



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M Journal of Property
Law

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

Article 6

5-28-2023

Comparing & Contrasting Economic and Natural Law Approaches to Policymaking

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Recommended Citation

Eric Kades, *Comparing & Contrasting Economic and Natural Law Approaches to Policymaking*, 9 Tex. A&M J. Prop. L. 561 (2023).

Available at: <https://doi.org/10.37419/JPL.V9.I4.6>

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**COMPARING & CONTRASTING ECONOMIC AND NATURAL LAW APPROACHES
TO POLICYMAKING**

Eric Kades[†]

Abstract

Eric Claeys’s monograph, Natural Property Rights, offers a comprehensive and thoughtful articulation of a general theory of property rights rooted in the natural law tradition. This detailed review compares Claeys’s work with the consequentialist law and economics perspective on property. After contrasting their objectives, assumptions, and methodologies this article concludes that, unlike more absolutist approaches, Claeys’s flavor of natural property rights places a modicum of weight on the welfare effects central to economic analysis. This restrained nod in the direction of practicality, however, does not eliminate some of the long-known weaknesses of natural law. Perhaps the most glaring gap in Claeys’s book is its failure to acknowledge and analyze the modern law of nuisance with its enriched set of remedies capable of making everyone a winner. At a macro level, Claeys (like most other natural law theorists) offers no substantive case against redistribution as an optimal method for addressing the fact that charity is a public good. The book, again in keeping with the natural law tradition, eschews any serious empiricism—indeed not a single argument it makes contains any empirical support. This is a fatal flaw for anyone with the ambition to offer practical advice on tougher property law issues for which the right answers depend on myriad social parameters whose values lie beyond the reach of deduction.

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DOI: <https://doi.org/10.37419/JPL.V9.I4.6>

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I. INTRODUCTION

Consequentialists, economic and otherwise, have disparaged natural law and natural rights for about two centuries now—and in no uncertain terms. Most famously, Jeremy Bentham dismissed natural rights as “nonsense upon stilts.”¹ In only slightly less derisive terms, Frank Buckley has quite recently concluded that “[o]f whatever stripe, natural law theories have no place in legal debates.”² I confess that I have long thought Bentham’s famous barb fair and think that Buckley’s powerful recent critique put another major nail in the coffin of natural law. Nothing in Professor Claeys’s draft book *Natural Property Rights* has changed my mind, even after three close readings.³

Yet very smart folks like Claeys, John Finnis,⁴ Adam MacLeod,⁵ and others have continued to develop and refine natural law theories. Even frameworks with fundamental flaws can contain valuable insights. In the spirit of sympathetically reading one’s intellectual adversaries, finding at least some common ground, and highlighting differences of all stripes (methods, assumptions, and interpretation of evidence), then, this Article identifies important parallels between natural law and consequentialism as embodied in neoclassical welfare economics. It also maps the junctures at which they diverge and the implications of these differing approaches for designing desirable social policies.

After identifying differing objectives, assumptions, and methods, this Article attempts to place Claeys’s natural property rights theory on a continuum between absolute rights and absolute consequentialism. It

1. 2 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 501 (John Bowring ed. 1843).

2. Frank H. Buckley, *Contra Naturam*, GEO. MASON U. LEGAL STUD. PAPER SERIES NO. 22-06 (Feb. 2022).

3. Claeys is not shy about returning fire to consequentialism, declaring that efficiency alone cannot justify property, Eric Claeys, *Natural Property Rights* 32–34 (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*”].

4. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (2d ed. 2011).

5. ADAM J. MACLEOD, *PROPERTY AND PRACTICAL REASON* (2015).

then examines a series of concrete property law domains to flesh out important policy domains in which natural law and economics converge and diverge, ranging from forced pooling of oil and gas interests to redistributionary tax and transfer programs. Although the differences outnumber the agreements, there are perhaps a surprising number of issues on which Claeys's natural property rights approach reaches the same policy conclusions as consequentialist economics—sometimes even with similar arguments.

II. TOP-LEVEL OBJECTIVES

Modern welfare economics, the dominant consequentialist theory in social science, is a highly refined version of utilitarianism. It does not presume to measure individual happiness directly and commensurately and then select social rules that maximize the simple sum. In its least controversial form, it defines as optimal, or “efficient,” any allocation of resources that cannot be changed without making at least one individual worse off.⁶ This is Pareto efficiency. It in effect assumes that individuals' utility/happiness/welfare is incommensurable—the first of a number of surprising parallels between economics and natural law, as we will see shortly.

Pareto efficiency is of little utility to social policymakers in real-world economies as virtually any legal innovation will harm someone and usually many. In a major nod to practicality, economic policy analysis instead advocates for policies that increase total social wealth. The welfare justification for this Kaldor-Hicks efficiency metric is that at least in theory the winners from the new policy could fully compensate the losers and still retain a surplus.⁷ This implies that individual welfare is commensurable: e.g., in a two-person society an outcome of (2, 3) is preferred to an outcome of (3, 1), which means that the gain of two for the second person more than cancels out the loss of one to the first person.

The final, *normative* step in conventional economic analysis posits some form of a social welfare function that values equality over inequality and so tilts social policymaking in the direction of “leveling” policies (e.g., progressive taxation; assistance to the poor).⁸ In the end, then, welfare economics still places great weight on wealth maximization but is willing to trade off some wealth for greater equality.

6. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 1.2 (9th ed. 2014).

7. *Id.*

8. The seminal paper is J. A. Mirrlees, *An Exploration in the Theory of Optimal Income Taxation*, 38 *REV. ECON. STUD.* 175 (1971).

Although the vocabulary of natural law as laid out by Claeys has no intersection with economics, there are some important similarities in its top-level objective. In a theme that dates back to Aristotle,⁹ natural law aims to foster human *flourishing*. Although not defined precisely in Claeys's book, flourishing seems to be pursuing the good life as informed by reason, wisdom, and judgment. These constraints (reason; wisdom; informed judgment) rule out many life plans. Claeys emphasizes that individuals will still have quite divergent routes to flourishing.¹⁰ Despite these restrictions, flourishing seems to have a significant overlap with the utility at the center of economists' optimization problems.

In another surprising parallel, with Pareto efficiency, Claeys emphasizes that the extent to which different individuals flourish is incommensurable.¹¹ As in the case of Pareto efficiency, such incommensurability is theoretically attractive but makes practical policymaking difficult—choices must be made, gains to group I must be weighed against losses to group II, but incommensurability assumes that such comparisons are impossible. Economics bridges the chasm of incommensurable individual preferences by trading in Pareto efficiency for Kaldor-Hicks wealth maximization and equality-weighting social welfare functions; natural law theory proceeds without compromising on the incommensurability of flourishing. This is our first important divergence between the two approaches, and we return to incommensurability later.¹²

III. CENTRAL ASSUMPTIONS

Whether the goal is economics's utility maximization or natural law's flourishing, assumptions about individuals' preferences and the nature of their tangible and intangible endowments play a central role in determining those policies that best serve these objectives. Thus, this section examines in some detail economic and natural law assumptions about these two central parameters.

A. Preferences

As a theoretical starting point, economists take individuals' preferences as axiomatic: there are no good or bad preferences. They cannot

9. Claeys, *supra* note 3, at 56–57.

10. Claeys, *supra* note 3, at 17–20, 42, 72, 7, 95, 98, 12, 198, 354, 356; *see also* Claeys, *Introduction*, *supra* note 3, at 419–21.

11. The word “incommensurable” appears 16 times in the manuscript.

12. *See infra* Section VI.

stop here, as they must address “clashing preferences”: murderers, rapists, thieves, and the like may derive utility from their acts of aggression and expropriation. Their victims, however, experience great disutility from such acts. Economists make a host of assumptions along the lines of the following one about murder:¹³

*The disutility of being murdered almost always exceeds the utility to the murderer, it is impossible to determine the few cases in which this is not true, and so a ban on murder is social desirable. In addition, and perhaps of even greater practical significance, living in an environment in which murder is legal causes many if not most individuals to engage in very expensive defensive measures.*¹⁴

Such assumptions for a host of anti-social behaviors form economists’ basis for constraining “raw preferences” with laws. They extend beyond criminal domains into civil laws. Unintentional tort law creates incentives for parties to potential accidents to take cost-justified precautions, reduce activity levels when efficient, and other measures to minimize the sum of accident and avoid costs.¹⁵ Contract law greases the wheels of commerce by minimizing a host of transactions costs to facilitate voluntary exchanges (definitionally efficient).¹⁶

Natural law in the end reaches many of the same public policy destinations as the economic approach, but by a very different route and with significantly more assumptions. Here is Claeys’s basic explication of the natural law foundation on which he builds natural property rights:

[P]rinciples of natural law are “natural” in being knowable through the exercise of human reason, and in being valid whether or not any community has established conventions carrying them into effect. The same principles constitute “law” in that they obligate people to act in ways that will help them attain what is objectively good for them. In theories in this family, the most fundamental bases for natural law can be found in two parts of human nature—peoples’ capacities to reason, and their capacities to flourish in a wide range of ways. . . . The theory introduced here relies on those foundations; it grounds natural rights in natural law understood as a set of principles identifying the courses of action people should take to cultivate

13. In this discussion, we use “murder” to refer to intentional killings without any possible justification, e.g., no self-defense, defense of others, or insanity.

14. Although it is difficult to imagine finding convincing empirical evidence about the subjective utility of murderers and their victims, it does seem possible to compile data to demonstrate that self-defense expenditures rise sharply as the legal system provides less personal security.

15. See POSNER, *supra* note 6, §§ 6.1–6.5.

16. ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* ch. 6 (5th ed. 2008).

fully their capacities to flourish and to exercise their rational faculties as best they can.¹⁷

This key statement of first principles requires close parsing to uncover the far from trivial assumptions Claeys implicitly makes. The central premise is that a universal human type of reasoning identifies those laws that best enable humans to attain some *objective* good life. Elaborating on this theme, Claeys says that “[r]eason helps people discern whether particular things—resources, life qualities, character traits, or activities—are objectively good.”¹⁸ What is objectively good? As discussed in the previous subsection, for natural law the answer is that which advances human flourishing.

There is a critical “ought” here: there are “actions people *should* take to . . . flourish,” and, moreover, some “resources, life qualities, character traits, [and] activities” are *objectively* good—meaning that others are bad. Differing preferences will lead people to seek different resources, different life qualities, different character traits, and different activities. Although Claeys does note that people can flourish “in a wide range of ways,”¹⁹ asserting a single universal form of reasoning that separates good from bad qualities, traits, and activities places significant constraints on those human preferences that inform policymaking. If it doesn’t impose any such restrictions, then natural law collapses to the conventional economic view that preferences are axiomatic. “The good” as dictated by natural law, as opposed to everyone’s subjective preferences, forms the foundational assumption for Claeys’s natural law theory.

This core assumption of some universally morally preferred ways of living immediately runs into the buzz-saw of human heterogeneity. The good life in the eyes of a Muslim jihadist has little if any overlap with the good life pictured for secular leftists in western democracies, yet there are millions and millions of individuals under both of these banners. Even within modern America, the good life for Christian fundamentalists in red states bears precious little resemblance to the good life for urban professionals in blue state cities—the two groups cannot even agree on whether or when to engage in simple public health measures like wearing respiratory masks during a pandemic. Put another way, the preferences and actions that best promote flourishing are contested—and hotly. Thus, vast, and conflicted human heterogeneity poses an existential challenge to natural law assertions that there is a relatively

17. Claeys, *supra* note 3, at 42.

18. *Id.* at 42, 135.

19. *See supra* text accompanying note 10.

constrained set of means and ends to achieve human flourishing. More than a century ago Justice Holmes plumbed this problem that widely variant human beliefs about “the good life” poses for natural law theorists:

[W]hile one’s experience . . . makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means skepticism. Not that one’s belief or love does not remain. Not that we would not fight and die for it if important - we all, whether we know it or not, are fighting to make the kind of a world that we should like - but that we have learned to recognize that others will fight and die to make a different world, with equal sincerity or belief. Deep-seated preferences cannot be argued about - you cannot argue a man into liking a glass of beer - and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours.

The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.²⁰

Claeys’s version of natural law makes a number of additional assumptions, specific and general, about human nature that are far from obviously true. To take a particularly specific constricting assumption, he asserts that:

The desire for money can easily get channeled into a ‘desire of having more than [one] need[s].’ Once a system of property is established, it can tolerate people who hold and manage property solely to make money. But the rights in that system should be set up as seems likely to help people use the resources it covers to survive or to flourish.²¹

Even abstracting from the acute difficulty of identifying even approximately, that level of greed past which the behavior becomes so excessive as to render it valueless under natural law’s flourishing calculus, this assumes that some levels of greed always and everywhere undermine rather than enhance flourishing. Gordon Gekko, that cinematic archetype of the villainous greed, is far from alone in asserting that “greed is good.”²² The idea of the benefits of potentially unlimited greed has

20. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).

21. Claeys, *supra* note 3, at 127.

22. The fictional Gordon Gekko spoke the famous line in *WALL STREET* (20th Century Fox 1987); *see also* *WALL STREET: MONEY NEVER SLEEPS* (20th Century Fox 2010).

been at the heart of capitalism at least since Adam Smith's famous "invisible hand" metaphor.²³

At a more general level, Claeys asserts that "[p]eople should want to be sociable toward people who belong to the same community as them. People should be sociable in part because it is virtuous to be sociable, and in part because sociability is a necessary condition for everyone in a community to benefit from living in it."²⁴ The identification of a virtue is an unambiguous signal that for Claeys's sociability is part of the limited class of morally elevated personal traits. The repeated use of the word "should" here implies that natural laws will not give much if any weight to the preferences of hermits, loners, extreme snobs, and the like. Yet again heterogeneous human natures may cause readers to choke on this axiom—the science of psychology has shown that there is wide variation in sociability among people.²⁵ Natural law, at least as Claeys formulates it, judges the loners as less capable of flourishing than the convivial. As I reflect on the many noble introverts I have known over the years (not to mention some reprehensible social butterflies), this strikes me not only as a strong assumption, but one that likely is incorrect and indeed immoral in stigmatizing many admirable folks who flourish in their own quiet, less social way.²⁶

Claeys makes another strong assumption by declaring (without benefit of citation or examples) that "[j]ust communities should not establish specific policies designed to promote flourishing; they should mark off spheres of freedom in which people can decide for themselves how best to flourish."²⁷ This essentially assumes that freedom-biased policies dominate more regulatory alternatives. It is clearly overstated in relation to wars, pandemics, and other exigencies during which governments impose far-reaching limits on liberty. Even in normal times, however, assuming that policies enhancing freedom are invariably preferred flies in the face of tax policy, environmental policy, workplace safety laws, and a host of other facets of the modern regulatory state. It would be one thing to make a detailed *empirical* case that freedom-biased laws are usually preferable; it is an entirely different thing to simply assume

23. 4 ADAM SMITH, THE WEALTH OF NATIONS ch. II (1776) (ebook).

24. Claeys, *supra* note 3, at 62–63.

25. Robert McCrae & Paul Costa, *Validation of the Five-factor Model of Personality across Instruments and Observers.*, 52 J. PERSONALITY & SOC. PSYCH. 81 (1987).

26. Many people with autism have aversions of varying degrees to socializing with others. Claeys's version of human flourishing seems to suggest that such individuals are less deserving of consideration in setting social priorities. See Claeys, *supra* note 3, at 69–70.

27. *Id.* at 69.

it as an axiomatic truth. As the remainder of this Article will show, Claeys's "liberty-biased" version of natural law makes many policy recommendations that are at odds with standard economic prescriptions.

The previous paragraphs drew examples from humanity circa 2022 to raise questions about natural law's assumption of universal human moral reasoning. A second challenge arises when we widen our perspective to include the evolution of fundamental ideals of the good life over time. Slavery, anathema to almost anyone today, has in the past been widespread and defended as morally justified. Dispossessing technically less advanced peoples of their lands is another behavior that few Americans today of any ideological stripe would defend, but our great-grandparents were active participants in the last wave of taking Indigenous Americans' land and forcing them onto small reservations on marginal lands.²⁸ Widespread condemnation of diverse sexuality and gender identities in the mid-20th century has devolved into a distinct minority viewpoint. Claeys offers no insights on how natural-law-based moral reasoning on such important questions can change and change so rapidly.²⁹

This subsection likely comes across as excessively critical of natural law and insufficiently probing of the economic approach. There is, however, a very good reason for this asymmetry: the natural rights approach makes many more assumptions in the course of justifying social policies. These assumptions, it turns out, are anything but obvious. Every assumption that a theory makes is a potential chink in its armor.

B. *Endowments*

People need *endowments*—embodiments of value that enable them to produce and trade—in order to translate their preferences into actual satisfaction or flourishing (to the extent the two concepts differ). Endowments fall into basically two categories: hard assets like cash, marketable securities, realty, patents, along with other tangible and intangible assets; and soft assets (or human capital): traits enabling people to create value, such as intelligence, social skills, education, emotional stability, and the like.³⁰

28. For a discussion of Claeys ambivalent comments on the expropriation of Indigenous Americans' land, see *infra* Section XII.

29. See *infra* Section XIII.

30. Ed Hopkins & Tatiana Kornienko, *Which Inequality? The Inequality of Endowments versus the Inequality of Rewards*, 2 AM. ECON. J.: MICROECONOMICS 106, 106–10 (2010).

As with preferences, economics begins with agnosticism on endowments: they are simply taken as given. Everyone starts with their endowments (inheritances and other gifts; intelligence; education provided by parents or the state; social skills; physical skills; artistic skills . . .) and uses them to produce and trade to maximize their satisfaction according to their preferences.³¹ Neither Pareto nor Kaldor-Hicks efficiency provide any grounds for redistributing endowments and the income they yield from those blessed with much to those cursed with poverty.

Modern economic welfare analysis, however, adds on a social welfare function (“SWF”) that calls for some level of redistribution to maximize social welfare based largely on the assumption of the diminishing marginal utility of wealth—the notion that an extra \$100 of wealth for a homeless person generates larger welfare gains than leaving the \$100 in the hands of a billionaire.³²

By and large, natural law parallels the efficiency doctrines of economics, viewing each individual as the outright owner of her endowments, both hard and soft. Hewing closely to Locke’s familiar perspective, if not always his labor theory of value, natural law maintains that individuals are entitled to all of the fruits of their own labor. Natural law theories actually are more egalitarian than Pareto or Kaldor-Hicks efficiency because of Locke’s famous “sufficiency proviso,” which allows individuals to privatize assets in the “great unclaimed commons” (e.g. land, timber, minerals) only as long as “there is enough, and as good, left in common for others.”³³ Although not radically egalitarian, the sufficiency proviso does place at least some limits on asset-grabbing—limits not present in economics’s efficiency doctrines.

In modern times, however, the importance of the sufficiency proviso is severely muted. Incomes and wealth today are rooted in inheritance, education, natural abilities, and social advantages. Claeys’s book contains only the slightest suggestion that redistribution based on these inequalities would comply with his theory of natural law.³⁴ The sufficiency proviso seems a relic of past ages in which the bulk of human wealth came from cultivating land, maintaining animal herds, cutting down

31. ANDREU MAS-COLELL, MICHAEL D. WHINSTON, & JERRY R. GREEN, MICROECONOMIC THEORY 516–25 (1995).

32. *Id.* 825–38.

33. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ch. V, para. 27; Claeys, *supra* note 3, at 19.

34. *See infra* text accompanying notes 141–42.

trees, and primitive mineral extraction. The proviso imposes essentially no limit on ballooning current socioeconomic inequality.

Still, the sufficiency proviso is at least a nod in the direction of equality—a nod entirely absent from Pareto and Kaldor-Hicks efficiency. Thus, Claeys's articulation of natural law falls between the agnostic efficiency doctrines and the potentially high redistributionary effects of egalitarian SWFs. As we will see, this critical difference between economic welfare functions and natural rights explains many of their conflicting policy recommendations.³⁵

IV. METHODOLOGIES

Layered on top of moderately divergent objectives and quite divergent assumptions, radically different reasoning methodologies round out the explanation for the divergent policy prescriptions of economics and natural law. Given individuals' preferences and some assumptions about comparative utility, economics turns to empiricism. When the facts suggest that a market functions well, the first theorem of welfare economics proves that unregulated trade will reach a Pareto *optima*.³⁶ This fundamental result gives economics a bias towards laissez-faire policies, but not as great as Claeys's because economics is open to market failures.

Markets fail in several ways. If data shows that a monopolist or a few oligopolists control a market and constrain supply to raise prices, anti-trust regulations can produce an improvement in Kaldor-Hicks efficiency at the expense of the (social undesirable) monopolist/oligopolists.³⁷ Asymmetric information between buyers and sellers in a market produces suboptimal outcomes absent the intervention of one of a variety of policies to correct for phenomena like moral hazard and adverse selection.³⁸ When the production or consumption of one person affects the utility of others outside of any market (usually due to transactions costs), externalities result.³⁹ Most commonly these externalities are negative and policy can achieve Kaldor-Hicks improvements by imposing taxes, tort liability, or some other disincentive on the source of the externality. In the converse case of positive externalities, subsidies

35. See *infra* Sections X–XI.

36. MAS-COLELL et al., *supra* note 31, at 326–27.

37. WALTER NICHOLSON, MICROECONOMIC THEORY: BASIC PRINCIPLES & EXTENSIONS 432–35 (3d ed. 1985).

38. MAS-COLELL et al., *supra* note 31, at 326–27, 437–50.

39. RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS AND CLUB GOODS 39–66 (2d ed. 1996).

instead of penalties improve welfare. Public goods, an extreme case of positive externalities, are perhaps the most important market failure and thus merit their own separate discussion below.⁴⁰

All of these market failures result in inefficiently low welfare; none address inequities that arise from unequal distribution of endowments. Both theory and evidence suggest that it is best to first address the inefficient market failures listed in the previous paragraph, and then use the income tax and income transfers to correct for inequality.⁴¹

Natural law proceeds from objectives and assumptions to policy by entirely different methods. Claeys does an admirable job of explaining how the tool (method) of *practical reason* guides natural lawyers in identifying desirable social policies:

[P]ractical reason stands in contrast with “theoretical” reason “Practical” issues force people to focus on particular details of the choices they need to make; “theoretical” issues raise issues about moral reasoning far more general than particular choices People reason practically when they decide whether particular propositions are valid. Or, when they reconcile several different normative claims on a particular set of facts. When people decide what to do about particular choices in social life or politics, they reason practically when they choose specific social norms or laws or policies.”⁴²

Claeys zeroes in on the importance of practical reason by emphasizing that it eliminates an important misconception about natural law:

[t]o rights skeptics . . . a defining feature of a theory of natural law or rights that consequences never count in deciding the rights and wrongs of individual actions. . . . Impressions like these are misconceived. Natural law-based natural rights theories do make consequences relevant to practical reasoning. But such theories also limit reasoning about consequences, in ways that differentiate them from consequentialist theories.⁴³

Thus, practical reason admits a certain amount of consequentialism into natural law—but not too much. It is frustratingly unclear how Claeys’s theory decides which stripes of consequentialism are permissible and which are not. In some contexts, Claeys’s application of practical reason yields results strikingly close to consequentialist theorists. For example, he seems to concur with Ellickson’s consequentialist analysis

40. See *infra* Section X.

41. Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 674 (1994) (although this paper and its renowned “double distortion” argument has been hotly debated for decades, the arguments it makes have stood the test of time).

42. Claeys, *supra* note 3, at 81 (footnotes omitted).

43. Claeys, *supra* note 3, at 93 (internal quotation and citation omitted).

of the evolution of efficient rules to determine the steps that whalers needed to complete in order to establish property rights in their prey.⁴⁴

Here is Claeys's most extensive explanation of the extent to which natural law is open to consequential arguments:

[N]atural law-based natural rights theories still make consequences relevant to practical reasoning. But such theories constrain the ways in which consequences get considered. A partnership can consider the effects of different courses of action on its partners, but basic principles of partnership law require that the partners consider how different courses affect the interests of all the partners, one at a time. Natural law principles provide similar guidance in practical reasoning about issues that arise in politics or social life. When authorities consider consequences, they need to consider the consequences only of actions that are *objectively reasonable* in natural law. And they must also consider the effects of different courses of action on all of the people who might be affected by those proposals, understanding that each of those people is a free actor entitled to free choice and equal opportunity.⁴⁵

I must confess that this passage mystifies me. It begins with the unsupported and inaccurate assertion that partnership law requires partners to “consider how different courses affect the interests of all the partners, one at a time.” This simply is not so. Partners have fiduciary duties to each other only in a narrow financial sense, and the modern framing is that they have duties to the partnership as a distinct legal and financial entity. I know of no authority for the assertion, e.g., that partners would have a duty to consider the peculiar tax problems or income requirements of one of their members in a given year. Partners are joint venturers as to the profits of their enterprise, not as to all of their individual subjective personal wants and needs.⁴⁶

Even were one to accept this assertion about partnerships, its analogic relevance to practical reason and the role of consequences in policymaking escapes me. The remainder of this passage begs the question by introducing new and undefined terms. What is “objectively

44. *Id.* at 213–14.

45. *Id.* at 95 (citation omitted) (emphasis added).

46. Analogizing social/political relations among citizens to partnerships seems to have a certain fascination for natural law theorists. Richard Epstein similarly used partnerships as a model for thinking about social policy and, seemingly without realizing it, defined a new type of efficiency even more unattainable in large-scale policymaking than Pareto Efficiency. RICHARD A. EPSTEIN, *TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 4–5 (1985). For a discussion of Epstein's novel and uber-aspirational efficiency stand, which I have dubbed “Super-Pareto Efficiency,” see Eric Kades, *The Natural Property Rights Straitjacket: The Takings Clause, Taxation, and Excess Rigidity*, 51 U.C. DAVIS L. REV. 1351, 1401–10 (2018).

reasonable” within Claeys’s system of natural law? The last sentence is the most baffling. It seems to ask of policymakers the patently impossible: consideration of the effects of a law on each and every individual affected. Not only is this impossible, but such an exercise sounds like a clarion call for *unlimited* consideration of consequences—in a passage that purports to define natural law limitations on consequentialism.

Perhaps of even greater importance, Claeys does not say a word about the role of empiricism in practical reasoning. The entire absence of statistical work and systematic empirical thinking from his book suggest that people applying practical reason simply draw on their own personal experiences for the relevant facts about phenomenon relevant to policymaking. This distinction puts in high relief the difference between economics and natural law in determining facts about the world. The economics literature is brimming with comprehensive, careful empirical work that collects large amounts of data, applies state-of-the-art statistical techniques, and makes policy recommendations based on this most objective form of evidence. Economics contains its own subfield devoted to improving statistical methods and applications in the field, econometrics. Natural law has no analogous body of work (naturometrics?). Claeys’s book contains no systematic appeal to careful empiricism—indeed I could not find a single instance in the 500-page manuscript where he makes a data-driven argument.

Although Claeys never gives a detailed description of the workings of practical reason, his frequent uses the word “intuition” in the course of making policy arguments suggests that it is rooted in personal experience.⁴⁷ If one assumes, as natural lawyers seem to, that there is sufficient commonality among humans to assume shared preferences about social arrangements, this might be justified. For those who infer, based on empiricism, more variability in human traits, the intuitionistic basis of practical reason is shaky.

Moreover, practical reason’s non-systematic empiricism might work for making decisions about simple rules of trespass and nuisance in the pre-industrial world but is ill-suited for complex modern human societies becoming more and more complex. For example, using only personal experience to reason about monetary and fiscal policy in advanced economies is almost provably a disaster.⁴⁸ The same conclusion likely

47. By my count, this word appears 12 times in 473 pages of text, or about once every 40 pages. Claeys, *supra* note 3.

48. See, e.g., Paul Krugman, *The Case for Cuts was a Lie. Why Does Britain Still Believe it? The Austerity Delusion*, THE GUARDIAN (Apr. 29, 2015), <https://www.theguardian.com/business/ng-interactive/2015/apr/29/the-austerity-delusion>

holds for almost all major public policy questions today, e.g., environmental issues; best ways to educate children; preventing and managing pandemics; and a host of other pressing social issues.

V. THE ABSOLUTE RIGHTS—CONSEQUENTIALIST CONTINUUM

Despite these serious concerns about its haziness and indeterminacy in practice, Claeys's explication of practical reason offers reason to think that there might be some common ground between economics and natural property rights. At least in a limited way, his version of natural rights has room to factor in some of the consequences of particular laws.

Perhaps more importantly, Claeys's work is suggestive of a sort of continuum of policy approaches ranging from absolute rights (unaffected by any consequences) to absolute consequentialism—essentially the modern economic approach. Claeys associates Robert Nozick with the absolute rights pole of this continuum and contrasts his natural law-based approach with Nozick's:

Nozickean property rights entitle people to broad freedom in relation to the resources in which they hold rights, no matter what effects such broad rights have on people without rights. . . . [N]atural law-based natural property rights differ significantly from Nozickean natural rights. Natural law-based rights justify property rights by their tendencies to help people put resources to valuable uses.⁴⁹

Claeys thus stakes out a middle ground between absolute rights and absolute consequentialism.

In practical terms this middle ground might have substantial overlap with the economic approach to property rights. To reprise an example discussed above,⁵⁰ economists *assume* that a rule against murder likely serves to raise social utility both because the loss to victims exceeds the gain to the murderer and because people in a society with legalized murder will make inefficiently large investments in self-defense.⁵¹ Claeys, I think, would reach the same destination via the route of practical reason, and the practical reasoning leading to this result would rely largely on the same observations and arguments.

[<https://perma.cc/8RYF-SU3X>].

49. Claeys, *supra* note 3, at 20–21, 316, discussing ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

50. *See supra*, at Section III.A.

51. Another way to say this is that murders can be minimized much more cheaply with a police force and criminal courts than with individual “self-help” defensive measures. This is part and parcel of the division of labor in advanced economies.

Generalizing on the example of murder, economics and natural law likely share congruent basic reasoning on most if not all widely observed criminal and intentional tort law strictures against rape, robbery, battery, fraud, and the like. Thus, it seems that although economics and natural law have different objectives, assumptions, and methodologies, underneath it all they have deep parallels. Indeed, at times Claeys's natural law version of property rights, leavened with practical reason, sounds like 100% consequentialism. "Every proprietor's property rights should be structured consistent with the rights of others and the legitimate priorities of the whole community, and the policies that governments are carrying out seem reasonable efforts to protect the rights of all or to promote common priorities."⁵² In another passage about balancing tensions between travel and safety on roads, Claeys says that:

[t]o say which of these rights take priority in different situations, law makers need to consult the interests served by each right and ask how strong those interests are. To conduct those comparisons, law makers must consider: land use patterns near roads; the kinds of travel likely on different roads; geographic conditions on local roads; the effects of different speed limits; and the habits and driving preferences of local residents.⁵³

This wide panoply of factors to consider (nearby land use; reasons for traveling; geography; effect of various speed limits) are just the sort of things that a diligent economist would factor into her rules of the road.

In the end, however, these passages do not reflect Claeys's general approach to policymaking. When we get to less universal and more contextual legal disputes, his natural law divergences from economic consequentialism multiply. In disputes ranging from nuisance to the law of takings, from pooling subterranean oil and gas rights to the provision of public goods (including charity), the different objectives, assumptions, and methodologies of economics and natural property rights lead to divergent and frequently antithetical policy recommendations.

VI. NATURAL LAW'S INCOMMENSURABILITY PREDICAMENT

Before examining these differing policies, this subsection highlights the radically different ways that economics and natural law deal with the difficulties of weighing individuals' desires and welfare. Economists' "stage 1" assumptions deny the possibility of comparing actors' utility levels. This limits policy recommendations to those that are Pareto

52. Claeys, *supra* note 3, at 28; *see also* Claeys, *Introduction*, *supra* note 3, at 459.

53. Claeys, *supra* note 3, at 77.

efficient (make at least one person better off and none worse)—a standard with great appeal except for the fact that it is so demanding that it is practically useless for policy measures affecting large numbers of citizens. Economics deals with this limitation by moving to a “stage 2” objective: (i) dropping Pareto efficiency and replacing it with simple wealth maximization (Kaldor-Hicks efficiency), (ii) making assumptions about comparative utility (e.g., murderers and their victims), and (iii) deploying a social welfare function (“SWF”) that calls for some redistribution from rich to poor. This change in objective and addition of assumptions are motivated at root by the desire to do the most good for the most people. This package requires comparing individual welfare levels and so from the economic perspective, incommensurability is a problem to be solved.

For natural law theorists, however, incommensurability seems to be a feature rather than a bug. Over and over again Claeys takes pains to emphasize the *incommensurability* of differing property uses,⁵⁴ declaring that “one of the most important functions of rights is to protect people’s discretion to pursue incommensurable projects.”⁵⁵ In a long passage on incommensurability he declares that “when choices and actions are legitimate, in principle the preferences on which people choose and act are incommensurable.” In the context of takings law’s public use requirement, he discussed the private land uses of owners whose properties were taken by the government and declares that “[a]ll of those uses are valuable and incommensurable, and a justification for property should not say that some of the uses hold higher priorities than others.”⁵⁶

Given the intuitionistic bases of practical reason, it is not surprising that natural law cannot identify optimal policies. What is surprising is that Claeys does not grapple with the fact that when there are competing interests in any facet of life and law the legal regime by definition must make a choice. If the laws leave private behavior unregulated (*laissez-faire*), that will favor one side (call her X) over the competing actor Y. Of course, the state could choose to legislate in Y’s favor e.g., by regulating X’s activity. State action (regulation) and inaction (*laissez-faire*) cover the field and so tautologically the state does in effect *compare* the value of the activities of X and Y by choosing to regulate vel non. Choosing *laissez-faire*, in effect if not in theory, deems X’s activity more valuable;

54. Incommensurable and variants with differing suffixes appear 20 times in Claeys’s book.

55. Claeys, *supra* note 3, at 75–76.

56. *Id.* at 127; see also Claeys, *Introduction*, *supra* note 3, at 441–42.

regulating in Y's favor effectively deems her activity of higher value. As discussed above,⁵⁷ Claeys's version of natural law and natural property rights gives significant weight to liberty and so biases lawmakers towards laissez-faire policies. In practice, this resolves a multitude of private actor conflicts by effectively deeming those activities that prevail under government inaction more valuable than those that require legal intervention to succeed. We will have multiple junctures in the remaining sections of this Article to highlight social policy concerns with Claeys's use of liberty to choose between clashing private actors, with particularly troubling examples from nuisance law.⁵⁸

VII. OF POOLING, PUBLIC USE, AND OTHER "PEDESTRIAN" PROPERTY LAW ISSUES

Having compared and contrasted the foundations and methods of economic and natural law approaches to identifying optimal social policies, we are ready to compare and (mostly) contrast their application to a sampling of property and allied areas of the law. Although we will find many divergent recommendations, it is important to remember that on some of the most important legal rules, e.g., murder, rape, robbery, and battery, the two approaches reach the same place and by routes that use different vocabularies but much of the same reasoning.

This section begins where Claeys begins: comparing and contrasting two specific property law regimes as an introduction to property rights: (i) forced pooling of oil and gas interests and (ii) governmental taking of land for urban redevelopment projects. Claeys argues that forced pooling is consistent with natural property rights principles, but takings for redevelopment that include some private owners are not. After briefly describing each of these topics and explaining why economists would find both rules unobjectionable, this section argues that it is difficult to understand how natural law and the tool of practical reason approves of forced pooling but disapproves of partially private redevelopment takings.

The economic literature on forced pooling of oil and gas interests generally finds such laws efficient for two reasons.⁵⁹ First, forced pooling prevents wasteful races to extract resources from common pools

57. See *supra* text accompanying note 27.

58. See *infra* Section VIII.

59. See, e.g., Gary D. Libecap & James L. Smith, *Regulatory Remedies to the Common Pool: The Limits of Oil Field Unitization*, 22 ENERGY J. 1 (2001); see, e.g., Larry S. Eubanks & Michael J. Mueller, *An Economic Analysis of Oklahoma's Oil and Gas Forced Pooling Law*, 26 NAT. RESOURCES J. 469 (1986).

(underground reservoirs of gas and oil that span multiple surface owners' lands).⁶⁰ Property rights in subterranean migratory resources like oil and gas are difficult to protect, and the first driller into a common pool can suck out all of the oil or gas from the common pool before her neighbors can start drilling themselves. Realizing this, rational landowners in an unregulated environment will all race to extract as much of the resource as possible. This will lead to an inefficiently high number of wells being drilled too soon and concomitant excessive extraction costs.

Still, one might ask, can't the owners of land over the common reservoir negotiate among themselves to solve this problem? This raises the second problem: transactions costs, here in the form of costly bargaining. In the absence of a law enabling a majority or supermajority of owners to force everyone to participate in a joint plan to extract the resource efficiently, it requires unanimous agreement to proceed. Strategically minded owners may well hold out for a disproportionate share of the gains from the pooling agreement. At a minimum this will lead to time-consuming and contentious bargaining, which is expensive. In extreme cases the parties may fail to reach an agreement at all, and then we will see the inefficient race to extract the resource.

A surprisingly similar narrative justifies the taking of private property for urban redevelopment, even when portions of the land taken will end up in the hands of private parties. Despite Claeys's "N=1" argument that Disney easily acquired the land for Disneyworld in Florida through private purchases,⁶¹ large-scale land assembly is not generally cheap and easy.⁶² The government's taking power exists to address one of the main reasons large-scale land acquisitions are expensive and difficult: holdouts.

If in designing a new stretch of highway the government identifies an optimal route that requires 10,000 parcels of private land, each of those 10,000 owners has a strong incentive to wait for others to sell and then threaten to block construction by holding out for a higher sales price. If even a small percentage of landowners pursue this strategy, it will raise not only the prices those sellers receive (a purely distributionary concern) but will increase transactions costs (deadweight loss).

60. *Id.*

61. Claeys, *supra* note 3, at 14–15. Note that according to Claeys, Disney employed devices to maintain secrecy which almost certainly raised its transactions costs materially.

62. See, e.g., Flavio Menezes & Rohan Pitchford, *The Land Assembly Problem*, 34 REG'L SCI. & URB. ECON. 155, 156 (2004).

Economically we have here a large cluster of bilateral monopolies, which are notorious for imposing expensive bargaining costs.⁶³ The takings power, enabling the government to force sales at market prices, short-circuits those costly negotiations. Reducing transaction costs is a pure social gain—indeed, meeting the demanding Pareto efficiency standard—and thus economics supports the government’s takings power, at least in the context of large projects where holdouts look to be a problem. Note that the problem here is almost exactly the same as the second difficulty with pooling oil and gas interests: strategic behavior by holdouts raises transaction costs (always inefficient).

Concerns about such transaction costs have led legislatures and courts in all states to confer takings power on private utility companies,⁶⁴ and some states have given owners of parcels with poor road access or no road access at all (landlocked parcels) the right to force neighbors to sell them cost-priced easements for road access.⁶⁵ Economic reasoning, then, supports the use of the taking power even if some or all of the direct beneficiaries are private parties rather than the entire population. Urban redevelopment frequently requires the purchase of many parcels, and the government frequently partners with private developers in such projects.⁶⁶ Thus economics justifies the government’s use of the taking power to acquire land in the *Kelo*⁶⁷ case, where the state of Connecticut was working with multiple private developers to revitalize a neighborhood in the city of New London.

Although Claeys concurs that forced pooling of gas and oil interests is desirable, he parts ways with the economic approach to takings of land for public/private urban renewal projects, arguing that such takings are inconsistent with natural law and practical reason. The first weakness in his analysis is failing to recognize the essential role that transaction costs play in determining the best legal rule in each context. Although absolutist natural property theories (like Nozick’s) might ignore significant transaction costs considerations, the practical reason that figures so prominently in his analysis seems tailor-made to at least consider such a practicality. I do not fault Claeys for the outcomes he identifies as

63. See, e.g., POSNER, *supra* note 6, at §§ 3.6, 3.7, 3.9–3.11, 4.8.

64. JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS & LICENSES TO LAND* § 6.6, Westlaw (database updated Aug. 2022) (“Easements created by condemnation—Condemnation by private entities.”).

65. *Id.*

66. See, e.g., Marc B. Mihaly, *Living in the Past: The Kelo Court and Public-Private Economic Development*, 34 *ECOLOGY L. REV.* 1 (2007); R. SCOTT FOSLER & RENÉE A. BERGER, *PUBLIC-PRIVATE PARTNERSHIPS IN AMERICAN CITIES: SEVEN CASE STUDIES* (1982).

67. *Kelo v. New London*, 545 U.S. 469, 483 (2005).

preferred in fostering flourishing, but transaction costs need to be part of the analysis.

A second weakness is that Claeys does not acknowledge the *public good* potential of urban renewal, a feature entirely absent from forced pooling. In simple terms, a public good is a product or service that is: (i) non-excludable, meaning that it is very expensive or impossible to exclude any member of the population from the benefits of the product; and (ii) non-rivalrous, meaning that consumption of the product by one individual does not prevent other individuals from also enjoying its benefits.⁶⁸ A classic example is a nation's armed forces. By their very nature, the armed forces protect everyone within the country's borders, and the fact that your neighbor enjoys protection in no way diminishes your concurrent enjoyment of these same military services. Redeveloping less attractive and less safe neighborhoods similarly qualifies as a public good: jurisdictions generally cannot exclude outsiders from neighborhoods, and unless the neighborhood becomes so crowded as to be congested, one person's stroll down an attractive street does not diminish the ability of others to also enjoy it.

A foundational principle of economics is that markets under-supply public goods.⁶⁹ It is hard to get paid for providing something from which you cannot exclude customers. Thus, the nigh-universal policy recommendation is that the government must either provide public goods itself or subsidize their private provision. The redevelopment at issue in the *Kelo* case (the Fort Trumbull neighborhood in New London, CT) conveniently features both: the local redevelopment authority partnered with private parties (a major employer, a hotel chain, restaurants, and some other businesses) to upgrade the neighborhood. Sharing its takings power with private actors was one way for the government agency to subsidize private contributions for the joint effort to improve the Fort Trumbull section of town.

Public goods are such an important part of distinguishing economic and natural law approaches to property rights that we return to them in Section X below. Putting them aside, along with the transaction costs discussed above, the biggest problem with Claeys's analysis, however, is that he does not convincingly explain why practical reason and natural law more generally embrace forced pooling laws but reject *Kelo*-type redevelopment takings. The remainder of this section proceeds on the assumption that Claeys is indeed applying practical reason to solve these practical problems. Given the unclear parameters governing exactly

68. CORNES & SANDLER, *supra* note 39, at 8–9.

69. *Id.* at 143–53.

how much consequentialism that practical reason inserts into property rights, we consider two practical reasoning frameworks: (i) one that uses a substantial dose of consequentialism and (ii) another that relies instead on categorizations that Claeys emphasizes in his discussion. We will see that Claeys is unable under either approach to convincingly distinguish pooling resource interests from takings for redevelopment.

In the consequentialist vein, Claeys justifies forced pooling based on the fact that it maximizes pay-outs: “forced pooling works to the reciprocal advantage of mineral rights-holders; it increases the amount of oil or gas produced, and rights-holders receive extra royalties in proportion to their rights in the reservoir or play.”⁷⁰ But if an extra slug of cash (possibly quite modest) is sufficient to compensate landowners for forcing them to join in a pooling regime, then the same principle should apply to takings for redevelopment. From this perspective, paying non-consenting owners 110% or 125% of the value of their parcels in a redevelopment zone should suffice to solve any natural law objections.⁷¹ Given the cost of land assembly, governments would find this modest premium tolerable.

Claeys, however, may be getting at something deeper. Although he does not use the term, at some points, it sounds like he wants to protect owners’ *subjective value* in their property. Subjective value refers to the minimum price at which an owner would part with her property.⁷² Due to customization and personal/emotional attachment, owners’ subjective value often exceeds the market value of property—the price that the property would realize on sale.⁷³ It is well-recognized that takings, for which just compensation traditionally equals market value, can inefficiently destroy subjective value.⁷⁴ Claeys may be contemplating the idea of subjective value when he talks about forcing one homeowner to “give up a 900-square-foot residence she had bought *and improved* for herself”⁷⁵ and when he notes the frustrated expectations of another who “was living with family the house she had been born in and [who] believed that a move so late in life would kill her.”⁷⁶ Proceeding from these examples, he argues that takings for redevelopment differ from forced

70. Claeys, *supra* note 3, at 14.

71. At least one state has such a supra-compensatory compensation requirement. See TEX. PROP. CODE ANN. § 2007.041.

72. POSNER, *supra* note 6, § 3.6.

73. *Id.*

74. See, e.g., Abraham Bell & Gideon Parchomovsky, *The Hidden Function of Takings Compensation*, 96 VA. L. REV. 1673, 1683 (2010).

75. Claeys, *supra* note 3, at 7.

76. *Id.*

pooling of oil and gas interests because in the former but not the latter “land is already owned and being used, people’s rights to their land should entitle them to stop others and governments from forcing them to surrender their land.”⁷⁷

It might well seem to many, if not most people, that subjective values exceed market values by higher percentages for homes and other property actively used than for underground oil and gas. This may well be an example of practical reason: in practice, this reasoning might well appeal to a substantial majority of people. It is, however, a rather impoverished view of how people value property.

There are a whole host of reasons that some subsurface rights holders, like homeowners, would value their holdings above current market price. Some may believe that the market is undervaluing the asset and that it will rise significantly—commodities markets live and breathe on heterogeneous expectations.⁷⁸ Variability in risk preferences can also cause some owners to value high-risk, high-reward plans for holding off on extraction in the hopes of selling at higher price in the future. To give one more example, divergent tax liabilities can cause owners of oil and gas rights to disagree about the timing and rate of extraction, e.g., some owners might wish to sell even at a time of seemingly low prices if they will incur capital losses offsetting capital gains they are realizing on other assets in their portfolio. In what readers likely realize is a theme, natural law and consequence-admitting practical reason stumble when confronted with heterogeneous preferences and do a poor job of producing consequential benefits to those with divergent practical reasons.

There are even bigger (well-known) problems with having the legal system preserve subjective values. They are, by definition, impossible to measure objectively, and those holding them have obvious incentives to overstate their subjective values. There seems to be no principled reason to limit legal recognition of subjective value to property disputes, and so if Claeys is arguing for such a policy, it would also apply to tort and contract law. Awarding subjective value damages across the entire gamut of common law claims would both raise litigation costs and might result in over-deterrence if plaintiffs are able to convince judges and juries to award damages in excess of their true valuations.

77. *Id.* at 11.

78. See, e.g., Fernando Zapatero, *Effects of Financial Innovation on Market Volatility when Beliefs Are Heterogeneous*, 22 J. ECON. DYNAMICS & CONTROL 597 (1998); Ronald MacDonald & Ian W. Marsh, *Currency Forecasters Are Heterogeneous: Confirmation and Consequences*, 15 J. INT’L MONEY & FIN. 665 (1996); Joseph T. Williams, *Capital Asset Prices with Heterogeneous Beliefs*, 5 J. FIN. ECON. 219 (1977).

Claeys argues that “average reciprocity of advantage” is another natural law standard that can tolerate forced pooling but not redevelopment takings. Under Claeys’s definition of the standard,⁷⁹ average reciprocity of advantage permits property rights regulation if: (i) “there is a *well-founded need* to reorder property rights,” and (ii) the regulation serves “the interests of the parties bound by the regulation more effectively than those same interests would be served without such restrictions.”⁸⁰ The “well-founded need to reorder” requirement sounds like it might be more categorical than consequential, centered around a notion of “necessity” discussed below.

The second arm of the implied reciprocity of advantage standard is consequentialist—it is none other than Pareto efficiency, requiring each regulated party to be better off with the regulation than without. As usual, the primary problem with the theoretically attractive Pareto standard is that it is impossible to satisfy in most real-world situations. In particular, any heterogeneity in the group of subsurface rights holders will mean that some will suffer under forced pooling, and so the policy generally fails to achieve Pareto efficiency. Once again, natural law loses much of its appeal when confronted with the heterogeneous preferences of our species.

The subjective value I inferred from Claeys’s discussion, along with the Pareto efficiency arm of average reciprocity of advantage, seem like secondary rationales for accepting forced pooling while rejecting *Kelo* takings. His main argument is much more categorical: the “well-founded” need arm of average reciprocity of advantage imposes a formidable *necessity* requirement. Claeys contends that forced pooling can clear this hurdle, but *Kelo* takings cannot.

The following two passages comprise essentially all of his argumentation for the supposed different outcomes based on a necessity requirement. As to forced pooling, he says:

[Forced pooling] is necessary, in a relatively strict understanding of “necessary,” to condemn and consolidate mineral rights to produce subsurface oil and gas. If the energy company is drilling by conventional methods, it needs all of the mineral rights to take the greatest advantage possible of geothermal pressure. If the company is fracking, its drilling pipes will run two or more miles horizontally underground. It is infeasible for a miles-long horizontal drill arm to take U-

79. It is not clear that Claeys’s definition of “average reciprocity of advantage” tracks that of Justice Holmes in the leading takings case *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Holmes actually coined the phrase in an opinion published earlier the same year, in a party wall case. *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30–31 (1922).

80. Claeys, *supra* note 3, at 13.

turns around the subsurfaces of protesting owners. ... forced pooling works to the reciprocal advantage of mineral rights-holders; it increases the amount of oil or gas produced, and rights-holders receive extra royalties in proportion to their rights in the reservoir or play⁸¹

Is this really a situation of “strict” necessity? Although forced pooling may allow a single entity to take “greatest advantage” of geothermal pressure, that is a far cry from pooling being strictly necessary; it may well mean that without pooling it will cost moderately more to remove moderately less oil or gas. This meets no one’s definition of necessity. It is simply higher costs for extractors operating independently. The same could be said for the need for horizontal drilling to make U-turns (more likely L-turns) to avoid trespasses: it would be more expensive, not impossible. Therefore, it is simply not accurate to describe forced pooling as strictly necessary.

There is an even more important dimension to necessity. From Claeys’s discussion, readers might infer that the two options are forced pooling or a hodgepodge of individual drilling efforts. It is ironic that a natural law theorist did not think of the obvious private ordering solution: contracting among the landowners over the reservoir. Private parties could reach the same result as forced pooling by bargaining. No doubt this situation is rife with incentives for strategic behavior, as it is something like a multi-lateral monopoly in which the first best outcome requires the agreement of all property owners. But it is certainly not impossible. From one perspective, this is just a land assembly problem in cavernous disguise. The most efficient (lowest cost) extractor should be able to buy up all the relevant parcels and extract the resource optimally. Claeys elsewhere claims that private land assembly is feasible and perhaps not that difficult.⁸²

Once we see that the real problem motivating the need for forced pooling is the high transaction costs of reaching a multi-party bargain, it looks incredibly similar to *Kelo* takings: redeveloping an *entire* neighborhood requires taking control over most or all parcels within that neighborhood. Why would the transaction costs for doing this in urban renewal be any lower than they are in pooling subsurface interests? Indeed, urban renewal frequently will involve more parcels and hence higher bargaining costs, making *Kelo* takings more necessary than forced pooling of subsurface interests.

Here is Claeys’s attempt to cast *Kelo* takings as less strictly necessary than forced pooling:

81. *Id.* at 13–14.

82. *See supra* text accompanying note 61.

Condemnation and transfer do not seem necessary to municipal economic development. Eminent domain is “necessary” in the sense of being “convenient”; it falls short of being necessary in the sense of being “unavoidable.” It is just not the case that a commercial development will fail if it builds around the lots of a few hold-outs. In *Kelo*, the Fort Trumbull neighborhood had the Italian Dramatic Club, a local men’s club and a go-to spot for local politicians. When members and local politicians complained about the Club’s being removed, the New London Development Corporation revised its comprehensive plan to keep the Club among all the new commercial construction. The Corporation could have made similar exceptions for the other owners who really wanted to stay. And if the Corporation (and Pfizer) had really, really wanted a parcel of property with no holdovers, they could have acquired an intact parcel by other means. When the Disney Company built Disneyland, it acquired the lots it wanted with option contracts and real estate agents who never let on that they were negotiating with Disney.⁸³

But the distinctions Claeys draws here are illusory. Just because *some* parcels are consistent with a redevelopment plan does not mean that a particular collection of holdouts will all own such parcels. Moreover, the same is true of pooling: the efficient drilling plan may not require any entry, either surface or subsurface, on some parcels. Indeed, it likely will not require entry onto many or even most of the parcels. If so, those parcels may be left as they are, and their owners paid for the fraction of the resource that resided underneath their undisturbed parcels if required by state law. Finally, Claeys’s recommendation that localities doing redevelopment obtain parcels via market transactions is a belated and only passing recognition of the critical alternative to forced transactions that applies to forced pooling just as much as to redevelopment.

Placing all of this in the context of Claeys’s general theory of natural rights, we have been examining the application of practical reasoning in a more categorical, non-consequential vein. On close examination, his concept of necessity is entirely unable to bear the weight of explaining the acceptability of forced pooling and the unacceptability of *Kelo* takings. The arguments in the previous paragraphs did not import any economic or other consequentialist notions into the discussion. Rather, they dissected Claeys’s text in some detail and demonstrated that necessity cannot do the work that Claeys needs it to do in his very own practical reasoning framework. Indeed, there likely is greater need for forced transactions in redevelopment than in pooling subsurface interests.

83. Claeys, *supra* note 3, at 14–15.

Given his natural-property-rights based opposition to redevelopment takings that include private parties, perhaps the most surprising passage in the book is his openness to justifications for a surreptitious trespass over a neighbor's property to drag a large mobile home up to a hilltop lot.⁸⁴ The victims in this trespass case, *Jacque v. Steenberg Homes, Inc.*, had repeatedly refused requests to cross their field for transport of the mobile home. Claeys says that the common law necessity doctrine makes this a close case and expresses some sympathy for defendants who had criminal *mens rea*—they actively concealed the trespass and later laughed about it. Necessity, however, is generally reserved for cases of life and limb, or the preservation of very valuable property. Getting a mobile home to a site during winter months, when curvy roads and snow drifts posed a temporary problem, is not even close to satisfying the requirements of the necessity doctrine. I confess that I do not understand why Claeys tries to stretch the law of necessity to protect the defendant in this case. This should be a point of agreement between economics and natural law. Economists recognize the need to force transactions in order to produce public goods, prevent resource races, and reduce transaction costs (witness forced pooling and redevelopment takings), but also realize that outside the domain of exigencies, forced transactions are likely inefficient. I would have thought that a liberty-biased natural law theorist like Claeys would concur, invoking practical reasoning to make substantially similar arguments.

In the course of his discussion, Claeys has a sort of linguistic twitch which suggests that he himself had trouble applying practical reasoning to articulate his necessity standard. In the course of attempting to use some standard of "strict necessity" to differentiate forced pooling and *Kelo* takings, he uses the word "seems" six times in the course of ten pages in a manner that sounds like someone with an intuition that he cannot justify with convincing evidence.⁸⁵ Claeys *seems* (☺) to have

84. Claeys, *supra* note 3, at 264–67, discussing *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997).

85. "It *seems* more just and appropriate to force pooling than it does to use eminent domain to assemble land for municipal development," Claeys, *supra* note 3, at 9; "mineral rights *seem somehow* distant from the uses they make of their lots," *id.*; "It *seems* troubling for a municipal government to condemn private land and reassign it in the course of economic development; it does not *seem* troubling for a state agency to pool mineral rights forcibly in the course of energy production," *id.* at 10; "That justification explains why eminent domain-supported economic development *seems* more troubling than forced pooling," *id.* at 11; "mineral rights *seem* fairly removed from whatever uses owners or occupants are making of the land above," *id.*; "But eminent domain *seems* troubling for a much more basic reason," *id.* at 14 (emphasis on *seems* added). Claeys uses the word "seems" a couple of other times over these pages, but in ways that do not

strong intuitions about the distinction he is trying to make—so strong that he uses the dichotomy as a centerpiece of his introduction. But intuitions unsupported by evidence are merely assumptions. As noted in Section III above, natural law approaches generally do make more, and stronger assumptions than economic analyses.

VIII. NUISANCE LAW AS AN EXAMPLE OF A COMMON LAW DOCTRINE

Forced pooling and redevelopment takings are relatively specialized issues. To examine wider issues in property law, Claeys discusses nuisance law at length. At common law, a nuisance is an interference with a landowner's quiet use and enjoyment of their land.⁸⁶ Typical examples of nuisances include odors, noise, dust, and even excessive light at night.⁸⁷

Claeys summarizes the natural law approach to nuisance as follows:

[O]fficials [in nuisance cases] should imagine as best they can how a hypothetical and reasonable member of the community would reconcile autonomy and use. The right that issues should give as many members of the community as possible broad liberty of action to use their lots. That hypothetical and reasonable decision maker should rely on a few rules of thumb. Other things being equal, general use rights should prefer relatively basic uses, uses that help people survive, over relatively refined uses. Other things being equal, general use rights should favor uses that are compatible with a wide range of specific uses over ones that are not. And other things being equal, general use rights should maximize the liberty of action that people may exercise over their own lots, even if it means surrendering opportunities to direct how neighbors use their own lots.⁸⁸

Some of this we have seen above. His invocation of “a hypothetical and reasonable member of the community” reconciling “autonomy and use” reflects the natural law assumption that there is a universal human natural intuition about social arrangements, here applied to the domain of nuisance law (which tries to reconcile/harmonize free use (autonomy) with the fact that many uses affect neighbors' ability to use their property). As discussed above at some length, this is a strong

seem to reflect a struggle to articulate the grounds for his intuitions about property rights.

86. RESTATEMENT (SECOND) OF TORTS § 822 (AM. L. INST. 1979).

87. *Penland v. Redwood Sanitary Sewer Serv. Dist.*, 965 P.2d 433, 437 (Oreg. 1998) (odors from composting sewage facility); *Mandel v. Geloso*, 614 N.Y.S.2d 645, 700 (1994) (noise from hotel air conditioning unit); *Smith v. Wallowa County*, 929 P.2d 1100, 1103 (Oreg. 1996) (dust and smoke from mining and crushing rocks); *Rodrigue v. Copeland*, 475 So.2d 1071, 1079 (La. 1985) (Christmas lights).

88. Claeys, *supra* note 3, at 356.

assumption.⁸⁹ In this excerpt, Claeys twice reiterates the liberty-biased norm of his theory of natural rights (“broad liberty of action”; “maximize the liberty of action”).

In addition to these fundamentals, Claeys introduces two nuisance-specific natural law principles. First, the law should favor “basic” uses that help people survive over “refined” uses. Second, the law should favor uses compatible with a wide variety of other uses over those having negative external effects. These two notions have significant intuitive appeal. Who could favor property uses inconsistent with survival? And how can anyone object to uses compatible with most other uses, i.e., uses that generate fewer or no negative external effects on neighbors? We will see below, however, that in tandem these principles smuggle in a strict, inflexible hierarchy of preferred land uses and misleadingly suggests that some land uses are threats to the survival of others.

Before getting to those issues, however, we need to examine some nuisance policy fundamentals. To illustrate ideas concretely, we will start with a classic nuisance: a factory making (delicious) kimchi emits fumes with strong odors that taint clothes being processed at an adjacent dry-cleaning store. The Kimchi factory could solve the problem with Type K filters, the dry-cleaner with Type D filters. The two are equally effective at preventing taint to the clothes, and neither type of filter costs so much that either business would have to shut down rather than install them. This last assumption in effect tells us that both businesses produce significant value to the community and hence generate significant profits. Shutting either down would be costly not just to the owner but to the entire community of consumers.

Whether applying economic efficiency or natural law’s practical reason, the solution must be to install whichever type of filter is cheaper. If transaction costs are low, the law is irrelevant, and the parties will achieve the desired outcome via contract. Say that K filters cost 10, D filters 5, and the law deems the factory’s emissions a nuisance. Instead of installing (expensive) K filters, the factory will pay the dry cleaner anywhere from 5–10 to install (cheap, and so efficient) D filters.

Transaction costs, however, are not low in this setting despite the presence of only two parties, because the parties cannot turn to others for competing offers—they are locked in a bilateral monopoly and fighting tenaciously over the division of a fixed surplus. The factory will push for a payment of 5, the dry cleaner will demand 10, and any price between these two extremes is acceptable to both parties.⁹⁰ Thus, they

89. *See supra* Section III.

90. POSNER, *supra* note 63, § 3.7.

may not be able to bargain to the obvious solution and the legal rule will define the outcome. In particular, if courts deem the factory's emissions a nuisance and transaction costs block bargaining, society ends up spending twice as much as necessary to achieve harmonization of these "colliding" land uses.

Claeys objects to this outcome. I believe that the essence of his natural-law-based practical reasoning case against such a result is that the dry cleaner is minding her own business, not doing anything that imposes any costs on the factory, and yet she is the one forced to spend money to solve a problem that, as a matter of physics, is "caused" by the acts of the factory. This is all true as far as it goes, but it fails to appreciate the minimalist beauty of Pareto efficiency and the way the law can use creative remedies to achieve it.

Even if nothing is done directly to compensate the dry cleaner, overall, she might well be better off in a world in which nuisance law factors in relative avoidance costs. Land use collisions (nuisances) are widespread and choosing efficient outcomes will lead to social savings in all such situations. In concrete terms, this means that the dry cleaner will pay less for a wide variety of goods (including that odiferous but delicious kimchi). This may more than offset her losses from having to install the D filters. In addition, her business might emit chemicals that peel the paint on the cars at an adjacent car dealership. If the dealer has lower avoidance costs than she does, nuisance law will directly work in her favor. Today's world has a welter of complex interactions. Having the law select rules that minimize the costs of harmful interactions and the costs of avoiding them should in the end benefit most, if not all, citizens.

Still, there is no guarantee that the stylized "law of large numbers" argument in the previous paragraph will, in the end, make the dry cleaner better off under a legal system determining nuisance liability based on which party is the least cost avoider. As outlined so far, such a rule achieves Kaldor-Hicks efficiency but not Pareto efficiency. Relatively recent groundbreaking innovations in the law of nuisance *remedies*, however, can carry us the rest of the way there.

We illustrate with a second example to which Claeys devotes considerable attention: the famous example of coal-powered trains emitting sparks that ignite dry matter in adjacent farms, starting fires that cause damage to crops, barns, and other valuable property. It might well be that the cheapest way to avoid such harm is for farmers to keep that portion of their lands within, say, 25 feet of railroad tracks free of combustibles. Claeys objects to any such requirement for the same reason

he objected to requiring the dry cleaner to install filters: such a legal rule, in effect, grants the railroad—the *active* party creating the *physical* source of harm—a servitude over strips of farmers' lands.

Although Claeys does not cite it, the most famous nuisance case of the 20th century provides a deft solution. Under the celebrated *Boomer* case, the law refuses to let the farmers shut down the trains but does award them damages equal to the costs of clearing their lands adjacent to the tracks.⁹¹ Refusing to enjoin the operation of the railroad and placing the burden on the farmers to take the least-cost avoidance measure achieves Kaldor-Hicks efficiency. *Boomer's* compensation requirement then produces a Pareto efficient outcome: the farmers are indifferent, the railroad continues to run and avoids paying for some relatively expensive precaution, and the rest of society enjoys the lowest-cost farm goods and railroad services. Kaldor-Hicks efficiency does have losers, and so we can imagine objections, but the universally-pleasing Pareto standard seems immune from objections—who is left to object? The *Boomer* remedy does, in effect, force a transaction on farmers, but Claeys has made it clear that natural law does not have any categorical objection to such forced transactions: recall his defense of forced pooling of oil and gas interests.⁹²

Boomer invariably comes with a close cousin, *Spur v. Del Webb*.⁹³ In *Boomer*, the victims of the nuisance (homeowners) had to tolerate the continued operation of the cement factory but received monetary damages. In *Spur*, a residential community developer successfully sued to shut down an adjacent cattle feedlot spreading odors and insects. But, inverting *Boomer*, the developer had to pay the feedlot owners' the cost of relocating their business. Like *Boomer*, this too produces a Pareto efficient outcome: the feedlot owner bears no costs to move, the developer would drop the suit if paying for this relocation would cost more than its cheapest alternative mitigation strategy, and the rest of the world gets cheaper housing and beef.

The decision in *Spur* seems to have been motivated by the "coming to the nuisance" doctrine, the idea that someone who purchases land in proximity to an existing nuisance should not be able to complain because they observed (or should have observed) the problem and should

91. *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 874–75 (N.Y. 1970). In *Boomer*, the court refused to shut down an expensive cement factory spewing dust onto and causing vibrations in nearby houses, but ordered the factory owners to compensate the homeowners for the reduction in the value of their properties caused by the dust and vibrations. *Id.* at 871.

92. *See supra* Part VII.

93. *Spur Indus. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (1972).

not have proceeded with the land purchase if they found the current neighboring use objectionable. This idea receives some weight in nuisance cases but generally is not decisive.⁹⁴ Claeys would give it little, if any, weight. He argues that someone maintaining a nuisance next to neighbors who happen to be engaged in a land use not damaged by the nuisance (e.g., in *Spur* it appears the developer's land had previously been farm or grazing land, neither of which clashed seriously with the feedlot) merely enjoys in effect a license to continue with the noxious use until his neighbors begin to use their land in ways materially harmed by the nuisance.

This approach indirectly but clearly suggests that there is some implied hierarchy of uses. Feedlots, even if established miles from other human activity, must yield to residential homes whenever they pop up within the radius of stench. His second nuisance law principle, preferring those uses that are most consistent with other uses, strongly reinforces the case that under his version of natural property rights, there is an implicit hierarchy of land uses. Houses conflict with almost no other uses, restaurants conflict with a few, and smoke-spewing factories conflict with almost anything else but other highly noxious uses.

Claeys should expressly acknowledge this and provide more details about this critical hierarchy. Are apartment building nuisances as to single-family homes?⁹⁵ Are noisy nightclubs nuisances as to apartments? I confess some skepticism about the ability of natural law's practical reasoning to answer such questions. Note also that even the single comparison Claeys provides, that new houses are preferred to cattle-producing operations, contradicts his first nuisance law principle articulated above, preferring basic uses necessary for survival over more "refined uses."⁹⁶ Producing food is necessary for survival, and Del Webb was developing deluxe housing for retirees, so Claeys's principle of prioritizing basic uses suggests that the feedlot should have been allowed to continue. This illustrates that such a crude principle is unhelpful in sorting out complex land use conflicts.

Finally, and perhaps most importantly, this hierarchy of uses stands in contradiction to another principle of nuisance law that Claeys embraces: the idea that what is a nuisance in one location may not be a nuisance in another location. Claeys embraces this notion at least three

94. See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* § 465 (2000).

95. *Euclid v. Ambler Realty Co.*, 273 U.S. 365 (1926) (discussing whether apartment buildings are nuisances to single family homes).

96. See *supra* text accompanying note 88.

times.⁹⁷ This idea suggests that someone who builds a house in the midst of a dozen factories should not have a nuisance suit—she has come to the nuisance in a neighborhood where it was her use, rather than the factories, that was “out of place.” This principle suggests that *current uses* play a leading role in defining nuisances, a rule unavoidably in direct conflict with having a universal hierarchy of uses that determine nuisances as outlined in the previous paragraphs. If factories are *always and everywhere* nuisances when close to residences, the particulars of the neighborhood simply do not enter the equation.

All this said, Claeys and natural property rights should not be judged too harshly for struggling with nuisance law. His own missteps demonstrate that he perhaps should not have so confidently rejected the widely held view that nuisance law is a bit of a quagmire.⁹⁸ Nuisance really is difficult, and nobody has all the answers. This section, however, has demonstrated that Claeys’s natural property rights approach does not acknowledge the nuisance remedy revolution launched by *Boomer* and *Spur*, overlooks the seemingly universal appeal of the Pareto efficient outcomes enabled by these remedies, and contains contradictory crosscurrents of defining nuisances via a universal hierarchy of uses at some times but a neighborhood-specific approach at others.

Despite these difficulties, it seems possible to craft a natural law of nuisances that would reach results generally similar to the economic approach. Practical reason seems flexible enough to at least weigh relative avoidance costs and embrace the new-fangled liability rule remedies of *Boomer* and *Spur*. Claeys’s hierarchy of uses, however, would have to go. Such a fixed and inflexible rule for determining nuisance liability is inconsistent with achieving Pareto-efficient outcomes because it prevents courts, in the presence of high transaction costs, from inducing lowest-cost avoidance measures.

IX. COMMON LAW COURTS: COMPETENCIES AND FRAMEWORKS

Before finishing with private common law property disputes, the remainder of this section addresses two institutional assertions that Claeys makes towards the end of his discussion of nuisances. First, in a brief passage, Claeys suggests that common law courts may not be well-equipped to implement the efficiency-oriented agenda of economics. He

97. Claeys, *supra* note 3, at 359, 363, 367; *see also* Claeys, *supra* note 3, at 476–78.

98. Claeys, *supra* note 3, at 353 (“Nuisance has a bad reputation in many quarters for being ‘an impenetrable jungle.’” (quoting KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, 616 (5th ed. 1984))).

wonders how well legal officials “can process information about specific parties and system-wide effects [and] ascertain the values that parties place on resources in dispute,”⁹⁹ supposedly required to implement efficiency-based policies.

This generally overstates the demands imposed by efficiency-implementing policies. In our kimchi/dry-cleaning hypothetical, all a court needs to do is compare the prices of two different sorts of filters. This, of course, is an oversimplified example, but it is suggestive of the fact that reducing the world to calculable and comparable numbers is a strength of economics and something that doesn't place steep demands on judges or juries. Indeed, contrast the economic approach in this simple hypothetical with the natural law approach. I have not covered every element of Claeys's natural rights paradigm, but we can expect the parties to hotly debate the relevant “artifacts” and “interests” before they even get to the application of practical reason. As we have noted at several junctures, Claeys's assumption that there is a high-universal consensus on the methods and goals of humans is an extremely strong assumption unlikely to hold in practice. Without this assumption, it seems practical reason will admit that virtually any argument in furtherance of the ill-defined notion of human flourishing is on the table. Is there any way that this open-ended natural law inquiry, even within the simple confines of the kimchi/dry-cleaning hypothetical, reduces to anything even remotely as simple as comparing the price of two filters? Relatively speaking, economic approaches to common law disputes are invariably more concrete and objective than natural law and other morality-based alternatives and thus place less onerous demands on judges and juries.

Finally, Claeys makes the decidedly bold assertion that common law courts generally make arguments that reflect natural law principles, that economics “assumes premises different from the premises that inform private law reasoning,”¹⁰⁰ and that common law cases put “front and center” normative judgments that diverge from economics.¹⁰¹ He asserts, for example, that common law courts focus more on Hohfeldian categories like “immunized claim-rights” than on efficiency. I teach Property and Torts and cannot recall a single case for which Hohfeld's categories or the logic behind them organized a court's thinking or drove its analysis.¹⁰² In contrast, scores of cases, including many leading

99. *Id.* at 382.

100. *Id.* at 377; see also Claeys, *Introduction*, *supra* note 3, at 427.

101. Claeys, *supra* note 3, at 378.

102. In addition, as anecdotal evidence, not a single federal or state case since the dawn of U.S. history even uses the phrase “immunized claim-right” or closely related

ones, either explicitly or implicitly invoke efficiency.¹⁰³ Indeed, one of the most impressive achievements of Richard Posner and other founders of law and economics is the compilation of numerous efficiency-oriented cases across a broad swathe of the common law, most prominently including Property, Torts, Contracts, and Remedies, but extending to Criminal Law, Procedure (both Civil and Criminal), business entity law, Family Law, and a host of other topics.¹⁰⁴

Until Claeys or other natural law theorists construct a similarly bulky catalog of cases across multiple legal domains that have been decided in keeping with the tools natural law theory (Hohfeldian categories; artifacts; interests; human flourishing; practical reason), the contention that common law courts generally use natural law methods lacks the formidable foundations for the assertion that courts have long invoked the logic of economics and the goal of efficiency to decide private legal disputes.

X. PUBLIC GOODS, INCLUDING CHARITY

Society cannot live on private goods (and services) alone. Recall the modern economic definition of a *public* good: something that is both non-excludable and non-rivalrous.¹⁰⁵ A small number of public goods/services are older than the Republic, e.g., the armed forces and courts of law. Over time the breadth and depth of public goods and services has grown to include, *inter alia*, police forces, roads, and lighting public streets. This trend has accelerated in recent decades to include such important *global* public goods as the internet, the global

alternatives, based on a Westlaw search on 3/18/2022.

103. See, e.g., *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) (Hand, J.) (famous “Hand Test” for negligence, explicit efficiency calculation); *Rodi Yachts, Inc. v. Nat’l Marine, Inc.*, 984 F.2d 880 (7th Cir. 1993) (efficiency standard for deference to custom in negligence cases); *Ploof v. Putnam*, 71 A. 188 (Vt. 1908) (efficiency of saving higher-valued property by sacrificing lower-valued property under necessity doctrine); *Stacey v. Knickerbocker Ice Co.*, 54 N.W. 1091 (Wisc. 1893) (excusing defendant in negligence case for failing to take required precaution that would not have prevented accident); *Ghen v. Rich*, 8 F. 159 (D. Mass 1881) (justifying special rule of capture for one whale species as only rule that made commercial hunting of such whales feasible); *Sommer v. Kridel*, 378 A.2d 767 (N.J. 1977) (requiring landlords to make reasonable efforts to fill vacated apartments to maximize use of such apartments); *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970) (compelling lower-value users to accept continued presence of neighboring nuisance on payment of damages for reduction in value of plaintiff’s properties).

104. See generally POSNER, *supra* note 6, *passim*. Posner published the first edition of this book in 1973. It is an acknowledged masterpiece and one of the signal intellectual achievements of the 20th century.

105. See *supra* text accompanying note 68.

atmosphere (climate change), and antibiotics. Given their ever-expanding importance, any general theory of property should include some account of public goods.

At least one natural law scholar anticipated the modern economic definition of public goods by about three centuries. In the 17th century, Pufendorf wrote that private property should not extend to goods that “can lie open to the uses of all and yet the use of no single man be any the worse.”¹⁰⁶ This maps precisely onto the accepted current definition of a public goods: (i) “lie open to the uses of all” is synonymous with non-excludable, and (ii) “yet the use of no single man be any the worse” captures the notion of non-rivalrous.

Despite Pufendorf’s perceptive anticipation, it appears that subsequent natural law scholars have not picked up modern economic insights into the nature of public goods. Claeys devotes only about three pages to discussing public goods,¹⁰⁷ and hews closely to the oldest and most traditional examples:

In some contexts, the best way to provide sufficient access to a resource is to establish a public commons. Seas fit that profile. When a large body of water is designated as a commons, that designation frees people to use seas to travel, fish, and recreate. Sidewalks fit that profile as well; they are part of the public infrastructure people need to travel between their residences and venues where they work or associate with others. We make broad presumptive judgments when we classify seas and sidewalks as common resources, and the use-interests that give rise to the sufficiency proviso shape those judgments.¹⁰⁸

He does note in passing that public ownership of historical landmarks is also sometimes justified.¹⁰⁹

This tradition-bound, categorical approach is an unhelpful framework for understanding and addressing needs for public goods. First, it confusingly mixes natural commons with publicly provided goods. The two are related, but not the same. Focusing on pollution helps highlight

106. Claeys, *supra* note 3, at 256, citing V SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO ch. v., § 1, 558 (1688) (C.H. Oldfather & William A. Oldfather trans. 1934). I could find no references to this centuries-old precursor to Samuelson’s modern definition of public goods. See, e.g., Meghnad Desai, *Public Goods: A Historical Perspective*, in PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION (Inge Kaul ed., 2003).

107. Claeys, *supra* note 3, at 151, 256–58.

108. *Id.* at 151.

109. *Id.* at 257. Claeys goes on to identify situations in which private and public property interests co-exist in some special circumstances, such as spots occupied by beach bathers and “snow dibs” norms for the use of shoveled-out parking spots in cities in the aftermath of significant snowfall. *Id.*

the difference. Until late in the industrial revolution, air was a natural commons rather than a public good. Governments did not provide fresh air; nature did. There was no concern about an under-supply of privately produced air. With the advent of significant air pollution, fresh air became scarce in some areas. It is at this juncture that the notion of a public good became helpful. People needed air cleansing services. Any private party would have an exceedingly difficult time getting beneficiaries to pay her for providing air cleansing services (non-excludability), and consumers of such services would not diminish the supply of freshened air available to others (non-rivalrousness). This market failure is the reason that governments need to step in and provide air cleansing services—that is the public good (well, service) at stake. This justifies the extensive environmental regulations enacted in most advanced economies.¹¹⁰ Such national regulations are not up to the task of scrubbing warming gases like carbon dioxide and methane from the atmosphere. This type of air cleaning is a *global* public good that requires coordination among all or most nations.

Claeys addresses commons and public goods only in passing, and thus, it is unclear how his version of natural property rights would deal with global warming and the growing list of public goods needed in our increasingly interconnected world. What he does offer, however, is unpromising. Instead of drawing on the modern economic definition of public goods, he seems satisfied with limiting public ownership and involvement to only older, long-established examples like open seas, roads, police, and courts.

Once again, however, natural law's capacity for practical reason does hold out the possibility of integrating useful insights from economics into natural property rights laws. Both theory and evidence support the idea that private actors will undersupply non-excludable and non-rivalrous goods and services if they provide them at all. Recognizing this, practical reasoning could import enough consequentialism into natural property rights to license regulatory regimes beefy enough to provide clean air and an atmosphere that won't produce the seismic world disaster that global warming now threatens.

As this environmental example shows, the nature of public goods can be subtle. It is worth going over another such cloaked and vitally important public good to drive home the growing importance of public goods in the modern world. At first blush, antibiotics do not look like a

110. 2 U.S.C. 7401 et seq. (Clean Air Act); 33 U.S.C §§ 1251 et seq. (Clean Water Act); Environment Act (Act No. 25/1995) (U.K.); Basic Environment Law (Act. No. 91/1993) (Japan).

public good. The law provides powerful exclusionary rights at two levels: basic property rights enable manufacturers to force patients to pay for each dose they consume, and patent laws (domestic statutes¹¹¹ and international treaties¹¹²) enable drug developers to prevent copycats from free riding on their expensive inventive efforts. And each dose of an antibiotic is obviously rivalrous: if I take a penicillin pill, nobody else can consume that specific pill.

The hidden public good relating to antibiotics is rooted in the ability of microbes to evolve resistance to these medications.¹¹³ Viruses, bacteria, and other microbes undergo frequent mutations, and Darwin taught us that those mutations enabling a microbe to survive and thrive would outcompete other strains. The more we expose microbes to an antibiotic that kills them, the greater the chance that they will evolve resistance to the drug. Thus, we can make virtually limitless doses of, e.g., penicillin, but due to evolving resistance, we have only a limited supply of *effective doses*, after which microbes develop resistance and the drug is worthless. The optimal strategy for the deployment of these life-saving and disability-preventing substances, to a first approximation, is to save them for serious cases—infections likely to result in death, permanent disability, or other extremely deleterious outcomes.

Private markets, however, may not be able to induce this efficient use of antibiotics. Pharmaceutical companies may well find that selling millions or billions of doses at a modest price over a few years is much more profitable than setting a high price to limit demand to serious cases and selling a few thousand doses every year over the life of their patent. This means that *effective* doses may be non-excludable. Further, effective doses are also non-rivalrous: if we limit use to serious cases, the use of one dose by seriously ill X will not diminish the ability of seriously ill Y to receive another effective dose. Thus, we see that although *doses* are not a public good, *effective* doses are. This justifies some form of government ownership or regulation to limit the use of antibiotics to treat only serious illnesses. To date, the government has not implemented any such policy, and as a result, there are now some microbes resistant to all known antibiotics and many microbes resistant to all but one or two of more expensive and less convenient antibiotics.¹¹⁴

111. See generally 35 U.S.C.

112. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 320 I.L.M. 1197 (1994).

113. See generally Eric Kades, *Preserving a Precious Resource: Rationalizing the Use of Antibiotics*, 99 Nw. U. L. REV. 611 (2005).

114. CENTERS FOR DISEASE CONTROL AND PREVENTION, ANTIBIOTIC RESISTANCE THREATS IN THE

Some public goods are even more opaque and less intuitive than antibiotics. Perhaps the most important example for public policy purposes is charity. There is now significant evidence that humans generally feel empathy for other humans.¹¹⁵ This explains the widespread phenomenon of charitable giving to those suffering and in need. Americans donated approximately \$471 billion to charitable causes in 2020,¹¹⁶ a number nominally so large that it might convince some that private actors make sufficient charitable gifts. In the context of a gross domestic product (“GDP”) of a bit more than \$21 trillion,¹¹⁷ however, \$471 billion is less impressive—only 2.25% of national income. For such a wealthy nation, one could argue that current charitable giving is suboptimal.

Here is why widespread empathy makes charitable giving a public good. If X gives needy individual C enough money to buy some food, non-donees Y, Z, and millions of others, due to empathy, experience satisfaction at seeing C rescued from starvation. X has no way to exclude these others from experiencing this empathy-based utility (non-excludable), and the fact that X enjoys the results of her charity in no way prevents Y, Z, and others from experiencing exactly the same gain in utility (non-rivalrousness). Thus, charitable giving constitutes a public good, and so we have strong theoretical grounds to believe that private action, unaugmented by any government action, will yield charitable giving below the optimal societal level.¹¹⁸ This argument is uncontroversial; it is now a standard, accepted principle in public economics.¹¹⁹

UNITED STATES 35 (2019), <https://www.cdc.gov/drugresistance/pdf/threats-report/2019-ar-threats-report-508.pdf> [<https://perma.cc/W9KW-6EDJ>].

115. See, e.g., Alison Jane Martingano & Sara Konrath, *How Cognitive and Emotional Empathy Relate to Rational Thinking: Empirical Evidence and Meta-Analysis*, 162 J. SOC. PSYCH. 143 (2022); SUSAN LANZONI, *EMPATHY: A HISTORY* 134 (2018); SIMON BARON-COHEN, *THE SCIENCE OF EVIL: ON EMPATHY AND THE ORIGINS OF CRUELTY* 96 (2011).

116. Anna Pruitt & Jon Bergdoll, *Americans Gave a Record \$471 Billion to Charity in 2020, Amid Concerns About the Coronavirus Pandemic, Job Losses, and Racial Justice*, THE CHRONICLE OF PHILANTHROPY (June 15, 2021), <https://www.philanthropy.com/article/americans-gave-a-record-471-billion-to-charity-in-2020-amid-concerns-about-the-coronavirus-pandemic-job-losses-and-racial-justice> [<https://perma.cc/DCZ6-XSFL>].

117. *Gross Domestic Product*, U.S. DEPT. OF COM.: BUREAU OF ECON. ANALYSIS (Jan. 28, 2021, 8:30 A.M.), <https://www.bea.gov/news/2021/gross-domestic-product-4th-quarter-and-year-2020-advance-estimate> [<https://perma.cc/3VVR-5YZ3>].

118. See CORNES & SANDLER, *supra* note 39, at 143.

119. The seminal work on charity as a public good remains. See Harold M. Hochman & James D. Rodgers, *The Optimal Tax Treatment of Charitable Contributions*, 30 NAT. TAX J. 1, 1 (1977); see generally James Andreoni, *Philanthropy*, in 2 HANDBOOK OF THE ECONOMICS OF GIVING, ALTRUISM AND RECIPROCITY 1201, 1212 (Serge-Christophe Kolm & Jean Mercier Ythier eds., 2006).

Those with even a modicum of knowledge of the United States Tax Code¹²⁰ no doubt have already realized that the government actually subsidizes charitable giving via income and estate tax deductions.¹²¹ It is essentially impossible to compute the optimal level of charitable giving for Americans, so it is possible that these tax deductions solve the undersupply of charity. There are, however, reasons to think otherwise. The bulk of charitable giving in the United States goes to the churches that donors attend and to institutions of higher learning.¹²² The former does not seem charitable at all in the sense of helping those in need and generating any positive empathy externalities; it is rather an improper subsidy for taxpayers to fund religious services that they consume personally (e.g., the cost of paying ministers and heating churches). Gifts to colleges and universities may generate more empathetic benefits among non-donors, e.g., money to provide scholarships for underprivileged youths, but unrestricted funds may be used to hire star faculty, fund the tennis team, or some other purpose that doesn't generate empathy-based utility.

If charitable donations induced by tax deductions are quantitatively insufficient to begin with and if portions do not target true charitable causes (those that generate positive empathy external effects), then delivering the optimal level of the public good called charity requires redistribution of income and wealth via tax and transfer policies. Although property law and tax law may not seem like close relatives, any overarching theory of property (what Claeys is offering) must address taxation and transfer payment policies because they can completely reorder property rights. As Chief Justice Marshall noted in a different setting (federalism and banking policy) that is nonetheless relevant to property rights, "the power to tax involves the power to destroy."¹²³ A 100% tax on all income is essentially communism.

XI. ENDOWMENTS, REDISTRIBUTION & OTHER EQUITABLE CONCERNS

Publicly funded charity almost surely is best done via taxes and transfer payments. Claeys's discussion of the legitimacy of such policies is minimal. Although some scholars have offered natural law theories that would tolerate and even require significant redistribution,¹²⁴ most

120. See generally I.R.C.

121. 26 U.S.C. § 170 (income tax charitable deduction); *id.* § 642(c)(2) (estate and gift tax charitable deduction).

122. See Andreoni, *supra* note 119, at 1204–09.

123. *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819).

124. John Finnis, *Natural Law: The Classical Tradition*, in *THE OXFORD HANDBOOK OF*

leading versions are notably hostile to such policies¹²⁵ and Claeys fits comfortably in the latter camp. It is not difficult to tell where he is headed because he (yet again) makes two very strong assumptions (yet again) without empirical support. He first asserts that “[l]aws and social norms tend not to be effective at helping individuals flourish as individuals. Laws and social norms do tend to be effective at helping people acquire basic preconditions for flourishing.”¹²⁶ This is a breathtakingly broad assertion, involving complex empirical questions from psychology, sociology, and economics. Candidate counterexamples readily come to mind. Changing laws and social norms on racism over the last 60-odd years almost certainly have helped Black Americans to flourish more than they could before the Civil Rights Movement. Strong empirical evidence suggests that college scholarships for impoverished adolescents that were funded from general tax revenues have helped these unlucky but determined young adults to escape from the cycle of poverty—flourishing by any definition of the term.

In a similar vein, Claeys next states, naked of any empirical evidence, that “[g]overnments should not pursue visions of the common good that require extensive sacrifice; they should promote the common good understood as securing to citizens opportunities to acquire basic life goods.”¹²⁷ The same counterexamples mentioned in the prior paragraph seem to apply. The Civil Rights Movement arguably at least contemplated extensive sacrifice on the part of White Americans to achieve racial equality. Fully and effectively providing primary, second, and college educations to all underprivileged youth would require extensive sacrifices from the wealthy. Both racial equality and equal educational opportunities seem to qualify as “basic life goods.” Indeed, this assumption seems internally contradictory if the most cost-effective means to achieving the end of acquiring basic life goods is extensive progressive taxation and redistributionary transfer payments. That is hard to prove, but as an assumption it seems at least as plausible as many of the assumptions Claeys, and other natural law theorists make.

In addition, this assumption seems to bar governments from engaging in wars that rather clearly salvaged western civilization¹²⁸ and could

JURISPRUDENCE AND PHILOSOPHY OF LAW (Jules Coleman & Scott Shapiro eds., 2004); A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* (1992).

125. Two of the most influential natural property rights books are EPSTEIN, *supra* note 46, and NOZICK, *supra* note 49.

126. Claeys, *supra* note 3, at 58.

127. *Id.* at 75.

128. See *World War II*, HISTORY, <https://www.history.com/topics/world-war-ii/world-war-ii-history> (last visited Oct. 6, 2022) [<https://perma.cc/CT4H-RLYE>].

be construed to prevent the government from mandating vaccines and other public health measures to combat lethal pandemics—though Claeys is clear that his version of natural law does sanction such measures.¹²⁹

Taking a step back, the important takeaway from these two assumptions is that they may enable Claeys to get where he clearly wants to go—a regime in which redistributionary tax and transfer policies are difficult or impossible to justify—but at the high cost of making very powerful assumptions that form the shakiest of foundations for his arguments.

When Claeys does move (the short distance) from these strong assumptions to their necessary conclusion that redistributive policies generally violate his system of natural law, he finds that making it “easy to redistribute property to the impoverished . . . seem[s] unjust and inefficient.”¹³⁰

Unjust because they don’t give due to intuitions that people are entitled to secure authority in relation to some resources. Inefficient, because it seems next to impossible to parcel out access to resources with delegating significant authority to particular people in relation to particular resources. That sort of strategy takes advantage of people’s local knowledge about particular resources.¹³¹

Disappointingly, this conclusion, on one of the most important elements of property in a modern advanced economy, rests directly on yet more “intuitions”—i.e., assumptions—about security of ownership. Worse, the second sentence seems to raise a non-sequitur. Claeys seems to worry that redistribution will move assets from those who understand them best (local land holders; business owners) to others. He cites Hayek, reinforcing the impression that he is concerned about the importance of asset-specific knowledge to efficient resource use. Redistribution in advanced economies, however, never (to my knowledge) involves taking specific assets from the rich and giving them to the poor. Instead, it is done via some flavor of progressive tax and transfer policy, i.e., all in cash. Cash is fungible and universal; there is simply no dimension of local knowledge about how to spend dividends or welfare checks. There doubtless are valid arguments (with empirically supported assumptions) against redistribution, but local knowledge about asset use

129. See Claeys, *supra* note 3, at 4, 45, 54–59, 76, 83.

130. *Id.* at 115. Note the appearance once again of the linguistic twitch word “seem.” See *supra* note 85 and accompanying text.

131. Claeys, *supra* note 3, at 115.

is not a story that works against the monetary redistribution of income and wealth in advanced economies.

The one bone that Claeys tosses in the direction of redistribution is a bare-boned interpretation of Locke's sufficiency proviso, that those who take resources from the commons must leave sufficient quantity of like quality for later comers.¹³² In other times and places, this condition has been equality-reinforcing. The most compelling quasi-modern example is the American government's sale of lands occupied by Indigenous Americans to European immigrants and their descendants from the founding of the Republic until around the end of the 1800s. This great commons (not unclaimed, as it was occupied by the indigenous tribes) was for the most part either sold at very low prices, typically \$2 an acre, or given away under one of the many Homestead Acts.¹³³ For over a century, the United States government sold or gifted relatively small parcels to almost all (European) comers—a discriminatory approximation of Locke's proviso of making sure that there was sufficient land for those appearing late on the scene.

This frontier, however, has long been closed. There is no more free or cheap land, and anyway land is no longer the critical asset that it was in the agricultural economy of the 19th century. Opportunity today depends on a stable, nurturing upbringing and a good education, from kindergarten through college and frequently extending to graduate education. In addition, genes contributing to intelligence, good health, and other productive attributes now serve as foundations for economic success. None of these resources exist in any sort of commons. Children cannot go into the forest and "chop down" new and better parents, years of education, or genes conferring intelligence. In today's world, it is exceedingly difficult to find any relevance of Locke's proviso to creating equal opportunity for all. If we were to honestly and systematically apply Locke's proviso to correct for the complete lack of any relevant resources to the poor slice of the American population, we would end up with much greater redistribution than the nation has ever seen.

Claeys acknowledges none of this and breezily concludes that the sufficiency proviso functions well as long as there are:

opportunities to work, the local currency must be stable, and there must be enough resources to go around that people who own relatively few resources have reasonable prospects of acquiring what

132. *See supra* note 33 and accompanying text.

133. For a detailed, contemporary documentation of the sale of Indigenous American lands to European immigrants, see THOMAS DONALDSON, *THE PUBLIC DOMAIN, ITS HISTORY WITH STATISTICS*, PUBLIC LAND COMMISSION (1884).

they need for survival or flourishing. When these conditions are satisfied, however, the opportunities to acquire new resources and hold them securely satisfy the proviso.¹³⁴

I suspect that he and I would differ sharply on whether those with “relatively few resources have reasonable prospects” of flourishing in America today. Sharply decreasing intergenerational socioeconomic mobility since the Reagan administration provides some empirical grounds to cast doubt on his optimism.¹³⁵

Most critical to his optimism is the opportunity to work—a robust and well-functioning labor market, especially for unskilled and semi-skilled workers. Not everyone can be an entrepreneur, a professional, or a business executive. There is macroeconomic evidence that our economy in recent decades has been biased against unskilled labor. The share of national income going to labor has declined as a bigger and bigger slice of the pie has found its way into the pockets of owners of capital (the wealthy).¹³⁶ In addition, while productivity has been growing steadily since the 1980s, those at the median of the income distribution along with all those below essentially have not had a raise for going on five decades.¹³⁷

Claeys does not acknowledge these important social facts, but he does understand that a well-functioning labor market is critical to the flourishing of the vast majority of Americans not born to wealth and privilege. His prescription for a dependable labor market? “Community residents must be civilized and trained well-enough that they can switch jobs relatively easily.”¹³⁸ We have already addressed the “trained well-enough” component; Claeys’s version of natural law does not seem open to the rather hefty bill of educating inner city minority youths to the same standard as their wealthy suburban counterparts. His advocacy of fluidity—“switch jobs relatively easily”—makes some sense, though it ignores important evidence about the value to workers and firms of having employees develop “firm-specific capital,” meaning that the workers

134. Claeys, *supra* note 3, at 260.

135. For a short, accessible introduction to the scholarship on declining intergenerational socioeconomic mobility, see Raj Chetty, David Grusky, Maximilian Hell, Nathaniel Hendren, Robert Manduca, & Jimmy Narang, *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, 356 *SCIENCE* 398 (2017).

136. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* ch. 5 (Arthur Goldhammer trans., 2014).

137. Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, *Trends in Income and Wealth Inequality*, PEW RSCH. CTR. (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/> [https://perma.cc/EJ9J-ZL2Q].

138. Claeys, *supra* note 3, at 239.

develop firm-specific knowledge and skills that make them more valuable to their current employer than to other employers.¹³⁹ This of course inhibits switching jobs as such workers are less valuable when they begin working with a new firm and so command a lower wage.

Firm-specific capital, however, is small beer. As virtually every American who reaches adolescence understands, without benefit of any training in macroeconomics or microeconomics, the biggest threat to a well-functioning labor market is the business cycle. Although there was some hope in the 1990s that we had vanquished recessions and depressions, subsequent events have demonstrated our hubris: witness the dotcom bust of 1999–2000, the financial crisis of 2007 and subsequent Great Recession, and the deep recession caused by the Covid pandemic in 2020–22 (and counting). When the entire economy tanks, millions of workers get laid off through absolutely no fault of their own.¹⁴⁰ No amount of flexibility and hard work can yield new jobs for most of them until the demand for labor recovers. Claeys conveniently omits this singularly important economic fact from his rather fairy-tail portrait of a smooth, well-functioning labor market. If ever there was a case for publicly coordinated charity effectuated via tax and transfer policy, recessions are it.

In addition to eliding over the enormous dangers that recessions and depressions pose to the survival and flourishing of the working class, Claeys also omits another major contributor to inequality both within and especially across generations: inheritances. One of the major findings of Piketty's magnum opus, *Capital in the 21st Century*, is that inheritances traditionally have been paramount in determining socioeconomic class. We experienced a prolonged deviation from this phenomenon during the middle of the 20th century but are fast returning to a world in which inheritances are a predominant source of life chances and ability to flourish.¹⁴¹ Although Americans may take for granted the right to leave their wealth on death to whomever they please, no less a founding era natural law legal light than Blackstone flatly declared that the right to leave wealth by will on death is purely a creation of statutory law.¹⁴² Thus, natural law does not stand in the way of even highly progressive inheritance and gift taxes.

139. See, e.g., Boyan Jovanovic, *Firm-Specific Capital and Turnover*, 87 J. POL. ECON. 1246 (1979); Donald O. Parsons, *Specific Human Capital: Application to Quit Rates and Layoff Rates*, 80 J. POL. ECON. 1120 (1972).

140. *Id.* (In the dot-com bust and the Great Recession, fault seems to rest at the door of the captains of capital on Wall Street and their ever-evolving novel financial tools).

141. PIKETTY, *supra* note 136.

142. 2 WILLIAM BLACKSTONE, COMMENTARIES *102–03; 1 FREDERICK POLLOCK & WILLIAM

Perhaps sensing some of these problems, Claeys has a single paragraph on tax and transfer policy that is in significant tension with the passages quoted from his manuscript earlier in this subsection.

[W]hen the sufficiency proviso cannot be addressed in property law, it can be addressed outside of property law, via safety-net policies in public law. Here, the two most obvious strategies consist of progressive taxation and public assistance policies [S]afety-net policies should be tailored so as not to undermine the goals associated with the productive use requirement. "Productivity" requires activity that is self-reliant, vigilant, industrious, and the result of intelligent planning; safety-net policies are thus unjust if they encourage learned helplessness [S]uch policies [should] be structured so that they protect only citizens who (in Locke's words) suffer from "pressing Wants" and lack "means to subsist otherwise" and do not incentivize some people to "live unnecessarily upon other people's labour."¹⁴³

Although Claeys's definitions of "pressing wants" and subsistent income are unclear, the language in this paragraph could justify fairly robust income redistribution. Other than Locke, however, there is no natural law foundation offered to support redistributionary policies and indeed Claeys rejects the work of natural law theorists who have tried to justify such policies. Claeys seems squarely in the camp of natural law theorists like Nozick and Epstein who reject essentially all redistributionary laws.

XII. SOME THOUGHTS ON THE EXPROPRIATION OF NORTH AMERICA

This section deals with an issue Claeys discusses that is clearly tangential to his project: the colonial expropriation of the land making up the United States from its indigenous inhabitants. Claeys discussion is deeply ambivalent and, therefore, somewhat confusing.

His main thrust is to adopt Chief Justice Marshall's morally bankrupt argument that some unspecified natural law doctrine gave higher-intensity land users (the European colonists, with their intensive agriculture and husbandry, nascent manufacturing, and a division of labor sufficient to support urban centers) the right to take the land of lower-intensity land users (nomadic hunting; slash & burn agriculture):

the United States and its citizens had at least some plausible ground to say that land could be put to uses far more valuable to human life than the semi-nomadic uses to which Native Americans put them ... it was at least possible in principle that the disputed land was

MAITLAND, THE HISTORY OF THE ENGLISH LAW BEFORE THE TIME OF EDWARD I 329 (2d ed. 1898).
143. Claeys, *supra* note 3, at 263-64 (citations omitted).

underused. And if that fact could be shown, as a matter of natural law the United States and its member states would have had legitimate authority to disregard Native American claims of exclusive authority over the land in dispute.¹⁴⁴

After all his talk of natural law's objective principles crafted to help individuals flourish based on their personal ideal of living good and meaningful lives, it is surprising and disappointing that he never concedes that Indigenous Americans had a quite different but no less legitimate vision of human flourishing: sparse population; more nomadic lifestyle; and less intensive agriculture. The Indigenous tribes occupied the land for centuries before the European colonists showed up, and first-in-time is one of the most revered notions of the common law and natural law. To put it in Lockean terms, the Indigenous Americans removed the United States land mass from the commons but, by definition, left the Europeans with their own lands. For someone who exalts universal human moral reasoning, how is this not an airtight case?

Claeys first analogizes the taking of Indigenous lands to forced pooling of oil and gas interests, discussed above in Section VII. This is exceedingly inapposite. First and foremost, forced pooling requires a majority and usually a super-majority vote among the affected landowners to obtain an order mandating unified extraction. When the process of expropriating Indigenous Americans' lands began, European colonists were a distinct minority on the continent and in all regions. Second, forced pooling takes place within one culture with a shared view of the role that resources play in flourishing: they are to be extracted and sold at the highest price possible. As noted in the prior paragraph, Indigenous Americans' world view, their conception of flourishing, was wholly different and distinct from the colonists' views.

There is an important parallel here to our discussion of nuisances. Recall that implicitly, if not explicitly, Claeys's natural law perspective on nuisance law instantiated a hierarchy of uses, with lower uses (manufacturing, e.g.) always constituting a nuisance to any higher use (e.g., residential housing). Behind Claeys's justification for the colonists' expropriative behavior is a similar hierarchy, but one systematically favoring higher-intensity uses over lower-intensity uses. The source of and justification for this hierarchy are never identified; in the end it appears likely that they are assumed to spring up from the supposed universal human moral reasoning at the core of natural law theory.

144. *Id.* at 216–17.

Such a hierarchy has rather radical implications. Taken seriously, Claeys's case for a hierarchy favoring more intensive land uses would seem to:

- support the outcome of the *Kelo* case, forcing homeowners to sell so that a parcel could be redeveloped with more dense and diversified occupants;
- permit the condemnation of farms for the development of private homes; and
- permit the condemnation of homes to build a shopping center or big box store.

Indeed, Claeys's hierarchy of intensity on its face justifies even more outlandish acts. What if a group of citizens from crowded neighborhoods of Los Angeles decided that they would rather live in rural Montana? Citing Claeys, it would seem that they could take the land of ranchers (pay "just compensation" but not a penny more)—ranching is just about the least intensive land use imaginable, rivaling the Great Plains Indigenous American's reliance on vast tracts to maintain buffalo herds on which they depended for almost all necessities.

Claeys realizes that many readers will not find his case for the colonists convincing and seems only half-convinced himself. He notes "how dangerous it is for any observer to compare and rank the uses that other people might want to make of the same resource,"¹⁴⁵ and stresses that the colonists had an obligation to leave sufficient land for the Indigenous tribes *and* to compensate them—perhaps supra-compensatorily given that they took the land instead of negotiating for it.¹⁴⁶ His moral bottom line is that "at the end of the day, United States policy toward Native American tribes was almost certainly unjust."¹⁴⁷

He does not, however, stop with this moral conclusion. His practical bottom line is that "the issues about rights were deeply political, and they needed to be resolved and settled by the political branches of the governments of the United States and its states."¹⁴⁸ The Indigenous Americans don't figure in this equation because they were not powerful enough to alter federal and state politics. This is a confession that raw power trumped all notions of justice in the expropriation of American lands from Indigenous tribes. I cannot understand how a natural law theorist can swallow, or even half-swallow, the principle of might makes right—the law of the jungle. This is the singular issue in the book for

145. *Id.* at 216.

146. *Id.* at 217.

147. *Id.* at 218.

148. *Id.*

which Claeys raises political considerations and suggests that they may trump natural law.

Lest we forget, American leaders from very early on understood that the two best “weapons” for separating Indigenous tribes from their land were spreading diseases endemic in colonists’ communities to which Indigenous Americans had no resistance and killing off wild game (deer; elk; moose; buffalo) along the frontier. One of President Washington’s generals outlined the game-plan for expropriating Indigenous Americans’ lands at least cost (in terms of both blood and money):

[A]s our settlements approach their country, they must, from the scarcity of game, which that approach will induce to, retire farther back, and dispose of their lands, unless they dwindle comparatively to nothing, as all savages have done, who gain their sustenance by the chase, when compelled to live in the vicinity of civilized people, and thus leave us the country without the expense of a purchase, trifling as that will probably be.¹⁴⁹

Washington endorses this strategy without reservation:

[T]he Indians as has been observed in Gen. Schuyler’s Letter will ever retreat as our Settlements advance upon them and they will be as ready to sell, as we are to buy; That is the cheapest as well as the least distressing way of dealing with them, none who are acquainted with the Nature of Indian warfare, and has ever been at the trouble of estimating the expence of one, and comparing it with the cost of purchasing their Lands, will hesitate to acknowledge.¹⁵⁰

Thus, the expropriation of America was a conscious project pursued systematically that relied on disease and starvation to so weaken the original inhabitants that they could offer little resistance and could be coerced to sign treaties ceding most or all of their lands for a pittance. It is hard to imagine any moral reaction to this process save outright condemnation.

As readers no doubt have inferred, I find Claeys’s discussion of the expropriation of Indigenous Americans’ land quite troubling. I fear that many will find it highly offensive and possibly motivated by subconscious racism—asking why political considerations appear on stage for this brief act but are otherwise invisible in this 500-odd page opus. The

149. Letter from General Schuyler to Congress (July 29, 1783), in 3 PAPERS OF THE CONTINENTAL CONGRESS 593, 601 (item 153) (1774–89).

150. Letter from George Washington to James Duane (Sept. 7, 1783), in 27 THE WRITINGS OF GEORGE WASHINGTON 133, 136 (John C. Fitzpatrick ed. 1938) (emphasis added). In the same letter, Washington similarly argued that “the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho’ they differ in shape.” *Id.* at 140.

issue is not central to his argument and omitting it would not disrupt the flow of his narrative. If Claeys cannot craft more convincing arguments to justify the expropriation of America, or instead clearly and unambiguously concede that it was a simple case of the exercise of power in naked violation of Indigenous American's natural property rights, I suggest that he omit discussion of the topic.

XIII. ADJUSTING FOR SOCIAL CHANGE

As an offset to this deletion, I suggest that Claeys add a chapter or section explaining how natural law *transitions* can occur. Moral beliefs, like just about any other facet of human societies, change over time. Natural law, with its postulated universal moral norms, seems inconsistent with this ubiquitous fact. To draw on an example given by Claeys, he says that people feel outraged by segregated education.¹⁵¹ We may hope that this is a widely held sentiment in 2022, but we can be pretty confident it was not in 1922 and assuredly it was not in 1822. As late as 1959 the state of Virginia shut down its entire system of public schools rather than comply with *Brown v. Board of Education*¹⁵² and its mandate for desegregation.

Economists have a straightforward explanation: as people's preferences change, their behavior changes. For centuries it would seem that most whites believed other races inferior and thus found it easy to justify discriminatory measures like separate schools. As their beliefs and thus their preferences changed, they voted for officials who enacted legislation and appointed judges to reflect their change in perspective. This is a positive explanation that does not pass moral judgment on such changes.

It is difficult to imagine a positive model of social change under the assumptions made by natural law theories. If humans have an innate, universal ability to use reason and intuition to identify just outcomes, how can those outcomes change over time?

Desegregation is only one of many examples of fundamental changes in human social norms. I offer two examples from the history of property law. First, the institution of slavery was ubiquitous in classical

151. Claeys, *supra* note 3, at 56.

152. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); see generally DAVID J. MAYS, RACE, REASON, AND MASSIVE RESISTANCE: THE DIARY OF DAVID J. MAYS, 1954-1959 231-52 (James R. Sweeney ed. 2008), for Virginia's "massive resistance" to the *Brown* decision; JAMES W. ELY, THE CRISIS OF CONSERVATIVE VIRGINIA: THE BYRD ORGANIZATION AND THE POLITICS OF MASSIVE RESISTANCE (1976).

Greece and Rome, as well as in China, India, and Africa.¹⁵³ It disappeared only slowly over the last 500-odd years. Second, married women in England and America could not own property until a sea-change in the law began in the late 1800s. Claeys could perform a real service by explaining how to square natural law and natural property rights with such momentous changes in legal and moral norms.

XIV. CONCLUSION

Despite its backwater status in modern legal academia and despite unreceptive courts, natural law continues to attract bright scholars assiduously working to explain and advocate for their world view. Claeys has taken up the mantle in the realm of natural property rights and has penned an impressively clear and comprehensive theory.

At the most general level, his policy prescriptions coincide with economic consequentialism (murder is bad) even if his reasoning and methods diverge (practical reason instead of utilitarianism and careful empiricism). As we zoom in from such “consensus” policies on which most if not all normative frameworks concur, however, the differences between natural law and economics proliferate. Perhaps the most troubling divergence we have examined is in nuisance law, where the natural property rights approach seems to reject a recent revolution in remedies that can achieve Pareto efficient outcomes—outcomes with some winners and no losers. It is exceedingly difficult for any theory that claims to embrace even a limited role for consequentialism to justify rejecting policies with no losers.

At a methodological level, the most glaring fault of natural law is the use of practical reason instead of rigorous empiricism to make policy judgments. For example, determining the tax and transfer payment policies that optimally reduce inequality requires wrestling with a host of questions answerable only with statistics. What disincentives to work do such policies create? How much do transfer payments improve health outcomes for poor recipients and their children? Do citizens in more egalitarian societies enjoy lower levels of stress?

153. See generally THOMAS W. WIEDERMANN, *GREEK AND ROMAN SLAVERY* (1981); William V. Harris, *Demography, Geography and the Sources of Roman Slaves*, 89 *J. ROMAN STUD.* 62 (1999); C. Martin Wilbur, *Slavery in China During the Former Han Dynasty, 206 B.C. - A.D. 25*, in 34 *ANTHROPOLOGICAL SERIES 1* (Field Museum of Natural History) (1943); ANDREA MAJOR, *SLAVERY, ABOLITION AND EMPIRE IN INDIA 1772-1843* (2012); Gareth Austin, *Slavery in Africa, 1804-1936*, in *CAMBRIDGE WORLD HIST. SLAVERY 174* (David Eltis, Stanley L. Engerman, Seymour Drescher & David Richardson eds., 2017).

The only reliable way to answer such questions is with careful statistics. Although it embraces limited doses of consequentialism, no amount of practical reason can answer these questions. Any framework for making specific recommendations about real-world property policy issues must place empiricism front and center. In Claeys's narrative, data and statistics do not even make it on stage.