Oil, Trees, and Water: Evaluating the Transition from Natural Property Rights to Property Conventions

John A. Lovett
Loyola University New Orleans College of Law, jlovett@loyno.edu

Follow this and additional works at: https://scholarship.law.tamu.edu/journal-of-property-law

Part of the Natural Law Commons, Oil, Gas, and Mineral Law Commons, and the Water Law Commons

Recommended Citation
Available at: https://doi.org/10.37419/JPL.V9.I4.7

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Texas A&M Journal of Property Law by an authorized editor of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.
OIL, TREES, AND WATER:
EVALUATING THE TRANSITION FROM NATURAL PROPERTY RIGHTS TO PROPERTY CONVENTIONS

John A. Lovett†

Abstract

In his new book, Natural Property Rights, Eric Claeys offers a property theory grounded in a person’s ability to make productive or purposive use of a resource and the requirement of clear communication about the extent of a person’s claim to that resource. This Article illustrates some of the normative and practical advantages of Claeys’s theory by using it to explicate three property disputes that have arisen in Louisiana concerning highly contested natural resources—oil, trees, and water. The Article argues that Claeys’s theory illuminates a major focal case in the development of Louisiana’s law of the obligations of neighborhood, might have produced a more satisfying outcome in a leading case concerning the usufruct of timberlands, and could help the State of Louisiana, private landowners, and recreational sportsmen resolve disputes over ownership of submerging land and water-based access on Louisiana’s disappearing coast.

I. INTRODUCTION ........................................................................................................614
II. THE CORE ELEMENTS OF A “CLAEYSIAN” NATURAL PROPERTY RIGHT ......616
   A. Two Essential Elements ..................................................................................617
   B. Two Provisos ..................................................................................................619
III. OIL: NEIGHBORS IN THE OIL FIELD ...............................................................620
IV. TREES: THE USUFRUCT OF TIMBERLANDS .....................................................623
V. WATER: OWNERSHIP AND ACCESS ON SUBMERGING COASTAL LAND ......629
VI. CONCLUSION ........................................................................................................636

DOI: https://doi.org/10.37419/JPL.V9.I4.7

†De Van D. Daggett, Jr. Distinguished Professor, Loyola University New Orleans College of Law. My thanks to Christopher Serkin and Adam MacLeod for comments and encouragement on this Article. I offer special thanks to Eric Claeys for his comments on this Article and for the many other times he has offered detailed and thoughtful feedback on other projects. In his writing and support for colleagues, he exemplifies the best in American property law scholarship.
I. INTRODUCTION

In *Natural Property Rights*, Professor Eric Claeys argues that the system of property rights we currently enjoy and sometimes struggle to understand in the United States can be justified and explained by a theory of natural property rights—a theory that prioritizes rights people enjoy in the exclusive use of resources and that structures the law to serve the interests that people have in using those resources.¹ This is an ambitious project. To his great credit, Claeys’s comprehensive account and application of his theory help to explain a great deal of substantive American property law.

Claeys’s natural law theory is also normatively appealing. He grounds his theory in an intuitively-attractive idea that property rights reside in autonomous, rights-bearing individuals but suggests that those rights must be coordinated in a way so that all the members of a community can flourish and survive.² Claeys argues that when property rights are conceptualized as protecting people’s interests in the productive use of resources and would-be rights holders are required to communicate clearly about the extent and nature of those rights, the property law system maximizes human flourishing and facilitates the creation of new resources and their wide dissemination.³

Some readers may approach Claeys’s book expecting to find a manifesto that attacks all, or most, government regulation of property as an unnatural infringement on individual liberty.⁴ Those readers, however, will be disappointed. Claeys clearly recognizes the need for government

---


² Claeys, *supra* note 1, at 17–18; *see also* Claeys, *Introduction, supra* note 1, at 419–21. Other scholars have attempted to derive property rights starting from a more communitarian perspective. For these scholars, particularly those in the “Progressive Property” movement, property rights serve not only individual interests but also collective interests in creating, preserving, distributing, and sharing resources to achieve human flourishing. *See generally* Gregory Alexander, *Property and Human Flourishing* (2018); Gregory Alexander, *The Social-Obligation Norm In American Property Law*, 84 Cornell L. Rev. 745 (2009). Claeys’s theory is also concerned with human flourishing, but places less emphasis on the need for shared sacrifice to achieve that end and is less concerned about resource distribution equality as long as some minimal level of property access exists.

³ Claeys, *supra* note 1, at 236–37; *see also* Claeys, *Introduction, supra* note 1, at 420–21, 437.

regulation and state reordering of property rights in some contexts. One of the primary goals of his book is to identify those circumstances when government intervention in and state reordering of property rights makes sense. Somewhat surprisingly, Claeys argues that one useful metric for determining whether a positive law or regulation that limits or rearranges existing property rights can be justified is the notion derived from 20th century U.S. takings doctrine of "average reciprocity of advantage." As Claeys puts it:

If a positive law reorders property rights already established in law, it is legitimate only if the reordering seems reasonably likely to serve the interests of most of the affected proprietors better than existing rights do. The 'advantages' that proprietors get from a genuine reciprocity of advantage are thus the benefits that accrue when the regulation serves their interests.

Whether this average reciprocity of advantage metric originates in consequentialist or natural rights reasoning is an interesting question but not one that this Article seeks to resolve. This Article, instead, focuses on the portions of Natural Property Rights that move beyond arguments about average reciprocity of advantage and takings doctrine and offers tools for explaining and evaluating, as Claeys puts it in a crucial passage, "how natural property rights supply people with guidance"; that is, how understanding the conceptual elements of a natural property right help people "develop sophisticated laws, policies and norms for property," and how we make the "transition—from 'natural property rights to property conventions.'"

This Article examines several disputes that might be the subject of a typical first-year property law course but also involve tangible things that non-lawyers often care about deeply. How should the law resolve a dispute between neighboring property owners with competing interests in a resource, like an underground oil or natural gas reservoir, that overlaps surface boundaries? How should the law resolve a dispute between two people with correlative but temporally distinct property rights in the same resource—like land covered with valuable timber or "timberlands"? And finally, how should the law resolve disputes between private owners of coastal marshland, the state, and people interested in recreational fishing when the once privately-owned marshland

5. Id. at 11–16.
7. Claeys, supra note 1, at 13; see also Claeys, Introduction, supra note 1, at 446–48.
becomes permanently submerged beneath the waters of the sea? In short, this Article asks: how does Natural Property Rights help us sort out—or find “guidance” or complete the process of “specification” to use two of Claeys’s favorite terms—these intriguing disputes over oil, trees, and water?

My conclusion is that Claeys’s articulation of the elements of and justifications for natural property rights helps us visualize how the transition from property rights to property conventions is accomplished in most of these contexts. Moreover, Claeys’s theory can help us understand why the resulting property conventions sometimes do, or sometimes do not, produce widespread legitimacy depending on whether they seem like “reasonable efforts to protect the rights of all or to promote common priorities.”

II. THE CORE ELEMENTS OF A “CLAESYAN” NATURAL PROPERTY RIGHT

From my perspective as a property professor who alternatively teaches and writes about property law in both civil law and common law jurisdictions, the primary trans-systemic and architectural appeal of Claeys’s theory of natural property rights emerges in chapters 4 and 5 of his new book. In these chapters, he describes the essential elements of and limitations on natural property rights. As Claeys explains, these core elements and limitations help justify a system of property rights that functions as a meaningful social artifact, that is, a social construction that produces legitimacy and facilitates practical reason by providing guidance to help resolve disputes over distinct resources. For Claeys, a natural property right gives the right holder some exclusive zone of use and control of the resource. It gives its holder a claim to take a resource out of the general pool of resources that might form “a community of goods,” make it his or her own, deny others access to or control over that resource, and call upon the state to back up that claim of exclusive authority with force if necessary.

9. Id. at 28.
10. Id. at 19–20, 117–18; see also Claeys, Introduction, supra note 1, at 434–38.
11. Claeys, supra note 1, at 10; see also Claeys, Introduction, supra note 1, at 436.
12. Claeys, supra note 1, at 118–19; see also Claeys, Introduction, supra note 1, at 436–38.
A. Two Essential Elements

For Claeys, a person can legitimately claim a natural property right in a thing, a separable or “ownable” resource distinct from the personality of the claimant, if he (1) uses a claimed resource “in a manner that contributes to someone’s preservation or flourishing” and (2) gives other people in the community some kind of reasonable notice that he is using the claimed resource and does not want others to interfere with that use. Although these “productive use” and “claim communication” elements are necessary for the existence of a Claeysian natural property right, whether it is his baseline usufructuary right or a more complete ownership right, the interest in putting a claimed resource to productive use is foundational.

The terms “use” and “productive use” have a particular meaning for Claeys. He defines the scope of legitimate “use” in a philosophical sense to be an “activity that seems to produce moral value,” by which he means “most intentional and purposive activity.” He excludes anti-social activities, like those of the “neighbor-hating and duck-scaring” defendant in *Keeble v. Hickeringill*. Claeys also explains that productivity alone is not the only relevant consideration.

Use must also be “consistent with other’s use, actual or hoped for.” Here, Claeys evokes the Latin maxim *sic utere tuo ut non alienum laedes* to explain that any person’s use of their property “must be carried out respectfully of others’ like interest in use; use must be not only productive but also sociable.” Even more pointedly, Claeys clarifies what he means by “productive use” when he evokes Locke, as interpreted by Stephen Buckle, to explain that productive use is inextricably linked with “labor,” that is, a “rational (or purposeful) value-creating activity” and must be “directed toward the preservation or comfort of our being.”

---

13. In the first part of Chapter 5, Claeys quite nicely articulates why property law concerns rights in “ownable” things, that is, disputes people have over access to and control of resources, whether they are tangible or intangible, that are distinct from a person’s personality. Claeys, supra note 1, at 115–18. Indeed, Claeys’ synthesis of Penner’s “separability” thesis, J.E. Penner, The Idea of Property in Law 105–27 (1977), and Smith’s proposition that property is about “rights in things,” Henry E. Smith, Property as the Law of Things, 125 Harv. L. Rev. 1691 (2012), is one of the jewels of his book.

14. Claeys, supra note 1, at 117; see also Claeys, Introduction, supra note 1, at 436–38.

15. Claeys, supra note 1, at 112 (discussing Keeble v. Hickeringill, 11 East 574, 103 Eng. Rep. 1127 (Queen’s Bench 1707)).

16. Id. at 112; see also Claeys, Introduction, supra note 1, at 437.

17. Claeys, supra note 1, at 112.

18. Id. at 112–13.

19. Id. at 122 (quoting Stephen Buckle, Natural Law and the Theory of Property:
“productive use,” or purposeful, value-creating activity, even more capacious by recognizing that productive use can serve many diverse and “incommensurable life projects” as long as the activity helps someone thrive or flourish.\textsuperscript{20} Although productive use can thus include passive uses of resources—ecological, historical preservation, recreation, and even aesthetic purposes, to name a few\textsuperscript{21}—there are limits to this conception. Activities that amount to waste or spoliation or are motivated purely by spite, for instance, are disqualified from the realm of natural property rights because they do not enhance anyone’s survival or flourishing.\textsuperscript{22}

Claeys’s second essential feature of a natural property right—claim communication—is perhaps less intuitive than the productive use requirement but no less significant, particularly in its social context. As Claeys explains, drawing on Christopher Newman and ultimately on Grotius and Pufendorf, a person’s claim to an “ownable” resource only deserves legal recognition as a natural property right if the claimant has communicated the nature and extent of that claim to other persons in the claimant’s community in a manner that is reasonably intelligible to the community.\textsuperscript{23} In a word, a natural property right has to give “fair notice” of the sphere of interests subject to the property right claim.\textsuperscript{24} If a property claim does not give fair notice of the extent of the claim, it is not "sociable;” it only produces confusion and conflict within a community of potential resource users. Although the concepts of “occupancy” and “possession” may often function interchangeably with “claim communication” in the realm of tangible things, Claeys’ articulation of the “claim communication” requirement extends the idea of communicating sociably about the extent of one’s expectations about exclusive use and control to the realm of intangible things and rights.\textsuperscript{25} It also explains…

\textsuperscript{20} GROTIUS TO HUME 151 (1991)).
\textsuperscript{21} Claeys, supra note 1, at 122–23; see also Claeys, Introduction, supra note 1, at 437, 441, 444.
\textsuperscript{22} Id. at 124, 127; see also Claeys, Introduction, supra note 1, at 436–38.
\textsuperscript{23} Claeys, supra note 1, at 129; see Christopher M. Newman, Transformation in Property and Copyright, 56 VILLANOVA L. REV. 251 (2011).
\textsuperscript{24} Claeys, supra note 1, at 129; see also Claeys, Introduction, supra note 1, at 459–60.
\textsuperscript{25} Claeys, supra note 1, at 130–31. Recognizing the same need to expand the concept of possession to the incorporeal world, the drafters of the revised Louisiana Civil Code coined the term “quasi-possession,” which correlates roughly with Claeys’ broader conception of claim communication; see also Claeys, Introduction, supra note 1, at 420. 442; see LA. CIV. CODE ANN. art. 3421 (1982) (“The exercise of a real right, such as a servitude, with the intent to have it as one’s own is quasi-possession. The rules governing possession apply by analogy to the quasi-possession of incorporeals.”).
property law’s frequent concern with constructive notice, priority of claims, and boundary demarcation with respect to newly created and established resources.

B. Two Provisos

Drawing primarily on Grotius and Locke, Claeys explains that a natural property right is subject to two important limitations, the necessity proviso, and the sufficiency proviso. Both describe situations in which people who do not hold conventional property rights in things—outsiders, we might say—are given a temporary right to use the resource.26 Both of these provisos function, in Claeys’s view, as a safety valve that relieves pressure on the property system when the rigid, formal nature of property rights denies certain people access to essential resources in emergency situations (the necessity proviso) or the system fails to allocate a minimum amount of resources to large segments of a community (the sufficiency proviso).27 Although some might argue the necessity proviso should not be limited to dire emergencies such as that presented in Ploof v. Putnam,28 Claeys readily admits that the point is to establish the general principle and then let courts and legislatures get busy with the messy art of line drawing.29 Claeys’s articulation of the sufficiency proviso, the idea that a property system cannot be justified unless it assures that all members of a community have at least “a reasonable opportunity to acquire and use goods for their own preservation and self-government,”30 similarly acknowledges that difficult line-drawing questions will always emerge in determining the proviso’s scope.31 However, as my third example shows, the sufficiency proviso can still provide significant help in the specification of property rights, particularly in hard resource allocation cases. For instance, the sufficiency proviso can provide crucial guidance when a resource undergoes a significant physical transformation in a moment of contested legal transition, the resource has significant social meaning in the affected

26. Claeys, supra note 1, at 133.
27. Id. at 132–37; see also Claeys, Introduction, supra note 1, at 430, 437–38.
29. Claeys, supra note 1, at 133–35.
30. Id. at 135. Locke phrased this idea more famously, but more narrowly, as the requirement that a system of property rights must leave “enough, and as good” for the uses of people besides someone trying to establish property.” Id. at 136 (quoting John Locke, Two Treatises of Government 116 (Rod Hay ed., McMaster University, 1988) (1698).
31. Id. at 137.
community, non-owners can use the resource without harm to the primary right claimant, and effective claim communication becomes increasingly difficult to achieve.

III. OIL: NEIGHBORS IN THE OIL FIELD

Claeys’s natural property rights paradigm might provide guidance to a particular legal community—my own community of Louisiana civil law property lawyers, judges, and scholars—in sorting out competing claims in three resource allocation problems. The first example comes from the Louisiana oil field in the classic case, Higgins Oil & Fuel Co. v. Guaranty Oil Co.32 The facts are straightforward but provocative. Sometimes before 1919, the plaintiff, Higgins Oil and Fuel Co. (Higgins), acquired an oil lease on a tract of land in Louisiana.33 Defendant, Guaranty Oil Company (Guaranty), had an oil lease on an adjacent tract of land.34 Higgins sunk a well that began to produce substantial amounts of oil on a daily basis.35 Next, Guaranty Oil sunk its own well, 400 feet away from Higgins's well.36 Guaranty's well was dry, a non-producer.37 Guaranty then abandoned its well but did not cap it.38 Curiously, as a result of some “underground communication” between the two wells, Guaranty’s uncapped well let air into the zone of the underground reservoir affected by Higgins’s well and markedly reduced the suction power, and consequently, the production in Higgins’s well.39 If Guaranty simply plugged its well, a task that required minimal effort and expense, production from Higgins’s well would be, according to Higgins's well-pleaded complaint, immediately restored.40

Higgins asked Guaranty to plug its well, but Guaranty refused. Higgins then filed suit seeking both damages for lost production and, most importantly, an injunction to compel Guaranty to cap its well.41 The trial court dismissed Higgins’s suit for failure to state a claim, but, in a

33. Id. at 206.
34. Id.
35. Id.
36. Id.
37. Id.
38. Id. at 206–07.
39. Id.
40. Id. at 207.
41. Id. at 207. Higgins’ petition also alleged that while its pump was being prevented from working to its full capacity because of Guaranty’s failure to cap its well, “the pumps which are being used by other parties on all of the adjoining tracts of land are depleting the reservoir of oil which lies under the lands of that locality.” Id.
learned decision authored by Justice Oliver Provosty, the Louisiana Supreme Court reversed and held that Higgins had stated a claim for injunctive relief.  

Higgins Oil & Fuel is indeed a fascinating case and frequently serves to introduce the doctrine of “obligations of neighborhood” in Louisiana law—the civil law version of the law of nuisance. One can easily visualize the dispute as a classic reciprocal rights and harms situation. If the parties are left undisturbed by the intervention of positive law or judicial rearrangement of property rights, they should, as Robert Coase’s theorem teaches us, reach an efficient equilibrium if left to their own devices since, as it seems reasonable to assume here, the parties know each other already and could negotiate their way to an optimal setting of property rights with minimal transaction costs. When I have suggested this approach to my students, however, I am often met by bafflement. Now, after reading Claey’s, my students’ puzzled reaction makes a lot of sense. The real lesson of Higgins Oil & Fuel lies in Justice Provosty’s elegant natural law reasoning.

After first admitting that positive law sources in the Louisiana Civil Code offer little guidance, Provosty quickly turns to French doctrinal sources (Pothier, Laurent, and Toullier, among others) and then to a series of French judicial decisions about dummy chimneys and natural springs. It is here that Provosty transplants the French theory of abuse of right directly into Louisiana property law. He begins by quoting Laurent’s great aphorism, “rights are serious things and must be used seriously. Beyond that serious use there is no right but only wickedness, and justice cannot sanction an act prompted by malevolence.” Provosty then articulates two overriding “principles” to resolve the dispute: an owner, or, as in this case, an oil lessee, (1) “must not injure seriously any right of his neighbor;” and (2) “even in the absence of any right of his neighbor, must not in an unneighborly spirit do that which while of no benefit to himself causes damage to the neighbor.” The key to

42. Id. at 207, 212.
45. Higgins Oil & Fuel, B2 So. at 207 (dispensing with, inter alia, Louisiana Civil Code articles 667-668 and 2315).
46. Id. at 207–11.
47. Id. at 209 (quoting 6 F. LAURENT, DE LA PROPRIÉTÉ 186 (3d. 1878).
48. Id. at 211 (emphasis added).
Provosty’s decision lies in what he does next with these abstract, natural rights-based principles.

If Guaranty’s well had been a producer and it then chose to leave the well open, Higgins would have had no complaint, Provosty implies, because Guaranty’s well would then have led to productive use of its oil lease.\textsuperscript{49} Given the rule of capture applies to fugacious minerals in Louisiana and the absence of a forced pooling or unitization order at the time, Higgins would have had to resort to Coasian bargaining. Here, though, Guaranty’s use of its well actually amounted to the opposite of productive use—it did not produce any oil for Guaranty or anyone else. The only effect of its use was to harm a neighbor and another oil and gas producer. Moreover, Guaranty’s action (or, to be precise, its inaction after taking some action) was now interfering with a neighbor’s ability to put its property to productive use.\textsuperscript{50} This confluence of Higgins’s purposeful exploitation of its lease, followed by Guaranty’s purposeless refusal to cap its own well, which produced a clear negative externality affecting Higgins, justified injunctive relief and damages for Higgins.\textsuperscript{51}

\textsuperscript{49} \textit{Id.} at 211-12.

\textsuperscript{50} \textit{Id.} Provosty drills down on this principle of productive use using his own version of natural law practical reasoning when he explains:

\textit{Were defendant leaving his well open for some purpose of utility, other than the supposed utility of preventing the drainage of the oil from under defend- ant’s land, a different case might perhaps be presented; but the allegation, which must be taken for true, is that leaving this well open is of no benefit to defendant. It will be noted that this action of defendant in leaving his well open has the effect not merely of preventing plaintiff from drawing the oil under defendant’s land, but also from under plaintiff’s own land, so that an unquestioned right of plaintiff is being interfered with.}

\textit{Id.} Provosty points out that if Guaranty had initially done nothing, the outcome would also have been different. Nevertheless, here Guaranty actually took some action—it sunk its well—and then after becoming aware of its impact, refused to remedy its impact on the neighbor. As Provosty summarizes his reasoning here:

\textit{Had defendant left things in their original condition, plaintiff would not be suffering. Defendant is causing this air to pass from its land to that of plaintiff. True, defendant is now merely passive or inactive; but the agency complained of was set in motion by defendant. Defendant alone is responsible for its beginning and its continuing; its activity is therefore that of defendant.}

\textit{Id.} at 212. In light of Justice Provosty’s subtle and extended natural law reasoning, one might be tempted to call \textit{Higgins Louisiana}’s update of \textit{Keeble v. Hickeringill}, 11 East 574, 103 Eng. Rep. 1127 (Queen’s Bench 1707), one of Claeys’s focal decisions.

\textsuperscript{51} \textit{Id.} at 212. Justice Provosty also hints that an injunction might have been warranted even if Guaranty’s well had been productive based on \textit{Ohio Oil Co. v. Indiana}, 177 U.S. 190, 209–10 (1900) (recognizing the need to restrain coequal rights of surface owners in an underground oil or gas basin even if all surface owners can extract some of the oil or gas from the field).
I suspect Claeys and I are tightly aligned on the meaning of *Higgins Oil and Fuel*. In Chapter 9, appropriately titled with a Civil Law accent "Limiting Ownership," Claeys observes that "some acts will seem far from focal cases in which an owner is exercising his rights legitimately and seem instead focal examples of malicious conduct."52 I agree. *Higgins Oil and Fuel Co.* is certainly a focal case in which one person's existing property right no longer deserves protection because it is no longer serving but actually impeding productive use of a valuable resource.

IV. TREES: THE USUFRUCT OF TIMBERLANDS

The second dispute we can use to test Claeys's natural property rights theory, *Kennedy v. Kennedy*,53 involves another natural resource, trees. Rather than adjoining neighbors, it features two people who hold temporally distinct property rights in the same land, people Claeys calls "correlative proprietors."54 In 1988 Walter Kennedy died.55 His valid will bestowed property rights in 143 acres of North Louisiana timberland to two relatives.56 To his surviving spouse, Helena Kennedy, Walter left a usufruct for life (the civil law equivalent of a life estate).57 To his cousin, James Kennedy, Walter left the naked ownership (the civil law equivalent of a vested remainder).58 The timberland had never been subject to systematic silviculture. The last major tree harvest occurred in the 1930s or 1940s.59

In 1993, Helena, then in her late 80s, informed James, then in his late 60s, of her plans to clear-cut all of the standing timber on the land.60 After James objected, litigation ensued.61 At the time of trial, the standing timber was reportedly worth $2,200 to $2,500 per acre, while the land, without trees or planted seedlings, was worth a small fraction of that amount, just $200 to $300 per acre.62 Relying primarily on testimony offered by Helena's expert foresters, the trial court ruled that Helena could clear cut 113 acres, as the trees in these areas were 60 to 75 years

52. Claeys, supra note 1, at 253.
54. Claeys, supra note 1, at 332–42.
55. *Kennedy*, 699 So.2d at 352.
56. Id.
57. *Id.*
58. Id.
59. *Id.* at 357 (Knoll, J. on rehearing) (referring to Helena as the "91 year old usufructuary" and to James as the "70 year old naked owner.").
60. *Id.* at 357 (Knoll, J. on rehearing) (referring to Helena as the "91 year old usufructuary" and to James as the "70 year old naked owner.").
61. Id.
62. *Id.* at 352 (Bleich, J., first hearing).
old and included “undesirable” hardwood species, but that she should selectively cut the somewhat younger, 45 to 50 years old trees, found on a 30-acre parcel of the land.63 The court of appeals affirmed as to the selective cut on the 30-acre parcel but ordered a halt to all timber harvesting on the 113-acre parcel and directed that James receive the proceeds of this harvest.64

The Louisiana Supreme Court heard the case twice.65 On its first hearing, the Court attempted a Solomonic division, holding that the 30-acre parcel should be selectively cut, the 113-acre parcel could be clear cut but that Helena and James must split the proceeds from the harvest of the older trees on the larger parcel. The portion constituting “fruits” should be allocated to Helena and the portion representing “products” given to James.66

On rehearing, the Court reversed course.67 In a new opinion authored by Justice Jeannette Theriot Knoll, the Court agreed with the earlier majority decision that all 143 acres of the land subject to the parties’ correlative rights constituted “timberlands” under the Louisiana Civil Code even though the land had never been subject to consistent forestry management.68 However, after weighing the parties’ dueling expert forestry

---

63. Id. at 353.
64. Id.
65. Id. at 357.
66. Id. at 355–56. On first hearing, the majority of the court classified all 143 acres as “timberlands,” a distinct category of property for purposes of the law of usufruct in Louisiana, because all of the land was capable of producing commercial quantities of timber. Id. at 354–55. Therefore, the rights of the parties were governed by Article 562 of the Louisiana Civil Code, which provides:

When the usufruct includes timberlands, the usufructuary is bound to manage them as a prudent administrator. The proceeds of timber operations that are derived from proper timber management of timberlands belong to the usufructuary.

LA. CIV. CODE. ANN. art. 562. On first hearing, the court limited the usufructuary’s rights to benefit exclusively from the harvest on the 113-acre parcel because “[t]o hold otherwise would allow ruin to occur to the property in violation of the fiduciary relationship of prudent management.” Kennedy, 699 So.2d at 355. In that decision, the majority of the court stressed that Article 562 was designed to “take into account the interests of both the usufructuary and the naked owner,” and that allowing the usufructuary to claim all the proceeds from a clear cut of most trees on the 143-acre tract would constitute waste. Id.
67. Kennedy, 699 So.2d at 360.
68. Id. at 358–59. On rehearing, the new majority rejected an interpretation of Article 562 that would have been consistent with the “open mines doctrine” applicable to usufructs over mineral interests and thus would have prevented a usufructuary from reaping all of the benefits of timber harvests on land subject to a usufruct unless the land was cultivated as a tree farm at the commencement of the usufruct. Id. at 358–59; see also id. at 356–57 (Kimball, J., first hearing, dissenting).
reports, the Court determined that Helena’s plan to “clear cut” all of the trees on the 113-acre parcel and selectively cut the rest was consistent with the actions of a prudent administrator under the relevant Civil Code provision. In effect, the Court’s decision on rehearing meant that Helena was entitled to reap all the proceeds of the timber harvest for herself—a potential windfall of approximately $280,000 in timber proceeds from the 113-acre parcel alone and some additional sum from the 30-acre parcel. According to the Court, Helena’s only obligation was to replant the land with genetically modified seedlings that would need to grow for many more years until they could produce valuable saw logs.

While the details of the Louisiana Supreme Court’s interpretation of Article 562 of the Louisiana Civil Code in Kennedy are no doubt fascinating to the Louisiana lawyer, one can consider the core problem of resolving disputes between correlative right holder like Helena and James though the frame of natural property rights. When Claeyse turns his attention to several well-known, related ameliorative waste cases, Brokaw v. Fairchild and Melms v. Pabst Brewing Co., he does so to establish what at first seems like a binary set of approaches. The first approach, which Claeyse classifies as the “rights-based view,” typified by Brokaw, protects the dispositions of grantors and the expectations of future interest holders that certain uses of property are preserved, especially when those grants protect incommensurable values such as land conservation. The second approach, which he calls the “pragmatic view,” typified by Melms, or at least the legal realist reading of Melms, will approve significant changes made by a present, possessory interest holder

---

71. Kennedy, 699 So.2d at 360. Ironically, the court noted that if the land had been a “properly managed tree farm” at the commencement of the usufruct, Helena’s clear cut plan would likely not have been considered “prudent” and she could only have claimed the proceeds of the selective cut. Id. at 360.
73. Melms v. Pabst Brewing Co. 79 N.W. 738 (Wis. 1899).
74. Claeyse, supra note 1, at 334–37. Technically, Kennedy might be classified as an “affirmative waste” case because it concerns whether the usufructuary (the present possessory holder) can be prohibited from damaging the premises or “over-consuming their fruits;” whereas Brokaw and Melms are technically “ameliorative waste” cases because they concern whether the life estate holder can be prevented from changing “the main uses of the premises.” Id. at 335.
75. Claeyse, supra note 1, at 336.
(the life estate holder) in spite of an objection by the long-term, future interest holder (the vested remainderman) provided the life estate holder’s changes can be said to promote the best interests of all parties.\textsuperscript{76} Reading these cases in light of Thomas Merrill’s historically-informed reinterpretation of Melms,\textsuperscript{77} Claey’s challenges the pragmatic approach and argues for a rights-based approach that establishes a strong presumption in favor of protecting the interests of the long-term, residual property right holder to receive the property subject to correlative rights more or less unchanged at the termination of the short-term interest.\textsuperscript{78} That presumption is rebuttable when some exceptional, unanticipated changed condition, external to the actions of the parties, justifies giving the short-term, possessory holder the power to make a value-improving and productive-use enhancing change in the property’s use.\textsuperscript{79}

What I find most valuable about Claey’s discussion of waste doctrine, however, is what he says after discussing Brokaw and Melms. Returning to the problem of rights fragmentation in common field oil and gas cases and the pragmatic solution of forced pooling and unitization, Claey’s suggests that a proper, natural-law-based standard that could be used to adjudicate a dispute about profits from permissible ameliorative waste (the precise dilemma faced by the court in Kennedy v. Kennedy) could involve the concept of “reciprocity of advantage,” which Claey uses as a kind of over-arching standard for justifying intervention in existing

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{76} Id.
\item \textsuperscript{77} See generally Thomas M. Merrill, Melms v. Pabst Brewing Co. and the Doctrine of Waste in American Property Law, 94 MARQ. L. REV. 1055 (2011).
\item \textsuperscript{78} Claey’s, supra note 1, at 335–40; see also Claey’s, Introduction, supra note 1, at 429–30.
\item \textsuperscript{79} Claey’s, supra note 1, at 335–40. To be more specific, Claey’s view of waste doctrine does not envision a categorical prohibition on ameliorative waste. To the contrary, he sees only a presumption that “may be overridden if conditions change so drastically that the resource in dispute comes to be useless for the purposes for which it was expected to be used when conveyed.” Id. at 339. Yet Claey also limits the exception by stating it “should apply only when circumstances change without being precipitated by the holder of the present, possessory estate.” Id.

Interestingly, although he cites her work, Claey does not mention that Jill Fraley’s historical research into the origins of the English common law rule prohibiting all ameliorative waste by the life-tenant without the consent of the remainderman was itself a pragmatic, not a rights-based, rule with origins in concerns about maintaining evidence of estate boundaries before modern surveying and title recordation techniques evolved sufficiently to ascertain boundaries without reference to physical features of the landscape such as a forest or a field. Jill M. Fraley, A New History of Waste Law: How a Misunderstood Doctrine Shaped Ideas about the Transformation of Law, 100 MARQ. L. REV. 861 (2017). Fraley’s research demonstrates that claim communication, rather than rights-based reliance interests of remaindermen, may been the critical feature of property right formulation in this niche corner of property law.
\end{enumerate}
\end{footnotesize}
property rights arrangements, or simply a resort to the basic principles of equity.\footnote{Claeys, supra note 1, at 340–41.} Claey\'s explains:

In situations (like Melms) in which a present occupant is justified in changing the main use of the premises, \textit{the benefits from the change should accrue not only to the occupant but also to all of the future-interest holders} who oppose them. And those benefits, profits or otherwise, should be distributed in rough proportion to all of the correlative rights-holders\' interests in the resource in dispute.\footnote{id (emphasis added).}

Once again, I agree. Claey\'s natural law practical reasoning here clarifies why I sympathize with the Louisiana Supreme Court\'s first attempt to resolve the dispute between Helena and James when it ordered that the timber proceeds of Helena\'s proposed clear-cut be apportioned as fruits and products, even though that interest-sharing solution still begs the question of how to make the fruit-product distinction.\footnote{The Louisiana Civil Code defines fruits as \textquote{things that are produced by or derived from another thing without diminution of its substance.} \textit{L. A. Civ. Code Ann. art. 551.} Products are things \textquote{derived from a thing as a result of diminution of its substance.} \textit{id. art. 488.} The reason trees are so tricky to classify is that although they are \textquote{born and reborn of the soil}, they are \textquote{ordinarily considered to be capital assets rather than fruits on account of their slow growth and high value.} \textit{id. rev. cmt. b (1980).}} More broadly, I also agree with Claey\'s insight that a natural law influenced \textquote{interest-based} theory of property rights, with its emphasis on property rights grounded in use and sociability, can make reasoning about waste conflicts \textquote{subtle and context-sensitive} rather than \textquote{brittle and extreme.}\footnote{Claeys, supra note 1, at 341.}

In her brief dissent to the Court\'s final decision on rehearing, Louisiana Supreme Court Associate Justice Bernette J. Johnson observed that because of the age of the trees on the Kennedy land (\textquote{some have reached their prime and others are near maturity}), \textquote{[i]t is evident that some type of maintenance is needed to preserve this land for both the naked owner and the usufructuary.}\footnote{Kennedy v. Kennedy, 699 So.2d 351, 360 (Johnson, J., dissenting on rehearing).} Thus, like the majority in its first hearing, she would have found that a selective cut of all of the timber would have served the interests of both parties and prevented the usufructuary from committing waste. In the end, although forestry management principles might support a clear cut just as well as a selective cut, I still sense that the final majority decision in \textit{Kennedy} hid behind the text of the Civil Code—after all civil law judges can sometimes be blind legal
positivists—to condone what, in the end, amounted to a stark resource
grab by the usufructuary in the last years of her usufruct.85

One more fruit of Claeys’s natural property rights theory blossoms in
the context of Kennedy. In most of his study, Claeys labors to further
the philosophical understanding of property rights, to justify legal rules that
reinforce the primacy of ownership, and to help legal decision makers
(judges) decide focal cases and hard cases. Yet I have always found Ken-
ny to be an excellent vehicle for teaching law students about the re-
 sponsibilities of being a wise counselor. I always conclude my discussion
of the case by asking students to consider the advice offered by the law-
yer who drafted Walter Kennedy’s will or counseled him about this be-
quest. Did the lawyer explain the potential complications of leaving a
relatively large, previously unmanaged, but valuable tract of timberland
to his wife in usufruct and to his cousin as naked owner? One suspects
the lawyer, if there was one, simply told Walter that a usufruct would
give his wife the right to use and enjoy the timberland for the rest of her
life and that after her death the timberland would pass unencumbered
to his cousin.

Teaching students to think critically about the long-term implications
of such a bequest is not easy. But inviting students to think about the
“natural property rights” that a usufructuary and a naked owner might
be able to claim in this situation could help them see that a usufruct-
naked owner bequest could produce two diametrically opposed “inter-
ests” in a particular resource, trees, poised precariously on the fruit-
product borderline. Further, by exercising the skill of natural rights
practical reasoning, a lawyer might foresee that, as a result of this be-
quest, two presumably-beloved relatives whom Walter presumably
hoped would both cooperate and flourish after he passed, could be
drawn into bitter conflict.86 A discussion of the “natural rights” and “le-
gitimate interests” of a usufructuary and naked owner of timberlands
can lead to a productive discussion about how much care a lawyer
should exercise in helping a client formulate a bequest like the one in
Kennedy.87

85. Helena Babst Kennedy apparently died in 2003 at the age of 98. Obituaries, THE
86. Kennedy, 690 So.2d at 352
87. Indeed, I often ask my students whether Walter would have been more kind to
his beloved relatives if he had left the 143 acres in undivided shares (i.e., tenancy in
common) with some percentage of undivided ownership to Helena and the rest to James.
In that event, neither co-owner could have made substantial alternations or improve-
ments in the land without the consent of the other. La. CIV. CODE ANN. art. 804. Further, if
they did agree to harvest the timber, the proceeds of the harvest (whether classified as
V. WATER: OWNERSHIP AND ACCESS ON SUBMERGING COASTAL LAND

The last property problem I would like to explore using Claeys’s natural property rights paradigm is a current one that seems to have no easy solution. Because of a confluence of environmental factors—sea level rise caused by global warming, sediment starvation resulting from the construction of levees and flood control structures, subsidence resulting from both natural causes and the removal of oil and gas from beneath the surface of the earth, and wetland destruction resulting from the construction of canals and pipelines serving the oil and gas industry—Louisiana’s coastal wetlands are rapidly disappearing. Between 1932 and 2000, Louisiana lost over 1,800 square miles (or one million acres) of coastal wetlands to the Gulf of Mexico. In recent decades, wetland losses continue to mount on a daily and even hourly basis. The state of Louisiana is currently attempting to design and implement a series of complex geoengineering projects costing more than $50 billion to combat this problem. However, even if all of these projects are
funded and implemented, the projects will only slow the rate of coastal wetland loss, not reverse it. This story of natural resource depletion has led to two interrelated property problems, one involving ownership and the other concerning access.

Let’s start with the ownership problem. For many years, as much as 80% of Louisiana’s coastal land—sea marsh, swampland, and occasionally completely dry land—has reportedly been privately owned and is still claimed by private owners even as that land becomes submerged beneath the Gulf of Mexico and smaller water bodies affected by the tide. These private owners, individuals and very often large oil and gas corporations, generally derive their titles from the original transfer of an estimated nine million acres of “swamp and overflow lands” unfit for cultivation from the United States to the state of Louisiana under the Swamp Land Grant Acts of 1849 and 1850, and then from the state to private owners.

Pointing to Article 450 of the Louisiana Civil Code, which declares that “running waters, the waters and bottoms of naturally navigable water bodies, the territorial sea, and the seashore” are all public things owned by the state, the state of Louisiana, however, claims ownership of these same lands now submerged beneath the Gulf of Mexico, its bays, and its estuaries. Not without significant statutory and scholarly

93. Törnqvist, supra note 89.
94. Michael C. Schimpf, Comment, Le Deuxième Grand Dérangement: Expelling Louisiana’s Taking of Private Property Through Article 450, 80 LA. L. REV. 1557, 1559 (2020); Sprague, supra note 90, at 146; Mestayer, supra note 90, at 897; Judith Perhay, Louisiana Coastal Restoration: Challenges and Controversies, 27 S.U.L. REV. 149, 153 (2000). The actual source of this frequently repeated figure is a 1993 report, Louisiana Coastal Restoration Plan, prepared by the Louisiana Coastal Wetlands Conservation and Restoration Task Force, led by the United States Army Corps of Engineers. See Marc. C. Hebert, Coastal Restoration under CWPPRA and Property Rights Issues, 57 LA. L. REV. 1165, 1166, n. 1, 1167, n. 7 (1993). Whether this figure is still accurate is beyond the scope of this Article.
95. Mestayer, supra note 90, at 896-97; Act of March 2, 1849, ch. 87 § 9 (1849); Act of Sept. 28, 1850, ch. 84 § 9 (1850). As a result of legislative acts in 1855, 1860, and 1880, Louisiana began conveying these former swamplands to private persons. A.N. Yiannopoulos, Five Babies Lost in the Tide—A Saga of Land Titles in Two States: Phillips Petroleum Co. v. Mississippi, 62 Tul. L. REV. 1357, 1361 (1988). In its 1880 act, the Louisiana legislature authorized the sale of “sea marsh or prairie, subject to tidal overflow” to private persons, a formulation that was destined to “create confusion as it seemed to obliterate the difference between lands subject to the ebb and flow of the tide ‘that Louisiana acquired from the United States under the equal footing doctrine,’ and ‘swamp lands subject to overflow’ that Louisiana acquired from the United States under the Swamp Land Grant Acts.” Id. (quoting 1880 La. Acts., No. 75, § 11).
96. LA. CODE ANN. art 450.
97. Mestayer, supra note 90, at 898-913. As the result of a 2006 legislative commission, the State Land Office began reviewing the ownership status of coastal lands in
support, the state argues that when previously dry land or water bottoms beneath non-navigable water bodies are permanently submerged beneath navigable water bodies, the state acquires ownership of those lands or water bottoms because all such land is subject to a possible reversion to state ownership.\textsuperscript{98}

The access problem introduces a third player to the dispute over these wet places: Louisiana residents who enjoy one of the state’s most cherished pastimes, recreational fishing. These fishermen, or “Sportsmen” as they typically call themselves,\textsuperscript{99} claim the right to travel upon and fish in all waters that flow either seasonally or permanently over water bottoms, regardless of whether those water bottoms lie beneath man-made canals, natural but non-navigable water bodies, or water bodies that were non-navigable in the past and are only now becoming navigable in fact or in law.\textsuperscript{100} The landowners deny the Sportsmen’s claims to access over these wet places.\textsuperscript{101} With respect to lands beneath Louisiana and eventually published a map depicting the extent of coastal land now subject to dual state and private ownership claims. \textit{Id.} at 891. \textit{See SONRIS Interactive Map – Oil/Gas Inspections, LOUISIANA DEPARTMENT OF NATURAL RESOURCES, http://sonris-www.dnr.state.la.us/gis/agsweb/IE/JSViewer/index.html?templateID=181 (last visited July 3, 2022) [https://perma.cc/6VFK-MQ3E].

\textsuperscript{98} Mestayer, \textit{supra} note 90, at 898–913 (detailing argument for state ownership of submerged land based on Article 450 and other Civil Code and statutory sources). \textit{But see} Schimpf, \textit{supra} note 94, at 1572–91 (criticizing the state’s implied reversion theory as applied to land submerged beneath newly navigable water bodies but acknowledging legitimacy of same theory as applied to land abutting historically navigable water bodies). A key supporter of the state claim is Professor Lee Hargrave, an important figure in the drafting and adoption of Louisiana’s 1974 Constitution. Hargrave endorsed the literal interpretation of Article 450 or implied reversion theory. Focusing on cases when a physical transformation of a navigable water body occurs because of natural causes, Hargrave grounded his position that the state owed no compensation to private landowners divested of ownership by Article 450 in the following terms:

Conversely, if a nonnavigable stream becomes navigable, it would cease to be susceptible of private ownership and would become property of the state. The argument that such a change in ownership may be a taking without due process ... probably falls because such a loss is not caused by the state itself. Rather, the loss is part of the natural changes in water bodies. Indeed, if this is a taking without due process, the entrenched institution of loss of land by dereliction and by natural expansion of water bodies to cover more area should be equally unconstitutional.


\textsuperscript{100} \textit{See Task Force Report, \textit{supra} note 88, at 44–46 (describing proposals submitted by Louisiana Sportsmen’s Coalition).}

\textsuperscript{101} David Jacobs, The Center Square, \textit{Louisiana lawmakers try to balance property
canals and still non-navigable water bodies, the landowners often cite a string of judicial decisions holding that the mere presence of running water in a natural but non-navigable water body or a man-made but navigable water body (a privately constructed canal) located on private land does not give members of the public any right to use or access the running water in that water body.\textsuperscript{102} With respect to former swamps and marshlands now submerged beneath the waters of the Gulf, the landowners argue that the state cannot take ownership—and thus provide public access—without paying just compensation.\textsuperscript{103}

Despite the flood of commentary on all sides of this debate, the important point for purposes of this Article is that the various claims have produced a dead end, maybe even a kind of anti-commons.\textsuperscript{104} Neither the state of Louisiana nor the private landowners of Louisiana’s disappearing coast have risked pursuing a final decision from the Louisiana Supreme Court. Instead, both sides have been content to let their

\textsuperscript{102} See National Audubon Society v. White, 302 So.2d 660, 662 (La. App. 3 Cir. 1974); People for Open Waters, Inc. v. Estate of J.G. Gray, 643 So.2d 415, 418 (La. App. 3 Cir. 1994); Buckskin Hunting Club v. Bayard, 868 So.2d 266, 274 (La. App. 3 Cir. 2004); Dardar v. Lafourche Realty Co., Inc. 985 F.2d 824, 826, 834 (5th Cir. 1993); Parm v. Shumate, 513 F.3d 135, 138 (5th Cir. 2007). For a forceful critique of this line of jurisprudence, see Karly A. Kyzar, No Trespassing: The Legal Origins of Louisiana’s Water Access Dispute, ___ J. Crv. L. & St. ___ (forthcoming 2023) (unpublished version on file with author).

\textsuperscript{103} See Task Force Report, supra note 88, at 20–21. The landowners typically cite the argument briefly noted by A. N. Yiannopoulos in his treatise. Yiannopoulos, supra note 43, § 4.2 (noting that a literal application of Article 450 could give rise to an argument that a landowner has suffered an unconstitutional taking of property without just compensation in violation of the United States and Louisiana constitutions). For a more extended statement of this basic argument, see Schimpf, supra note 94 (advancing landowners’ argument that transfer of ownership of submerged water bottoms beneath newly navigable water bodies under Article 450 would amount to a taking).

\textsuperscript{104} Michael A. Heller, The Tragedy of the Anticommons: Property in the Transition from Marx to Markets, 111 Harv. L. Rev. 621, 624 (1998) (defining an anticommons as a situation in which “multiple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use.”). As Heller later explained, anticommons problems can arise not just when multiple persons have ownership rights in the same valuable resource, but when myriad persons, groups, governmental entities, or robber barons have the ability to block access to, development, or use of a recourse. See generally Michael Heller, Gridlock Economy (2008).
interests in what is commonly referred to as “dual-claimed land” remain ambiguous.105

One reason for this standoff is that third-party oil and gas companies—those who do not claim surface ownership of dual-claimed land—do not care who owns the land. They simply execute mineral leases with the dual-claimants—the purported landowners and the state. If good fortune strikes and a well is a producer, the mineral lessee, the private landowners, and the state then negotiate a mineral revenue-sharing agreement.106

This private settlement mechanism, however, does not settle boundaries.107 It does not stop private landowners from claiming the right to exclude non-owners, including Sportsmen, from their purported dominion. It does not stop Sportsmen from lobbying in favor of dramatic changes in Louisiana law related to access to privately held water bodies108 or in opposition to modest legislation to promote boundary settlement agreements between private landowners and the state that might yield more public access.109 In fact, Sportsmen continue to advance their most cherished argument—that the reference to “running water” in Article 450 of the Louisiana Civil Code, if properly understood, requires that the public enjoy a servitude for recreational fishing on any waters now accessible by means of modern, shallow draft vessels.110

So far, no one has come up with a satisfying answer to this multi-cornered property dilemma. Perhaps Claeys’s model of a natural property right can help, though. If a natural property right depends on both the claimant’s ability to make productive use of a resource and the claimant’s ability to communicate the extent and nature of the claim-right, we can see right away that the private owners of the sinking Louisiana coast

106. Id. at 24. (discussing oil and gas corporations’ practice of leasing from state and private landowners and subsequent settlement practices).
107. Id.
110. Kyzar, supra note 102, at 29–30 (arguing that the presence of “running water,” a public thing under Article 450, is the trump card in questions of recreational access especially in light of new vessel technology).
have a problem. What productive use really remains of the privately-owned former swamplands, marshlands, and dry land once those lands are fully submerged beneath the sea? The only practical use for these lands—and what obviously drives the private owners’ passion to maintain their ownership claim—is the value of those lands for mineral production.

In a moment of surprising natural law lucidity, however, the Louisiana legislature seems to have taken care of that interest. In a statute first enacted in 1952 and then amended in 2001, commonly known as the “Freeze Statute,” the legislature declared that:

In all cases where a change occurs in the ownership of land or water bottoms as a result of the action of a navigable stream, bay, lake, sea, or arm of the sea, in the change of its course, bed, or bottom, or as a result of accretion, dereliction, erosion, subsidence, ... the new owner of such lands or water bottoms, including the state of Louisiana, shall take the same subject to and encumbered with any oil, gas, or mineral lease covering and affecting such lands or water bottoms, and subject to the mineral and royalty rights of the lessors in such lease, their heirs, successors or assigns; the right of the lessee or owners of such lease and the right of the mineral and royalty owners thereunder shall be in no manner abrogated or affected by such change in ownership.\(^{111}\)

Although this provision clearly reveals a legislative intention that the state should become the owner of the newly submerged water bottoms, the private landowners claim “no fair” because not all of their subsiding, sinking lands are or will be subject to mineral leases when conversion to state ownership takes place.

As Claeys notes, though, exponents of natural law property rights, including Justinian, have long recognized that some resources, especially resources like the sea, the seashore, rivers and harbors, and, crucially, running water, should not be subject to private ownership at all, or if they are, the state should own the resources for the benefit of all citizens.\(^{112}\) The natural law reasons for this shift from private ownership to common or public ownership are simple. These kinds of resources cannot be practically used by a single person or, for that matter, marked off with legible boundaries or fences by any single person. They can only be productively used by the community as a whole, subject to reasonable regulation to preserve common access and common use.\(^{113}\) In short,

\(^{112}\) Claeys, supra note 1, at 255–58.
\(^{113}\) Claeys, supra note 1, at 256–57.
they fail both the productive use and claim communication requirements of privately held, natural property rights.

A natural rights approach informed by Claeys’s model could help Louisiana resolve the competing claims of landowners, the state, and Sportsmen. Such an approach might first note that if private landowners are not currently leasing their lands for mineral production, then the Freeze Statute appropriately terminates mineral rights if ownership changes hands due to natural causes because productive, mineral-generating activity is not occurring when the reversion to state ownership takes place. A natural rights approach might then acknowledge that if privately owned lands or water bottoms are yet to be, or have only recently been, submerged beneath the waters of the Gulf, long-term landowners have undoubtedly had many years to benefit from mineral production, mineral royalties, and mineral payments. Reallocation of ownership or usufruct rights would therefore not impose a windfall penalty.\textsuperscript{114}

Finally, a natural rights approach might point to a possible compromise. It seems that landowners’ primary interest in resisting the claims of Louisiana Sportsmen is to preserve their ability to assert title against the state of Louisiana in the event the water bottoms might one day become valuable once again for mineral production. If that is their primary interest, perhaps Louisiana’s Sportsmen, who just want to boat and fish on running waters of the state and do not claim any ownership rights, should be granted a usufructuary right over those waters and water bottoms subject to the dueling title claims of private landowners and the state of Louisiana.\textsuperscript{115} As Claeys would put it, ownership—that is, absolute Blacksonian dominion—is not always the only practical or desirable natural law solution to resource allocation. Here, a public usufruct of fishing and navigation over the waters that spread over the disappearing coastal wetlands of South Louisiana would make a lot of natural law sense.\textsuperscript{116}

\textsuperscript{114} La. Rev. Stat. 9:1151 (2001). See generally, Claeys, supra note 1. Conversely, recent purchasers of dual-claimed lands or water bottoms should not be able to prove any significant economic loss if the legislature or the courts were finally to recognize state ownership given that the risk of reversion to state ownership has been understood for many years and is now surely discounted into purchase prices.

\textsuperscript{115} In Louisiana, this “usufructuary” right would need to take the form of a limited personal servitude of right use in favor of the public and could not, strictly speaking, be termed a usufruct because a usufruct in favor a natural person must end at death and a usufruct in favor a juridical person can only last for 30 years. Compare La. Civ. Code Ann. art. 639 (“The personal servitude of right of use confers in favor of a person a specified use of an estate less than full enjoyment.”), with La. Civ. Code Ann. art. 607-608.

\textsuperscript{116} If a Louisiana court recognized or the Louisiana legislature established a public
VI. Conclusion

This Article demonstrates, I hope, why Professor Eric Claeys’s theory of natural property rights is a useful tool for understanding—and potentially solving—challenging property disputes. In *Higgins Oil & Fuel Co. v. Guaranty Oil Co.*, the Louisiana Supreme Court used natural law reasoning to produce an outcome that feels intuitively just given the defendant’s malicious abuse of his formal property interest and predicts the kind of interest-sharing approach that has gained widespread acceptance in the United States in the context of unitization and forced pooling arrangements.117

In *Kennedy v. Kennedy*, the Louisiana Supreme Court struggled, somewhat unsuccessfully, I contend, to balance the correlative rights of two temporally distinct property right holders.118 Its unsatisfying holding is attributable not only to its insistence on grounding its reasoning solely in textual exegesis but also to its failure to acknowledge the legitimate natural property interests of the usufructuary and naked owner.119 *Kennedy* reminds us, however, that an attorney assisting a client with the disposition of an important family asset may provide better advice if she is skilled in the practical reasoning of natural law property rights.

Finally, the bitter ownership and access battles now roiling on Louisiana’s disappearing coast present another opportunity to use natural law reasoning. The failure so far of the various property rights claimants—the landowners, the state, and Sportsmen—to recognize the existence of common priorities in the use of a resource that is undergoing dramatic transformation caused by exogenous forces speaks to the need for a deeper understanding of natural property rights.

---

119. *See id. at 355.*