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Natural Property Rights: A Reply

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NATURAL PROPERTY RIGHTS: A REPLY

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Abstract

This Reply concludes the symposium hosted by the Texas A&M University Journal of Property Law on the author's forthcoming book Natural Property Rights*. The Reply shows how natural law and rights apply to a wide range of doctrinal examples raised in this symposium—including business associations, correlative oil rights, timber extraction, sinking coastlands, water law, nuisance law, property rights in subsurface minerals, and the issues about sovereignty and property disposition associated with* Johnson v. M'Intosh (1823)*. The Reply also addresses a wide range of skeptical objections to natural law—especially the arguments that it relies too much on intuitions and not enough on hard empirical data. The Reply responds to objections to natural rights familiar from law and economic scholarship—and rehearses important but often-neglected reasons why economic analysis of law needs support from moral and political theory. And the Reply responds to criticisms of rights theories typical from Progressive property scholarship—and argues that a Lockean theory of rights is more sober and tougher-minded than Progressive theories are about whether and how much law can secure justice in practice.*

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I. INTRODUCTION

As I read the various articles for this Symposium, I went through three reactions. The first and strongest one was gratitude. All of the contributors took *Natural Property Rights* very seriously. I cannot thank the contributors enough, even the most impish and disputatious ones. My second reaction was relief. For the most part, all of the contributors "get" labor and natural rights in their main points. Even better, all of the main themes of *Natural Property Rights* are taken up in one or another of the Articles in this Symposium.

Notwithstanding those happy thoughts, I do have concerns about some of the points made in some Articles. Some of the criticisms call for responses. And a few compliments praise *Natural Property Rights* for features I don't mean for the book to possess. I'll do what I can to respond in this Reply.

The following responses are organized inside out. In other words, in the first and longest part of this Reply, I restate *Natural Property Rights*'s main argument, and I address criticisms and suggestions germane to the book's argument in the course of the restatement. Part II restates the main intentions of *Natural Property Rights*. Part III restates the book's main claims about natural law and rights, and Part IV restates its main claims about practical reason. Part V considers criticisms and questions about the book's claims about property, and Part VI considers criticisms and questions about its claims about regulation and eminent domain.

Parts VII and VIII step "outside" and consider root-and-branch critiques raised in some of this Symposium's contributions. One Article insists that law and economic analysis supplies a better framework for critiquing property than alternate frameworks. That suggestion raises issues from what used to be known as "the efficiency wars," and Part VII restates the arguments why economic efficiency needs supplementation from some theory of justice before it can make normative

recommendations in law. Part VIII considers criticisms of property rights reasonably representative of contemporary Progressive views on property. Part VIII uses *Johnson v. M'Intosh* to test those criticisms and to show how a theory of natural rights differs from Progressive property theories.[1]

II. THE FOCUS OF *NATURAL PROPERTY RIGHTS*

Natural Property Rights introduces a normative theory of property. The theory relies on philosophical arguments. And the book's main intention is to show how natural rights can supply a standard, or a "Measure,"[2] for evaluating existing property laws and social norms.

Jim Ely asks whether "natural law ha[s] authority independent of express constitutional and statutory provisions?"[3] That is a topic I prefer to avoid in *Natural Property Rights*, for reasons I explain in Section III.E of my Introductory Article.[4] Tentatively, my answer goes like this: "Sometimes, yes, but not always and it's complicated." Principles of natural law can "bleed" into positive law, most often via custom, common law, equity, customary international law, the purposes or intentions informing legal texts, or (as in *Campo*[5]) canons of statutory interpretation. But positive law can also be instituted in opposition to what natural law recommends. Which is one of several reasons why *Johnson* needs to be studied, as Part VIII will show.

In *Natural Property Rights*, however, I avoid the issue Ely is raising. Although the relations between constitutional law and principles of natural law are interesting, they are interesting primarily to jurisprudence scholars and to constitutional scholars. *Natural Property Rights* is written primarily for legal scholars and philosophers interested in property law and policy. So as my Introduction does when it studies *Campo*,[6] so too in the book I sidestep issues about why and when principles of natural law may supply rules of decision directly into positive law. *Natural Property Rights* introduces natural property rights as standards for critiquing positive property laws.

1. 21 U.S. 543 (1823).

2. JOHN LOCKE, TWO TREATISES OF GOVERNMENT II.v.37, at 290 (1698) (Peter Laslett ed., 1988). I explain how this Reply cites to the *Two Treatises* in Eric R. Claeys, *Natural Property Rights: An Introduction*, 9 TEX. A&M J. PROP. L. 415, 418 n.2 (2023).

3. James W. Ely Jr, *How Far Does Natural Law Protect Private Property*, 9 Tex. A&M J. Prop. L. 545, 547 (2023).

4. Claeys, *supra* note 2, at 453, Sec. III.E.

5. *See id.* at n. 186.

6. *See id.* at Parts III through VIII.

III. THE FOUNDATIONS OF NATURAL LAW AND RIGHTS

A. *Natural Law and Rights*

Timothy Sandefur and Adam MacLeod support natural law-based rights projects, and I will use their observations on natural law and rights to restate what I hope to demonstrate in *Natural Property Rights* is trying to claim. When Sandefur introduces natural law, he says that principles of natural law are "laws" in that they consist of "rules or regularit[ies] controlling behavior."[7] And that those principles are "natural" in that they are not "merely cultural or contingent," and they mark people off as "members of a species."[8] With all that I agree. And like me, Sandefur believes that rational flourishing supplies the most fundamental grounding for natural law.[9] Since people can flourish, every person is responsible for trying to flourish in some manner. Each has a corresponding right not to be interfered with as he tries to flourish, and everyone else owes responsibilities to respect that right. Those capacities, rights, and responsibilities supply the most basic foundations for political and legal obligations.

The rights that follow from general principles of flourishing are natural rights. MacLeod describes natural rights as "the first principles that guide practical reasoning about the use of things where more than one person is interested and where human well-being is at stake."[10] I agree, but I think they have other important features. Natural rights focus normative reasoning. They force leaders and groups to consider the interests of group members, one member at a time. Natural rights do not entitle their holders to specific results. But they do entitle their holders to have their points of view considered. They make some policies and results seem off-limits, like desiring someone else's death. For many other policies, they constrain decision-making. A right to personal liberty does not stop a government from instituting a military draft or mandating vaccinations. But the rights do force governments to present public arguments. And those arguments need to explain why the government has legitimate authority to override citizens' individual rights.

Natural Property Rights applies that basic framework to property. Natural law makes this much clear: People can acquire resources that

7. Timothy Sandefur, *The Natural Right of Property*, TEX. A&M J. PROP. L. 673, 678 (2023).
8. *Id.* at 677.
9. *See id.* at 676–77.
10. Adam J. MacLeod, *Opus at the Core of Property*, 9 Tex. A&M J. Prop. L. 637, 642 (2023).

are not themselves people or offshoots of people. They can use those resources to survive or flourish. When people use resources to survive or flourish, the use is morally valuable. The use is capable of justifying natural rights, rights to the continued use of resources, on conditions respectful of others' equal opportunities to acquire and use resources for their own life projects. The use and the rights justify correlative responsibilities. Those responsibilities justify a common law of property. They also justify government's possessing the powers to regulate by public law and to condemn via eminent domain.

B. *Natural Law, Philosophy, and Theology*

In her essay, Lolita Darden suggests that a "theistic view" "provides the basis for natural property rights."[11] I prefer to call justifications based on divine revelation "theological" justifications, and I will use that phrase here. I am in no way opposed to theological justifications for law or social practices. Many of the arguments in *Natural Property Rights* could be reinforced on complementary theological grounds. If Darden reads *Natural Property Rights* as a theological book, however, I did not write it that way. The book advances a philosophical argument.

C. *The Priority of Rights*

Natural law (of the philosophical variety) justifies both rights and duties, and *Natural Property Rights* teases both out in property law. As Chapter 2 of the book explains, however, for deep prudential reasons, law should assume that the rights are primary and fundamental—that they supply "the first principles that guide practical reasoning."[12] In Chapter 2, I argue that rights have two main advantages. First, they help bring legal and social systems into focus. Such systems run much more smoothly if people press their own complaints than if they wait for the government or other parties to do it. Second, rights embolden people to think of themselves as independent actors and not as cogs in someone else's wheel.

Ezra Rosser worries about the consequences of giving rights priority over duties, and he warns that rights-talk can be used to justify oppression by rights-holders against people who are vulnerable and

11. Lolita Darden, *Balancing the Inequities in Applying Natural Property Rights to Rights in Real or Intellectual Property*, Tex. A&M J. Prop. L. 493 (2023).

12. MacLeod, *supra* note 10, at 642.

dependent on them.[13] The concern Rosser expresses is real. But it goes only to the second argument for rights, not the first. And on that second argument, Rosser and I will need to agree to disagree. If a system of law and politics can focus on only one danger, in my opinion it should focus on the possibility that governments and control groups might try to convert people into cogs. Lucia Silecchia suggests that a rights-based system of property law might need shoring up in social morality—religious doctrines, culture, and social norms—stressing "the moral duties and responsibilities that accompany the right to property."[14] That argument goes beyond the scope of *Natural Property Rights*, a book primarily on property *law*. For what it is worth, however, I agree strongly with Silecchia. In my view, the concerns Rosser raises are best addressed twice—by marking off narrow limits on property rights in law, and then again by reminding citizens that property entails duties in religion, culture, and the other components of decent social morality.

D. *Natural Law and Moral Judgment*

Although many of this Symposium's contributors find natural law arguments persuasive, natural law does not and cannot persuade all readers. In particular, in legal scholarship, scholars often fall into two camps I will call here "humanists" and "Benthamites." Humanists hold that moral rights and obligations build on values held by individual people—their capacities to excel, their rights to freedom, or their rights to equal respect and treatment.[15] *Natural Property Rights* is definitely a humanistic work. Humanistic works are not to everyone's tastes, and Eric Kades speaks for many who will not find *Natural Property Rights* convincing. In Anglo-American law, Jeremy Bentham was the social scientist *par excellence*. Bentham railed against natural law, he called for replacing the common law with legislation, and he sought to rationalize legal practice wherever he could. Kades invokes Bentham's mantle in his Article, and he makes many Benthamite criticisms of natural law and rights.[16]

13. Ezra Rosser, *Natural Law, Assumptions, and Humility*, Tex. A&M J. Prop. L. 653, 658–60 (2023).

14. Lucia. A. Silecchia, *Property and Moral Responsibilities: Some Reflections on Modern Catholic Social Theory*, Tex. A&M J. Prop. L. 733, 734 (2023).

15. *See* Joseph William Singer, *Something Important in Humanity*, 37 HARV. C.R.-C.L. L. REV. 103, 104 (2002).

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

Kades's Article confirms that natural law and rights matter more convincingly than anything I said in my Introductory Article or anything I could say here. *Natural Property Rights* introduces natural law and rights as alternatives to relatively interventionist law and economic projects and to what the book calls "pragmatism"[17] in public property law. Kades starts from the same premises as property pragmatism and relatively interventionist law and economic analyses, and he takes *Natural Property Rights* to task for going against those premises. The issues Kades takes up raise some of the most important and interesting questions in American property theory. I may not convince Kades, but I hope his and my exchange educates readers.

I cannot respond to Kades's Article point by point.[18] In the rest of this Part, I want to respond to four criticisms Kades makes of natural law reasoning. Later, in Part VII, I will rehearse some of the reasons why natural lawyers and other humanists find law and economics as unsatisfying as a self-contained basis for law as Kades finds a natural law and rights-based theory of property.

Criticism one: natural law can be ignored because it consists of reasoning from intuitions.[19] I would prefer to say that natural law reasoning consists of reasoned argument discerning what seems true about human nature from self-reflection and also from common social

17. *See* Claeys, *supra* note 2, at 427, Sec. II.A.1.

18. Kades criticizes *Natural Property Rights* on far more grounds than I have space to address here. The criticisms discussed in text deserve far more consideration than the ones passed over. Here are two examples. Kades complains that *Johnson v. M'Intosh* is the only case in which I believe that political considerations may justly override doctrinal considerations. *See* Kades, *supra* note 16, at 606–10. That is not an accurate description of *Natural Property Rights*. As Chapter 3 of the book explains, when legislators write positive laws to secure natural rights, they need to engage in "determination." Political compromise is one of several factors that can go into determination, and compromises can and often do constrain what positive law requires. Chapter 3 illustrates specifically with the practice of *sati* in colonial India and the problems that English authorities encountered when they tried to outlaw that practice.

Separately, Kades argues that *Natural Property Rights* makes a claim with no basis in partnership law, that "basic principles of partnership law require that the partners consider how different courses affect the interests of all the partners, one at a time." *See id*. at 573 (internal quotations to my draft manuscript omitted). In partnership law, however, each partner is entitled to an equal share of the partnership's distributions, and each is also chargeable with a share of its losses in proportion to his share of the distributions. *See* UNIFORM PARTNERSHIP ACT § 401(a) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1997). Those assignments of distributions and losses give partners the distinct interests to which the book analogizes.

19. *See* Kades, *supra* note 16, at 588–89. Kades's criticism could be focused not against natural law generally but instead against my strategy of argument in *Natural Property Rights*. *See, e.g.*, *id*. at 587 (describing my use of the verb "seem" in the book as a "linguistic twitch.").

opinions. With Kades, I grant that (what he calls) intuitions need to be studied carefully before they can be relied upon in practical reasoning. But Kades suggests it is always inappropriate for decision-makers to rely on common opinions or tentative conclusions from self-reflection. That suggestion seems to me unrealistic and wrong.[20]

In *Natural Property Rights*, I claim that natural rights are good enough for government work. When lawyers and politicians use that phrase, they usually mean it as a criticism. In the book, I wear the phrase as a badge of honor. (I take some solace that some of the other contributors to the conference—especially Ezra Rosser—seem to like the badge as well.[21]) We humanists try to be realistic in what we expect from government. For humanists, the most important things for people to do are to discover how to live well as individuals and in community with others. If those are the most important questions, people lack information responsive to the questions. If "[t]he things that are beautiful and just, about which politics investigates, involve great disagreement and inconsistency," then one should (with Aristotle) "be content . . . to point out the truth roughly and in outline."[22] Or, one should (as John Locke does) regard practical judgment as being rendered in a "state of mediocrity and probationership" analogous to "twilight."[23]

I try to stick to that sense of probationership throughout *Natural Property Rights*. All of the book's many recommendations should be understood as being contingent on the absence of better information. In my Introductory Article, when I show how natural rights guide reasoning about the Bonnet Carré spillway and Gulf Coast oyster beds, I do so in part because I think it likely that regulators will not have all the empirical data they would need to satisfy rigorous standards of social science.[24] But if and when such evidence does exist, the moral judgments

20. In what follows, I am going to explain in my own terms how I think common opinions and tentative judgments from self-reflection fit into practical reasoning. But there are well-developed bodies of scholarship about intuitions and their roles in moral judgment. *See, e.g.*, Robert Cowan, *Ethical Intuitionism*, OXFORD BIBLIOGRAPHIES, https://www.oxfordbibliographies.com/display/document/obo-9780195396577/obo-9780195396577-0037.xml [https://perma.cc/U9ZK-QBMY]; Joel Pust, *Intuition*, STAN. ENCYC. PHIL. https://plato.stanford.edu/archives/sum2019/entries/intuition/ [https://perma.cc/5QAC-ZLEC]. Kades doesn't consider those bodies of scholarship before dismissing them.

21. *See, e.g.*, Rosser, *supra* note 13, at 671.

22. ARISTOTLE, NICOMACHEAN ETHICS bk. I, ch. 3, at 2 (Joe Sachs trans., Focus Publishing 2002).

23. John Locke, *Essay Concerning Human Understanding* bk IV, ch. xiv; *see also* Claeys, *supra* note 2, at 418, n.2.

24. *See* Claeys, *supra* note 2, at 459, Sec. V.B.

people form on the basis of general principles should take that evidence into account.[25]

But I also maintain that, on really basic questions, people can form moral judgments in the absence of complete and responsive empirical information. In the book, I remind readers with *Brown v. Board of Education* and racial discrimination.[26] Racial discrimination forces humanists to think through their methods. If humanists are going to consult common sense, they need to explain why the common sense of 1950s civil rights leaders counted more than the common sense of 1950s segregationists. Racial discrimination raises harder challenges for Benthamites. When the Court held that racial discrimination violates the Equal Protection Clause in *Brown*, it relied in part on empirical evidence, like studies of how children reacted to dolls of different skin colors. As one observer worried at the time, just observers "would not have the constitutional rights of Negroes—or of other Americans—rest on any such flimsy foundation as" contestable doll studies.[27] If that observer was right, then people can, do, and should rely on intuitive judgments more often than Kades thinks is acceptable.

Humanists ask questions antecedent to the questions best answered with social science. Why have law? When may law justify coercion? Why have property? What limits may justly be placed on property rights? When people dispute how to use a resource, how should their preferred uses be reconciled? Experts can gather data relevant to questions like these. By itself, however, the data will not answer those questions—not without some more general framework.

To answer those questions, theorists can and should consult a few different sources fairly covered by what Kades calls intuition. Theorists may learn from reflecting on their own natures. Every person is capable of reasoning, developing plans and tools to get what he wants, speaking, associating with others, developing vices and virtues, and being happy or miserable. Those capacities give every person some insight into people generally. If that were not so, it would not be possible for books, songs, or movies to provoke most members of their audiences in the same ways. Theorists may also consult broad social opinions. People are unusually social beings. For many things that other animals do by instinct, people "do" pursuant to social guidance. Communities assume and enforce taboos, shared beliefs, norms, laws, and religious dogmas expressing views about what is good for members and groups. Those

25. *See id.* at 463–64.
26. 347 U.S. 483 (1954).
27. Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157–58 (1955).

opinions try to answer and settle basic questions about justice and human well-being.[28] Self-reflection and group opinions are in no way perfect guides to normative reasoning. But they do provide helpful windows on such reasoning. The alternative—Kades's position—requires ordinary citizens and officials to surrender legitimate moral discretion to expertise.

E. *Natural Law and Empirics*

Natural Property Rights does not dwell on the relations between normative reasoning and empirical analysis, but it does assume a distinct and consistent relation between the two genres of inquiry. Natural law and rights help put empirics in perspective. Natural law and rights help explain which data matter and why they matter. They generate presumptions for officials to rely on in the absence of data. Kades's Article takes *Natural Property Rights* to task for not being empirical enough: "The entire absence of statistical work and systematic empirical thinking from [my] book suggest that people applying practical reason simply draw on their own personal experiences for the relevant facts about phenomenon [*sic*] relevant to policymaking."[29]

Herein lies another difference between humanists and Benthamites. It takes a lot of different steps for a good idea to become settled practice, and many of those steps involve different kinds of arguments. Social scientists prefer statistical and empirical arguments, humanists find other sorts of arguments more convincing, and both styles of argument are probably necessary. *Natural Property Rights* does not mean to rule out statistical work or empirical analysis. But lawyers and policymakers make many sensible judgments without the benefit of statistical or empirical information. And analytical and normative philosophy study issues that usually precede and help make relevant statistical and empirical analysis. I hope readers of the book will understand why it studies what it studies—without going into the statistical and empirical topics that interest Kades more.

Let me offer two relevant examples. Over the last generation, a lot of scholars have studied the *in rem* character of property rights.[30] For my part, that scholarship has constituted one of the best and most

28. *See* LEO STRAUSS, NATURAL RIGHT AND HISTORY 123–37 (1951).

29. Kades, *supra* note 16, at 574.

30. I study *in re*mness in Chapter 6 of *Natural Property Rights*. The relevant passages of that Chapter build on Eric R. Claeys, *Property, Concepts, and Functions*, 60 B.C. L. REV. 1 (2019), and Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617 (2009) (book review).

important contributions to property theory in the same time frame.[31] Some of that work has consisted of armchair analytical philosophy. In particular, James Penner asked readers to understand why, if they walked through a parking garage, it would never occur to them to get into cars they do not own.[32] By intuition, the duty people discharge might as well be a duty to each of the cars; they do not need to know who the owners are to grasp the duty. The insight Penner made with analytical philosophy Thomas Merrill and Henry Smith restated as a law and economic hypothesis. In Merrill and Smith's recasting, *in rem* rights and duties diminish the information costs that third parties need to expend when they encounter property they do not own.[33] Merrill and Smith's hypothesis provoked fine empirical scholarship—Maureen Brady's (historical) study of land boundaries in colonial New Haven,[34] and Gary Libecap and Dean Lueck's (economic, empirical) study of the same in 19th-century Ohio.[35]

By the standards Kades is applying to *Natural Property Rights*, Brady, Libecap, and Lueck's scholarship is the only valuable scholarship on *in rem*ness. But the work by Brady, Libecap, and Lueck does not settle the case for or against *in rem*ness. Libecap and Lueck confirm the case for *in rem*ness, while Brady argues that *in rem*ness plays only a weak role in property boundaries. More important, the empirical works would not have seemed interesting or topical without the earlier, theoretical, only lightly-empirical work by Merrill and Smith. Or, without Penner's armchair philosophizing.

The other example comes from this Symposium's online conference. *Natural Property Rights* is light on statistical and empirical data, I concede, but the book is not (Kades) "entirely" free of such data. Chapters 8 and 9 of the book study ownership. Thirty years ago, Robert Ellickson wrote an article of the sort Kades seems to want; Ellickson summarized empirical economic and sociological evidence on the cases for and against ownership.[36] In *Natural Property Rights*, I summarize some of the evidence Ellickson gathered when I explain why and how rights of

31. For a similar assessment, see Robert C. Ellickson, *Two Cheers for the Bundle-of-Rights Metaphor, Three Cheers for Merrill and Smith*, 8 ECON. J. WATCH 215 (2011).

32. *See* J.E. PENNER, THE IDEA OF PROPERTY IN LAW 75–76 (1997).

33. *See* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 101 YALE L.J. 357 (2001).

34. *See* Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. 872 (2019).

35. *See* Gary D. Libecap & Dean E. Lueck, *The Demarcation of Land and the Role of Coordinating Property Institutions*, 119 J. POL. ECON. 426 (2011).

36. *See* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993).

ownership and exclusive control might secure natural rights to use things.[37] Although Rashmi Dyal-Chand did not write an article for this Symposium, she participated in the Symposium conference and she found Chapters 8 and 9's evidence thin and unconvincing.

Dyal-Chand and I will need to agree to disagree about what the available empirical evidence says about ownership. But we do agree that the case for ownership needs to be framed with a normative argument; only then can it be settled with empirical data. We also agree that policymakers will and should weigh empirical data differently depending on how important and sweeping it seems and that normative opinions will shape judgments about "importance" and "breadth." *Natural Property Rights* focuses on those normative issues, not statistical or empirical analysis.

F. *Natural Law and Consequences*

Although *Natural Property Rights* assumes a relation between natural law and data, it assumes nothing about natural law and consequences. The book goes to some length to explain how a natural law theory considers consequences. The book discusses this topic at length to anticipate a reaction from Benthamites—that philosophically-consequentialist theories and arguments are the only ones that make consequences relevant to normative analysis.[38] Natural law and rights explain which possible consequences matter and why they matter. But these relations do not make a theory of natural law and rights, strictly speaking, a consequentialist theory.

When I wrote *Natural Property Rights*—and especially Chapter 2—I wondered whether those passages of the book might be superfluous and distracting. Kades's Article illustrates exactly why they were necessary. Kades is kind enough to praise my account of rights and consequences in a few respects, but he misconstrues natural rights in several important respects. Kades's criticisms repay careful study; many consequentialists make the same broad and mistaken generalizations about moral theories of rights.

Kades posits a continuum between absolute rights "unaffected by any consequences" and wholly consequentialist analysis.[39] He grants that the theory of rights in *Natural Property Rights* makes consequences

37. I made the same sort of arguments and citations to Ellickson. *See* Eric R. Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N.C. L. REV. 413, 445–46 (2017).

38. *See* Claeys, *supra* note 2, at 423–24.

39. Kades, *supra* note 16, at 575.

relevant. But Kades finds the book's theory "frustratingly unclear[, on] which stripes of consequentialism are permissible and which are not."[40] In these criticisms, Kades is using the term "consequentialist" in a manner that non-consequentialists find uncharitable and polemical.

For Kades—as in the scholarship I was worrying about when I wrote the sections of *Natural Property Rights* on consequentialism—theories and arguments are "consequentialist" if they consider consequences in any way. The more consequences considered, the closer a theory or argument comes to the consequentialist end of Kades's continuum. By contrast, I use the term "consequentialist" in a sense familiar among normative philosophers. In that usage, a theory or argument is "consequentialist" if it affirms that "the rightness or wrongness of our conduct is determined *solely* by the goodness or the badness of the consequences of our acts or the rules to which those acts conform."[41] In other words, many theories and arguments that are not consequentialist do consider "the consequences of . . . acts or the rules to which those acts conform." They are non-consequentialist (or deontological or rights-based) if they make relevant to their prescription's factors in addition to the goodness or badness of consequences.

Once one understands how normative philosophers define non-consequentialism (or deontology, or theories of individual rights), the contrast that Kades draws seems like an attempt to set and monitor boundaries. The contrast makes Benthamite approaches seem to belong in bounds and humanist alternatives to belong out of bounds. As John Rawls warned, however, "[a]ll ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy."[42] For humanists, consequences count, but they are not the only or the most important things to count. It is thus uncharitable to dismiss theories of rights, equality, or justice as theories that do not take consequences into account at all.

Let me illustrate with one passage from *Natural Property Rights* Kades comments on. Often in the book, I illustrate how natural rights focus reasoning by studying how they apply to speed limits. Rights-based reasoning makes relevant information about land use patterns,

40. *Id*. at 572.

41. F.M. KAMM, INTRICATE ETHICS: RIGHTS, RESPONSIBILITIES, AND PERMISSIBLE Harms 11 (2006); *accord* Larry Alexander & Michael Moore, *Deontological Ethics*, STAN. ENCYC. PHIL. § 2 (Edward N. Zalta ed., 2020), https://plato.stanford.edu/archives/win2021/entries/ethics-deontological/ [https://perma.cc/DG9Z-W2F8]; Kenneth Einar Himma, *Toward a Lockean Moral Justification of Legal Protection of Intellectual Property*, 49 SAN DIEGO L. REV. 1105, 1109–13 (2012).

42. JOHN RAWLS, A THEORY OF JUSTICE 26 (1971) (rev. ed. 1999).

expected travel patterns, geographic conditions, driving preferences, and the likely effects of different speed limits. Kades finds these factors "just the sorts of things that a diligent economist would factor into her rules of the road."[43] In *Natural Property Rights*, however, I argue that those factors get considered within a broader framework of rights. Driving is a legitimate activity, but it creates incidental risks of injury to person and property. Why does driving produce welfare, and why do personal injury and property damage detract from it? In a theory of natural law, the answers to those questions come not from consequences but from basic insights about human flourishing. Driving is productive when and as long as people are traveling to and from activities in which they flourish, while personal injury and property damage interfere with people's capacities to flourish. To set speed limits, a just system should anticipate that different people rate driving and its risks differently. It is really difficult to reconcile those preferences and aversions while giving them all due regard. But rights, equality, excellence, and other values associated with individual people make clear why it is necessary to try. Different humanist theories supply different strategies for trying. The effects of driving that count are the effects on particular individuals, not the effects on some population analogous to a hive of bees.

G. *Natural Law, Natural Rights, and Incommensurability*

Natural Property Rights relies on a theory of natural law to justify a program of natural rights in government. One of the arguments for rights relies on incommensurability. Although flourishing sets an objective standard for evaluating what people do and how they pursue happiness, people flourish in many different ways. The things that some people find really gratifying may seem unsatisfying to others, depending on their personalities, their upbringings, or the things they hold dear. And sometimes, people need to choose between legitimate but incompatible activities.[44] In a rights-based program, rights focus government on protecting people's rights to decide for themselves which of many different legitimate activities they want to pursue.[45]

43. Kades, *supra* note 16, at 576.

44. *See*, *e.g.*, JOHN FINNIS, NATURAL LAW & NATURAL RIGHTS 114–17 (1980) (2d ed. 2011); DOUGLAS B. RASMUSSEN & DOUGLAS J. DEN UYL, NORMS OF LIBERTY: A PERFECTIONIST BASIS FOR NON-PERFECTIONIST POLITICS 175–83 (2005).

45. My Introductory Article addresses the same problems, in the same general way as the book, when I talk about the challenges judges and regulators would have managing the resource dispute in *Campo* in close detail. *See* Claeys, *supra* note 2, at 469.

Kades doubts that justification; he warns that *Natural Property Rights* suffers from an "incommensurability predicament."[46] The book "does not grapple," Kades believes, "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."[47] And on this topic too Kades's criticisms illustrate broader contrasts between Benthamite and humanistic approaches to law. Pragmatists, and interventionist law and economics scholars, want judges and regulators to supervise resource disputes relatively closely. It seems unrealistic for government to supervise that closely if people exhibit different preferences and if it is hard for outsiders to reconcile those preferences. Pragmatists, and interventionist law and economics scholars, deny that government officials have any choice but to supervise people that closely. That is what Kades is getting at when he insists that "when there are competing interests in any facet of life and law, the legal regime by definition must make a choice."[48]

But programs for government do have a choice. If it is really hard for governments to pick between competing preferences, better to focus government policy on a broader project—to recognize and protect broad rights. Broad rights let people decide for themselves which preferences they want to satisfy. Although one person's rights can get in the way of someone else's preference-satisfaction, if the rights are structured well, they give people discretion to satisfy their preferences in the spheres of life most important to them. Broad rights reduce the number of disputes governments need to manage and settle. And even when rights come into conflict, officials usually do not need to resolve the conflicts by picking and choosing between preferences. Instead, conflicts can be resolved consistently with whatever strategies seem to secure rights and equal opportunity for everyone.

Let me illustrate with a variation of one of Kades's examples. Kades asks readers to imagine a nuisance dispute in which a kimchi maker and a dry cleaner operate businesses side by side. (Fumes from kimchi-pickling destroy clothes being dry-cleaned.[49]) The example is stylized, and it makes interventionist government seem more necessary and attractive than it really is for reasons I will explain in Part VII. But let's assume that

46. Kades, *supra* note 16, at 576.
47. *Id.* at 577.
48. *Id.*
49. *See* Kades, *supra* note 16, at 589. The fact pattern resembles a fact pattern studied by R.H. Coase in *The Problem of Social Cost*, 3 J.L. & ECON. 1, 10–11 (1960). In the English case Cooke v. Forbes, L.R. 5 Eq. 166 (1867-68), an ammonia factory operated near a business that made fiber mats from coconuts. Fumes from the ammonia plant reacted with chemicals used in the mats, and the reactions changed the color of the mats.

the kimchi maker ("KM") and dry cleaner ("DC") do operate next to each other in a community that also has 1,000 owners total with residents, business offices, farms, and factories.

It would be totally unreasonable and unrealistic to expect courts or local land use regulators to settle KM and DC's disputes by asking whether KM's use or DC's use is better. The same goes for the disputes that the residents would have with the farmers and factory owners. Or the disputes that the residents would have with KM or with DC. All of the land uses are legitimate, and judges and regulators would be hard-pressed to favor some of them over others.

It seems much more reasonable and realistic for courts and regulators to resolve the disputes in relation to broad rights. Common law property rights entitle owners and occupants to be free from tangible pollution crossing the boundaries of their lots. Those rights seem formalistic; they do not promote any particular land use directly. But such rights protect most land uses indirectly. Boundaries and prohibitions on tangible pollution protect owners and occupants from interferences that hit them where they live. Such boundaries and prohibitions also protect the land uses that contribute most to the more basic imperatives of life, like survival and making a living. So regimes organized around boundaries and pollution let broad classes of owners and occupants satisfy their preferences without getting too much into the details of particular land uses or preferences.

Now, systems like these can go too far. A resident could complain that KM's pickling operations annoy her, even though the pickling would not bother most of the inhabitants nearby. But a system of property rights can address those concerns, too. The system does not need to pick and choose between residential living and kimchi pickling. Rather, broad prohibitions on pollution can be relaxed—by asking which exceptions seem consistent with everyone's enjoying equal opportunities to put their lots to the uses that make property worth having. That inquiry points toward "live and let live" norms—norms that excuse tangible pollution incidental to land uses that seem both morally productive and common in the area.[50]

Those live and let live norms make it easier to resolve the dispute that interests Kades, the one between KM and DC. Judges and regulators should ask whether the fumes from kimchi pickling seem as or more

50. The "live and let live" phrase goes back to Bamford v. Turnley, 122 Eng. Rep. 27, 33 (Exch. Ch. 1867) (Bramwell, B.). *See also* Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379, 1411–13, 1421–22 (2010).

annoying than the smells, noises, seepage, and other pollution incidental to ordinary land uses in the locale where KM and DC both operate. If the fumes are more annoying than the annoyances consistent with live and let live norms, then KM is the bad actor. That pronouncement does not communicate social judgments that kimchi-pickling is bad, that dry-cleaning needs to be protected at all costs, or that dry-cleaning is more desirable than kimchi production. KM is engaging in a legitimate and valuable activity. Even so, KM is stealing more of her neighbors' clean air than seems consistent with their all having equal opportunities to use their lots for different gratifying uses. And if KM's fumes seem no worse than the smells of nearby manure, noise from nearby lawn-moving, and on and on, DC seems the bad actor for complaining. Not because dry-cleaning is bad, because kimchi-pickling is great, or because kimchi-pickling is more valuable than dry-cleaning. Rather—as may be the case with complaints by coastal oyster producers about diverted fresh water[51]—because DC is demanding more peace and quiet than seems consistent with equal opportunities for people to use their land for a wide range of uses contributing somehow to flourishing.

Now, in practice, in some cases, government officials may need to pick and choose between different property uses and different preferences. Maybe DC and KM run the two biggest businesses in town, each has lots of employees, and there are not any other land uses nearby. In doctrine in cases like this, courts need to balance the hardships between competing land uses in deciding whether to enjoin polluting land uses, and when courts balance hardships they do peek at the merits of the relevant uses.[52]

Even in these cases, however, courts avoid passing on incommensurability when they can. And again, a normative legal theory only needs to be good enough for government work. Two-company-town disputes are litigated only rarely. A system of nuisance law is good enough if it structures use rights in a manner that helps resolve all of the mine-run cases. Such a system addresses the challenges presented by incommensurability. It does so by declaring and protecting broad rights—structured to give every owner or occupant the greatest discretion to make incommensurable choices consistent with neighbors' enjoying equal opportunity to do the same.

51. *See* Claeys, *supra* note 2, at 479, Sec. VIII.E.

52. *See* Boomer v. Atl. Cement Co., 257 N.E.2d 870 (N.Y. 1970); *see also* Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658 (Tenn. 1904); *see also* Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889, 935–39 (2009).

IV. PRACTICAL REASON

As the last Section explained, natural rights express a judgment that the best way to promote flourishing is to vest in people broad discretion how to flourish. In part, that judgment relies in part on theoretical reasoning about human nature and happiness. But the judgment also relies in large part on broad prudential assumptions. People's projects for flourishing differ sharply; it is hard to compare different people's projects in ways that take into account their differences; and governments are systematically incompetent at making those comparisons anyway. Those broad assumptions are contingent and implicitly empirical. They belong in a domain of reasoning that is not theoretical but practical. Chapter 3 of *Natural Property Rights* recounts how practical reason affects property law. As Locke explains, property regulation is a "great Art of government," one requiring the exercise of prudence by "wise" and even "godlike" officials.[53] Chapter 3 introduces the main concepts that guide practical reasoning—the specification of natural rights, the determination of natural rights in law and policy, and the use of focal or core cases to specify and determine.

John Lovett finds appealing the capacity for natural rights to "help us sort out," "find guidance[,] or complete the process of specification" of rights, and he confirms as much by studying three contemporary disputes using rights-based practical reason.[54] I am extremely pleased and grateful that Lovett finds practical reason a helpful framework. As strange as it may seem, however, I am going to resist Lovett's compliment a little here. Practical reason is not understood nearly as well as it should be in contemporary philosophical or legal scholarship. I worry that Lovett's portrait may, unintentionally, lead readers to form mistaken impressions about how practical reason applies.

For better or worse, practical reason operates at a high level of generality. In consequentialist moral theories, theorists are familiar with "two-level" systems of reasoning. In such systems, "rule"-level prescriptions make broad and sweeping directions. When those rules apply badly to particular situations, however, "act"-level prescriptions allow for overrides.[55] For supporters, two-level reasoning gives decision-makers the best of both worlds—clarity and generality at wholesale, and

53. LOCKE, *supra* note 2, II.v.42, at 298; *see also* Claeys, *supra* note 2, at 418, n.2.

54. John A. Lovett, *Oil, Trees, and Water: Evaluating the Transition from Natural Rights to Property Conventions*, 9 TEX. A&M J. PROP. L. 613, 616 (2023).

55. *See, e.g.*, Walter Sinnott-Armstrong, *Consequentialism*, STAN. ENCYC. PHIL. § 5 (Edward N. Zalta & Uri Nodelmann eds., 2022), https://plato.stanford.edu/archives/win2022/entries/consequentialism/ [https://perma.cc/NXZ5-YQXQ].

context-sensitivity at retail. For critics, supporters are trying to eat their cake and have it, too. For critics, two-level reasoning is indeterminate. It also makes it more likely that decision-makers will make bad decisions because it gives them more decisions to make and at different levels of generality.

For better or worse, practical reason operates as two-level reasoning does. Natural law justifies reasoning with broad presumptions. But the interests that justify rights also justify exceptions to the presumptions. Like two-level consequentialist reasoning, then, practical reason sacrifices determinacy for flexibility.

I say all this because, when Lovett applies practical reason, he focuses on situations in which officials need to make context-specific decisions—disputes over correlative oil rights, duties of waste in timber extraction, and submerging coastlands.[56] On the merits, I find Lovett's recommendations convincing. When I say that, however, I am assuming two judgments. I assume that the general rules assumed in each doctrine represent generally-sound approaches to the policy problems to which they are addressed. I also assume that it is practically reasonable for those general rules to build in safety valves for (respectively), spiteful energy production, redistributions securing an average reciprocity of advantage, and situations in which a resource can no longer be used or marked off privately.

Safety valves may not always seem appropriate. Joseph Schremmer illustrates in his study of the *ad coelum* maxim, which declares the principle whereby property in land entitles the land's owner or lawful occupant to exclusive use not only of its surface but also of all mineral and air rights inside its boundaries.[57] That maxim is as general and "rule"-like as any doctrine in law. And in my introductory article, I eat the proverbial cake in some analyses and try to keep it in others. When I study the *Campo* case, I claim that labor and rights can justify (on one hand) broad distinctions between private property and public commons and (on the other hand) a relatively context-specific analysis of whether a government-sponsored water diversion inversely condemns rights in oyster leases.[58]

In my opinion, a general normative theory can and should operate at all of these various levels. Lovett and Schremmer seem as optimistic as I am. But readers should consider for themselves whether practical

56. *See* Lovett, *supra* note 54, at 619–33.

57. *See* Joseph A. Schremmer, *Ad Coelum and the Design of Property Rights*, 9 TEX. A&M J. PROP. L. 707 (2023).

58. *See* Claeys, *supra* note 2, at 480–81.

reason is too indeterminate, and whether Lovett, Schremmer, and I are all too optimistic.

V. NATURAL PROPERTY RIGHTS

In *Natural Property Rights*, I argue that a natural property right constitutes an interest-based right. Someone who wants to appropriate a resource may do so if he shows (first) that he has an interest in using the resource exclusively. He does as much by showing that he is putting the resource to *productive use*. The would-be appropriator must also show (second) that the interests of others are not as strong as his interest. The appropriator makes that showing if he *communicates his claims* to use the resource exclusively, in a manner reasonably clear to his neighbors. But that prima facie right can be defeated. Since everyone is entitled to sufficient access to resources, others' interests in using things may justly limit one person's property when the latter's appropriation denies the former *sufficient* access. And since preservation is more urgent than property, proprietors' interests in using things may justly be defeated by genuine *necessities*.

A. *What Use Means in Use-Based Property Rights*

This account of a natural property right provoked many reasonable reactions from contributors to this Symposium. MacLeod asks whether the "use" that justifies property traces back to the Latin term *opus* for "work."[59] Yes in part . . . but not entirely. As a term of art in property, "use" relates back to two derivations—not only to *opus* but also to *uti* and *usus*, the Latin verb and noun for "use." "Productive use" refers to the intelligent deployment of a resource to make things productive for human survival or flourishing. Both of "use's" etymologies inform the "use" in productive use. *Opus* expresses the effort in the deployment; *uti* and *usus* express the intelligence and technical skill in it. Neither flatly require, but both can easily be read to expect, that the deployment must produce moral well-being.

B. *Applications*

Some contributors ask how natural property rights apply to doctrines or resource disputes beyond the ones studied in *Natural Property Rights*. Natural rights do have many more implications than the book

59. MacLeod, *supra* note 10, at 645, Part IV.

covers—and I encourage the contributors to explore those implications. So when Lolita Darden asks if *Natural Property Rights*'s argument can apply to intellectual property,[60] my answer is "Yes!" and I have been exploring how in other work.[61]

Kevin Douglas asks whether business associations can be considered property since they can facilitate labor.[62] I have two answers. First, we should not assume that property rights are the only rights that secure labor. Many rights of personal liberty—like the right to practice a calling[63]—can secure labor as well, and contract and business law can study why, how, and in what circumstances. My second answer is, "Yes, businesses can be conceived of as 'separable' resources." Anglo-American law accomplishes as much by making shares of companies property.[64]

Vanessa Casado Pérez critiques *Natural Property Rights*'s observations on water rights. She seems largely positive about how I treat water rights, and I am relieved by and grateful for her reactions. She also offers two criticisms. First, *Natural Property Rights* neglects the role, Casado Pérez worries, that public trust law plays in water law. Fair enough. In *Natural Property Rights*, I use water rights to drive home the lesson that property rights are (sorry) more fluid than property in land and personality make them seem.[65] That focus makes my treatment of water rights a little lopsided, and I hope that my treatment of the public trust doctrine in my Introductory Article goes a little way in evening the scales.[66] Second, *Natural Property Rights* should have studied contemporary issues in water policy, Casado Pérez wishes, in greater depth. So do I. But the book is long enough as it is. I hope that *Natural Property Rights*

60. Darden, *supra* note 11, at 518–22.

61. *See* Adam Mossoff & Eric R. Claeys, *Patent Injunctions, Economics, and Rights*, 50 J. LEGAL STUD. S129, S133–37 (2021); *see also* Eric R. Claeys, *Claim Communication in Intellectual Property: A Comment on Right on Time*, 100 B.U. L. REV. ONLINE 4 (2020); *see also* Eric R. Claeys, *Intellectual Property and Practical Reason*, 9 JURISP. 251 (2018).

62. Kevin Douglas, *Business Organizations as Things*, 9 TEX. A&M PROP. J. 525 (2023).

63. *See, e.g.*, Keeble v. Hickeringill, 103 Eng. Rep. 1127, 1128 (Q.B. 1707) ("[T]here is great reason to give encouragement thereunto [the practice of a trade]; that the people who are so instrumental by their skill and industry so to furnish the markets should reap the benefit."). Chapter 2 of *Natural Property Rights* studies *Keeble* and the labor that goes into practicing a trade.

64. *See* J.E. PENNER, THE IDEA OF PROPERTY IN LAW 214–15 (1997); *see also* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 1–9 (reprint ed., 1982).

65. *See, e.g.*, Joseph L. Sax, *Why I Teach Water Law*, 18 U. MICH. J.L. REFORM 273 (1985).

66. In *Natural Property Rights*, Chapter 9, I acknowledge that a government may in some contexts designate resources as off-limits for private ownership—on the ground that the relevant resources need to be kept in some government- supervised commons. But I acknowledge the possibility abstractly, and I certainly do not elaborate as much as Casado Pérez and other similarly-disposed readers will want.

interests scholars who know the institutional details of water law and that it interests them in critiquing contemporary water law from a rights-based perspective.

C. *Individuals, the Community, and Property*

Other reactions to *Natural Property Rights*'s justification for property are more critical. Although Sandefur is a fellow natural lawyer and rights-proponent, he finds my book's justification for property "question-begging[;] it assumes the existence of (collective) property rights as part of its purported proof of (individual) property rights."[67] Throughout his discussion, Sandefur contrasts the individual and collective, and he suggests that Chapter 5's justification gives the collective too much control over unowned property.

Sandefur's criticism illustrates in a concrete way how libertarian justifications for property differ from what I would call classical liberal justifications. To make the case for a classical liberal approach, I want to make two arguments in the alternative. The first argument tries to accommodate Sandefur. The concept of the "collective"—the concept that mine-run natural lawyers call the "community"—seems threatening to Sandefur. Fine. Assume that ten people have no track records with each other. In concession to Sandefur, in no way do these ten people constitute a collective or a community. Assume that the ten all lay claim to the same resource—say, a seed oyster from the *Campo* case. What principled justification might entitle any one of them to take the seed oyster and exclude the other nine from it? And what makes that justification so clinching that the taker would also be entitled to exercise force to repel the other nine? Since (by stipulation) there is no greater "collective," the claims of none of the ten are being subordinated to the same argument made by a greater group.

Sandefur argues that the concept of "self-ownership" helps resolve the dispute. But the concept of self-ownership is question-begging. All ten of the claimants are self-owners. Self-ownership entitles them all to see that access to the oyster is parceled out consistent with some scheme that respects their equal statuses as self-owners. But that scheme does not follow by deduction from self-ownership. Rather, the ten claimants need to specify and ask which sorts of conduct seem to give a person justified priority in access to the oyster. Productive use,

67. Sandefur, *supra* note 7, at 694.

claim-communication, sufficiency, and necessity all help determine who gets that priority.

In that light, the "collective" or "community" is not nearly as threatening as Sandefur makes it seem. That is the argument in the alternative. It is misleading to say that property rights present conflicts between the individual (note the singular) and an abstract, disembodied "collective." Property rights present conflicts between people. People can resolve those conflicts in communities. Communities are not dangerous by themselves. They are dangerous when they conceive of the common good in ways that threaten individual freedom, survival, and opportunities to pursue happiness. As *Natural Property Rights* argues, unowned resources should be understood as being in a "community" in this sense: Access to them should be parceled out consistent with criteria that lets them be used productively in ways that sign-post to non-owners which resources are already owned, and in ways that protect equal opportunity to use resources for survival and thriving. A community like that should not seem threatening.

D. *Natural Property Rights . . . in the 25th Century?!?*

Although the philosophy of property is often dry and boring, for some reason philosophical studies of labor are hilarious. Robert Nozick sends up labor theory with hard hypotheticals about radioactive tomato juice and Day-Glo-painted driftwood, while Jeremy Waldron sends it up with a hypothetical about a ham sandwich buried in cement.[68] I study those hypotheticals in *Natural Property Rights*. But the imp in this Symposium wants readers to get a sneak preview. Christopher Serkin poses a hypothetical in the same spirit. In a 25th-century dystopian future, sunlight is lethal to people, and shade is one of the most precious commodities. In Anglo-American law, proprietors are usually entitled to claim property neither in the shade nor in continued access to light,[69] and I explain the practical reasoning behind these doctrines in Chapters 12 and 13 of *Natural Property Rights*.[70] Rights-based principles cannot pivot, Serkin

68. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 174–75 (1974); *see also* Jeremy Waldron, *Two Worries About Mixing One's Labour*, 33 PHIL. Q. 37, 43 (1983); *see also* Claeys, *supra* note 2, at 438.

69. These principles are enforced most often in cases in which courts refuse to find that defendants commit nuisances when they block plaintiffs' access to sunlight. *See, e.g.*, Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So.2d 357 (Fla. Dist. Ct. App. 1959); *see also* Sher v. Leiderman, 226 Cal. Rptr. 698 (Cal. Ct. App. 1986).

70. The pertinent sections of the book track Claeys, *supra* note 50, at 1411–13; Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549,

suggests, from the doctrines we follow now to the doctrines necessary for our 25th-century dystopian future.

But those principles can indeed account for Serkin's hypothetical. In the world we now live in, land has tremendous potential for productive use. In our world, property in sunlight and shade are not problematic on the ground that it is impossible to put either to productive use. They are problematic on grounds studied in Chapter 10 of *Natural Property Rights*—thanks to principles of "thing" or "*res* design." If the law recognized servitudes in light or shade, it would need to reconcile them to property in land. In our social, economic, and cultural conditions, land can be put to thousands of different uses. Even granting that shade and sunlight can be used productively, the full use of either restrains many active uses that land users might make of their lots. Since in Serkin's dystopic world only shaded areas have value for life, by contrast, the interplays between land ownership and shade servitudes drop out of the picture. In the dystopia, inhabitants should be able to appropriate shady areas—consistent with the elements of natural property rights.

In Part III, I explained why I thought it necessary to dedicate a whole chapter of *Natural Property Rights* to practical reason. Serkin's hypothetical makes me glad I spent the time on the chapter. Behind Serkin's hypothetical lies this suggestion: Once principles of natural law justify a rule of thumb against property in continued light or shade, the rule is set in stone. I reject the suggestion. Chapter 6 of *Natural Property Rights* takes up an example not too different from Serkin's hypothetical—the example Casado Pérez likes so much, the transition from (humid climate-friendly) riparian rights to (arid climate-friendly) appropriative rights.[71] In the relevant respects, arid conditions resemble Serkin's dystopia; aridity played the same role in the 19th-century U.S. West as sunlight lethality plays in the dystopia. No surprise, then, that 19th-century U.S. courts jettisoned the rules by which property in running water "ran" with property in riparian land and moved to a system in which appropriative rights were dominant and ditch easements "ran" with property in the water rights. Both systems carried into effect the same natural law principles—to facilitate productive use of land and water and to facilitate such use within clear claims. That sort of practical reasoning constitutes "determination," and it raises many questions of its own. But such reasoning is good enough for government work, even in a dystopic 25th century.

1615–18 (2003) [hereinafter "Claeys, *Takings, Regulations*"].

71. *See* Eric R. Claeys, *Property, Concepts, and Functions*, 72 B.C. L. Rev. 1, 24–33 (2019).

VI. PROPERTY, THE POLICE POWER, AND THE POWER OF EMINENT DOMAIN

A comprehensive theory of rights justifies a complementary theory of government power. Chapters 13 and 14 of *Natural Property Rights* discuss the broad outlines of that theory. Governments take all sorts of actions that adversely affect property rights. In a rights-based regime, such actions must be legitimate, and legitimate on the specific ground that they are consistent with the government's protecting the rights of all. As Chapter 14 shows, governments may condemn property—if they pay just compensation and if the condemnation is for some use by the entire public as a corporate entity. And as Chapters 13 and 14 both show, governments may limit control over, use of, or disposition of property, in the course of regulating it for justifiable police goals. But the police power limits regulation in the course of regulating it. Government policies do not constitute police regulations unless they seem genuinely to make substantive rights determinate, to prevent harm, or to secure average reciprocities of advantage, and if the policies they implement seem reasonably proportionate to their police goals.

Those arguments provoked reactions I find surprising. Lovett is more sanguine that governments will use government powers justly and effectively than I am, and Ely and I both support strong constitutional limitations on property.[72] Somehow, however, I seem to have interested Lovett and alarmed Ely. Says Lovett: If "readers . . . expect[] to find a manifesto that attacks all, or most government regulation of property as an *unnatural* infringement on individual liberty," they will be "disappointed."[73] Ely may be one of those readers; he is "left to ponder just how much support private property actually receives from natural law."[74]

Ely criticizes my assessments of some of the best-known "regulatory takings" decisions. Readers will need to read the relevant passages of *Natural Property Rights* and decide whether they agree more with my or with Ely's assessments of the cases we read differently.[75] Here, however, let me make two observations.

First, a theory of property rights needs a principled account of property regulation.

72. *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 9 (3d ed. 2008); Claeys, *Takings, Regulations, supra* note 70, at 1567.

73. Lovett, *supra* note 54, at 614.

74. Ely, *supra* note 3, at 552.

75. The discussions of the leading Supreme Court regulatory takings cases in Chapter 13 of *Natural Property Rights* track discussions in Claeys, *Takings, Regulations*, *supra* note 70, at 1604–69.

That relation seems uncontroversial enough in other fields of law. The right to bodily autonomy is more basic and deserving of protection than the right to property. But does the right free a person from going into public without immunization for a communicable and dangerous disease? How should the law reconcile the right of the person who wants to go into public without immunization with the rights of others not to be infected? Property requires even more regulation—because it is less connected to people and more likely to provoke conflicts than personal rights are.

VII. NATURAL PROPERTY RIGHTS, ECONOMIC ANALYSIS, AND THE EFFICIENCY WARS

With that, this Reply has restated the main claims of *Natural Property Rights* and responded to the main objections and questions raised in this Symposium. But in Chapter 1 of the book, and then again in my Introductory Article,[76] I also argue that natural rights supply an important alternative to property theories influential today. Some of the Articles in this Symposium confirm those claims as well. This Part shows why natural rights shed important light on economic analysis of property, and the next Part does the same in relation to Progressive property theory.

Natural rights are not necessarily opposed to or in tension with economic analysis. It depends on whether a particular law and economics study has a big or a small tent. In ecumenical studies, economic analysis focuses on property-design questions. Any normative claims made in such studies are implicitly contingent on normative claims normally not demonstrated with economics. Ronald Coase was ecumenical in this respect; in *The Problem of Social Cost*, he assumed that "problems of welfare economics must ultimately dissolve into a study of aesthetics and morals."[77] So is Robert Ellickson, in his restatement of the best empirical scholarship on land. In that article, Ellickson assumes that "discussion[s] of the costs and benefits of alternative systems of property [are] circular unless one has identified some foundational property entitlements that precede the decision on the [property] system."[78] *Natural Property Rights* is meant to complement such big-tent law and economic analyses. Natural property rights supply the "foundational . . . entitlements" antecedent to transaction cost analysis, and economic analysis can proceed from there.

76. *See* Claeys, *supra* note 2, at 427–31.
77. Coase, *supra* note 49, at 43.
78. Ellickson, *supra* note 36, at 1326. n.34.

But not all economic analyses of property are as ecumenical as Coase and Ellickson's analyses are. Richard Posner's *Economic Analysis of Law* assumes that economic analysis does not need moral grounding.[79] In *Fairness versus Welfare*, Louis Kaplow and Steven Shavell argue that such grounding causes more problems than it solves.[80] Kades's Symposium Article follows Posner, Kaplow, and Shavell. As I conceded in Part II, Kades is free to make Benthamite criticisms of natural law and rights, and his criticisms help clarify what natural law and rights are and how they apply in practice. But since Kades is asking tough questions about the foundations of philosophical arguments, it must be fair game to ask tough questions about the foundations of normative law and economic analysis.

And those questions occupy a strange place in contemporary legal scholarship. Today, thanks to works like those by Posner, Kaplow, and Shavell, conventional wisdom probably holds that economic analysis can make recommendations about law or policy without support from a philosophical theory of law.[81] One or two generations ago, however, the conventional wisdom probably was to the opposite effect. Thirty to 50 years ago, normative law and economics were subject to withering critiques.[82] Those critiques were assembled into several serious books.[83] Today, however, I really do not know whether those critiques are accepted. Some recent elite articles note that those critiques happened. But few property works break new ground in them. In an article launching the Progressive property movement, Gregory Alexander chose not to "revisit[]" the moral and analytic failings of law-and-economics theory's exclusive concern with aggregate social welfare; he assumed that "[o]ther scholars ha[d] critiqued" those failings "in considerable detail."[84] In the last 20 years, a lot of classic 1970s and 1980s movies have

79. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (9th ed. 2014).

80. *See* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002).

81. *See, e.g.*, Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 750 (2009) (conceding that law-and-economics analysis has dominated property scholarship).

82. For one early salvo, see Arthur Allen Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. REV. 451 (1974) (reviewing the first edition of POSNER, *supra* note 79). For an account of the main lines of debate, see Jules L. Coleman, *The Grounds of Welfare*, 112 YALE L. J. 1511, 1514–20 (2003) (book review of KAPLOW & SHAVELL, *supra* note 80).

83. *See* JULES L. COLEMAN, MARKETS, MORALS, AND THE LAW (1988); KLAUS MATHIS, EFFICIENCY INSTEAD OF JUSTICE? SEARCHING FOR THE PHILOSOPHICAL FOUNDATIONS OF THE ECONOMIC ANALYSIS OF LAW (Deborah Shannon trans., 2009) (2004); WALTER J. SCHULTZ, THE MORAL CONDITIONS OF ECONOMIC EFFICIENCY (2001).

84. Alexander, *supra* note 81, at 750.

been remade.[85] Maybe it is time for a remake of legal scholarship from the 1970s and 1980s—on what used to be called the "efficiency wars."[86]

Kades's Article shows why such a remake might get a decent audience. As influential as law and economics is in contemporary scholarship, it has not yet been shown that it can make convincing recommendations about law or policy—without support from a moral theory explaining why economic analysis should be binding in law. Kades's Article illustrates perfectly. Assume that some judge or regulator issues an order. Assume that this official is as skeptical of theories of justice as Bentham and Kades are, and that the arguments justifying the order rely only on efficiency. What entitles that official to order citizens around? Assume that some party resists the order. Assume that the party gets prosecuted, a court sends in marshals to have the order enforced, and the party resists the marshal. Law is always implicitly backed by violence; the enforcement of law "takes place in a field of pain and death."[87] So any normative justification for law faces a second challenge. Not only must it justify whatever policies it means to justify, it must also justify the use of government-sponsored violence to bring citizens who oppose those policies into line. So even if the order promotes efficient results, can those results by themselves authorize the marshals to jail, shoot, and even kill resisting parties?[88]

Law and economics scholarship has proffered two main possible answers to that question. One is preference utilitarianism, the other is wealth, and each suffers from really powerful objections.[89] Utility maximization can lead to monstrous injustice to individuals or minorities. People can take great pleasure subjectively in outcomes that are unjust or misery-producing objectively. Utility maximization also raises the incommensurability problems discussed above in Section III.F.[90] As for wealth maximization, a society could diminish utility or inflict injustices in the course of enlarging wealth. When parties transfer valuable goods

85. *See, e.g.*, *Charlie's Angels* (ABC 2011); MAD MAX: FURY ROAD (Warner Bros. Pictures 2015); Denise Petski, *'Starsky & Hutch' Remake in Works at Fox*, DEADLINE (Feb. 16, 2023, 4:04 PM), https://deadline.com/2023/02/starsky-and-hutch-remake-fox-1235262731/ [https://perma.cc/WQE9-DV83].

86. Or so scholar and contemporaneous observer James Gordley reports to me.

87. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

88. *See, e.g.*, Coleman, *supra* note 82, at 1515 (reviewing KAPLOW & SHAVELL, *supra* note 80, at 1515).

89. *See* Scott Shapiro & Edward F. McLennen, *Law-and-economics from a philosophical perspective*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 460 (Peter Newman ed., 1998).

90. *See* Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 111–19 (1979).

to higher-value users, it is not clear that society is better off in any respect after the transfer. People often prosper morally without material means, and people who win lotteries end up being miserable.[91] There have been other attempts to justify efficiency,[92] but those proposals have been met with other forceful objections.[93]

If Kades is going to insist that economic analysis does not need support from some theory of justice, the burden lies on him to explain how and why, taking account of the scholarship recounted here.[94] He does not do so. In part, Kades's Article argues from hypotheticals and cases—the kimchi-versus-dry cleaning hypothetical[95] and the train sparks cases made famous by Coase.[96] But those arguments are not convincing. Those arguments present a few hard cases, but every general normative theory has hard cases. Moreover, Kades and other law and economics scholars assume that their critiques are devastating when the critiques are not at all devastating. As Section III.G of this Reply shows, rights can account helpfully for the kimchi-versus-dry cleaning hypothetical, and Chapter 12 of the book does the same with sparks cases. So there is not a conflict between one system of law that produces ludicrous results and another that does not. There is instead a conflict between two systems of law producing different results. Since Kades and like-minded law and economics scholars' critiques of hard common law cases are not convincing, they still owe readers reasoned arguments why a rights-based approach is undesirable.

As an alternative to a rights-based approach, Kades also introduces dozens of economic concepts. But a conceptual vocabulary is only as useful as the project the vocabulary furthers. Unless economic analysis furthers goals that can legitimize the use of government-sponsored force, economic concepts are best left to economic analysis pure and simple. Kades's Article does not address that challenge—even though the concepts Kades introduces raise it. For example, Kades argues that law and economics make recommendations via Pareto standards and

91. *See* Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 192 (1980).

92. *See* KAPLOW & SHAVELL, *supra* note 80 (introducing welfare as an independent basis for efficiency).

93. *See* Coleman, *supra* note 82, at 1527 (arguing that welfare cannot supply an adequate basis for public policy without taking account of deontological concerns not accounted for by welfare).

94. The arguments in the preceding and in this paragraph are elaborated on in *Natural Property Rights*, Chapter 12.

95. *See supra* Section III.G.

96. *See* LeRoy Fibre Co. v. Chicago, M. & St. P. Ry., 232 U.S. 340 (1914); Coase, *supra* note 49, at 29–35; Kades, *supra* note 16, at 590–91.

the Kaldor-Hicks standard.[97] But each of those standards is normatively defensible only in conditions that can only be justified on political-philosophy grounds. Pareto superiority is appropriate (philosophically) when the parties have pre-political entitlements to the resources they hold. (Like the rights parties in a garden-variety nuisance dispute have to engage in their land uses.[98]) Kaldor-Hicks efficiency is appropriate when a party holds a legal entitlement to which he has no pre-political entitlement. (A domestic producer benefiting from a tariff or an import ban slated for repeal.) If an analysis evaluates a proposal under the Kaldor-Hicks standard when Pareto superiority seems philosophically appropriate, the analysis makes an interventionist form of utilitarianism the relevant normative standard without explicitly saying so.[99] This presentation makes economic analysis of law seem more value-neutral than it really is. And when law and economic analyses do not tackle hard questions about justice, readers should wonder why those analyses deserve a hearing. And if *Natural Property Rights* is reminding readers about issues this fundamental, it offers a fresh and important perspective on property.

VIII. NATURAL LAW, NATURAL RIGHTS, AND THE OBLIGATIONS THAT DIFFERENT POLITICAL COMMUNITIES OWE ONE ANOTHER

Since Progressive property and natural rights theories are all theories of justice, they express similar concerns about economic analysis. But a theory of natural rights conceives of the good, the right, and the just on terms strikingly different from those set forth in Progressive property theories. In this Symposium, one topic illustrates those differences really vividly—*Johnson v. M'Intosh*, the case in which the United States Supreme Court construed really narrowly the political jurisdiction and property claims that Native American tribes could exercise over lands under U.S. jurisdiction.[100] Thomas Merrill has spoken of the Progressive property movement's having "battle stanchion[s,]"[101] and *Johnson* is one of those battle stanchions. When *Natural Property Rights* studies *Johnson*, its conclusions are much more tentative and conflicted than the conclusions that Progressive property theorists and indigenous-peoples

97. *See* Kades, *supra* note 16, at 563–64.
98. *See supra* Section III.G.
99. *See* GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 155–70 (1996).
100. 21 U.S. 543 (1823).
101. Thomas W. Merrill, *The Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 23 (2014). Merrill was referring specifically to State v. Shack, 277 A.2d 369 (N.J. 1971), on which see Rosser, *supra* note 13, at 662–63.

legal scholars typically draw about the case. So in hindsight, I should not have been surprised that Darden,[102] Kades,[103] and Rosser[104] were less than fully convinced by *Natural Property Rights*'s treatment of *Johnson*.

I am sorry that *Natural Property Rights*'s passages on *Johnson* troubled those authors. And in hindsight, the draft manuscript for this Symposium could have done much better to head off some misunderstandings. I hope to dispel those misunderstandings in the book's production manuscript. Nevertheless, even then, I am sure that my treatment of *Johnson* will differ from those of Darden, Kades, and Rosser. And those differences fairly illustrate important differences between a rights-based property theory and the commitments that typically inform Progressive theories of property. Some of the relevant issues go to the structure of property rights and government power to act on property. But other issues highlight the limits of property law—how property law is made and enforced in relatively closed political communities. These sorts of issues surfaced in this journal's last Symposium. During that Symposium, Kenneth Stahl[105] and I[106] debated the merits of his book *Local Citizenship in a Global Age*. The same basic tensions—between justice and the closed character of a political community—make *Johnson* even more difficult than it already is as a property case.

In *Johnson*, companies with rivaling titles in lands in Illinois asked the Supreme Court—probably in a staged lawsuit[107]—to settle how title was assigned to land originally inhabited by Native American tribes. The titles claimed by M'Intosh traced back to patents issued by the U.S. federal government. The titles claimed by Johnson and his co-plaintiff traced back to grants from two tribes, the Illinois and Piankeshaw.[108] The Supreme Court held that it was the law of the land in the United States that the political jurisdiction needed to convey title needed to trace back to the first European country to claim the relevant land by discovery.[109] In other words, the Court denied that the tribes could exercise any political "sovereignty" or "absolute title" over the same land,

102. *See* Darden, *supra* note 11, at 511–12.
103. *See* Kades, *supra* note 16, at 606–10.
104. *See* Rosser, *supra* note 13, at 668–70.
105. *See generally* Kenneth A. Stahl, *Equality and Closure: The Paradox of Local Citizenship*, 8 TEX. A&M J. PROP. L. 29, 30, 33–35 (2021).
106. *See* Eric R. Claeys, *Liberalism, Patriotism, and Cosmopolitanism in* Local Citizenship in a Global Age, 8 TEX. A&M J. PROP. L. 1 (2021); *see also supra* note 105.
107. *See* Eric Kades, *History and Interpretation in the Great Case of* Johnson v. M'Intosh, 19 L. & HIST. REV. 67, 99–101 (2001).
108. *See* Johnson v. M'Intosh, 21 U.S. 543, 553–57, 560–62 (1823) (summaries of the facts by the case's Supreme Court reporter).
109. *See id.* at 573–74.

and it held that Native Americans could hold no property rights in that land beyond rights of possession and use.[110]

When Darden, Kades, and Rosser criticize *Natural Property Rights*'s treatment of *Johnson*, I think they read the manuscript to make a few claims it does not make. So let me summarize how I understand our agreements and disagreements. With the relevant contributors, I agree that the rules of law announced and applied in *Johnson* were extremely unjust to the relevant Native American tribes and tribal members.[111] With them, I also agree that the policies that the Court recognizes as the law of the land in the United States came into being in substantial part thanks to religious and racial bigotry toward Native Americans.[112] I may have more of a soft spot for Chief Justice Marshall than the relevant contributors. As I read his opinion for the Court, Marshall suggested on at least four separate occasions that the rules of positive law he was announcing and applying contravened the natural law.[113] But I cannot say for sure that the contributors are wrong about Marshall. In his Court opinion, Marshall did find that the first European discoverer rule and the no Native American sovereignty rule were the law of the land throughout the United States. And the Court opinion does say that those arguments gave Europeans and the United States "some excuse" for making those rules settled law.[114]

With all those concessions, though, *Johnson* still raises two troubling clusters of questions. One of those clusters covers issues in property law and policy. If a natural property right is justified as it is in *Natural Property Rights*, it makes it a lot easier to rationalize the forcible taking of Native Americans' property rights than if the right were simpler and

110. *Id.* at 574, 588.

111. *See, e.g.*, Eric Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of American Indian Lands*, 148 U. PENN. L. REV. 1065, 1069–72 (2000).

112. *See, e.g.*, *Johnson*, 21 U.S. at 573 (justifying the rules announced on the ground that Native Americans were getting "ample compensation" via "civilization and Christianity"); *id.* at 590 (justifying the rules announced on the ground that "the tribes of Indians inhabiting this country were fierce savages"); *see also* Ezra Rosser, *Assumptions Regarding Indians and Judicial Humility: Thoughts from a Property-Law Lens*, 45 CT. REV. 40, 40–41 (2009).

113. *See Johnson*, 21 U.S. at 572 (focusing on the positive law in abstraction from "those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations."); *id.* at 589 (disclaiming intention "to engage in the defence of th[e] principles which Europeans have applied to Indian title."); *id.* at 591 (suggesting as "extravagant the pretention of converting the discovery of an inhabited country into conquest."); *id.* at 591–92 (suggesting that the rules of law announced and applied in the case "may be opposed to natural right, and to the usages of civilized nations.").

114. *Id.* at 589.

more sweeping. *Natural Property Rights* introduces an account of interest-based natural rights in place of Nozickean natural rights. I worry that Nozickean natural rights are too simplistic to guide law and policymaking on all the topics that need to be covered in a mature system of property, and MacLeod seems to like *Natural Property Rights* for the same reason.[115] *Natural Property Rights* also shows how a government dedicated to securing rights can: assign title to property; institute all the positive laws that support and protect absolute ownership; regulate property; and condemn land via eminent domain. I think a serious theory of government needs to justify and uphold all of those powers; Ely finds some of the powers disturbing, but Lovett likes *Natural Property Rights* because it justifies all of those powers.[116]

But interest-based rights and government powers can be abused. Rosser assumes that, in "any robust theory of natural rights, even a theory emphasizing use . . . the dispossession of the continent [would count] as a violation of the natural rights of Indians."[117] The issue is more complicated than that, as Rosser decently recognizes with the limiting phrase "even a theory emphasizing use." By natural law, property in resources is always held implicitly subject to an expectation that it be used for the benefit of everyone in the community. Again, Sandefur objects to this feature of natural law-based property.[118] Rosser, by contrast, approves that the rights that follow from this focus; that focus "provid[es] a balance to property claims that otherwise can suggest that the rights of property owners trump all other considerations."[119] But that focus gives newcomers to any area plausible grounds to challenge the claims of existing users. Especially if the existing users devote the resource in dispute to aboriginal uses, and the newcomers claim that they will put it to higher and better uses. As *Natural Property Rights* shows, a just system of property builds in many safety valves to deal with underused property—adverse possession; relief for builders who make small encroachments on nearby land mistakenly; regulations for building of mill dams; or regulations pooling oil and gas production. Once institutions like those get recognized in law, they supply precedents for reallocating aboriginal property rights.[120] Rosser is right to this extent; the foregoing arguments and precedents do not justify

115. *See supra* note 10 and accompanying text.
116. *See supra* Part V.
117. Rosser, *supra* note 13, at 665.
118. *See supra* Section V.C.
119. Rosser, *supra* note 13, at 654.
120. *See* Johnson v. M'Intosh, 21 U.S. 543, 590 (1823) ("To leave [the relevant Native Americans] in possession of their country, was to leave the country a wilderness.").

newcomers' flatly "dispossessing" aboriginal inhabitants. In the right practical conditions, however, those arguments and precedents could justify steps fairly close to outright dispossession. Occupying some of the disputed land exclusively and leaving some to the aboriginal inhabitants. Or occupying most of the land and then making some really generous package of compensation. Most general theories of property could be hijacked this way. Neither Darden, Kades, nor Rosser identifies a theory that might have done better.

To make things worse, *Johnson* raises hard questions on a second cluster of issues, ones at the interface between property law on one hand and citizenship and political allegiance on the other hand. Political communities and their subjects should never violate anyone's natural rights. But if natural rights leave open factual questions about whether a policy violates natural rights, each political community involved in a dispute may justly decide for itself whether the policy is indeed violative of rights. As I explained last year while commenting on *Local Citizenship in a Global Age*, even liberal governments can prioritize the interests of their own citizens over the interests of non-citizens.[121]

These constraints seem sensible enough when a liberal government is in dispute with a non-liberal one or when it is asked to consider claims by people not under its jurisdiction and hostile to its rule. But once those constraints seem legitimate some of the time, they complicate *Johnson* even more.[122] European settlers and Native Americans had different expectations about how land should be used. Native American tribes already had the infrastructure they needed to use land as they wanted. European settlers wanted to establish infrastructure—familiar from European law—necessary for exclusive use, absolute ownership, titling, and transfers. Where should those arguments have been settled? Natural law sets standards for how property rights should be protected as an abstract matter. But natural law says little about which political body gets to apply those standards.

121. *See* Claeys, *supra* note 106. For a few representative natural law defenses of such an approach, consider THE FEDERALIST NO. 2, at 5–9 (John Jay) (George W. Carey & James McClellan eds., 2001); Thomas Aquinas, *Summa Theologiae I-II, Q.* 105, art. 3, https://www.newadvent.org/summa/2105.htm#article3 [https://perma.cc/44CK-26KR]; Thomas Williams, *Why Saint Thomas Aquinas Opposed Open Borders*, DEFENDERS OF THE CATH. FAITH (2017), https://catholicconvert.com/why-saint-thomas-aquinas-opposed-open-borders/ [https://perma.cc/VH9R-EKF9].

122. I find accurate and impartial a summary of the differences between Native Americans and European settlers in Eric Foner, *How the Indians Lost Their Land: Law and Power on the Frontier*, LONDON REVIEW OF BOOKS (Feb. 9, 2006) (book review), http://www.ericfoner.com/reviews/020x906lrb.html [https://perma.cc/96T5-GEVV].

Rosser reads me to be making an "implicit assumption that the natural or objective perspective is that of non-Indians."[123] No. As a matter of natural law, when people from two or more political communities have stakes in a dispute, there is no "natural" or "objective" perspective. That is the problem. While Native Americans, colonists, and then state citizens were fighting with each other, there was no single political community in which all of their claims could have been adjudicated sympathetically and fairly. Each tribe and each European government, colony, or U.S. authority could press the claims of its own subjects. But since political allegiance is local, none could press the claims of the subjects of other communities. Native American tribes would not have wanted to admit European settlers into tribal governance and vice versa. And for the same reason, none of them would have been obligated to surrender decisional authority to any other government.

In short, at the level of property policy, all tribes and colonies or European countries were bound to respect equal opportunities of use for all of the parties on the ground. At the level of international relations, however, each tribe, European power, colony, or U.S. authority could take the measures it believed appropriate to protect its subjects' just claims. The power to make laws on property can be used justly and unjustly, and so can the power to take measures advancing one's own state's territorial claims. Again, the bottom line from *Natural Property Rights* is the same as those of Darden, Kades, and Rosser on the main point. It was unjust for Native Americans to be dispossessed of their traditional lands. But *Natural Property Rights* gets to that bottom line by a path much windier and more tortured than the paths those contributors take.

And in my judgment, the path taken in the book is less sentimental and more realistic than the lessons other Articles in this Symposium take from *Johnson*. And those lessons fairly illustrate broader differences between a Lockean theory of property and Progressive property. Kades illustrates when he says that *Natural Property Rights*'s study of *Johnson* endorses "the principle that might makes right."[124] Might does not make right. But right cannot be put into practice without might. Inside any political community, the control group may not agree to use might for right. Not unless the people in that country all have track records with one another, and unless they can be convinced that whoever is in charge will use might only for ends they all agree are right. When a dispute involves people from two or more political communities, in

123. Rosser, *supra* note 13, at 665.
124. Kades, *supra* note 16, at 608.

theory the dispute should be settled consistent with what is right. In practice, however, it is unrealistic to expect the members of any one of the communities to trust other communities to use might for right. Sad as it is to say, then, it is imprudent to expect right to prevail over might very often in conflicts between different peoples and governments.

These complications do not arise in most of the cases taught in first-year property courses. But that is because most such cases were decided within legal systems with large reservoirs of social trust. *Johnson* is not one of those cases. There was not nearly enough social trust between Native Americans and European colonists or (later) U.S. citizens, and *Johnson* is a one-sided opinion because it handed down the only result that most colonists and citizens were willing to accept. A satisfying theory of property needs to identify these complications and explain why they matter. Which is one small credit in favor of a Lockean theory of politics, and one corresponding disadvantage in the corresponding theories for Progressive property theorists.

IX. CONCLUSION

Again, however, I am grateful to all the contributors to this Symposium. The Symposium has confirmed the main claims I made in my Introductory Article. Property rights can be justified as interest-based rights. Those rights can be justified on the ground that they facilitate the use of ownable resources for survival or human flourishing, consistent with mine-run principles of natural law. Natural rights and basic principles of natural law focus practical reasoning about property on the sorts of issues that lawyers, judges, and policymakers find relevant to resource disputes. A natural law and rights-based theory of property supplies helpful guidance to a broad range of resource disputes, and the many issues taken up in this Symposium confirm as much. Such a theory also offers a perspective strikingly different from the perspectives on property most influential in scholarship today. I hope that this Reply's observations on natural rights, law and economics, and Progressive property confirm as much. So I hope that readers order copies of *Natural Property Rights*[125] and, like this Symposium's contributors, see what they think.

125. Or, convince acquisitions librarians to order it via their libraries. I'm not too proud to beg.