

# THE LAW OF PROPERTY IN VIRGINIA SCHOOL PERSPECTIVE

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## I. INTRODUCTION

Richard Epstein's paper explores the importance of time — both backward and forward — in shaping substantive and procedural rules, both at common and at public law, with specific application to the law of property. In particular, Epstein emphasizes the significance of time-related uncertainty, with its attendant transaction costs, in establishing particular judicial solutions, to problems concerning the acquisition of property, the limitations of action, and the disposition of property in the future.

Central to Epstein's analysis is the positive assertion that the law of property, both at common and at public law, is driven by an economic-efficiency objective (Kaldor-Hicks without actual compensation) and the normative judgment that this objective is socially desirable. Insofar as efficiency clashes with rights (and the requirement of corrective justice) the former is seen, justifiably, to prevail over the latter, at least with respect to the law of property. With this paper, the metamorphosis of Epstein from libertarian to utilitarian ideology is completed almost as if the Editorship of *The Journal of Legal Studies* carries with it the wealth maximization mantle of Judge Richard Posner.

In this commentary, I shall first distinguish sharply between the concepts of liberty and Pareto optimality, and so demonstrate their essential incompatibility in a society composed of individuals with potentially meddlesome preferences. Secondly, I shall subject the utilitarian efficiency calculus, developed by Epstein, to the subjectivist critique of the Virginian school of political economy, which suggests that the Posner/Epstein approach is more ambiguous than its advocates suppose, and that it fails to discriminate effectively between higher-level and lower-level efficiency considerations. Thirdly, I shall direct attention to the transaction-cost issues raised by Epstein's paper, suggest an analytical framework appropriate for their evaluation and indicate some pitfalls to be avoided in their use as a discriminant in the comparative analysis of legal institutions.

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## II. RIGHTS VERSUS EFFICIENCY

Epstein, until recently, has stressed the importance of libertarian values — and thus the primacy of individual rights — in his normative analysis of the law. There are traces of libertarian ideology in the paper here reviewed — especially in the discussions of first possession and of alienability — but the shadow of efficiency stalks even these important remnants of a discarded philosophy. Because rights conflict with efficiency in important respects, Epstein's switch in favor of the latter carries with it important implications for the evaluation of the law of property.

Efficiency rests entirely upon consent among uncoerced individuals (at least when actual rather than potential compensation is required) and, as such, was long regarded as being compatible with a system dedicated to the maintenance of individual rights. Such complacency was disturbed, however, in 1970 when Sen demonstrated<sup>1</sup> that a condition of minimal libertarianism is incompatible with the weak Pareto condition, even for a social-decision mechanism that does not require strict transitivity of preferences and independence of irrelevant alternatives, as was required by Arrow for his social-decision mechanism. Although Sen's example is somewhat artificial in that rights are not assigned and thus exchange possibilities are disallowed, the logic of his proof has not been challenged successfully in a large literature of subsequent debate.

Sen's proof involved the specification of a social-choice function ( $F$ ) that was always required to accommodate the following conditions:

1. Condition  $U$  (unrestricted domain): The domain of  $F$  includes all logically possible  $n$ -tuples  $\langle R_1, \dots, R_n \rangle$  of individual preference orderings over  $X$ .
2. Condition  $P$  (weak Pareto principle): For any  $x, y$  from  $X$ , if  $x P_i y$  for all  $i$ , then  $x P y$ .
3. Condition  $L$  (minimal libertarianism): There is at least one pair of persons decisive both ways over at least one pair of alternatives each, i.e., for each  $i$  there is a pair of alternatives in  $X$  ( $x_i, y_i$ ) such that  $x_i P_i y_i$  implies  $x_i P_i y_i$  and  $y_i P_i x_i$  implies  $y_i P_i x_i$ .

Sen demonstrated the impossibility of such a social-choice function even in the limited case of two individuals (Man 1 and Man 2) and two pairs of alternatives ( $x, y$ ), and ( $z, w$ ) respectively, with  $x = z$  for analytical convenience. Assume that Man 1 prefers  $x$  to  $y$  and  $y$  to  $w$ , while

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1. See C. Rowley, *Liberalism and Collective Choice: A Return to Reality?*, MANCHESTER SCHOOL, Sept. 1978, at 224-251; Rowley, *Collective Choice and Individual Liberty*, 30 ORDO BAND 107 (1979).

Man 2 prefers  $y$  to  $w$  and  $w$  to  $z$  ( $=x$ ). Both individuals thus evidence transitive preferences. By Condition  $U$ , their preference orderings are in the domain of the social-choice function. By Condition  $L$ ,  $x$  must be preferred to  $y$  and  $w$  must be preferred to  $x$ . However, by Condition  $P$ ,  $y$  must be preferred to  $w$ . A choice function for the society, as prescribed by Sen, therefore, does not exist.

The particular configuration of preferences outlined in Sen's proof turns out to be meddlesome and it is this characteristic that sets the libertarian and Pareto conditions in conflict with each other. Sen illustrates this by reference to a social decision concerning the book 'Lady Chatterley's Lover'—namely, whether it should be read by Mr. Lascivious, or by Mr. Prude or not at all. Although Mr. Lascivious would like to read it, rather than let it go to waste, his first preference is to have Mr. Prude read it. Although Mr. Prude's first preference is for it to go unread, he prefers to read it himself rather than for Mr. Lascivious to be further corrupted. Thus, they both agree that the book should be read by Mr. Prude in preference to Mr. Lascivious, even though the former does not want to read the book and the latter does want to read it.

Sen's impossibility theorem can be avoided only by limiting the domain of social choice to exclude 'private' choices, or by overriding efficiency in favor of rights or by overriding rights in favor of efficiency. Otherwise, the social-choice function will exhibit incoherence when confronted with just those difficult cases that its advocates had believed it could resolve.

It might be thought that the introduction of rights in association with alienability opportunities via exchange would eliminate any conflict between rights and efficiency. Not so. Sadists and masochists entering freely into Pareto-preferred coercive contracts advance the efficiency cause; but not the libertarian. Slavery contracts between those with appropriate preferences of demand and supply augment Pareto efficiency. They do so at a great cost to liberty.

Rights to land and property, including rights to restrict alienability, derived on the basis either of first possession or of freely contracted exchange, are central pillars of the libertarian society<sup>2</sup> as are rights to inheritance on the precise terms of the last will and testament of those who transfer ownership at death. Inevitably, such rights limit the ability of those now living to increase efficiency in the utilitarian sense via uncon-

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2. See R. NOZICK, ANARCHY, STATE AND UTOPIA, (1974).

strained exchange transactions. Evidently, some individuals endowed with rights in property may not be motivated by wealth-maximizing objectives (though definitionally they must maximize utility in the wider sense). Consequential wealth losses to society will flow from such institutional and behavioral characteristics. But a liberal society is not dedicated necessarily to the maximization of wealth. "Accumulate, accumulate; that is Moses and all the prophets" may dominate the utilitarian calculus, but its momentum may not be sustained through the libertarian alternative.

Epstein is entitled, of course, to his normative stand in favor of the utilitarian efficiency objective. He may be correct in his positive assertion that the law of property reflects the efficiency calculus. Judgment on this latter issue, however, is more difficult than Epstein acknowledges. It will be the assertion of this commentary that Epstein's hypothesis has not yet been put to an appropriate empirical test, if indeed such a test is feasible from a scientific viewpoint.

### III. OF EFFICIENCY

Epstein evaluates alternative sets of legal rules and procedures, concerning limitations and perpetuities, against the standard of utilitarianism (roughly equivalent to Paretian efficiency buttressed by a potential compensation principle). Although his paper in no sense is empirically oriented, Epstein pursues an essentially objectivist approach to this concept, implying that "efficient" outcomes exist independently of the process of their generation.

Thus, parties to potential exchanges, themselves rational maximizers of expected utility, may fail to reach the presumed identifiable efficiency frontier. "Gains from trade" may remain at the conclusion of the bargaining process. Resources may remain in uses that yield relatively lower values than might be obtained elsewhere. Transaction costs, which impede efficient outcomes in specified institutional frameworks, are more or less objectively identifiable and are to be overwhelmed by outside intervention (e.g., by the public law). Epstein's approach to all these aspects conforms to the methodology of conventional welfare economics, which evaluates exchange on the basis of outcome rather than process efficiency.

Efficiency is viewed radically differently through the subjectivist-con-

tractarian perspective of the Virginian school of political economy.<sup>3</sup> If the only source of valuation of assets or resource claims is the revealed choice behavior of parties to actual or potential exchange, external observers like Epstein simply cannot determine whether observed trades fall short of or exceed some idealized efficiency norm. Within the institutional setting specific to an exchange relationship, the absence of consummated exchange demonstrates that the asset involved remains in its most highly valued use. "Efficiency," *given the institution*,<sup>4</sup> is ensured as long as all relevant parties are free to engage or not in the exchange mechanism.

It may seem that the contractarian reconstruction, as above outlined, is a tautology, at least where agreements are reached freely in the absence of force and fraud. Buchanan has argued forcefully that the contractarian notion of efficiency is not a tautology even though outside observers cannot test objectively for its presence.<sup>5</sup> In his view, the agreement test for efficiency may be elevated to the stage of institutions or rules, thus treating institutionally constrained allocative outcomes as second-order events.<sup>6</sup> Certainly, there is nothing unique about lower-order outcomes, even given initial endowments, once higher-level institutional outcomes are subjected to contractual adjustment. In the absence of transaction-cost impediments to higher-level adjustment, Buchanan asserts that there is no meaning to the term "allocative efficiency" under the subjectivist-contractarian perspective.<sup>7</sup> In essence, whatever exists must be presumed to be efficient.

The notion that what exists is efficient, given institutional constraints, is a logical implication of the axioms of rational behavior. Rationality surely implies that utility-maximizing individuals will fully exploit all available gains from trade via mutual interactions. If transaction costs impede such exploitation, then it must be assumed that such exploitation is not mutually beneficial within the system under consideration. For transaction costs reflect opportunities foregone, which must be weighed

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3. See J. BUCHANAN, *COST AND CHOICE* (1969); Buchanan, *Rights, Efficiency, and Exchange: The Irrelevance of Transactions Cost*, in *LIBERTY, MARKET AND STATE: POLITICAL ECONOMY IN THE 1980S* 92 (1986) [hereinafter cited as Buchanan, *Rights, Efficiency, and Exchange*].

4. See Buchanan, *Rights, Efficiency, and Exchange*; Stubblebine, *On Property Rights and Institutions* in *EXPLORATIONS IN THE THEORY OF ANARCHY* 39 (G. Tullock ed. 1979).

5. See Buchanan, *Positive Economics, Welfare Economics, and Political Economy*, 2 *J.L. & ECON.* 124 (1959).

6. See Buchanan, *Rights, Efficiency, and Exchange*;

7. See *id.*

against any potential gains from trade. Even where individuals find themselves trapped in an evident prisoners' dilemma, the fact of their entrapment suggests that any potential gains from cooperation are overwhelmed by the transaction costs that would be required to escape.<sup>8</sup> In this sense, conventional welfare economics, which ignores transaction costs in its prescriptive thrust for gross gains-from-trade solutions, is categorically misconceived.

In recognizing this institution-specific logic, contractarians avoid the tautological implications of a single-layered analysis by elevating normative considerations to a higher, constitutional level which encompasses decisions among alternative institutional constraints. At this level, contractarian specialists center attention upon the nature of transaction costs in the extant environment and upon comparative transaction costs in alternative institutional settings. The role of the political economist in such comparative institutional analysis is restricted to discovering potential changes in rules that might yield net gains-from-trade. Such rule changes ideally become hypotheses subject to the contractual test of Wicksellian unanimity, modified as necessary by side payments designed to compensate those who otherwise would lose out and thus veto efficiency—enhancing adjustments in institutional constraints.

It might be inferred (upon occasion is inferred) that such meta-level analysis does not evade the tautological trap. If changes in rules offer net gains in efficiency, surely utility maximizing individuals would already have embraced them. In my view, this stretches the equilibrium concept beyond acceptable limits. Perfect knowledge is a chimera that has plagued welfare economics throughout its existence despite an abundant literature on the cost of search and on information as an economic commodity. Individuals may well be uninformed about the transaction-cost implications of alternative systems. Indeed, where constitutional change is involved, "rational ignorance" suggests that they should invest minimally in information. By reducing the cost of search, political economists play a productive role in political market intermediation, even when the relevant transaction-cost information already exists. More creatively, the truly original political economists exercise an essentially entrepreneurial role dedicated to the design of cost-reducing institutional alternatives that are to be subjected to the consensus-efficiency test.

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8. *See id.*

There is nothing tautological about either of these potentially productive pursuits.

Three transaction-cost constraints, which serve as potential impediments to efficiency-enhancing constitutional reform, are to be distinguished in the contractarian approach, namely (i) those related to bounded rationality, (ii) those related to free-riding on public-good provisions and (iii) those related to strategic behavior in the post-contractual environment. These constraints impact somewhat differently on the borderline between lower-level and higher-level decision making, and pose distinct problems for efficiency-enhancing constitutional reform.

Problems of information communication,<sup>9</sup> based on bounded rationality rather than on strategic behavior, are among the most frequently discussed in the transaction-cost literature. At lower-level exchanges, bounded rationality is viewed as an efficient response to information costs in the extant institutional setting. Whether or not some shift in information communication constraints is Pareto-preferred at the higher-level exchange can be determined only by the consent of those directly involved, who must respond consensually to the advanced hypothesis and invest resources in eliminating disfavored lower-level constraints.<sup>10</sup> Handwringing by outsiders, be they Arrow-type social decisionmakers or Epstein-like observers of the judicial process, is more or less irrelevant unless existing constraints are artificially imposed by a non-consensual political process.

Transaction-cost impediments to efficient exchange manifest themselves differently in the free-rider prisoners' dilemma associated with public-good provisions. In such circumstances, at least in large-numbers settings, individuals perceive incentives to evade committing resources to efficiency-enhancing provisions because they cannot be excluded from the public good ultimately provided. Even where community-wide agreements are reached, incentives for individuals to renege are great. In such circumstances, conventional welfare economics swallows an apparent free lunch and draws out interventionist solutions in the form of publicly-enforced rules and even public provision.

Once again, reliance upon outside intervention rather than upon internally negotiated consensus is unacceptable in contractarian terms, as

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9. See Stubblebine, *supra* note 4, at 39-50.

10. See Buchanan, *Positive Economics, Welfare Economics, and Political Economy*, 2 J.L. & ECON. 124 (1959); Buchanan, *The Institutional Structure of Externality*, 14 PUBLIC CHOICE 69 (1973); Buchanan, *Rights, Efficiency, and Exchange*.

Buchanan has repeatedly emphasized.<sup>11</sup> If consent exists among all parties to the potential exchange (if necessary following side-payment commitments) that unfettered markets should give way to political-decision rules (or even to political institutions) the contractarian approach confronts an intractable real-world dilemma. Specifically, a distinction becomes essential between unanimity as a test for efficiency-enhancing trade and unanimity as a constitutional-decision rule for society.<sup>12</sup> If the former is required (whereas the latter, for calculus of consent reasons is not), an evident tension arises. Rule changes, universally endorsed in outline but legitimated in detail by a majority-vote, pluralist polity, may well coerce minorities at the lower level of exchange.<sup>13</sup> Yet, if the polity itself is the outcome of universal or near-universal consent, such lower-level coercion is endorsed by meta-exchange-level considerations. Outside observers should tread especially cautiously, therefore, in evaluating against an efficiency standard, decision rules collectively negotiated through a non-consensual political process.

The third transaction-cost impediment to efficient resource allocation is that of strategic post-contractual behavior opportunities available to potential contractors.<sup>14</sup> This impediment occurs not infrequently even in small numbers cases where contracts are difficult to specify precisely *ex ante*, are of lengthy duration and determine the allocation of relatively specific assets. In such circumstances, mutual trust is at a premium and, where it fails, efficiency may be dissipated in a prisoner's dilemma outcome. Once again, the lower-level-exchange outcome must be judged to be efficient, given the contract problems that co-exist. Higher-level adjustments, however, need not be ruled out in a counsel of despair.

For example, Axelrod has demonstrated, with a rare entrepreneurial facility, that stable rules may emerge offering relatively countless gains from trade where individual interactions are frequent and where no known end-game is discernible. Specifically, Axelrod has demonstrated via computer simulations that tit-for-tat strategies systematically applied are wealth-maximizing for each individual (indeed for any individual alone) in the prisoners' dilemma environment. Alternatively, Buchanan has emphasized the importance of nudging the matrix of gains and losses towards symmetry, where it is asymmetric in the initial position, as a

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11. Buchanan, *Rights, Efficiency, and Exchange*.

12. *See id.*

13. *See* Rowley, *Collective Choice and Individual Liberty*, 30 ORDO BAND 107 (1979).

14. *See* Cooter, *The Cost of Coase*, 11 J. LEGAL STUDIES 1 (1982).



means of securing efficiency-enhancing agreements in prisoners' dilemma situations. Both of these innovations are meta-level consent hypotheses with nontautological implications for efficiency.

#### IV. OF TRANSACTION COSTS

Conventional welfare economics has long emphasized the importance of transaction costs as a barrier to the attainment of allocative efficiency. Indeed, by grouping information costs, bargaining costs and other institutional impediments to free exchange under this umbrella term, transaction costs and inefficiency have almost been rendered synonyms in the first-best nirvana of the conventional literature. Those, like Posner, who are prepared to evaluate institutions by reference to their transaction costs *relative to other institutions*, undoubtedly have returned welfare economics somewhat from mystic unreality to the more recognizable reality envisaged in classical political economy. But, even they—and I include Epstein in their number—for the most part assert relative transaction cost values without the slightest attempt at measurement. Even in such experienced hands, therefore, transaction costs retain the flavor of “the wind blowing through the rocks at Delphi” as a basis for judging institutional efficiency.

It is to the great credit of the new institutional economics—“economics as it ought to be” in the words of Ronald Coase—that it has moved transaction costs center stage, empirically as well as conceptually, as a basis for comparative-institutional analysis. Transaction costs, in this approach, are viewed as the costs of specifying and enforcing the contracts that underlie exchange. As such, they comprise “all the cost of political and economic organization that permit individuals to capture available gains from trade.”<sup>15</sup> Contracts may be implicit or explicit. In either case, they must be defined and enforced. It is the cost of defining and enforcing them that make up transaction costs. In the view of North,<sup>16</sup> transaction costs principally arise from attempts to define and enforce rules that individuals are motivated to disobey. Individual rather than group self-interest is retained as the maximizing generative assumption of this approach. North views transaction costs as an increasing function of specialization in society.

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15. See North, *Transaction Costs, Institutions, and Economic History*, 1984 J. INSTITUTIONAL & THEORETICAL ECON., at 7-17.

16. See *id.*

Williamson,<sup>17</sup> one of the founding fathers of new institutional economics, suggests that the distinctive features of the transaction-cost approach are: (1) a set of behavioral assumptions that describe organizational man as cognitively less competent but motivationally more complex than his economic man counterparts; (2) a set of underlying dimensions that describe transactions in more micro-analytical detail than has previously been employed, of which asset specificity is the most distinctive and most important dimension; and (3) a comparative institutional strategy for evaluating alternative modes of organization whereby transactions are assigned to governance structures according to a transaction-cost-economizing criterion.

Transaction-cost economics places greater emphasis than neoclassical economics on the *ex post* or execution side of the contract, albeit from an *ex ante* viewpoint. Given that contracts are unavoidably incomplete, how are adaptive, sequential decisions implemented through time? The transaction becomes the basic unit of analysis; the focus is on alternative means of contracting-governance structures (in the sense of Williamson) that replace the abstract neoclassical firm with a more detailed set of organizational alternatives.

The new institutional economics is especially relevant to the issues addressed by Epstein. Long-term contracts executed under conditions of uncertainty, it is argued, do not fit comfortably into the classical-contracting scheme. Problems of several kinds arise. First, not all future contingencies, for which adaptations are required, can be anticipated at the outset. Second, appropriate adaptations may not be evident for many contingencies until the circumstances materialize. Third, where changes in states of the world are ambiguous, veridical disputes over state-contingent claims may arise, either genuinely, or for opportunistic reasons. Classical contracting may break down under such conditions.

In such circumstances, three alternative responses are available. The first is that such transactions are foregone entirely. The second is that such transactions are removed from the market and organized internally under common ownership, with the assistance of hierarchical incentive and control systems to overcome incipient principal-agent problems. The third is that a different contracting relation, which preserves trading via additional governance structures, must be devised. In resolving dis-

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17. See Williamson, *Transaction - Cost Economics: The Governance of Contractual Relations*, 22 J. L. & ECON. 233 (1979); Williamson, *Assessing Contract*, 1 J. L. ECON. & ORGANIZATION, 177 (1985).

putes and evaluating performance such a contracting relation would rely explicitly on third-party assistance in the form of contracted arbitration, court discretion or legislative intervention.

Where uncertainty is present in a non-trivial degree, much depends upon the extent to which bounded rationality, opportunism and asset specificity characterize the exchange relationship.<sup>18</sup> If parties are opportunistic, assets are specific, but agents have unrestricted cognitive competence, complex contracts are required to ensure the appropriate alignment of incentives, with all the relevant issues settled at the *ex ante* bargaining stage. If agents are subject to bounded rationality, assets are specific, but opportunism is absent, contractual promise with contract execution based upon efficient joint-maximizing behavior at contract-renewal intervals is possible. But if agents are subject to bounded rationality, given to opportunism, and assets are non-specific, parties have no continuing interest in each other's identity. In such a case, discrete market contracting is efficacious, albeit with court protection against fraud and egregious contract deceptions.

None of these cases, however, encompass the contract situations envisaged by Epstein. Epstein's conceptions are those in which bounded rationality, opportunism and asset specificity are joined. Planning is incomplete, because of bounded rationality. Unguarded promise predictably breaks down because of opportunism. Pair-wise identity of the parties matters because of asset specificity. This is the world of governance in which transaction costs exert non-trivial influence in determining the institutions of private ordering. It is also the world in which legislative interference in private contracting is likely, whether or not via a consensus calculus.

For Williamson, North and others working in new institutional economics, transaction costs are directly measurable in more or less objective terms. Indeed, such authors urge the introduction of transaction-cost evaluations as a mechanism for delineating efficient from inefficient institutions. This approach is fundamentally flawed. If, following Buchanan,<sup>19</sup> cost is recognized as a subjective concept, with choice-influencing cost an ephemeral *ex ante* visitor to the mind of the decision maker at the moment of choice alone, how can outside investigators pos-

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18. See Williamson, *Transaction - Cost Economics: The Governance of Contractual Relations*, 22 J. L. & ECON. 233 (1979); Williamson, *Assessing Contract*, 1 J. L. ECON. & ORGANIZATION, 177 (1985).

19. See J. BUCHANAN, *COST AND CHOICE* (1969).

sibly put numbers on them? The *ex post* objective cost data that they must employ are ultimately imperfect measures not of the determinants but of the consequences of choice. Such costs are irrelevant to the issue of contract, or of legislative efficiency in the sense of Epstein's normative analysis of the law.

#### V. OF TIME AND THE PAST: EPSTEIN ON FIRST POSSESSION VERSUS ADVERSE POSSESSION

The central theme of Epstein's elegant paper is the uncertainty cost of time in the common law. This cost creates pressures, he argues, both public and private, to ensure that legal rights and duties do not depend on events that are remote from the present, either past or future. These pressures often clash with the strict principles of corrective justice and give rise, at least in part, to the ungainly structure of legal doctrine. As such, the approach is *positive*, offering an interpretation of the development of legal doctrine not far removed from that of Judge Richard Posner. In my view, however, Epstein steps beyond this positive border to endorse as desirable that which he observes. In so doing, (as is his right) he dons the *normative* mantle, for the most part, of utilitarian philosophy.

Consider first, Part I of his paper, devoted to time and the past—the battle between first possession and adverse possession as a basis for common law rights in real property. Libertarian philosophy would stress the primacy of first possession, irrespective of its distance in the past and the litigation costs in its determination, as an unassailable legal right and an important safeguard of negative freedom. Epstein indeed recognizes a case for first possession; but in his case the justification is utilitarian, decided by a cost-benefit simulation. He notes a conflict between principle and proof when defining legal rights far back in time and explains the law of adverse possession as reflecting a reversal, in such circumstances, in the balance of the utilitarian cost-benefit calculus. He explains the existence of statutes of limitation—imposed incidentally by government, not the common law—by reference to such an exercise.

Epstein explicitly supports those statutes as they impact upon the law of real property. He suggests that uncertainty costs should determine the appropriate length of the basic period of limitation. He employs cost-benefit analysis as a basis for tolling the statute; and he argues a utilitarian case for prior prevention of the uncertainty problem. Indeed, he suggests that developments in conveyancing, recordation, zoning and

other land-use controls have evolved to solve the cost-benefit problem in utilitarian terms.

Epstein is vulnerable to each of the pitfalls outlined above with respect to Part I of his text. He does not rely upon higher-level consensus between the transacting parties as evidence of an efficient outcome. Statutory interventions via a special-interest-ridden, pluralist machine of government do not necessarily reflect a calculus of consent. Transaction-cost differentials, which fuel Epstein's explanation, are asserted without any evidence. More importantly, Epstein does not rely upon a theoretical structure such as that advanced by Williamson, to predict transaction-cost differentials qualitatively, given the difficulty of quantitative analysis. In the event, with neither consensus nor evidence, his commentary rests uneasily on repetitive assertion. Libertarian rights and corrective justice are overridden by this uneasy utilitarian imperative, and administrative innovations praised as cost effective may be no more than constrained lower level responses to coercive government intervention.

Nor is Epstein prepared to limit his analyses to the *generalities* of a statute of limitations. He is eager to *fine-tune* his system, much as Samuelson, Tobin and Solow chafed to fine-tune the U.S. economy during the Era of Camelot. Two-tier statutes are thus advocated to cater for infants and the insane, for the 'bad faith' and 'good faith' adverse possessor, and for tenants in possession and remaindermen, rather than leaving such matters to the sensibility of the common law. In all such instances, utilitarian objectives are to govern the tolling of the statutes.

Whether or not Epstein believes that Congress really would toll the statutes in this meticulous fashion is unclear. Recent evidence of legislative behavior with respect to the tax treatment of the pensions of federal employees, suggests that senators and congressmen, at least, would receive privileged treatment. Public choice does not predict that fine-tuning would operate elsewhere in accordance with Epstein's benevolent hand. Epstein presents no convincing theory of benevolent government to explain efficiency in the tolling of statutes by the political process.

## VI. OF TIME AND THE FUTURE: EPSTEIN ON OWNERSHIP RIGHTS, INHERITANCE AND GOVERNANCE

Part II of Epstein's paper is directed at time and future and offers a utilitarian perspective on uncertainty costs associated with future events. Specifically, Epstein inquires, within this context, as to what limitations, if any, should be placed upon the structure of ownership and the power

of disposition over things owned as a consequence of costs associated with uncertainty concerning the future. In this context, Epstein explains why ownership in fee simple dominates the law of real property, why common law rules restrict the alienation and control of property, and why there has been a gradual transition from grant to contract in the evolution of joint ownership.

Epstein endorses the view that, where ownership is acquired by first possession, it should be (as it is) of infinite duration. His acceptance is couched in utilitarian rather than libertarian terms (the cost of determining succession under any other rule); but in this case the two philosophies are mutually supportive. Where original acquisition of property provides only a limited interest, Epstein correctly views the problem of allocating rights over the remainder as fundamentally more complex. His approach to the problem is unashamedly utilitarian—weighing the likely cost and benefits of different legal balancing between the interest of the owners of limited interests and those of the remaindermen, given the likelihood of market failure via externality.

Epstein extends this utilitarian calculus to justify the law of private inheritance which allows the owner of property unfettered discretion in choosing his successor in title. He claims that this solution provides a definite system of property rights across generations, reduces the likelihood of wasteful subterfuges designed to minimize the impact of the tax, and limits excessive consumption of wealth during the wealthholder's declining years. Epstein acknowledges Buchanan's counterargument<sup>20</sup> that unfettered rights of disposition at death could generate a cycle of wasteful rent-seeking behavior as members of the next generation compete by trying to curry favor with the present owner. In my view, this counterargument is simply wrong.<sup>21</sup> Because the testator holds all the cards, he will only respond to *utility-enhancing* overtures. There is nothing unproductive in such activities, save as a consequence of misjudgment by potential heirs of the preferences of the testator. Rent seeking relates to socially wasteful rather than to utility-enhancing expenditures of resources.

Although Buchanan would regulate private inheritance via constitutional constraints to avoid rent seeking, Epstein finds the utilitarian bal-

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20. See Buchanan, *Rent Seeking, Noncompensated Transfers, and Laws of Succession*, 26 J. L. & ECON. 71 (1983).

21. See Anderson & Brown, *Heir Pollution: A Note on Buchanan's Laws of Succession and Tullock's Blind Spot*, 5 INT'L. REV. L. & ECON. 15 (1985).

ance still favors unfettered inheritance. Fortuitously, his utilitarian judgment coincides with the libertarian solution.

The problem of divided interests in real estate is not restricted to the issue of sale. It extends to interim periods in which a fee simple is divided between present and future interests. The law of waste, which policies the temporal boundary between life estate and remainder is criticized as over protecting the remaindermen. Trust developments are viewed as an efficient private response. The rule against perpetuities, designed to strike down certain future interests at the moment of creation, is dismissed as unimportant, again in the light of private alternatives available to evade its application. Court decisions rendering restraints on alienation invalid are viewed as less than certainly justified. All of this is done by reference to the utilitarian calculus, loosely defined.

Epstein places considerable faith in the trust alternative in each of these areas without really questioning whether this is a lower-level efficiency response by parties frustrated from higher-level consensus by courts exercising an unwarranted external intervention.

Finally, Epstein reflects upon the development of governance contracts designed *ex ante* to regulate, by process rather than by contingent outcomes, the complex interparty problems of condominium and cooperative arrangements. Here, Epstein closes the gap between himself and the new institutional economics, albeit without the formal precision of Williamson's analytics. He recognizes, implicitly, the combination of bounded rationality, asset specificity, and *ex post* opportunism that renders classical contracting vulnerable to market failure. His support for government contracts remains entirely utilitarian, though he retains a libertarian dislike for recent proposals to allow corporate boards to modify their corporate structures (with supervoting shares and poison pills) without going to their shareholders.

## VII. CONCLUSIONS

Epstein is a fine legal scholar, with an immense grasp of the broad sweep of the law of property, and an appreciation of jurisprudence and utilitarian philosophy. He tells a convincing utilitarian story. He may well be correct in his positive analysis. Property law is more likely than most areas of the law, after all, to be governed by wealth-maximizing criteria. The problem is that we really cannot judge effectively from his paper whether or not Epstein's story is true or false. Everything is made to rest on transaction costs. But where have all the numbers gone?

Surely transaction costs are difficult to enumerate. Surely they would intrude on the fine flow of Epstein's prose. But without them Epstein presents only a hypothesis, not a proof of the dominance of efficiency in the law of property.

Epstein's story is not helped by the absence of any theory of the judiciary that might drive the utilitarian calculus. Judges after all are appointed for life. Their salaries cannot be diminished during their tenure in office. They are supposed to uphold the U.S. Constitution, to interpret and not to amend its clauses. They are supposed to abide by precedent in order to provide stability and certainty within the legal process. Now, by accident or by design, these features of the judiciary *may* lead to utilitarian judgments. But we are not told *how* in this otherwise compelling story.

It is possible that judges may view good economics as bad law<sup>22</sup> and lash themselves hand and foot to the strict constructionist mast as they pass between the sirens of liberty and utility. In order to determine whether this is so, someone sooner or later is going to have to dirty his hands and find some numbers concerning the relative transaction costs of alternative legal systems.

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22. See Buchanan, *Good Economics—Bad Law*, 60 VA. L. REV. 483 (1974).