

ADVERSE POSSESSION AND PERPETUITIES LAW: TWO DENTS IN THE LIBERTARIAN MODEL OF PROPERTY RIGHTS

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Richard Epstein adheres to what can fairly be called a “libertarian model” of law. Although he occasionally implies that this model positively describes the law as it is, his is mainly a normative vision of what it should be. With great energy and courage, over the past dozen years he has used the model to assess, and often to condemn, prevailing legal doctrines in torts, contracts, labor law, and other fields. In his article “Past and Future: The Temporal Dimension in the Law of Property”¹ Epstein carries the libertarian mission into new territory, and analyzes a number of fundamental doctrines of property law that law-and-economics scholars have largely ignored. Although in this comment I am often critical of Epstein’s analysis, I congratulate him for opening up these neglected topics to debate.

I will first outline the libertarian model of law and contrast it with a utilitarian model. I will then analyze the adverse possession and perpetuities problems, and conclude that the venerable doctrines that govern these areas reveal a utilitarian theme in property law. I will conclude by contending that Epstein himself often lapses into utilitarianism, perhaps because the reality of transaction costs makes a purely libertarian model of property rights normatively untenable.

I. LIBERTARIAN AND UTILITARIAN MODELS OF PROPERTY RIGHTS IN LAND

The credo of libertarianism — one with which I have considerable sympathy — is that the law should allow individuals to pursue their own ends, as they individually define them, with a minimum amount of state interference. Although there are undoubtedly libertarian conceptions of

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1. 64 WASH. U. L. Q. 667 (1986).

property rights in labor, capital, and other resources, I will focus mainly on rights in land.

In a libertarian utopia, the state would start by distributing most land, perhaps even all land, to exclusive private owners.² A libertarian state would then confer on each landowner the maximum degree of freedom to use the land that would be consistent with each neighbor also having that same degree of freedom. Thus each landowner would have total freedom of alienation, and would be constrained in using the land only by the law of nuisance and other doctrines that constrain infliction of external harms.³ Whenever possible, the libertarian state would protect a landowner with what Calabresi and Melamed have called "property rules."⁴ Property rules entitle a landowner to prevent the unconsented defeasance of rights in land, even when compensation would be forthcoming. Thus, property rules serve the libertarian goal of enabling a landowner to determine his own values and priorities. Property rules are often normatively more appealing than "liability rules" because market prices, the usual metric for legal compensation, fail to reflect any subjective surplus an owner may have. Libertarians (and economists who abide by the Pareto Superiority principle) are therefore suspicious of any "efficiency" justifications for legal rules that allow forced exchanges for compensation, much less rules that legitimize uncompensated expropriations.

Utilitarianism, as I define it, differs from libertarianism in its willingness to respond pragmatically to the reality of transaction costs. A principled utilitarian is well aware of the dangers of using market values either to measure compensation or to conduct cost-benefit analyses of alternative policies. In situations where transaction costs are likely to be small enough for consensual market exchanges to be the best resource allocator available, a utilitarian is apt to join with a libertarian in advocating the use of property rules to protect entitlements. Indeed, a utilitarian should regard property rules as the "default" rules of property law — the ones that should apply in the absence of good reasons to the contrary.

Unlike a libertarian, however, a utilitarian is willing to abandon property rules in situations where market prices and other objective evidence

2. Although Epstein argues the virtues of a first-possession rule of initial distribution, any rule that created exclusive rights would get the system going.

3. See Epstein, *supra* note 1, at 673-74, 694.

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

indicate that transaction costs are likely to prevent parties from entering into mutually enhancing exchanges. In those situations, a utilitarian would be willing to allow forced exchanges for compensation, and sometimes even uncompensated expropriations. The normative underpinning of utilitarianism is the hunch that in the long run everyone will gain if property rights are pragmatically defined to avoid messes in which high transactions costs prevent the voluntary exchange process from reshuffling resources to more highly valued uses.

II. A UTILITARIAN PERSPECTIVE ON ADVERSE POSSESSION

Epstein starts his system of “corrective justice” with “remorseless doctrines of original acquisition.”⁵ Yet those doctrines turn out to be much less than remorseless. He ends up concluding that when adverse possessors have come to occupy the lands of original owners, transaction-cost considerations — such as the costs of searching titles — may eventually justify dents in the libertarian foundations of the property system. As time passes, Epstein explains, “the lines cross.”⁶ Although he does not reveal exactly what lines he has in mind, the phrase reveals that Epstein is willing to apply a species of utilitarian cost-benefit analysis to determine when the interest of the original owner should be sacrificed for the greater good of others.⁷

This is puzzling coming from someone usually reliably staunch in his libertarianism. Libertarian principles make the expropriation of property without compensation highly suspect. Moreover, adverse possession in effect makes a landowner police against intruders. Libertarians usually bridle at the legal creation of affirmative obligations to act.⁸

Yet adverse possession doctrine, as Epstein himself observes, makes good utilitarian sense. In the next few pages I will attempt to elucidate Epstein’s insight that the “lines cross”—that at some point in time it does make sense for the state to side with the adverse possessor and not the original owner.

5. Epstein, *supra* note 1, at 676.

6. *Id.*

7. Epstein also resorts to a Rawlsian argument that a person choosing a rule from behind a veil of ignorance would agree to a doctrine of adverse possession. *See id.* at 679-80. An unbending libertarian would resist this analytic mode because it fails to respect differences between people as they are.

8. Elsewhere, Epstein has indicated his opposition, under all circumstances, to the imposition on bystanders of a legal duty to rescue. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 198-200 (1973).

The rules applicable to adverse possession situations can affect the costs that four parties—landowners, adverse possessors, land transferees, and courts (financed by taxpayers)—are likely to incur. All the subdoctrines of adverse possession law can influence the magnitude of these costs. I will analyze, however, just one substantive issue: the length of the statute of limitations that sets a deadline within which the landowner must begin an ejectment action or else risk losing out to the adverse possessor. This issue of the optimal length of the limitations period crops up all over the legal landscape, yet to my knowledge it has not been subjected to economic analysis. In analyzing statute length, I assume that the other subdoctrines of adverse possession law—dealing with tacking, continuity, color-of-title, and so on—are held constant.

A utilitarian legislature would set a time limit for the bringing of ejectment actions only if it perceived that adverse-possession disputes are potentially fraught with high transaction costs. The outcomes of particular adverse possession disputes have consequences for others besides the original landowner (*O*) and the adverse possessor (*A*). As I will soon explain more fully, these outcomes affect the welfare of as-yet-unidentified transferees of land. Moreover, the outcome of a particular adverse possession dispute may significantly influence the individual morales of *O*, *A*, and others; and hence their propensity to engage in antisocial or prosocial behavior that affects third parties. Therefore, if the law were to permit *O* to dawdle for an inefficiently long time period before bringing an ejectment action, the law would impose deadweight losses on diffuse third parties—losses that *A* would not have an incentive to bargain out of existence.⁹

If a utilitarian legislature were to decide that it did want to set a deadline for ejectment actions, how would it go about setting the length of the limitations period? Statutes of different lengths entail costs of different magnitudes. Many of these costs are difficult or impossible to quantify. A utilitarian legislator would turn to inexpensive sources of information,

9. Even if *O* and *A* were the only parties affected, transaction costs would not necessarily be low. The bargaining situation is one of bilateral monopoly, and perhaps also one likely to be marked by interpersonal enmity. I assume, however, that these sorts of barriers to mutually enhancing exchanges do not constitute an adequate utilitarian justification for stripping a property owner of property-rule protection.

A utilitarian would not want distributive preferences, whether in favor of landowners or adverse possessors, to affect the content of adverse possession law. Narrow legal doctrines are typically inferior to broad tax and transfer programs as mechanisms of redistribution. See A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 105-13 (1983).

such as market-price data, and perhaps readily available indirect measures of subjective value,¹⁰ to make the best feasible estimates of these costs.

Figures One through Five contain hypothetical estimates of the various types of costs that would be associated with ejectment-limitations periods of between zero and twenty years. All costs shown have been discounted to present value in the year of enactment of the limitations statute. The figures divide into four categories the costs that a utilitarian drafter of a statute of limitations of ejectment would want to consider. Litigation costs, whether incurred by a court or a party, are pulled out for separate treatment in Figure Four. Figures One through Three divide up the remaining costs according to the party that bears them — namely, original landowners, adverse possessors, and would-be transferees of land. I have no great stake in this particular taxonomy of costs. My main purpose is simply to demonstrate the possibility of a utilitarian analysis of alternative limitations periods.¹¹

A. Landowners' Costs

Under any finite limitations period for ejectment, landowners run the risk of permanently losing out to squatters. Landowners aware of this risk must bear either uncertainty costs or additional monitoring costs. The uncertainty costs are the disutilities they suffer from the prospect of losing their lands. Monitoring costs are expenditures they choose to incur to police against intruders in order to reduce these uncertainty costs. In cases where *O*'s actually lose their lands to *A*'s, *O*'s and their sympathizers bear what Michelman has called in another context "demoralization costs."¹² Demoralization costs include not only their personal

10. See generally Levmore, *Self-Assessed Valuation for Tort and Other Law*, 68 VA. L. REV. 771 (1982).

11. The figures assume, for simplicity, that *O* and *A* place the same subjective value on the disputed premises. If this assumption were relaxed, another figure, entitled "misallocation costs," would be included. It would chart the costs of the risk that the law would bestow the land in dispute on the "wrong" owner. When the law bestows an asset on a party who is not its highest-valuing user, the transaction costs of a transfer to the highest-valuing user set a ceiling on the costs of that particular misallocation.

The market value of the disputed land does not appear anywhere in the cost calculus. This is proper if the act of adverse possession would not affect the quality of the possessed premises. If *O* were to lose Blackacre, with a market value of \$1,000,000, to *A*, *O*'s objective \$1,000,000 loss would be offset by *A*'s objective \$1,000,000 gain.

12 Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967).

losses, but also the social losses that result when those who have been demoralized become more antisocial in their behavior. The more wrongful they perceive an expropriation to have been, the more severely landowners and their sympathizers will be demoralized. Note that a landowner utterly unaware of the risk of adverse possession would, because of that innocence, bear no uncertainty or monitoring costs during the period of *A*'s adverse possession; this landowner might, however, on account of that same innocence, suffer especially severe demoralization costs were an *A* eventually to wrest legal ownership away from him.

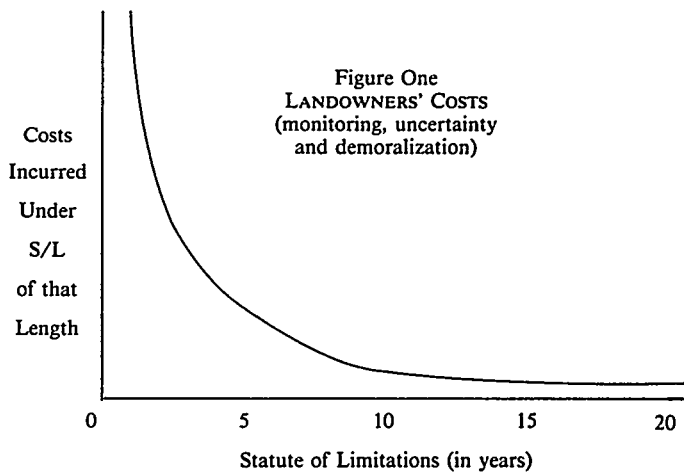
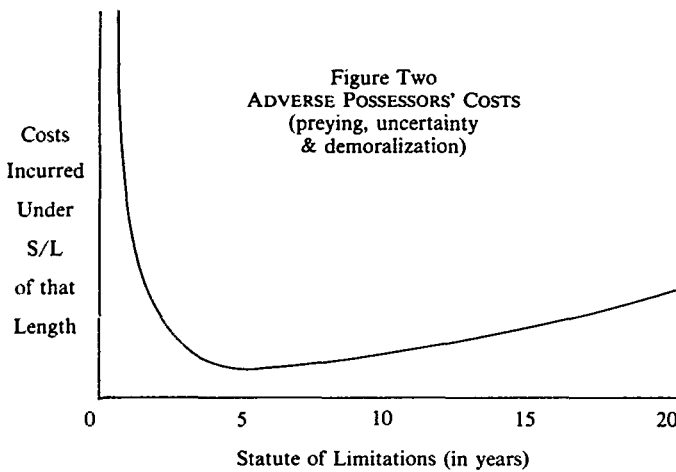


Figure One suggests how the discounted present value of landowners' costs of all types would vary with limitations periods varying from zero to twenty years in length. The graph suggests the obvious: that landowners' costs rise as limitations periods become shorter. The shortening of the period increases landowners' uncertainty, which landowners can reduce only by increasing their expenditures on monitoring. Moreover, as the period becomes shorter, returns to adverse possession would increase and both more squatting and more numerous expropriations by *A*'s could be expected. The more frequently and sooner the *O*'s lost their property, the higher their demoralization costs would be.

B. Adverse Possessors' Costs

Figure Two illustrates how *A*'s costs might vary with different limitations periods. *A*'s costs are of three varieties—uncertainty, preying, and demoralization. As time passes, squatters put down roots and increas-

ingly rely on the right to control the adversely possessed territory. The lengthening of the limitations period is thus likely to increase the uncertainty costs of legally informed *A*'s in two ways—by both increasing their *levels* of anxiety before the limitation period lapses, and stretching out the nailbiting period. *A*'s preying costs are the counterpart of *O*'s monitoring costs. If aware of the contents of adverse possession law, a rent-seeking squatter might make some outlays solely to enhance prospects of a legally successful expropriation. The squatter might, for example, spend time and money scouting the countryside for easy pickings, or inefficiently alter the use of adversely possessed lands solely to manufacture more favorable legal evidence.¹³ Lastly, just as legal expropriation may demoralize *O*'s, ejectments after lengthy periods in possession may demoralize *A*'s, especially *A*'s with a good faith belief that the disputed lands were theirs all along.



The curve in Figure Two has the shape of a lazy U. It assumes that bad faith rent-seeking activity would be common if limitations periods for ejectment were short, and thus, that the total preying costs would be high under those conditions. The graph assumes that a five-year limitations period, or thereabouts, would quell most quellable preying, and that the curve would bottom out at that point. Further extensions of the limitations periods are assumed to increase the uncertainty and demoralization.

13. Similarly, in personal-injury cases an injured plaintiff has an incentive to malingering prior to settlement in order to enhance awards for future medical expenses and impairment of earning capacity. Shortening the statute of limitations for tort claims helps reduce this cost.

zation costs that the increasingly rooted *A*'s would incur. Hence, after five years, the curve representing adverse possessors' cost is rising.¹⁴

C. *Transferees' Costs*

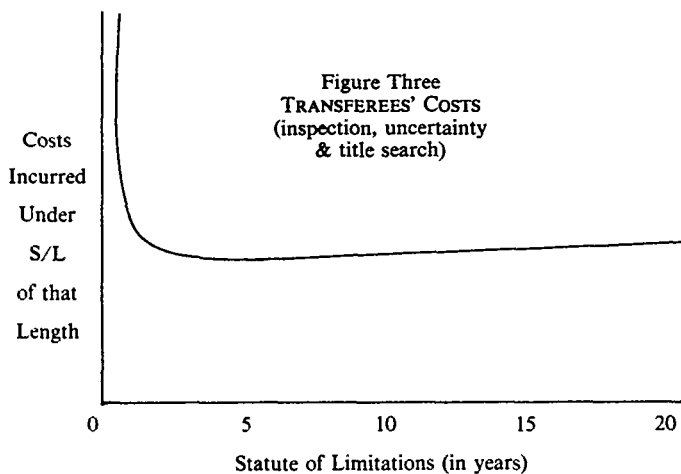
Figure Three suggests how changes in the limitations period might affect the administrative costs of land transfers. Adverse possession law is a mixed blessing for transferees.¹⁵ As Epstein notes, it serves to clear encumbrances revealed only in aged documents. This reduces purchasers' title search costs (or related uncertainty costs, should purchasers choose not to search). On the other hand, adverse possession law bestows valid claims upon persons not identified in the land records. A transferee has three ways of dealing with the risk of valid unrecorded claims. The transferee can simply bear the risk (thereby incurring uncertainty costs), insure against it (thereby bearing the loading costs of the applicable title-insurance coverage), or conduct a physical inspection prior to closing to look for evidence of adverse possession (thereby incurring inspection costs).¹⁶

14. The fact that all costs are discounted to present value is assumed not to be sufficient to counterbalance these increases.

15. "Transferees" include vendees, mortgagees, lessees, and others affected by the quality of a transferor's title. The text implies that transferees bear the consequences of all changes in transfer costs. These changes may in fact be partly or wholly capitalized into land prices and thus borne by transferors. So long as the taxonomy includes (and does not double-count) all relevant costs, I need not resolve the incidence question.

16. I count as inspection costs any costs that transferees bear to assess, prior to closing, the legal weightiness of any evidence of adverse possession that their inspections uncover.

Adverse possession is not the only legal doctrine that creates an incentive to inspect. In a state with a notice or race-notice recording act, a transferee may desire to inspect prior to closing to guard against the risk that the transferor has previously conveyed the land in question to another party. The discussion in the text assumes that the risk of adverse possession is much more significant than the risk of a double-dealing seller.

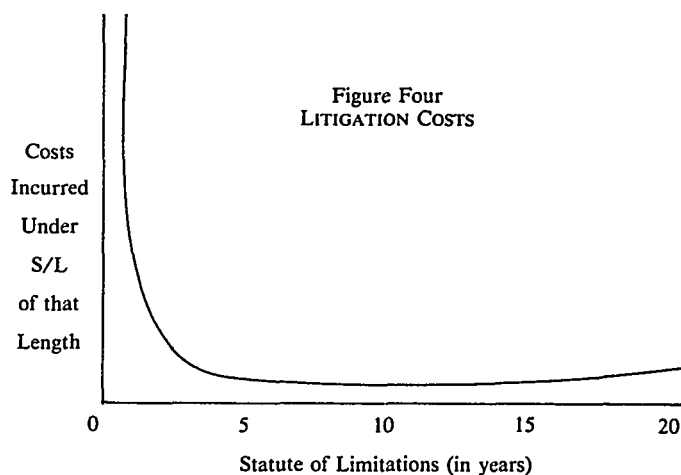


Buying land would be chancy indeed if the statute of limitations for ejection were as short as one hour. Under those circumstances, a transferee who chose the physical inspection option, for example, would have to inspect within minutes of the closing. The curve in Figure Three therefore associates high transferees' costs with short-fuse statutes. The curve assumes that transferees' inspection costs fall sharply as the limitations period lengthens, and reach bottom at a year or so, a time period more than ample for the convenient scheduling of pre-closing inspections. Transferees' total costs are assumed to begin to rise as limitations periods extend beyond one year, because longer deadlines increase title-search costs by diminishing the encumbrance-clearing effects of adverse possession.

D. *Litigation Costs*

Figure Four suggests how the costs of litigating adverse possession cases vary with the length of the limitations period. I have given litigation costs — whether borne by landowners, adverse possessors, transferees, or taxpayers — separate treatment in order to assert that they have little effect on the utilitarian value of different limitations periods. Following Posner, I define litigation costs as the sum of (1) outlays on litigation and (2) the costs of erroneous legal decisions.¹⁷ A utilitarian system of civil procedure seeks, all else equal, to minimize the sum of these two costs.

17. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 429-33 (2d ed. 1977).



Litigation costs rise with both the number and average complexity of litigated cases. In the adverse possession context, a lengthening of the limitations period could be expected to reduce volume but to raise average complexity. A short statute would probably result in a high volume of litigation, both because bad faith *A*'s would prey more, and because more good faith *A*'s would go undetected for the statutory period. The curve in Figure Four therefore indicates that the shortest statutes would engender the highest litigation costs. On the other hand, the costs of determining whether a particular *A*'s possession had been open, hostile, continuous, and so on, would tend to rise with the length of the limitations period. A longer historical record would have to be examined and ever more remote events would have to be reconstructed from memory. The curve in Figure Four honors what I suspect is the conventional wisdom that the complexity effect eventually outweighs the reduced-caseload effect as the period is lengthened; the Figure thus shows litigation costs rising slightly as the statutes become longer.¹⁸

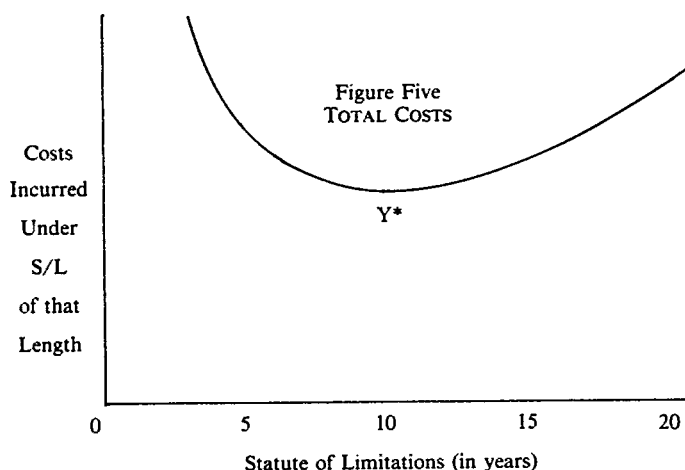
Figure Four pictures litigation costs as only a minor part of the overall utilitarian calculus. Epstein seems to share the perception that they are rather unimportant. He notes that the "key value" of adverse possession rules is to "shape . . . the primary conduct of the parties."¹⁹

18. Epstein implies that litigation costs rise with time. See Epstein, *supra* note 1, at 676. Because of discounting, postponing litigation saves costs, everything else being equal. Figure 4 is drawn under the assumption that increases in other costs over time outweigh this saving.

19. Epstein, *supra* note 1, at 677.

E. Total Costs

The hypothetical curves in Figures One through Four can be summed vertically to produce a curve showing the total costs associated with statutes of limitations of different length. Figure Five shows the shape of the summed curve. The point at the bottom of this curve, Y^* , indicates the length, in years, of a cost-minimizing statute. In Figure Five, this length happens to be about ten years. Because I drew the curves in Figures One through Four from intuition, no one should take this particular outcome seriously. I do observe, however, that the bottom of my total-cost curve is rather flat, indicating that I intuitively regard limitations periods of five to fifteen years as being in the right ballpark. Most states now have adverse possession statutes that fall into this range.²⁰ Figure Five also suggests that a one-year statute and a fifty-year statute would both be far outside the cost-minimizing range.



Utilitarian analysis can illuminate other issues of adverse possession law. For example, it helps explain Epstein's interest in a "two-tier" statute under which the claims of bad faith adverse possessors would take longer to ripen.²¹ Figure Two lumped together the costs of both good

20. See G. THOMPSON, 5 COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 2552 n. 3, at 656-59 (1979). See also NAT'L L. J., Dec. 25, 1978, at 16 (indicating that 32 states have basic limitations periods of between 5 and 15 years, with the periods in the remaining 18 states all falling in the 18-to-30-year range. My knowledge of these facts may have subconsciously influenced how I drew the curves.

21. Epstein, *supra* note 1, at 684-85.

faith and bad faith adverse possessors. Changes in preying costs mostly caused the left side of the lazy U in Figure Two to fall, and changes in demoralization costs mostly caused the right side of the lazy U to rise. Good faith and bad faith *A*'s differ dramatically in the degree to which they suffer these sorts of costs. Ejection demoralizes good faith *A*'s more than bad faith *A*'s, who rely less on their continuity of possession. Because good faith *A*'s are innocents, only bad faith *A*'s can incur preying costs. If the costs of good faith adverse possessors and bad faith adverse possessors were to be separately tallied, the curve for good faith *A*'s would therefore begin to turn upward before the curve for bad faith *A*'s would. If total costs were tallied separately for each group, the Y^* for good faith *A*'s would thus be located to the left of the Y^* for bad faith *A*'s.²²

Statutes of limitations for ejectment have been becoming shorter.²³ Utilitarian analysis supports these truncations. Barbed wire, the airplane, and other recent technological innovations have reduced landowners' monitoring costs and transferees' inspection costs, thus shifting Y^* leftward.

III. A UTILITARIAN PERSPECTIVE ON LEGAL TIME LIMITS ON CONSENSUALLY CREATED PROPERTY RESTRICTIONS

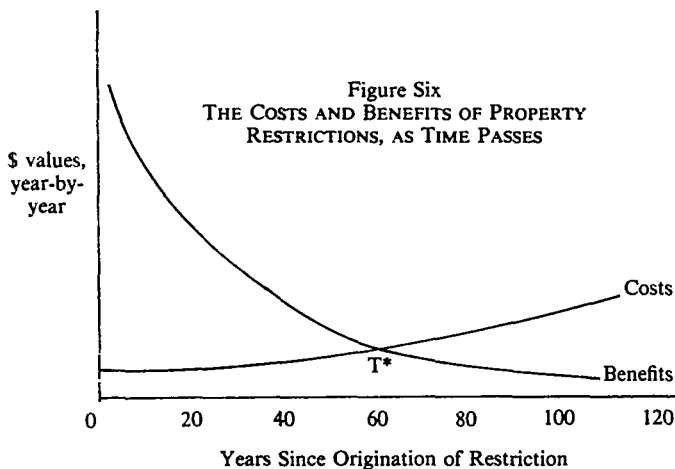
Epstein believes that the libertarian first principles of property law must be adjusted to accommodate the doctrine of adverse possession. Yet when he turns his attention to equally venerable legal doctrines that restrict a property owner's freedom to tie up a resource far into the future, he is unwilling to bend first principles. He condemns, as inconsistent with fundamental rights of alienation, the rule against perpetuities, the doctrine that changed neighborhood conditions warrant the termination of covenants, and similar doctrines that nullify consensually created land restrictions.

A utilitarian can effortlessly defend the basic thrust of these doctrines. Figure Six depicts the general problem created by long-term restrictions on property ownership and use. The Figure suggests that the benefits of

22. A utilitarian analysis of the two-tier proposal is complicated by the difficulty of proving *A*'s subjective intent. If legal outcomes were to turn in part on *A*'s intent, both inspection and litigation costs might rise.

23. Because of the influence of the Statute of 21 James I., ch. 16 (1623), the standard period was once 20 years. Twenty-four states now have basic limitations periods of 10 years or less. NAT'L L. J., Dec. 25, 1978, at 16.

restrictions, measured year-by-year, decline as restrictions age. Costs, on the other hand, rise. Eventually the costs of a restriction exceed its benefits. The law still need not terminate the restriction at that point so long as transaction-cost impediments would not unduly impede the affected parties from consensually putting an end to the restrictions. Thus, courts rightly refuse to apply the doctrine of changed conditions to old easements, because easements typically concern only two parties. Yet the negotiated termination of other kinds of long-term restrictions can be hard to arrange. If all beneficiaries must consent to termination, large numbers, or the unreachability of a beneficiary, would throw a monkey wrench into the bargaining process. In these situations, a doctrine that terminates the restrictions as a matter of law at time T^* spares the affected parties, in the aggregate, from some costly combination of dead-weight losses and transaction costs. (Legal termination doctrines of this sort can apply *ex ante* when the restriction is created, or *ex post* as the passage of time reveals the actual costs and benefits of the restriction. *Ex ante* termination rules are allocatively cruder, but cheaper to administer.)



Although the general utilitarian analysis is the same, different termination doctrines are appropriate for *ownership* restrictions, as opposed to *use* restrictions.

A. *Ownership restrictions*

Entitling a current owner of property to designate the future owners of the property serves two basic utilitarian functions. First, the greater the

freedom to dispose, the greater the incentives to acquire wealth, and thus to make socially productive use of labor, capital, and land. Second, and more narrowly, freedom of testation inhibits, in people who have bequest motives, the profligate squandering of assets during the autumn of life.

The utilitarian benefits of dead-hand control decline as the time period controlled fades further into the future. People have positive discount rates, that is, they care more about the near future than the far future. Additionally, testators and trustors typically have deeper affections for living, closely related descendants, than for unborn, distant ones. Property doctrines that protect a testator's freedom to control ownership over the course of the next several generations are therefore likely to garner almost as many utilitarian benefits as a totally unfettered freedom of testation would. The benefits curve in Figure Six therefore associates few benefits with ownership controls that operate far into the future.

The costs of ownership restrictions tend to rise slowly with time. When class gifts are involved, owners multiply, and administrative costs rise. When property has been tied up in a trust, the trust's administration is apt to become more burdensome as time passes. Individual trustees die, and their replacements may insist upon accountings of the assets before taking over; institutional trustees, if not supervised, are likely to be stodgy managers of trust assets. Consensual escapes from the grip of old restrictions are impossible because the dead are highly inflexible negotiators. The rule against perpetuities responds on utilitarian fashion to these realities. It expunges as a matter of law long-term, objectively costly, ownership restrictions.

B. Use Restrictions

Rational actors would negotiate restrictions on land use only when those restrictions would increase the total value of the benefited and burdened lands as affected landowners would subjectively judge those values. Allowing landowners to tailor controls that supplement the law of nuisance and public land-use regulations advances libertarian goals of private ordering. Because no one can predict the future, however, covenants that were originally well-tailored tend to become ill-fitting. Affected landowners are eventually likely to perceive the subjective costs of the restrictions as exceeding the subjective benefits. Yet, if many parties are beneficiaries of the covenant scheme, transaction costs may prevent them from unanimously agreeing to its elimination. Courts have responded by developing the utilitarian doctrine of changed neighbor-

hood conditions, a doctrine that cleanses subdivisions of objectively outmoded covenants.

IV. IS EPSTEIN AN INCONSISTENT LIBERTARIAN?

To a utilitarian, Epstein's normative criteria for assessing property doctrines seem erratic. He is willing to bend the remorseless first principles of property rights to allow an adverse possessor to expropriate someone else's land. But for him, freedom of alienation is a principle never to be dented because the process of consensual alienation involves "no externalities." Yet to the utilitarian, the "lines cross" in both situations. In both, the relaxation of the basic libertarian model of property promises to clear up transaction-cost-perpetuated messes. To a utilitarian, whether those messes arise because of physical externalities, the death of a testator, the presence of large number of beneficiaries, or whatever, is normatively irrelevant.

Posner has advanced the controversial thesis that the common law, as a positive matter, tends to evolve so as to maximize aggregate wealth.²⁴ Some doctrines, for example, those that are part of the recent pro-compensation thrust in tort law, are hard to square with Posner's thesis. Yet the ancient and relatively stable doctrines of adverse possession and perpetuities law generally support the Posnerian view.²⁵ Anglo-American law over the centuries has tended to apply "property rules" that respect a property owner's subjective preferences only when this libertarian approach would not unloose a flood of either transaction costs or deadweight losses arising from failures in the exchange process. In situations where evidence from market prices and other objective sources suggests that a libertarian definition of property rights *would* unloose a flood of costs, traditional property law rather predictably places dents in the libertarian model. As a positive matter, the deep structure of property law has traditionally been not libertarianism, but transaction-cost utilitarianism. This may appall Epstein, but it doesn't appall me.

24. For a concise statement of the theory, see Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775, 775-77 (1981).

25. Both courts and legislatures have shaped these doctrines; Posner's thesis was essentially one about the behavior only of courts.

