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Stories about Property

William W. Fisher III
Harvard University

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*William W. Fisher III**

PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP. By *Carol M. Rose.* Boulder: Westview Press. 1994. Pp. ix, 317. $24.50.

For a decade, Carol Rose[1] has been writing provocative essays about the history, doctrine, and theory of private property. Irreverent, unpredictable, learned, and concise, these articles have been a pleasure to read. The same traits make them wonderful teaching tools. It is thus not surprising that several excerpts from Rose's essays have found their way into first-year Property casebooks.[2] Many Property teachers, myself included, go further, assigning entire articles.[3] Each year, some of the most energetic classroom discussions spring from those assignments.

Property and Persuasion contains eight of those articles plus a previously unpublished essay, *Seeing Property* (pp. 267-304). For two reasons, the book is better than a set of copies of the original essays. First, although Rose has sensibly left unchanged the arguments of the individual articles, she has updated many of the footnotes and pared others. The resulting essays are both more current and more trim. Second, she has included many substantive cross-references, suggesting how the theses of the articles relate to one another. These links make it possible to see how the various parts of Rose's complex conception of property hang together — or, as will be suggested below, in some instances do not hang together.

Among the characteristics that make the essays so refreshing is their unusual narrative form. These are not typical law review articles, marching predictably through premises, analyses, and doctrinal applications. They are quirky and surprising. Sometimes, like Faulkner novels, they go over the same ground two or three times, examining a doctrine or problem from various points of view. For example, in *The Comedy of the Commons* (p. 105), perhaps the best

* Professor of Law, Harvard University. B.A. 1976, Amherst College; J.D. 1984, Ph.D. 1991, Harvard University. — Ed.

1. Gordon Bradford Tweedy Professor of Law and Organization, Yale Law School.

2. *See, e.g.,* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 19-20, 37-38 (3d ed. 1993).

3. My personal favorite for these purposes is *Crystals and Mud in Property Law,* 40 STAN. L. REV. 577 (1988), which I assign when I am discussing conveyancing. Professor Joan Williams reports that students in her Property classes regularly find that *Women and Property: Gaining and Losing Ground,* 78 VA. L. REV. 421 (1992), is the most eye-opening of all the readings in her course.

essay in the book, she studies the development of American and English "public property" doctrines from many angles, and each perspective is sufficiently different that the reader does not lose patience.

Sometimes the essays change course suddenly. For example, the bulk of *Possession as the Origin of Property* (p. 11) consists of an effort to identify the economic logic underlying the "first-occupancy" principle — the notion that the first person to reduce an unowned object or animal to "firm possession" owns it. But two pages from the end, the tone changes abruptly from panglossian to critical. The first-occupancy principle may have served effectively to maximize the material welfare of the Europeans who conquered the Western Hemisphere, Rose insists, but its central presupposition (that human beings are outsiders to nature) made no sense to — and indeed helped justify the forcible ouster of — the Native American population.[4] The shift is jarring, and that, presumably, was her intent.

Finally, like Dorothy, Rose frequently strays from the road of her own argument. These detours, instead of distracting, contain many of the most memorable parts of the book. For example, the primary topic of the final essay, *Seeing Property* (p. 267), is whether it is good or bad that ownership is so closely related to vision — that property as a socioeconomic institution depends heavily on visual markers and codes (fences, maps, photographs, and so on) and that property *law* employs many visual metaphors ("body politic," "bird on a wagon,"[5] and so on). Rose's main, typically revisionist claim is that the sense of sight — in general and in connection with property — is epistemologically more constructive than its critics contend; that it is just as "interactive" and social as the senses of hearing or smell; that it sensitizes us to the ephemeral character of all rights as much as to their solidity; and that it is fully compatible with the telling of stories and thus is not vulnerable to the charge that it "eradicates . . . the dimension of time, and with time, the importance of experience and even consciousness" (p. 270). But in the midst of this abstruse — and not wholly convincing — argument, Rose pauses to explore a more mundane — and illuminating — topic. Although visual metaphors are not inherently misleading, she argues, some of the metaphors we have developed to describe property rights are. Specifically, the comparison of a fee simple to a "bundle of sticks," although useful for some purposes, unfortu-

4. *See* pp. 18-20. Note that it is this concluding point — not the positive economic argument that precedes it — that finds its way into the most popular first-year property casebook. *See* DUKEMINIER & KRIER, *supra* note 2, at 19-20.

5. 5 RICHARD R. POWELL, POWELL ON REAL PROPERTY ¶ 670[2], at 60-6 (Patrick J. Rohan ed., 1996) (asserting that a real covenant is annexed to an estate "like a bird riding on a wagon").

nately inclines us to think of all of the entitlements that make up a property right as easily separable and "all more or less alike" (p. 280). This tendency, she plausibly contends, impedes our ability to deal sensibly with particular doctrinal problems — such as (she might have suggested) the issue of when a governmental regulation of land use goes so far as to constitute a "taking."[6] A metaphor more sensitive to the heterogeneity and interdependence of the rights constitutive of ownership, she playfully but shrewdly proposes, would be "[t]oys in a toy chest" (p. 280). Similarly suggestive tangents abound in the other essays.[7]

In view of Rose's evident familiarity with contemporary narrative theory, it is hard to believe that these stylistic innovations are inadvertent. An important substantive aspiration of her book, she frequently tells us, is to destabilize conventional understandings of ownership. The novel organization of the argument is equally effective in challenging conventional expectations concerning the proper form of legal scholarship. In view of her equally apparent familiarity with contemporary feminist theory,[8] it is also hard not to associate the stylistic innovations with Rose's gender. In many other fields — literary theory and anthropology come to mind most quickly — feminist theorists during the past decade have insisted upon the interdependence of misogynist substantive views and patriarchal narrative forms.[9] Dislodging one requires dislodging the other. Although Rose never expressly aligns herself with such projects, she at least is proceeding along a parallel course.

The novelty of the form of the book should not be exaggerated, however. One never has any doubt when reading through these essays that they were produced by a single author. Rose's voice appears to have changed little over the decade in which they were written. More importantly, the same concerns recur in most of the essays. Three themes are particularly prominent and merit response: an effort to refine the conventional utilitarian theory of property and the associated progressive history of property doc-

6. *Compare, e.g.,* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (emphasizing the magnitude of the economic impact of the regulation on the owner of the land, rather than the character of the entitlement abridged) *with* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (going to the opposite extreme by holding that any impairment of a landowner's right to exclude others, no matter how trivial, constitutes a taking).

7. For example, the central topic of the second essay is how narratives concerning the origin of private property rights have enabled many theorists to conceal a gap in their arguments — namely, that the same collective-action problems that make private property rights socially necessary would also impede the establishment of a private property regime. *See* pp. 37-38. Toward the end of the essay, however, Rose takes up a different issue: the possibility that these narratives might have some hortatory value in cultivating altruism. *See* pp. 41-42.

8. *See* chapter 8.

9. *See, e.g.,* MARILYN STRATHERN, THE GENDER OF THE GIFT: PROBLEMS WITH WOMEN AND PROBLEMS WITH SOCIETY IN MELANESIA (1988).

trine; the excavation and defense of a competing, republican theory of property; and a reassessment of the venerable question of the relationship between rules and standards.

I. Classicism and Its Discontents

Central to many of Rose's essays is an argument she describes as the "classical theory of property." A blend of utilitarian political theory, neoclassical economics, and materialist history, this approach contends that property rights originate in the efforts of the members of a society to maximize their aggregate welfare. The assignment of scarce resources to individual owners, so the argument goes, has four related beneficial effects. First, it provides the persons to whom the rights are assigned incentives to engage in socially beneficial activities. Second, it avoids "tragedies of the commons" — the tendency of persons who have access to unowned or communally owned resources to overuse them. Third, it reduces "rent dissipation" — the tendency of people to spend their time grabbing resources in the hands of others. Fourth, it facilitates commerce — mutually beneficial exchanges of resources and services.

Social recognition of these advantages, the argument continues, typically occurs in three stages. In stage one, there is more than enough of a resource to satisfy all members of the society. Consequently everyone is permitted to appropriate as much as she wishes and no effort is made to manage the resource. Stage two represents an intermediate or transitional phase. As the free-for-all of the initial period threatens to exhaust the resource, "a group or tribe may jointly take over the resource — such as a hunting area or a set of common fields — and reserve access to its own members, perhaps allocating in-group access according to a set of informal customary arrangements" (p. 164). Increasing scarcity eventually renders this arrangement inadequate, whereupon the members of the society typically shift in stage three to a full-blown property regime, in which discrete pieces of the resource are assigned to individual owners. This final phase is not static, however; legal rules are constantly adjusted to provide the individual owners socially optimal incentives to use and conserve the resources that have been entrusted to them.

Rose's posture toward the classical theory is complex. Sometimes she relies, seemingly uncritically, on the standard story to make sense of some aspect of property law. In the first essay, for instance, she observes that several doctrines in Anglo-American law place a premium on "clear acts of possession" — manifestations of dominion sufficiently obvious to be noticed by members of the pertinent community. The most important of these doctrines doctrine is the first-occupancy principle, mentioned above, which

assigns ownership of certain objects to the persons who first visibly take hold of them. Another is adverse possession, under which a trespasser can acquire title to land only if his long-continued wrongful occupancy is, among other things, sufficiently "notorious." The best explanation of such rules, Rose contends, is that, by quickly and reliably assigning resources to determinate people, they minimize rent-seeking (p. 16). To be sure, they sometimes result in the allocation of resources to persons not in the best position to put them to productive use, but as long as the entitlements are clear-cut, such misallocations can be easily corrected through voluntary bargains. This explanation, which emphasizes the economic advantages of consensus concerning who owns what, also helps explain the willingness of courts, when deciding cases on the edges of these doctrines, to defer to customary understandings within particular communities regarding what counts as possession. The overall effect of the argument is to reinforce the economists' contention that, when resources are scarce, private property rights — and the particular rules adopted by courts to administer the private-property regime — operate to maximize the aggregate welfare of the members of a society.

This sort of uncritical acceptance and amplification of the classical theory is, however, unusual in the book. More often, Rose seeks to modify or refine the standard story in some way. A fine illustration is her highly original essay on the history of water law (pp. 163-96). In both England and the United States, Rose points out, sharp-edged property rights in water did not emerge in the way or at the time the classical theory would seem to predict. Indeed, doctrinal development in this field seems sometimes to have moved backward, as when the English courts abandoned relatively clear-cut, stage-three-style doctrines (such as the rules in force before the middle of the eighteenth century, favoring "ancient" uses, or the regime advocated by Blackstone and others in the late eighteenth century, favoring the first person to put water to productive use) and replaced them with more vague, stage-two-style doctrines (such as the muddy "reasonable-use" rule). What, according to Rose, explains these and other deviations from the expected pattern? The answer is not, as one might expect, that the classical story is wrong. Rather, she argues, each regime was indeed optimal during the period in which it emerged, but for reasons not noticed by the developers of the classical theory. For example, the first-occupancy rule — employed in England in the late eighteenth century and in Massachusetts for much of the early nineteenth century — was well suited to the kinds of disputes that dominated those jurisdictions at those times, in which the plaintiffs typically complained that the defendants, by constructing dams downstream, had thrown water back upon the plaintiffs' water wheels. In such situations, it was most

important that the disputants know their rights; if, by chance, the first appropriator was not the most efficient user of the water, the other party could and should buy him out. By contrast, when the paradigmatic disputes involved defendants who either diverted water from a stream or cast debris into it, thereby injuring many riparian owners downstream, lawmakers, sensing that collective-action problems would prevent Coasean bargains, adopted the reasonable-use rule, which, in view of the public-goods characteristics of moderately scarce water used primarily for power instead of consumption, approximated the efficient solution. The principal lesson of the analysis is that each of the legal regimes adopted over the centuries to handle conflicts over water actually made good economic sense.

A more far-reaching and overtly iconoclastic argument of the same general form dominates *The Comedy of the Commons* (pp. 105-62). The essay begins with a demonstration that English and American law contains three mechanisms by which the "public" — either the sovereign or, more interestingly, an unorganized nongovernmental "public" — can assert or acquire property rights: the "public trust" doctrine, in which the community as a whole is deemed to have inalienable rights to certain resources; the related doctrines of prescription and implied dedication, which grant the public permanent easements in lands over which they have long regularly traveled; and the doctrine of customary rights, which converts ancient customary practices (such as conducting an annual festival on particular lands) into permanent property rights. She then carefully traces the history of the application of these doctrines to a variety of important resources: roads, navigable streams, tidal lands, town greens, and so on. The classical theory, she argues convincingly, cannot account for the persistence or expansion of these doctrines. Classical theorists' only justification for public property is that negative externalities resulting from uncontrolled private exploitation of resources sometimes can be efficiently controlled only through government ownership and management, and that argument fails to make sense of many of the historical examples she catalogues. But this powerful critique does not prompt Rose, as one might expect, to repudiate the wealth-maximization hypothesis. On the contrary, she offers a clever explanation of why these doctrines and practices, upon reflection, operated and continue to operate to make everyone better off. Certain resources, she argues, are most valuable when used by an indefinite and unlimited number of persons. When those resources are also physically susceptible of monopolization by private persons — i.e., when "holdout problems" are likely to prevent voluntary transfers of those resources from individuals to the collectivity — then semi-compulsory uncompensated acquisitions of the resources in question by the

public make good economic sense. Lo and behold, the three Anglo-American public-property doctrines, as refined by the courts during the nineteenth and twentieth century, take hold in precisely — and only — those circumstances.

The cumulative effect of arguments of this sort is a picture of property law similar to those supplied by Richard Posner[10] and Robert Ellickson,[11] but more supple and nuanced. Like Posner and Ellickson, Rose seems (most of the time) to believe that legal rules *ought* to be shaped to maximize aggregate consumer welfare and that Anglo-American property law in fact has done a remarkably good job of achieving that end — but she is less wedded than either author to the notion that, except in unusual circumstances, a crisp system of individual private rights best manages scarce resources. This flexibility enables her to be even more sanguine than her comrades in arms — even more adept at providing plausible economic rationales for the oddities of our current legal system.

In the end, however, Rose's explanations, ingenious as they may be, are not fully convincing. Three related difficulties afflict each of her arguments in this vein. First, even her nuanced narratives cannot account for all of the case law in the fields she considers. In water law, for example, many courts defied her guidelines for efficient adjustment of riparian rights. Confronted with disputes involving the diversion or pollution of streams, they sometimes opted not for the reasonable-use rule — Rose's preferred solution — but for either prescriptive easements[12] or the natural-flow rule.[13] For backflow cases, Rose advocates the prior-appropriation doctrine, but the courts did not always agree.[14] In general, antebellum water law was substantially more chaotic than Rose would have us believe.[15] Her account of the development of public property rights is similarly flawed. Although her analysis goes far toward explaining and justifying the expansion during much of American history of the public-trust and public-prescriptive-easement doctrines, it fails to makes sense of the fact that the doctrine of customary rights was sharply curtailed by American courts beginning at least as early as the antebellum period.[16]

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10. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 3.1 (3d ed. 1986).

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

12. *See, e.g.,* Bullen v. Runnels, 2 N.H. 255, 257 (1820).

13. *See, e.g.,* Sackrider v. Beers, 10 Johns. 241 (N.Y. 1913).

14. *See, e.g.,* Gilman v. Tilton, 5 N.H. 231, 232-33 (1830).

15. *See* William Fisher, The Law of the Land: An Intellectual History of American Property Doctrine, 1776-1880, at 239-54 (1991) (unpublished Ph.D. dissertation, Harvard).

16. Rose acknowledges American courts' hostility to the doctrine. Pp. 122-28. However, she does not attempt to reconcile that fact with her analysis of the economic merits of the doctrine. Pp. 124-27.

Second, the judges and legislators who shaped these doctrines described their objectives in terms that do not align closely with Rose's analysis. To be sure, they included among their goals things that Rose would find congenial — facilitating commerce, fostering the productive use of resources, etc. — but they also thought they were advancing other ends as well, such as protecting the *rights* of individual landowners against potentially tyrannical majorities and rendering decisions that fairly reflected the equities of individual controversies.[17] It would be surprising if these aspirations did not often prompt them to deviate from the criterion of economic efficiency.

Finally, Rose fails to identify the mechanism by which the law came to embody economic wisdom. Other historians and economists, convinced that there is an economic logic to legal history, have suggested several possible mechanisms. Each of their theories, however, suffers from serious difficulties. Rose's account, instead of addressing those problems, exacerbates them.

The simplest and most commonly held view is exemplified by Richard Posner's work. The reasons that the common law has evolved in the direction of economic efficiency, Posner contends, are: (1) most economic principles are "commonsensical";[18] (2) common sense in the United States in the nineteenth century, when the common law acquired much of its modern shape, was especially favorable to economic principles;[19] (3) most judges have been shrewd enough to realize that the legislature is better equipped than the judiciary to (re)distribute wealth, and that, accordingly, they should devote their energies to shaping rules that increase the size of the pie to be distributed;[20] and (4) judges' aspirations to render "fair" decisions did not conflict with that commitment, because most conceptions of fairness are, at bottom, disguised intuitions concerning economic efficiency.[21] An obvious objection to this argument is that lawmakers often say they are trying to achieve things — such as the protection of "rights" for their own sake — that have long been thought to conflict with the pursuit of economic

17. *See, e.g.*, Tyler v. Wilkinson, 24 F. Cas. 472 (C.C.D.R.I. 1827) (No. 14,312).

18. *See* POSNER, *supra* note 10, § 8.1, at 232.

19. *See id.* § 8.1-.4. The "educated classes" accorded considerable importance to economic growth, and many were steeped "in a laissez-faire ideology based on classical economics." *Id.* § 2.2, at 21.

20. *See id.* § 8.1, at 232. For recent defenses of the view that Posner attributes to judges, see A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 110-13 (1983); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

21. *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972) ("Because we do not like to see resources squandered, a judgment of negligence has inescapable overtones of moral disapproval, for it implies that there was a cheaper alternative to the accident.").

efficiency.[22] A less obvious objection, developed by Gillian Hadfield, is that judges do not encounter a random sample of disputes, and thus, even if they were exclusively concerned with the maximization of wealth, the biases in the information they receive would prevent them from achieving their goal.[23] Rose now supplies us with another reason to doubt the Posnerian mechanism: the legal rule that would result in the most efficient exploitation and management of a scarce resource, she persuasively argues, is often not at all "commonsensical" (p. 232). Indeed, most of the political theorists and economists who have hitherto discussed the rules pertaining to riparian rights, navigable waterways, roads, town greens, and so on have failed to discern the optimal solutions. It seems highly unlikely that busy judges, proceeding on the basis of intuition, could have done better.

An alternative mechanism might be derived from the recent work of Robert Ellickson. The informal, customary norms that arise in close-knit communities, Ellickson argues, often work remarkably effectively to maximize the welfare of the members of those communities. So, for example, the norms that evolved among nineteenth-century whalers and twentieth-century ranchers did a remarkably good job of minimizing the costs — "deadweight losses" and "transaction costs" — associated with conflicts over whales and the injuries caused by trespassing cattle.[24] By observing that judges, when shaping the common law, often defer to well-established, welfare-enhancing customs, one might — although Ellickson himself does not — seek to explain why common law doctrines of the sort charted by Rose seemed to evolve so nicely in the direction of allocative efficiency. This explanatory edifice would have several weaknesses, however, only two of which need be mentioned here.[25] First, Ellickson carefully and sensibly limits his argument to the informal norms developed by close-knit social groups, and many of the rules that concern Rose did not arise in such communal settings. Second, Ellickson also notes that his argument can explain at most the evolution of "workaday" norms (norms that regulate people's everyday affairs), not "foundational" norms such as the fundamental principles that protect persons and

22. *See supra* text accompanying note 17.

23. *See* Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583 (1992).

24. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW 184-206 (1991); Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83 (1989).

25. For others, see Robert Merges, *Among the Tribes of Shasta County*, 18 LAW & SOC. INQUIRY 299 (1993).

property;[26] the latter, of course, are precisely the kinds of norms with which Rose is concerned.

The third possible mechanism might be described as the natural-selection theory of common law development. Even if judges have no economic aptitude or aspirations, some economists have argued, the common law will gradually evolve in the direction of efficiency because disputants are more likely to litigate (and to request reformation of the extant rules) when those rules are inefficient than when they are already efficient.[27] The many difficulties associated with this argument need not detain us, because even the more enthusiastic proponents of the theory acknowledge that, for the evolutionary mechanism to work, at least three conditions must obtain: (1) both the plaintiffs and the defendants in a substantial proportion of the controversies that arise under a rule are "repeat players" with sufficient long-term stakes in the content of the rule to justify the expense of litigation; (2) transaction costs prevent the affected parties from "bargaining around" an inefficient rule; and (3) judges are not pursuing any objectives other than economic efficiency with enough vigor to swamp the mild pressure exerted by the differential pattern of litigation. In most of the fields of property law discussed by Rose, at least one of these conditions does not hold. In many of the areas (e.g., public prescriptive easements, adverse possession), affected parties tend not to be repeat players. In other contexts (e.g., controversies between adjacent riparian owners), transaction costs are low. Finally and most importantly, for the reasons sketched above, judges administering these fields have frequently sought explicitly to advance or respect noneconomic values.

In sum, the revisionist arguments deployed by Rose seeking to make economic sense of property laws that seem inconsistent with the classical story are clever and in some cases plausible, but she has not solved — and indeed may have amplified — important difficulties associated with the positive economic interpretation of the common law.

II. Rival Theories of Property

The classical theory, although certainly the most popular and probably the most powerful of the perspectives on property, is not, Rose insists, the only game in town. She devotes two of the essays

26. *See* Ellickson, *supra* note 24, at 283-84. For a criticism of this distinction, see Lewis A. Kornhauser, *Are There Cracks in the Foundations of Spontaneous Order?*, 67 N.Y.U. L. Rev. 647, 653 (1992) (book review).

27. A relatively simple argument of this general form is contained in Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. Legal Stud. 51 (1977). More complex and qualified versions are deployed in Paul Rubin, Business Firms and the Common Law (1983); Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. Legal Stud. 139 (1980).

in her book to the elaboration and partial defense of a dramatically different view: what she refers to as the theory of the "ancient constitution."

To understand the character and importance of Rose's argument, one needs some historiographic background. Beginning in the 1960s, two lines of innovative scholarship laid the foundation for a dramatic reassessment of the character of the American Revolution and indeed of the whole of American political history. First, philosophers, anthropologists, and historians of science began paying much greater attention to the ways in which ideological filters influence how people perceive and construct their social and physical environments.[28] Second, a group of British historians argued convincingly that the "Country" party in mid-eighteenth-century England derived many of its ideas from the venerable ideological tradition of classical republicanism.[29] Republicanism, as these scholars explicated it, revolved around the following propositions: active, altruistic involvement in public affairs is essential to a good life; to be an effective and responsible citizen, a man must be economically and psychologically "independent," which in turn requires that he own at least a modest amount of property and not have to rely on the monarch, or anyone else, for his livelihood; and a healthy polity embodying these ideals is delicate and easily infected by the diseases of "luxury," "corruption," and standing armies.[30] Observing that the same ideas figured prominently in the political discourse of the British North American colonies, a group of historians led by Bernard Bailyn, Gordon Wood, and J.G.A. Pocock invoked the new understanding of the mind-shaping power of ideology to mount a successful assault on the then-dominant interpretation of the origins of the Revolution.[31] To explain the break with England, they insisted, we must look not to the logic of Lockean liberalism or to the material interests of the Patriots,[32] but to how the ideology of republicanism caused the colonists to perceive the relatively innocuous initiatives of the British imperial authorities as fundamental threats to their liberties.

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28. *See, e.g.*, PETER BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1966); CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973); THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

29. *See, e.g.*, J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT (1975); CAROLINE ROBBINS, THE EIGHTEENTH-CENTURY COMMONWEALTHMAN (1959).

30. *See* POCOCK, *supra* note 29, at 361-422.

31. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); POCOCK, *supra* note 29, at 462-552; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969).

32. For expressions of these interpretations, see CARL BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS (2d ed. 1942); ARTHUR MEIER SCHLESINGER, NEW VIEWPOINTS IN AMERICAN HISTORY (1922).

This new reading of the Revolution was both powerful and suggestive. Alerted to the content and importance of classical republicanism, other historians began to see signs of its persistence into later periods. Jeffersonianism, the Jacksonian and Whig persuasions, the aspirations of antebellum working-class movements, and late nineteenth-century and early twentieth-century protest movements were all reread as avatars of the classical vision.[33] The net result was a conception of the overall shape of American political history radically different from the one that had prevailed during the previous generation. Where Louis Hartz and Daniel Boorstin had seen a stable liberal consensus established with the first settlements and continuing to the present, the revisionist historians saw a grand narrative of ideological struggle and transformation. A republican orthodoxy, they contended, had powered the Revolution and helped determine the original shape of the nation, but sometime between the drafting of the Federal Constitution and the end of the nineteenth century (exactly when was a matter of much controversy) it had been largely, though not completely, displaced by a liberal ideology. This ideology was less interested in civic virtue and political participation; more receptive to individualism, commerce, and capitalism; and more protective of private rights. Republicanism had not disappeared altogether, but it had become a suppressed, subordinate ideology.[34]

In the 1980s, an important group of law professors sought to extract from this new vision of American history lessons for their own fields. Some of these scholars argued that republicanism provides us conceptions of the good life and the good society superior to those supplied by liberalism and should prompt us to reconstruct several fields of contemporary doctrine. For example, cities and other fora for the exercise of citizenship should be accorded greater autonomy and power; businesses should be discouraged from moving their bases of operation when the result would be to disrupt local communities; group libel laws and limits on campaign contributions should not be deemed to violate the First Amendment; and courts should encourage legislatures to engage in empathetic

33. *See, e.g.*, LANCE BANNING, THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY (1978); DREW R. MCCOY, THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA (1980); HARRY L. WATSON, LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA (1990); SEAN WILENTZ, CHANTS DEMOCRATIC: NEW YORK CITY & THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850 (1984); THOMAS BROWN, POLITICS AND STATESMANSHIP: ESSAYS ON THE AMERICAN WHIG PARTY (1985); Lary May, *Movie Star Politics: The Screen Actors' Guild, Cultural Conversion, and the Hollywood Red Scare, in* RECASTING AMERICA: CULTURE AND POLITICS IN THE AGE OF COLD WAR 125 (Lary May ed., 1989).

34. For a fine sketch of the emergence of this view — and, in particular, of the controversy concerning the timing of the suppression of republicanism — see Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11, 19-20 (1992).

processes of rational deliberation.[35] Other scholars were less programmatic and invoked republicanism for heuristic purposes — as a generator of arguments we might consider, rather than as a blueprint for reform.[36]

In the past decade, the republican reconceptualization of American history and law has lost much, though not all, of its momentum. A growing group of historians has contended that it is misleading to describe our ideological history in terms of a struggle between two discrete worldviews — that Americans' political thought has been more creative and eclectic than such a narrative would suggest.[37] At the same time, political and legal theorists have become more sensitive to the unattractive features of the classical republican vision — its association with slavery, its pugnacious cast, its sexism, and its apparent incompatibility with cultural pluralism.[38] Proposals that we reformulate contemporary doctrines to track the republican outlook have, accordingly, become less common.

One of the causalities of these historiographic struggles was the clarity and coherence of our understanding of the outlook of the Antifederalists, the eclectic group who opposed the ratification of the Federal Constitution. Before 1965, when the Constitution was seen by most historians as the natural outgrowth of the same Lockean impulse that produced the Revolution itself,[39] the Antifederalists were generally seen as paranoid and short-sighted — "men of little faith," as Cecilia Kenyon called them.[40] By contrast, in Gordon Wood's great revisionist study of the founding of the nation, the Antifederalists were depicted as valiant, even heroic, champions of the dying ideology of classical republicanism, resisting the liberal innovations of the Federalists.[41] As the Bailyn-Wood-

35. *See, e.g.*, Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515-16, 1528-41 (1992); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 543-57 (1986); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682 (1988).

36. *See, e.g.*, Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 292-94, 314-15 (1989); William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1338-50 (1991).

37. *See, e.g.*, Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. Rev. 273 (1991); Hendrik Hartog, *Imposing Constitutional Traditions*, 29 WM. & MARY L. REV. 75, 77-78 (1987); James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9 (1987); Rodgers, *supra* note 34, at 34-38.

38. *See, e.g.*, Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988).

39. For the major exception, see CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

40. *See* Cecelia M. Kenyon, *Men of Little Faith: Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3d ser., 3 (1955).

41. *See* WOOD, *supra* note 31, chs. 10, 12.

Pocock reconceptualization has come under increasing attack, this image has blurred — to the point where, in Wood's most recent book on the Revolution, the Federalists have become the custodians of the republican outlook, while the Antifederalists appear as hardheaded, acquisitive, individualistic liberals.[42]

The third and fourth essays in Rose's book provide a novel perspective on these debates — not a dramatic reformulation, but a helpful set of adjustments. She begins with the shrewd observation that classical republicanism was just one variant of a general outlook toward politics, society, and property widely held by Western Europeans prior to the late eighteenth century (pp. 73-78). Commonly associated with the phrases, "ancient constitution" and "propriety," this outlook placed much stock in "long-standing ways of doing things, justified either by the sheer antiquity of practice or by the wisdom and suitableness that antiquity signifies" (p. 73). Hostile to the centralization of political power and to the equalization of individuals' fortunes and "privileges," this outlook championed "local particularism" — preservation of the powers and perquisites of the many social and political organizations that lay outside the control of the increasingly powerful European monarchs.

The American Antifederalists, Rose argues, were the carriers of this political tradition (pp. 85-92). Whereas the Federalists advocated the centralization of political power, the promotion of commerce, and secure private property rights of the sort that would facilitate commerce, the Antifederalists clung to an older set of values: localism, the importance of civic virtue, and "proper" property rights — i.e., holdings appropriate to each person's station and civic responsibility. In two senses, she contends, the Antifederalists "lost" (p. 85). First, the Constitution not only was ratified but became a sacred document, a central feature of Americans' self-conception. Second and less obviously, the outlook of Antifederalism has not figured significantly in our theories of either government or property. She argues, however, that the Antifederalist vision has had a little-noticed but powerful impact on American culture: it has found expression in and helped to sustain a strong tradition of political localism. Even today, we can "see a number of the Antifederalist attitudes and concerns in our local politics: the acceptance of community definitions of the rights and responsibilities of property, the concern for virtue and corruption, the possibility for personal participation or voice, the further possibility for choice through the 'exit' option" (p. 89). We would do well, Rose contends, to pay greater attention to the merits of these aspects of our political practice and to ensure that they endure.

42. *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 258 (1991).

In three respects, this modestly revisionist narrative is valuable. First, it helps bring back into focus our picture of the worldviews and legacies of Federalism and Antifederalism. All historical analogies have their limitations, but Rose's characterization of the Federalists as "monarchists" and the Antifederalists as defenders of the "ancient constitution" rings more true than any of the recent efforts to align the two groups with the categories of liberalism and republicanism. Rose's detailed account of the persistence of a tradition of localism also seems less pretentious and more illuminating than other historians' efforts to document the enduring power of the detailed ideology of civic humanism.

Second, by attempting less than the champions of republicanism, Rose's effort to harness history for normative purposes accomplishes more. Reminding us of the merits of localism is less grand, but more constructive, than invocations of James Harrington and the Commonwealthmen in reformations of contemporary constitutional or administrative law. To be sure, Rose sometimes stretches her points — as when she suggests that Americans have paid greater attention to questions of "virtue" and corruption when engaged in local politics than when participating in national elections (p. 87), or when she assures us that the ability of citizens to "exit" from their localities has operated historically as an effective check on oppressive or racist practices by municipalities (p. 90). These enthusiasms aside, however, Rose's retelling of the story represents a substantial advance.

Third, Rose has succeeded in her central ambition: to hold up a developed conception of property and its relationship to social and political life that can stand as a viable alternative to the classical utilitarian vision. She is correct that conceiving of "property as propriety" provides us a vantage point and basis for reform dramatically different from the orthodox perspective.

This third accomplishment comes at a cost, however. In her haste to deploy and accredit the Antifederalist vision, Rose brushes aside or ignores two other substantial theories of property that could have assisted her in her larger project of highlighting the contingency of the classical view. The first of these is the labor-desert theory. Originally developed by Locke and updated and modified by a variety of modern political and legal theorists, the labor theory centers on the notion that, by laboring upon an object or resource held "in common," a person acquires a natural property right in the thing with which he has mixed his labor — a property right that the state has a duty to respect and protect.[43] At two points, Rose turns

43. *See* JOHN LOCKE, *The Second Treatise of Government, in* TWO TREATISES OF GOVERNMENT ch. 5 (Peter Laslett ed., rev. ed. 1960) (1690); RICHARD A. EPSTEIN, TAKINGS (1985); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); Wendy J. Gordon, *A Prop-*

her attention to the Lockean theory; both times, she puts it down. In her book's opening essay, *Possession as the Origin of Property* (pp. 11-28), she briefly considers the labor theory as a possible explanation and justification for the common law rule awarding ownership to the first person to reduce a resource to "firm possession."[44] Two difficulties, she contends, prevent it from serving effectively in that capacity. First, it fails to explain why a laborer should be deemed to own his own labor and thus is incapable of explaining why labor upon an unowned object creates a property right rather than merely dissipating the laborer's energy (p. 11). Second, the theory contains no guidelines for determining "the scope of the right that one establishes by mixing the owned thing (one's labor) with something else" (p. 11). The other occasion arises in the course of a brusque review of Stephen Munzer's book, *A Theory of Property*.[45] Munzer argues that three principles shape American property law: "(a) preference satisfaction (that is, a combined version of efficiency and utility), (b) justice and equality, and (c) desert" (by which Munzer means primarily providing appropriate rewards to labor) (p. 51). What Munzer fails to recognize, Rose contends, is that principles (b) and (c) are, in truth, nothing more than derivatives of principle (a) (pp. 55-58). In particular, the proposition that a laborer deserves a reward "is an obvious corollary to a property regime that tries to increase the bag of goodies by encouraging the investment of effort and time" (p. 57). The labor-desert argument, in other words, fails to provide a normative criterion that is not ultimately reducible to wealth-maximization.

Two circumstances should make us hesitate before accepting Rose's dismissal of the labor-desert theory. First, countless judges and legislators have relied — and continue to rely — on it when shaping property rights.[46] Rose's excavation of the outlook of Antifederalism is inspired partly by the notion that a challenge to the classical theory of property is most likely to be effective if it can draw on elements of our own political and legal tradition; the same notion should make her pause before discarding a nonutilitarian theory of property rights that has already played a substantial role in the shaping of our law. Second, when polled concerning the ideal criterion of distributive justice, the large majority of Americans (and Western Europeans) offer some variant of what social psychologists call the "equity theory" — the gist of which is that each per-

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erty Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property, 102 YALE L.J. 1533 (1993).

44. The explanation she prefers is sketched *supra* on pp. 1779-80.

45. STEPHEN R. MUNZER, A THEORY OF PROPERTY (1990).

46. *See, e.g.*, Harper & Row, Publishers Inc. v. Nation Enters., 471 U.S. 539, 562-63 (1984); International News Serv. v. Associated Press, 248 U.S. 215, 236, 239-40 (1918); *In re* Marriage of Graham, 574 P.2d 75, 76-77 (Colo. 1978).

son deserves a share of the fruits of a collective enterprise proportionate to his or her contribution to the venture.[47] That outlook is sufficiently close to the Lockean vision that, again it would behoove Rose to pause before tossing Locke aside.

To be sure, the difficulties toward which Rose points are substantial — too substantial to be definitively resolved here — but Rose is wrong to suggest that they are obviously insurmountable. The justification for the notion that a person owns his own labor might be derived from a variety of sources: what Locke calls "natural reason";[48] Rawls' technique of "reflective equilibrium";[49] or perhaps, indirectly, through rumination concerning the immorality of slavery, the system in which a person's right to her own labor is most explicitly denied. The famous proportionality problem — the difficulty of determining the scope of the property right produced by labor upon an unowned object[50] — might be addressed through an elaboration of the Lockean "sufficiency" proviso: the notion that one cannot through labor acquire a natural property right unless "enough, and as good [is] left in common for others."[51] Finally, the proposition that one can finds strains of utilitarianism in Locke's theory is correct (and familiar),[52] but Rose improperly infers from that fact that the labor-desert argument has no independent normative power. Rose goes astray partly by assuming too quickly that one deserves a reward only for a certain type of labor: "labor that produces goods or services that people *want*" (p. 57). Property theorists working this vein have proposed a variety of other criteria for identifying work of the sort that can underlie natural property rights: the sheer expenditure of time and effort;[53] engaging in activities that one would prefer not to do and others would prefer not to do;[54] and "creative" or "transformative" la-

47. For a discussion of equity theory, see MORTON DEUTSCH, DISTRIBUTIVE JUSTICE: A SOCIAL PSYCHOLOGICAL PERSPECTIVE 9-10 (1985). For a summary of the empirical work showing the popularity of the theory among contemporary Americans and Western Europeans, see J. Stacy Adams & Sara Freedman, *Equity Theory Revisited: Comments and Annotated Bibliography, in* 9 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 43, 47-49 (Leonard Berkowitz & Elaine Walster eds., 1976).

48. *See* LOCKE, *supra* note 43, at 303.

49. *See* JOHN RAWLS, A THEORY OF JUSTICE 20, 48-51 (1971).

50. For the classic illustration of this difficulty, see NOZICK, *supra* note 43, at 257-60.

51. LOCKE, *supra* note 43, at 306. For some work in this general vein, see Gordon, *supra* note 43.

52. *See, e.g.*, ALAN RYAN, PROPERTY AND POLITICAL THEORY 14-48 (1984).

53. Locke himself seems to have had such a criterion in mind, or at least he seems uninterested in whether the laborer's activity produced things that other people (as opposed to the laborer himself) valued. *See* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 305 (1988).

54. *See id.* at 302.

bor.[55] Adoption of one of these alternative interpretations would make the argument far less vulnerable to assimilation by the utilitarian juggernaut. To repeat: the point is not that the difficulties in the Lockean vision identified by Rose are easily remedied, but rather that they are not necessarily insoluble and that there are good reasons — reasons with which Rose herself should agree — for continuing to work on them.

The other potentially powerful theoretical rival of the classical theory of property is the personality or "personhood" theory of property. Its core is the notion that persons need stable control over certain objects and a certain amount of resources in order fully to be able to realize their selves, and the law ought to ascertain and respect, in the form of property rights, persons' claims to those resources. Less well grounded in Anglo-American political theory and legal practice than the labor-desert theory, this argument nevertheless has a respectable theoretical lineage (originating, as it does, in the writings of Kant and Hegel), many manifestations in modern property doctrine, and some formidable contemporary exponents.[56] Yet it does not figure at all in Rose's book. Again, if her ultimate goal is to destabilize — by revealing the contingency of — the classical, utilitarian vision, she would do well not to neglect such potentially powerful allies.

III. Forms of Norms

In the lexicon of contemporary American legal theory, "rules" are crisp legal norms that direct a decisionmaker's attention to a few pertinent aspects of a dispute and thereby enable her to resolve the controversy in a determinate, predictable manner.[57] "Standards" are more open-ended legal norms that instruct a decisionmaker to consider many aspects of a dispute and compel her to exercise discretion in determining the relative weight of those aspects and thus how the controversy should be resolved.[58]

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55. *Cf.* Lawrence C. Becker, *Deserving To Own Intellectual Property*, 68 Chi.-Kent L. Rev. 609 (1993) (emphasizing the distinction between ordinary labor and creative, original labor).

56. The best analyses of the origins and implications of the theory are Margaret Jane Radin, Reinterpreting Property (1993) and Jeremy Waldron, The Right to Private Property (1988).

57. An example would be a rule prescribing that, if a person dies intestate survived by a spouse and two children, his or her spouse shall receive one-half of the decedent's real and personal property, and the children each shall receive one-quarter. For a more complex but similarly crystalline rule, see Mass. Gen. L. ch. 190, §§ 1-3 (1994).

58. An example would be a norm directing a judge, when apportioning marital property to spouses who are obtaining a divorce, to consider:

> "the duration of the marriage . . . the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties . . . the contribution or dissipation of each party in the acquisition, preser-

A substantial body of literature explores the relative merits of these two forms.[59] Rules, it is often said, have two principal advantages. First, by providing private parties reliable guidance concerning their rights and duties, rules facilitate planning and trade and discourage rent seeking, thereby enhancing productivity and economic efficiency. Second, by diminishing the discretion exercised by judges and the corresponding dangers of bias and corruption, rules increase the chances that like cases will be decided alike and that elected representatives will determine the principles by which we are governed. Rules, in other words, facilitate democracy and fidelity to the "rule of law." Standards, by contrast, are said to have three advantages. First, they contribute to economic efficiency by encouraging foolish and ignorant parties (who, in a society dominated by hard-edged rules, are likely to fear exploitation by the shrewd and informed) to get involved in economic activity — to invest in companies, buy houses, and so on. Second, by avoiding the inevitable over- and under-inclusiveness of rules, standards make possible more precise implementation of substantive policy goals. Third, standards foster a deliberative or conversational approach to dispute resolution in which judges make their decisions only after consulting among themselves and with the disputants concerning the most just outcome — a method that fosters both contextually sensitive rulings and normatively attractive modes of governance.

In *Crystals and Mud in Property Law* (pp. 199-202), Rose reflects on how this debate illuminates — and is illuminated by — the content and history of property doctrine. As is true of most of her essays, Rose approaches the topic from several disparate angles. The most predictable of the perspectives is normative: Rose seeks to add to the evaluative literature summarized in the preceding paragraph (p. 202). Her contributions in this vein are only modest. She nicely summarizes but does not materially refine the debate concerning the relationship between the forms of norms and economic efficiency, and she devotes little attention to the noneconomic dimensions on which rules and standards differ. Even

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vation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit."
UNIF. MARRIAGE & DIVORCE ACT § 307(a), 9A U.L.A. 238-39 (1987) (alternative A of § 307).

59. The principal pertinent works are: MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15-63 (1987); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991); Frank H. Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System,* 98 HARV. L. REV. 4 (1984); Duncan Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685 (1976); Margaret Jane Radin, *Reconsidering the Rule of Law,* 69 B.U. L. REV. 781 (1989); Pierre Schlag, *Rules and Standards,* 33 UCLA L. REV. 379 (1985); Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards,* 106 HARV. L. REV. 22 (1992).

in 1988, when the essay was first published, one could find more rich treatments of the subject elsewhere, and today one would certainly not look to *Crystals and Mud* for an answer to the question whether rules or standards are better.

More intriguing is Rose's discussion of the didactic messages conveyed by the two types of norms. Building on the seminal article by Duncan Kennedy, Rose observes that rules and standards express radically different conceptions of ourselves and the ways in which we wish to associate with each other. Rules connote or celebrate individualism, separateness, liberalism, predictability, and security. Standards connote or celebrate community, connectedness, altruism, flexibility, and vulnerability. It is far from clear, Rose argues convincingly, that the two types of norms in fact advance the ideals with which they are conventionally associated. Thus, rules, by facilitating commerce, may foster "sociability" and community more than standards, and it is no accident that philanthropy flourished during historical periods dominated by rules and the related ideology of classical liberalism. By contrast, as the drafters of the UCC recognized, within a community whose members share customs and a vocabulary, standards — like "commercial reasonableness" — may result in more predictable decisionmaking than crystalline rules. However, the fact that the two types of norms do not necessarily serve the values with which they are commonly associated only enhances their rhetorical importance. Our endless debate over rules and standards reflects and helps sustain a profound and unresolved tension in our aspirations: Do we "view friends, family, and fellow citizens from the same cool distance as those we do not know at all," or do we "treat even those to whom we have no real connection with the kind of engagement that we normally reserve for friends and partners?" (p. 225). In presenting the topic this way, Rose draws upon and amplifies one of the central arguments of the original incarnation of Critical Legal Studies.[60]

The most original and provocative of the views Rose takes of the rule/standards debate concerns its historical dimension. Few fields in property law, she argues, have been dominated for long by one form or the other. The more typical pattern is an "oscillation": sharp-edged rules gradually corrode, giving way to vague standards, which in turn are replaced by a new regime of rules that corrode, and so forth. For example, in the mid-twentieth century, the harsh but crisp doctrine of caveat emptor as applied to sales of houses was overrun by the muddy warranty of habitability, which imposed substantial but vague duties on both the builders and the sellers of

60. *See, e.g.*, KELMAN, *supra* note 59, at 3; Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 211-12 (1979).

homes. Private parties briefly were able to reinstitute a crystalline regime through contractual waivers of this new warranty, but the courts, by refusing to enforce such warranties, opted for standards (pp. 202-03). Similar trends can be seen in the laws governing mortgages, the recording of land titles, and rights to continued flows of sunlight (pp. 201, 203-08). What accounts for these oscillations? Rose speculates that "endogenous" forces may be at work. In other words, each form triggers behavior that precipitates a swing to the other form. Rules, precisely because of their clarity, tend to get "overused" (like a field held in common), thereby diminishing their reliability and prompting us to turn to standards. Rules also commonly result in visible and galling "forfeitures" — losses or penalties disproportionate to the lapses that occasioned them — the unfairness and inefficiency of which also inclines us to turn to standards. Eventually, however, the unpredictability and expense of standards makes us yearn for a return to rules.

The observation that our reliance upon rules and standards to manage our affairs has changed over time seems entirely right, but the particular story Rose tells is misleading in two related respects. First, during the twentieth century, most fields of property law — and most other fields of American law as well — have witnessed not an oscillation between rules and standards, but a long slide into the pit of standards. The erosion of the hard-edged Rule Against Perpetuities by "reform" statutes of one sort or another;[61] the repudiation of the principle of caveat lessee in landlord-tenant law in favor of the muddy implied warranty of habitability;[62] the allocation to judges of ever greater discretion for dividing spouses' property upon divorce;[63] the proliferation of vague exceptions to landowners' rights to exclude unwanted entrants;[64] the abandonment of the sharp-edged tripartite classification of tort plaintiffs injured on private land — invitees, licensees, and trespassers — in favor of a generic negligence doctrine;[65] the growing importance of the doctrines of promissory estoppel and quasi-contract;[66] the deterioration of the principle that a seller of goods has no affirmative duty to disclose information to the buyer;[67] the erosion of discretion-reducing guidelines in the law of child custody in favor of the generic

61. *See* ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY 143-48 (1993).

62. *See* Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503 (1982).

63. *See, e.g.*, UNIF. MARRIAGE & DIVORCE ACT § 307(a), 9A U.L.A. 238-39 (1987) (alternative A of § 307).

64. *See, e.g.*, State v. Shack, 277 A.2d 369 (N.J. 1971).

65. *See, e.g.*, Rowland v. Christian, 443 P.2d 561 (Cal. 1968).

66. *See* GRANT GILMORE, THE DEATH OF CONTRACT 55-85 (1974).

67. *See* E. ALLAN FARNSWORTH, CONTRACTS §§ 4.9-.15 (2d ed. 1990).

standard of the "best interests of the child";[68] and the growing popularity of discretionary "balancing tests" in constitutional law[69] all reflect shifts in the direction of standards. There are exceptions to be sure, such as the repudiation of the negligence principle (qualified by the fellow-servant rule) in favor of worker's compensation systems for dealing with industrial accidents or the revival of criminal sentencing guidelines. But they are just that: exceptions. Even the fields on which Rose concentrates seem, on reflection, inconsistent with her "oscillation" thesis. For example, during the twentieth century the *law* governing sales of homes has steadily become increasingly muddy; the brief retreat in the direction of rules that Rose emphasizes did not result from any adjustment in the governing doctrine but from the efforts of private parties to employ contractual waivers to override that doctrine — efforts the courts soon rejected.

Recognition of this trend exposes the other weakness in Rose's account: her reliance on "endogenous" factors to explain the relationship over time of rules and standards. To make sense of the overwhelming recent trend in the direction of "mud," one needs to consider forces larger than those to which Rose directs our attention. What those forces might be is far from clear. The consolidation and ascendancy, through Progressivism and then the New Deal, of an ideology — associated primarily but not exclusively with the Democratic Party — more receptive to altruism and "safety nets" than individualism and self-reliance? The logic of cultural hegemony, in which "soft" legal rules are used to disguise such things as the steadily widening gap between the rich and the poor in the United States?[70] The success (or abandonment) of the effort — described by P.S. Atiyah in his related study of the development of contract law in England — by late-nineteenth-century lawmakers to use crystalline legal forms to instill in the populace the habits of forceful productive activity necessary to a free market?[71] The "needs" or institutional concomitants of post-industrial welfare capitalism? Much work and thought would be required to assess these hypotheses. The only thing that seems certain is that Rose's account is inadequate.

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68. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH 234-85 (1985); Fran Olsen, *The Politics of Family Law*, 2 LAW & INEQ. J. 1 (1984).

69. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987). *But cf.* Sullivan, *supra* note 59, at 60-62 (disagreeing with the conventional view on this score).

70. *Cf.* Jay M. Fineman & Peter Gabel, *Contract Law as Ideology, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 373, 381-85 (David Kairys ed., rev. ed. 1990).

71. *See* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979). Rose takes note of this hypothesis on p. 213.

Conclusion

Property and Persuasion deserves careful attention. Wide-ranging, well informed, highly original, playful yet serious, it will provoke many intense reactions. Under critical pressure, not all of Rose's arguments hold up, but many do. More importantly, the book should stimulate a series of conversations that will deepen our understanding of property and law.