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**NATURAL PROPERTY RIGHTS AND PRIVATIZATION: A
COMMENT ON PROFESSOR ROSE**

ERIC R. CLAEYS*

Professor Rose is to be commended for her choice of topic.¹ Practically, international development policy is important, and theoretically, it raises issues that American property scholarship tends to overlook. Property scholars, quite naturally, tend to gravitate toward the hard chestnuts that test the limits of any theory of property—nuisance, the lines between public and private property, commons and anti-commons problems, and so forth. In these areas, again quite naturally, scholars take for granted that they can fine-tune the relations between competing stakeholders without affecting the basic function of property—to secure the connection between what one reaps and what one sows. That most urgent function reasserts itself, by contrast, when countries embark on, to use Professor Rose’s term, a program of “privatization.”² It is always useful for a community of property scholars to get back to basics, and Professor Rose is to be commended for encouraging us to do so.

Professor Rose is also to be commended for making many constructive suggestions about how development policy might avoid some obvious pitfalls in its protection and regulation of property. To take just a few examples, I find quite sensible many of her suggestions about regulating common carriers,³ protecting drug patents,⁴ and property’s tendency to civilize or undermine civil society.⁵ The following musings should thus not be confused for serious disagreement with the main intentions of her paper.

Nevertheless, I do wish to raise several questions about different aspects of Professor Rose’s argument. In general, my questions come from my vantage point—specifically my familiarity with natural-law/natural-rights property theory from the period Rose describes as “old . . . going back to the eighteenth

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1. See Carol M. Rose, *Privatization—The Road to Democracy?*, 50 ST. LOUIS U. L.J. 691 (2006).

2. *Id.*

3. See *id.* at 707–10, 719.

4. See *id.* at 715–16.

5. See *id.* at 718–20.

century and before.”⁶ (In general, throughout this Comment, I will refer to these thinkers as “classical liberals.”) In some cases, I read many of the early moderns, like Smith, Locke, and their American students differently from Professor Rose, and draw correspondingly different conclusions about what those students might have to say about similar problems in Third World development now. In others, I suspect that natural-law/natural-rights theory provides a useful heuristic for considering more deeply than Professor Rose does some of the theoretical issues raised by her survey.

Before proceeding, let me hasten to add that this Comment will raise more questions than it answers, and suggest more than it proves. I am not now ready to answer some of the questions I will raise with appropriate academic rigor, and even if I could, this Lecture is Professor Rose’s stage, not mine. Even so, I offer these suggestions in the spirit of focusing more precisely on the urgent questions Professor Rose has raised.

I. NATURAL-LAW/NATURAL-RIGHTS PROPERTY THEORY

Let me begin by briefly recounting the basics of natural-law/natural-rights theory as it relates to property. Natural-law/natural-rights theory presumes that the overriding objects of civil society are to secure and to order the conditions in which citizens can enjoy a moral state of freedom known as “natural liberty.” As explained by James Wilson, a drafter of the Constitution, member of the first Congress, and early Associate Justice on the U.S. Supreme Court, “natural liberty” refers to a person’s right “to exercise his power for his own happiness . . . in such a manner, and upon such objects, as his inclination and judgment shall direct; provided he does no injury to others; and provided more publick [sic] interests do not demand his labours.”⁷ Natural property rights are the rights to which a citizen is entitled after accounting for the limits imposed by her responsibility to do no injury to others and to labor for overriding public interests. Generally, “property” recognizes in owners a zone of free action as wide as possible after accounting for these moral obligations. The width of the free action maximizes owners’ control over their assets. Such control makes owners secure that they can use their assets for their own chosen ends and needs. That security, in turn, encourages owners to invest their time, talent, and industrious passions into their assets—in a word, to sow in the expectation that they may reap. Thus, when John Locke traced the moral foundations of property in his *Second Treatise*, he insisted that “God gave the world . . . to the use of the industrious and rational, (and labour was to be his title to it),”⁸ and

6. Rose, *supra* note 1, at 700.

7. 1 JAMES WILSON, *Lectures on Law*, in *THE WORKS OF JAMES WILSON* 227, 242 (Robert Green McCloskey ed., 1967).

8. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 34 (C. B. Macpherson ed., 1980) (1690) (emphasis omitted).

that “[t]he measure of property nature has well set by the extent of men’s labour and the conveniencies of life.”⁹ U.S. Supreme Court Justice William Patterson explained, in the 1795 case *Van Horne’s Lessee v. Dorrance*, perhaps the most comprehensive American restatement of natural-rights takings principles:

Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labor and industry.¹⁰

Under the law of nature, then, “property” refers to the web of rights and obligations that maximizes such freedom and incentive to labor. By contrast, “regulations” refer to the positive-law rules that define, protect, and order property. They protect property where it deserves to be protected by natural law. They may circumscribe property uses that must be limited out of respect for other natural rights. Or, they may re-order property where doing so redounds to the joint benefit of all affected owners.¹¹

However, even if we assume that natural-rights principles are good enough for government work, this portrait still begs one huge practical problem: How should the positive laws of property be written in cases in which two competing uses of property collide? Different authorities have stated the answer in different ways, but the basic claim was the same: Since property’s natural end is to secure to a person the fruits of her industry, in cases in which property rights do not compete with other legitimate goods, the positive law must tap and encourage that industry as much as possible. In the easy cases, property rules must simply guarantee to each owner a zone of control and free action proportionate to the asset in question. In the hard cases, non-owners may plausibly claim to be stakeholders in someone else’s asset. In those cases, depending on how the asset is used, the law may reverse the basic presumption that the owner has general dominion over the property to encourage and secure the contributing labor of the stakeholder.

This last point is subtle but important. John Locke made it in an oft-overlooked passage of the *Second Treatise*. Locke concluded that “numbers of men are to be preferred to largeness of dominion” because goods take their “value from human industry.”¹² Important here: “[T]hat prince, who shall be so wise and godlike, as by established laws of liberty to secure protection and

9. *Id.* § 36, at 22 (emphasis omitted).

10. 2 U.S. (2 Dall.) 304, 310 (1795).

11. See Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 886–92 (2004); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1566–74 (2003).

12. LOCKE, *supra* note 8, at § 42.

encouragement to *the honest industry of mankind*, against the oppression of power and narrowness of party, will quickly be too hard for his neighbours.”¹³ Although the nuances of Locke’s argument deserve closer study, Locke is clearly suggesting that the proper object of civil legislation is to make the difficult practical judgments to determine, for any species of property, which combinations of rights and duties, among which owners and other lesser stakeholders, will best promote “the honest industry of mankind.”¹⁴ Now, this general command begs all sort of difficult questions—practical, empirical, and conceptual—as Locke himself admitted when he suggested that only a “wise and godlike” prince was capable of writing the necessary laws. Be that as it may, Locke pointed here toward the general principle by which natural-law/natural-rights property resolves hard questions about the creation and delineation of property.

II. PRIVATIZATION

This recapitulation prompts three doubts about Professor Rose’s paper. The first is a challenge to Professor Rose’s “typology of privatizations.”¹⁵ “Privatization” is a slippery term. Rightly, Professor Rose recognizes that she speaks “[v]ery roughly” when she uses the term “privatization.”¹⁶ She is, after all, trying to take the term as it comes in practice and render it as coherent as theory allows. While international-development specialists may know privatization when they see it, they may not be able to define “privatization” rigorously enough to satisfy the expectations of property theorists. Because the natural-law/natural-rights approach defines what “property” and its “regulation” mean with more specificity, that approach may be able to provide a more focused account of what “privatization” is and when it is appropriate than many other viable theories of property.

It helps to unpackage the relevant issues in three steps. The most fundamental question asks whether a certain asset is properly classified as private property, a public commons, or private property *publici juris*, that is to say, affected with a public interest. Natural-law/natural-rights theory does not favor making every asset into a private asset. Privatization is the right strategy when private ownership helps to connect industry to its fruits and therefore to unleash the value of labor. But a more public solution makes sense when all can use the asset in common to apply labor on their more private assets. Blackstone illustrates the tension. On one hand, he famously described “property” as that “sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of

13. *Id.* (emphasis added).

14. *Id.*

15. Rose, *supra* note 1, at 694–98.

16. *Id.*

any other individual in the universe.”¹⁷ On the other hand, in a less-familiar passage, he also recognized that “there are some few things, which notwithstanding the general introduction and continuance of property, must still unavoidably remain in common . . . [including] light, air, and water”¹⁸ Read as broad guides rather than literal rules, Blackstone’s contrasts follow the value of labor. Consider water as just one example, and leave room for exceptions. In a temperate jurisdiction, like Blackstone’s England, water has many common uses, including recreation and especially transport. In an arid jurisdiction, water is relatively useless for transport and other common functions; it therefore makes sense to switch to a prior-appropriation regime—a privatizing regime—to encourage the labor needed to appropriate scarce water.

These variations make quite tricky the phenomena Professor Rose describes as “divestiture” and “enablement.”¹⁹ In practice, divestiture is usually sound, for many developing countries must transfer competitive assets out of state ownership to gain the benefits from labor and industry. In theory, however, regulators must at least consider the possibility that a particular state-owned asset ought properly to remain in common hands; if so, then they must consider the subsidiary question whether it is more expedient for the state to own it or to assign it to a common carrier regulated *publici juris*. These fine questions make vexing the regulation of telecommunications and waterworks, two examples considered by Rose.²⁰ Similar problems arise with “enablement” when a state must draw the line between private and public in intellectual property. When American patent law treats useful, novel, and non-obvious inventions as private property for a limited term,²¹ it tacitly assigns to the commons things that are not inventions and inventions that are obvious, not useful, or not novel. Copyright assigns to the private sphere the expression of ideas but reserves to the commons pure ideas.²²

Once assets have been classified as private, public, or *publici juris*, the next inquiry asks whether any third parties have rights strong enough to count as “property” in those assets. Adverse possession illustrates here. Normally, as Professor Rose recognizes, titling is an extremely simple way of “recognizing” private property.²³ But what of adverse possession? On one hand, it encourages “honest industry” by reallocating title from one who is not mixing her labor with her land to one who is; on the other, it seems to ratify

17. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 2 (facsimile ed. 1979) (1765–69).

18. *Id.* at 14.

19. Rose, *supra* note 1, at 696–98.

20. *See id.* at 696.

21. *See* 35 U.S.C. § 101 (2000).

22. *See* 17 U.S.C. § 102(b) (2000).

23. *See* Rose, *supra* note 1, at 694.

theft. Locke's "wise and godlike" prince earns his keep here by relying on observation and experience to determine which particular regime, if applied generally, is most likely to encourage industry.

Once ownership rights have been recognized and distributed, the last inquiry asks in what circumstances private property is properly "regulated." This inquiry goes to the heart of the "deregulation" Professor Rose mentions. Again, in practice, most "deregulation" in developing countries is sensible, because deregulation usually refers to the process by which the state lifts controls on competition in industries that are competitive. In the first third of the twentieth century, American courts used natural-law/natural-rights principles to inform substantive due process doctrine and to invalidate many Progressive and New Deal programs that required firms to acquire certificates of convenience and necessity to compete in competitive businesses.²⁴ American legislators and regulators repudiated similar programs in the 1970s and 1980s as academic economists encouraged deregulation.²⁵ To the extent that developing countries are lifting similar controls on similarly competitive businesses, it is eminently sensible to "privatize" by "deregulating."

But in natural-law/natural-rights parlance, it *is* legitimate to "regulate" to prevent owners' use rights from doing what Wilson called "injury to others." On this ground, many health, safety, and environmental protections are sensible regulations for protecting the public, understood as the collective individual and natural rights of its citizenry. That broad description of ends leaves hard questions of means—what combination of abatement, taxes, fines, tradeable pollution permits, and other tools best prevent the harms in question. Health, safety, and environmental restrictions also raise sticky issues between nations because they can be co-opted for domestic protectionist reasons, as Professor Rose aptly notes.²⁶ But a rigorous theory of property must be able to mark off which kinds of "regulation" are forbidden, which are acceptable, and how the acceptable ought to proceed consistent with the overriding purposes of property ownership.

III. OBLIGATIONS IN THE STATE OF NATURE AND IN CIVIL SOCIETY

My second doubt about Professor Rose's analysis relates to her use of Locke, and particularly Locke's state-of-nature theory. After surveying the lessons from several decades of privatization, she concludes that they tend to call into doubt Locke's arguments that property is pre-political: that it has "priority" because it "alone predates, and justifies government."²⁷ In

24. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 275–77 (1932).

25. See Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1329–30 (1998).

26. See Rose, *supra* note 1, at 695–96.

27. *Id.* at 701.

particular, she suggests, a titling law “is an assurance of property that does *not* predate the state”; it is instead “a *creature* of the state,” and it “can scarcely be justified on the classic ground that it simply reinforces a form of pre-existing property that is somehow natural to humans.”²⁸

Although it would take several articles to confirm them, I have strong doubts that this description is fair to Locke or other classical-liberal property theorists. To begin with, this argument misunderstands how Locke (and other classical liberals) understood “nature.” At bottom, “nature” referred to the external world separate from man. Quite often, it referred to the passions and faculties that motivate and limit human action. At the top, “nature” set the prescriptive standards for human happiness and excellence that human reason can discern after observing how humans behave and become happy. These senses are confused, for instance, when Professor Rose cites Locke (and Elinor Ostrom) loosely to support the “easy assumption” that “privatization protects ‘natural’ pre-existing property rights.”²⁹

To be fair to Rose and others, early moderns and their American students often shifted quickly from one of these meanings to the other, and it can be hard for people not steeped in the natural-law/natural-rights tradition to keep up with the variations. Even so, I strongly doubt that Locke, his contemporaries, or his American students referred to “property” as “natural” in the sense that people develop property institutions as inevitably and universally as human nature drives babies to learn to walk. Nor did they mean it in the sense that the positive law ought to legislate and reinforce customary patterns of use and ownership. Rather, “nature” here meant: *If* a society wants to generate laws and cultural norms that will insure the happiness of its citizens as far as is practically possible, it ought to write property laws that maximize the return that individual industry gets from property. This sense is fairly clear in the writings of many American jurists (though, again, there was considerable variation among them).³⁰ To take just one example, as James Wilson put it, “True it is, that, by the municipal law, some things may be prohibited, which are not prohibited by the law of nature; but equally true it is, that, under a government which is wise and good, every citizen will gain more liberty . . . by the limitation of other men’s freedom, than he can lose by the diminution of his own.”³¹ For Wilson, “nature” sets standards for a sound understanding of freedom and happiness; it sets a prescriptive standard that citizens may or may not choose to attain.

28. *Id.* at 703–04.

29. *Id.* at 701–02.

30. To appreciate some of the variations, consider Philip A. Hamburger, *Natural Law, Natural Rights, and American Constitutions*, 102 YALE L.J. 907, 922–37 (1993), and the original sources cited therein.

31. 2 WILSON, *supra* note 7, at 587–88.

From this perspective, legal titling programs do not refute the arguments of Locke and other state-of-nature theorists as much as Professor Rose suggests.³² It does not matter whether titling laws pre-date the state. It *does* matter that a person's natural right to labor takes priority to and sets a standard for judging the actions of the state. Titling laws deserve respect because they secure the right to labor in land and other important assets.

To be sure, the understanding presented here can be challenged. Perhaps the rights people enjoy in the state of nature are morally irrelevant to the rights they enjoy in civil society, as Liam Murphy, Thomas Nagel, and Andre Marmor argued recently.³³ While I cannot address this argument fully here, let me say that, to explore it fully, one would need to be careful how to portray the relation between the state of nature and civil society in different natural-law/natural-rights teachings. At one extreme, some natural-law/natural-rights theorists—contrary to Rose's generalizations, and contrary to Murphy, Nagel, and Marmor's portrait of Locke—did not follow state-of-nature teachings. For them, man was a political being, he was naturally inclined toward political society, and such a society could be judged by the extent to which it secured his natural rights with its positive laws and its law enforcement. Thus, Vermont jurist Nathaniel Chipman held that “[t]he right of property itself, still remains founded in natural principle[s],” and the positive laws “serve only to bring the subjects of property within those principles.”³⁴

In the middle, some natural-law/natural-rights theorists viewed political society as a bargain to get out of the state of nature—and then concluded that the society's laws needed to be understood to give citizens the benefit of that bargain. The most prominent authority to take this view was Blackstone, who defined “privileges” and “immunities” as civil laws designed to secure to individuals the greatest share of rights to which they are naturally endowed as is consistent with the requirements of organized political and social life:

[P]rivate immunities . . . will appear, from what has been premised, to be indeed no other, than either that residuum of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals.³⁵

32. See Rose, *supra* note 1, at 700–01.

33. See, e.g., LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP* 74 (2002); Andre Marmor, *On the Right to Private Property and Entitlement to One's Income*, 2 (UNIV. OF SOUTHERN CAL. LAW SCHOOL PUBLIC POLICY RESEARCH PAPER SERIES NO. 04-15, 2004), <http://ssrn.com/abstract=567784>.

34. NATHANIEL CHIPMAN, *PRINCIPLES OF GOVERNMENT: A TREATISE ON FREE INSTITUTIONS* 75 (Burlington, Va., Edward Smith 1833).

35. 1 BLACKSTONE, *supra* note 17, at 125. See generally Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents: Reevaluating the Patent “Privilege” in Historical Context* (unpublished manuscript, on file with the Saint Louis University Law Journal).

At the other extreme, John Locke certainly *did* contrast the state of nature to civil society. It would take elaboration more detailed than I can provide here to sort through the relevant interpretations and criticisms of Locke's defense of property. My sense, however, is that the lessons one learns about property in the state of nature are considerably more relevant to civil law than Professor Rose's portrait suggests. The main thesis of Chapter 5 of the *Second Treatise* is that the world is for the "use of the industrious and rational," not for "the fancy and covetousness of the quarrelsome and contentious,"³⁶ because "labour indeed . . . puts the difference of value in everything."³⁷ This lesson is made clearest in the state of nature, where customs, institutions, and laws do not complicate analysis, and Locke's treatment clearly indicates that the labor theory of value is directly ethically binding in lands and societies still governed by the state of nature. Locke, however, is more circumspect with respect to civil society. He anticipates the criticisms laid out above, for he acknowledges that people can "by consent . . . set out the bounds of their distinct territories, and agree on limits between them and their neighbors, and by laws within themselves, settle[] the properties of those of the same society."³⁸ As a result, he anticipates Rose (as Rose has acknowledged elsewhere), for he concedes that the laws of nature may not be directly binding in civil society, not if the citizens consent to a different set of laws.³⁹

Even so, the state of nature's teachings is still relevant to civil society. They are relevant morally, for the principles evident in the state of nature are principles that a humane people would want to consider while determining to what laws they will consent. They are also relevant for reasons of political expediency and justice. Locke alludes to the expediency when he suggests that "that prince who shall be so wise and godlike as by established laws of liberty to secure protection and encouragement to the *honest industry* of mankind against the oppression of power and narrowness of party will quickly be too hard for his neighbors."⁴⁰ That prince's laws should protect and encourage property not because doing so is morally required, but because doing so increases national power. Later, however, he suggests that the protection of property is required by justice:

[W]herever the power, that is put in any hands for the government of the people, and the preservation of their properties, is applied to other ends, and

36. LOCKE, *supra* note 8, § 34, at 21–22.

37. *Id.* § 40, at 25 (emphasis omitted).

38. *Id.* § 38, at 24 (emphasis omitted).

39. See Carol M. Rose, *Property as Keystone Right?*, 71 NOTRE DAME L. REV. 329, 335 (1996).

40. LOCKE, *supra* note 8, § 42, at 26 (emphasis added).

made use of to impoverish, harass, or subdue them to the arbitrary and irregular commands of those that have it; there it presently becomes *tyranny*.⁴¹

More needs to be said to tease out how much Locke thinks it is advantageous for society to protect property, how much it is morally obligatory for it to do so, and how much of this is just hortatory. Nevertheless, one way or another, Locke's teachings are still relevant for organizing a civil society. More generally, Rose and other contemporary property theorists need to be more sensitive not to conflate "natural" with "universal" or "customary" in the writings of Locke and other natural-law/natural-rights theorists.

IV. PROPERTY, MORALITY, AND SOCIETY

My last reservation relates to a series of observations that Professor Rose makes about property and political morality. Rose considers three separate arguments that, in different ways, analyze how property shapes culture and politics. One is the "distraction" argument: "[I]f property can be made secure and trade made easy, citizens are likely to become more interested in making money, and correspondingly less interested in killing one another for religious or clan-related or nationalistic reasons."⁴² Another is the "symbolic" argument, that property provides "an education in what it means to be a rights-bearer."⁴³ The last is the "civilizing" argument: "Property and commerce are central rights because they educate people in the patterns of give-and-take on which democracy depends."⁴⁴

Professor Rose deserves credit for considering these possibilities seriously, for they are often overlooked in contemporary property scholarship. Different political regimes expect different things from property. Feudal English courts construed the estates and future interests in land to preserve land as a tool for keeping dynastic families together, while early-modern English courts reconsidered the same estates and interests with a view toward promoting commerce. By the same token, property ownership influences the general culture. Political theorist Tom West likes to point out that the United States has relatively few deep disputes about property ownership in large part because Americans who do not now own property expect that they can get it by working.⁴⁵ The American Founders focused on such connections between law and culture. Many organized religions do so now in their social teachings, including the Catholic Church of which Saint Louis University is a part.

41. *Id.* § 201, at 102.

42. Rose, *supra* note 1, at 710.

43. *Id.* at 714.

44. *Id.* at 718.

45. See THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA 44–46 (1997).

Comparatively speaking, however, contemporary property scholarship does not engage these themes with the same interest.

I have one minor qualification and one more serious reservation about Rose's treatment of these cultural themes. The qualification is this: When Rose cites counter-examples against the general relations she suggests, she is not saying anything that would have surprised Locke, Montesquieu, or any other of the major classical liberals. Rose cites hard cases in which property disputes trigger contentious and intractable political conflicts: fights over the allocation of public water in Bolivia, racial discrimination against ethnic Chinese in Indonesia, rent-control fights in the United States, and fights over intellectual property here and internationally.⁴⁶ I read Rose not to be suggesting that these exceptions undermine the general rule that ownership improves culture, but rather that this rule needs to be understood reasonably. I doubt any major classical liberal thinker would have disagreed. For example, Publius expected Americans to be largely free from deep divisions on the basis of religion, language, history, or nationality,⁴⁷ but he also described property regulation as "the most common and durable source of factions."⁴⁸

So understood, both Rose and major classical liberal thinkers call for laws, constitutional provisions, and political institutions to act as counter-weights against some of the more likely sources of division over property. As Rose suggests, it is probably impossible to eliminate all political factions associated with patents or common-carrier utilities. Because owners' sunk costs are high, consumers have strong incentives to lobby for laws that drive owners to produce at the (low) marginal cost of production, not at a price that recoups owners' investments. Politically speaking, this problem probably cannot be eliminated, only mitigated. One part of the solution is to institute constitutional provisions guaranteeing protection for utilities and patents. In the United States, courts have used due process and takings principles to do just that.⁴⁹ However, as Gregory Alexander suggests in a forthcoming book, the better solution may be to change the political culture: If the culture does not respect property, political parties and legislators will flout constitutional guarantees anyway.⁵⁰ But since it is usually impossible to reform culture from the top down, it is crucial for policy makers to identify the political and legal institutions that best appreciate property rights, and then shift control over

46. See Rose, *supra* note 1, at 708–711, 715–16.

47. See THE FEDERALIST NO. 2, at 5–6 (John Jay) (Clinton R. Rossiter ed., 1961).

48. THE FEDERALIST NO. 10, at 45, 47 (James Madison) (Clinton R. Rossiter ed., 1999).

49. See *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 601–19 (1944); *Smyth v. Ames*, 18 S. Ct. 418, 424, 426 (1898) (protecting utilities against confiscatory ratemaking); *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 210–22 (1843) (protecting patent holders against substantive changes to their patent rights).

50. See Gregory Alexander, *The Global Debate Over Constitutional Property* (June 2006) (unpublished manuscript, on file with the Saint Louis University Law Journal).

precarious forms of property to those institutions. Brian Levy and Pablo Spiller have highlighted this approach in a book-length collection of studies of telecommunications sectors in different countries.⁵¹ Their case studies show how different institutions may be better or worse equipped to provide the credible commitments telecommunications companies require, depending on how well-educated their officers are, on how strong political parties are, how strong the rule of law is, and so forth.⁵²

My reservation is this: I strongly doubt that any of the major classical liberals gave property as much priority as Professor Rose's treatment suggests.⁵³ They agreed that property deserved to be protected. In their time, they agreed that it needed to be protected far more than it had been protected in a world dominated by kings, the feudal system, and guilds. In our time, they would probably agree with libertarians and libertarian-conservatives that property should be protected more than it is under current law.

Even so, I wonder whether it is helpful or accurate to say, as Professor Rose does repeatedly, that the major classical liberal thinkers gave property "priority" over other rights. The American Founders who were so enamored of property also were enamored of using moral philosophy and religion to inculcate the principles and habits of republican virtue. One can see as much in the Northwest Ordinance, which legislated on behalf of the Northwest Territories: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."⁵⁴ The same Adam Smith who wrote *The Wealth of Nations*⁵⁵ also wrote *The Theory of the Moral Sentiments*, the first sentence of which reads: "How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it."⁵⁶ The same can be said of Locke. True, John Locke is most famous for his discourse on property in the *Second Treatise*. But this justification comes after the *First Treatise*, where "the positive [l]aws of the [s]ociety" are "made conformable to the [l]aws of [n]ature, for the public good," which is defined explicitly in reference to "the good of every particular

51. REGULATIONS, INSTITUTIONS, AND COMMITMENT: COMPARATIVE STUDIES OF TELECOMMUNICATIONS (Brian Levy & Pablo T. Spiller eds., 1996).

52. See generally *id.*

53. See Rose, *supra* note 1, at 701 (challenging property's "centrality"); Rose, *supra* note 39, at 333 (challenging property's status "as the linchpin, the pivot, the central right").

54. An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio, 1 Stat. 50, 52 (1789).

55. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (William Benton, pub. 1952) (1776).

56. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 9 (D. D. Raphael & A. L. Macfie eds., 1976) (1759).

[m]ember of that [s]ociety, as far as can by common [r]ules, it can be provided for."⁵⁷ Locke also wrote *Some Thoughts Concerning Education*, which instructs parents how to educate their children (men *and* women) to be self-restrained, generous, just, and courageous.⁵⁸ He also wrote *The Reasonableness of Christianity*, which taught that reason and revelation complement one another in teaching men the same set of earthly duties.⁵⁹ Most important, modern scholars tend to forget that Locke influenced not only secular Enlightenment intellectuals, but also clergy, who then taught their congregations in England and especially in America.⁶⁰

Again, these reservations do not detract from any of Professor Rose's specific arguments about the problems property creates. But they do call into question whether those thinkers expected property to carry the weight Professor Rose suggests when she reads them to give property "priority over other rights."⁶¹ To go by the Northwest Ordinance, the early Congress put its bets on "the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected."⁶² Similarly, while Locke has been read for a long time in a manner that stresses the acquisitive materialism in his thought, ultimately he grounds the basis of civil government in "men being all the workmanship of one omnipotent, and infinitely wise maker . . . [a]nd being furnished with like faculties, sharing all in one community of nature."⁶³ Civil equality—and republican government—become possible only when "there cannot be supposed any such *subordination* among us, that may authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for our's [sic]."⁶⁴

If the Northwest Ordinance and these passages of Locke are reliable guides, international-development specialists had better be leery of relying too much on property rights and institutions to moderate politics in developing countries. Property rights and property-respecting institutions may be necessary, but they may not be sufficient. Property cannot do its work unless a nation embraces in its laws and in its culture a basic respect for civil and

57. JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 92, at 228 (Peter Laslett ed., 1960) (1698).

58. See JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION (Ruth W. Grant & Nathan Tarcov eds., 1996) (1693).

59. See JOHN LOCKE, THE REASONABLENESS OF CHRISTIANITY: AS DELIVERED IN THE SCRIPTURES §§ 241–43 (John C. Higgins-Biddle ed., 1999) (1695).

60. See Thomas G. West, *Vindicating John Locke: How a Seventeenth-Century 'Liberal' Was Really a Social Conservative*, FAMILY RESEARCH COUNCIL, Jan. 10, 2006, <http://www.frc.org/get.cfm?i=WT01F1>.

61. Rose, *supra* note 1, at 701.

62. An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio, 1 Stat. 50, 52 (1789).

63. LOCKE, *supra* note 8, § 6, at 9.

64. *Id.*

religious equality. Property may unleash acquisitive passions that roil a nation's politics or enervate its culture. The major classical liberal thinkers were keenly aware of these dangers, and considered seriously how social instincts, moral duties, and organized religion might serve as counterweights to property's atomizing tendencies. Although more would need to be said to trace out how these thinkers understood the relations among property, society, and morality, we must be careful not to overstate the extent to which these thinkers emphasized property.