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## HOW FAR DOES NATURAL LAW PROTECT PRIVATE PROPERTY?

James W. Ely Jr.<sup>†</sup>

### Abstract

*This Article first explores the ambiguous relationship between natural law and the rights of property owners in American history. It points out that invocation of natural law principles was frequently conflated with English common law guarantees of property rights in the Revolutionary Era. Reliance on natural law as a source of protection for private property faded during the nineteenth century and was largely rejected in the early twentieth century.*

*The Article then considers the extent to which natural law principles are useful in addressing contemporary issues relating to eminent domain and police power regulation of private property. Taking a skeptical review, it concludes that natural law, standing alone, is largely theoretical and does not appear to offer meaningful guidance to current problems.*

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Professor Eric Claeys's forthcoming book is at once erudite and highly ambitious. He is seeking to reclaim the natural rights tradition from decades of neglect and outright ejection. I confined this Article to the chapters on regulation and the police power and eminent domain.

### I. NATURAL LAW IN THE FORMATIVE ERA

Natural law and property rights have a long, if somewhat ambiguous, history in the United States which can only be sketched here. "Natural

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<sup>†</sup> Milton R. Underwood Professor of Law, Emeritus, and Professor of History, Emeritus, Vanderbilt University. This Article is an expanded version of remarks presented on Eric Claeys's forthcoming book, *Natural Property Rights*, at the Natural Property Rights Symposium sponsored by Texas A&M University School of Law in October 2021. I wish to thank Christopher Serkin for insightful comments on an earlier version of this Article.

law theory," two scholars explained, "held that the positive law of a state, to be worthy of being obeyed, had to embody or affirm certain eternal principles inherent in the structure of the universe."<sup>1</sup> Thus, natural law relies on the premise of the existence of universal and eternal principles inherent in the moral order.<sup>2</sup> Natural law rhetoric, with its emphasis on limiting governmental authority, played a prominent role in the political debates of the Revolutionary Era.<sup>3</sup> John Locke, who appealed to natural law to constrain government and safeguard property rights, was very influential in Revolutionary discourse.<sup>4</sup> Indeed, several state constitutions of the Revolutionary period explicitly affirmed the natural right to property.<sup>5</sup> For example, the Massachusetts Constitution of 1780 proclaimed: "All men are born free and equal, and have certain natural, essential, and unalienable rights, among which may be reckoned . . . that of acquiring, possessing, and protecting property . . ."<sup>6</sup> Well into the 19th century, commentators and jurists frequently discussed property rights in the context of natural law.<sup>7</sup> But both the content and function of natural law were open to diverse interpretations.<sup>8</sup> Americans of the Revolutionary Era regularly conflated natural law with English common law guarantees.<sup>9</sup> Yet few of the particular English common law rights were universal and enjoyed in other nations.<sup>10</sup> Could they then be properly viewed as natural? John Phillip Reid vigorously asserted that natural law itself was not a source of rights and was commonly invoked to provide a rhetorical flourish to defend rights

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1. KERMIT L. HALL & PETER KARSTEN, *THE MAGIC MIRROR: LAW IN AMERICAN SOCIETY* 60 (2d ed. 2009).

2. *Id.*

3. Ellen Frankel Paul, *Freedom of Contract and the "Political Economy" of Lochner v. New York*, 1 N.Y.U.L. & LIBERTY 515, 530 (2005).

4. PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 87 (1997) ("By the late eighteenth century 'Lockean' ideas on government and revolution were everywhere accepted in America; they seemed, in fact, a statement of principles built into the English constitutional tradition."); *see also* Paul, *supra* note 3, at 528–37 (discussing influence of Locke on drafting of U.S. Constitution and state constitutions in the Revolutionary era).

5. Paul, *supra* note 3, at 530–37.

6. MASS. CONST. of 1780, art. I, pt. 1.

7. 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 1 (1st ed. 1827) ("The absolute rights of individuals may be {resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered and frequently declared, by the people of this country, to be natural, inherent, and unalienable.").

8. *Id.*

9. *Id.*

10. JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, VOL. 1: THE AUTHORITY OF RIGHTS* 89 (1986).

grounded in English positive law.<sup>11</sup> Put bluntly, he insisted that claims of natural rights were largely irrelevant to Revolutionary Americans.<sup>12</sup>

Other problems abound in assessing natural law as a source of rights. Was natural law confined to providing guidance for policy-makers and setting a baseline for explicating the text of the Constitution or legislation? This seems to be the approach adopted by Claeys. He asserts: “Natural property rights do not supply direct or detailed answers . . . but they do supply general guidelines.”<sup>13</sup> Or does natural law have authority independent of express constitutional and statutory provisions? To what extent could judges appropriately rely on fundamental principles not set forth in written instruments? Or could lawmakers decide to ignore or override natural law? In short, was natural law of any practical application or just a theoretical construct?

The debate over the viability of natural law was early joined in the famous case of *Calder v. Bull* (1798).<sup>14</sup> At issue was the validity of a Connecticut act setting aside a decree of probate and directing a rehearing.<sup>15</sup> Upholding the legislation, Justice Samuel Chase nonetheless maintained that fundamental principles not set forth in the state’s constitution limited legislative power.<sup>16</sup> He invoked natural law: “There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power.”<sup>17</sup> Among illegitimate legislative actions, Chase declared, was “a law that takes property from A. and gives it to B.”<sup>18</sup> Justice James Iredell, on the other hand, rejected any notion that courts could invalidate a statute because, in the court’s opinion, it was “contrary to the principles of natural justice.”<sup>19</sup> He explained:

The ideas of natural justice are regulated by no fixed standard: the ablest and purest men have differed upon the subject; and all that

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11. *Id.* at 88–95.

12. *Id.*

13. Eric Claeys, Natural Property Rights 22 (Sept. 17, 2021) (unpublished manuscript) (on file with the Texas A&M Journal of Property Law); Eric R. Claeys, *Natural Property Rights: An Introduction*, 9 TEX. A&M J. PROP. L. 415 (2023) [hereinafter “Claeys, *Introduction*”].

14. See *Calder v. Bull*, 3 U.S. 386 (1798).

15. *Id.*

16. *Id.* at 387–88.

17. *Id.* at 388.

18. *Id.* at 387–88. Similarly, in *Vanhorne’s Lessee v. Dorrance*, 2 U.S. 304, 310 (1795), Justice William Paterson referred to the Pennsylvania Constitution and declared that “[f]rom these passages it is evident; that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man.”

19. *Calder*, 3 U.S. at 399.

the Court could properly say, in such an event, would be that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.<sup>20</sup>

The Chase-Iredell debate has resonated throughout American constitutional history.

From time to time in the early 19th century, members of the Supreme Court mentioned natural law principles, often in conjunction with express constitutional language.<sup>21</sup> The clearest case to rely on natural law as the basis for a decision was *Terrett v. Taylor* (1815).<sup>22</sup> Justice Joseph Story, writing for the Court, invalidated an attempt by the Virginia legislature to confiscate church property without compensation.<sup>23</sup> “[W]e think ourselves standing upon the principles of natural justice,” he observed, “upon the fundamental laws of every free government, upon the spirit [ ] of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine.”<sup>24</sup> Absent an applicable constitutional provision, Story looked to natural law provisions to restrain legislative authority over property.<sup>25</sup> Clearly, natural law reasoning had gained a degree of currency in the jurisprudence of the Early Republic.

Still, it is hard to deny that Iredell’s views regarding natural law prevailed in the long run. Natural law reasoning gradually fell out of favor, and the concept was firmly rejected during the Progressive Era.<sup>26</sup> Oliver

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20. *Id.*

21. In the famous case of *Fletcher v. Peck*, 10 U.S. 87 (1810), the Supreme Court struck down a Georgia statute that repealed a prior land grant. Chief Justice John Marshall voided the repeal act because it violated the “general principles which are common to our free institutions” or the constitutional ban against impairing the obligations of contracts, thus leaving the basis of the opinion ambiguous. *Id.* at 136–40. In contrast, Justice William Johnson, concurring, rejected reliance on the contract clause and grounded his decision “on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.” *Id.* at 143; see James W. Ely, Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 JOHN MARSHALL L. REV. 1023, 1048–55 (2000) (analyzing the extent to which Marshall and his colleagues relied on fundamental rights derived from natural law as a basis for constitutional adjudication); Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

22. *Terrett v. Taylor*, 13 U.S. 43 (1815).

23. *Id.* at 55.

24. *Id.* at 52.

25. In *Wilkinson v. Leland*, 27 U.S. 627, 657–58 (1829), Story again affirmed that governmental authority over property was restrained by principles of natural justice, but he did not resolve the case on this basis.

26. James W. Ely Jr., *The Progressive Era Assault on Individualism and Property Rights*, 29 SOC. PHIL. AND POL’Y 255, 260 (2012); see also James W. Ceaser, *Progressivism and the Doctrine of Natural Rights*, 29 SOC. PHIL. AND POL’Y 177, 188–95 (2012) (pointing out that Progressives dismissed natural law as outmoded for an industrial society and did much

Wendell Holmes and influential historian Charles A. Beard ridiculed the concept.<sup>27</sup> Moreover, it is also hard to deny that Iredell had a point. Natural rights are nebulous. What does it mean to claim that one has a natural right to property? Claims of natural rights often look suspiciously like English common law. Indeed, as noted above, natural law and common law were often equated and frequently linked together.<sup>28</sup> Do open-ended invocations of natural law add much to our understanding?

## II. CONTEMPORARY PROBLEMS: EMINENT DOMAIN

Let us consider natural law in the context of eminent domain. The cardinal principle that an owner was entitled to compensation when his or her property was taken by government has deep roots in natural law as well as in English constitutional law.<sup>29</sup> Making an important contribution to eminent domain law, natural law theorists explained the rationale for the compensation requirement in terms of “natural equity” to achieve equal treatment among citizens when the government took the property of a few for the common benefit.<sup>30</sup> The compensation norm was widely observed in the American colonial period.<sup>31</sup> Moreover, drawing in part upon natural law principles, a number of state courts during the antebellum era mandated compensation when property was taken for public use, even if the state constitution was silent on the matter.<sup>32</sup>

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to discredit the doctrine with the educated public).

27. CHARLES AUSTIN BEARD, *POLITICS* 30–31 (1908) (pointing out the “decreasing reference to the doctrine of natural rights as a basis for political practice,” agreeing that “natural rights are at bottom only moral aspirations,” and declaring that the theory “has been rejected for the reason that it really furnishes no guide to the problems of our time and because we have come to recognize since Darwin’s day that the nature of things, once supposed to be eternal, is itself a steam of tendency.”).

28. *Terrett*, 13 U.S. at 47.

29. James W. Ely Jr., “*All Temperate and Civilized Governments*”; *A Brief History of Just Compensation in the Nineteenth Century*, 10 BRIGHAM-KANNER PROP. RIGHTS J. 275, 275–81 (2021).

30. *Id.* at 280.

31. James W. Ely Jr., “*That Due Satisfaction May Be Made: The Fifth Amendment and the Origins of the Compensation Principle*,” 36 AM. J. LEGAL HIST. 1, 4–13 (1992) (describing the practice of awarding compensation for property taken by government in the colonial and post-Revolutionary periods).

32. *E.g.*, *Gardner v. Trs. of Newburgh*, 2 Johns. Ch. 162, 166 (N.Y. 1816); *Sinnickson v. Johnson*, 17 N.J.L. 129, 146 (1839); *Young v. McKenzie*, 3 Ga. 31, 44 (1847); *see also* 3 JOSEPH STORY, L.L.D., *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (1833) 768 (Lonang Institute, ed., 2005) (declaring that the Fifth Amendment was just “an affirmation of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of

Nonetheless, I submit that the invocation of natural law alone does not carry our analysis of compensation very far. How does one determine the amount of compensation? Claeys maintains that just compensation should provide “a fair measure of the value that owners place on the property provided that the measure seems reasonably defensible.”<sup>33</sup> This is a confusing standard. What starts as a subjective value seemingly collapses into an objective standard. How does this differ from the prevailing fair market standard? Other problems present themselves. What procedures should be employed to make this determination? What if lawmakers and judges set such a low level of compensation as to undermine the natural law principle?<sup>34</sup> Does natural law speak to the practice of offsetting supposed benefits resulting from a project? Reliance on municipal law to address these questions may well produce results at odds with natural law. Moreover, the safeguard of “just compensation” is in the Fifth Amendment and most state constitutional counterparts.<sup>35</sup> Natural law precepts may have helped pave the way for the adoption of the just compensation norm in the federal and state constitutions, but in current eminent domain practice, what does natural law add to these express guarantees?

Claeys posits that another constraint on the exercise of eminent domain is that “the project genuinely be used by the public.”<sup>36</sup> Thus, he favors “a relatively strict construction of public use.”<sup>37</sup> Since the Supreme Court, and many state courts, have virtually drained the constitutional “public use” clauses of meaning, this might be an area in which natural law precepts, if actually applied, would curtail the taking of property largely for the benefit of private interests. It would call into sharp question the controversial case of *Kelo v. City of New London* (2005), in which a divided Supreme Court approved the exercise of eminent domain for economic development by private parties.<sup>38</sup> Claeys appears rightly skeptical about this ruling. I share his view. However, I am perplexed by

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universal law.”).

33. Claeys, *supra* note 13, at 436; *see also* Claeys, *Introduction*, *supra* note 13, at 472.

34. Ely, *supra* note 29, at 305–314 (stressing pattern of systematic undercompensation in eminent domain cases).

35. *Id.* at 275.

36. Claeys, *supra* note 13, at 435; *see also* Claeys, *Introduction*, *supra* note 13, at 472–73.

37. Claeys, *supra* note 13, at 435; *see also* Claeys, *Introduction*, *supra* note 13, at 472–73.

38. *Kelo v. City of New London*, 545 U.S. 469 (2005); *see* ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* (U. Chi. Press, 1st ed., 2015), for a critical analysis of the exercise of eminent domain for economic development by private parties.



Claeys's suggestion that the strict public use justification for eminent domain, if actually adopted by courts, would stop "private actors from lobbying government to expropriate the property of other private parties."<sup>39</sup> This strikes me as overly optimistic. Although a strict reading of the "public use" requirement would surely help to curtail free-wheeling exercises of eminent domain, private parties still have every incentive to seek to utilize eminent domain to their advantage.<sup>40</sup> There is no disincentive to such opportunistic behavior.

What actions, beyond outright appropriation, constitute a taking of property? When might a regulation so diminish the value or usefulness of property as to amount to a taking? The doctrine of regulatory takings, of course, is a confused and contested area of law.<sup>41</sup> Although both leading jurists and commentators had earlier recognized that regulation of property usage might be the practical equivalent of appropriation,<sup>42</sup> the Supreme Court first put its seal of approval on regulatory takings in *Pennsylvania Coal Company v. Mahon* (1922).<sup>43</sup> Writing for the Court in *Pennsylvania Coal*, Holmes warned that "the natural tendency of human nature" was to extend the police power until "at last private property disappears."<sup>44</sup> Claeys is surprisingly equivocal about *Pennsylvania Coal*. Does natural law not speak to this important issue?

### III. CONTEMPORARY PROBLEMS: POLICE POWER

As Holmes pointed out, there is a close interface between the scope of the police power and the enjoyment of property.<sup>45</sup> An expansive police power can reduce the rights of property owners to an empty shell. Claeys boldly proclaims that "governments have no legitimate authority to regulate except to secure, protect, and facilitate the exercise of natural rights."<sup>46</sup> He sets out to explicate "natural law principles of

39. Claeys, *supra* note 13, at 435; *see also* Claeys, *Introduction*, *supra* note 13, at 473.

40. Claeys, *supra* note 13, at 436; *see also* Claeys, *Introduction*, *supra* note 13, at 473.

41. STEVEN J. EAGLE, *REGULATORY TAKINGS* (5<sup>th</sup> ed. 2012).

42. David J. Brewer, *Protection to Private Property from Public Attack*, 55 *NEW ENG. & YALE REV.* 97, 102–103 (1891); JOHN LEWIS, *A TREATISE ON THE LAW OF EMINENT DOMAIN* 40–46 (1888) (maintaining that the concept of property entails the rights of possession, usage, and disposition, and concluding that "when a person is deprived of any of those rights, he is to that extent deprived of his property, and, hence, that his property may be taken, in the constitutional sense, though his title and possession remain undisturbed.").

43. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415–16 (1922).

44. *Id.* at 415.

45. *Id.*

46. Claeys, *supra* note 13, at 393; *see also* Claeys, *Introduction*, *supra* note 13, at 446.

regulation.”<sup>47</sup> But he further explains that natural rights do not furnish precise guidance and “leaves legislators and regulators considerable discretion for determination.”<sup>48</sup> Along this line, the examples discussed in Chapter 13 strongly indicate that in many instances natural law serves to buttress rather than restrain the police power. I am left to ponder just how much support private property actually receives from natural law in the context of regulation. Unlike Claeys, I see no reason why an exercise of the police power may not also amount to a taking of property. The police power is not a magic talisman that absolves government of responsibility for taking property.

Claeys posits that laws can regulate natural rights in several situations: providing determinacy, preventing harm, securing reciprocity of advantage, and eliminating unjust legal systems.<sup>49</sup> This list raises some issues. What about regulations that do not readily fit into these categories? For instance, how should one assess railroad rate regulation in the late 19th century, a much-contested subject in which the carriers argued that such controls amounted to pro tanto confiscation of property?<sup>50</sup> Does natural law play a role when states destroy types of previously lawful property? Some jurists and commentators in the 19th century expressed concern that prohibition laws amounted to a taking of property.<sup>51</sup> Claeys notes that the prohibition of alcoholic beverages raised hard questions but does not carefully explore whether such controls run afoul of natural law. Fundamental issues remain: to what extent can legislators redefine a long-recognized form of private property as a nuisance and then confiscate it without compensation? If property is held at the sufferance of the legislature and shifts in public sentiment, is natural law of much value?

In an effort to rebut skeptical views and to demonstrate that natural law principles of regulation can provide meaningful guidance, Claeys examines some cases well known to property scholars. His analysis is invariably thoughtful, but I must take exception and feel that he tends to uphold regulation rather than vindicate the rights of owners. Consider

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47. Claeys, *supra* note 13, at 416.

48. *Id.* at 395.

49. *See generally id.*; *see generally* Claeys, *Introduction*, *supra* note 13.

50. *See* JAMES W. ELY, JR., *RAILROADS AND AMERICAN LAW* 80–99 (2001), for the rate regulation controversy.

51. James W. Ely, Jr., *Are Eminent Domain and Confiscation Vehicles for Wealth Redistribution? A Skeptical View*, 6 *BRIGHAM-KANNER PROP. RTS. J.* 211, 227–32 (2017) (pointing out that some jurists and commentators in the nineteenth century were concerned that prohibition amounted to an unconstitutional taking of property without compensation).

the *Hadacheck* case.<sup>52</sup> As the City of Los Angeles expanded, a residential area engulfed a long-established brickyard.<sup>53</sup> The city then enacted an ordinance prohibiting a brickyard within this area, causing a sizeable drop in the value of the tract.<sup>54</sup> Hadacheck, the brickyard owner, alleged that this ordinance amounted to a deprivation of his property without compensation in violation of the Fourteenth Amendment.<sup>55</sup> Rejecting this argument, the Supreme Court characterized the police power as “one of the most essential powers of government—one that is the least limitable.”<sup>56</sup> The Court acknowledged that an application of the police power might “seem harsh in its exercise.”<sup>57</sup>

Claeys concedes that the decision “strains common-sensical reactions about property rights” and that readers are often sympathetic to Hadacheck.<sup>58</sup> Count me among them. The people who moved to the community knew what they were doing, and thereafter they used the coercive power of government to put the brickyard out of business. Claeys contends that the brickyard operation was inconsistent “with the equal rights of the neighbors who may develop their lots later.”<sup>59</sup> But surely newcomers must be prepared to deal with existing circumstances or relocate elsewhere. If eliminating the brickyard was so important to the new neighbors and the city, a resort to eminent domain and payment of compensation would have constitutionally resolved the problem. Indeed, does this case not bring to mind Holmes’s warning that: “We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”<sup>60</sup> Why would natural law not provide support to the individual property owner in this situation? As with the prohibition cases mentioned above, one must ponder whether any business is subject to destruction by subsequent regulation.<sup>61</sup>

52. See *Hadacheck v. Sebastian*, 239 U.S. 394 (1913).

53. *Id.* at 407.

54. *Id.* at 404.

55. *Id.* at 405.

56. *Id.* at 410.

57. *Id.*

58. Claeys, *supra* note 13, at 393.

59. *Id.* at 421.

60. *Pennsylvania Coal Co. v. Mahone*, 260 U.S. 393, 416 (1922).

61. Frank I. Michelman views *Hadacheck* as one of “the most violently offensive decisions not to compensate.” He also raised practical concerns about the ruling, observing: “There might be a substantial demoralizing effect on economic activity from a rule declaring all investment vulnerable to retroactive frustration if it should later be decided that the investor should have foreseen a possible future incompatibility.” Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just*

The coming to an already established but potentially objectional activity frequently appears in another guise. Urban-suburban sprawl in many places has spread into farming areas. New arrivals then complain of farm operations, including odors, noise, and flies, and seek to bar such activities. Anxious to support agricultural operations and encourage food production, nearly every state responded by enacting right-to-farm statutes providing relief from nuisance lawsuits.<sup>62</sup> This might be food for thought in relation to the *Hadacheck* case.

Another problematic case examined by Claeys is *Miller v. Schoene* (1928).<sup>63</sup> At issue was a 1914 Virginia statute authorizing the destruction, without payment of compensation, of cedar trees potentially carrying cedar rust fungus if located within two miles of any apple trees.<sup>64</sup> This fungus, harmless to cedar trees but devastating to apple trees, was carried by the wind to adjacent orchards.<sup>65</sup> The statute declared the existence of such cedar trees to be a public nuisance and directed their removal.<sup>66</sup> Apple growing was a principal agricultural pursuit in Virginia, whereas Cedar trees were deemed to be of little commercial value.<sup>67</sup> Upholding this statute, the Virginia Supreme Court of Appeals declared: "The State was not taking or damaging the property of the owner for

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*Compensation*" Law, 80 HARV. L. REV. 1165, 1237 & 1237 n. 122 (1967). But see RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 120 (1985) (arguing that compensation was properly denied in *Hadacheck* on grounds that the brickyard was a nuisance, and that "the neighbor's coming to the nuisance was at most a partial offset.").

62. *Buchanan v. Simplot Feeders Ltd. P'ship*, 952 P.2d 610, 615 (Wash. 1998) (construing state right-to farm act, and observing that with subsequent urban development the developers "presumably have notice of those 'farm' activities."); see also Rural Empowerment Ass'n for Cmty. Help v. State, 868 S.E.2d 645, 653 (N.C. Ct. App. 2021) (limiting potential nuisance liability to protect agricultural activities and encourage food production within scope of police power).

63. Claeys, *supra* note 13, at 1, 423; *Miller v. Schoene*, 276 U.S. 272 (1928).

64. Under the statute a cedar tree owner ordered to destroy his trees could appeal to the circuit court. That court was authorized to hear any objections and to "determine the amount of damages, if any, which will be incurred by the owner in cases said trees are destroyed, and the costs incurred or to be incurred in cutting down trees . . ." The Virginia Supreme Court of Appeals admitted that the provision on damages "is not clear," but concluded that the legislature did not intend to confer compensation for the trees destroyed but only cover incidental damages incurred during the removal operation. One judge dissented from the judgment with respect to the damages awarded. *Miller v. State Entomologist*, 135 S.E. 813, 818-19 (Va. 1926), *aff'd sub nom. Miller v. Schoene*, 276 U.S. 272 (Va. 1928).

65. *Id.* at 818.

66. *Id.*

67. *Id.* at 814.

either a public or private use, it was simply abating a nuisance, and requiring the owner to so use his property as not to injure another.”<sup>68</sup>

It had long been the prevailing rule that state police power encompassed the eradication of diseases among animals and the destruction of diseased fruits and trees. For example, in 1917 the Supreme Court of Louisiana upheld a law authorizing the destruction of orange trees infected by citrus cancer.<sup>69</sup> It rejected the argument that the act amounted to a taking of property without compensation.<sup>70</sup> But this was not the situation in *Miller* as the cedar trees were not diseased.<sup>71</sup> Indeed, in an earlier opinion dealing with cedar tree removal the Virginia Supreme Court of Appeals conceded that the cedar trees would not have constituted a nuisance at common law.<sup>72</sup>

Affirming the Virginia court in a rather cursory opinion, the Supreme Court in *Miller* brushed aside a Fourteenth Amendment due process challenge to the statute.<sup>73</sup> In contrast to the Virginia court, the Supreme Court explicitly declined to decide whether the cedar trees constituted a nuisance either at common law or pursuant to the statute.<sup>74</sup> Instead, the Court employed a frankly utilitarian analysis and sustained the power of the state to decide “upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public.”<sup>75</sup> Endorsing an expansive view of the police power, it gave no attention to the question of compensation.<sup>76</sup> “The Court, at any rate,” Frank I. Michelman cogently observed, “seemed to acknowledge that the immolation of the cedars could be justified only by the benefit which would result to the general economy, and not by

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68. *Id.* at 819. Likewise, William A. Fischel analyzed the cedar tree litigation at length and argued that the owners should not receive compensation. His conclusion is grounded on the assumption that the cedar trees amounted to a nuisance and that the trees were of little monetary value. WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 151–58 (1995). In contrast, I submit that the modest value of the cedar trees does not bear on whether there has been a taking of property but is relevant in the determination of just compensation payable.

69. *La. State Bd. Agric. & Immigr. v. Tanzmann*, 73 So. 854, 857 (La. 1917).

70. *Id.*

71. *Miller v. Schoene*, 276 U.S. 272, 277 (1928).

72. *Bowman v. Va. State Entomologist*, 105 S.E. 141, 144 (1920). Similarly, Epstein concludes that the cedar trees did not constitute a nuisance to the apple trees in the vicinity. EPSTEIN, *supra* note 61, at 114; see Claey, *supra* note 13, at 424.

73. *Miller*, 276 U.S. at 277, 280.

74. *Id.* at 280.

75. *Id.* at 279.

76. *Id.* at 280.

any attribution of responsibility to the cedar owners. But why, then, was no compensation required?"<sup>77</sup>

Claeys wrestles at length with the decision in *Miller*. He feels that the Supreme Court's harm prevention rationale was not appropriate. He inconclusively considers alternative justifications for the destruction of the cedar trees, including payment of compensation. He is surely correct that the Court's utilitarian opinion in *Miller* is fundamentally inconsistent with "natural law principles of regulation."<sup>78</sup> Claeys rightly points out that *Miller* opens the door for authorities "to extinguish property rights that seem inconvenient to what a political majority believes to be good policy."<sup>79</sup> Richard Epstein lends support to Claeys's unhappiness with *Miller*.<sup>80</sup> He maintains that "the court abandoned *all* efforts to distinguish police power from public use or to place principled limitations upon the scope of the police power."<sup>81</sup>

Why not compensate? It seems to me that the solution to the *Miller* quandary is to treat the destruction of the trees as a taking of property for community benefit requiring payment of compensation. Virginia lawmakers might reasonably prefer apple to cedar trees, but it does not follow that they can dump the financial burden on a few individual cedar tree owners.<sup>82</sup> Since the state and federal courts repeatedly insisted that the cedar trees were of little monetary value,<sup>83</sup> the compensation payments would not likely be so onerous as to bar the scheme to protect the apple orchards. Similar legislation in West Virginia suggests this constitutionally sound route.<sup>84</sup> In 1925, West Virginia enacted a law to control cedar rust modeled after the Virginia law.<sup>85</sup> A crucial difference,

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77. Michelman, *supra* note 61, at 1199.

78. Claeys, *supra* note 13, at 416, 423.

79. *Id.* at 426.

80. *Id.* at 416, 424.

81. EPSTEIN, *supra* note 61, at 114.

82. The purpose of the compensation norm in the takings clause of the Fifth Amendment is to mandate that the cost of improvements for common benefit should be borne by the public as a whole and not placed on a few individual property owners. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 345 (1983) (explaining that the compensation principle "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (stating that takings clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all justice and fairness, should be borne by the public as a whole.");

83. *Miller v. State Entomologist*, 135 S.E. 813, 818 (Va. 1926), *aff'd sub nom. Miller v. Schoene*, 276 U.S. 272 (Va. 1928) (pointing to "insignificant value of such cedars.");

84. *Lemon v. Rumsey*, 150 S.E. 725, 725-26 (1929).

85. *Id.* at 726.

however, was that the West Virginia measure was construed to provide a mechanism by which cedar owners could secure compensation.<sup>86</sup> This, I submit, is the constitutionally-correct approach and is consistent with Claeys's natural law principles governing regulations. Claeys and I are largely on the same page with regard to the shortcomings of the Supreme Court's *Miller* opinion, but I would urge him to be more forthright in recognizing the need for compensation.

#### IV. UNJUST LEGAL SYSTEMS

Claeys's suggestion that natural law could override municipal law in cases involving unjust legal systems (he mentions only slavery) is striking on a number of levels. First, he generally maintains that natural law does not provide detailed answers but offers general guidance to lawmakers. Yet with respect to slavery, he contends that natural law goes far beyond mere guidance and might serve as an independent source of law establishing a basis for decisions.<sup>87</sup> It is indeed very different to assert that natural law lent no support to slave property than to insist that natural law concepts could override the positive law affirming the existence of slavery.<sup>88</sup>

Second, I am not certain the natural law tradition so clearly proscribed slavery as Claeys seems to believe.<sup>89</sup> After all, slavery existed for centuries in different cultures. Aristotle's conception of natural slavery cast a long shadow over debates about slavery for decades.<sup>90</sup> Well into the 18th century, the doctrine of capture was employed to justify slavery.<sup>91</sup> Leading theorists, including John Locke and Thomas Jefferson, were troubled by slavery but did not unequivocally denounce it.<sup>92</sup> The point, of course, is that trying to apply natural law to a specific

86. *Id.* ("Our act provides a method by which an owner may secure compensation after the destruction of his trees.").

87. Claeys, *supra* note 13, at 113; *see also* Claeys, *Introduction*, *supra* note 13, at 435.

88. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 153 (1990) ("No one in 1787 defended the ownership of slaves as included among the natural rights of property. And yet most of the Framers believed that since slavery existed as a matter of positive law, slave owners could claim the right to have their property secure.").

89. Claeys, *supra* note 13, at 113; *see also* Claeys, *Introduction*, *supra* note 13, at 435.

90. *Philosophers Justifying Slavery*, BBC, [https://www.bbc.co.uk/ethics/slavery/ethics/philosophers\\_1.shtml#:~:text=The%20great%20Greek%20philosopher%2C%20Aristotle,%2D%20and%20non%2Dslaves](https://www.bbc.co.uk/ethics/slavery/ethics/philosophers_1.shtml#:~:text=The%20great%20Greek%20philosopher%2C%20Aristotle,%2D%20and%20non%2Dslaves) [https://perma.cc/7XN9-8HRK].

91. DAVID BOUCHER, THE LIMITS OF ETHICS IN INTERNATIONAL RELATIONS: NATURAL LAW, NATURAL RIGHTS, AND HUMAN RIGHTS IN TRANSITION 202 (2009).

92. *See id.* at 202, 208–09.

institution, even one as bitterly contested as slavery, requires wrestling with a complex and hotly-debated history or risks becoming conclusory.

Third, Claeys is correct that radical abolitionists argued that the United States could abolish slavery without compensation, but this was not Abraham Lincoln's view nor a widely-shared opinion.<sup>93</sup> Indeed, Lincoln urged compensated emancipation upon Congress and was instrumental in securing compensated emancipation in the District of Columbia.<sup>94</sup> Moreover, I think that it is a disingenuous stretch to describe abolition of slave property as a regulation.

By way of analogy, the end of slavery triggered a bitter controversy over the enforcement of contracts for the purchase of slaves.<sup>95</sup> A number of southern states adopted constitutional provisions to bar the enforcement of such contracts, although the contracts were valid when made. This raised the issue of whether such laws ran afoul of the contract clause of the Constitution.<sup>96</sup> One federal judge invoked natural law as a basis to refuse enforcement of a slave purchase agreement.<sup>97</sup> The judge characterized slave purchase contracts as "inherently vicious and contrary to sound morals and natural justice and right."<sup>98</sup> The Supreme Court, however, was unimpressed by arguments based on natural law and upheld the validity of the agreement.<sup>99</sup> It pointed out that the institution of slavery had existed since ancient times and that the contractual rights at issue had become vested before the adoption of the Thirteenth Amendment.<sup>100</sup> In other words, natural law did not carry the day against slave purchase contracts.

I think that Claeys would be best served to either expand this section to tackle the difficult question of unjust legal systems in detail or to eliminate it altogether. The legal complexities of slavery systems could be fairly viewed as beyond the scope of this volume and requiring specialized treatment.

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93. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 25, 84 (3d ed. 2008).

94. *Id.* at 84.

95. Andrew Kull, *The Enforceability after Emancipation of Debts Contracted for the Purchase of Slaves*, 70 CHI.-KENT L. REV. 493 (1994).

96. Article I, Section 10 of the Constitution provides in part: "No State . . . shall pass any . . . Law impairing the Obligation of Contracts." See JAMES W. ELY, JR., *THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY* 1, 111-13 (2016).

97. *Buckner v. Street*, 4 F. Cas. 578, 580 (C.C.E.D. Ark. 1871).

98. *Id.* at 583.

99. *Osborn v. Nicholson*, 80 U.S. 654, 663 (1871).

100. *Id.* at 660-63. Chief Justice Salmon P. Chase, long an antislavery advocate, dissented alone, arguing that slave purchase contracts were "against sound morals and natural justice." *Id.* at 663.



V. CONCLUSION

My comments are offered in the hope that some of them may help Professor Claeys strengthen an already strong and challenging book manuscript. The book will surely create waves in the academy as it voices a powerful call to revive the venerable natural law tradition in American jurisprudence.

