human beings).

114. *M'Intosh*, 21 U.S. at 572–73, 587.

was premised on the belief that the native peoples were “uncivilized” and just compensation to them was the “bestowing on them civilization and Christianity in exchange for unlimited independence.”¹¹⁵ Justification for stripping the native people of their right of ownership under their notions of natural right lie in superior beliefs of Europeans that the

tribes of Indians inhabiting this country were fierce savages whose occupation was war and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness; to govern them as a distinct people was impossible because they were as brave and as high spirited as they were fierce, (sic) and were ready to repel by arms every attempt on their independence.¹¹⁶

This view supports the prevailing natural law and natural rights theories that only certain humans, those meeting certain standards of a civilized society, are entitled to the advantages and benefits of natural law, which is antithetical to the fact that a God of mercy and goodness is its author.

To illustrate further the insular focus of Lockean natural law concepts, rights in property attach upon appropriation thorough labor. Barbara Arneil in her article, *John Locke, Natural Law and Colonialism*,¹¹⁷ writes that the means of appropriation through labor means “in the case of animals by killing them, in the case of fruit by picking them, and in the case of land by cultivating it.”¹¹⁸ In Locke’s natural rights theory, land that is left in its natural state—land that that has no improvement of “Pasturage, Tillage, or Planting is called . . . a waste.”¹¹⁹ Only that land that one “[t]ills, [p]lants, [i]mproves, [c]ultivates, and can use the [p]roducts of . . . is his [p]roperty.”¹²⁰ This view of ownership by appropriation and labor is in stark contrast to how the native peoples of America possessed their land. Some scholars write that Locke developed his theories in support of “English settler’s right to appropriate land in America [and] claims that it is the lack of enclosure by Indians which allows the Englishman to claim, by virtue of a higher yield of good.”¹²¹

As the Defendants in *M’Intosh* argued, the Native People likely would not have satisfied European notions of possession, as they did not

115. *Id.* at 573.

116. *Id.* at 590.

117. Barbara Arneil, *John Locke, Natural Law and Colonialism*, 13 HISTORY OF POLITICAL THOUGHT 587 (1992).

118. *Id.* at 601.

119. LOCKE, *supra* note 6, § 42.

120. *Id.* § 32.

121. Barbara Arneil, JOHN LOCKE AND AMERICA: THE DEFENCE OF ENGLISH COLONIALISM 62 (1996).

possess the land in a Lockean way, yet they relied on the land for their survival and flourishing. According to their customs and traditions, their close association with the land rose to the level of a type of ownership.¹²² Simply accepting the natural rights claims of one people as valid over those of another does not seem to comport with natural law or natural rights based on sacred or divine principles and even if we do not get to hard cases like that of *M'Intosh*, what about the competing interests of establishing say a green energy farm in the middle of a prime fishing location. How does one decide whose interests are primary—the need for green energy or the interests of the fishermen looking to earn a living (e.g., to survive and flourish).

The final question concerns productive use—how does one determine what constitutes a productive use and how will one decide which uses are the most important in relation to survival and flourishing? It is likely that what qualifies as a productive use will change over time as the community changes, which will result in a change in community interests, as illustrated by the *Hadacheck*¹²³ case Claeys discusses in the book.¹²⁴ Some argue that these failures or deficiencies of natural law, natural rights theories require the adoption of a universal standard, which in itself is also a problematic concept.

Deciding upon universal standards for addressing these questions may be challenging, if not impossible. Any universal standard would be a by-product of ever-changing factors—the environment, which is ever-evolving, and the experience of the parties involved, which would turn on their customs, beliefs, and how they organize themselves in this shared space called earth. Claeys highlighted the ever-evolving state of nature in his discussion of the *Hadacheck*, the brickyard case.¹²⁵ As Claeys writes, *Hadacheck*, in 1902, purchased

land with clay-rich soil in a neighborhood that (when he bought the tract) lay outside Los Angeles's city limits and was distant from any

122. This writer recognizes that some traditions of people native to America teach that “one cannot “own” land, yet one may live with the land” and in harmony with it. See Talia Boyd, *Native Perspectives: Land Ownership*, GRAND CANYON TRUST (June 29, 2021), <https://www.grandcanyontrust.org/blog/native-perspectives-land-ownership> [<https://perma.cc/82FT-2787>]. However, Professor Bobroff in his article, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1557 (2001), describes various property systems of Native American people, including some instances of private land ownership. See *Id.* at 1571-94.

123. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

124. Claeys, *supra* note 1, at 419. Similar questions persist about ownership—how one decides what property should be eligible for exclusive ownership, who should own it, and how does one decide what use is deemed the most appropriate productive use.

125. *Id.*

residential neighborhood. Over the course of a decade, however, Los Angeles acquired Hadacheck's neighborhood, and it started to attract residential inhabitants. Some of those inhabitants complained that Hadacheck's brickworks caused them discomfort, and Los Angeles authorities enacted an ordinance prohibiting the baking of bricks in the neighborhood. Hadacheck alleged that the prohibition extinguished \$740,000 of the \$800,000 value of his lot.¹²⁶

One way to begin to address the inequities in a natural property rights theory of the type faced in *M'Intosh*, *Hadacheck*, or the green energy hypothetical discussed above, is to apply a natural rights-based balanced-interest approach. The balanced-interest approach would not require the creation of a universal standard but the adoption of an interest-resolving approach for addressing the needs, interests, and rights, legal and natural, of all parties involved.

V. USING A THEORY OF BALANCING INTERESTS TO OVERCOME DISPARATE APPLICATION OF NATURAL RIGHTS

It is beyond the scope of this paper to define the balanced-interest approach in detail. In summary, the goal and purpose of the balanced-interest theory is to maximize the common good in the most equitable way. It requires balancing the interests of all involved parties to find the equitable mean between conflicting interests. It considers the interests of all constituents and balances those interests against local and cultural norms and beliefs to find an equitable position between conflicting interests. Finding the equitable mean promotes order in the common, which leads to maximizing potential to thrive (advance the sciences and useful arts), which leads to flourishing. This approach would address the questions of "rights" as raised in *M'Intosh*, *Hadacheck*, and the hypothetical fishing ground issues raised above.

VI. CLAEYS'S THEORY AS A JUSTIFICATION FOR NATURAL PROPERTY RIGHTS TO PATENT PROTECTION

As an IP scholar and practitioner, I would be remiss if I did not address how Claeys's proposed theory, as buttressed by the balanced-interest approach, relates to natural rights in an intellectual property context, specifically patents. Claeys says inventions can and should be objects of property,¹²⁷ and he finds support therefor under a modified Lockean framework. I do as well. Although there are many philosophical

126. *Id.*

127. *Id.* at 108.

views on natural law, John Locke's view of natural law and its organizing principles¹²⁸ concerning property ownership is the basis of my analysis.¹²⁹ Locke had a profound impact on the founding fathers and the establishment of the general and positive law,¹³⁰ so his theory of the natural law is a logical starting place to establish the link between tangible property rights and rights in intangible intellectual property. Finding this link requires an exploration of Locke's labor-mixing theory as applied to intangibles.

A. *Locke's Labor-Mixing Property Theory*¹³¹

In an intangible property context, the concept of labor turns on a different understanding of the term "labor." While labor as used in conjunction with intangibles does not define physical labor, effort (labor) is required to realize a fully conceived idea and reduce it into a tangible from which it can be perceived or understood or reproduced. It is generally believed that ideas, even under a Lockean theory, are not capable of protection.¹³² So, the idea must be expressed in some form. Just as physical labor expended in transforming the state of tangible objects creates a property interest, physical labor expended in transforming concrete ideas into tangible expressions of the idea also creates a property interest.¹³³ Labor is labor, whether it be physically rigorous, or mentally challenging, or inspiring.

The nature of the idea dictates the most optimal form for its reduction to practice (e.g., a prototype, model, written description in full and exact terms, etc.). When dealing with innovations, patent law prohibits the

128. See LOCKE, *supra* note 6, Chapter 2, §§ 4-15 (describing the state of nature as a place where persons are "perfectly free to order their actions, and dispose of their possessions and themselves, in any way they like . . . subject only to limits set by the law of nature.").

129. *Id.* ch. 5 §§ 25-51; see also Gordon, *supra* note 35 at 1540 nn. 32-55 (citing court references to Lockean or Locke-like property theory as justifications for their holdings).

130. See Gordon, *supra* note 35, at 1540 (citing Morton White, *The Philosophy of the American Revolution* (1978)).

131. This paper does not argue the philosophical underpinning of Locke's theory, nor does it attempt to defend Locke's description of natural rights, his description of the state of nature or his definition of property ownership.

132. See Gordon, *supra* note 35, at 1560 n. 149; see also *Bilski v. Kappos*, 561 U.S. 593, 612 (2010) (no patentable property interest attaches to abstract ideas).

133. See Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 413-14 (1983) (people "have the right to enjoy the fruits of their labor, even when the labors are intellectual," provided those intellectual labors are reduced to a complete and exact tangible expression).

claim to general ideas by requiring the invention to be reduced to practice physically or through a written description, drawings, or other illustration that teaches one to make and use it.¹³⁴ The law seeks to ensure that the inventor has a full and complete concept of the invention and not simply an abstract idea for an innovation.¹³⁵ Other scholars have also found justification for natural property rights in intangibles under Locke's theory.

B. *Natural Property Rights in Intangible Intellectual Property*

Wendy Gordon uses Locke's apple analogy to make the association between ownership of real things and the establishment of ownership rights in intangible intellectual creations through labor.¹³⁶ She analogizes the public commons for intangible things to that of the public commons for real things and provides the following example: "if I use the public domain to create a new intangible work of authorship or invention, [(X)], you should not harm me by copying it and interfering with my plans for it. I have a property in the intangible as well."¹³⁷ I agree with Gordon that my labor in creating X invests initial ownership of X in me, but if I place X in the commons without any restrictions as to its use or duplication, have I not added to the commons something of value which would harm the commons if removed?¹³⁸ Yes, but at the same time, I have enhanced the commons by providing something of value that did not exist. Allowing others to recreate X without authorization, using the fruit of my efforts, harms me.¹³⁹ In the state of nature, as Locke

134. See *Barry v. Medtronic, Inc.*, 914 F. 3d 1310, 1332, 1337 (Fed. Cir. 2019) (explaining the requirements for reduction to practice); see also *E.I. du Pont De Nemours & Co. v. UNIFRAX I LLC*, 921 F. 3d 1060, 1075 (Fed. Cir. 2019) (discussing constructive reduction to practice, which occurs when a patent application is filed that meets the requirements of patent statutes).

135. See *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980) (explaining that patent law prohibits the extension of patent protection to abstract ideas, laws of nature, and natural phenomena).

136. See Gordon, *supra* note 35, at 1545–47.

137. *Id.* at 1545.

138. See Lunney, *supra* note 8, at 16–17 ("Locke's theory explains how an individual comes to hold an initial property interest in a thing However, once I voluntarily sell or give the apple to another, nothing in Locke's reasoning suggests that I have a retained right to prevent [another from using it].").

139. See Hughes, *supra* note 5, at 299 ("If it can be wantonly appropriated by the social mob, the laborer will realize quickly that he has no motivation to produce property and increase the common stock. One solution would be to rely upon the laborer's donations to the common but increasing the common stock cannot be made to depend on supererogatory acts. The better solution—one that Locke in fact advocated—is to make this added value potentially part of the common stock by introducing the money

writes, all persons have a duty not to harm the commons or others. So, my labor justifies my private interest in the resource and obligates others not to harm my private interest in the resource. It is this conflict of interests that has sparked the debate as to whether there can be a natural property right in intangibles such as artistic or expressive creations and innovations.

Since in a Lockean state of nature one cannot block another's access to the commons, some scholars argue that others should be able to access the commons to create their own version of X, just as persons would have the right to access the commons to pick their own apples. This argument finds a basis in the view that intangible resources are non-rivalrous and can be used infinitely by numerous people without harming the use or value to any other person, including the initial producer.¹⁴⁰ There is some validity to the non-rivalrous argument and the ability of many people to use the resource without harming or depleting its value to others, except where that recreation or use deprives the originator of the enjoyment of the fruit of their labor in terms of survival or flourishing.¹⁴¹ So, like the laborer that picked the basket of apples had the right to sell apples to support their survival or flourishing, X's creator should enjoy a natural property right to use or sell X for its survival or flourishing.¹⁴²

In a patent context, Robert Nozick agrees that under a Lockean framework awarding a patent to an inventor does not "deprive others of an object which would not exist if not for the inventor."¹⁴³ In fact, granting creators and inventors rights in intangible things created or invented through their labor "increase[s] the common stock of mankind."¹⁴⁴ Professor Hughes posits that if the property remains private property, it does not increase the common stock of mankind.¹⁴⁵ I submit that it does because it provides access to advancements and improvements that did not exist before.

Professor Moore takes a contrary position to that discussed above. He argues that when an inventor publicly uses a newly invented article called, for example, a "wheel," she places it in the public domain. Moore further argues that the inventor's public use foists the idea on others

economy[,]" including the concept of licensing).

140. See Damstedt, *supra* note 56, at 1181–82.

141. *Id.* at 1188–89. There is also a notice problem here. Without notice that I have created X, how will others know not to copy it?

142. See LOCKE, *supra* note 6, § 28.

143. Nozick, *supra* note 55, at 149–82.

144. See Hughes, *supra* note 5, at 299 (1988) (citing LOCKE, *supra* note 6, § 37).

145. See *id.*

who are incapable of seeing or hearing about an idea and then deleting it from memory, making them bound to recreate it. “[W]ithout any prior agreement regarding use after [public] access,” Moore argues, “one would assume that making and using the wheel would be fine.”¹⁴⁶ But, by contrast, one could also argue that someone seeing a basket of picked apples sitting unattended could reasonably assume that taking an apple or the entire basket would be fine. So, the real difference between rights in X and the apples, in view of Professor Moore’s position, is public notice or public communication of a rights interest.

As Claeys espouses, constructive notice of a rights interest is critical and key to establishing a rights claim. The difference between X and a basket of picked apples is the inherency of notice or constructive notice of a rights interest in the basket of apples. It is unequivocal that both were created or transformed from their natural state to something else by effort, manual or intellectual. Both can be used to enhance or add value to the commons in supporting the survival or flourishing of an individual or a community. The difference is that the “picked” apples, by their very nature and state, leads one to reason, either innately or based on experience,¹⁴⁷ that a rights interest likely exists.¹⁴⁸ Picked apples placed in a basket, like the manure piles in the *Haslem v. Lockwood*¹⁴⁹ case discussed in Claeys’s book,¹⁵⁰ required some actor to expend effort or labor to alter the picked apple’s state. This change in state or condition is enough, as it was in *Haslem*, to communicate to others through reason alone or by reason and experience that the apples were being prepared for someone else’s productive use.¹⁵¹ Reason, according to Locke, would suggest a property interest in the apples, and “[r]eason teaches all mankind, who will but consult it, that . . . no one ought to harm another in his life, health, liberty, or possessions.” Hence, the real difference between the picked apples and X is a basis for putting the

146. See Moore, *supra* note 8, at 1094. Moore writes, “We can view the Lockean model as a bargain between authors and inventors . . . and society, which reaps the benefits of the innovation. In return for disclosure and, perhaps fair use, authors and inventors, are protected from those who would copy and use intellectual works after being granted access. Without such agreement, those who innovate would likely . . . wall off their creations”

147. See Claeys, *supra* note 1, at 50.

148. Merges, *supra* note 8, at 35 (As Peter Merges explains, “common ownership . . . is the default state; appropriation comes about through effort, which is required to alter the default state.” Reason would cause one to understand that apples found in an altered state are likely associated with a rights interest).

149. *Haslem v. Lockwood*, 37 Conn. 500, 506–07 (1871).

150. See Claeys, *supra* note 1, at 143 (discussing *Haslem v. Lockwood*).

151. *Id.*

community on notice of the creator's rights in X. This is where Claeys's concept of claim communication is a helpful construct.

Claim communication, as Claeys defines it, provides reasonable notice that puts the public on notice of the rights-claimant's proposed use of the resource, giving the public an opportunity to present reasons why it should not be foreclosed from using a resource.¹⁵² Claeys writes that in order to communicate a rights interest in X by virtue of X's existence, as was the case with the basket of apples and piles of manure, "lawyers simply need to identify proxies for productive use and claim communication that are appropriate given the natural characteristics of such works."¹⁵³ As support for this position regarding productive use, Claeys cites Chancellor Kent's statements explaining that "to satisfy the productive use requirement, someone must demonstrate that he has engaged in 'intellectual and manual labour'—that he has produced information useful to human life and not previously in circulation."¹⁵⁴ How does one demonstrate that s/he has engaged in intellectual labor—by making that effort known to others, which is a requirement of patent law. Claim communication becomes the proxy for notice of intellectual labor that results in a patentable invention.

In patent law, the claim communication proxy includes several components that notify the public of innovation, as well as protections to preserve the commons. First, the patent law requires that a protectable innovation be novel, useful, and nonobvious.¹⁵⁵ Second, the law further requires that the invention be fully described in a written description that teaches how to make and use it. Finally, the inventor must file an application that includes the written description, as well as claims that define the metes and bounds of the invention.¹⁵⁶ If the application satisfies the requirements of patentability, it will be published,¹⁵⁷ and at the end of the patent term or the earlier surrender of rights, publication equips others with the knowledge to exploit or use the invention.

Using civil or positive law to support enforcement of natural rights is not a new concept.¹⁵⁸ Locke acknowledges the use of positive law under

152. *Id.* at 19.

153. *Id.* at 146.

154. *Id.* (citing Kent (1827/1971), v. II, pp. 298-99).

155. 35 U.S.C. §§ 101, 102, and 103.

156. 35 U.S.C. § 112.

157. The U.S. Patent law also allows for the publication of patent applications eighteen months from their effective filing date. *See* 35 U.S.C. § 122.

158. *See* Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? – Reevaluating the Patent Privilege in Historical Context*, 92 CORNELL L. REV. 953, 971, 992 (2007) (Mossoff defines patent rights as civil rights in property justified by natural rights).

a “civil government [as] the proper remedy for the drawback of the state of nature.”¹⁵⁹ One entering into civil society, Locke opines, understands and agrees that the primary purpose of civil government is to secure everyone’s property, which includes both tangible and intangible property.¹⁶⁰ Claeys aptly sums up the justification for natural IP rights in the following passages:

As with land, so too with intellectual property: Legislatures may by statute recognize substantive intellectual property rights different from the common law rights sketched here.

Again, however, the requirements for natural rights supply the standards for evaluating statutory substitutes. Statutes seem just substitutes if they facilitate the creation and use of intellectual objects more effectively than common law doctrines do, and also if they make clearer for people who will not hold rights in those objects the property claims that proprietors hope to establish.¹⁶¹

While natural rights in intellectual creations do not and cannot stand alone, as natural rights in tangible property do not stand alone, the use of positive law to reinforce a natural right does not render the natural right any less valuable.¹⁶² One commentator writes that, “rights of private property are among the rights that men ring with them into political society and for whose protection political society is set up.”¹⁶³ The outer limit of political society and the power it wields is set by the good of the society as a whole.¹⁶⁴ The power of society can never extend beyond its primary purpose of securing everyone’s property, which is the common good.¹⁶⁵

VII. CONCLUSION

Claeys’s monograph sets forth a convincing argument and justification for natural property rights. Although Claeys’s theory differs significantly from a Lockean theory, it retains enough Lockean properties that it may be classified as Lockean-like. Claeys’s theory is consistent with

159. LOCKE, *supra* note 6, § 13.

160. *Id.* §§ 94, 138; *see also* Byrne, *supra* note 8, at 56 (“According to Locke, civil government originated because of the need for a set of laws to govern society in order to preserve man’s natural right to property.”).

161. Claeys, *supra* note 1, at 147.

162. One understands that many rights in property in civil society are not based on just natural rights—things such as conveyances, recordation requirements, and the statute of frauds requirements are not stand-alone natural rights.

163. Claeys, *supra* note 1, at 135.

164. LOCKE, *supra* note 6, § 131.

165. *Id.*

Locke's view of natural law and natural rights. It is consistent with Lockean principles for establishing a natural right to a private property interest via labor or productive use for survival or flourishing. The basic principles of Claeys's property theory—justified interests, claim communication, and productive use—also provide a basis for addressing critiques of Lockean property rights systems in that it divests the community of its interests in a resource. Under Claeys's theory, the community interest in a resource is never fully divested as long as a member of the community can present a justified interest in the resource. This claim may be made at any time. If the claim meets the requirements of local norms, the second interest claimant may be granted a shared interest in the resource.

The underlying tenets of Claeys's theory, including the Lockean productive use elements, justify natural property rights in intangible intellectual property. Just as productive use and justified interests secure rights in tangible property, these concepts justify interests in intangible property. The one difference is that certain proxies must be used to place the public on notice of a rights interest in the intangible property. For instance, the intangible idea must be fully expressed in some tangible form from which it can be perceived or reproduced, and it must be something more than an abstract idea. In the patent context, the idea must be reduced to practice in a patent application that fully describes how to make and use the invention, as well as include claims that set forth the metes and bounds of the invention.

While I agree there is a natural right to property, more specifically, to use a resource for survival and flourishing, a lot more work needs to be done to find a universal application of natural law and natural rights to all human beings when applied generally and to property rights both tangible and intangible. Professor Claeys's theory has the potential of moving the conversation closer to finding that universal. Professor Claeys's acknowledgment that although interests may be self-regarding, they must also be structured to consider the correlative interests of others in the community is the arrow pointing to a more inclusive application of natural rights. However, the community must include all affected communities, balancing the interests of all constituted beneficiary groups to find that equitable mean.