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TIME, PROPERTY RIGHTS, AND THE COMMON LAW

INTRODUCTION

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The fee simple is often defined as an estate or interest of "potentially infinite duration." This way of speaking suggests that property rights are fixed and permanent—indeed, that they last forever. Similarly, property rights are regarded in classical liberal thought as sources of stability and security that foster individual autonomy and protect owners against the vicissitudes of life. This too suggests that property rights are not contingent upon a particular temporal context, but rather are impervious to the passage of time.

When we look at the common law, however, we quickly discover a much more complex relationship between property rights and time. Property rights do not extend infinitely backward in time. Rather, they originate at some determinant point in the past, typically with a grant from the sovereign, but occasionally also with acts of first possession. Further, property rights can be lost through the passage of time. If property comes into the possession of someone other than the owner, and the owner sits on his rights, then, by operation of the doctrines of adverse possession and prescription, ownership may pass to the possessor. Finally, property rights cannot be projected indefinitely forward in time. The power of an owner to tie up his property in the future is restricted by various rules and doctrines, such as the rule against perpetuities, the prohibition on restraints of alienation, statutes forbidding the creation of a

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fee tail, marketable title acts that limit the duration of defeasible fees, and the changed circumstances doctrine in the law of servitudes.

A Conference on "Time, Property Rights, and the Common Law," sponsored by the Liberty Fund, Inc. and administered by the Law and Economics Center of George Mason University, was held at Point Clear, Alabama on November 14-17, 1985. The papers delivered at the Conference, and an edited transcript of the proceedings, are reproduced here. The principal paper, by Professor Richard Epstein of the University of Chicago Law School, ties together in a single unified framework the various ways in which time and property interact. There follow four critical commentaries, by Professors Robert C. Ellickson of Stanford Law School, Margaret J. Radin of the University of Southern California Law School, Charles K. Rowley of the Public Choice Center at George Mason University, and David D. Haddock of the Economics Department at Emory University. These four authors take issue with Epstein's method and with at least some of his conclusions. Finally, in the round table discussion that concludes the conference, Professor Epstein responds to his critics, and the five authors join forces with other leading academics in a spirited exchange of views about the legal, philosophical, and economic implications of the temporal element in the common law of property.

Professor Epstein divides his analysis into two broad categories: problems that arise because of events that occurred in the past, and problems that arise because of what might happen in the future. Looking backward, Epstein argues that the root of property rights should be first possession. First possession, he says, gets valuable resources in the hands of private owners quickly and efficiently and avoids the might-makes-right implications that follow if we posit that property rights originate in grants from the sovereign. Somewhat paradoxically, however, Epstein also endorses adverse possession—a doctrine that allows the claims of the first possessor to be defeated by a later possessor. In an ideal world of corrective justice, Epstein believes, we would not permit the involuntary transfer of property rights. But where property has been transferred by nonconsensual means, and a significant period of time has passed without the true owner asserting his rights, rectification becomes ever more costly. At some point, Epstein argues, the error costs of seeking to maintain an ideal system of corrective justice become too great and justify a transfer of ownership to the possessor.

Looking forward, Epstein adopts a much more uncompromising stand

in favor of unrestrained ownership rights. He first considers and defends the potentially infinite duration of the fee simple. Any temporally-limited system of rights, he argues, would run into insuperable problems over how to allocate the rights to the remainder and how to avoid distorted incentives on the part of the primary owner. More controversially, Epstein would give the owner of this potentially infinite right complete freedom to determine its use and ownership in the future. Thus, he would strike down all doctrines, such as the rule against perpetuities, that limit the power of an owner to dictate who shall hold property or how it shall be used in future generations. In support of this position, Epstein argues that a rational property owner will always seek to maximize the present value of his property, whether it be in his own hands or in the hands of a donee or heir. Thus, the rational owner will not tie up his property in ways that would reduce its value; rather, he will create a trust or other governance structure that will permit the identity of specific assets to change over time while maintaining the purpose of the original gift. Consequently, Epstein concludes, when we look to the future there is no need to depart from a system of pure corrective justice, as is the case with adverse possession when we look to the past.

The four commentaries tackle Epstein's paper at two different levels. At one level, they question Epstein's attempt to mix libertarian and utilitarian arguments. Professor Ellickson sees Epstein as a libertarian who inconsistently opts for a utilitarian defense of adverse possession. Ellickson argues that Epstein would be better off applying a utilitarian analysis to all of the issues he discusses. Similarly, Professor Radin finds that Epstein asserts an equivalence between Lockean entitlement theory and utilitarianism, when in fact they are in considerable tension and would often lead to different results. She also notes Epstein's disregard of personality theory, another philosophical tradition that has still different implications for time and property rights. Professor Rowley is likewise unpersuaded by Epstein's blend of libertarianism and utilitarianism. Rowley, however, finds that Epstein's argument is primarily utilitarian, in the wealth-maximization tradition of the Chicago School of law and economics. He criticizes this orientation from the perspective of the Virginia School of political economy, which he contends is more sensitive to the problematic nature of transaction-cost arguments and less inclined to assume that the decision maker (the state, the judiciary, or whatever) will apply an efficiency criterion, as opposed to some self-serving or interest-group perspective, in setting governing rules.

At a second level, the commentaries challenge several of Epstein's specific arguments. Professor Haddock takes a critical look at Epstein's endorsement of the rules of first possession. Building on work that addresses the optimal system of property rights in innovations, such as patent rights, Haddock argues that where the nature and scope of property rights are clear before they are discovered—as is generally the case with land and other conventional property rights—a system of "mightiest possession" is more efficient than a system of first possession. Professor Ellickson takes a detailed look at Epstein's treatment of adverse possession, and offers an analysis of the optimal length of the statute of limitations that differs in several respects from Epstein's analysis. Finally, Professor Radin challenges Epstein's conclusion that there should be no legal restrictions on the power of property owners to tie up their property into the indefinite future. She argues that it may be necessary to restrict the freedom to bind future generations in order to insure that the owners of tomorrow have the same degree of freedom as the owners of today.

In the round table discussion that follows the papers, the reader will find many vigorous exchanges between Professor Epstein and his critics on virtually every point raised by the principal paper and the commentaries. In addition, the discussion explores a number of topics in greater depth than do the papers. Some of the issues considered include: Is libertarianism a unitary concept, or are there several strands of libertarian thought which are in varying degrees of tension with utilitarianism? What is the status of aboriginal claims under a regime of first possession? Can adverse possession and the length of the statute of limitations be analyzed in terms of a Calabresian cheapest-cost-avoider analysis? How should the legal system handle the problem of good faith as opposed to bad faith adverse possession? What accounts for the variations we see from one state to another in the length of the statute of limitations? Should government-owned land be subject to the same adverse possession rules as privately owned land? Why, given the advantage of the potentially infinite fee simple, do we commonly see property conveyed by ninety-nine-year leases? Should a property owner have the power to destroy his own property, and if so, does this necessarily entail the power to make it unmarketable in the future? Is it correct to posit that property owners will act to maximize the present value of their property when they give it to someone else, or are there significant problems of incapacity, irrationality or anti-market preferences that require state interven-

tion here? Does the emergence of condominium and cooperative associations suggest an analogy to the formation of political constitutions? If so, does the fact that political constitutions are always amendable suggest that privately imposed restraints on the future use of property should also be amendable by some collectively determined process?

These questions are fascinating, and the Conference proceedings should be of interest to a wide audience of academics, including not just specialists in the field of property law but also those interested in legal and economic theory more generally. In addition, first-year property teachers will find a vertiable treasure trove of material here that can enrich and enliven the traditional property course. Finally, law students should find the papers and the discussion an excellent vehicle for review, as well as a stimulus to further thought and study.