

TIME, PROPERTY RIGHTS, AND THE COMMON LAW

ROUND TABLE DISCUSSION

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I. PHILOSOPHICAL FOUNDATIONS

EPSTEIN: At the outset, it might be useful for me to explain how I come down on the libertarian/utilitarian dilemma, since I have been accused again of being both. I am both. I think they are consistent with one another. In fact, a major defect of much modern thinking is the notion that if you believe in consequences you can't believe in antecedents, and if you believe in antecedents you can't believe in consequences. In other words, there is no rapprochement between the deontological ethic, on the one hand, and the consequentialist ethic, on the other. My own sense is that this is wrong. The great weakness of a libertarian theory is that nobody can explain where the rights come from apart from self-evident assertion. So the libertarian waxes more and more eloquent in defense of something whose foundations tend to be weaker and weaker upon analysis. The great attraction of the utilitarian theory is that it does seem to address the matters about which we care the most: the consequences of rules upon the lives of real persons. Its great problem is that it seems to be unable to generate a coherent and principled set of rules, so that in an odd sense it seems to be useless.

Basically my long-term campaign—and it's one that I stress in my *Takings* book¹ more than I do in this paper—is to explain why libertarian rules are the first approximation of a decent set of rights in the utilitarian world. If you are trying to organize social institutions to maximize utility, some of the key features you want are observability, stability, and rules that resist uncertainty, error, and government deprivation. A very simple rule like first possession is nicely designed to handle the problem of error, precisely because it is more reliable and simpler in form than any of its rivals. Of course, all of these rules are basically first approximations. That is, the world is so complex that simple rules

1. R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985)

like first possession, freedom of contract, and the prohibition of force and fraud don't carry you the whole way. For example, they don't provide for a governance structure to maintain the system. The key issue is, do you believe in forced exchanges or not? The hard-line libertarian doesn't, and essentially I think his system breaks down at that point. The subjective value problem becomes so dominant in his mind that he won't allow the state to take, even if it purports to restore an equivalent or to make everybody better off because of the exchange.

My own view is that the agenda for law is to ask the following question: Given that we start with the libertarian paradigm, can we find ways to make Pareto improvements? I disagree with Bob Ellickson when he says my model permits hypothetical gains or uses a Kaldor-Hicks type criteria. I would require implicit but real compensation where the benefits to individuals in the form of the added protection they get from a rule more than offset whatever vulnerabilities they suffer. I would argue, for example, that statutes of limitations and recording acts are, in fact, not only wealth maximizing in the crude aggregate sense, but they also have very desirable distributional effects for the sharing of the gains.

This in turn raises the question why looking backward and looking forward are so different. Peggy Radin is puzzled by that asymmetry. But I don't think there is much of a problem. The reason why adverse possession requires you to scramble and make all sorts of accommodations of a utilitarian nature is that somebody has violated the standard rules of the game. You no longer have a transfer which has taken place in accordance with those rules. And now the question is, is it worthwhile to make rectification or is it not? Sooner or later, given all that has transpired, rectification is too costly and will cause more harm than it does good. You don't want to reach that judgment on a case-by-case basis because of all the political errors that creep in. A statute of limitations gives you a categorical rule that tends to reduce the degree of manipulation that otherwise can take place in answering the question: Do we rectify or not?

When we look forward to the future, with restraints on alienation and so forth, we don't have that problem. There is nobody who has violated the rules by the imposition of a voluntary restraint. Peggy's argument that you want to equate restrictions on alienation imposed by contract with restrictions imposed by government completely ignores the fact that they are imposed by two very different processes. In the first case you have the model of mutual gain working for you; it may take you a while

to figure out where the gains come from, but if you look hard enough you can usually find them. In the other case the rent-seeking model is going to be dominant. A paper that equates private covenants and zoning is a paper that confuses the externality problem with the contract problem. My view is that the common law got it wrong in the restraint on alienation cases, because it forgot the central theorem of modern welfare economics: where there are no externalities, contracts that are voluntarily entered into will give you the right results. Because there are no externalities when *A* imposes a restraint on the alienation of his own property, the hard libertarian line is appropriate. There is no way that public intervention can produce a Pareto superior shift, as it can with recordation and statutes of limitation.

RADIN: I think maybe you have the subjective privilege to label yourself a consistent libertarian and utilitarian if you wish, but almost everybody else is going to say that any person who says, "Libertarian rules are the first approximation of a decent set of rights in a utilitarian world" or something like that is really a rule utilitarian. Even if the rules that you choose tend to be libertarian ones, you are in fact a rule utilitarian.

EPSTEIN: What I said is that the ultimate crank that one produces as a conceptual matter will be a utilitarian crank. I have no doubt about that. But on the other hand, what it generates will be libertarian rules.

RADIN: Except when they don't work.

EPSTEIN: No, as a first approximation. We will never get a situation where we will be able to state things in terms of logically necessary and sufficient conditions. That is the problem—the fallibility of man. We use a set of approximations, and my sense is that the degree to which you remain a libertarian depends on how good you think the first approximation is as against subsequent iterations.

RADIN: A libertarian thinks that there are absolute rights. You don't. Moreover, I don't think you have really answered the backward-looking/forward-looking point. You say the distinction between adverse possession and restraints on alienation is that in adverse possession someone has violated the rules of the game, and in restraints on alienation he hasn't. But that adopts a backward-looking perspective on both problems. What you are saying is when someone violates rules he is punished, or rearrangements must be made, and when he doesn't violate rules there is no justification for state intervention. When you argue this way you are being essentially a libertarian. A utilitarian isn't going to say that. A utilitarian is going to keep looking forward all the time and

ask, "What are the consequences? How is this going to turn out in the long run?" So I think you still haven't answered the utilitarian objection to restraints on alienation, which is, how are we going to keep a sufficiently functioning free market if we let people impose whatever whims they want on successors with restraints on alienation?

ELLICKSON: I agree that utilitarianism and libertarianism are hard to reconcile. The issue of whether or not government should have the power of eminent domain nicely illustrates the difference between the two. An unalloyed libertarian would regard eminent domain as indefensible. Richard Epstein might tolerate its use to overcome transaction-cost barriers. If so, Richard is at bottom a utilitarian, as I suspect are most of us.

SCHWARTZ: As to whether one can consistently be a libertarian and a utilitarian I think I'm more on Richard Epstein's side than are some other people. I would put the issue this way. As I understand Locke, he said first possession and the mixing of one's labor with property would justify a property right only in a state of nature and subject to the condition that as much and as good is left over for others. In civil society, particularly after money is invented, according to Locke, property is regulated by convention, and the justification for convention is the common good, which seems to be some seventeenth century notion of utilitarianism. So if Richard is actually a Lockean he is not too inconsistent in talking about cost-benefit justifications for rules.

The more fundamental point I want to make is that if you get beyond libertarianism as the simple-minded notion that "they" can never tell you what to do, and ask for justifications for why "they" can't tell you what to do, then the issue is whether those justifications are consistent with the sorts of reasons Richard gives in support of his position. In order to show that Richard is being inconsistent, I think you have to examine the justifications for the libertarian position and then match those justifications against the arguments that Richard makes. And I am not so sure, at least at this stage of the game, that they would be that much out of sync. There may be some conflicts, but I think that inconsistency has to be demonstrated rather than assumed.

RADIN: Could I just make a brief response on Locke? Although philosophers may debate this, I don't think the prevalent view is that he represents a seventeenth century version of utilitarianism. Locke didn't say that after money was introduced property rested on convention. What he said was that after money was introduced it was possible to

have more possessions than you could otherwise use before they would spoil, and possible to have an unequal distribution of wealth. But his main point was that the property rights that you get from a state of nature existed prior to government and are superior to government and convention, and the reason government exists is to protect your natural property rights. The result is I think, as Bob Ellickson mentioned, that eminent domain is probably prohibited. Government is not supposed to rearrange property rights for society or for convention. And I don't see anything in the Second Treatise that would support saying that this conception of property is reconcilable with utilitarianism.

GOLDBERG: I think that there has been too much emphasis on labeling Richard Epstein a utilitarian vs. libertarian or for that matter a contractarian. He's a little of each. The prior question is, which rights are to count? That's the philosophic issue that ultimately lies behind the major differences. The three schools differ formally in that if you were a pure type, you would have some different answers to certain questions, but when you really try to implement these approaches in any real world situation they are going to merge. And whether you are a utilitarian with a libertarian bent or vice versa, it doesn't matter much. We are all pragmatists in that sense.

KOMESAR: I may, in fact, only divulge my lack of sophistication about philosophical standpoints, but I agree with Vic Goldberg that we may not get very far discussing things in terms of ideal philosophic states. The question we want to address is, why do we have different legal rules? Why do we have different common-law rules? What sense do they make? Which regime makes them more sensible? It seems to me, if I understand things correctly, that it makes no difference which philosophical approach one takes. Whether a given rule is good or bad under a particular regime depends on the kind of institutional context one assumes.

Now Richard has suggested that libertarian rules are the best first approximation of utilitarian rules. Well, if they are a good first approximation, does that mean that they are linked to one another? What are the elements that make one a more or less good approximation of the other? That is what we should be talking about.

COOTER: I want to try to clarify the relationship between libertarianism and the philosophical and legal positions that have been discussed. Libertarianism has several different strands to it, and how you come out with regard to time, or how you come out with respect to particular legal

rules depends upon which strand you emphasize. I want to disentangle three strands, which I call the natural-law strand, the minimum-law strand, and the ordinalist-law strand.

The natural-law strand stresses that social life gives rise to norms (rules imposing obligations and granting rights) spontaneously and in a decentralized way without government intervention. The natural-law idea is that rules are generated spontaneously for society in a decentralized way, and the government is just a convenient way that we choose to enforce some of them. These rights restrict the government and protect individuals against it. Indeed, if natural rights are regarded as thick enough, then there is not really any scope for government legislation. All legislation can do is enforce the rules that are generated spontaneously by this decentralized system because any substantive legislative act the government undertakes will violate somebody's natural rights and, therefore, be illegitimate.

The second strand, the minimum-law strand, is very simple. Just imagine a set of all possible actions and imagine a partition of those actions by government into permitted and forbidden zones. The minimum-law strand advocates minimizing the forbidden zone—it should be as small as possible, subject to some kind of pragmatic restraints such as the constraint that the permitted acts should interfere with each other as little as possible.

There is no necessary reason why the natural-law strand and the minimum-law strand should coincide. After all, if it turned out that people were just naturally meddlesome and naturally liked to interfere with each other, then the kind of rules that they spontaneously generate within a decentralized social life might, in fact, be extremely intrusive. What unifies libertarianism and avoids this potential contradiction is what I call the ordinalist-law strand. This aspect of libertarianism emphasizes the privacy of goals and values and their incommensurability. If you believe that goals are private and incommensurable, then, of course, you end up with the view that the natural law cannot be too meddlesome because that would violate ordinalist values. Moreover, if you take the view that values are ordinalist, the natural-law and the minimal-law positions don't seem to contradict each other, rather they seem to reinforce each other.

When you put all three strands together you get a fairly coherent political philosophy. But whether that political philosophy is consistent with other philosophical principles, such as some form of utility theory, or with particular legal rules, such as eminent domain, will depend a lot on

which one of the strands you emphasize. For example, if you emphasize the ordinalist-law aspect, then any form of cardinal utility theory, any sort of Kaldor-Hicks or cost-benefit type of reasoning, is going to be thrown out, and any type of eminent domain action is going to be thrown out, too. On the other hand, if you emphasize the natural-law strand, particularly if you give it some kind of constructivist interpretation, that is to say, if you think of the natural law as being constructed out of the contemporaneous judgments of people, you may allow for a considerable amount of utilitarian reasoning. Under this view, it just may be that people left alone by government will spontaneously agree to act in ways that correspond to Kaldor-Hicks or something like that. Similarly, if you emphasize the natural-law strand, you may not end up objecting to eminent domain. Finally, if you emphasize the minimal-law strand, then you have a clear contradiction between utilitarianism and economics, because I think that the general thrust of economics is to emphasize optimal laws rather than minimal laws. Optimal law and minimal law just aren't the same.

EPSTEIN: I think Bob Cooter and I are basically working the same side of the street. The one point that I would want to be careful about is that even if you are an ordinalist, you would not necessarily reach the conclusion that you have to throw out eminent domain. If we are going to have any system of centralized enforcement, the great problem is: How do you generate the revenues to enforce private rights without violating those rights? You can't do it. You've got to have taxes. That means you are going to have forced exchange. So it seems to me that what the ordinalist would say in this particular context is, "Give me a set of taxes that roughly leaves untouched those areas in which we think the subjective values are apt to be thickest."

The great weakness of libertarianism as it is classically understood, and the reason why the gap between optimal laws and minimal laws, though small, is nonetheless persistent, is that the standard libertarian understands the imperfections associated with aggression and is prepared to take very powerful steps to combat it, including the imposition of taxes in order to provide an enforcement agency. But, by and large, he is much less sensitive to the problems of common pools, free riders, and so forth, which impose real resource losses. Generally speaking, my view of the optimal situation is that these are appropriate grounds for intervention, but you have to make sure that when you overcome the common-pool problem you do so with a set of roughly durable institution rules

that prevents pooling from becoming a source of disguised confiscation. I would also argue that natural rights are slightly thinner than Bob suggests, because many of the meddlesome interventions are enforced by social, and not by legal, sanctions. Finally, I don't think the ordinal problem is going to be as dominant as he states, and so there is probably a closer relationship than he suggests between optimal and minimal rules.

SCHWARTZ: I want to respond to a point that Neil Komesar made which no one has answered. Neil essentially asked, what difference does it make what moral theory we adopt? It seems to me that if one is going to engage in moral argument, one ought to disclose one's starting points, because they happen to be relevant. I admit there is a real puzzle, because even when starting points are chosen, it is sometimes very difficult to see how the ultimate positions follow directly from these starting points; that is really Neil's point. But this is just an aspect of the curious and difficult nature of moral argument. I don't think the best response is to give up. I think the best response is to try to define the starting points a little better.

ZERBE: A quick point. There has been, I think, an unfortunate identification, and it runs throughout Richard Epstein's paper, between utilitarianism and wealth maximization. I think the jump between the utilitarian theory and wealth maximization is a big one, and it is one that needs to be spelled out more than it is in Richard's paper.

KOMESAR: In response to Alan Schwartz's comment, I am certainly not opposed to moral arguments. My argument was simply this. When we examine a series of legal rules and institutions—first possession, adverse possession, eminent domain, and so on—and the questions are, how do we explain them, how do we evaluate them as good or bad, how have they evolved? It seems to me that in each instance it would be absolutely essential for a complete theory to have a clear sense of the kind of moral theory being applied. But even with the moral theory fully specified, the argument is far from complete. My point is not that the moral theories are identical or that there is nothing worthwhile in exploring them, but that there is a great deal more to understanding these various legal rules than can be learned by engaging in abstract moral argument.

II. FIRST POSSESSION

CARR: Not being a lawyer, when I hear about the right of first possession the problem I have is, what do you possess? If I am the first to

land in North America, do I now own North America, Central America, South America, and all the land that is contiguous? Do we limit my rights of possession to what I can enforce? If so, how do you test the enforceability of property rights? By the ability to keep strangers off? If so, does that make first possession just the other side of adverse possession? That is, if you can enforce it, you own it by first possession; if you can't enforce it, you can lose it by adverse possession.

Now you could test that. The differences we see in statutes of limitations over time and across countries should depend, according to this argument, upon enforceability costs. If enforceability costs go down over time, the statute of limitations should go down. If enforceability costs are different over different jurisdictions, the argument should be that the statute of limitations will be longer when enforceability costs are higher. It's very much like the three mile limit for sovereignty over the seas. Why didn't countries claim a 1,000 mile limit? It's the Demsetz argument:² because they couldn't enforce it, there was no meaningful sense in which they could call it a property right. Limits have been extended in recent years because the costs of enforcement have, in fact, been going down.

EPSTEIN: I was only going to talk about the temporal dimensions of these rules, and what Jack Carr says about first possession is that I am wrong because I can't handle the extent question. That is, what is it you acquire when you acquire by first possession? Now it turns out that that's a real problem to which there are a couple of real answers that have existed in practice and are enormously stable. The first point is that you want to distinguish clearly between what it is that you can claim and the mode of enforcement. Demarcation of rights may be based solely on private acts, but the enforcement question is a mix of private and public acts. You have to be around long enough to assert your claim, but once you are, you call on the sheriff to aid you. The usual way in which people handled the problem of demarcation is that, instead of having a rule of naked first possession, they had a rule in which they put out claim stakes at the edges that formed a visible and known barrier. Everybody else then had notice and was able to alter his conduct accordingly. So you had some natural mechanism to delineate how much you could take, which then operated to set up consistent rights afterward.

The second dimension you have to worry about is up and down. One

2. See Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

of the things the common-law rule did was get stuff into private hands as quickly as possible. The nineteenth century writers used to say that the law abhors a void in ownership, precisely because you didn't know who was entitled to do what with what. So you had the *ad coelum* rule, which said that if you took the land, you owned the sky above and the minerals underneath the land. In this way, minimal rules of possession managed to place a maximum amount of resources under exclusive and consistent rights as between individuals.

HELMHOLZ: I wanted to raise a couple of points that reflect some real puzzlement on my part concerning what has been said about the rule of first possession. I think Richard has effectively answered Jack Carr's point, but there still is an important difficulty about the rule: It is not always very easy to tell who possessed something first. What are the actions that make you the first possessor? Anyone who has looked in depth at property law knows how intractable and difficult those issues can be. The rule is not quite so simple as it seems.

Second, the rule of first possession fits very poorly with the facts of human history. Richard puts aside conquest, puts aside sovereign power. I don't know by what right he does so, because conquest and sovereign power have been continuing and strong forces in the development of human society. Why is it sensible to say we'll just disregard those?

Third, it seems to me that Richard tries to show that the rule is utilitarian because it is a simple place to start, and so forth. But I don't quite see what difference it makes today. You've got some small subsets of things, like sunken treasure, where it might make a difference, but why is it of great importance otherwise?

EPSTEIN: You basically make three points. Let me see if I can answer all of them. The first point, I think, is the temporal analogue to Jack Carr's point. He said basically, "I don't know what space looks like under a first possession rule," and you are saying, "I don't know what time looks like." It seems to me that in many cases the problem is not very difficult. That is, if you get your fence posts up in time, then you are there first. We know how the system works in time, for the same reason that we know how it works in space. Where you have real problems, of course, is with mining claims and similar things like that. But there you just substitute one first possession scheme for another. That is, instead of having the first possession of the claim, you have the first priority under the filing system of the claims office. This problem becomes extremely important, for example, when you go to the patent situation that Dave

Haddock talks about in his paper because there is no natural, or physical, way to take exclusive possession of information, inventions and so forth. Consequently, you must have a filing office that is a substitute for first possession.

The second point you talk about is conquest. The reason that we always put conquest aside is because we are trying to figure out a theory that constrains government, violence, and the Hobbesian world. The reason that first possession is so important as a theory—the Lockean theory—is because first possession is a decentralized theory of acquisition that, by and large, helps explain why everybody is not dependent upon the tyrannical whims of somebody with greater power. In private law, the anti-might-makes-right position explains the dominance of the medieval real action. That is, the major function of the crown with novel disseisin and the writ of right was to make sure that when the guy who was stronger claimed it, the guy who had gotten there first kept it. You can't do normative theory if you are going to allow conquest to be a trump because then you are in a world where you are not trying to aggregate preferences or protect rights. You have an arrogant dictator, he's called the sovereign, and whatever he says goes, and everybody else can forget about it.

The third point that you make is, what does the rule have to do with us today? This ties in with what Alan Schwartz said about Locke. I think one of the great mistakes that Locke made was the proviso, because he was always worried about the amount that was left in the common pool, and he never took into account the enhancement of wealth and opportunity for other individuals that occur by virtue of privatization. The example I always give is, suppose you had no capital of your own. Would you rather be plunked down in an unowned desert or in Beverly Hills where the land is worth a zillion dollars? I know where I'd go, because I think the right of first possession is not particularly important, given the right of acquisition from people who have well-defined rights. The first-possession theory is nice, however, because it explains why the right to alienation has to belong to somebody, and it also explains how you can make subsequent corrections from original allocative mistakes by having a series of voluntary trades under low-transaction-cost rules.

But there is one area in which Locke is still directly important to this present day, and that is ownership of self. He gives you a rule of first possession by which you mix your labor with unowned things, but the first point is that you own your labor. And it turns out that no matter

how modern the society is, if you have a rule of decentralized labor ownership, you constantly generate new sorts of wealth, that very profoundly influence the decentralization of power and the ability to maintain competitive markets that would otherwise be forestalled.

HELMHOLZ: None of those three answers erases my puzzlement. First, you say that everyone has a fence and that in mining law the filing system works. Now if you look at a map of mining claims in the American West, you often will see a quilt of overlapping claims. Moreover, not everyone has a fence. There are a lot of cases dealing with possession where no one will have a fence, where the acts of dominion are not very great. So, to say that because one may have a fence, everyone in fact has a fence, seems to me wrong.

Second, conquest. I think it is not quite fair to think about the importance of conquest in human history in terms of just the individual versus the individual, because in most cases the conquering agent is a conquering government. If you are thinking about conquests in human history, the model you have to have in front of you is not one individual against another but one government against another.

Third, I don't think the first possession rule explains the ability to alienate. In early English society you had no freedom to alienate, and yet the first possession rule still held. I think, therefore, the ability to alienate can exist, in fact, must exist quite apart from the rule of first possession. Something else explains it, not the first possession rule.

ZERBE: Following up on Dick Helmholtz's point, it might be worthwhile mentioning, for those who might not know it, Umbeck's work on mining claims.³ Looking at the California gold rush experience, Umbeck found that first possession didn't cut it because the original claims were too large to be enforced. What is interesting is that although first possession did govern who got claims, it didn't govern the size of the claims. What governed the size of the claims was a sort of group meeting in which a majority of people were wearing guns, and the majority decided that the appropriate size of the claim was smaller than the size of existing claims. So they divided up the claims on the basis of arrival times. But not everyone ended up getting a claim. Umbeck asserts that the size of the claims given was the size that an individual person could efficiently defend. I have some problem with that. Given that there was some gov-

3. Umbeck, *A Theory of Contract Choice and the California Gold Rush*, 20 J.LAW & ECON. 421 (1977).

ernance structure in place, and there was some enforcement mechanism in place in the camp, it is unclear that the efficient size from the individual's point of view would also be the efficient size from the group's point of view. That is a distinction which he doesn't really address.

COOTER: I want to distinguish between two uses of the principle of first possession. The first use is what I would describe as a metaphysical tale—a story rather like Adam and Eve that can be used to justify and explain certain facts of the world within a particular tradition that might be described as literary. The other use is as a judicial principle to actually decide property disputes on the strength of concrete historical acts of possession.

Now I am not very interested in the doctrine of first possession as a metaphysical tale. Who needs it? My own view is that first possession is largely a metaphysical tale. Its use as a principle of adjudication, on the other hand, is very limited and probably unsound. I want to discuss this latter point.

With regard to land, Richard's paper quotes Pollack and Maitland as saying that the doctrine of first possession was not operative in England because everything was already possessed. Well then, where was it operating? First possession operated mainly in the colonies to dispossess native people of their land. I have spent quite a bit of time in the last ten years on Indian reservations, and this summer I was in northern British Columbia where the Nishga are lodging a property claim against the Crown. This is what happened to the Nishga. They were not conquered, they never signed any treaties, they never ceded their land by conquest or anything else. Well, in the 1880's the Canadian surveyors came into the Naas Valley where the Nishga lived and drew a little circle around each of the four Nishga villages and said, "That is yours. All the rest of this valley and these hills, belong to the Crown." The fact that the first two inches of topsoil in those valleys was the blood and bones of the Nishga's ancestors didn't make any difference, because the Nishga didn't use the land like civilized people. They didn't fence it off, graze cows on it, or make some form of investment other than hunting the game on it. So they were dispossessed, and now they are trying to get their land back. The Crown's use of first possession against the Nishga is a real use, not a metaphysical tale. The experience of the Nishga is generalized in Carol Rose's recent article,⁴ where she argued that the principle of first posses-

4. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985).

sion is, in fact, designed to favor certain kinds of possessing acts, such as fencing off the land and raising cows and crops like civilized people are supposed to do, as opposed to other uses.

The other problem with first possession as a rule of decision is that it leads to preemptive investment. Let me give you an example. Suppose there is a piece of land, and in order to establish title to it you have to fence it. Suppose the only reason to fence it would be to keep cows on it. Suppose also that it wouldn't pay to keep cows on it unless there were a railroad to get them out to market. Suppose the year is 1820, and you have reason to believe that the railroad is going to arrive in 1830. What do you do? You may have to fence the land now to get title and let the fences rot for a decade until the railroad arrives. In this example the main effect of the investment is redistributive rather than productive. The investment is made solely to establish your title against others. We all know that investments motivated by redistribution rather than production are inefficient. So I think that using the principle of first possession as a judicial principle rather than a metaphysical tale is quite inefficient. When you go outside the land area and look at something like fishing rights, this is even clearer. There is just a great deal of preemptive investment.

RADIN: Bob Cooter has now said eloquently the first thing I was going to say, but maybe I'll say it again in other terms because I do think it is important. Let me put it in terms of the idea of social contract. Some people thought that a social contract happened once upon a time and then governed what we did ever after. Other people like Rawls thought, No, this is a heuristic tale; this is something we argue about philosophically but is not an actual historical event. Dick Helmholz said if first possession is anything it has to be heuristic, because what we had historically was conquest and feudalism and a gradual evolution of fee simple. Only later did we invent these tales to explain why first possession might be a good idea. Richard Epstein has now agreed to that, as I understand him; but in the paper he wrote I think he is much more ambivalent. He sometimes talks as if first possession happened historically, and other times talks as if it is a metaphysical tale. I think we should all get perfectly clear that first possession is a heuristic or a metaphysical tale, and take it on that basis.

Second, I don't think Richard Epstein has really answered Jack Carr's point, so I think you conceded on that too quickly, Dick Helmholz. When we talk about first possession, we talk about possessing the re-

source; we act as if we know what a resource is, but we don't. We act as if we know what possessing a thing is, but we don't know what a thing is. It could be that a thing is defined by what defensible boundaries exist. Or a thing could be defined philosophically by what we ordinarily think of as objects. Or possibly a thing is defined by other kinds of conventions by which we've agreed that the world should be divided up into things. Whatever the principle is, it is clear that it is rather dynamic in that it could change over time or with surrounding circumstances. I think that the history of water rights is a wonderful example. They were rather confused about this early on because nobody could tell what "the resource" was. Maybe now we know because we have better scientific information. In any event, I think that there are more problems with first possession than we realize when we start talking about "the resource" or "the thing."

GOLDBERG: Returning to Bob Cooter's railroad example. The problem is the one Dave Haddock raised in his paper, which is that under the first possession cases you always have a race to be first. There will be a dissipation of rents in that process. Part of the way of dealing with the problem is to enable people to establish rights early enough so that they don't dissipate as many rents, which is the point Kitch made with regard to patents.⁵ On the other hand, pushing back claims to an early point in time may mean that you have to hold the land for a long time, which is just another waste, and that's the point Bob Cooter identified.

SCHWARTZ: I don't agree with Bob Cooter that first possession is necessarily inefficient in the circumstances to which Richard Epstein was referring. First possession encourages people to give notice of ownership claims and giving notice of ownership claims can greatly reduce conflict. If you have a very good recordation system, first possession would be less efficient than that system. But I think the question has to be judged relative to particular institutions rather than just up in the air.

EPSTEIN: I want to focus on some of the attacks that Bob Cooter made against the first possession rule, and I want to respond to them in several ways. Let's take some of the examples. One was the railroad case. It seems to me that the right way to handle that is to recognize that fencing, although one viable way in which to stake a claim to land, is not the only way. I have been a big fan of recordation offices. Of course, you

5. See Kitch, *The Nature and Function of the Patent System*, 20 J. LAW & ECON. 265 (1977).

only allow the people who actually take possession in some way to do the recording. You don't allow somebody in New York to say I hereby record all of Alberta and then claim it as an owner. But the acts that constitute taking possession can be less expensive than fencing the land. Somebody puts out four stakes, but he has to at least go to the trouble to go there. You then have an identification and proof model, which is a permutation of the original first possession rule, and you don't have to let the fences rot for ten years.

The second illustration is the one about the Indians. I sense that your basic claim for them *is* a first possession claim. What you are saying in effect is that they had persistent use of this land over a period of time; they didn't set their haunches down on it, but they hunted it and so forth, and everybody knew that. So there was no notice problem. At that point you should respect that claim. You certainly would not give them a claim to any valley that they had never entered. So what you have to do when you are dealing with non-Western communal institutions is modify the rule, and frankly, I am very sympathetic to that. But I certainly couldn't be sympathetic to that idea unless we had a theory of prior use and occupation that would make it viable. If it was simply a question of need, you could send Indians to Nova Scotia. So what you are saying basically is that you have to be sensitive to the way in which you interpret the first possession rule. I agree.

The third point is the breakdown of first possession rules, which I didn't talk about in this paper because I was confined largely to land. But in the *Takings* book⁶ I deal with the breakdown of first possession rules at great length. There is no question in my mind that common-pool problems are the great *bete noire* of the first possession rules. But what do you do then? You didn't talk about the question of alternative institutions. One thing you can say is "Gee, first possession doesn't work, so now the state owns it." And you could do that with oil and you could do it with water, but in those cases the first possession rule delineates a limited set of persons who have claims once you put the common pool in place. It is only surface owners that have interest in the oil, not the state. It is only riparians that have interest in the water, not the state. With fishermen it is more complicated, but it is only those people who have invested in fishing who get some claims under the state apportionment system and can't be wiped out without compensation. So the great ad-

6. EPSTEIN, *supra*, ch. 15.

vantage of the first possession rule is that it limits the class of individuals to whom the collective-choice mechanism has to be applied. That limitation is an unqualified good. That is, if we have large numbers of people who have no particular direct connection with the resource, and if you say in effect it's up for grabs in the federal government, you're going to have a lot more of the rent-seeking, self-interested action than you will have if you constrain the debate to those individuals who are involved in it as prior owners under first possession rule.

So first possession is the start of the analysis, not the end. Once you work in the refinements, it seems to me that the rule becomes much more attractive as a base of operation. Especially because—and I think this is critical—nobody here, at least as a matter of moral theory, is prepared to give me a rival, operational rule. We may talk about different kinds of approaches, but whether you start with personhood, utilitarianism, libertarianism, everybody sooner or later comes back to possession as the root of title. The only question is, how much give is there in that system? Nobody has come forward, and I don't think anyone ever has come forward, with an alternative that starts with an open system where the state owns everything, or everything is owned pro rata by all the people on the face of the earth. Because if you started with such a system, and then tried to make corrections from that system, it seems to me the nightmares we see in mining claims would be dwarfed by nightmares of a far greater magnitude.

MERRILL: I want to make a comment, following up on what Bob Cooter said, that might tie some of this discussion together. It seems to me that if what you want from a system of property rights is a set of clear, simple rules that can be used as a basis for voluntary transfer, then there is no reason that you can't start with state ownership just as easily as first possession. You would start with the state owning everything; it would then transfer the property by a series of grants to individuals; these grants would be recorded or registered or what have you; and thereafter the property would be subject to free transfer. Thus, it seems to me that the strong insistence from Richard Epstein on first possession as the necessary starting point cannot be based on the fact that first possession is the only clear or unambiguous rule. Indeed, as Dick Helms and Peggy Radin have pointed out, first possession is really a rather messy rule, at least at the margins. The better argument for first possession, I think, is based on the public-choice point that you don't want to start with the state because that would encourage rent-seeking behavior.

But if that is the point, then I think first possession is really just a metaphor. It's a kind of fable we tell in order to reinforce the case for a minimalist state.

MANNE: I want to follow up on something Dick Helmholz and now Tom Merrill said to Richard Epstein. If I have the power to come and take your ring away, and the power to defend that possession against anyone else once I have the ring, why isn't this power a form of ownership that transcends first possession? Isn't that what happened with conquests of many lands?

EPSTEIN: Sure.

MANNE: How then do you integrate that with the notion of first possession? You seem to be saying that in looking back to find out where to start, we go back to whoever first possessed the property in this chain of ownership. But you don't go back to the Indians in North America.

EPSTEIN: Why do you say I don't? I don't address the problem of the Indian claims in the paper, but my comments to Cooter I thought were, by and large, very sympathetic to that side of the argument.

MANNE: No, it seemed to me in your comments to Bob Cooter, you took the specific case that he gave. But take something like the dispossession of the Indians in Oklahoma.

EPSTEIN: Well, I would want to know more about it before taking a position on it. Generally speaking though, it seems to me that the Indians' claims faced two problems that were enormous. One is that when you have a system of communal ownership, as many of them did, the idea of first possession has to be adjusted to take into account the fact that one person is going to be an agent for many other individuals. And I am quite prepared to do that. The second problem is that many of these claims are enormously garbled because lots of Indians managed to take property from other Indians.

Nobody wants to argue that the world is not going to have enormously complicated factual situations under any given rule. But the right question to ask is: Is there an alternative legal rule to which you are prepared to give moral assent that has fewer complexities? When Tom Merrill starts talking about the state giving "it" out, we have to find out who the state is, how it's funded, how it's organized and so forth, and the Lockean impulse to the first-possession rules as a heuristic device is still the right one. Locke's rule forces you into a decentralized system, so that you don't start with socialism of some sort. I think that is the right inclination. Unless someone can give me a rule that's superior to first

possession, it seems to me that the debate is between a rule that is wounded in many different ways as opposed to no rule, unless you are prepared to justify conquest.

MANNE: I am. I am prepared to justify conquest. That was exactly the point of my question.

EPSTEIN: If that's your position, then I suggest you better lie awake at night, because once you lose, you have no recourse. You'll be vulnerable to the next set of tyrants. That's not a normative theory. That's basically an argument that says whatever is, is right.

III. ADVERSE POSSESSION

FISCHEL: I want to ask Richard Epstein a question. In his paper he clearly accepts the idea that adverse possession is permissible in his scheme of the propertied world. This reminded me of the question of takings by local governments. If we had a serious resurrection of takings doctrines, as Richard suggests in his book, and as several others, including Bob Ellickson and myself, have suggested in our writings, a great number of suburban zoning laws would be put under extreme duress by owners who would sue for takings of their property without just compensation. The problem is that many suburban communities have had these excessive, or "supernormal" to use Bob Ellickson's term, zoning laws for a long time. They have made plans around them. They have become capitalized in the value of other people's property. Municipalities have made capital improvements based on the existence of such zoning. Would you allow a doctrine similar to adverse possession to be argued by these local governments in preservation of their zoning laws?

EPSTEIN: That is the hardest question in the world. Let's go back to the adverse possession situation. What happens with adverse possession is that you see the original wrong, and then sort of make a ballpark collective judgment that the cost of rectification of that wrong would create more mischief than it would eliminate. As far as I can see, when you come to the zoning area, if you were simply to invalidate these laws, you would not really restore the status quo ante. Because what happens is, once government introduces an elaborate system of zoning, it displaces a whole variety of consensual arrangements that otherwise might have grown up in its place—covenants, restrictions and so forth—that might have duplicated some portion of what zoning does. Moreover, it is also clear that to the extent that everybody thought the legal regime had a

degree of permanence to it, they made a lot of investments in reliance on the new legal order.

I have always said that the only way to understand takings doctrine is to make a radical separation between the question of whether you think something should or should not be adopted in principle, and whether or not you can undo it once it turns out that it's in place. Even if there is a clean answer to the first question, I don't think that there is a clean answer to the last. My own view about it is that to the extent that you are dealing with vacant land and large contiguous plots—and a lot of zoning directs itself toward that—striking down the statute seems to me to be perfectly appropriate. To the extent that you are dealing with complex communities in which there are all sorts of difficult interactions and where people have built in reliance, as it were, on government imposed covenants, I am much more unwilling to do so. The question that you ask, which is how you undo past errors, is one question to which nobody can give a per se answer. What you try to do is figure out those areas in which the reliance interests and the cost of correction are relatively small; and you do it. In those cases in which things are enormously entangled you don't correct past errors. Adverse possession is designed to reflect that same kind of situation. There comes a point at which everybody is better off if nobody is prepared to go backward and undo this kind of a mess, and therefore you leave it at that.

This is not, by the way, just a problem only for a libertarian or free-market type. Anybody who thinks that the past has made some big mistakes faces this problem. But it seems to me that you'll never come up with anything that looks like a clean and wholly satisfactory line. What you want to do is avoid two perils. One, you don't want to get yourself into a frame of mind where you ignore all these past and entrenched practices and strike everything down. On the other hand, you don't want to make the past so powerful that it simply legitimates everything that has taken place for more than a very short period of time, so that you get yourself into a constitutional ratchet. That is the dilemma that one has to face.

MERRILL: I would like to expand on the rationales behind the institution of adverse possession from the utilitarian perspective. There are a whole host of rationales of which Richard's paper mentions, I think, only a couple. I would like to list some of the other rationales that are found in the older legal literature and in the case law. Maybe people will think

that some of these rationales are erroneous but, nevertheless, they have at least been cited.

The two that Richard seems to emphasize are, first of all, the fact that evidence deteriorates over time and that the cost of litigation rises over time. Therefore, at some point, we want to cut off the possibility of suit in order, if nothing else, to induce parties to resolve these claims while the evidence is relatively fresh. A second and distinct point, which, incidentally, I happen to think is the most important, is the one about facilitating transactions by wiping out lots of old and stale claims and thereby reducing information and transaction costs.

The third point that you find in the literature is the interest in punishing owners who sleep on their rights. That one, I think, is controversial because it implies to a certain extent that there are affirmative burdens on owners to develop their property or act in a way other than passively with respect to their land. But you can also see it as a kind of duty simply to assert your right to exclude periodically, to make your presence known, or to make a mark on your property that could have a kind of efficiency justification in that it also reduces transaction costs.

The fourth argument, that is very prominent in the literature—and Peggy Radin's writing touches on this—is the reliance interest of the possessor. Many people think that is the key to adverse possession. We want at some point in time to be able to encourage people to invest and make improvements on their property even if they have questionable title to it. Adverse possession strengthens those expectation interests or gives some substance to them.

The final justification, which I think is quite important, is third-party reliance interests. Not everyone can do a title search before they act toward apparent property owners as if they, in fact, own the property. For example, all sorts of contractors do work on property on the assumption that the person living there actually owns it, and it would be very burdensome to force them to do a title search before they extend those types of services. You have people who lend money on the strength of apparent ownership. You have renters that rent from people whom they think are landlords, and so forth. Adverse possession gives some substance to those kinds of third-party reliance interests by suggesting that the appearance of ownership asserted over a period of time is, in fact, going to be actual ownership. So the older literature does suggest a whole host of utilitarian-type arguments for adverse possession, and in discussing it, we

should at least consider all those arguments, not just arguments about deteriorating evidence or whatever.

ELLICKSON: Tom Merrill should add to his list yet another utilitarian consideration—one recognized in the traditional literature to which he referred. A utilitarian should see value in protecting people's territorial roots. The notion of territoriality is extremely important in biology. The sociobiologists who have ventured to apply biological theory to humans have understandably created controversy. Yet it is plausible that humans are to some degree territorial, and that this tendency has helped shape adverse possession law. Someone who resides or works on a particular piece of land has, in Peggy Radin's terms, invested his personhood in it, or in my terms, is vulnerable to suffering demoralization costs upon being dispossessed from the property. In Bob Cooter's story about the Indian tribe in British Columbia, I suspect that it was relevant that land was involved. The tribe's members would not have been as distressed if they had instead lost stock in a corporation. In my comment on Richard's paper, I therefore treat damage from uprooting as a demoralization cost. During the early stages of adverse possession, I assume demoralization considerations favor the original owners, but that as time passes the adverse possessor can lay claim to deeper roots.

COOTER: I think the point that you are making is that the consumer surplus of the original owner may be large whereas the taker values it at the market price, so to force an exchange at the market price rather than respecting the original owner's property rights can destroy that surplus. It's the old argument in favor of restitution, rather than damages, for the taking of idiosyncratic goods.

ELLICKSON: That can't be the entire explanation, Bob. If only the original owner has idiosyncratic surplus and the transfer of the good would have no significant wealth effect, the original owner could restore the surplus by buying back the good from its taker.

MERRILL: In fact, the roles are reversed. At least after the statute of limitations has run, the adverse possessor is the one who has the surplus. The true owner is presumably the one who values it at the market price because the true owner hasn't been in active possession.

CARR: Yesterday Bob Ellickson mentioned that there was no doctrine of abandonment in the law of real property. And I take it legal abandonment is something you have to do instantaneously. But I can't see why, if you think of abandonment apart from its precise legal meaning, you couldn't interpret adverse possession as a doctrine of abandon-

ment. The argument would be, how can you tell the property has been abandoned? Basically, because the true owner is not using it. Well, if somebody else can come on the land and use it for a certain period of time, an adjudication that the true owner is no longer entitled to enforce his property rights is, in effect, a determination that he has abandoned his property. You may say, why would anybody ever abandon a valuable asset? It must be that there are high transaction costs in getting the buyer and seller together; there must be some type of market-failure argument, otherwise you would always sell the property. But if you accept that, then I can't see why you can't interpret the adverse possession as abandonment.

HELMHOLZ: Most adverse possession cases are not cases where someone has abandoned the land in any real sense. Most cases are where people have made a mistake and don't know where the boundary line is. If they did know where the line was they would make the correction. So in that sense it is very difficult to talk about true abandonment.

CARR: Talk about squatters though.

HELMHOLZ: The number of squatters cases in adverse possession law is a very small percentage of the total cases.

GOLDBERG: I think that the notion of abandonment has some appeal, at least to the non-lawyers. It is especially appealing when we look not just at the narrow case of land, but at the general form of property rights where the same sort of principles arise. In trademark law—and trademarks are property—we have what appears to be an adverse possession-type doctrine: use it or lose it. It is a clear sort of rule and it is one where you have to do much more active policing precisely because if you don't, you will abandon the trademark. Part of the reason for that is because it is inherently more difficult to enforce that right by claims of title written down in the recorder's office. Another area where this same sort of problem comes up is contract law where we have doctrines such as waiver, estoppel, or contract modification by behavior. All of those things in effect become something like an adverse possession-type claim. Ultimately the contract has been modified, but the modification is not recorded anywhere. At least courts often do recognize that the contract now is a different thing even though it says something else. The rights that are recorded are quite different from what will be enforced.

SCHWARTZ: I think there are two kinds of situations in which adverse possession cases are likely to arise. One of them is the case of mistake. I really don't think I own the land, someone else thinks that he

does. The other is some kind of changed circumstances: I thought the land was worthless, so I didn't much care that somebody was using it, and then it turns out that it becomes valuable. Why can't we analyze both types of cases in terms of the cheapest cost-avoider concept? After all, we usually analyze mistake and changed circumstances cases along the line of which person can best bear or insure against the risk. Not thinking very deeply about it, it seems to me that the cheapest cost avoider in most cases will be the original owner. And that would suggest to me very short statutes of limitations. I don't see why you should have a twenty-year period or even a five-year period.

ELLICKSON: To apply my typology of costs, a major problem with short statutes of limitations is that they require landowners to bear high monitoring costs to keep squatters out.

SCHWARTZ: In the case of squatters the monitoring costs would be low. You are not going to have a statute of less than two years, which means that once every two years you have to cruise the land and say to anybody who is on it, leave. Now I can't imagine that that is expensive.

ELLICKSON: But why should the statute be as long as two years if the landowner is the cheapest cost avoider? You must be concerned about the magnitude of monitoring costs or else you would have called for a statute of thirty days.

SCHWARTZ: I am not really sure that is right. In mistake cases the error is not always corrected instantaneously, and you would want to leave some amount of time for the owner to wake up. But it would hardly take ten years to wake up; from an efficiency standpoint, it doesn't seem likely that ten years would be the appropriate time.

ELLICKSON: I have a second, more fundamental, reservation about your analysis, Alan. The Calabresian cheapest cost-avoider approach typically allocates a risk to someone who is undertaking an activity, because actors typically have the best knowledge of risks and preventive measures and the best ability to act on that knowledge. Your analysis assumes that the key act in adverse possession is the ownership act. But the cheapest cost-avoider analysis could just as plausibly identify the key act as the entry act. Why put the risk of loss upon the arguably passive landowner instead of upon the active entrant?

MANNE: Are the cases systematic enough that you can talk in terms of selecting a least cost avoider? As we talk about the period that you would allow the owner to sleep on his rights, it is one thing if he owns

some wilderness land across the continent. It's another thing if he has a lot in the center of a big city.

GOLDBERG: One of the problems is that the cases will change if you change the statute of limitations dramatically. If you adopted a very short statute, you would have a lot more opportunistic attempts to become adverse possessors. And that would change substantially who is the least cost avoider. I would try to take your property very quickly if the statute of limitations was an hour.

HELMHOLZ: In finding a system that will provide a cheapest cost avoider, it may be important to remember that most mistakes are not discovered until there is a subsequent transfer of the title. So if you want to consider how best to deal with the problem, that is the moment that you have to focus on.

COOTER: I want to make a point about a fundamental difference between an accident that destroys resources of the sort that Calabresi had in mind and adverse possession. An accident is a destruction of resources whereas adverse possession is a transfer of resources. And this fundamentally changes the economic logic of the situation. Suppose there are a dozen potential trespassers and one owner. Well, since there is only one owner, you might say that it would be cheaper for him to know exactly where his boundaries are and to warn off the twelve trespassers, than to require each of the twelve potential trespassers to know where the boundary lies. So from that point of view, it looks like the cheapest cost avoider is, in fact, the owner. On the other hand, we have to keep in mind that if the person adversely possesses the property he transfers it to himself. As a consequence, the parties who are the potential trespassers have an incentive to undertake these acts. Consequently, the cheapest cost avoider of bona fide mistakes may be the owner, but unless you have a rule that distinguishes between bona fide mistakes and intentional acts of trespass, you invite trespass. In contrast, nobody has an incentive to create an automobile accident. That is why the analysis of accidents in *The Costs of Accidents*⁷ must be modified when applied to trespass and adverse possession.

MERRILL: I agree that the cheapest cost-avoider analysis is not the best approach to the adverse possession problem. Let me elaborate a little bit on the importance of adverse possession to real estate transactions.

7. G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

There is a whole variety of interests affected by the doctrine of adverse possession, and you can't take a simple paradigm like fence cases or squatter cases and think that it is generalizable to the entire set of problems. All sorts of things can cloud title to property over time. Unextinguished mechanics' liens, mortgage interests that haven't been fully satisfied, spousal rights that have never been relinquished, future interests that are still contingent or perhaps exist but haven't materialized—over time all sorts of interests like this can multiply by accretion. And the most persuasive argument for adverse possession, I think, is that it is a very powerful device for reducing the transaction costs and information costs of real property transfers, because it wipes all of these old claims off the books. It is like a broom that each year sweeps off another potential layer of these claims in the past. Thus, even in a world where there was perfect information about boundaries, and deeds were all recorded and there were no error costs at all, if you didn't have adverse possession, every time you had to transfer you would have to trace title all the way back to the original root. You would then have to trace forward to the current successors in interest and negotiate some kind of release in order to have good title to the property. And the burdens that such a system would impose on the process of real estate transfer would be horrendous. Most of these interests are very remote; people don't think about them; they really have small value; but if they weren't extinguished, they would have holdup value or nuisance value and so would complicate the process of transfer. And when you open up the inquiry to include those kinds of factors, I don't think you can say that a cheaper cost-avoider principle—a kind of case-by-case inquiry into who could have avoided the particular problem—would really work very well in facilitating these transactions.

SCHWARTZ: While my advocacy of cheapest cost-avoider analysis may imply that the issues are simple, I really didn't mean to suggest they are. I suppose the way I would put it is that the way you assign property rights affects the incentives of people, and given this, one should ask which assignment of property rights will produce the cheapest system overall. In this sense I agree with Vic Goldberg who pointed out that if there were a different rule, people would have different incentives. I think that Dick Helmholz's comment is relevant, but I don't agree with it. That is, Dick said most of these disputes come to light when there is a transfer, but it may be that this is a function of the current rule. If you change the current rule then you would get different results. Tom Mer-

rill in effect says adverse possession is useful because it is the most efficient way to clear titles to property when they get fairly disordered. I would like to see a little more argument on that. For example, in personal property security law we make a filing of a financing statement effective only for a relatively short period of time, so that if you check the files and see the date on the financing statement you know right away whether it's still valid. My only point is that these things could be examined carefully using economic analysis, and my hunch is that you probably would wind up advocating shorter limitations than we now have.

The only other thing I'd say is that a lot of American law is affected by concepts that hang on from English law, and I wonder whether a part of the lengthy statute of limitations in English law had to do with social class. That is, the people who owned the land were also the people running the country. It may be that this social class wanted a long statute because the last thing they wanted was to have bourgeois or lower class people taking away their property. Maybe we don't have to be influenced by those kinds of hang-ups here.

EPSTEIN: Starting with your last point first, it is probably not a very good explanation for the English system. Generally speaking, if you go back to the early cases in which adverse possession was central, the real actions and so forth, it was rival lords against rival lords. The doctrine of adverse possession didn't deal with squatters, that is, people who come onto land that is not occupied, but with terrorists who, basically, forcibly disposed of people. The reason the statute of limitations was so long in medieval times was that it was the only way the king was able to assert the monopoly of force within the jurisdiction. If he had not been prepared to replace the people who had been thrown off, then the law of conquest would have taken hold and a change in sovereignty necessarily would have been imposed.

With respect to the more general point, I remember that when Brian Simpson taught me real property in England twenty years ago, this was the way he started the puzzle: How does the passage of time convert an action that is prima facie wrong into a right when all of our theories about human action say that you have to have some other act that would otherwise justify doing it? The idea that wrongdoers are guys who ought never to be able to sleep in peace is something that is completely lost when you translate this into a best cost-avoider device. At that point, it looks as if there is a neutral act, an act of God of some sort, and then the

question is which of two guys is in a position to prevent it. But it is not a question of that. It is a question of which of two guys is in a better position to prevent the wrong committed by *X*.

It would be a mistake, I think, to spend too much time on the way in which the doctrine tends to work itself out in litigated cases. As with every body of law, if you make the world turn on a single point, there are going to be cases that come right at the margins. But in adverse possession, and this I think is Tom Merrill's point, in the vast bulk of cases it is perfectly clear what is going to happen. These claims are going to get wiped out, and the importance of the doctrine is that it is basically a comprehensive settlement device—a massive settlement device—where there simply is no controversy. I regard the reliance and transaction-costs points as clear. If you wipe these claims out you are now in a position to rely and you can rely, either by selling or developing. I have no doubt in my mind that as society becomes more orchestrated, as the devices for anticipatory title clearing become better—surveys and so forth—and the problem from the position of the original owner becomes less acute, what we will see is a shortening of the statute of limitations, and a massive substitution of *ex ante* devices for *ex post* devices. But, basically, the law is pretty much where it ought to be.

MANNE: Is there some doctrine of clean hands for adverse possessors?

GOLDBERG: Implicitly there may be, and that was the point of Dick Helmholz's research⁸ I guess. There is this good faith/bad faith sort of notion the courts employ, even though the law does not say that they should.

RADIN: There are fifty states, and the doctrines are not uniform. In fact, it is really interesting how much variety there is in the details. With respect to clean hands or good faith, some states have the doctrine or a statute saying you have to have good faith or color of title to acquire land by adverse possession. On the other hand, it used to be that a few states said the opposite—you actually had to be a nasty trespasser who believed you didn't own it. I think it is true, however, that most of the states, as far as the doctrine goes, say they don't care what you thought about it. But I think the normal scenario is where everybody is mistaken. The paradigm case is you built a fence in the wrong place because the surveyor made the mistake, or you built your building and it's over the line

8. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U.L.Q. 331 (1983).

six inches, or the documents that are recorded are documents that were drawn up wrong.

CARR: Richard argues in his paper that good faith really should be a consideration—that from a utilitarian point of view you should worry about good faith. This is a point that has always bothered me, especially in labor negotiations when lawyers talk about good faith bargaining. From an economic point of view it is clear that what you care about is the actions people take. Intentions are something you never observe. If you say, I am going to look at good faith, then you'll find that any bad faith possessor will, in fact, try to make it appear that he is acting in good faith. Because intentions aren't that easily observable, you'll get people behaving opportunistically and they will completely mask their intentions. That is probably why the courts in a number of states do not take good faith into account, and it is something that economists don't really worry about.

EPSTEIN: But, Jack, it is not a mystical notion. What they mean by bad faith in these cases is simply a question of whether there is knowledge that somebody else owns the land. Any comparison between that idea of bad faith, which is a violation of a known right of another, and the good faith/bad faith distinction in labor relations, is simply a complete confusion of words. The point about labor relations is that the whole notion of bad faith and good faith doesn't presuppose a well-established definition of rights. What it is designed to do is to put the surplus of the firm and the union into a collective pool and say: Don't take too much but you can take as much as you can within that constraint. In the one area it is a clear violation of known rights and in the other case it is a muddling up of rights.

In every area of law that I know about, the distinction between good faith and bad faith—in the sense of whether one is acting with prior notice of someone else's rights—is absolutely archetypal. I can't think of an important area of law in which the doctrine does not play a very decisive role. And I suggest to you that once you recognize what notice means, the inventions of trial and discovery are pretty good at getting at bad faith, given the fact that it's all going to turn on that single variable.

MERRILL: I don't think that Richard's proposal for a two-tier statute of limitations really goes far enough to handle the problem of the bad faith possessor. Dick Helms' study totally convinced me that courts give extraordinary significance to their intuitions about whether or not the act of original entry was taken in good faith or bad faith. The legal

doctrine, with the exception of a few states as Peggy Radin has noted, does not take this fact into account. What you have is a very unfortunate phenomenon of courts manipulating a doctrine that does not explicitly take good faith and bad faith into account to reach results that very much follow a pattern that the good faith possessor obtains title by adverse possession and the bad faith possessor does not. This situation creates immense amounts of tension and uncertainty because the doctrine says one thing and the courts come up with a different set of outcomes and results.

What I would like to suggest, which is something that I have written up in a paper I have coming out,⁹ is that you bifurcate the question of title and the question of treatment of the good faith and bad faith possessor. I suggest that we ignore the question of good faith and bad faith for adverse possession purposes—we would continue to transfer title to the bad faith possessor after the statute of limitations has run—but then grant an independent action for indemnification to the true owner. If the true owner could show that the original entry was taken in bad faith, the true owner would obtain damages from the bad faith possessor equal to the fair market value of the property at the time of the original entry. Essentially you would have a system of liability rules for bad faith possessors, and a system of property rules to adjudicate the question of title. Given my views about the important role adverse possession plays in facilitating real property transactions, I would not, absent this problem, advocate using liability rules here. But since we do have the problem of the bad faith possessor, and we see that the courts are overwhelmingly inclined to give that significance, it would be better as kind of a second best solution to let courts do justice at the stage of remedy by awarding damages against the bad faith possessor than struggling to ignore the issue for purposes of determining title.

MANNE: I would like to add another possible solution, perhaps a lower cost remedy than Tom Merrill's, which would be to have very long statutes of limitations. That would necessarily put the burden on the adverse possessor to get insurance. *O* is ignorant, he doesn't know he ought to go out and do anything about insurance or anything else. If he knew what was going on, he could simply take care of it. But *A* would be on notice that there is a very long statute of limitations, so that if there is

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

anything wrong with his title he is at risk; he had better get insurance. This puts a cost on him, and leaves it to the insurance companies to deter moral-hazard problems. I think this is an argument for a long statute of limitations.

MERRILL: What about adverse selection? The only adverse possessors who would seek insurance would be people who had acted in bad faith or otherwise had reason to doubt the quality of their title, so there wouldn't be an insurance market that would arise to handle the problem.

GOETZ: One thing that bothers me about looking at the adverse possessor as the best insurer is that the adverse possessor is typically in a very inferior position. The classic case is the building that is three or four inches over the line. Damage to the legitimate possessor of the land is usually very small, but the legitimate possessor of the land presumably has the right to demand that three or four inches be sliced off the building.

MANNE: I didn't say anything about what remedy would be appropriate. I wouldn't change that. You could award damages.

GOETZ: But if you wouldn't change the remedy then the remedy would be that he would have the right to slice three or four inches off the building. That means any insurance would have to be insurance against a much greater risk than that probable difference in value.

MANNE: I would either change the remedy, or, if you want to keep the remedy constant, I would say that that simply is one of the costs that gets calculated into insurance premiums.

ELLICKSON: A century ago the common law typically afforded landowners property-rule protection against encroaching buildings. Today the law of encroachments is more muddled. The trend, perhaps not a salutary one, is to limit owners to liability-rule protection. This is often the effect of good-faith-improver statutes, the doctrine of balancing the equities, and similar innovations.

COOTER: I think that the situation that Tom Merrill described—where you bifurcate title and recovery for a harm brought on by bad faith—is essentially what prevails with regard to notes under the holder-in-due-course doctrine. If I take a note from a person who has taken it in bad faith, but I take it in good faith, then the defect is cleansed, but the underlying action against the person who gave it to me remains; it's just not an action against me.

ROWLEY: Yesterday Richard challenged me with respect to my pa-

per and said I haven't given my own view on whether I would have a statute of limitations or not, and what length of time the statute would be. I haven't; I can't. I can't, I think, for two important reasons. The first is that I suspect that no one would be either a complete utilitarian or a complete libertarian; there will be a tradeoff in most people's minds between the importance of rights and the importance of utility. We don't want to live in caves like savages. If that is the cost of libertarianism, I guess I will trade off a bit for utility. One would have to very clearly define the particular balance between those two doctrines. But let me now just take the utilitarian line and explain why, even within the utilitarian framework, I don't think that I could give you an honest or justified answer.

There are three issues that I would face. First, there is a lot of talk in the law area generally and, of course, in Richard's paper, about transaction costs. But there are no numbers; I don't see a number. It is very difficult to get hold of the appropriate numbers. Now, there are areas that one could work with. One could, for example, knowing that there is variability in the length of statutes of limitations across the states, try to do some cross-state analysis. One could look at the costs the legal process imposes on land title settlement by reference to either time series changes in the statute of limitations within the state or look at a cross section of the states with different statutes. That at least would give some *ex post* information; it is information which is not ideal, but you might come up with very strong results in this kind of *ex post* analysis.

The second point is that we are not just looking at the transaction costs of the legal process itself. Within the utilitarian framework we are also looking at the benefit side of the account. And when we come to the benefit side of the account, it's, again, much harder to get numbers. With the cost side, you can at least look at what is happening in the legal process, but with the benefit side you have to penetrate the mind of the owner. Suppose I own a plot of land and I leave it vacant for, shall we say, twenty years. It may be that I obtain some utility by not having that land disturbed. And if it is subjective utility that we're talking about, who is to deny *me* that right, and who is to put a GNP number against me? As soon as you enter into that area of benefits, you can't get numbers; you can only make hunches. So trading those off against each other, we run into very serious difficulties of knowing whether we've got a really powerful transaction-cost argument unless we have a much tighter formulation, a proper theoretical framework.

And then I come to the final point. We have talked as if the law is trying to be efficient or utilitarian, and, if it isn't managing to be, it should be adjusted. But that ignores the public-choice arguments. I suggest that if we were very concerned to see whether or not the law is being manipulated by special interests, we have no mechanism to do it. We do have statutes of limitations that have been passed. We can go back to those legislative decisions; we can see what groups drove that legislation through; we can assess whether they are the carpetbaggers or whether they are, if you like, the population at large. We could get some information on that, and we could test the proposition, and if it came out systematically that it was the special interest groups that were driving it, then I would be a lot less convinced that the law was trying to be efficient or utilitarian. Of course, by accident it could still be a utilitarian solution. But I would be much more suspicious of it.

ELLICKSON: I think that a simplistic public-choice model does not work well in this context. By simplistic I mean a model that requires an investigator to pair each statute with a concentrated special interest group. This simplistic model cannot explain statutes of limitations. These statutes have been relatively stable in content over the course of centuries during which the power of affected interest groups has varied enormously. A richer public-choice model perhaps could generate more upbeat results than the simplistic public-choice model does. A richer model might allow the legal process to generate basic ground rules that serve the "public interest." These ground rules would be ones that work to almost everyone's benefit because they help people to coexist peacefully and to achieve gains from cooperation. Examples might include not only statutes of limitations but also the essentials of criminal law, the law of intentional torts, and the rule that promises shall be kept. These rules are extremely stable and are found in most societies. I doubt if a search for a well-placed, rent-seeking interest group will help explain the existence and persistence of basic ground rules.

HADDOCK: A couple of students of ours, Jeff Netter, Bill Manson, and an associate of theirs named Phil Hersch have worked on this very issue. Rather than speculate about what might have happened, they tried to look at what actually happened. They found it to be a difficult job, but they have come up with some information nonetheless. One of the distinctions they make, in common with a number of people here, is between innocent takings, or takings-by-mistake, and ones where people are really trying to steal. They are focusing on innocent takings. Im-

plicit in the Netter, Manson, and Hersch paper is that optimal caretaking is shared. It is not a case of one least cost avoider, which is a good model only if you have what an economist would call a corner solution. Rather, as in a lot of tort law, this is an area where some effort is most efficiently borne by one party, the landowner; but another part is efficiently borne by the party who is thinking of acquiring the land and developing it. Looked at in this way, one can ask how the optimal balance of caretaking shifts when certain variables change. If certain forces are changing the benefits of having security of title, that should augment efforts to reduce the expense and difficulty of being able to secure title, such as by shortening the statute of limitations.

So these three fellows have tried to divide things up into a benefit side and a cost side. The benefit side of the adverse possession laws is that they permit innocent parties to establish title to facilitate useful investments. That value will be a function of the value of land, among other things. If the value of land is trivial, then people have much less interest in security of title because there are lots of alternatives to which they can turn. As the value of land goes up, the value of being able to assure title will go up as well. On the cost side, Netter, Manson and Hersch look at the dynamics of the economy. Holding all else equal, checking for illicit use is more costly if an economy is developing particularly rapidly. In a stable economy, you can cheaply determine whether someone is on your land by observing the landmarks that are around it, but many landmarks are on other people's land. If the land surrounding yours is being developed and the landmarks are being changed, it becomes more difficult to keep tabs on your own land. If the benefits of having secure title go up, and the costs are held constant, these writers predict that we will get a shorter statute of limitations. If the costs go up, and benefits remain constant, they predict that you will get a longer statute of limitations.

Turning to a point that Charles Rowley raised, Netter, Manson and Hersch next tried to find out how statutes of limitations were determined for adverse possession. They found that it's rare for legislatures to get involved, and to the extent that changes are made, they are made through interpretations of the statutes by common-law judges. Some of those are very difficult to track down. In fact, to estimate how statutes of limitations varied from place to place, they found that the best proxy was the date of formation of state constitutions. They looked across states and found that only when the constitution was originally formed could one consistently expect some sort of non-judicial body to be involved.

The constitution writers always addressed this problem. But special interest groups did not seem to come back and constantly try to alter the statutes.

Netter, Manson, and Hersch looked at the date the state constitution formed, they measured land values and the rate of change of the state economy over the previous ten years, and they got some confirmation for their hypothesis. As land values go up, the statute of limitations tends to be shorter; as the rate of development in the state goes up, the statute of limitations tends to be longer.

COOTER: There seems to be considerable sentiment that we should shorten the period that it takes to possess property adversely. I want to introduce an argument to support shortening the period that is somewhat different from the considerations existing in this empirical research that Dave Haddock describes. Let me draw your attention to one area where adverse possession does, as it were, take place instantly. I have in mind bills and notes where the doctrine of holder in due course was developed, particularly in Lord Mansfield's decision in *Price v. Neil*.¹⁰ Now you may know that when bills and notes were used as payment in the early eighteenth century, the fundamental issue was how you could extinguish defenses so that the person who took the bill or note could assess its value from the face rather than fearing that some defense still existed with respect to that note. This was done by a doctrine, which I think has a felicitous title, called "currency." The instrument is current when it is unburdened by the past. The idea is that bills and notes subject to the holder-in-due-course doctrine are current, because they are unburdened by the past, and as a consequence they exchange at an undiscounted rate.

How would an economist decide whether to give currency to a payment instrument? We want exchange to take place because it is productive, but at the same time, we want to prevent unproductive rent seeking (e.g., fraud and theft). To balance these considerations, one of the most important factors was that, as a bill or note was exchanged more frequently, as it circulated faster, as the velocity of money increased, the currency of the bill or note became more important. Currency and discounting are inversely related. If the note isn't current, each time it is exchanged it is discounted. And discounting burdens the transaction. So, as the velocity increases, you get discounting more and more rapidly, and that means the instrument is losing value quicker than is desirable.

10. 3 Burr. 1354, 97 Eng. Rep. 871 (1762).

So my prediction would be, as the rate of circulation increases, the currency should increase. Applied to property, as the rate at which land is bought and sold increases, the period for adverse possession should diminish.

MERRILL: I would like to inject a note of mild skepticism about all this discussion concerning the significance of the exact length of the statute of limitations. One reason for my skepticism is that my understanding is that the length varies quite dramatically from one state to another in this country. At one end, a number of states have twenty-year statutes of limitations, and at the other end, states have limitations all the way down to five years. Now it could be that some of those differences could be explained by factors like the value of land, the frequency of development, the velocity of turnover, and so forth but I think the differences from one state to the other are so extreme that these factors wouldn't explain that differential. The other reason I am skeptical about length per se is that as Richard, I think, very nicely points out, the key fact is that you've got a clear rule. The legislature has prescribed a number of years that is not open to redefinition or debate by the parties. Once it is known, the true owners can adjust their monitoring behavior accordingly. Given that this is largely a transactional phenomenon, I think everyone can simply adjust to that fact.

HELMHOLZ: I think there is a case to be made for longer statutes of limitations, and that it would be useful to make that case explicitly, because I think Bob Cooter was right in saying that there is an emerging consensus favoring shorter periods of limitations. Let me just make this case briefly.

The first point in favor of longer statutes of limitations is the interest in protection of rights. I really am surprised that Richard Epstein is not more uncomfortable with embracing the statute of limitations than he appears to be. At bottom, adverse possession is a way of cutting out the first possession rule, and I would think that someone who believes in first possession and in the importance of rights ought to be uncomfortable with a very short statute of limitations.

The second factor that cuts in favor of the longer statute of limitations is Bob Ellickson's demoralization point. I think at bottom one would object greatly to a very short statute of limitations, which has the effect of putting title up for grabs more often than does the system that we now have. One is likely to be demoralized by the thought that one's property

can be taken away quickly, and I think that this cuts in favor of a longer statute of limitations, although twenty years may turn out to be too long.

The third point is the point about aggression. Even if we say that statutes of limitations and adverse possession are not primarily concerned with aggression still there are two ways a very short statute of limitations would encourage aggression. First, in the case where the mistake is discovered, if you have a very short period of limitations, the person who made the mistake, that is, the adverse possessor, would be encouraged not to return the property to the true owner if there were a very short period of limitations. In other words he'd say, "Well, I know that I did wrong but it's only a two-year statute of limitations and now I've decided to keep it." Where the period is short, the record owner is less likely to acquiesce than where it is long. Therefore, the statute is likely to lead to bitterness, a form of aggression.

Second, the important factor of transfer was left out of what I said before about aggressors not being able to benefit from adverse possession. This is because the transfer from the aggressor to a bona fide purchaser will have the effect of cleansing the bad faith from the record. That is, the taker from the bare aggressor will be operating in good faith, so if you start the statute of limitations running at that moment, a shorter period will allow the trespasser to transfer title more quickly and to cut out the rights of the true owner. And that, too, indirectly encourages aggression.

COOTER: I want to turn to a question that has been mentioned several times, but not really analyzed. Why should the statute of limitations expire abruptly; why should there be an exact date at which the cutoff occurs, rather than a continuous deterioration? I think there is a fundamental point that most lawyers haven't come to appreciate, and that has to do with what we in economics call the distinction between a response on the intensive and extensive margin. This is something that I have emphasized in a recent article,¹¹ and there is a paper in the most recent *American Economic Review* that also makes the point.¹² The basic idea can be made by comparison of strict liability and negligence. As the injurer takes more precaution, the expected harm from an accident diminishes at a continuous rate in most cases (assuming that you have continuous functions). Consequently, if you are strictly liable for the

11. Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984).

12. Blinder & Rosen, *Notches*, 75 AM. ECON. REV. 736 (1985).

harm, as you take more precaution your liability will gradually diminish. Furthermore, if there is a change in the way that liability is calculated—say some class of damages is excluded—everyone will respond by taking less precaution. This is an example of adjustment on the intensive margin. Why is that? Because under strict liability the parties are at an internal solution where everyone who is potentially liable is taking some precaution, and they are balancing at the margin exactly the costs and the benefits of that precaution. If the benefits of the precaution go down, that is to say, the extent of your liability is diminished somewhat, then the amount of precaution you take goes down a little bit, and that happens for everybody.

On the other hand, if you have a negligence standard where you have an obligation with a sharp cutoff, and your precaution gets up to the legal standard, then blam! Your liability falls to zero. You do not balance costs and benefits at the margin; there is a sharp jump, a discontinuity, in your cost function. For most people there is going to be a considerable advantage in either abiding by the legal standard or falling short of the legal standard, but very few people are going to be on the margin where they exactly balance costs and benefits of more precaution. So as a result, when you change the magnitude of the *sanction* that attaches to failing to achieve a legal standard you get an adjustment on the extensive margin. In other words, a few people change their behavior quite a bit in response, but most people don't change their behavior. On the other hand, when you get a change in *price*, i.e., a change in damages under strict liability, a lot of people change their behavior a little.

Now there are circumstances under which it is going to be better to have a few people changing their behavior a lot rather than a lot of people changing their behavior a little. This is essentially the argument for inducing these discontinuities or for having these rules with precise cut-offs. And I think that analysis could be worked out quite well with regard to statutes of limitations. The basic idea is this: If your claim to some legal entitlement deteriorates a little bit each year, then everybody who possesses that claim is going to change his behavior a little bit in response. But if your claim doesn't deteriorate a little each year, but only changes abruptly after ten years, then a few people are going to change their behavior quite a bit. For example, let's say you are monitoring your land for trespassers and let's say your rights in the land, if you fail to detect a trespasser, deteriorate by ten percent each year. This means everybody is going to have to engage in some monitoring activity every year.

On the other hand, if you have a rule that says you are safe up to ten years, but you are not safe after ten years, then what is going to happen is that people are going to monitor their land every 9.9 years. So it must be that we prefer the second pattern of behavior to the first, and that is why we have this sudden discontinuity with statutes of limitations.

EPSTEIN: With respect to whether adverse possession should occur in an instant or should sort of grow and mature over time, the reason that you have a fixed point is really the same one that Bob Cooter gave in the course of attacking, wrongly I think, the rule of first possession. The point is you want to minimize the amount of legal paraphernalia or private paraphernalia that's needed to establish the muniments of title. If you defer the perfection of title until use is intense, whatever problems you have with the first possession doctrine are only going to be compounded by virtue of the fact that you now must make more and more investments for maintenance of title, and fewer investments for economic return. The reason for the doctrine is simple: by and large you try to minimize the number of actions that people have to take in order to protect themselves.

SCHWARTZ: I'll be brief. I was just trying to give Bob Cooter's theory on extensive and intensive margins normative application in this context. It seems to me that one way to do it might be to focus on monitoring costs. That is, if you really wanted the original owner to monitor a lot, you might have a rule where the owner would lose a part each year, because that would produce more monitoring than if you just had a long ten-year statute with a sharp discontinuity—one day you own it all, the next day you own none of it. Because I happen to think original owners are probably the best monitors, I think that Bob's theory suggests that owners should lose a little bit every year. The only countervailing thing I'd say about that is there might be, as Richard's comment seems to suggest, fairly high administrative costs in applying the rule.

LEE: I want to ask a question. The question is a very simple one: can adverse possession be used against the government?

EPSTEIN: No.

MANNE: It's complicated.

ELLICKSON: It's harder to succeed against the government than against a private owner. That's the central difference.

LEE: Well, perhaps then I don't really need to give this example. But let's assume that I wander on some sort of unused corner of a natural

wilderness area, unbeknownst to me or beknownst to me, it doesn't make any difference, and start a small farm. I farm for ten years, nobody bothers me. There are these huge wilderness areas; I could easily go undetected. The answer you gave me is the one I expected, but it seems to me that you can make a very strong argument that if you did allow adverse possession against the government, it would certainly discipline or help discipline the government in its willingness to take large hunks of land out of what I could call productive use. You'd certainly have a very strong personhood argument for allowing this, and I am completely confident that I can come up with a very compelling utilitarian argument in favor of this type of possession. So the question is, is this just another example of where we have good rules that the government decides it likes to impose on others, but doesn't want to impose on itself, or are there other reasons against applying adverse possession to the government?

EPSTEIN: It is interesting that not only the adverse possession rules but *all* sorts of procedural rules—discovery periods and so forth—are more favorable to the government than to other parties. The systematic ability of government officials to protect themselves against adverse interests in the courts by a subterranean set of procedural rules is nothing short of phenomenal.

ELLICKSON: Adverse possession doctrine generally favors governmental owners compared to private owners. Richard has condemned this distinction, and I infer that Dwight Lee would too. I used to share their view, but recently I have come to think that the distinction may be defensible. There are several utilitarian reasons for treating government lands differently. For a variety of reasons it may be more expensive for a government to monitor its lands than for private owners to monitor theirs. If so, on my simple graphs the Y^* might be higher for a government than for a private owner.

Why might a government face higher monitoring costs? First, both theory and evidence suggest that governments tend to be less competent than other organizations in controlling their agents. If so, the sale of government lands to private owners would often be a good policy. But a utilitarian should worry about using adverse possession to effect the alienation of government lands. That legal policy might just encourage government agents to waste more taxpayers' money on monitoring.

Second, government lands tend to differ physically from private lands in ways that increase monitoring costs. Current federal lands are basically the lands that homesteaders passed by during the nineteenth cen-

ture. These lands are rarely valuable for agricultural or urban uses and are relatively expensive to monitor.

Local-government lands—streets, parks, and so on—present another sort of problem. These lands are often optimally allocated as commons that members of the public can enter when they please, perhaps subject to some rules of the road. If these lands could be adversely possessed, the monitoring problem would be a nightmare. For example, government agents might have to make sure that some free spirits didn't sleep in the park long enough to acquire exclusive easements or perhaps even fee ownership. In sum, differences in the nature of government land and in the nature of governments as organizations may support the special treatment of government in adverse possession law.

FISCHEL: In response to Dwight's observation about the government's not being subject to these statutes of limitations, I think that at least in some contexts, particularly with a large government unit, you can use a public-choice model to defend the long statute of limitations or absence of the statutes of limitations against the government. Assume the government is holding the land not out of sheer negligence or perversity but to provide some kind of a public good such as a park, wilderness for hikers or would-be hikers, or back in the old days, as a form of future revenue for states as they would sell off the land. If we permit squatters' rights—that is, invading occupation that transfers title from the government to private individuals—we reward a highly concentrated private interest (the person who wants to farm land), and we penalize the very diffuse interests of would-be taxpayers who would benefit from auctioning it off at a later time, or in modern times (people who enjoy wilderness hiking but who are not actively represented at the time of adverse possession).

LEE: You could question how diffuse some of the interests are behind the establishment of wilderness areas and so forth. But I wanted to go back to Bob Ellickson's comment just briefly. I think he's correct when he says that it is very expensive for the government to monitor huge expanses of land. But it's also expensive for the government to monitor the benefits or lack of benefits that accrue from the holding of that land. It seems to me that washes out both ways. It is clear an adverse possessor would have a lot more incentive to monitor these benefits and make use of them if they are exploitable. As far as the government owning the dregs, they might have been the dregs in the 1860's, but things change, and what was unusable or a very unvaluable piece of land in the 1860's

might have a lot of value now. The government is not usually very responsive to those changes in value. An adverse possessor might be. And to the extent that land remains a "dreg" we don't have to worry about adverse possession in any event.

GOLDBERG: It seems to me that Dwight gives the government two choices. Either it can go raise taxes to hire bureaucrats to monitor or it can change the statute of limitations. Either way it is going to be "wrong" by one standard or the other. It seems to me that there is a real policy choice. Increasing the statute of limitations for the government will enable it to collect less taxes for enforcing its right. That is a perfectly legitimate response, it seems to me.

IV. THE INFINITE DURATION OF THE FEE SIMPLE

MANNE: Let's move on to the point about the fee simple as absolute ownership with infinite duration. It is not obvious that this should be the standard for what we mean by ownership. There are any number of alternative schemes that can be imagined, including all property escheating to the government after lifetime ownership, or in the extreme, I suppose, all allocations for use being made by government.

CARR: One scheme I looked at a number of years ago was that of ancient Israel, where every seventh year the fields lay fallow and every seventh seventh year, actually it was every fiftieth year, was a jubilee year in which all land reverted back to the original owners. In such a system you could never convey land for more than fifty years, and then it went back to its original owners. One possible explanation for this system is that it was designed to tie people to the land, so that they would have a vested interest in defending the country. To solve the end-point problem, which Richard brings up, you have to have regulation. Here, the regulation was that any food taken from land that was not being kept in accordance with the law was not considered kosher; no one could eat it. But as to why the system of land ownership only went for fifty years is somewhat of a puzzle.

MANNE: Is something like our fee simple ownership the standard around the world?

ELLICKSON: No. Israel, for example, has a policy against overt private land ownership and land is therefore held under long-term leases from the state. In civil-law countries usufructuary arrangements have been common. (As a Scrabble player, I'm impressed by any word that

has four *u*'s in it.) Usufructuary rights are time-limited and usually also use-limited. Mexico relies in large part on an *ejido* system derived from Indian traditions of communal ownership. I have been told that this system has had perverse effects on the use of agricultural land in Mexico.

Richard's paper contains a valuable discussion of the advantages of fee simple tenure. I don't recall much writing on the subject. The main advantage of the fee simple is that it encourages landowners to adopt a planning horizon of infinite length. Usufructuary and other time-limited rights tempt land users to be short-sighted.

GOLDBERG: I think that Bob Ellickson is right. It is so obvious that fee simple has all these valuable characteristics, but one thing that puzzles me is why societies that have fee simple rights continue also to have these very odd long-term leases of land. People rent the land, then build structures on them, so there is separate ownership of the structure and the land. I gather that ninety-nine year leases were common, and probably still are common, in England. That seems to be what existed in Hawaii for a long period of time, and I suspect that there are a lot of other places in the world that do this too. The fact that it's chosen in a world in which the backdrop of the law is fee simple is puzzling. I don't know why these institutions exist.

CARR: In some cases long term leases may be used to avoid regulation. The University of Toronto was given land that it could not sell. What it did was lease it for ninety-nine years, presumably as a way around the regulation. Once you discount the future stream of rents at very modest interest rates, there is little functional difference between having a ninety-nine year lease and owning the property outright. (At five percent interest, the right to one hundred dollars ninety-nine years from now has a present value of eighty cents.)

MERRILL: There are at least two tax explanations for long-term leases that I know of. One is a desire on the part of large landholders to avoid transfers that would establish value for estate tax purposes. I think that in Hawaii, for example, where a small number of families own large holdings of property, they did not want to transfer the land in fee simple because it would establish a high value for estate tax evaluations upon their deaths. The other tax explanation is that in some large development projects, for example, Renaissance Center in Detroit, the way the thing gets structured is that you peel off the improvements from the realty so that a partnership can purchase the improvements separate from the realty and can take 100% depreciation on what it purchases.

EPSTEIN: But these devices long preexist the current tax structures. It's not that there aren't tax rationales, but long-term leases are not an artifact of the modern tax laws. One can see how to control the problem, but what one can't see is why it is worth undertaking those costs in order to do so. And I must say I am a little bit puzzled. I think it's a fair question to which the regulatory answer and the tax answers are a partial solution, but I don't think that there is a complete explanation. I think there have to be internal benefits for a complete explanation.

RADIN: The standard thing that is usually said about long-term leases, culturally and historically, is that under feudalism and other kinds of non-market societies, landholding and land use are embedded in social relationships. Your land, your employment, your servants and your social status are all bound up. And when you have something like a ninety-nine-year lease that is always renewed, you have something like late feudalism. You have a lord; you have a tenant; you have a continuing relationship. It's expected that the heirs will get it, and there are certain fees required for inheritance, which are maybe analogous to the feudal incidents. In two of the colonies, Maryland and Pennsylvania I think, Lord Baltimore and William Penn took directly from the Crown, and therefore they weren't prohibited from continuing to be lords. Consequently, you still find in those states lots of things that are held under this sort of feudal arrangement with long-term leases. As time went on and we proceeded toward the industrial revolution and the free-market society, so the story goes, land ownership became detached from these other relationships and the notion of the fee simple absolute became dominant, because in a market society landowners are supposed to be free from these other kinds of relationships. But I would imagine that any time you find a society or a culture that has land use bound up with other kinds of social status or social relationships, you would be likely to find this divergence from the pure fee simple absolute.

GOLDBERG: I don't think that renewal is as routine as we are describing. My recollection is that in the late nineteenth century a whole lot of these leases came due in England, and it was one of the very big issues politically for a long period of time. Ultimately, it was in part solved by a lot of *ex post* regulation of the terms in which these leases could be renewed. But then, after living through all the end-period problems, they renewed them again, and created a whole new bunch of these ninety-nine-year leases. This strikes me as very, very weird.

LEE: I find this a fascinating question too, why you get into these

ninety-nine-year leases when you have a fee simple option. The first thing I thought about was that the contracting parties have strongly different discount rates. For example, if the lessor had a very low discount rate, for whatever reason, and the lessee had a high discount rate, then there would be gains from trade from some leasing arrangement. But I don't find that a very satisfying answer, because in some sense your discount rate is affected by the title you have.

MANNE: Let me follow up on the point Peggy was making. It seems to me that once you start talking about ninety-nine and 999 years the economic difference between being a lessee versus being an owner is immaterial, so if there is any, even slight, vestige of a sense of status, of feudal relationship to it, even though it's very tiny, it might prevail, because there is nothing opposed to it at all.

EPSTEIN: Peggy Radin contrasts feudal arrangements with market arrangements. I have never understood that comparison. What is characteristic of feudalism is that there seem to be relatively few well-defined tenurial terms and people say, "Aha, that means that you are dealing with status rather than markets." But it seems to me such a statement is wrong for two very clear reasons. First of all, there clearly remained dimensions over which negotiations took place within the fixed status. For example, it might be that knight service meant that someone had an obligation to provide soldiers to the crown, but it didn't tell you the number of soldiers that he had to provide, or the amount of land that he was going to get in return. As best one could tell from reading Maitland and the other sources, those particular terms of trade were always decided by express contract.

The second point is that standardization is absolutely essential if there are going to be subsequent transactions in the same resources. For example, take the modern times. You go to the bank and you try to negotiate a special kind of mortgage arrangement instead of haggling on the interest rate. Why don't you succeed? Well, the answer is the banks sell these mortgages to third parties and they would never be able to pool them and price them if every mortgage had a different set of terms. Well, the point about subinfeudation is exactly the same. If every mesne lord is going to have a different set of basic terms, that means the further down you go on the chain of subinfeudation, the less secure this particular structure is going to be, and nobody will be able to know what is happening. In a world without recordation, if you are trying to convey information to third parties, standardization of the incidents of tenure and title is abso-

lutely critical for subsequent negotiations with strangers. So I think that the right way to understand feudalism is basically to understand it as a network of contractors that for good, powerful, efficiency and utilitarian reasons had to adopt certain kinds of status mechanisms.

HELMHOLZ: Just a historical note to support what Peggy Radin said. There are three advantages historically to a long-term lease in certain kinds of situations. First, it was a possible stand-in for subinfeudation. After subinfeudation was forbidden by the Statute of Quia Emptores in 1295, you had to substitute rather than subinfeudate. Subinfeudation continues a tenurial relationship, that is, a relationship of lord and vassal between the grantor and the grantee, so that the grantee is bound by the ties of feudalism to the grantor. Quia Emptores required that in order to transfer property you had to substitute the grantee so that, in fact, there was no continuing tie between the grantor and the grantee. But certain grantors wanted some sort of continuing relationship with the grantee. A long-term lease allowed the grantor to have a tie to the grantee. If they knew at the end of ninety-nine years that the landlord was going to get it back, there would be some, however small, continuing relationship between the two parties. Some people thought that was worthwhile.

The second practical advantage to a long-term lease was that it allowed the interest of the grantee to be treated as personalty rather than realty and that might have been seen as a strong advantage from the point of view of devising it and controlling it.

And third, it was permissible in a lot of cases to grant a lease where you could not alienate the property itself. For example, the church could not alienate its property, but they could grant a long-term lease. There were a number of situations like that.

CARR: I am still puzzled by the ninety-nine-year lease. I don't understand Dick Helmholz' point that you're going to get the land back and that establishes some kind of continuing relationship. The present value of that residual interest is a number close to zero. In ninety-nine years it's worth something, but now its present value is very small, so people are not going to take that into account in their decisionmaking. I wonder if maybe it is related to adverse possession. If you lease it for ninety-nine years, what can happen if it's adversely possessed? I take it that somebody adversely possessing it doesn't have a claim against the lessor.

EPSTEIN: The basic rule on your adverse possession point is that the

statute of limitations runs against the lessor only after his interest falls into possession, so if you wanted to make yourself bulletproof against encroachments, creating these long-term leases might work. But that is not going to explain why, for example, Oxford Colleges entered into these long-term leases. The adverse possession point was relatively trivial there.

My own theory basically is this. The reason a landowner used long-term leases is he wanted to impose restrictions on the land, not for the benefit of the reversion, but for the neighboring, contiguous land that he held. The doctrine of real covenants wasn't very good, because it wasn't developed at that particular time. If the fee itself basically was an all-or-nothing conveyance, then the only way the landowner could impose land-use restrictions was by lease. The benefit to the landlord was not in his interest *qua* landlord, but rather was in his interest *qua* neighbor. If I had to make a guess, that would be the form it would take, but the only way you could prove that would be to learn something about the physical configuration of the land that was subject to these things, of which I don't think we have too much direct knowledge.

ELLICKSON: I would like to offer a speculative, game-theoretic perspective on these long-term leases and on feudalism. Robert Axelrod's work¹³ indicates that a continuing relationship may induce egotists to cooperate in iterative prisoner's dilemma situations. The Middle Ages were highly precarious times in England. The Vikings could invade at any time. By forming continuing relationships that glued them together, the English were better able to cooperate against foreign invaders. Oliver Williamson and like-minded economists thus might try to analyze feudalism as a complicated system of self-enforced contracts. Similarly, the Oxford Colleges may have preferred to lease rather than to sell land to local merchants because leasehold arrangements created continuing relationships that better enabled the University to control merchant behavior.

STUBBLEBINE: It seems to me that there is another potential explanation for long-term leases. I can either have a lease that pays \$1,000 a year or sell the land for \$10,000 to the prospective lessee, and he and I are in complete agreement. Therefore, I should be indifferent between those two forms. But I may not be indifferent because if I sell the land I have \$10,000 in cash. What am I going to do with it? I have to invest it

13. See R. AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

somewhere, and, in fact, in these unsettled times it may be that the lease arrangement provides me more security over time—more security, that is, than if I had tried to invest the \$10,000 elsewhere. This could be, in these unsettled times, if property rights are weak, if governments are unstable, if capital flows are subject to *ad hoc* regulations, etc.

MANNE: Ninety-nine years still discounts into zero. You can alter your cash flow into a lump sum or vice versa.

MERRILL: I would turn Craig Stubblebine's point around and look at it from the lessee's side rather than the lessor's side. If you assume perfect capital markets, of course, there is no difference between borrowing from a bank in order to buy land, on the one hand, and leasing it, on the other. But, in fact, in the time we are talking about there was great difficulty in borrowing money, because of usury laws and so forth. The lease may have been a financing instrument whereby the landlord provided the capital in the form of land and improvements, and the lessee made a periodic payment earned out of annual profits from the land. In fact, I think that mortgages actually evolved out of leases, am I correct about that?

EPSTEIN: It is complicated, but basically the first form of mortgage was a conditional fee that became possessory upon failure of payment. This was a ruinous arrangement because it turned out that if the mortgagee went into possession, the property could not be put to productive use in order to pay off the debt. Getting it to a more efficient form took a long period of time and the lease with the option to get the reversion upon non-payment of the money was one of the intermediate forms before we got to the modern lien, and that took a couple of hundred years more.

SCHWARTZ: I just wanted to say briefly that I agree with Jack Carr that this is a whole lot more of a puzzle than other people seem to think. Tom Merrill's answer presupposes imperfect capital markets. Now it may be that the capital markets were imperfect or that all the capital was tied up in one way, but I don't know. I think you have to develop difficult institutional explanations because none of the facile ones are terribly great.

MANNE: I take it that the search for an explanation for the ninety-nine-year lease is an inverse argument for why the norm is the fee simple. We wonder why it ever varies from that and we haven't really explained it.

V. THE RULE AGAINST PERPETUITIES

MANNE: We are about to talk interminably on the rule against perpetuities. One central question raised in the papers was whether this is a rule that in effect gets property back into the market. That is, whether it is a rule that either by design or accident cleans things up so that individuals many years down the road are not burdened with restrictions that do not serve a social goal. Would any one like to defend that notion?

HELMHOLZ: I'll defend it. I think Richard Epstein's attack on the rule against perpetuities is essentially fallacious and I think your statement of it, Henry, is a pretty fair statement of what the rule accomplishes. The standard criticism of the rule against perpetuities proceeds by setting up a parade of horrors that the rule leads to and then shows that those could have been avoided, and that you could have created the same restrictions if you had a smart enough lawyer. It seems to me that Richard's paper takes the same tack. He shows that you could have effectively tied up land for quite a while by other means than those struck down by the rule against perpetuities and he thereby condemns the rule. But there is an inconsistency there because he prefaced his discussion by disapproving the wait-and-see rule—the rule that says you should wait and see what future interests are going to pass within the permissible period of the rule. I essentially agree with him, but then he uses the same kind of argument to try to get rid of the rule completely.

EPSTEIN: Can I defend myself? I think one has to be very conscious of the legal environment in which the rule against perpetuities emerged. You can see why they adopted the rule, because there was another set of rules that, for example, made it very clear that contingent remainders were inalienable. So you can look at the rule against perpetuities, which strikes down at least some of these contingent remainders, as an effort to improve the marketability of property. But when you start coming to more modern times, the problem about inalienability came to be perceived by testators, and the trust emerged as an instrument into which all sorts of property could be placed, so that beneficial ownership was separated from ownership of specific assets. Or to use the currently trendy phrase, it allowed grantors to create "liability" rules instead of "property" rules with respect to remote beneficiaries. But once you overcome the concern with restraints on the disposition of specific assets, it turns out that the rule against perpetuities is an effort to say that certain income flows are permissible while other income flows are not, without any discernible rationale. So I think the rule against perpetuities had second-

best justifications in an earlier legal regime that was subject to other regulatory constraints, but I am absolutely mystified as to why it ought to have any appeal once you get rid of those other imperfections. Today the second-best justifications fail.

I don't think my objection to the wait-and-see variant on the rule against perpetuities shows any kind of contradiction. What I said, in effect, was that I didn't think that the rule against perpetuities was particularly good or useful and that it ought to be struck down. Now if you are going to strike the whole thing down in its severe form there is no reason to move to the compromise position that says just wait a little bit longer. All that the wait-and-see rule does is, instead of 99.9% of dispositions being valid, it is now upped to 99.95%. My basic concern with the rule against perpetuities is that when you start to create epsilon degree of uncertainty, even though the number itself may be very small, everybody is going to worry about it in a very large way. It tends to queer all sorts of transactions, slow people up, get them apprehensive and nervous for no particular social gain. So strike the rule down.

SCHWARTZ: Richard, are you opposed to the rule on the grounds it could be easily avoided and is confusing, or are you opposed to any rule that would prevent people from tying up property for as long as they want to, even to infinity?

EPSTEIN: The second position is the one I believe in, basically.

SCHWARTZ: You would oppose anything that would prevent a person from tying up property, and it has nothing to do with the technicalities of the rule?

EPSTEIN: If there were something ultimate out there that the rule is trying to protect I would oppose it as an extremely clumsy way to get at that issue. But I think I would stay with the second position as well.

GOLDBERG: In her paper Peggy mentioned that imposing restrictions on property might lead to the drying up of markets. But to a large extent that problem is handled by the nature of markets themselves. The people who impose these restrictions, in effect, put a value on the property at the time they make the initial transfer by capitalizing a future stream of benefits. This means there is a strong incentive not to put on restrictions that would reduce the value of the property at that time. Nevertheless, there are times when those restrictions are going to impose substantial losses in the future, and people are going to try to undo them. People will do stupid things, and they will tie up property, and you will want at some point to try to undo the restrictions. The question is

whether you want to do it with a general rule that says we'll ban this whole set of restraints, or whether you'll adopt a more fine-tuned approach to choosing the cases where you can undo them.

I would like to make a more general point related to this. The problem arises not just in property but in contract as well. As you get further and further away from the past, it becomes more expensive to enforce what the original parties to the contract wanted. This is going to cause a couple of problems. First, it is going to cause a lot of secondary rent-seeking behavior with people trying to avoid restrictions. Second, it's also going to cause or induce people to bring in public-enforcement mechanisms, which is precisely what Richard said could be avoided in this area. But you do bring the public into it. For example, we have very long-term contracts where it is not uncommon to see gross inequity clauses that say if this contract gets too out of line—whatever that means—the courts can come in and revise the contract. In effect, the parties have said: “Courts, do our work for us because we can't do it.”

CARR: I agree entirely with Richard on these restraints on alienation/rule against perpetuities issues. I don't understand the point about destruction of future markets that Peggy Radin makes. If you allow people to negotiate freely, I don't understand what it means—destruction of future markets. Suppose I have an asset; I have a house or a car. Am I allowed to destroy it? The answer is I take it, if it's my property, I am allowed to destroy it. If I can destroy it, then why can't I tie it up in the future? Now one of the reasons you don't worry about destruction is that it's not normal behavior for people to destroy something that is fairly valuable. But the same argument can be made about tying things up. If it is very costly to put all these restraints on, then people won't do it. And they don't do it. So the question is, why do you need these rules to prevent people from wasting the resource? The usual argument is that people know where their best interests lie, and therefore you want maximum freedom, you want people to have freedom to contract. What is the argument against that here? That in some sense the state knows better how to make individual contracts and you are preventing people from making contracts that are going to harm them? I find that a fairly unacceptable argument.

MERRILL: Two things. First I think Richard's argument about the rule against perpetuities overlooks one of the insights of the Coase theorem, which is that as long as we have a rule that defines entitlements clearly, the parties can rearrange their affairs so as to maximize their

joint product. The thing that has always struck me about the rule against perpetuities is that a moderately well-educated lawyer, moderately smart and well-educated, can always figure out with absolute certainty exactly what interests are good or bad under the rule, and he can figure that out *ex ante*, at the time of the original conveyance. As Richard himself has pointed out, virtually any desire that a normal testator might have can be accommodated under the rule against perpetuities. That being the case, someone who wants to give property to their descendants can go to a lawyer, be advised how to do that consistent with the rule against perpetuities, and have their intentions effectuated. What the rule does is handle the extreme case, "To my dog Fifi and her progeny" or something like that. . . .

EPSTEIN: It doesn't strike that down.

MERRILL: Yes it does.

EPSTEIN: That's just simply a separate rule about bequests to animals.

MERRILL: There is no measuring life. In any event, it strikes down the truly extreme sorts of things that would, in fact, tie up property for very long periods of time where it might be undesirable to do so. And because it does so in a way that really doesn't frustrate most people's interests or desires, I don't see what there is particularly to object to about the rule. It is an interesting rule in that it is complicated, but it is extraordinarily mechanical in that it can always be ascertained in advance.

The second point I want to make is in response to Jack Carr. I think that there is a problem in the future interest area and it's basically a tension between *ex ante* and *ex post* effects. Let me try to give you an example to describe what I am talking about. Quite frequently you will see people giving property to some kind of charity or some kind of association with restrictions on it, stipulating that it be used only for a given purpose. There is a case that I teach, for example, called *Odd Fellows Lodge v. Toscano*,¹⁴ where someone gives property to the Odd Fellows to be used for lodge purposes only. Now if someone does that during his life, and it turns out that the lodge runs into hard times, say there are only two or three old members and the property is no longer really of much use as a lodge, then perhaps you can have a renegotiation between

14. *Mountain Brow Lodge No. 82, Indep. Order of Odd Fellows v. Toscano*, 257 Cal. App. 2d 22, 64 Cal. Rptr. 816 (1968).

the benefactor and the lodge to undo the deal and allow the property to be sold in return for giving some consideration back to the original donor. But once the donor is dead, he is no longer around to negotiate a release from that kind of provision. And as time goes on, the loss of wealth from that kind of a restraint begins to loom larger and larger relative to the desire for free alienation that we had originally. It seems to me the law makes this hard tradeoff between the *ex ante* principle of freedom of contract and free alienation, and these *ex post* tensions about the fact that as time marches on you get situations where the loss of wealth because of a restricted use of property gets larger and larger. I think this is reasonable. At some point we are forced to make the tradeoff and say that we are going to undo restraints that were made by the original donor.

SCHWARTZ: Perhaps this is an area where utilitarian and libertarian notions do diverge. If one is going to be utilitarian, it might be the case that utility is more likely to be maximized by the people on the scene who have a sense of what is going on, rather than by following the dictates of someone who is really uninformed; that is, someone who lived a very long time ago. Now I don't have any brief for the rule against perpetuities per se, but I think that what Richard has to address is the various justifications for a changed circumstances doctrine: either that the original grantor might not have wanted things to apply in the current circumstances, or that if one is going to be maximizing utility, one wants the most knowledgeable people who will bear the direct consequences to make the decisions—that is, the people now alive. So there is, it seems to me, at least a *prima facie* justification for limiting the ability to tie up property rights over time. I don't know whether the rule against perpetuities is a good way to do it, but I think that these are things that the paper should address, but doesn't address in enough detail.

ELLICKSON: Like Alan, I think this rule can be justified on utilitarian grounds. Jack Carr assumes he is entitled to destroy his automobile. He shouldn't be confident of that. Jack, what would happen if you were to take a hacksaw to your car one day, put a torch to your house the next day, and so on? Your parents or your wife would call the local mental hospital and say, "Please have Jack committed." There are real legal constraints on owners wasting resources, as "waste" would be objectively defined. Just as torching one's house is regarded as evidence that a conservator should be appointed to manage one's assets, the bizarre and ob-

jectively wasteful division of property ownership through time can be seen as an insane act that need not be respected.

Use of a trust does not eliminate the risk of objectively wasteful future interests. Trusts are costly to administer. As the years pass, the transaction costs of management steadily erode the principal of the trust. A utilitarian thus would want rules like the rule against perpetuities to apply to equitable interests as well as to legal ones.

MANNE: I remember that there are cases in which a testator instructs an executor to burn a house down; he lived happily in it, and he doesn't want anyone else occupying it. If I remember correctly, some courts will not allow property to be destroyed in these circumstances. Now that strikes me as a gross intrusion on private freedom and private property by a government agency. It strikes at the very heart of any kind of libertarian concept of society, but it is precisely what we are talking about here, just a more dramatic case. Suppose someone says, "I am willing to take the risk that three generations down the road this little one-acre plot is going to have eighty owners." In those circumstances, the transactions costs of organizing and getting them together are going to be enormously high, and maybe the property will be of no value for that reason. Isn't this just a more extreme version of telling the executor to destroy the property? It is hard to come up with an explanation of why you shouldn't be free to do that.

KOMESAR: If I make either of two extreme assumptions, I know what the correct answer ought to be, at least under utilitarian principles. First, if I assume that all people who put restrictions on property are fully aware of all potential uses and values of their land, then I do not want any other entity in the future to be able to remove them or adjust them. I know who the best adjuster is at the beginning. On the other hand, if I assume that there are problems with the knowledge or foresight of the original owner, and I assume that there is some entity later on, the ubiquitous "we," who can remove these restrictions and has the wisdom to do so, then that would be preferable. I just substitute that entity, and we would have a more utilitarian or more efficient system. The question is what does the balance of these entities, or institutions if you would, look like? I think there are a lot of instances in which testators have done nutty things, but there are also examples in which courts have removed restrictions of one sort or another where the motive for removing the restriction was nothing more than the proverbial rent seeking. I am thinking now of the removal of covenants, a slightly different thing in

which the individual comes in to court, says to the court, "My land would be worth a lot more if this restriction were taken off," and the court looks at it, fumbles around a little while, and removes the restriction. Well, of course, anyone knows that any restriction removed so long as the remaining property is still restricted will result in a special advantage to the one property owner. I think that whether restraints on alienation are good or bad cannot be decided simply by recourse to utilitarianism, libertarianism, or any other philosophical maxims. I think the answer can be given only in the context of the specific subject matter and, in particular, in the context of a careful balancing of the institutional choices we have.

RADIN: Pursuing the Carr analogy about the car for a minute, the argument seems to be that since I have free alienability of my Porsche and dominion over it, I can also destroy it. And it also seems to be as a conceptual subset of this that I can create whatever *inalienabilities* I like. So that it would be all right to say, "I'll sell it to you if you promise never to drive over fifty-five, and if you do, you forfeit it to my cousin, unless my grandson has already reached the age of twenty-one, in which case it zaps to him, but with the proviso that eventually it is going to go to the poor of Philadelphia when they have managed to lift themselves from their degrading condition." Now the answer given to this problem, at least by the economists, is that people will not do this because people will act in their best interests *ex ante*. I am not going to sell my car on those conditions; people are not going to do that, at least not systematically. So we don't have to worry about it. I think that the problem with land is a little more complex, because people have done weird things and I'm afraid that they are still going to do weird things.

I think that a good example that Richard doesn't discuss is the fee tail. A fee tail is where I say my children can get my property but they can never transfer it out of the family, and if they do, it has to zap back to my progeny forever and ever. It has to stay with my blood family forever.

EPSTEIN: A series of perpetual life estates.

RADIN: People are still trying to make fees tail. There is no state in which they can really do it, but the ways in which the states have gotten rid of it are all different.

Now the economists assert that these things are all taken care of by the market. I don't think that is something we can decide by conceptual reasoning. We cannot just assert that people will make contracts in their best interests; we have to ask, what are the problems about making these

contracts, what are the specifics that have to do with land as the object of them, what are the details? To what extent is it abnormal behavior to want to create fee tail, and to what extent is it normal when we are talking about land and family? I don't think that the answers to those questions are obvious. At least they should be treated in greater detail.

One thing bears emphasis. It's not particularly costly to me if I create a fee tail. Almost by definition I take pleasure in thinking that the land will be with my family forever. It is costly, however, to my children and the people who want to purchase from my children because they can never get a fee simple. So that's where future generations come in; it's a possible externality if you want to consider externalities as costs to future generations, because it is the children that are not born yet and the people that now have nothing to say about it who are going to be deprived of value, whereas, by definition, I get something out of it. So that's why it's very clearly a conflict between alienability and maximizing value in future markets, and I really don't think that we have looked at this problem in enough detail. I don't go with the asserted solutions.

CARR: I have a number of points, but on Peggy Radin's last point, if you get pleasure through giving to your children, why would you want to give them something that has greatly diminished value? That doesn't make very much sense, because if you get pleasure giving to your children you have to give them something of value. What you are saying is that in your utility function you take their utility into account, and if you are taking their utility into account, then you have got to give them something of value. Which gets back to the recurrent theme which is, are there any tensions between libertarian values and utilitarian values? I don't see where those tensions lie. In fact, the argument is that the reason you support libertarian values is that by letting people have freedom to contract they are going to create the greatest amount of utility.

With respect to Tom Merrill's point about changed circumstances, the problem with changed circumstances is that people realize that the future is uncertain, and they realize that there can be various contingencies, and unless there has been something that occurred that no one ever thought of, most of these changed circumstances are just a matter of drawing out a probability distribution of events that people expect could occur. If you only want something to have a particular use, and you realize that if there are changed circumstances the courts will not allow that use, then people are not going to be able to give for that particular use and you are going to have a reduction now in terms of efficiency. You are going to

lose. And so you can't play the game by saying: "Wow, if they only would have known there would have been these changed circumstances, they wouldn't have done this." The problem is that there are many things that could be in the future, and you can't simply change the terms of the contract *ex post* and expect that not to have any effect *ex ante*. It is going to have *ex ante* effects, and when you change the rules you reduce the present efficiency.

People have been asking, how do we know someone is not going to want to destroy property? The answer is we don't see it as normal behavior; as Bob Ellickson said, we treat those people as insane. Insanity is not something we should worry about as a basis for legal institutions. If you accept the proposition that people are going to act rationally, you don't want to restrict their choice, because you will greatly reduce the efficiency of the system.

EPSTEIN: Starting with insanity first, I think that there is clearly a problem, but it's a problem you handle by civil commitment procedures, not by gross invalidations of property transfers that are going to affect 99.9% of the people who are sane in order to control the insane. We have similar doctrines in wills. We have doctrines of undue influence, competence, and distress that handle those things. The rule against perpetuities is in this sense wildly underinclusive because there are all sorts of valid dispositions under the rule that could be struck down as being made by mad men, and then there are all sorts of innocent limitations that the rule against perpetuities is going to hit even though there is no question of insanity at all. So I don't see that that is very important.

The second point is the question of knowing that there is no one to release in the future—Tom Merrill's point. One of the things that is very striking about grants is that they anticipate that problem. There are default provisions. Let me give you an alternative regime that makes a lot more sense. Somebody wants to give property to the lodge at such and such a time and then it turns out that the lodge doesn't have any particular use for the property and the question is, whom do they negotiate with to release it? Well, one thing you can do is specify another institution that would take the reversion over, which would be in the position to negotiate the release. One reason you have universities, charitable foundations, and all these other entities is you don't have to worry about which person is involved. You can have an institution, the University of Chicago, to take an example at random, that is going to be relatively constant over time, that can handle that problem of bargaining. And if

you don't have anybody like that, I am not wildly opposed to a position that says that in the event you have long-term restrictions, the default provision—filling in the contract—would be negotiation with the attorney general of the state for that release. I am convinced if you had that kind of very clear rule, people would quickly contract out of it and put somebody else in there in order to get themselves to a sensible position. So the release problem is not an externality problem. It is something that, far from being an unexpected situation, is the most routine of all problems that you must guard against.

As for the third point, Bob Ellickson said that trusts are enormously expensive and therefore you can't count upon them for devises. But here the issue is not the cost of the trust; it's the cost of the marginal rates of substitution of having slightly more activity by trustees as opposed to having a second legal regime that trumps them. And my sense is that anybody—whether you have a rule against perpetuities or not—who is going to be tying up property in ways that limit the discretion of the next generation is going to have to have a trust. And if you must have a trustee, then the amendment problem is answered. Typically you are going to afford the trust some degree of discretion, and the grantor will generally understand the tradeoffs between giving discretion that allows people to divert resources to antithetical purposes, on the one hand, and discretion that allows them to take into account changed circumstances on the other.

And the final point. The changed circumstances doctrine is bad not only for the reason that Jack Carr says, but also because you don't know what to do with it when you have it. That is, suppose it turns out that you have a rule that says that in the event of major changed circumstances—and you even try to specify them—something can be done. Somebody still has to decide whether or not the trigger has taken place. Moreover, somebody has to decide what that alternative disposition is going to be. Any grantor who sees that rule is going to say to himself, "You know, I don't want this intermediate solution. I am going to opt for a regime that ducks that." So, in the covenants area for example, where the changed circumstances doctrine seems to be in vogue, you will simply make outright conveyances or no conveyance at all because of the uncertain application of the doctrine. Changed circumstances, like the release problem, far from being something that is never foreseen, is exactly the kind of thing that is always foreseen. The evolution from grant to governance, which I stress in the article, is simply an effort to say that,

once the courts eliminated the restrictions on the kinds of grants you could create, by allowing variations to take effect through the trust, then freedom of contract was the way to answer this problem.

COOTER: Epstein and Carr have a model, and I am a person who likes models. Generally, I find that where a model is being argued on one side and no model is being argued on the other, the model wins. So I think there is something fundamentally right about what they are saying. On the other hand, most economic models are sufficiently indeterminant and flexible to reach a variety of conclusions, even contradictory ones. What is not clear to me, is the place that the various objections that have been voiced would occupy within that model. I think most of us accept this economic model of rational behavior as being fundamental in structuring the law, but where within that model do the objections that have been voiced fall?

Let me try to be more explicit about what I think the model is. The model is a little bit troublesome in economics because it involves other-regarding preferences. That is to say, it concerns donations and bequests from one person in order to benefit another. So rather than having self-regarding preferences, there must be some account of other-regarding preferences. I think perhaps the best way to put the question is to think of the donor as maximizing the sum of his own utility and the donee's utility. This involves a kind of cardinality, but you notice it's an individual cardinality. It's the donor who determines what the marginal utility of the donee is, who does the summing; it's not some government agency performing the cardinalization.

Now if we conceive of this rational donor who is trying to maximize this sum of utilities, then it seems to me that the legal rule should be to facilitate that process—to allow the donor to achieve his will, rather than to tax it or burden it in some way. The result is twofold. First, this will result in maximizing the sum of the individual cardinal utilities—the sum of the utilities as cardinalized by the donor—which I think is a worthy social goal. Second, it also will maximize the sum of donations. If you impose a tax or a burden on the transfer process, when the sum is maximized, that tax is going to have to be taken into account. The lower the tax is, the more donations can be achieved. We ought to think of the government's role in this matter as creating incentives to maximize the sum of the individually cardinalized utilities, or equivalently, to maximize the sum of the donations. The basic rule we need in order to accomplish that is a rule that would try to effectuate the aims of the donor.

On the other hand, I think there are at least three areas where problems arise. First of all, the easiest ones to deal with, at least in theory, are the problems of mistake and changed circumstances. They involve no fundamental departure from the model, but there is a problem with the lack of information. Now Richard Epstein has very little faith in the competence of the judiciary to properly detect such mistakes and correct them. If the judiciary had that capacity, if you had a lot of confidence in the judiciary, then you would say that you want a fairly broad doctrine of mistake and changed circumstances because that would, in fact, effectuate the will of the donor rather than frustrate it. On the other hand, if you think that the judiciary really is incompetent in this matter, then you would want a very narrow set of circumstances in which you would recognize mistake or changed circumstances, because most cases would, in fact, turn out to be the occasion for frustrating the will of the donor in the guise of protecting it. So I think this problem really comes down to an issue about the administrative capacity of the judiciary to respond to changed circumstances.

Another problem that we have been discussing, which I think is quite different from mistake or changed circumstances, is irrationality. The law should be structured by and large with the assumption that people are rational, but there is an irrational element in the population with which it is the business of the law to deal. The boundaries of irrationality need to be legally described. That really is something for which I don't have a model. (Certainly if there is a model, it's not the model of rational donation that I have set out here.) So I don't know exactly how to accommodate it.

The third problem that we have to deal with, which I think is something quite different from either mistake or irrationality, is what I call anti-market preferences. Let me go back to my Indian case. It is a myth to think that tribal lands are communally owned. They are almost never communally owned, they are usually allocated to the clans. Clans know where their boundaries are, and the allocation is complicated because it's an allocation of use rights rather than just simply the right to exclude, although the right to exclude is often there as well. But the point would be that in tribal law, say the Papagos' law, it's very hard for a clan to sell its land. It is possible, but it is pretty hard to do. In short, there are a lot of anti-market preferences in that society. The fee tail is another good example. I think that when a person writes in his will that the children will have his land but it can never be sold outside of the family, that's a

kind of anti-market preference. This anti-market preference is probably motivated by an impulse that's not too different from what animates the Papago.

Now, how we deal with anti-market preferences is, I think, a difficult cultural problem. We as a society are so committed to the market that it seems as if the person who tries to set up a fee tail is either irrational or mistaken. It's possible that these are irrational mistakes, but it could be just an anti-market preference. Exactly how we want to deal with people who have such preferences I am not sure. My contribution here is not to resolve these problems but to clarify their connection to the fundamental model of donations.

GOLDBERG: I would like to take what Bob Cooter said and put it in a more mundane way. Peggy Radin's point about the fee tail harming the recipients is somewhat misleading. The question is, compared to what? If they get the land with the fee tail restriction, are they worse off than if they didn't get it at all? If you have a rule that says you can't have those restrictions, what is the donor going to do? If the donor says, "Well, since I can't keep the land in the family, I am just going to sell the land, spend the money and give them zip," then they are clearly worse off. From the donees' perspective, clearly they are worse off *ex post*, but *ex ante* are they worse off with that rule or not? That's really a restatement of Bob's basic point, I think.

GOETZ: There is another issue here, which has not been discussed, that has to do not with intergenerational conflicts, or even interpersonal conflicts, but intrapersonal conflicts, within the same person's psyche if you will, at different moments of time. If you look at history, there have been various mechanisms to guard an individual against impulsive purchases or commitments, where the Goetz of now commits the Goetz of the future to something that the Goetz of the future will regret very bitterly. For example, you have waiting periods before marriage, both legal and in the reading of the banns; you now have a cooling-off period on door-to-door sales, presumably designed to take care of impulsive or at least so-called impulsive buying. But more troublesome, I think, are kinds of very, very long agreements committing people in certain ways. I'll give you an example of something I have been ruminating about for a couple of years, which is the increasing use of prenuptial agreements to govern the disposition of marital rights and property. To what extent are we prepared to honor such agreements that are made by people in the throes of infatuation? Is infatuation a bar to making a contract? Or per-

haps we could use a waiting period, so that you could not take the perpetual vows without making temporary ones first that then had to be renewed. Again, it may go back to demoralization costs. Perhaps society will say with respect to certain kinds of very, very long contracts that we will allow you to make any promises that you want, but we simply won't enforce those promises through the mechanisms of the law.

RADIN: I want to continue my brief for a bit of empiricism. Assume for the moment that one is acting irrationally if one creates a fee tail or other types of contingencies like contingent remainders and possibilities of reverter. The question is, to what extent does this irrationality exist, and in what areas? Is it that we do not see much of this behavior today because it is irrational, or because we have rules against it? Most people have been saying that the rule against perpetuities applies to a very small number of situations and these things are very anomalous. I think we can think about that a little bit more empirically. Maybe fees tail are an example. Some people still try to create fees tail, but everywhere there are statutes that turn a fee tail into something else, so you can't do it. Is there any way we could find out to what extent they would do it if those statutes weren't there? Similarly with possibilities of reverter—maybe this one is more amenable to investigation. It may be that lots of possibilities of reverter that are potentially troublesome still exist. That's the situation where the property goes back to 147 heirs of the grantor after it ceases to be used for church purposes, which is a transaction-cost nightmare. I think the reason that a lot of possibilities of reverter still exist but are not perceived to be a problem is because of the emergence of marketable title acts. Lots of states now have these marketable title acts that say that the beneficiaries of possibilities of reverter have to come forward and re-register them every thirty or forty years or else they are going to lapse. I'd be interested in Richard's position on the marketable title act. You could say this is rent seeking by somebody or another, but also you could say they have a salutary effect. This is not something that the common law did anything about, but it's analogous to the rule against perpetuities and to getting rid of the fee tail. Can we tell to what extent these irrationalities, if they are such, do exist or would exist in the absence of these types of rules, and which ones are truly troublesome in the long run?

MERRILL: One of the things that positive economic analysis of law has taught us is that we should think long and hard before condemning to oblivion institutions that have survived for many centuries. It seems

to me that a number of these institutions that deal with restraints on alienation—the doctrine against restraints on alienation, the rule against perpetuities, the ability to bar the entail and so forth—have been around for an awfully long time, which may suggest that there is, in fact, some utility to be gathered from them. Now Richard's point, I take it, is that they have survived because it's been easy to get around them; they are sort of a nuisance, but they're not that much of a nuisance, so there has never been any real agitation to get away from them. But it is interesting to note that in the areas where there have been gaps, and Peggy Radin identified possibilities of reverter and rights of entry as examples, we have, in fact, seen legislative intervention in order to adopt similar kinds of tempering restraints. Thus, we see lots of states that now have statutes that limit the duration of possibilities of reverter to fifty years; we have the marketable title acts, and so forth. And no one seems to suggest that there is any more of a public-choice explanation for these statutes than there is for the doctrine of adverse possession or statutes of limitations. All this suggests to me that what you have here is a tradeoff or balancing between a strong preference for free alienation and freedom of contract on the one hand and a concern that there is a need for some kind of fail safe mechanism or doctrine that handles changed circumstances in the exceptional case on the other. Our legal institutions have essentially arrived at a set of doctrines for achieving these kinds of compromises, and they have been fairly enduring.

ELLICKSON: Bob Cooter has said that someone who has a model has an advantage over someone who doesn't. Although I may lack a model, I'll nevertheless venture to criticize the positive model that some of the participants have been using. Because libertarians often use this model, I'll call it the libertarian model. The libertarian model assumes that everyone has the capacity to act rationally. Second, it assumes that all actors have perfect knowledge of legal doctrine. Third, the model assumes that people regard law, as opposed to, say, informal norms, as the sole source of entitlements. I suggest that all three features of this model badly oversimplify reality.

The capacity problem is a more pervasive problem than many of those who apply the libertarian model recognize. Testamentary dispositions are made mostly by old people. Most of us have lived long enough to have seen older family members lose much of their alertness. Many of us also have children, toward whom we often act paternalistically.

Although the libertarian model correctly presumes capacity, we should recognize how frequently the presumption can be rebutted.

A deeper problem with the model is its assumption of perfect legal knowledge. Richard Epstein incautiously suggested that if there is a rule against perpetuities, everyone will simply draft around it. This vastly exaggerates the legal knowledge of those who draft wills. An awful lot of testamentary dispositions are made quite casually. John Langbein, who specializes in this area, calls it trailer-park law. Some testators don't consult lawyers but rather write holographic wills, or use will forms available for sale at a bookstore. These testators are highly unlikely to know of the rule against perpetuities. Lawyers' knowledge is also imperfect. Most of us who teach property would probably be willing to confess to having less than total knowledge of the rule. A famous California decision even holds that a lawyer's failure to understand the rule against perpetuities is not legal malpractice because the doctrine is so difficult.¹⁵ Richard should not assume that testators will invariably draft around the law.

The third defect in the libertarian model is its tendency to view the legal system as the exclusive source of constraints on behavior. I return to our friend Jack Carr and his automobile. Libertarians often underestimate both the legal and social constraints on the use of property. There are laws against the destruction of one's own human capital, for example, laws against suicide. More importantly, when someone is deliberately injuring himself, that is a sufficient legal basis for involuntary commitment to a mental institution.

My main point, however, is that many constraints on the use of property are social, not legal. Suppose we saw Jack Carr out in front of the hotel here in Alabama destroying his rental car. We would be likely to run up to him and grab him, throw him to the ground, and lie on him until he calmed down. We would do this *not* because he was violating Alabama law, but because we would guess that he should appreciate our paternalism once he returned to his senses. After we returned home we would say to our spouses, "I accomplished at least one good thing at the conference; I stopped Jack Carr from destroying his car." Until the libertarian model of property rights takes into account social constraints on behavior, it will ill describe how the world works.

15. *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962).

EPSTEIN: I want to respond to a couple of points, mainly the ones Tom Merrill and Bob Ellickson raised. The point about gaps in the law and durability of these institutions is a very important point. I have generally treated it as being a matter of quiescence because parties have been able to evade most of the restrictions. Let me give you one illustration where it turns out that old restrictions were very bad. It is the rule in *Chudleigh's Case*,¹⁶ which states that it is against the law to create a fee simple which says to *A* for Monday, to *B* for Tuesday, to *C* for Wednesday, to *D* for Thursday, and so on down the days of the week in cycles. And it was quite clear in early common law, in an age of no recordation statutes, why you would want that kind of restriction. It made the state of the title unknowable to third parties and therefore completely destroyed transferability. Enter the twentieth century and somebody says, "I'll tell you the kind of contract I want to make; it is a contract which says my condominium unit to *A* for the week of . . . , and to *B* for the week of . . . , and we call it time sharing," which turns out to be a fairly extensive kind of business that takes place in many resort states. Typically, somebody goes to the legislatures, confronts them with the old rule that says you can't create new kinds of fees simple, and sure enough they pass an enabling statute that allows you now to enter in these kinds of agreements. It is interesting where you really have genuine economic stakes at issue, then the kinds of techniques that are taken to fill the gaps are enabling statutes rather than restrictive statutes.

With respect to Bob's point, I think he misconstrues, at least in part, my objection to the rule against perpetuities, which can be expressed in the form of an exhaustive dilemma. Either the restriction is sufficiently well known by lawyers that it can be fully evaded, or it turns out to be a gratuitous trap against the unknowing and the unwary, which causes an enormous amount of trouble to evade. It seems to me that trailer-park wills, of which there are many, illustrate the second problem, that people blunder into these kinds of things. That's not an argument for keeping the rule against perpetuities; that's an argument for saying that we really have to worry about the competence problem directly. Do we have formalities? Do we require witnesses for wills to be valid and so forth? And I am prepared to take a whole range of views on that particular question.

Going to the competence question, I think Bob is right again when he says that individuals do not routinely remain competent into their seven-

16. 1 Rev. Rep. 113b (1595).

ties, eighties, and the nineties. The problem of wills and dotage is a serious problem. But there is a very important asymmetry here between that problem as it applies to folks in their old age and to those with children who are just coming into the world. To some extent, most of us, like Bob, understand that problem and what we try to do is work out some arrangements to handle it. We make the wills earlier in our lives rather than later; we may even have, as some people do, triggers that can be imposed whereby other people can take powers of attorney upon the approvals of two doctors or something of this sort. More importantly, it seems often that the problem is handled by the intervention of the next generation which in effect writes the wills for the parents, by hiring the lawyers, supervising the transactions, and so forth. I think that you could turn Bob's argument against him by arguing that because those kinds of social control are so powerful and so pervasive you don't want to have any kind of blunderbuss legal rule that is only going to look at the form of the disposition in order to invalidate it.

This argument, I think, ties in with Bob's other illustration of how we handle incompetence during life. I would argue that Bob's theory is a libertarian theory of incompetence. Notice the example that he gave as the case to justify intervention. It was the use of force and fraud, or typically force, against yourself. It was not the case where Jack Carr goes out and rents the car from an agency that charges ten percent too much, which sends him into action; it was instead the case where Jack is slashing his wrists or wrecking the tires, committing actions that, if done against a third party, would be a form of aggression. It seems to me that that's basically the right rule. It is a rule that is relatively non-discretionary in its application. This rule permits relatively low-level and short-term interventions and tells you when you are going to stop and so forth. It seems that the problem of competence is all pervasive, and the touchstone in practice, that captures most of the intervention, is basically the question of whether or not someone is doing actions which, if directed against third parties, would be called wrongs of force.

HELMHOLZ: I'd like to go back to *Chudleigh's Case* and time-sharing arrangements. Remember this case is one in which we are creating a fee that alternates on different days of the week. Richard Epstein used it to show the inconveniences of the rule when it came up against a time sharing arrangement. I take it that your conclusion was that the rule in *Chudleigh's Case* was bad and therefore the rule against perpetuities was bad also.

EPSTEIN: It was to answer Tom Merrill's point about what we do when there are gaps in the law. I intended no implications from that for the rule against perpetuities.

HELMHOLZ: Well I thought Tom's point was that because a rule has lasted quite a while that is prima facie evidence that it probably is doing some good and ought to be retained. Your counter to that was *Chudleigh's Case*, a rule that had lasted a long time and was positively doing harm.

EPSTEIN: At that point, then there was a legislative switch.

HELMHOLZ: But what causes the rule in *Chudleigh's Case* to do harm is the development of a time-sharing rule, isn't it? That just didn't fit in with the rule in *Chudleigh's Case* and therefore, something had to be done in the legislature. I can't see here what the equivalent is in restraints on alienation and the rule against perpetuities. What is the harm? What is the modern development? What is the change that causes us to say that we should now throw these rules out?

EPSTEIN: I think Bob Cooter made a nice point when he said that the rise of informal transactions has made the rule a trap for the unwary. It is quite clear that we have had a legislative change—the wait-and-see rule—which is designed so that a lot of these traps for the unwary are avoided by the deferred revaluation. So a transfer “to *A* when the gravel pits have been exhausted” is bad under the rule against perpetuities, because the pits may have an infinite supply of gravel, but when in fact they run out fourteen years later, you uphold the gift over. I think that the history is quite clearly on my side. You start with Barton Leach's advocacy of changes in the rule because of the injustices that it caused in individual cases, and then the legislative response by folks who basically took Tom's position and said, “Yes, it's been around for a long time, we don't want to take the radical step of getting rid of it, but what lesser move can we take?” One legislative response was the English statute of 1964, which jiggered around with the rules so as to solve the problem of the fertile octogenarian and the unborn widow, and the other was the American response, which said another way to jigger around the rules is to give ourselves a longer window of time to look at a disposition. And, in effect, both of those movements have been in favor of giving greater scope to freedom of testation when it has been shown that the rule has caused a perceptible horror. To give you a contrary illustration, take the New York rule, for example, that said that an interest had to vest, if at all, within two lives in being in order to be good. That turned out to

create a large number of drafting problems for a large number of people, and was quickly repealed by statute.

HELMHOLZ: The experience with the New York rule shows the foolishness of that change in the rule against perpetuities, but the evils that you've identified are in no sense new; there is nothing here that corresponds to the problem of the time-sharing arrangement. What's the case that comes up over and over again to demonstrate the problem you talk about? It's *Jee v. Audley*,¹⁷ and what was the date of *Jee v. Audley*?

EPSTEIN: 1787.

HELMHOLZ: That doesn't indicate that there is any new danger. You've just brought out the same parade of horrors that we've been looking at over and over again and said, "Now we've got to do something." Well, what is it that's happened in the last five years that's caused *Jee v. Audley* to be a new problem to which we have to respond?

EPSTEIN: My position is different from that. My position is that the rule against perpetuities imposes very low costs but generates even lower benefits, and therefore you want to get rid of it. So if you're trying to figure out which way you ought to go, I think I am pretty clear on that. If, on the other hand, you want to ask where I would rate this as against, for example, something that would be really useful like the repeal of estate taxation, I know exactly where I would put it. I'd give this a score of .04 and I'd give the other one a score of say ten, but that was not the question, and I thought I said fairly clearly in the paper that I did not regard this as an important problem. What I do regard as an important question, as Peggy Radin said, is the servitude question. The governance question is important also. My own positive tale is that where the pressures really start to mount, you see movement. Where the pressures are relatively unimportant, you can make all the intellectual arguments you want, but a state legislature is unlikely to make any fundamental changes. Thus, even though there are positive causes for change, it may not be worth correcting the evil because the harm is relatively small and you may not want to spend your capital on that.

HELMHOLZ: I was only raising the point that Tom Merrill was raising, namely that the long-time persistence of the rule indicates that there probably was some benefit behind it.

EPSTEIN: But in my view, the long-term persistence of the rule is explained by the rise of the trust. Once it became clear that you should

17. 1 Cox 324, 29 Eng. Rep. 1186 (1787).

put these things behind trust, and once the clear illustrations came out, the number of catastrophes was relatively small. In addition, I would bet that there was a lot of post mortem planning where people just voluntarily relinquished claims, because a lot of these issues arise within families where there is a lot of overlap in utilities and desires, so you can nurse your way around the disasters. The reason covenants are so much more important is precisely because you are dealing with strangers where none of that natural love and affection is present. So all I'm doing is making a positive point, which is that Tom is right about durability, but it may not show that the rules have large benefits; it may only show that the rules have small costs.

VI. GOVERNANCE STRUCTURES AND THE THEORY OF CONSTITUTIONS

FISCHEL: I want to bring up a parallel to what we have been talking about, which is the writing of constitutions. In effect, Richard's position seems to be that people can, and maybe sometimes even should, write constitutions that are non-amendable. If we think of the rule against perpetuities as a rule that prevents the drafting of constitutions that cannot be amended by the people who are subject to them in the future, then the rule makes a little bit more sense. Of course, there may be other ways, such as revolutions, to overcome this non-amendability problem with constitutions. But I think once we have put the rule against perpetuities into the public sector, its purpose makes a little more sense.

KOMESAR: I think that is quite correct. We would not want a constitution that did not have the possibility of amendment. The parallel here is a constitution without the possibility of amendment in it. The question is, why didn't the original parties provide for some governance mechanism themselves to provide for changes? I think the problem is more difficult than simply saying that there are times and circumstances in which errors are going to be made, because you have to recognize that any externally imposed decision-making mechanism is also subject to error and expense. Even if we went to a Hegelian principle that looked to the degree to which somebody had an attachment to property, someone or something is still going to have to decide whether that attachment has occurred. Without some sense about what that someone or something looks like, I don't think we can assess under any of the philosophic regimes that we have talked about, whether or not rules against restraints on alienation make sense.

ELLICKSON: I've done some research on land use covenants and thought I'd just give some factual background, as I see it, of the history of governing structures as they've evolved over the last 100 years. We have very poor data because it is very hard to find out what people were actually doing when they drafted covenants, but you can, in a crude way, divide the history into four stages.

The earliest covenants tended to have no express termination provisions. They had infinite life, so, for example, they would say, "This land will only be used for single family purposes," or something like that. These were often done on the back of an envelope or whatever; the drafters never thought about termination. That brought trouble down the line, not surprisingly. A serious termination problem, which would be costly to litigate, was inevitably posed, and drafters got more sophisticated.

The next stage in history, say early in the century, would be express termination provisions that set specific lives for covenants. So they would say, "These covenants shall expire in the year so and so." That turned out to be a fairly crude way of dealing with changed circumstances because, in fact, it might be appropriate that it would remain restricted to single family use after that date.

So the next stage, which is probably the most important today, was pushed by the FHA and its standard subdivision provisions after World War II. And that provided for a voting mechanism, usually by lot ownership, which said, "These covenants shall last thirty years, but at that point a majority can vote to extend or a majority can vote to terminate," or something like that. It was sort of an ad hoc voting mechanism at that point.

A fourth type, and I'm not sure that this is a different stage, tends to involve different kinds of real estate developments. The fourth type is where a full-blown governing structure is set up—a government that is set up by the developer to run not only these covenants, but to do other things. Here you have an elected board of directors; you have power to tax in a way; power to spend; and the governing structure is involved in making modifications to these covenants. Again, there may be extraordinary majority provisions that vary through time and whatever. It's actually a fairly rich pattern out there, but if one is interested in these issues, there are some phenomena out there that we should look at that have evolved over time.

KOMESAR: I am now doing some work considering the process of

making constitutions. If we want some particular end result, but are not able to define it very exactly, we are unlikely to draft a code. We are then left with the problem of how to make the decision in the future. It is easy under those circumstances to think about process without recognizing that, by degree, the same kinds of problems arise in a procedural guise that originally bothered us about defining substantive provisions. Let's take the United States Constitution. It's one thing to design the institutions to say, "Well, we'll have two houses, we'll have an executive, etc." But one of the most difficult problems that arises, and I think it arises whenever there is any sort of large-scale entity making these determinations, will be the question of the allocation of responsibility among those decisions makers. That problem turns out to be a microcosm of the question of how well we can make substantive determinations to be applied long into the future. The allocation questions become such a detailed and difficult problem that even allocation itself is left for the future. This seems to be a pervasive issue within documents like the ones setting up restrictions on future decision making in condominiums, corporations, and subdivisions. These issues of the allocation of decision-making responsibility seem central in understanding the common law or statutory law that surrounds these documents. I think these questions are immensely complex, but I do think, frankly, that this is where a great deal of the future of the law of property lies, much more so than the other questions we've been addressing today.

MANNE: I would like to ask Richard Epstein, following up on something he said earlier, if instead of imposing a doctrine of changed circumstances he would favor a kind of default position, some sort of a governance structure in, say, a condominium? Everybody would get the right to vote for a body that would then make the decision, as opposed to a court deciding whether circumstances had changed.

EPSTEIN: Yes. My sense is that we have to be clear about what a default provision is, and I think there is some confusion here. A default provision is one that you could override by express contract, and my own sense about it is that you should try to track the dominant tendencies, and as the dominant tendencies tend to move away from substance to process, I would try to adopt something that looked like majority vote with routine decisions and two-thirds to three-quarters votes with extraordinary decisions. This is a pattern that is surprisingly extensive when you are looking at condominium associations, limited partnerships,

and so forth, which, by the way, seem to track very closely to basic kinds of institutional structures that we have in the United States today.

MANNE: Do you think a common-law judge faced with an agreement that doesn't have such provisions should have the right to read them in?

EPSTEIN: This is a problem that I first confronted, oddly enough, in workmen's compensation. The standard default question in workmen's compensation cases, is what do you do in the event there is an accident? How do you allocate the risk? If you look at the dominant express contracts that developed in industries with high accident rates, they tended to have governing structures to allocate risks consensually. That is, they had rules that set up panels and tribunals and so forth to allocate these losses and to pay out claims, very much like the modern workmen's compensation statutes, which were, in fact, patterned on the private plans which they then enacted into public law. The problem is you can't introduce this kind of compensation system *ex post* in a world that doesn't have it, because there is just too much other water that has passed under the bridge. So a judge can't impose a governance structure by common-law adjudication. But on the other hand, you can do it by statute. One of the advantages that statutes have over common law is that, on the question of implication, they can impose much more complicated structures in default provisions. That's why, for example, even when you are dealing with something like commercial law, you tend to move away from common-law rules to a UCC that sets out an elaborate set of default provisions. Another good virtue of legislation over common-law adjudication, it seems to me, is that in this limited context, legislation doesn't have much adverse rent-seeking potential, precisely because the default provision limits the amount of gain that any one could get from changing the rules.

GOLDBERG: I am delighted to see Richard and a lot of other people trying to look at the world using the analogy of complex long-term contracts. It's something I've been doing for ten years now, and it's nice to see other people doing it as well. It really does help explain, I think, what is going on when you ask the crucial question, how do you on the one hand establish reliance and on the other hand maintain some sort of flexibility? Order versus change seems to be the general issue. The balancing must take place in a world in which external enforcement is not costless, opportunism exists, and information is not perfect. Those are really the bases of the questions you are dealing with.

FISCHEL: During the break I asked Dick Helmholtz whether he

knew of many instances of long-term trusts in which future generations were highly constrained from altering the terms of the trust—that is, where the trust made the corpus virtually inalienable. And Dick said there were very few of those examples. He offered an explanation that I think is relevant to our constitutional question. People who have these ideas of long-term inalienability are typically talked out of them by their lawyers. They go to a competent trust lawyer who says, “You don’t want to do that.” The analogy to the constitutional issue is that we very seldom observe a constitution that cannot be amended by the people who are subject to it way down the line. Public debate would surely defeat any constitution that acted as an immutable dead hand upon future generations. What I think we ought to point up here is the value of conversation, of getting other people’s opinion, of dialogue, in formulating rules. Once people think about the difficulties created by making something inalienable—this is something that most of us here apparently regard as an irrational act—once these things get out in the open, they get disposed of fairly quickly. And I think this might help resolve the libertarian uneasiness about restraints on the freedom of testament. If people don’t make some provision for changes in future conditions, in conversation with a competent attorney at least, then there will be some default provision saying that some third party may intervene and alter the terms of the contract. I think that the amendability of constitutions can illuminate our unease with long-term private inalienability, and can help explain why we are willing, at least to some extent, to restrain individuals from unilaterally tying up resources for a very long time.

