

PAST AND FUTURE: THE TEMPORAL DIMENSION IN THE LAW OF PROPERTY*

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All human interactions, and hence all legal rules, have a temporal dimension. Offer precedes acceptance; cause precedes effect; parents are born before their children. It is unremarkable for the entitlements of today to depend upon the events of yesterday. It would be inconceivable for them to depend upon the events of tomorrow. Time marches on, and in one direction, forward. When Kant said that time and space are fundamental categories for organizing all human experience, he spoke as much about the law as he did about physics, biology or history.

This paper deals with time in two separate senses. In one sense, it is about how the categorical nature of time, as a necessary element of human experience and comprehension, shapes substantive and procedural legal rules. In a second sense, however, the larger part of this essay focuses on the contingent nature of time, that is, about the length of interval between cause and effect, between antecedent and consequence. These questions of degree raise issues where empirical guesses must fill in the gaps left by general theory. The passage of time between the operative facts on which liability rests and the onset or resolution of a lawsuit may be long or short; yet large bodies of law turn on the length of that interval, not simply on its direction. Time may cure some ills, but it exacerbates others. The legal treatment of temporal issues cuts across the traditional substantive categories of the law: property, contracts, torts and restitution. It also cuts across procedure and evidence. The purpose of this paper is to explore the legal response to the temporal dimension in the law of property.

The central theme of the paper is simple. The major cost associated with the passage of time is uncertainty. For risk averse individuals, that

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uncertainty creates a cost that greater certainty could reduce. In addition, any increase of uncertainty increases the scope of the discretion lodged in both public and private hands. That discretion spurs private litigation that generates high administrative costs and high error rates. The passage of time therefore creates pressures, both public and private, to take steps to ensure that legal rights and duties do not depend on events that are remote from the present, either past or future. These practical demands often clash with the strict principles of corrective justice, where the passage of time is of no particular consequence in determining the relative rights and duties of all persons. As an abstract principle each violation of individual rights appears to require full redress on a case by case basis. The ungainly structure of legal doctrine is sometimes explained by the difficult task of reconciling these two inconsistent tendencies in a wide range of specific contexts.

Part I looks backward to the past, at the rules that govern the acquisition of property and the limitations of actions: first possession and adverse possession are its main subjects. Here I argue first that the rule of first possession, though widely ignored historically, offers the best way to establish the priority of rights in external things. That first possession principle is in turn restrained by statutes of limitation, which lie at the core of the law of adverse possession doctrines. The analysis of their function in clearing title and facilitating voluntary transactions completes the analysis of this section.

Part II looks forward and analyzes the various rules that govern the disposition of property in the future. Here I argue that the common law rule of absolute ownership, including the absolute power of disposition at death, is the second part of a coherent system of private rights that begins with the rules of first possession. The only social justification for limiting the right of private parties to create whatever interests they choose is the need to protect strangers to the title. As that goal can be accomplished cleanly by trust and recordation devices, the traditional rule against perpetuities and the parallel rules limiting consensual restraints against alienation should be abolished. Removing these fetters upon private grant, however, does not determine the structure of contracts regulating future conduct. As the number of contingencies becomes more difficult to control and to plot, there is a shift from rules that specify performance—so called complete contingent state contracts—to rules that set up governance structures for making the appropriate decisions on the strength of subsequently acquired information. Temporal

uncertainty thus accounts for the emergence of private governance and within the political realm for constitutionalism writ large.

I. LOOKING BACKWARD: FIRST POSSESSION AND ADVERSE POSSESSION

A. First Possession: Prior in Time is Higher in Right

Temporal issues arise with evident urgency in the law of real property. Land itself lasts forever, and the improvements upon it can last for a very long time. The durability of the asset means that no one person can consume it in a lifetime, so that any legal relations with respect to land will of necessity involve a large number of persons over a long period of time. How then are these relationships to be sorted out?

Every one knows and follows the rule of ordinary life that applies to such prosaic matters as waiting in line for theater tickets or in a cafeteria: "first come, first served." The rule of first possession at common law converts that intuition into the analytical foundation for the entire system of private property: the party who takes first possession of a thing is entitled to exclude the rest of the world from it, forever. The element of time is part of the priority rule and of the definition of the property interest acquired.¹

The rationales for this rule are many and complex. Often the rule has been regarded as something akin to a self-evident truth. But the rule also has clear political and utilitarian virtues that account for its lofty status. These deserve to be mentioned briefly. The first possession rule promotes a system of decentralized ownership: private actions by private parties shape the individual entitlements in ways that do not involve the active role of the state, whose job, as umpire, is neatly restricted to protecting entitlements previously acquired by private means. The rule thus allows one to organize a system of rights that is not dependent upon the whim of the sovereign, and makes it possible to oppose on normative grounds the all too frequent historical truth that ownership rights rest upon successful conquest, nothing more and nothing less. It is not surprising therefore that a variant of the first possession rule exerted so large an influence in the writing of John Locke, whose political mission was to defend a theory of representative government against the power of the

¹ For caveats on the historical use of the law, especially with respect to land, see *infra* notes 52-74 and accompanying text.

Crown.²

The first possession rule also has more direct economic virtues for it yields a consistent and exhaustive set of property rights, whereby everything has in principle one, and only one, owner. Vesting ownership in the first possessor makes it highly likely that a person who owns the land will use it efficiently and protect it diligently. At every stage the rule reduces transaction costs. There is no need for a routine lawsuit for the true owner, however identified, to pry property away from the party in wrongful possession. The uniqueness of owners means that development and sale can take place at relatively low cost. The first possession rule does give rise to serious problems in the case of common-pool assets, such as oil, gas and fish. Yet even here it furnishes a baseline of entitlements which permits the state to organize forced exchanges that on average work to the long-term advantage of persons with interests in the pool.³

This paper, however, stresses the temporal feature of the rule. Any determination of ownership maps external facts into a decision rule on entitlements. The first possession rule represents an ingenious, if intuitive, recognition that time provides the best one dimensional ruler for making the needed mapping. Time offers a unique measuring rod, sufficient in principle to resolve two or two thousand competing claims for priority. Whoever got there first, wins. Except in the improbable case of ties, an enormous decision-making capability is contained in a single variable. Getting a lot of results out of a little bit of information surely enhances the overall efficiency of the system.

Consider an alternative rule that requires someone to map from n different dimensions to a single answer. The balancing of factors requires tradeoffs amongst incommensurates that breed uncertainty and, with it, litigation: there is no way to map a plane into a line, while preserving a one-to-one correspondence between the points in the plan and those in the line.⁴ Yet making a clear decision one way or the other is of enor-

2. JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERANCE* 3-4 (J. W. Gough ed. 1946).

3. I explore these at some length in R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* ch. 15 (1985) [hereinafter cited as EPSTEIN, *TAKINGS*]. On oil and gas see Libecap and Wiggins, *The Influence of Private Contractual Failure of Regulation: The Case of Oil Field Unitization*, 93 J. POL. ECON. 690 (1985) (noting that the private forces that oppose unitization by contract tend to work to defeat it by regulation).

4. Thus points on a line (say, the x -axis) can be represented by a single variable (a, O), where the full information about the location of the point is generated by knowledge of a . When the points

mous importance. The relatively automatic quality of the first possession rule helps private parties organize their affairs without resorting to litigation. The point should not be overstated, for the first possession rule will not eliminate every factual dispute over who took possession of the land first. Land has a large physical dimension. One person may enter land first, while (with or without knowledge of this entry) another stakes out a claim to the same parcel or part thereof. The problem can be especially acute with mining claims. No legal rule can solve all borderline cases where individuals act in ignorance or disregard of what others have done. As the enormous nineteenth century debates on possession indicate,⁵ once "possession" becomes the source of rights and duties, it becomes subject to heavy verbal stress.⁶

But so what? The mark of a good legal rule is not whether it resolves all doubtful cases at the margin. No rule can fully capture the distinction between the occasional use of unowned land and its occupation,⁷ between the acquisition of full ownership and the claim of limited (e.g. hunting) rights. Yet all of these complications are manageable if the rule generates enough clear cases in routine situations. No one says that the doctrine of adverse possession should be scrapped because it generates close cases on the question of what counts as possession. The linguistic doubt is not allowed to dismantle the substantive doctrine. The same is true of first possession. It provides a marked degree of decisional stability, which is all that can be asked. Any more complicated rule would doubtless have a temporal component to it: for example, a rule that awards

can lie anywhere in the x, y plane, the unique description is now (a, b) , where both can vary simultaneously. One way to plot (a, b) into (a) is treat (b) as a constant when it is a variable. Any other mapping (say the sum, $a + b$) will provide a unique mapping from the plane to the line. But information will be lost as it is impossible to reconstruct the point of the plane knowing only the point on the line.

5. See, e.g., O.W. HOLMES, *The Bailee at Common Law*, in *THE COMMON LAW* (1881); and on seisin, its rough parallel for land, see 2 F. POLLOCK & F.W. MAITLAND, *THE HISTORY OF ENGLISH LAW*, ch. 4, § 2 (2d ed. 1968) [hereinafter cited as 2 POLLOCK & MAITLAND].

6. See Simpson, *The Analysis of Legal Concepts*, 80 L.Q. REV. 535 (1964).

7. See, e.g., *Brumagim v. Bradshaw*, 39 Cal. 24 (1870), where fencing three sides of the land was sufficient where the fourth was protected by natural barriers. The headnotes give some sense of the law:

Actual possession of land can only be taken by such open, unequivocal and notorious acts of dominion, as plainly indicate to the public that he who performs them has appropriated the land, and claims the exclusive dominion over it. A substantial, artificial inclosure, erected around the entire tract, is such an act of dominion. . . . An inclosure, partly by natural and partly by artificial barriers, will under certain circumstances, likewise establish an actual possession.

Id. at 25.

ownership to the party who, after enclosure, first makes substantial use of unowned land, unless the prior party in possession had been there a long time.⁸

Who needs it? How much of a temporal priority is needed to offset a substantial use? The rule could only survive because the two features of original acquisition and substantial use are positively correlated, which is itself an argument for making the earlier fact decisive on the question of ownership. The demands for "substantial use" could only induce a proliferation of borderline cases that place ownership (and hence the right to use and dispose) in limbo until the question of substantial use is resolved. Delay has its costs. A sound system of rights resolves the claims of ownership early in the process to reduce the legal uncertainty in subsequent decisions on investment and consumption. Any system of ownership (including state grants) requires that some positive costs be incurred to establish claims. These costs should be minimized in order to reserve the bulk of resources for the productive use of assets. The first possession rule itself can encourage the premature acquisition of interests, but that cost is tolerable in light of the alternatives. Any system of state grants transfers the cost of land acquisition from the open field to the legislature; while any alternative rule of private acquisition, such as first substantial use, only increases the fraction of resources that must be devoted to the acquisition of claims.⁹ The need for an early determination of entitlements has been made with great force by Professor Kitch in his "prospect" theory of patents, which he developed in large measure by analogy to the first possession rule applied to land and mining claims at common law.¹⁰ It applies with equal force in the more general case.

8. This rule is suggested by many land use statutes which state in essence that development rights are lost unless they are used by the passage of the statute or some other fixed time. *See, e.g., CAL. PUB. RES. CODE, § 21170(a) (Deering 1977).*

9. The point also has assumed great relevance with respect to many modern land use control statutes, which prevent the development of land after the passage of certain enactments, unless substantial development had taken place before. One consequence of these statutes is to encourage premature development in order to perfect rights that are otherwise inchoate. The same tendency arises with the disposition of land. In 1978, when there was talk in Chicago of an ordinance prohibiting the conversions of rental properties to condominiums, many projects converted early in order to beat (or at least obtain a leg up on) the statute.

10. Kitch, *The Nature and Function of the Patent System*, 20 J. L. & ECON. 265 (1977). The hard question is precisely where along the continuum of development the rights should be said to vest. Yet debates on that point should not be allowed to obscure the central point that all arguments presuppose some system of decentralized acquisition that rest at root upon first possession. The patent office simply provides a central registry that is necessary to structure priority, given that inventions are intangibles that cannot be reduced to physical possession.

To a modern lawyer all this talk about first possession seems to have no practical interest. After all, historically most land was acquired by grants from the state; and there are few among us who have acquired even a tiny fraction of our assets by first possession. More to the point, while litigation over possession was commonplace in the nineteenth century, it is far less frequent today: reliable surveying has put it largely to rest with respect to land. Litigation of the sort found in *Pierson v. Post*,¹¹ which involved the claims of two rival hunters for the capture of a wild fox, is effectively precluded because the combined costs of suit are sure to be greater than the value of the (single) fox.

It is, however, misleading to measure the importance of a rule solely by its frequency in litigation.¹² The major effect of the first possession rule lies in its relation to a general theory of entitlements. While most individuals claim property directly by transfer, their title is in principle no better than the title of their transferor. In order to make out a good claim of title, therefore, one is often driven back to the root of title. In some cases that means tracing the title back to the person who has acquired property by original acquisition. In other cases that means a title acquired by grant from the sovereign, who in a virtuous world has acquired sovereignty either by grant or by original occupation.¹³ At a normative level, the first possession rule precludes totally the acquisition of title by adverse possession. If no person is able to profit by his own wrong, then acts of adverse possession are by definition out of bounds, are flatly illegal, whether done by private parties or by the state.

Original acquisition starts the process by creating rights against the

11. 3 Cai. R. 175, (N.Y. Sup. Ct. 1805).

12. A point I have stressed before, see Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717 (1982).

13. Note that the subject of the natural acquisition of land never developed in England because of the dominant position of the Crown.

Of the occupation of unowned land we have not to speak, for no land is or can be unowned. This rule seems to be implied in the principle that the king is lord of all England. What is not held of him by some tenant of his is held by him in demesne. In all probability no tenant can abandon the land that he has been holding in such wise as to leave it open to the occupation of any one who sees fit to take it to himself.

2 POLLOCK & MAITLAND, *supra* note 5, at 80-81.

Maitland then traces the prospects of the "general occupant." An estate *pur autre vie* is created when *A*, a tenant for life conveys to *B*, for life. *B* predeceases *A*. Until the death of *A* who owns the land? In principle it could be taken by first possession, that is, filled by the general occupant. To be sure, the gap itself is a small one, but nonetheless even here there is the tendency to avoid occupation by allowing (against strict theory) *C* to devise the land, even though he has no heritable estate, or implying a reversion in *B*'s heirs where *C* has not so done. *Id.* at 81.

world. Within a framework of corrective justice, the passage of time, without more, has no influence upon the rights or duties of the parties to any dispute. Time is a wholly neutral factor, as the system operates upon the assumption that individual rights and duties are a function solely of individual actions, to which personal credit or responsibility can be assigned. Thereafter, only voluntary acts of transfer (including transfer at death) can change the status of the legal title, while only acts of aggression (or deceit) by outsiders can give owners tort remedies against strangers.

In *Anarchy, State and Utopia*, Robert Nozick offers a historical account of justice, which is consistent with his theoretical perspective, but which is in no way sensitive to questions of temporal degree: rights are strictly determined by temporal priority.¹⁴ The older the title, the better the title—period. Sequence is everything; the magnitude of the interval is nothing.

Nozick's view of the first possession rule, like his view of entitlements generally, closely follows the pattern of common-law rules of entitlements. Yet his analysis, as a species of ideal theory, fails to recognize that no system of justice works without frictions. These frictions generate a set of counterprinciples that are as important as the basic entitlements they limit. As a matter of high principle, what comes first is best; as a matter of evidence and proof, however, what comes last is more reliable and certain. As a result, any operating legal system responds to a powerful pressure to make everything turn on events that lie in or close to the present. Time dims recollections and allows people to forget or to suppress unpleasant evidence. It does not take a profound knowledge of human cognition or motivation to conclude that all evidence decays with time. One could quarrel over rate of decay. The decay function may or may not be linear, but it surely increases monotonically with time, and for many types of evidence it is probably steep. What should be done to counter the problem?

B. Adverse Possession

1. Tension Between Principle and Proof

The conflict between principle and proof manifests itself in the law of adverse possession. That body of law could scarcely arise in a world of zero transaction costs, for the true owner could always put the adverse

14. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

possessor out instantly and regain possession of the land. When transaction costs are zero the wrongdoer will always be identified, and litigation will be error free. But practical frictions can dominate the system and shape its legal rules. Wrongs are not always instantly uncovered; it takes money to identify a wrongdoer, and more money to bring a suit, which could be erroneously decided. As time passes, it is more likely that the original or subsequent title will be split (by deed, and especially by will) amongst a large number of individuals, making management of a suit clumsy and awkward. With time, memories fade and witnesses die: no one can recall who did what to whom. Time forces a greater reliance upon documentary evidence, and even that may be forged, lost, altered or destroyed.

Nonetheless in the interim, there remains a pressing need to preserve the semblance of well-ordered property rights. It would not do to allow a free-for-all once land passed out of the hands of its rightful owner, for then the productive value of the land is diminished for all time. Using the doctrine of *relative title*, of prior (not first) possession, to confer rights upon the adverse possessor against the rest of the world has the same virtues that the doctrine of first possession has with respect to land originally unowned. The doctrine of relative title gives a clear and expeditious temporal rule to resolve conflicting claims, even by adverse possessors whose claims are precarious against that of the true (that is, any other prior) owner. The party in possession trumps the claims of any stranger to the title.

The rule of relative title was moreover of enormous importance in the formative era of real property. It does not take a close reading of either the Roman texts or the early English writs and cases to realize that the dominant issue in the early law of real property was forcible dispossession, or the illegal occupation of abandoned or unoccupied property. Early land law, closely tied to the order and security of the realm, possessed a public as well as private character. This is one central lesson in the Roman law of *usucapio*,¹⁵ and it is repeated in the early English writs—the writ of right, and of novel disseisin, which were drafted as a matter of high politics in the reign of Henry II.¹⁶ While the Roman and

15. See the discussion in J. NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* (1962). Key passages on *usucapio* are found in 2 *THE INSTITUTES OF GAIUS* 68-73 (Francis de Zulueta trans. 1946).

16. See F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* (A.H. Chaytor & W.J. Whittaker eds. 1936).

English rules themselves differ on points of detail, they all reach the right theoretical result on the central issue: the adverse possessor has rights against the rest of the world from the moment that he claims possession. A system with an indefinite suspension of rights could not work when titles were routinely precarious. The rule of first possession may have had little historical relevance to original acquisition. But it survives as the only rule of acquisition that protects the adverse possessor against all but the true owner.

What about the claim of the original owner against the adverse possessor? Here the pragmatic questions of proof are in systematic tension with the remorseless doctrines of original acquisition. In this situation, it is quite possible that the benefit of making the right determination decreases with time, given the way in which it disrupts present expectations of an adverse possessor who may well have improved or developed the land. Yet even if the benefits of restoring the original owner remain roughly constant over time, the basic point remains unchanged. The costs of making that determination continue to mount over time, so that at some point the lines cross, so that it ceases to be worthwhile to determine the facts on which an original and remote claim of right rests.

To be sure, one could try to compromise the difference by imposing new or heavier burdens of proof upon the plaintiff, or by making certain types of evidence (e.g., a purported deed to the property) necessary to establish the claim. Yet these intermediate solutions, taken by themselves, are defective. The passage of time does not work to the equal disadvantage of both sides. Indeed to say that the change of time frame has no effect at all on the outcome is a contradiction in terms. To the contrary, the passage of time, like any other reduction in the quality of evidence, produces a systematic bias for the weaker side.

To see the point, one can think of a tennis match between two professionals. Normally, one expects the better player to win. Yet if the game is played on a rough surface, an element of randomness is introduced into the contest, shifting the odds back towards even, which thus works systematically in favor of the inferior player. In the extreme case (for instance, where the game is played in a junkyard or on the side of a cliff), the random elements completely dominate the skill elements; and the results of the game have little correlation to the players' skills. Litigation is like that. The passage of time tends to help the party with the weaker case by giving greater prominence to the random elements of the case. The moving party sues because there is some scrap of evidence that sup-

ports the claim, while all evidence on the other side is lost or misinterpreted. To avoid these situations, at some point it becomes necessary to end litigation, not to redefine its parameters. Hence the case for the statutes of limitations that lie at the core of the modern judicial doctrines of adverse possession.

The statute of limitations should be evaluated from the same institutional perspective that is brought to the first possession rule. The key value of the rule does not derive from the way it handles doubtful cases at the margin. It stems from the way in which the well-crafted statute of limitations shapes the primary conduct of private parties, thus preventing certain kinds of cases from being litigated at all. The point is not novel and was well brought out over sixty-five years ago by Ballantine, who in two brief paragraphs was able to articulate the tension between the search for perfect justice in a world of imperfect institutions:

Title by adverse possession sounds, at first blush, like title by theft or robbery, a primitive method of acquiring land without paying for it. When the novice is told that by the weight of authority not even good faith is a requisite, the doctrine apparently affords an anomalous instance of maturing a wrong into a right contrary to one of the most fundamental axioms of the law.

“For true it is, that neither fraud nor might can make a title where there wanteth right.”

The policy of statutes of limitation is something not always clearly appreciated. Dean Ames, in contrasting prescription in the civil law with adverse possession in our law, remarks: “English lawyers regard not the merit of the possessor, but the demerit of the one out of possession.” It has been suggested, on the other hand, that the policy is to reward those using the land in a way beneficial to the community. This takes too much account of the individual case. The statute has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.¹⁷

Ballantine is right to regard the choice between merit and demerit theories as a second order problem.¹⁸ He is also right on the institutional

17. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135 (1918) (footnotes omitted).

18. Thus the issue of merit or demerit arises, for example, when there are successive acts of adverse possession, when the limitation period has run against the first adverse possessor, but not separately against the party who has taken the property from him. Sometimes the question is stated as one of “tacking,” i.e. can the second adverse possessor tack the time of possession of the first adverse possessor onto his own. The merit position denies the tacking and says that the original

significance of statutes of limitations. The statute spares the rightful owner the costs of litigation that might otherwise be needed to establish title. The statute protects against claims that are most potent in principle, but most dubious in fact. It thus enhances the marketability of title by shortening the period during which prospective purchasers and lenders (both noted for their squeamishness) need examine the state of the title. That squeamishness arises from the enormous practical difference between a perfect title and a flawed one, however small the flaw. There is a real discontinuity at the origin, which is not replicated elsewhere in the distribution. *Any* doubt about the status of the title requires that everyone must shift from the deterministic to the probabilistic mode. Someone must estimate the extent of the risk, which is itself no trivial problem. Small risks are hard to measure, and they may provide telltale evidence of major weakness in the title. The minimum loss to uncertainty therefore is not the expected value of the defect in the title, but some threshold level of the legal and business expenses necessary to estimate it. These costs are greatest where the clouds on the title are oldest.

The statute of limitations generally avoids these title-clearing costs. Most critically it avoids them where title is in fact impeccable. The statute induces individuals to bring suit early, when it is more likely to be manageable, and the outcome correct. So viewed, protection of the guilty is not an end in itself, but the inevitable and necessary price paid in discharging the primary function of protecting those with proper title. "It is better to favor some unjust than to vex many just occupiers."¹⁹ What drives the statute is the need to control high administrative error and transactions costs. The statute's effectiveness would be wholly undermined if it were used to bar only invalid claims, for then the statute would bar claims only after they are litigated, when it is too late. The doctrine of adverse possession accepts the principle, prior in time is higher in right; but it marries this principle to a procedural system that

owner wins because the new adverse possessor has not established the merit of his own claim. The demerit position allows tacking and says the new adverse possessor wins because the original owner has not cured his demerit of waiting too long. I clearly prefer the second answer to the question as a way to eliminate the staleness of old claims. Ballantine himself seemed to move in that direction, with perhaps unnecessary caution: "As a broad question of legislative policy, however, it may perhaps be advisable to bar stale demands without requiring proof of privity of estate between successive holders." *Id.* at 158.

In modern times the entire question is of diminishing importance. Anyone who consults a lawyer will bring suit quickly, and not count on the remote chance of a subsequent and independent disposition in order to reassert his original title.

19. *Id.* at 136. The quote is attributed to Frederick Pollock.

makes it unnecessary to run the full course in order to establish the needed temporal priority. The contradiction between corrective justice and statutes of limitations is overcome because the error rate, when measured against the ideal of a rule of first possession, is lower with the statute of limitations than it is without it.

The theoretical justification for the general statute can, I think, be neatly explained by an analogy to the general principles of forced exchanges that dominate the law of eminent domain. The system of corrective justice provides all individuals with a framework of rights based upon the rules of first possession and voluntary subsequent transfer. The question is whether the removal of some of these rights through general rule can be justified on the ground that the shift in entitlement increases the overall utility of each individual, roughly in proportion to his original holdings.²⁰ With statutes of limitations generally, it is difficult to think of any important component of subjective value that would require distinguishing between wealth and utility in estimating the value in prior entitlements. While there are subjective values in the ownership of land, they can be fully protected by bringing timely suit. The question with statutes of limitations, as with other general rules, reduces therefore to this question: is the protection that each party is afforded *ex ante* by a statute of limitations worth more than the right of action that he might otherwise possess?

The argument in favor of statutes of limitations in the abstract is very simple. The reduction in error, administrative and transaction costs brings about a gain that can be shared by all parties to the system. In a world where everyone has an equal probability of being plaintiff or defendant, the shift in the laws should work to universal advantage. In a world in which some persons have a systematic bias to take the property of others, the question is less clear cut, for scoundrels may get (net) benefit from the limitations period. But even here the overall gains from the statute seem so large that a substantial portion must inure to everyone subject to the rules in question. Everyone shares, for example, in the

20. In EPSTEIN, *TAKINGS*, *supra* note 3, at chs. 12 & 14, I argue that the function of the just compensation limitation is to insure that every person is left at least as well off after the loss of property rights, of which the right to recover real property is surely one. In addition, the public use requirement, although generally neglected in the literature, has the explicit function of dividing the surplus thus created pro rata. That last element is needed to make property rights as definite after forced exchanges as before in order to control rent seeking over the surplus. I have recently applied this same theory to taxation. See Epstein, *Taxation in a Lockean World*, 4 *SOC. PHIL. & POL'Y* 49 (1986).

reduction in the administrative costs of operating the system; and they retain their full rights of suit where these have their greatest value. Those individuals who break the rules most frequently can be subject to additional sanctions, whether criminal penalties or punitive damages, within the limitation period to equalize the overall gains.

The real questions are not whether a statute of limitations in the round works some Pareto superior move. Instead, the harder question is one of fine tuning. What is the best way to structure the rules of adverse possession in order to maximize the general gain? Here in principle the usual caveats apply. One wants to consider this question, *ex ante*, both for the individual and for the aggregate. But as all players operate pretty much behind the veil of ignorance, with adverse possession it is possible to indulge a useful simplification not possible in many other contexts. The distributional question is not key. Any gain to the whole will maximize the gain to each of the parts.

2. *Fine Tuning the Structure*

a. *The Need for a Number*

How then to maximize the whole? The first point is to note that we speak here of a statute of limitations rather than a common-law rule. The point is often obscured by the massive common law gloss upon the basic statute. With adverse possession the requirements that possession be actual, open, notorious, continuous, hostile and under color of title are often read into statutes in order to flesh out their basic structure. That process can hardly be avoided. For example, if possession is only intermittent, it could be regarded as a simple trespass and not as a claim of title by the intruder. Something like the "continuous" and "actual" requirements are needed to determine whether the original owner is only barred from claiming money damages for physical damage to property or is also barred from claiming ownership of the property as such. Similarly, where the claim of possession is in secret, it does not give the notice of inconsistent use that should trigger a response by the original owner.

To focus upon the elements in litigation, however, is to ignore the uncontroversial, but critical, portions of the underlying statute. The major reason why the law of adverse possession begins with a statute is that common-law adjudication cannot generate the number needed to structure litigation. It may be able to develop, as did the courts of equity, some principle of laches, whereby "unreasonable and unexcusable delay"

bars relief. Yet a number, not a principle, is far more likely to maximize the social gain from this set of forced exchanges. The certainty provided by a number increases the value generated by the statute and makes it more likely that the deviation from the original baseline of corrective justice (landowner always wins against wrongful intruder) will satisfy the Pareto superior test.

Consider the alternative. What is the utility of a doctrine that assigns a probability of success to the length of the interval between the last act relevant to liability and the time of suit? No individual plaintiff or defendant wants to be told that there is 0.60 chance of allowing the suit to go forward if it is brought within 10 years of the date the cause of action accrued, but only 0.25 chance of allowing it to proceed if it is brought after 20 years. Sheer random chance makes everyone worse off in a world of risk-averse persons, while it still permits a large number of suits by plaintiffs who think the fractional gain is worth the expense of going forward. A single number stated in advance truncates the risk of making it clear that some actions cannot be brought. Randomness still remains in the system for suits that do not run afoul of the limitation period, but the level of error is clearly reduced. But it is necessary to remember that too much of a good thing is a bad thing. Any effort to reduce randomness altogether runs into an opposite problem: A short limitations period increases the likelihood of improper conduct by trespassers to begin with, by reducing the likelihood of private correction action. To take an extreme case, a statute of limitation of a single day is virtually tantamount to abolishing the entire substantive law.

How then should statutes of limitations be designed to reconcile the competing objectives? One critical element is the length of the basic period of limitation. Here the general historical tendency has been to reduce the period of limitation. While periods of 20 years were once commonplace, today one sees statutes in which the basic period is in the range of six to ten years, the shorter number predominating when the adverse possessor pays taxes.²¹ Overall, the long period in early times was perhaps a result of high politics and of gaps in civil order that arose from the forced absence of landowners from the land because of plague, crusade or military service. Today the shorter period seems to make bet-

21. See, e.g., 1 The Statute of 21 James I., ch. 16 (1623), which called for a 20-year limitation period. In New York for example, the limitation periods were reduced from 15 to 10 years in 1963. Section 34 of the 1948 Civil Practice Act called for the 15-year period. The modern 10-year statute is now found in N.Y. CIV. PRAC. LAW § 212(a) (McKinney, 1972).

ter sense because there are fewer obstacles to taking prompt action once adverse possession occurs.

The arguments for short statutes of limitations gain some support when one looks at the analogous problem of limitations in the context of private contracts. Here the parallel is imperfect because the underlying nature of the dispute, say a contract of employment or for the sale of goods, is radically different from that involved in the typical title dispute. Nonetheless, the parallel is instructive because it gives some clue as to the consensual attitude toward the limitation problem. That evidence is useful in light of the general admonition that rules regulating disputes between strangers should, subject to limitations of knowledge and administration, imitate the rules which private parties fashion for themselves. In practice, voluntary agreements tend (strongly, I should hazard) to bring operative facts back to the present. In most voluntary agreements these statutes tend to be shorter than those prescribed by law, a result expressly contemplated by the Uniform Commercial Code.²² In addition, private contracts often adopt analogous rules, such as those governing the rejection of nonconforming goods, that function like statutes of limitations, at least with regard to the use of certain remedies.²³ To be sure, there seem obvious reasons why the periods of limitation for real estate should be longer: it is far harder for the absentee landowner to discover the loss of rights than it is for a buyer to learn that he has received nonconforming goods. Nonetheless, even after making appropriate adjustments, the long limitation periods of ancient times appear to be inappropriate today.

b. Tolling the Statute

Once the length of the statute is settled, the next question concerns the exceptions to the general rule. One important statutory exception deals with the disability of the party dispossessed: infancy and insanity at the

22. See U.C.C. § 2-725(1) (1983): "An action for breach of contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it." The language of the section suggests that reductions in statutory periods are more common than extensions. Yet it is not clear why there is any restriction upon the parties' ability to vary the appropriate limitation period by agreement.

23. The U.C.C. allows the buyer a reasonable period of time to reject goods not in accordance with tender. That right of rejection may be more valuable than a right of action for the damages attributable to breach, but it is only triggered by a very short fuse. See U.C.C. §§ 2-601 & 2-602(1) (1983).

time of the adverse possession normally toll the running of the statutory period. In one sense, the exception seems odd. By the normal views of corrective justice, the private disabilities of one party are not individual acts that alter the balance of entitlements between parties. It should not matter whether the infant or insane person is the plaintiff or the defendant. If an infant or an insane person takes actions that harm a stranger, the proper view, I believe, is to hold the defendant responsible in tort to the extent of his resources; an act of aggression should not be the occasion to transfer resources from one private party to another. If the defendant had inflicted harm upon himself, he could not demand aid from the plaintiff. Why then should he be allowed to escape the consequences of the harm so inflicted when it is imposed upon another?²⁴ Status is not conduct and the rights of action are not diminished solely because of the age or mental condition of the plaintiff. Matters are far more complex where the plaintiff's conduct is in issue, but even here there are many contexts (e.g., driving) where the defendant's age or insanity should not diminish the standard of conduct expected by a plaintiff, even though there are others (e.g., infant trespassers) where some additional burdens are imposed upon landowners.

Against that mixed background, it is instructive to ask, why the uniform recognition of disabilities in the context of adverse possession? The conventional answer is that these exceptions are appropriate because the party who labors under a disability is not in an effective position to vindicate his rights by recourse to the legal system. There is obviously a great fear of the victimization of those helpless to protect themselves. But surely a complete account must contain more than this, for the question still remains, how do we take into account the losses on the other side that result from the tolling of the statute where the disabled party in fact has an invalid claim? If the original justification for the statute of limitations spoke in terms of Pareto superior moves from common-law rights, the tolling exceptions should be justified by the same standard, as a further step toward overall social gains.

It is, moreover, possible to find reasons for tolling that go beyond unrestrained sympathy for the helpless plaintiff. One possible explanation

24. [There is] no more propriety or justice in making others bear the losses resulting from his unreasoning fury when it is spent upon them or their property, than there would be in calling upon them to pay the expense of his confinement in an asylum when his own estate is ample for the purpose.

T. COOLEY, *A TREATISE ON THE LAW OF TORTS* 100 (1868). For opposition to this position, see O.W. HOLMES, *THE COMMON LAW* 88-96 (1881).

refines the earlier analysis of error costs. Suppose that the general reliability of lawsuits diminishes over time. The question is whether the subset of suits brought by infants and insane persons degenerates at the same level as the usual class of cases. There is some reason to think that it does not. In the ordinary case, the strong plaintiffs have an incentive to bring their suits within proper time, which suggests that the residual cases are apt to be weak. Where disabilities are present, that opportunity for suit cannot be availed of. Accordingly, the pool of suits that remains at the expiration of the original statutory period should be somewhat better in quality than a group of suits randomly chosen. If so, then barring causes of action where these disabilities are present comes at a somewhat higher price, for now more meritorious claims will be prevented here than in the broader class.

Yet, the argument cannot be taken too far. Infancy can last for eighteen years. Insanity can last for a good deal longer than that. The dominant view does not allow individuals to tack one disability upon another—once the infant reaches 18 the period runs even if he becomes insane at age 15—but it still tolerates very long periods of delay in comparison with the relatively short periods routinely allowed under the statute. One possible explanation is that such multiple hardships are not foreseeable, but typically the possibility of their occurrence is easily foreseen even if their low probability is generally well known. In the end, the better explanation comes from a different quarter. The passage of time in dual disabilities cases so diminishes the quality of the pool that the lines finally cross: there is no overall benefit to allowing these suits to continue. The prohibition against tacking one disability upon another is thus a crude (and highly imperfect) surrogate for an absolute statute of limitation.

The hard question thus raised is whether the simple passage of time at some point becomes so powerful an obstacle to recovery that suits should be barred notwithstanding the equitable considerations raised by the infancy and the insanity disabilities. I believe that it should. The pool of cases under disability may be somewhat better than those which are not. But there is nothing in the argument given above that says that the differences in quality are apt to be very substantial. At that point, the most that can be said is that the appropriate time for suit should be extended slightly. The fundamental Pareto superior logic of the statute of limitations does not demand that the single number provide the solution to all problems. One approach is a short statute of limitations (e.g., six years),

with tolling for disabilities. Married to that should be an outside period of recovery which stipulates that all actions must be brought within, say, 15 years after they have accrued—period. There is no reason to use the anti-tacking rule as a proxy when a better rule—a number—is available.

Nor is the cost of the absolute prohibition high in this context. The number of suits involving disabilities is surprisingly small.²⁵ It seems, therefore, unwise to extend routinely the period of title examination long enough to cover both the initial limitations period and the disability period. The possibility that the plaintiff will never be in a position to bring suit can be handled by the appointment of guardians (who may be needed for other reasons) with the capacity to bring suit on behalf of the infant before his maturity.²⁶ True, this solution is itself imperfect because of possible conflicts of interest between principal and agent. But the costs of indefinitely prolonging the time of suit seem even greater. A rule that says “finis” seems to be an intelligent part of a two-tier scheme, similar to that which distinguishes adverse possessors who pay taxes and those who do not. A somewhat more complex “capital structure” is needed here as well.

c. *Subjective Intent*

The two-tier statute could also be helpful in connection with another important problem in the law of adverse possession, the treatment of subjective intention of the adverse possessor. Under the standard view of hornbook law, it is immaterial whether the adverse possessor has taken property in good or bad faith, i.e., with knowledge that title to the property rests in the hands of another.²⁷ The case law, however, seems to tell a different story. Richard Helmholz has persuasively documented the proposition that judges and juries are far more hostile to parties who take in bad faith and will often take steps to prevent the limitation period from running.²⁸ Often these steps are covert, as by reading the continuity requirement in a restrictive sense when the defendant is in bad

25. See Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 336 n.19 (1983).

26. The point was seen by Ballantine: “Friends or relatives or guardians will ordinarily protect the rights of owners under disability, and individual cases of hardship would be more than balanced by the greater security of all titles.” Ballantine, *supra* note 17, at 145-46.

27. See, e.g., 3 AMERICAN LAW OF PROPERTY §§ 15.2-15.4; RESTATEMENT SECOND OF PROPERTY § 458 (1944); J. AMES, *The Nature of Ownership* in LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS, 192, 197-207 (1913).

28. See Helmholz, *supra* note 25, at 331.

faith. This hostile treatment of bad faith possessors is troublesome because it raises the specter that the original owner has a perpetual right to recover land that was originally taken in bad faith: in principle it is far from clear how subsequent events can "cure" the total denial of the limitation period created by the trespasser's original bad faith. Moreover, the manifest inconvenience of that rule should be evident. As time passes improvements are made, and property may be devised or sold to an innocent purchaser. The case law offers very few explicit answers to the question when the period starts to run, as most suits to recover real property are brought against the original dispossessor. It may well be that any voluntary transfer removes the bad faith taint that tolls the statute.²⁹ Stated otherwise, the bad faith is regarded as personal to the original dispossessor, but does not follow against subsequent takers in good faith.³⁰

The situation is in a sense parallel to the general refusal to tack disability upon disability, and again it implicitly creates a two-tier statute of limitations. Allowing transfer *inter vivos* or by death to remove the bad faith taint in effect creates *de facto* a longer limitation for bad faith takings. It is important that this limitation not be tied to the usual rules governing the bona fide purchaser for value because then the period itself becomes very long, given the common practice of keeping land within the family by essentially gratuitous transactions.

However this elusive line is to be drawn, the intuitive distinction between good and bad faith possessors is backed by powerful utilitarian overtones. Parties who engage in deliberate wrongs constitute a greater threat than those who make innocent errors or are simply negligent: there is a greater danger that intentional wrongdoers will do it all again. They are both bad people in the individual cases and a menace in the future, so in this context the ideals of deterrence and retribution move hand in hand.

In other contexts the legal system is replete with rules designed to remove legal protection from persons who act in bad faith, willfully harming the person or property of another. Parties who in bad faith cut timber or mine coal from their neighbor's land must normally surrender

29. The point was not covered in the cases analyzed in Helmholtz's article. In conversation, Helmholtz has suggested that any subsequent transfer (not just one to the bona fide purchaser) would start the operation of the statute. Otherwise there could be no end to litigation.

30. Here again it seems that knowledge of the original defect in acquisition should not bar the running of the statute, unless the transferee was part of the original scheme to take the property.

the property without the offset for costs made available to the cutter or miner acting in good faith.³¹ The standard plans for automobile no-fault insurance and workers' compensation generally prevent some classes of deliberate wrongdoers from taking advantage of the limited liability that the system affords in cases of accidents, whether or not attributable to negligence.³² Similarly, noninvasive nuisances, e.g., spite fences, also turn on the presence or absence of malice.³³ In a different realm, the grant of a qualified immunity for public officials leaves them exposed to claims for decisions executed in bad faith.³⁴

Even if bad faith cases are rightly distinguished from good faith cases, there is still the matter of the payoff. The dominant practice identified by Helmholz seems to imply that the bad faith possessor, and just possibly his successor in title, *never* obtain clear title. But that conclusion does not seem desirable, given uncertainties of litigation.³⁵ As with the case of disabilities, an *explicit* two-tier statute of limitations may be the appropriate response. The good faith possessor may be able to claim the benefit of a short period of limitation, while the bad faith possessor is subject to a second, longer period of limitation. The costs of maintaining suit rise with time, as does the likelihood that an innocent party will succeed to the adverse possessor. The net benefits of allowing suit are not always positive, even for bad faith takings; after all, statutes of limitations run for intentional torts. If the optimal length of a statute of limitations for the good faith possessor is, say, 6 or 10 years, then that for the bad faith possessor might be 12 or 20 years. The special treatment of bad faith possessors is still preserved, and the sanctions imposed against them can

31. See, e.g., *Maye v. Tappan*, 23 Cal. 306 (1863); *Phillips v. Homfray*, 24 Ch. D 439 (1883). For a discussion, see generally Epstein, *Inducement of Breach of Contract as a Problem of Ostensible Ownership*, 16 J. LEGAL STUD. 2 (1987).

32. See, e.g., *Pinnick v. Cleary*, 360 Mass. 1, 6 n.3, 271 N.E.2d 592, 597 n.3 (1971).

33. There is a distinction in that, with the spite fence cases, the malice renders actionable conduct that would not otherwise be actionable. With the bad faith possessor, no one denies the actionability of an entrance, even in good faith; the sole question is the duration of the statute of limitation.

34. Often the choice is between qualified and absolute immunity. One absolute immunity see *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Barr v. Mateo*, 360 U.S. 564 (1959). For qualified immunity, see *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Butz v. Economou*, 438 U.S. 478 (1978). The course of official immunities has been treacherous to say the least. Interestingly enough, no one regards an immunity that covers only innocent or negligent actions worth having. See generally, *Symposium on Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 LAW & CONTEMP. PROBS. 1 (1978); Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110 (1981).

35. But see the discussion of slant drilling *infra* p. 689 where the statute seems to take the categorical position, for reasons perhaps associated with the nature of the underlying asset.

be strengthened by other devices: a different valuation for interim improvements, the payment of damages in addition to the surrender of the land, or the possible exposure to fines or other criminal sanctions.

On balance, I believe that the two-tier statute of limitations is superior to another alternative recently examined by Professor Merrill in his paper, *Property Rules, Liability Rules and Adverse Possession*.³⁶ The gist of Merrill's proposal is to apply the well known distinction between property rules and liability rules of Calabresi and Melamed³⁷ to the adverse possession area. In general, the property rule will provide the owner with an injunction in a tort case or specific performance in a conveyance case so that the party not in possession of the right must purchase it from the owner. The liability rule in contrast allows the party, who does not own the right, upon payment of damages, to leave the original owner at least as well off as before. The Merrill proposal, based upon a recent California case, *Warsaw v. Chicago Metallic Ceilings, Inc.*,³⁸ would protect good faith adverse possessors by a property rule. In its novel feature, bad faith possessors would be protected only by a liability rule. Accordingly, the bad faith possessor could either maintain a suit for quiet title or resist a suit for recovery of the land by paying the true owner the market value of the land, measured at the time of the dispossession. This rule recognizes the important practical consequences that judges and juries alike attach to the question of good and bad faith. The difficulties with the rule, however, are more substantial because it does not contemplate any specific statute of limitation for the bad faith case. Thus, the rule raises the possibility that these suits, with their attendant valuation questions, may be brought for an indefinite period of time. It also raises the possibility that the land will have to be returned if its value has declined from the time of the original adverse possession. The alternative two-tier limitation system recognizes the core of common sense in the good and bad faith distinction. By so doing, the two-tier statute of limitations tends to make it more difficult, but not impossible, for judges to distort

36. Merrill, *Property Rules, Liability Rules and Adverse Possession*, 79 NW. U.L. REV. 1122 (1984-85).

37. Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

38. 35 Cal. 3d 564, 676 P.2d 584, 199 Cal. Rptr. 773 (1984). The Supreme Court decision relied upon the statutory language that provided "Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of property confers a title thereto, denominated a title by prescription, which is sufficient against all. . . ." CAL. CIV. CODE § 1007 (1971).

the other substantive requirements of adverse possession. By drawing different statutes of limitations for the two kinds of cases, the two-tier statute respects the basic intuition and promotes finality. Over the long history of adverse possession, the doctrine has never required the adverse possessor to pay for what has been taken after the statute of limitations has run. On balance, there seems to be no good reason to alter that historical judgment. Liability rules are costly to administer and undercut the security of transactions concern that lies at the base of the rule.

Some evidence about the difficulty of the limitation question, moreover, can be gleaned from statutes of limitations governing slant drilling in oil and gas cases.³⁹ These statutes were passed by and for the benefit of individuals who were in the same line of business. In general, the commercial interests who secured their passage were as likely to be defendants as plaintiffs in future cases. It is very difficult to find in these statutes an implicit scheme to transfer income or property from one group of owners to another. Rather, the close nature of the business community that pushed the statutes through makes them look more like contracts to clear up the condition of titles, which work for the long run advantage of all interested parties. It is instructive, therefore, that the statutes explicitly incorporated the distinction between good and bad faith slant drilling and provided a short statute of limitations (180 days) for good faith drilling that started running 10 days after the well was placed into operation. The statutory treatment of bad faith drilling postponed the operation of the 180 day statute of limitations until the aggrieved party discovered the violation of his rights. That statute differs from my proposed two-tier scheme in that it has no outside period for undiscovered bad faith drilling that runs from the date of the offense. This open-ended rule is somewhat puzzling, but it may be tied to the possibility that most violations will be discovered in a relatively short time because of the wasting nature of oil and gas resources, which are quickly developed whenever there is a common pool problem. Whatever the reason for that particular feature, the statute is singularly instructive about the administerability and relevance of the line between good and bad faith. The line seems coherent and makes sense.

d. Adverse Possession and Future Interests

There is one final situation in which a two-tier statute of limitations

39. CAL. CIV. PROC. CODE § 349 3/4 (Deering Supp. 1986).

might be appropriate. Under the standard hornbook doctrine, time begins to run only when the party entitled to possession is able to bring suit against the adverse possessor. Where the party dispossessed owns the fee simple in possession, the right of action begins at the time of dispossession. But where the land is subject to a future interest, the single dispossession gives rise to two distinct causes of action. The statute of limitation begins to run against the tenant in possession at the time of entry, but it normally will begin to run against the remainderman only when he becomes entitled to possession, which could occur many years after the original dispossession took place. This system could postpone the perfection of title for a long time, for even if a ten year statute has run against the life tenant, the entire statutory period will start anew at his death, which might occur 40 years after the original dispossession.

The usual argument for allowing the remainderman to recover is said to rest on fundamental fairness. The statute of limitation cannot run before the right of action begins, for it is important to provide legal protection for those not in position to protect themselves. As stated, the argument bears a close parallel to that invoked to toll the statute of limitations for personal disabilities. But as with disabilities, more is at work; for it is necessary to prevent a second type of error—groundless suits by the remainderman and unfortunate impediments to the marketability of title. The reopening of the statutory period for the benefit of the remainderman raises very high costs on these counts.

To understand the total picture, however, it is necessary to note that the remainderman need not be wholly without protection even if the statute does not start anew at the termination of the life estate. The remainderman could be allowed a right of action even before he is entitled to possession. The obvious analogy is to an action for waste, which the remainderman can bring against a tenant in possession, even before his own interest vests in possession. In principle, there is no reason why the remainderman should not be allowed to sue a third party, even if the tenant for life chooses not to protect his own interest. That offset, however, is far from perfect because in many instances the contingent remainderman might not be identified. Even if he is, he may not be in a position to learn of the adverse possession. Finally, the remainderman might choose not to sue precisely because his benefit from suit is only obtained upon the death of the tenant for life.

There is, of course, the possibility that the tenant for life and the remainderman can bargain to allocate the costs of suit, but in many cases

we can be confident that such a bargain will not be reached because the transaction costs exceed the anticipated gains to the parties. Yet even so, the remainderman is not without resources. To some degree he is able to free-ride upon the interests of the life tenant, who in successfully completing suit, necessarily vindicates the interest of the remainderman as well. The key question then is whether the life tenant will bring suit.

If there is some family connection between the tenant for life and the remainderman, a common situation, then there is a far greater likelihood that the tenant for life will regard restoration to the remainderman as advancing in large measure his own interest. If so, the problem of creating proper incentives in the presence of public goods (here the external benefit to the remainderman) is a large measure reduced.

Now suppose that there is no family connection between the tenant for life and the remainderman. Whether suit will be brought will then turn upon whether the anticipated expenses of the life tenant exceed the potential recovery. Where the life tenant is young, he will enjoy the greater portion of the estate, so that the incentive to sue will be high. The window of vulnerability—cases where the anticipated costs of suit lie between the value of recovery to the tenant and the total value of recovery—will be narrow precisely because the value of the remainder interest is low. With young life tenants, then, the public goods problem is not apt to be severe.

Alternatively, with older life tenants, it is far more likely that the remainderman will be identified and will have a substantial interest in bringing suit. He might even take possession of the real estate within the basic statutory period. While the life tenant may be less likely to sue, the remainderman is more able and more likely to protect his own interest—even within a short statutory period. In the end, therefore, the number of cases that are apt to fall through the cracks, that is, those where neither life tenant nor remainderman have sufficient incentive to sue, is likely to be small. As with disabilities, the case of extending the limitation period can be made; but again the proper solution seems to be a two-tier statute with an absolute outer limit, which for the ease of convenience should be set at the same point as that used in both disability and bad faith cases.

3. *An Ounce of Prevention*

Thus far I have looked at the question of the limitation of actions from the perspective of someone interested in remedies after the violation has

occurred. In practice, this thinking has an archaic element. An optimal system of remedies is one that makes two sets of comparisons. The first comparison is between remedies *ex post* and remedies *ex ante*. The second is between public and private remedies. On both these points, the law of adverse possession has a distinctively obsolete caste. Modern institutional developments have tended to reduce the importance of this entire body of law.

First, the frequency of adverse possession varies inversely with the expenditures that the owner incurs in order to avoid that adverse possession. Today, effective avoidance measures are available at low cost. Surveys have become cheaper and more reliable. More property is sold by institutional developers who are able to generate the paperwork for clear title to tract housing. Future interests in real property, and the knotty adverse possession issues they create, are today avoided like the plague. The increased use of trusts, often created by wills, reduces the likelihood that any person will obtain legal title to property during minority. Within the modern environment the overwhelming practice is to avoid the blunders in conveyancing and surveying that breed a large number of adverse possession claims. There is an instructive parallel to recordation systems generally, in which a system of clear title has eliminated the endless permutations of actions and constructive notice that arose under the earlier law.

Cleaning up the system in advance puts far less stress on the remedies that are available after the fact. There are simply fewer cases of innocent adverse possession for the remedial system to contend with. The bad faith portion of the docket has shrunk as well. In the formative era of the common law, the police were unknown; self-help and legal action were the dominant modes of protection. The key objective of the ancient procedure was to delineate when self-help had to yield to legal suit, a period of time which was set surprisingly short—Maitland says at four days.⁴⁰ But the modern police force has changed all this. Dispossession is regarded as a criminal offense, and the public force is brought to bear long before any limitation period could possibly take effect. The theoretical analysis of adverse possession is not changed by these modern developments, but its practical importance surely is. The issue was once at the heart of land law and practical politics. Today, as an issue primarily concerned with boundary disputes and conveyancing errors, adverse pos-

40. 2 POLLOCK & MAITLAND, *supra* note 5, at 50.

session, as an institutional matter, is largely of a problem solved. In the law of real property, the action has shifted to questions of conveyancing, recordation, zoning and other land-use controls—problems themselves unknown in the earlier era when the question of forcible adverse possession lay at the heart of the land law.

II. THE FUTURE

The second part of this essay on property law is directed toward time and the future. Past and future are united in one sense and divided in another. They are united because the further one moves away from the present, the greater the uncertainty about what will happen, or has happened, and why. Yet, the past and the future are divided because time is always moving away from the one and toward the other. Only on rare occasions does the passage of time cure gaps in the available evidence about the past. For the future, however, it is a routine practice (as with rules of “wait-and-see”) to allow matters to resolve themselves as subsequent events unfold.

This section asks how legal rules and institutions should be fashioned to respond to the pervasive uncertainty about future events. The central question in the inquiry is what limitations, if any, ought to be placed upon the structure of ownership and the power of disposition over things so owned. That question has especial relevance because of the permanent nature of land, but it would be a mistake to think that the problem begins and ends with land. Many forms of ownership, such as the corporation and the trust, arise precisely because of the need to create fungible interests in what otherwise would be unique properties. The permanent nature of the underlying assets, such as those found in trusts, corporations, and condominiums, have important influence upon the governance structures needed for their sound operation. The problems initially confronted with ownership of land have spread out far from their original source.

This part of the essay addresses the question of time in three sections. The first looks at the reasons, historical and analytical, why ownership in fee simple, entailing absolute ownership rights of infinite duration, came to dominate the law of real property. The second section discusses the evolution of the fee simple from its feudal origins and examines the consequences of divided interests in land in connection with the law of waste, the rule against perpetuities, the rules on restraints of alienation, and the trust. This section concludes that the various legal restraints

upon the power of alienation should generally be abolished. Some of these restrictions serve useful functions for the parties to the transaction, while those which do not would ordinarily not be adopted by the grantor, either in family or commercial situations, because either he or his grantees would have to bear the lion's share of the cost. The third section traces the gradual transition from grant to contract in the evolution of joint ownership and finds that the same patterns emerge under trusts, condominium associations or corporations. In this third section, two themes emerge. First, here as elsewhere, freedom of contract turns out to be the hidden thread that links together many disparate practices and doctrines. Second, the governance structures chosen in these private arrangements lend unsuspected support to our present constitutional arrangements in the political sphere.

A. Absolute Ownership of Infinite Duration

The question, what restrictions should be imposed upon the rights of private ownership, is perhaps as old as the law of property. Both in principle and in practice, the question arises with the initial acquisition of property. Here, however, theory has often been submerged in the politics of feudalism, as royal claims prevented the emergence of ownership of land by occupation.⁴¹ Nonetheless, the analytical structure of ownership becomes clearer if viewed in light of the first possession rule applicable to wild animals, or indeed the law of adverse possession, which operates as a rule of first possession against all strangers to the original title.

More concretely, the first possession rule is relevant in two temporal dimensions. The first section of this paper spoke of the priority of acquisition. The subject of this section is the duration of the ownership interest thus acquired. On this issue, the basic case yields results that correspond with the dictates of good sense. Ownership acquired by first possession is and should be of infinite duration. Only this rule creates a complete set of definite property rights over all things. Any other regime leaves unresolved the vital question who has obtained, or who can obtain, ownership of the thing after the limited period obtained by first possession. Where ownership is not indefinite, the initial period could be measured either in lives or in years. The choice between these time periods itself has important consequences, but the most critical objections apply no matter how a limited interest is defined.

41. See *supra* note 13.

Where original acquisition of land or chattels gives only a limited interest, no satisfactory allocation of rights over the remainder is possible. One possible solution upon termination of the present interest would be to let the thing once owned revert into the common pool, where once again it can be subject to acquisition by first possession. Alternatively, the ownership of the property could revert to the state, best understood as the group of all other people out of possession. (A one hundred per cent estate tax would do it.) The first alternative returns the thing to its original unowned condition, while the second subjects it to collective ownership of the public at large—the very result precluded by the basic first possession rule.

While there are obvious differences between the two positions, both leave unresolved two major problems. First, how will the owner of the limited interest behave in order to minimize his losses at the expiration of the term, be it for years or for life? Second, how will gains from the unowned or publicly owned property be divided among the citizens of the state once it passes into public control?

On the first question, any owner will be more reluctant to invest in long-term improvements when his interest has a limited time horizon. As a matter of theory, the limited interest in property necessarily entails that the party who sows (all) cannot reap (all). The partial mismatch between investment and reward creates an external benefit for the (unidentified) remainderman, and in turn sets up a serious conflict of interest problem for the tenant in possession, not dissimilar to that which arises when the adverse possessor enters land occupied by a tenant for life. This mismatch will not curb all investment, but it will reduce investment levels until at the margin, the expected private returns equal the expected private costs. Inasmuch as the present owner is unable to capture income after the expiration of his interest, he will quit investing too soon. In principle that resulting externality could be overcome by a bargain between the tenant in possession and the parties entitled to the subsequent ownership interest. But how can those bargains take place if the tenant in possession does not know with whom to bargain, or if there are too many potential remaindermen to bargain with?

The difficulties with limited interests are frequently encountered in routine real estate practice. Yet, here it is possible to anticipate them by contract if the original fee was vested in a single owner. For example, lessees contemplating major improvements typically negotiate with the landlord *in advance* in order to insure that the lease can be renewed dur-

ing the anticipated life of the improvement; or that some compensation will be provided in the event that it is not. It simply is too risky to erect the improvement and then hope for the best. Even where the tenant's improvement is of no value to the landlord, there is still the risk of a landlord's holdout at renewal time if that improvement has value to the tenant. Some agreement *ex ante*, even one implicit and informal, goes a long way to reduce the risk.⁴²

Second, the indefinite rights at the expiration of the original limited interest set up a destructive competition for the remainder interest. Where property reverts back to its unowned status, there will be a race to see who can acquire it first. The heirs (or other potential devisees) of the prior owner may often have the inside track; nonetheless, others may be able to win the race. The children of the decedent may still be infants, or out of the country, or otherwise disabled. Yet even if their heirs are successful, the original uncertainty in the outcome will feed back into earlier decisions on investment and utilization: the temporal externality will be diminished, but only by the probability that the desired successors of the present occupant will become the new first possessors.

Alternatively, if property reverts to the government when the present interest expires, then government will have to maintain or sell property, or both, on a massive scale. These transactions in kind are always subject to various forms of intrigue and abuse not present when taxes are collected in cash.⁴³ These problems will only be exacerbated if tax sales must be made on a routine basis, instead of being reserved only for the occasional case of taxpayer default. In certain cases (i.e., with the acquisition of historical sites, mineral tracts, scenic areas) there will be major political disputes over whether government sale is preferable to government management of retained property. These administrative costs seem far greater than those in a system of private dispositions.

These issues help account for the strength of private inheritance that

42. The same uneasiness over limited interests arises where the government condemns a remainder interest in real property while leaving the present landowners in possession under a term of years, as has happened at the Beverly Shores National Park in Northern Indiana. By condemning the future interest over the term, the government has induced individual landowners to skew their investment decisions so that any future improvements are built to become worthless at the expiration of the term, no mean feat given the lumpiness of investment, both in the construction of new and the repair of old housing. New construction in the area is made of materials that are not expected to out-last (at least by very long) present interest.

43. I discuss the point at length in Epstein, *Taxation in the Lockean World*, 4 SOC. PHIL. & POL'Y 49 (1986).

allows the owner of property unfettered discretion in choosing his successor in title.⁴⁴ A definite system of property rights is preserved across generations. Allowing the present owner to choose the persons who enjoy the property after death reduces the likelihood of wasteful subterfuges designed to minimize the impact of the tax, or for a pattern of immediate consumption, which may be easily approximated by the sale of fixed assets and the purchase of a lifetime annuity.⁴⁵ It also cuts down on the premature or hidden transfers of assets to children or other family members. With a strong bequest motive, the benefits to the next generation will be treated largely as though they were benefits to present owners, thereby reducing the dislocations that time may impose upon consumption and investment preferences.⁴⁶

This system of rights does not work effortlessly. Recently, James Buchanan has argued that any system of ownership that provided for 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.⁴⁷ Ideally, rent-seeking is avoided because the owner demands something in exchange for the property surrendered. The prospective owner therefore engages in the transfer and not the dissipation of assets. Yet no return transfer can be made to a decedent. There is accordingly some lack of the market discipline that obtains in ordinary commercial transactions, because the risk increases that potential beneficiaries will engage in nonproductive activities in order to obtain control over desired assets.

Yet, in light of the alternatives it is dangerous to treat a problem as necessarily calling out for a regulatory cure. The state could limit the scope of discretion in the disposition of property at death, either by a rule

44. The emphasis in the text is on voluntary disposition at death. It is of course possible to have systems whereby the property remains in the family to discharge, as it were, support obligations to both spouse and (minor) children that survive death itself. Whether these obligations are imposed is a close question, but it is not critical for our purposes. The gulf between the obligations and desires of testators are, as a general matter, too small to generate any systematic distortions, the not infrequent horror stories to the contrary.

45. See Tullock, *Inheritance Justified*, 14 J. L. & ECON. 465, 471 (1971).

46. The estate tax of course brings money into the public realm at death. Here the objection to it cannot be based upon the ground that the state has no claim to private resources, but on the ground that the proportionate income tax generates all the wealth that is needed to run the state without creating the opportunities for factional behavior. For my views, see generally EPSTEIN, *TAKINGS*, *supra* note 3, at ch. 18.

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

that fixes the pattern of succession within the family, or by the comprehensive tax payable directly to the government. Yet, these alternatives appear, if anything, to be costlier than the problem they seek to obviate. An owner aware of competition for his property can take effective steps to avoid it by making clear (especially to his children) what kinds of behavior are regarded as acceptable. Similarly, the owner can limit his own power of disposition by contract or the creation of irrevocable trusts. One common form of trust gives the settlor power to invade the corpus, while leaving the residue to a favorite charity, including a foundation which is especially set up to honor the decedent. On the other hand, if dispositions take place within the family, the levels of competition are likely to be reduced because the natural love and affection between family members moderate the conflict that could be expected in struggles between strangers. A simple rule of thumb that calls for equal portions for all children goes a long way in that direction. Any scheme of direct regulation may well lock an owner into a pattern of disposition that he finds unpleasant, as with the parent who cannot discipline or control a wayward child secure in an inheritance.⁴⁸ Similarly, any restriction on disposition at death severely limits the power of owners to make contracts, including implicit contracts, that do generate an immediate benefit for the owner (say, care and companionship) in exchange for payment or performance after death. No legal system can eliminate the need for discretion; it can only locate it in the places where it is apt to be exercised most effectively. In general, that place is in private hands.

The attack against absolute ownership is not only based upon a concern for dynamics of wealth disposition within the family. In part, the criticism derives from an extensive social concern with inter-generational fairness, where it has two dimensions. The first arises from the fact that no future person can own property today. The second derives from a concern with income redistribution,⁴⁹ which taken in its extreme form holds that the initial financial endowments of any individual should not

48. The dynamic is important in family trusts. If the grandparents set up trusts that give the grandchildren vested rights in substantial sums of wealth, the parents are often uneasy because the financial independence undermines their control. Making social judgments about the situation is very hard because there is no reason to assume that the parents have better judgment on these matters than the grandparents.

49. A fuller exploration of these themes goes far beyond the scope of this paper. I have addressed some of these questions in Epstein, *The Uncertain Quest for Welfare Rights*, 1985 B.Y.U. L. REV. 201.

depend upon the wealth of his parents.⁵⁰ Often these concerns are offered as reasons to limit the rights of present owners to dispose of property as they will.⁵¹ But the concern is misplaced. Even if members of the present generation have absolute control over their own material wealth, they cannot deny to members of the next generation their right to their own labor—rights that will be worth more to them in an open and prosperous society. Efforts at confiscation are likely to produce defensive measures that will dissipate the overall stock of wealth, and short of a violent disruption of the family, they cannot reach the wide range of implicit and explicit transfers that take place when children live in the family household. Far from taking coercive steps to promote a set of equal economic endowments for the unborn, the better strategy is to develop institutional arrangements that insure that all members of the next generation will be able to develop their own talents without having to pay (say, in the form of higher taxes) for the extravagances of the previous one, and without being subject to various restrictions (e.g., the minimum wage) that work to entrench the established interests.

In addition, future generations can be protected by voluntary private arrangements as well as by public ones. Economic interests behind trusts are often created for the next generation at least, usually with some safeguards to preserve the corpus. Many of these limitations take place within the family, but many are for the benefit of the public at large. Private charities and bequests are frequently made for educational and medical purposes. In contrast, public ownership tends to lead to the premature dissipation of wealth, not to its preservation, as its political managers receive little direct benefit from improvements that yield their greatest benefits after they are no longer able to hold public office. A system that honors private dispositions in life and at death creates the rights structure best able to counter the frictions and discontinuities that impede the transfer and creation of wealth.

B. Common-law Ownership

1. Title by Grant, not Possession: *The Evolution of the Fee Simple*

The argument just made addresses the temporal dimension of owner-

50. See, e.g., B. ACKERMAN, *SOCIAL JUSTICE AND THE LIBERAL STATE* 202 (1980).

51. See, e.g., J. RAWLS, *A THEORY OF JUSTICE* 131 (1971): "Being unconditional, [first principles] always hold (under circumstances of justice), and the knowledge of them must be open to individuals in any generation." For a concrete legal application see Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 *IOWA L. REV.* 615, 635 (1985).

ship under the common-law doctrine of first possession. The historical account is quite different from the analytical one because of the intimate connection between private ownership and the medieval feudal institutions. That story has been told many times and well.⁵² My purpose here is only to select those portions of the tale that show the tension between history and theory.

Historically, claims of first possession took a back seat to claims of royal power. Individuals acquired all claims to land by grant. The first link in the chain of grant was always the Crown, but in practice many individuals in possession claimed through a succession of grants, each made by intermediate parties otherwise entitled to possession. In the feudal system, only the Crown claimed title outside the chain of grants. In a sense, royal title was the ultimate form of adverse possession, that is title by conquest, which any subject could challenge on the strength of his prior possession only at his peril.

Feudalism, therefore, shifted the origin of title to real property from possession to grant.⁵³ These grants in turn were subject to infinite variation that would not have been possible with land acquired by first possession. To be sure, these grants could have taken the form of out-and-out conveyances in which the entire interest of the grantor vested in the grantee. Where both grantor and grantee are private parties, outright conveyances are commonplace. The use of retained interests, which are expensive to monitor and protect, is reserved commonly for special situations in which buyer and seller (or landlord and tenant) have common interests in the same property, or where the grantor retains an interest in some adjacent or nearby property. But where the grantor is the sovereign, the out-and-out conveyance is something of a legal impossibility given the residual powers of taxation and eminent domain. More to the point, the terms of the early grants were expressly limited and condi-

52. See, e.g., 2 POLLOCK & MAITLAND, *supra* note 5, at ch. 1; A. SIMPSON, A HISTORY OF THE LAND LAW, ch. 1 (2d ed. 1986).

53. Even here the power of the prior possession principle asserted itself historically. In the period between 1278 and 1294, Edward I conducted his Quo Warranto campaign, in which he called upon various holders of franchises to show the Royal grant from which their titles proceeded. As a matter of general theory, the maxim *nullum tempus occurrit regi*, (no time runs against the Crown) appeared to preclude the use of any statute of limitations to protect franchises that had been held "time out of mind." Nonetheless, the need for stability was so insistent that a 1290 statute recognized prescription in this class of cases, so great was the potential disruption if long tenure was not considered a sufficient warrant of franchises. See generally SUTHERLAND, QUO WARRANTO PROCEEDINGS IN THE REIGN OF EDWARD I—1278-1294, ch. 4 (1963). My thanks to Richard Helmholz for suggesting the point.

tional upon the obligation to provide military aid or other assistance to the Crown.⁵⁴ The contract was in large measure an exchange of a limited interest in land for personal services. Today, employment contracts end with the death of the employee; and things were not much different in the feudal world. Hence, the life estate for the loyal knight was, most probably, the original measure of ownership.⁵⁵ Over time the nature of the bargain between Crown and vassal changed. As military obligations were commuted to cash payment, the obligations between Crown and lord became less personal, and consequently of longer duration and less variety.

The modern fee simple was built up by degrees as the older limitations contained in the earlier grants passed by the wayside, first by royal grace, then by custom, and then by legal right.⁵⁶ The transitions are captured in the development of the form of the standard grant. The simplest grant, "to *A*," contains an ambiguity as to whether it conveys what we should call the life estate or the fee simple. One way to show that the estate survived the original grantee was to specify that the property was transferred for the benefit of his heirs as well. Hence, the common form of the grant, "to *A* and his heirs." Originally, the limitation to the heirs was probably inserted as a compromise position. If absolute ownership were given to the vassal in so many words, then the king ran a risk that all promisees of services dread: the delegation of duties to strangers hostile to the interest of the Crown. Yet, to make the contract only for life left the vassal's family in a precarious state. Some protection for the heirs (who generally would follow their father to inclinations) might have been a good compromise solution, much as modern limited partnership agreements typically allow free transferability of interests within the family, but not to strangers.

The common form of the grant "to *A* and his heirs" reflected the underlying tensions in the situation, which as a matter of construction it did not obviously resolve. In one sense, this limitation could be read as a joint gift to *A* and to some other persons, here collectively described as his heirs. But the phrase "and his heirs" is not just like the phrase "and

54. Maitland gives an exhaustive and masterly account of the different forms of tenure, *see* 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 229-406 (1968).

55. "Life tenancies which arose through express grant have a rather obscure early history, which is bound up with the whole question of the development of the fee from something like a life interest into a heritable interest." A. SIMPSON, *supra* note 52, at 70.

56. *Id.* at 48.

B. *B* designates or names a particular person, but as the maxim “no living person has an heir” reveals, the phrase “and his heirs” does not refer to any individual or designated class of persons so long as *A* is still alive. Instead, it gives a rule of decision that permits designation of the takers of property at *A*’s death on the strength of information available at the time—another instance of wait and see.

One possible interpretation of the phrase “and his heirs” would have created the first strict settlement in land.⁵⁷ *A* could alienate only his life estate; each heir in turn would also have only a life estate to alienate; and so the progression could continue in perpetuity. The ingenious distinction between words of “purchase”—stating *who* takes under the grant—and words of “limitation”—stating *what* interest in land was taken—took hold to avoid just this result.⁵⁸ The phrase “and his heirs” was construed to define the nature of the estate in *A*, and not to confer any independent interest upon his heirs. This rendition destroyed the first strict settlement and moved in the direction of the modern form of absolute ownership, the fee simple. Where *A* conveyed the land, his heirs had to look to *A* (who had received the proceeds) to provide for them (normally a good assumption). They could not challenge the title of his grantee in the way that a surviving widow could claim dower rights if she had not joined in the original conveyance, or the surviving widower could claim courtesy.⁵⁹

This one constructional ploy did not of itself establish the absolute nature of the fee ownership. There was still the question of what estate the transferee took from *A*. When *A* (and his heirs) transferred the land to *B* (and his heirs), what was the duration of *B*’s estate? After some hesitation, the medieval courts held that the line of descent no longer was measured with reference to *A*, but traveled on to *B*.⁶⁰ In strict principle,

57. See *infra* note 83 and accompanying text.

58. A. SIMPSON, *supra* note 52, at 52. The distinction was well settled by Bracton’s time. Simpson thus quotes Bracton as saying “the heir acquires nothing from the gift made to his ancestor because he was not enfeoffed with the donee.” The thought is that a completed grant requires an explicit acceptance by livery of seisin, which the heir, who is unidentified (or even unborn) cannot perform.

59. A. SIMPSON, *supra* note 52, at 51-52.

60.

Strictly, if land were given “to *A* and his heirs,” the fee simple should have determined as soon as *A* and all his heirs were dead, even if *A* had alienated the land. But a fee simple became potentially eternal when the courts decided that if a fee simple was alienated it continued to exist so long as there was no failure of heirs of the owner for the time being.

R. MEGARRY & H. WADE, *THE LAW OF REAL PROPERTY* 69 (4th ed. 1975) (citing Y.B. 33-35

this devolution appears to violate the rule *nemo dat quod non habet*, (no one may convey what he does not own) that normally guarantees that the grantee's interest could not rise above the grantor's. If *A* died without heirs, all should revert to the Crown.⁶¹ But the formal objection, if pressed at all, did not survive, so that repeated application of the principle (as when *B* sold to *C*) guaranteed that the fee could last forever, no matter what happened to *A*'s line. The institution of outright ownership thus emerged from the linguistic ambiguities of the standard grants.

2. *Conflicts over Alienation of Fee*

The rise of the fee simple from the ashes of feudalism represents only the first chapter in the ceaseless elaboration of the English law of estates. With some exaggeration, it is said that the evolution of the doctrine of land law was driven by the conflict of interests between those who sought to tie up land indefinitely and their successors in title who tried to defeat these limitations. The history of the entail, of the destructibility of contingent remainders, of the unbarrable executory limitation, of the rule against perpetuities, and of the rule limiting restraints upon alienation all reflect the same basic tension.

Yet, there is a puzzle here in identifying the social source of the problem. With the decline of feudalism, the conveyance of land ceased to be connected intimately with the defense of the realm, and thus with the grantee's provision of services. The standard transaction increasingly took on the character of private law. Almost without exception, the creation of limited interests in land was done by private parties entering into voluntary transactions with other private parties. Typically *A*, an owner in fee simple, created by grant (and in later times by will) a limitation on the fee simple that denied absolute ownership of the fee to the next party in possession.

Conceptually, it has often been asserted that the difference in position between the two parties to the grant raises problems of intergenerational equity that call into question the original conveyance. A.W.B. Simpson voices the concern:

Edw. 1 R.S. 362 (1306). See also 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 106-07 (1923).

61. The situation is something of a puzzle, for in principle no one ever runs out of collateral heirs. Yet in practice, the problem could arise if any rule limited the number of generations you could go back to locate the collateral heirs, if only for reasons of imperfect record keeping. The rule allowed *B* to start anew with his own line, creating the fee simple in perpetuity.

The term "perpetuity" has been applied at various times in the history of the law to refer to various arrangements by conveyancers to enable landowners to restrict the power of free alienation of land, by imposing upon that land forms of settlement which made it impossible for their successors in title (usually their children) to deal with it as freely as they themselves had been able to do. Such attempts can be viewed as an abuse of the power of free alienation, for a settlor who makes such an attempt is using the freedom which the law gives him to deprive others of the same freedom; in consequence at most periods of English legal history the courts have set limits upon the degree to which landowners should be permitted to impose such restrictions.⁶²

The modern justifications for the rule against perpetuities echo the same concern. Simes and Smith note that today the rule applies largely to interests behind the trust and rarely to specific assets.⁶³ Yet even with the trust, they defend the rule on the ground that

. . . it strikes a fair balance between the satisfaction of the wishes of the members of the present generation to tie up their property and those of future generations to do the same. The desire of property owners to convey or devise what they have by the use of trusts and future interests is widespread, and the law gives some scope to that almost universal want. But if it were permitted without limit, then members of future generations would receive the property already tied up by future interests and trusts, and could not give effect to their desires for the disposition of property.⁶⁴

The insistence of perfect parity across the generations is no more persuasive here than it is with general attacks on private rights of disposition at death.⁶⁵ In the first place, any ability to create limited interests in lands violates the condition of parity: e.g., the grant of a life estate in the children with a vested remainder in the grandchildren. Yet from the earliest times, limitations in this form were recognized by the courts,⁶⁶ as they had to be if any freedom of disposition was to be preserved.

In addition, it is hard to understand how the parity of control should, or could, be created. The grantor owns the property outright and could have consumed it completely. When he does, there is no parity at all;

62. A. SIMPSON, *supra* note 52, at 208.

63. See L. SIMES & A. SMITH, *FUTURE INTERESTS* § 1117 (2d ed. 1956). The transition between rules for specific assets and for pools of wealth is discussed *infra* at text accompanying notes 92-96.

64. *Id.*

65. See *supra* text accompanying notes 49-52.

66. See *infra* notes 76-80 and accompanying text for a discussion of the law of waste, another body of law that illustrates a necessary asymmetry between the present and future.

there is not even a second owner. When the grant is made subject to condition, the grantee can either refuse to accept the limitation, or take it for what it is. We do not deal here with the control by a constitutional sovereign with limited powers which render certain types of grants beyond its power. Instead, we deal with an absolute owner for whom the syllogism—"If I needn't convey at all, than I can convey subject to whatever restrictions I choose"—seems to apply. If the grantee does not like the restrictions, there is an easy out: he can reject the gift and acquire his own property by purchase and thus obtain absolute control over it.

More generally, the only justification for restraints of private alienation is to prevent the infliction of external harms, either through aggression or the depletion of common-pool resources.⁶⁷ Thus, it might be appropriate to restrict the sale of guns in order to make sure that they do not get into the hands of persons who will kill with them, or to restrict the sale of riparian rights (as by tying them to the sale of riparian lands) to insure that no single riparian is able to take a disproportionate amount of water from a river.⁶⁸ Yet, these troublesome situations are far removed from the restraints on alienation on the ordinary disposition of land. The rule against perpetuities and its kindred rules are not directed toward any kind of externality. Quite to the contrary, a single person owns the entire interest in land before the disposition is made, ruling out the possibility that adverse external effects will be created by the grant.⁶⁹ The present owner can so tailor the terms of his grant to mediate in advance the potential conflicts amongst the subsequent grantees. His common grantees are in functional privity with each other because they are in actual privity with the grantor. The situation thus seems inappropriate for direct public regulation.

At this point, however, the historical record is clouded. It does seem clear that the catalogue of permissible common-law estates was somewhat limited, as the rules of "property" prevented the creation of any estate that suited the whims and fancy of the grantor.⁷⁰ Yet, historical

67. See generally, Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985).

68. Discussed *id.* at 973-82.

69. Note that the Buchanan argument applied in principle only to dispositions at death, but the rule against perpetuities applies to both inter vivos and post mortem transfers. As the two are close substitutes, it is difficult to have one legal regime for the one, and a second for the other.

70. See generally *Chudleigh's Case*, 1 Rev. Rep. 113b (1595). Note that one could not create an estate to *A* for Monday, *B* for Tuesday, etc. within the common law system. Special statutes were then required to legitimate time-sharing arrangements that are so popular in some resort communi-

knowledge is far less complete when it is no longer concerned with the legal doctrines limiting strict settlements and addresses instead the practical importance of those restrictions. Thus, we have some tolerable knowledge about the course of events that led to the barrable entail.⁷¹ But the critical question is, how often did landowners decide to create multiple interests in land? And, what were their motivations? Obviously, the decided cases provide no fair sample of the standard practices because they exclude all cases in which the fee simple passes between the generations. Even when the original grantor placed limitations upon the tenant in possession, these must be understood in context of other provisions of the grant. It makes, for example, a great deal of difference whether the tenant in possession was deprived of all powers of dealing with the land, or whether, notwithstanding an entail, there was express powers that enabled useful cultivation of the land—borrowing money secured on the fee for long term improvements is one example.

At this point the puzzle deepens. It takes no great insight to realize that multiple interests in real estate often reduce the economic marketability of title, for reasons that have long been understood.⁷² The existence of any future interests raises the specter of the standard bilateral monopoly problem between the life tenant in possession and the assorted remaindermen. When there are only two players, a life tenant and a single remainderman, any contract for sale to a third party requires the original two parties to agree on two key terms of the contract: (a) the price, and (b) the division of the proceeds. Agreement on the former is hard enough where unique assets are in issue, for the component of subjective value can be quite large. The second problem is, if anything, more difficult. The tenant for life and the remainderman are not joint tenants standing in roughly identical positions, where many problems can be obviated by an even split of the proceeds.⁷³ Instead, their positions are

ties, when grants of this form came to have a business purpose. *See, e.g.,* FLA. STAT. ANN. § 721.01 (West 1981).

71. *See* A. SIMPSON, *supra* note 52, at 126-37.

72. For a vivid and accurate account, see A. GULLIVER, *CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS* 16-21 (1959), where the imaginary dialogue between the life tenant in possession, two contingent remaindermen and the reversioner illustrate all the concerns with setting price and dividing shares, when the original positions are asymmetrical. *See also* L. SIMES & A. SMITH, *supra* note 61, at § 1117.

73. Even here complications can arise, as when one party has made improvements or repairs at his own expense, or has used personal funds to pay off a mortgage on the property. It is often possible to control the scope of strategic bargaining by rules that give credits for additional expenditures, for example. But these devices are not available when there is no symmetry to begin with.

asymmetrical. The parties may disagree both about the expected life of the tenant for life and the appropriate discount rate by which to evaluate the remainder. Matters only become more complex when the number of parties to the transactions increase, as can happen when successive life estates and remainder interests have been created under the original instrument. These problems are still more acute when the property in question is left to persons who are unborn, and hence unable to contract, or to living persons whose interests are contingent upon the occurrence or nonoccurrence of some event.⁷⁴ It is not clear therefore why any person should voluntarily court these problems by trying to complicate the state of the title. Business transactions will rarely take this form, as the price paid the owner will be reduced to reflect the uncertainty of the title. It is more difficult to make confident statements about gratuitous transactions, whether by deed or by will, for the grantor (not to mention the testator) typically receives only intangible and indirect compensation for the transfer. But, if the value of the whole is reduced, then the family or bequest objective of the grantor will be frustrated as well. There is good reason, therefore, to think that divided interests in real estate do not make a whole lot of sense in the routine case, a subject to which I shall return in discussing the trust.⁷⁵

3. *The Law of Waste*

The most concrete manifestation of the problems created by divided interests is reflected in the law of waste. Many management problems occur during the period in which the fee simple is divided between present and future interests. The law of waste⁷⁶ is designed primarily to police the temporal boundary between the life tenant and the remainderman. It begins with the assumption (to be examined presently) that the division between two legal interests in the same land is as rigid as the boundary line that separates two neighbors. For example, where standing timber is found on land, then its complete harvest by the life tenant implicitly transfers wealth from the remainderman (who had a fraction of the value of the land) to the life tenant (who keeps all the

74. The original common law was reluctant to recognize contingent remainders. The early cases recognized them only for heirs of a living person, so long as the remainder vested in interest before the determination of the prior estate. Later on, the rule was generalized to allow any form of condition, so long as vesting took place during the prior limited freehold condition. See A. SIMPSON, *supra* note 52, at 212-13.

75. See *infra* pp. 714-16.

76. For a summary see R. MEGARRY & H. WADE, *supra* note 60, at 104-10.

money) unless some steps are taken to insure that the proceeds of sale are invested for the benefit of both life tenant and remainderman. Putting the money into trust will do, although the choice of investment will influence the rate of return and hence the relative values of the life estate and remainder interests.

As is often the case with residential properties, difficult problems occur when life tenant and remainderman have honest differences in subjective values. The life tenant may prefer to turn a forest into a farm, or a farm into a factory; the remainderman may prefer to keep everything as it is.⁷⁷ The conflict between the two could be intractable, for actions which increase the market value of the fee may diminish its subjective value to the remainderman. Indeed, even if the remainderman wants either the farm in the first case, or the factory in the second, he has a (slight) temptation to dissemble, in hopes of extracting a cash payment as a precondition for allowing the life tenant to go through with the deal.⁷⁸ These conflicts may be reduced if the life tenant and remainderman are related by blood or marriage, but family ties, especially amongst adult siblings, can be eroded by honest differences in taste or changes in life style or circumstance.

It would, however, be a mistake to conclude that direct public regulation, such as that found in the law of entails and perpetuities, is necessary to guard against the possibility of abuse. Two preliminary inquiries must be addressed before reaching that conclusion. The first concerns a basic misconception as to the source of the problem. As stated thus far, the difficulties addressed by the law of waste appear to be inherent in the task of policing the natural temporal boundary between life estate and remainder. But there is no such natural boundary. The law of waste should be understood, not as part of some fixed law of property, but as part of the law of contract. The law of waste functions as a default provision that regulates the relationship of two interests in the absence of explicit grant provisions. A more elaborate grant, such as one that provides a life estate, "with permission to open mines," or "permission to harvest timber," or, most generally "without impeachment for waste," can take some sticks out of the remainderman's "natural" bundle of rights and transfer them to the life tenant. When the grant is allowed to

77. *See, e.g.,* *Melms v. Pabst Brewing Co.*, 104 Wis. 7, 79 N.W. 738 (1899).

78. The matter is far more acute in other contexts. For example, there are stories of tenants offering to pay money to break long-term leases just before they receive notice that the landlord is prepared to buy out the term of years in order to raze the building.

supplement the definition of the various estates, the catalogue of interests in land is far richer than a simple compilation of the classical estates might suggest. More specifically, the explicit language in the original grant can obviate most potential bargaining problems between co-grantees before they arise. A single grantor forms the hub from which the diverse divided interests radiate.

On this view, the proper criticism of the law of waste is that it sets the wrong initial default provision by providing too much protection for the remainderman. One branch of this criticism is that many of the default restrictions reduce the total value of the fee, as seems likely with the common law prohibition against opening new mines without explicit authorization in the grant.⁷⁹ Mines are worth opening, but the likelihood of that happening is reduced by the remainderman's holdout power. The problem can be especially irksome where the life tenant is young so that the slender interest of the remainderman can impose long delays on production.

The second objection to the usual presumption is that it tended to work against the distributive ends of the grantor, who normally wants to favor the life tenant, especially if it is himself or a surviving spouse. Modern trusts, which have to face similar allocation questions for intangible wealth, make the point very clearly. The life tenant, usually a surviving spouse, routinely receives the power to invade corpus. The remainderman (to my knowledge) rarely if every receives the power to invade the corpus without the consent of the tenant for life. The arrangement makes perfectly good sense if the remaindermen are in the prime of life, while the life tenant is at or near retirement age.

The comparison to the trust suggests a final twist in the tale. Why would anyone choose to create legal remainders in land even if granted the unquestioned power to do so? In principle, the transferor would have to be able to identify enormous distributional gains from this legal arrangement sufficient to overcome their enormous costs. Historically, it seems hard to know what these gains might have been—hence my skepticism about the practical importance of the entail and strict settlement. It is said that the Englishman had particular attraction to the grand estate and wanted to insure that it would remain in the family for many generations. But the decision to divide the land into various estates also worked

79 See R. MEGARRY & H. WADE, *supra* note 60, at 109: "for to open and work an unopened mine is voluntary waste." Voluntary waste itself was defined as "the doing of that which ought not to be done." *Id.* at 105, which, while restrictive, is not illuminating.

to the obvious disadvantage of the immediate family. These complex limitations might have been motivated by vanity or aspirations for grandeur,⁸⁰ but the typical family settlement does not stipulate that an estate be drained to purchase a monument for the grantor. Rather, it protects the surviving spouse and children, especially if minors, and perhaps the grandchildren. Within the immediate family, the real reason for voluntary restrictions on alienation may have been to ensure that incompetents in the next generation did not dissipate the fruits of their parents' labors. But with the passage of time, the original guesses of wise parents became ever more unreliable. The dead hand only works through a live agent, so the *trust*, which allows a mixture of fixed direction and subsequent discretion, became the instrument of choice for curbing the excesses of the young or the imprudent. There is an end run around the law of waste.

4. *Rule Against Perpetuities*

If the law of waste was designed to control the operation of divided interests in land, then the rule against perpetuities was designed to strike down certain future interests at the moment of their apparent creation. On its face the rule was designed to make sure that, at the very least, at some point in time, some designated persons were in a position to sell or mortgage every interest in the land. Yet the formal character of the rule assured that it achieved that purpose fitfully at best. Without offending the rule, landowners so inclined could easily tie up land in ways that could long postpone its sale. "To *A* for life, remainder to *B*, to *C*, to *D*, to *Z*, all living persons etc. for life, remainder to the children of *B* now living for etc." could divide land into tiny slivers for the better part of a century without ever running afoul of any restrictions on the creation of future interests. Even after valid contingent remainders vest, they may still be hard to value and to protect. Thus, any future life estate is in fact always contingent upon survivorship, even though the common law for historical reasons always regarded these interests as vested at their

80. See L. SIMES & A. SMITH, *supra* note 63, at § 1117. As an example, *Thelusson v. Woodford*, 31 Eng. Rep. 117 (1799) aff'd, 32 Eng. Rep. 1030 (1805). The limitation called for accumulations during the joint lives of children, grandchildren and great-grandchildren, with distribution among certain descendants. The limitation was good under English common law, but prompted passage of the so-called *Thelusson Act*. The trust itself was badly mismanaged and eroded by the costs of litigation, so little was available for distribution at the end of the period. See R. MEGARRY & H. WADE, *supra* note 60, at 265 n.53. In my view, the disastrous investment outcome made it less likely that anyone else would attempt such an outlandish scheme. The substantial business risks of these accumulations are reason enough to shy away from them.

creation.⁸¹

If the common law was designed to secure "practical alienability,"⁸² then there was no reason to focus upon the distinction between vested and contingent interests, which in no way reflects the ability to overcome the bargaining problems that might prevent the unencumbered alienation of the fee. Rather, the key question should have been the number of various interests in the land and the uncertainty of their valuation. Yet the vesting of remote interests is not even a plausible proxy for that question, which the common law never sought to regulate at all. For example, the standard rules on the entail only provided that the tenant in tail in possession could alienate the fee simple. But the law did nothing to prohibit the strict settlement where land was divided among the tenant for life, the tenant in tail in remainder, and some subsequent remainders or a reversion over that.⁸³ Likewise it is easy to draft limitations that satisfy the rule against perpetuities while tying up property during the lives of children and grandchildren, and, with a little ingenuity, for great-grandchildren as well—should anyone be so minded.⁸⁴

There has never been a good functional explanation for the old rules. The old saying was "let the lives be never so many, there must be a survivor, and so it is but the length of that life; for Twisden used to say, the candles were all lighted at once."⁸⁵ Yet the image reflects the concern with formalities, with bare possibilities, that so pervades the rule. The business practicalities are quite otherwise. The more the candles, the longer joint lives will tie up the title, and the graver the practical difficulties of conveyance. Yet it is just these features that the categorical nature of the common law ignores. The formal elegance of the rule, coupled with the literary enthusiasms and excesses of Professor Leach, have been

81. R. MEGARRY & H. WADE, *supra* note 60, at 177-78. The conventional explanation for the rule is that the contingency must govern something not implicit in the nature of the limitation itself. More concretely, "to *A* for life, remainder to *B* for life if he survives *A*" add no new information to a grant "to *A* for life, remainder to *B* for life." The survivorship condition would of course be critical if the interest to *B* were a fee simple in remainder.

82. L. SIMES & A. SMITH, *supra* note 63, at § 1115.

83. For a description of the strict settlement, usually attributable to Orlando Bridgman, the great 17th century conveyancer, see A. SIMPSON, *supra* note 52, at 229-30, 233-41.

84. Barton Leach, the Dean of the Perpetuities scholars, has said: "In 35 years of practice, largely connected with estate work, I have never found a testator or settlor who had any wish to exceed the limits of the Rule in its most severe application." *Quoted in Fetters, Perpetuities: The Wait-And-See Disaster—A Brief Reply to Professor Maudsley, With A Few Asides to Professor Leach*, Simes, Wade, Dr. Morris, et al., 60 CORNELL L. REV. 380, 388 n.27 (1975).

85. Scatterwood v. Edge, 91 Eng. Rep. 203 (1697).

primarily responsible for the enormous attention directed to the vagaries of the rule: the fertile octogenarian, the unborn widow, the magic gravel pits—stray cases all.⁸⁶ What is sometimes forgotten, or at least understated, is that in each case private responses can evade the rule, so that throughout history the percentage of wealth transmitted at death but caught by the rule is tiny. Today, virtually no wealth is redirected because of fear of its application. The clever and well counseled avoid the abuses to which the naive and uninformed fall prey.

The more recent legislation and scholarship shows a growing preference for the rule of “wait-and-see.” The validity of a contingent interest is no longer determined by the conditions as they exist at the time of grant, but by the way in which conditions unfold within the perpetuities period. The existence of the wait-and-see approach seizes upon the fundamental asymmetry between past and future uncertainties.⁸⁷ The simple intuition behind the wait-and-see rule is that time will cure original doubts, which can never happen for uncertainties of the past. Nonetheless, wait-and-see generates a new generation of technical problems, well understood in the literature. One recurrent issue is how one chooses the appropriate “measuring lives” for the revised rule.⁸⁸ The bottom line seems to be that any clear list of proper lives is preferable to any abstract principle of “causal relation” of the life chosen to the contested gift, or anything else. But here too, the point is essentially a diversion from the

86. The “unborn widow” arises from a limitation “to *A* for life, remainder to his wife, remainder to the children who survive him and his wife.” On the orthodox view, the limitation to the children is bad because *A*’s present wife and children could all die; *A* could remarry, with his second wife surviving him by 21 years, such that the remainder in the children would not necessarily vest within 21 years after some life in being.

The fertile octogenarian is a limitation “to my first grandchild to reach 25” made by a woman well past the age of menopause. Here the limitation is bad if no grandchild has reached that age. All present children and grandchildren may die, and the grantor may (biology notwithstanding) have another child, and then die. That child in turn may have children who will only reach 25, outside the perpetuity period.

The “magic gravel pits” example runs, “to *A* when my gravel pits are worked out,” which may be 22 years later.

The classic exposition of the rule is Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938). In later years his tone became more strident, as he tended to overstate the harmful effects of the rule. See, e.g., Leach, *Perpetuities in Perspective: Ending the Rule’s Reign of Terror*, 65 HARV. L. REV. 721 (1952); Leach, *Perpetuities: Staying the Slaughter of the Innocents*, 68 L. Q. REV. 35 (1952).

87. See *supra* p. 693.

88. See, e.g., R. MAUDSLEY, *THE MODERN LAW OF PERPETUITIES* (1979); Fetters, *supra* note 84; Maudsley, *Perpetuities: Reforming the Common-Law Rule—How to Wait and See*, 60 CORNELL L. REV. 355 (1975).

major criticism. The original rule against perpetuities restricted very little. Once liberalized, the rule restricts even less. The real question is whether anyone should bother with the rule against perpetuities at all.⁸⁹ The point is not that the modifications of the rule are good or bad policy. It is that they are unimportant in light of the private and public alternatives available to evade its application.

5. *Restraints on Alienation*

The concern with the power of alienation reveals itself not only in the rule against perpetuities, but also in the rules that govern direct restraints upon the rights of alienation. In one form or another, these rules place express limitations upon the power which a tenant in possession has to alienate his interest, whether a life estate or a fee simple. In virtually all common law jurisdictions, restraints on alienation on the fee are invalid, while in many jurisdictions, similar restrictions on more limited interests are invalid as well.

The usual analysis of the problem suffers from the same *ex post* character that bedevils much thinking about legal institutions. If the question is viewed at the time that the original buyer wants to resell, then a clear social loss occurs if the second sale is not consummated. But the usual analysis does not explain why any initial buyer would agree to the original restriction. Nor does it indicate the benefits that these restrictions might have in the deployment of land. For example, a restriction within five years from the date of original sale without the approval of the grantor has benefits that offset the costs of these restrictions.⁹⁰ The common-unit developer often has a retained interest in the entire project, and the ability to control resale should enhance the market for these retained units, which makes it possible for the original sales to take place at a lower price. Similar restrictions against the assignment of a leasehold interest are routinely (and rightly) upheld on the ground that they protect the value of the landlord's reversion.

These restrictions on alienation are also a standard part of the modern cooperative arrangement. There seems to be no good reason for treating neighboring land differently from a reversion in the same land. Presumably, the only difference between them lies in the extent to which the value

89. Fetters clearly sees the point, see *supra* note 84 at 383-84. I believe that he misspeaks, however, when he calls wait-and-see a disastrous reform. It is too unimportant to deserve that condemnation.

90. See, e.g., *Northwest Real Estate Co. v. Serio*, 156 Md. 229, 144 A. 245 (1929).

of one interest is tied to the value of the other. Yet, that is an issue which should influence either the willingness to include the restriction in the original sale or the nature of the restriction so included. It does not seem like an occasion for direct regulation.

At its most general level, the point made in connection with the rule against perpetuities is relevant here as well.⁹¹ The restrictions under consideration all arise by grant when there is no question of externality. Indeed, in the commercial setting restraints on alienation arise as part of bargain transfers so that any doubts about their functional value should be obviated. Yet, ironically, the restrictions upon restraints of alienation have more bite than those contained in the rule against perpetuities, which generally applies to gratuitous transactions. The law of future interests tolerates the division of land amongst many separate parties over a long period of time. In contrast, the law on restraints on alienation looks askance at limitations that are modest both in their duration and in the number of parties whose consent is needed to undo the original restraint. We should not expect the restrictions to be indefinite in duration because in many circumstances (i.e., when the developer has sold all his units) there is no gain from continuing to observe the original restrictions. Nonetheless, legal restrictions on the power of disposition seem well-entrenched. The rationale for these restraints is far less certain.

6. *Behind the Trust*

The previous section briefly covered the restrictions placed on specific assets of land and argued that these restrictions address no serious social problem. Most grotesque dispositions would not be favored by the parties able to make them, while those restrictions that were imposed would generally serve the interests of grantor and grantee alike. Moreover, where there is a desire to protect future generations, private solutions have developed which allow the separation of asset management from its beneficial interest. It is possible, at reasonable cost, for the property owner to have his cake and eat it too.

In this connection, the critical reforms have not taken place in the doctrines governing estates, perpetuities and restraints. Instead, they come from another corner, from the law of trusts. As owners more frequently placed land behind a trust, the critical practical issue was not the

91. I have made the same argument also for restrictive covenants. See Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353 (1982).

rule against perpetuities or the strict settlement; it was the power of the trustee (or tenant for life)⁹² to deal with the property in question. During the nineteenth century, for example, the English passed a series of settled-land act reforms that enhanced the powers of trustees and tenants for life to deal with property and to bind the remainderman, whose interests ran not against the property, but against purchase money that was paid to the trustees.⁹³ The powers given to the life tenant could not be reduced by agreement, but further powers could be conferred upon him. For well-drafted family settlements, little of consequence was changed, as these powers generally had been provided. But with respect to home-made settlements (of which there were some), the reforms meant a lower chance of limiting the powers of the life tenant in ways that could bring misfortune to the next generation.

The subsequent English land law reforms of 1925 took the earlier regime a step further by abolishing as a matter of positive law all legal estates except for the fee simple absolute in possession and the lease for a term of years.⁹⁴ Everything else was placed behind a mandatory trust, where the trustees had power to convey the land over the objections of the remaindermen whose rights now attached (as under the 1883 statute) by operation of law to the reinvested proceeds. The statute thus introduced a form of forced exchange whereby the remainderman's property right in the thing was transformed into an interest in a fund. Use of these mandatory settlements reduced the bargaining problem and made all the earlier restrictions on the alienation of lands obsolete because now no one could block the sale of specific assets by the trustees.⁹⁵ In truth, the protections contemplated under the English Settled Land Act (e.g., four trustees and all sorts of formal safeguards) are probably too costly for the peril at hand, so that most settled property goes through a more informal and efficient trust for sale, where the tenant for life controls the disposition of the property.

In a more fundamental sense, one can ask whether the English legislation was necessary. A look at the state of land titles in England and America suggests that even this reform is of very little importance. To be

92. The qualification is needed because under the English trust for sale the tenant for life had the power to alienate the fee, while with the strict settlement under trust the trustee had the power. Hence, it became vital to know which type of arrangement was in issue, a point that caused no little confusion in the English case law. See R. MEGARRY & H. WADE, *supra* note 60, at 288-90.

93. See, e.g., The Settled Land Act of 1882.

94. See Law of Property Act § 1 (1925).

95. See *supra* the comments of L. SIMES & A. SMITH, *supra* note 63.

sure, in America life tenants can sometimes obtain a court order to sell the fee in the fashion routinely contemplated under the English statute.⁹⁶ But as the discussion of waste suggests, only in a tiny fraction of cases does anyone create a legal remainder in land. What the English have directed by statute, we have achieved by private convention and practice. Elaborate family dispositions are routinely placed in trust, and in most cases do not involve land. Bilateral monopoly problems are also reduced in importance by allowing the tenant for life (usually the surviving widow) to invade corpus without the permission of the remaindermen. Other standard clauses achieve the same end by allocating certain kinds of receipts (e.g., stock dividends) either to income or principal. As the assets in trust are usually intangible and easily alienable, the system can work with an ease not possible with the law of waste governing the land itself. Family settlements have many complex features, but the established modes represent as good a solution to the problem as we are apt to find.

C. From Grant to Contract: Condominiums and Corporations

The rise of the trust is only one illustration of the transition from grant to contract. Yet it would be incorrect to conclude that the trust has ended concern with temporal issues. In part, the trust has only transferred this battleground to other arenas. This section will provide only two short illustrations of the larger problem of governance by grant: condominiums and cooperatives and the corporation. While ostensibly these institutions govern very different subject matter, they raise common issues of coordinated behavior.

1. Condominiums and Cooperatives

Condominiums and cooperatives (and subdivisions generally) are efforts to maximize the value of land and improvements. In each case, prospective investors benefit from the purchase of a sound institutional structure. Part of the price they pay is the cost of organizing the collective ownership that increases the value of individual units. The problems that emerge do not concern the distribution of wealth within the family across time. Yet they are most emphatically concerned with the distribution of wealth among strangers, both in the present and over time. In order to make this collective enterprise viable, individual investors must

96. L. SIMES & A. SMITH, *supra* note 63, at § 1117.

receive some assurance that fellow investors or the original promoters will not by one stratagem or another confiscate their investment. Legal rights of purchasers are an obvious source of protection.⁹⁷ Often it is possible to draft explicit contractual provisions about what will be done and who will pay for it. The physical boundaries of the unit can be specified with great particularity. Where exact drafting is possible, there is little need for discretion; and, hence, little danger of the abuse that discretion so often brings. One can think therefore of one component of the condominium deed as a grant with the simplicity of "to A for life."

Still appearances are deceptive, for the grant of the individual unit is in reality embedded in contract for governance. With the passage of time, fixed provisions are less valuable because they ignore all information acquired after the formation of the original contract. Contracting in condominiums and cooperatives comes down to a set of hard choices. Each ownership interest may be made separate so collective governance is no longer needed. Alternatively, the parties may try to negotiate modifications of the original agreement on an ad hoc basis. But here the combination of many parties and of long time frames makes bargaining breakdowns a likely possibility.⁹⁸ An unanimity requirement invites opportunistic behavior which is handled fitfully, at best, by the contract doctrines of consideration, pre-existing duty, estoppel and economic duress.⁹⁹

For want of a better solution, the dominant tendency is to retain collective ownership and to substitute explicit governance procedures both for fixed rules or informal adjustment. The law of property thus reveals its own constitutional dimension, in the private as well as in the public sphere. Separation of powers is one concern. The original condominium

97. For more extensive treatment, see Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982).

98. See, e.g., Goetz & Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); MacNeil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854 (1978). Both of these papers stress the way in which time breaks down perfect contingent state contracts in two-party relationships. The general solution is to resort to flexible performance standards and informal modification to keep matters on an even keel. Provisions for arbitration of serious grievances represent an intermediate step toward the types of contractual governance measures that emerge when the coordination problems must overcome temporal obstacles in situations involving a large number of parties.

99. See, e.g., Aivazian, Trebilcock, & Penny, *The Law of Contract Modifications: The Uncertain Quest For a Bench Mark of Enforceability*, 22 OSGOODE HALL L.J. 173 (1984), which concludes that no corner solution—either all modifications or no modifications will be enforced—will be socially optimal, even after the costs of administration and uncertainty are taken into account.

articles set up governance boards with powers to tax (by assessments, ordinary and special) and to propose structural changes in the organization of the body. The boards can hire specialized firms to manage day-to-day affairs. The full membership has to approve certain matters (e.g., annual budgets) after notice and hearing. The original structure is set up to protect against takeover of the governing body by faction. Bylaws or routine amendments cannot become the vehicle to strip some owners of valuable amenities (e.g., views or adjacent open spaces) or require them to foot the bill for expenditures from which they do not share (proportionately) in the benefit. The success of these institutional devices is never assured and depends as much upon the preferences of the parties governed as on the terms of the arrangements: the greater the divergence of tastes, the greater the difficulties. Yet, it is abundantly clear that some investment in contractual governance has a positive return for the parties so governed.

The entire discussion thus assumes constitutional overtones on its two central issues of representative government structure and vested rights. Governance cannot depend upon unanimous consent because the holdout problems become intractable. Yet, it cannot turn on simply majority rule because of the obvious dangers of expropriation by faction. Instead, it tries to respond to a police power limitation (to control the nuisance-like behavior by some) with a just compensation requirement, whereby a majority can coerce the minority so long as it does not discriminate against its interests by tests (measured by intent or effect?) that are as difficult to administer as they are necessary to apply.

The bottom line is that whenever fixed contingent state contracts cannot work to control the future, government must take its place. What is striking about the condominium example is that the governance procedures (like settled land and unlike a political constitution) can be created by unanimous consent. At the outset, a single original owner has the power to impose limitations that bind all against all. The need to insure that newcomers and late arrivals live under the same set of rules is critical whenever the sale of units cannot be completed simultaneously. It is for this reason that recordation and building plans¹⁰⁰ assume such importance in the area. Recordation protects the interests of newcomers while also giving information about the state of the title to latecomers. Build-

100. See generally, Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253 (1976).

ing plans insure that each and every purchaser is bound and benefited by the articles of association notwithstanding when they are purchased. The uniform set of front-end controls thus eliminates the possibility of strategic behavior in the timing of the original purchases because it minimizes bargaining nightmares that subsequently occur.

Within this institutional framework, one possible issue is whether the law should include certain "outs," whereby the provisions of some express contract may be displaced when original circumstances have changed. This entire issue is of great importance in the area of covenants and servitudes, which exist in rich profusion in the collective modern developments. The argument in favor of the exception is that without these mechanisms the holdout problems will become impossible to handle.

One favorite illustration of the point is the doctrine which allows the abrogation or modification of restrictive covenants in land because of "changed circumstances" over long periods of time.¹⁰¹ Yet there are weaknesses in that approach as well. No test of changed conditions can easily determine whether conditions have changed enough for the principle to apply, especially since old restrictions may have some substantial value even when the conditions have changed. In addition, the changes that do occur may be such that they are better guarded against by explicit private governance provisions than by crude public control mechanisms. Most long-term covenants are drafted by professionals. These contracts can address the future one way or the other, although even the best solution will have a high error rate. The condominium deeds can make the covenants good for specific periods of time, or they can allow for their extension, in whole or in part, by vote. Yet the bottom line remains: if there is no reasonable assurance that an implied term will have a better fit to the cases than the express contract, then there is no reason to use it. Quite the contrary, there is good reason to encourage private parties to deal with the contingency in advance so as to remove the pressure from the courts.

2. Corporations

The same argument on governance applies to interests in corporations.

101. See Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1352 (1982), criticized in part for its failure to take intergenerational claims into account in Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615 (1985).

Although they are organized for different purposes than condominiums, corporations face exactly the same structural problems: how to obtain money from investors with some assurance that they will receive an appropriate return. Here the original drive towards the corporation is to make sure that each participant in the joint venture is not a co-owner of each individual asset in the firm. By placing the corporate veil between the assets and the investors, the conveyancing and disposition of assets is done far more easily by the firm. Similarly, at the shareholder level the assignment of interests is facilitated because each share is, and is known to be, perfectly fungible with all other interests, without a detailed examination of the status of the title for each particular asset.

Yet the imposition of a separate legal layer between the ultimate owners and the assets they own again creates the explicit governance question. Fixed contingent state contracts will not work because of the range of contingencies that must be taken into account.¹⁰² Again, the issue quickly reduces to one of governance structures. The corporate promoter occupies the same role as the original developer. In consequence, this case too is blessed by the happy circumstance that amongst investors, there are no externalities in the original position. The subscription contracts for the purchase of shares mediate all contacts among separate parties. The promoter (like the settlor or developer) thereby places all investors in privity with parties who both proceed and follow them. To be sure, the time of purchase remains important; but its full value can be captured in the price term of the arrangement, where it reflects only the value of the underlying assets. The rights that shareholders have against one another remain constant by class regardless of the time or price of purchase. Accordingly, there is no way that one investor can strategically time the purchase of shares to obtain some advantage over his fellow investors, an effective prohibition that by controlling rentseeking works to the mutual advantage of all.

It should come therefore as no surprise that the governance structures needed to prevent the twin perils of holdout and expropriation with the condominium and cooperative must emerge in the corporate context as well. Conflicts of interest between directors and the shareholders are like conflicts of interest between the condominium board and the unit own-

102. See, e.g., Fischel & Bradley, *The Role of Liability and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis* (unpublished manuscript). The article concludes that liability rules are generally a poor way to secure performance. They are more expensive, given the errors and cost of litigation, than other devices, including sales of corporate control.

ers. The amendment of corporate charters raises the same issues as the amendment of condominium charters. The sale of firm assets to outsiders is like the sale of common condominium property. The right answer to these questions is hardly uniform across different corporate enterprises: these matters are too sensitive to differences in scale and to the informal relations between shareholders. It is unlikely therefore that any uniform type of direct regulation, which must be drafted in the absence of solid, firm specific information, will be as good as a private contract that can take that firm specific information into account.

Once the corporate charter is negotiated, ex post opportunism, familiar in the condominium context, must be addressed. The recent proposals to allow corporate boards to modify their corporate structures (with supervoting shares and poison pills), without going to the shareholders, show the dangers that can arise when management is given power to shift control and, through it, wealth from one group of corporate investors to another.¹⁰³ As with condominiums, one rough test of whether a change in individual rights and duties is desirable is whether that shift is pro rata across the individuals. Where it is not, recapitalization is probably part of a plan of partial confiscation, where the risks of contractual opportunism have come home to roost.

3. *From Corporation to Constitution: A Brief Post-Script*

This quick summary of the future indicates that while contracting is difficult, it generally affords the best answer for most questions of collective governance. Whether by trusts, condominium declarations or corporate charters, private contracts respond to similar perils in analogous ways. Binding future arrangements entail a partial shift from substance to process, from a concern with what will be done to a concern with who will decide subject to what constraints. These contracting systems give us a private analogue by which it becomes possible to understand collective governance in the political sphere. The one difference is that the stakes are higher, given the governments' exercise of power over the lives and deaths of their citizens. Moreover, the chances for success are lower,

103. See, e.g., *Moran v. Household Int'l, Inc.*, 490 A.2d 1059 (Del. 1985), upholding a poison pill program introduced by management action, notwithstanding the manifest conflict of interest between management and shareholders. For evidence that proposals that ward off takeover bids reduce the value of the shares of the target corporation, see Easterbrook & Jarrell, *Do Targets Gain From Defeating Tender Offers?*, 59 N.Y.U. L. REV. 277 (1984). See also Epstein, *Why Restrain Alienation*, 85 COLUM. L. REV. 970, 984-86 (1985).

and the dangers of abuse are greater because the happy circumstance of a single original owner is now necessarily missing. Politics is doing business with strangers when no one is in the position to choose his trading partners. The cumbersome nature of government becomes more plausible, and even more acceptable, once it is recognized that private agreements go to considerable cost to introduce similar safeguards against opportunistic behavior even when they are less needed. In both the public and private domain, everyone wants some assurance that he will see his share of the gain from the collective enterprise. The question of a constitution is the question of permanent structures of governance over time. The building blocks for the public solution are found in voluntary arrangements of the private law.¹⁰⁴ The Lockean theory of political obligation started with the rules of original acquisition of property by first possession and ended in the theory of constitutional government. The connection is more complete and precise than perhaps even Locke knew.

104. I have stressed this theme in my recent book, EPSTEIN, *TAKINGS*, *supra* note 3.