

Perpetual Property

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INTRODUCTION

Property interests, unlike contract, tend to adhere to a limited set of specific forms – the *numerus clausus* principle.¹ This distinction has been the subject of much scholarship in the past decade in an attempt to understand both the nature of and the reasons for the limitation on property forms that exist within the common law.² While these limitations on form are both intriguing and central to the common law, equally significant are the temporal limitations embedded in property law – property interests are typically defined by and thus only defensible for a specific time period. Even the fee simple, a property interest of supposedly infinite duration, is

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¹ See Thomas Merrill and Henry Smith *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 4 (2000) (“In the common law, the principle that property rights must conform to certain standardized forms has no name. In the civil law, which recognizes the doctrine explicitly, it is called the *numerus clausus*--the number is closed.”)

² See Merrill and Smith, *supra*. note 1; Henry Hansmann and Rainer Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373 (2002); Michael Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163 (1999). Bernard Rudden, *Economic Theory v. Property Law: The Numerus Clausus Problem in OXFORD ESSAYS IN JURISPRUDENCE* 239 (JOHN EEKELAAR & JOHN BELL eds., Third Series, 1987).

limited in time by a number of overarching rules often referred to as “rules furthering marketability.”³

Like the *numerus clausus* principle, these temporal limitations have been relatively tenacious, limiting the longevity and remote vesting of property interests for much of the recent history of the common law of property. The most infamous and controversial of these limitations is the somewhat quizzical rule against perpetuities. But recently many of these limitations have begun to disappear. In a number of discrete but significant areas of property law, temporal limitations are being stretched beyond recognition or are disappearing altogether giving rise to more enduring and in some cases more fragmented property interests. So while limitations on the forms of property interests remain relatively stable, limitations on the duration of some property interests are disappearing giving rise to a growing number of perpetual property interests.

This paper explores the emergence of perpetual property in a number of discrete areas of property law: the longevity of servitudes in historic and environmental protections, the ever growing time span of intellectual property rights, and the disappearance of the rules against perpetual interests. While the demise of these and other temporal limitations is itself worthy of recognition and will be the focus of a major part of this paper, my primary interest is whether these changes tell us something about shifting cultural attitudes to the institution of private property. If it is the case, as a number of prominent sociologists have argued, that an exploration of social attitudes toward time is indispensable to an understanding of our current cultural conditions then exploring temporal limitations in property law will presumably help us better understand what Professor Radin has called the “cultural commitments of property.”⁴ This topic is particularly compelling when one considers that the emergence of perpetual property, with its embedded expectations of stability and permanence, has occurred at a time when speed, flexibility and impermanence are dominant features of our current social conditions. The emergence of perpetual property within the larger experience of 21st century living and “time-space compression” is nothing short of paradoxical.

Section I of this paper begins with a brief exploration of time in property, from the abstract theories that justify and delineate entitlements to the concrete doctrines temporally constraining ownership interests. The

³ DUKEMINIER, KRIER, ALEXANDER, SCHILL, *PROPERTY* (6th ed, 2006).

⁴ Margaret J. Radin, *Government Interests and Takings: Cultural Commitments of Property and the Role of Political Theory*, in *REINTERPRETING PROPERTY* 168 (1993).

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institution of private property, Carol Rose has argued, functions within the expectations of “an agrarian or a commercial people – a people whose activities with respect to the objects around them require an unequivocal delineation of lasting control...”⁵ The primary contention in this section is that the temporal realities in the institution of private property are essential to the broader social expectations and conditions inherent in such a society.

Section II addresses the changes in property law affecting temporal limitations, beginning with those concerning the control of property in the distant future. Here the two most notable changes are the slow disappearance of the rule against perpetuities and the rise of perpetual servitudes in the areas of environmental conservation and historic preservation. In addition this section will look briefly at the increasing longevity of intellectual property rights. The second half explores the reclamation of property from the past, in particular the meteoric rise in both the number and success of repatriation claims. Most of the changes discussed in this paper are based in U.S. law, but I also draw on material from other common law jurisdictions with the expectation of making at least tentative claims about shifts in the cultural significance of private property within common law systems.

Section III discusses some plausible explanations for the emergence of perpetual property. It is important to note that there are a variety of diverse and complex first order explanations for the changes discussed in this paper, explanations that may have little to do with the temporal limitations themselves. For example the disappearance of the rule against perpetuities may be the consequence of changes to the tax code and the increasing length of copyright the result of a powerful entertainment industry lobby. And yet in each area the temporal changes are intentional and significant. Collectively they pose a phenomenon worth exploring particularly given the common law’s traditional abhorrence of perpetual property interests. Furthermore, it may be the case that considering these changes collectively reveals important underlying shared characteristics justifying the proposition of an emerging category in which our collective yearnings for stability in a rapidly changing world manifest themselves in a desire for longer lasting interests. In the final analysis I argue that it is this increasing collective desire for permanence, for a slowing of time in some select areas, not the fundamental and absolute nature of property rights as

⁵ Carol Rose, *Possession as the Origin of Property*, 52 U. CHICAGO L.R. 73, 87 (1985).

others have argued,⁶ that helps explain the emergence of perpetual interests.

I. TIME AND PROPERTY

A. General Conceptions of Time in Law

At the most abstract of levels the law operates within specific conceptions of time. It is legitimated as much through its temporal representations as through its spatial or territorial limitations – it is both here and now. But just as our cultural conceptions of time are complicated and contradictory, dependent on both linear and cyclical representations, so law partakes of such indeterminacies. The “now” is both the present and all times, at once specific and general.

In her insightful discussion of conceptions of time in the operation of law, Carol Greenhouse argues that the common law simultaneously draws on two conceptions of time. On the one hand it “reflects perfectly a logic of linear time.”⁷ It depends on past articulations through the doctrine of precedent not merely as substantively persuasive legal ideas but as statements that have the benefit of time itself. Common law courts depend on a “pervasive traditionality”⁸ in decision-making - the past is relevant “for its own sake.”⁹ The circularity of this is countered by the linear conception of reform. While constantly embedding itself in the past, law also expresses itself as an engine of reform and progress. Law as reform or as a constantly improving set of ideas has been a particularly pervasive view since the great reformers of the late 18th c. – Bentham and Mill. In this

⁶ See, e.g. Richard Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASHINGTON U. L.Q. 667, 795 (1986).

⁷ Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 YALE L.J. 1631, 1640 (1989)(The reception of linear time in the West was, Greenhouse writes, the product of Christianity but was secularized in medieval times)..

⁸ Martin Krygier, *Critical Legal Studies and Social Theory*, 7 OXFORD J. OF LEG. ST. 26 (1987).

⁹ Anthony T. Kronman, *Precedent and Tradition* 99 YALE L.J. 1029 (1990)(exploring the importance of the principle of stare decisis and a more general respect for the past not in terms of utilitarian or deontological considerations but as a pervasive and intrinsic feature of culture: “It is only on that condition--on the basis of a traditionalism which honors the past for its own sake--that the world of culture can be sustained.” 1068)

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way law and the legal resolution of disputes strings together the past, present and future thus perfecting representations of linear time.

But, Greenhouse argues, “the common law also involves larger claims beyond linear time.” While its linear presentation and its dependence on the possibility of change suggest incompleteness, at any given moment the common law “represents a totality.” Greenhouse writes:

It is by definition complete, yet its completeness does not preclude change. It is a human achievement, yet by its reversible and lateral excursions, and by its collective voice, it is not identifiably the product of any *particular* individual or group. Symbolically, it stands at the border between the two great zones of Indo-European thinking – the human-made ... and the divine ...- and is nourished by the indeterminacy of the distinction between events in linear time and possibilities (all-times).¹⁰

It is the representation of these two conceptions of time that, Greenhouse argues, generates the mythic dimension of law and as such sets it apart from other dispute-focused, norm-creating institutions. By being both “in time” and “out of time” the law is capable of sustaining its mythical status and its connected claims to neutrality.

First year law students in common law systems know this tension very well, even if it is rarely acknowledged. They learn in the first weeks of their legal studies the notion of precedent and *stare decisis*; the importance of rationalizing legal opinions by resorting to past decisions, the more prominent the better. But students are also conditioned to present legal solutions as being “out of time,” as part of a continuous whole that has, for the most part, always been as it is. Constancy, not change, is the foundation of persuasive legal arguments. The curious timeless nature of the common law, its mythical status, is also captured in the declaratory theory - the idea that judges only find and declare the common law, merely identifying its true nature, rather than making it up as they go along. While a strong version of the declaratory theory may be out of fashion among legal thinkers and judges, the notion that law pre-exists judicial decision-making still has a place in the common law.¹¹

¹⁰ Greenhouse, *supra*. note 7 at 1640.

¹¹ Richard Tur, *Time and Law* 22 OXFORD J. OF LEG. ST. 463, 471 (2002).

Greenhouse was writing broadly about the common law and its legitimation rather than specific substantive areas within the law. But we can borrow her notion of the temporalities of the law to explore specific substantive areas. If, as Greenhouse writes, the law engages specific temporal logics as a means of legitimating itself within the larger culture do specific areas of law represent their subject matter within a conception of time?

B. Time and Property

Property as a subset of the common law is dependent on these broad and competing conceptions of time but additionally it produces and depends upon specific temporal representations of property itself. So just as “law – as an idea – carries cultural force because it engages [certain] temporalities”¹² so property law engages specific temporalities as relevant to its subject matter. At the most abstract level, Carol Rose notes that, contrary to expectations, traditional theorizing about property almost inevitably takes “a striking turn toward a narrative or diachronic explanatory mode where ... time and cumulative experience play essential roles.”¹³ In such accounts, property as an institution is explicable only through a series of events emerging over time – a story in Rose’s terminology - rather than as an analytically derived system whose separate parts are immediately discernible and predictable.

If Rose is right, we can see how theorizing about property has relied on the same cultural expectation of linearity that Greenhouse suggests is embedded in the common law broadly speaking; essential to a diachronic explanation of the institution of private property is an assumption of progress over time. But equally apparent in Rose’s analysis of the structure of property theories is the “out of time” element. While many of the most important figures in the history of property theory must rely on stories to arrive at an explanation for property rights, the rights themselves are presented as being self-ordained - or natural. Locke’s theory of entitlements, for example, depends on a series of connected assumptions about the self and the products of individual effort¹⁴ and in this sense emerges like a moral from a cautionary tale. On the other hand, Margaret Jane Radin has noted that “the temporal dimension is irrelevant to the Lockean theory of property” in that it concerns itself with only the precise

¹² Greenhouse, *supra*. note 7 at 1650.

¹³ CAROL ROSE, PROPERTY AND PERSUASION 26 (1994).

¹⁴ John Locke, *Second Treatise of Government* § 25, in TWO TREATISES OF GOVERNMENT 327 (P. Laslett rev. ed. 1960) (1st ed. London 1690).

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moment of acquisition, ignoring the larger “temporal dimension of human affairs.”¹⁵ Both of these observations ring true and are not contradictory but rather reinforce Rose’s suggestion that while traditional property theories tend to rationalize property as a self-evident and timeless institution, they very much depend on “time and cumulative experience.” So property theory can be seen as an instance of law’s broader mythic dimension – both embedded in the constant flux and change of society while simultaneously presenting itself as unchanging and existing for all times.

If we move from the structures of property theories to the theories and doctrines themselves, the relevance of time to property becomes even more apparent. Certainly one of the most ubiquitous concepts in the establishment of property rights is “first in time” – the first person to possess the property in question has priority over all others.¹⁶ Robert Sugden argues that “first in time” is one of the primary conventions in both formal and informal justifications of private property.¹⁷ To this we can add the idea of intent of “lasting control”¹⁸ as another central feature of theories about successful ownership claims. While these concepts are complicated by difficulties in ascertaining what constitutes firstness or control, the person “first in time” with the intent to exercise “lasting control” in ways that are clearly recognizable by others is nonetheless more likely to succeed. As with the importance of diachronic explanations for the development of private property, the ubiquity of first in time theories reinforces the importance of linearity in the creation of cognizable property rights.

At the doctrinal level property law utilizes culturally determined time frames to create, limit and destroy property interests. While the central concept in the common law of property, the fee simple, is defined as a temporally unbounded interest, all lesser estates are defined by precise time limitations – a life, 99 years, a month etc.¹⁹ The fee simple, an interest of

¹⁵ Margaret Jane Radin *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 739-40 (1986).

¹⁶ See Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property* 64 WASH. U. L.Q. 667, 669-74 (1986) (detailing the importance of the first in time or “first come, first served” principle in property law).

¹⁷ ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, COOPERATION AND WELFARE* 87-97 (1986).

¹⁸ See Rose, *Possession*, *supra*. note 5 at 87 (“the common law of first possession ... requires an unequivocal delineation of lasting control so that those objects can be either managed or traded.”)

¹⁹ 2 BLACKSTONE COMMENTARIES 103 (“First, with regard to the quantity of interest which the tenant has in the tenement, this is measured by its duration and extent. Thus, either his right of possession is to subsist for an uncertain period,

“potentially infinite duration”²⁰ fits well with and no doubt even encourages a belief in absolute, unfettered property interests, despite the fact it too is subject to temporal constraints. It reinforces Greenhouse’s observation, that law and legal interests are represented as being both “in time” and “out of time.” An absolute right of infinite duration is “out of time,” lacking clear temporal definition, but just as the notion of absolute ownership is a misconception or a myth²¹ so too the idea of perpetual ownership has never been accurate. In other words while an *intent* of “lasting control” might be important in establishing property rights, real control over too long a period of time can in fact be used to quash those very same interests. Arguably this is the whole point of the various “rules furthering marketability.”²²

There are numerous ways the common law limits property interests to a specified time period in order to maintain clarity in ownership and free alienability. The most infamous and direct of these temporal constraints is the rule against perpetuities, discussed in greater detail below. Legislatures have also imposed time limitations predominantly through statutes of limitations. These temporal restraints effectively terminate some property interests while recognizing others based on little more than the passage of time.²³ They can be generic, as is the case with legislation regarding adverse possession, or specific, for example marketable title acts

during his own life, or the life of another man; to determine at his own decease, or to remain to his descendants after him: or it is circumscribed within a certain number of years, month, or days: or, lastly, it is infinite and unlimited, being vested in him and his representatives for ever.”)

²⁰ HERBERT HOVENKAMP & SHELDON KURTZ, *THE LAW OF PROPERTY* 94 (5TH ed. 2001).

²¹ See LAURA UNDERKUFFLER, *THE IDEA OF PROPERTY* 2 (2003) (“The idea that property rights – particularly those involving land – are presumptively free from collective claims has been decisively abandoned, if ever it was true.”); Kevin Gray and Susan Gray, *Private Property and Public Propriety in PROPERTY AND CONSTITUTIONS* 11, 15 (Janet McLean ed., 1999) (“The ideology of property as uncontrolled exclusory power is nowadays just as untenable as is the dichotomous distinction between the domains of the private and the public.”)

²² See Dukeminier and Krier, *supra*, note 4 at.

²³ While adverse possession has many elements, the most unwavering is the simple passage of time. For a discussion of the many justifications for adverse possession, many of which hinge on the passage of time, See Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 *GEO.L.J.* 2419 (2001) (ultimately isolating the endowment effect or loss-aversion theory as the most plausible justification for adverse possession).

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terminating stale claims²⁴ or limitations on the duration of certain defeasible interests.²⁵

C. Time and Boundaries

Property as a temporally bounded notion fits comfortably with the many other ways in which property law depends on boundaries. The most significant limiting factor or “boundary” in property is the limited number of carefully defined interests that are cognizable and enforceable as property interests – the *numerous clauses* principle.²⁶ According to Michael Heller, private property is circumscribed by a host of rules that attempt to protect against inefficient arrangements, predominantly commons (“overlapping rights of use in a commons”) and anti-commons (“too many rights of exclusions.”)²⁷ Heller argues that although the various metaphors for conceptualising property, particularly the physical thing and the bundle of rights metaphors, have generally obscured the “nuanced way law enforces property boundaries,” such conceptual boundaries have been pivotal to the ongoing vitality of private property.²⁸ Rules that limit “inter-temporal fragmentation,” such as the rule against perpetuities, are according to Heller, key examples of such efficiency-producing boundaries.²⁹

While Professor Heller and others firmly ground their observations concerning the *numerus clausus* in an efficiency framework,³⁰ specifically the role of law in protecting and encouraging the productive use of

²⁴ See, e.g. The Uniform Marketable Title Act (1990)(“The Model Act is designed to assure a title searcher who has found a chain of title starting with a document at least 30 years old that he need search no further back in the record.”)

²⁵ See, e.g. 765 ILCS 330/4 (limiting possibilities of reverter and rights of entry or re-entry to 40 years.)

²⁶ See Merrill and Smith, *supra*. note 1.

²⁷ Michael Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1195 (1999)

²⁸ *Id.* at 1187-1194.

²⁹ *Id.* at 1176-1182. *But see* Bernard Rudden, *Economic Theory v. Property Theory: The Numerus Clausus Problem*, in OXFORD ESSAYS IN JURISPRUDENCE Third Series 239 (John Eekelaar and John Bell eds., 1987)(questioning efficiency based justifications for the standardization of property interests).

³⁰ Heller focuses on antifragmentation as the key efficiency aspect of the *numerus clausus*, but Merrill and Smith focus on the standardization /efficiency function, Merrill and Smith *supra*. note 1; and Hansmann and Kraakman, also writing in this area focus on the verification/efficiency function, Hansmann and Kraakman, *supra* note 2.

resources, other accounts of the core of private property recognize the relevance of boundaries in a broader social, cultural context. At a very basic level, Professor Rose argues that physical boundaries, such as the dilapidated fence that graces the cover of her collection of essays, are essential to the declaration, "This is mine."³¹ But additional acts expressing a clear and unequivocal intent to exclude others are necessary to turn such physical boundaries into enforceable legal boundaries. The success of ownership claims depends on actions that both delimit one's interest and are easily understood by others. The spatial and temporal contexts for such actions are key delimiting factors that either support or contradict ownership claims given certain cultural and societal expectations. So, As Carol Rose argues, complete and successful claims to ownership depend at least partially on actions that evidence an intention of long term commitment rather than a temporary or itinerant interest, at least within the agrarian/commercial societies from which our system of private property evolved.³²

The point of this is to stress that the timing of our actions with respect to property is important in determining the validity and extent of property rights. In addition, how we judge such timing is a product of specific cultural and societal expectations. A hands-off itinerant form of occupation and use might be the basis of a cognizable and thus successful claim to property in some societies, but it is unlikely to support an ownership claim in traditional common law societies given their agricultural and commercial moorings.³³ While claims that look too uncertain or evince a lack of commitment are shunned in the common law, so too are claims that appear to extend beyond the reasonable limitations of individual control. In short, built into our system of private property is the expectation that owners will be in control of and committed to their property as appropriate but not beyond that which is useful in a commercial society.

If we look at this specifically through the lens of time rather than through the demands of commerce, the traditional common law regulation of property is well-suited to the "sheer pace of change" associated with

³¹ Carol Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership*, 1 (1994).

³² Rose, *Possession*, *supra*. note 5 at 87.

³³ Stuart Banner, in his discussion of property law and the colonization of Australia, notes that "In the late eighteenth century, may believed that a society without agriculture was therefore a society without property rights in land." Stuart Banner, *Why Terra Nullius? Anthropology and Property Law in Early Australia*, 23 *LAW AND HISTORY REV.* 95 (2005).

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modern society.³⁴ It privileges rules that encourage and enable flexibility and a quick response to changing circumstances. In short, given the pace of change, it would be irrational to allow individuals to retain interest in property well into the future under circumstances that are beyond our ability to predict.

Thus temporal limitations can be understood and justified based on the centrality of property to the development of commerce and the general experience of time in modern society. Clear boundaries both temporal and spatial are key to a system of property rights. How then should we understand the erosion of these temporal limitations? If temporal limitations in property are changing does this reflect changing assumptions about the role of property in our society? Property law has traditionally engaged specific temporal logics that are decipherable and thus persuasive within a commercial/agrarian society. If these temporal logics are shifting can we take this as an indication of a larger cultural/societal shift in expectations about our relationship with property – or at least with respect to some forms of property?

The following section looks at a number of doctrinal changes in property law that permit private property holders to control their property further into the future or alternatively to claim property from the distant past. All of these changes suggest a shift in our expectations about the legitimate temporalities of private property, at least in certain discrete areas of property law.

II. THE FUTURE AND THE PAST IN OUR PRESENT CONCEPTION OF PROPERTY

A. Reaching into the Future

The changes discussed below cover three doctrinal areas of property law. The first two are part of the traditional body of property law – the rule against perpetuities and servitudes. Changes in both of these areas permit interested property holders to retain control over their property perpetually, even though traditionally the common law guarded against this outcome. The third change comes from intellectual property law. Here the lengthening terms of intellectual property rights, in particular copyright, raise independent questions and problems while nonetheless sharing the same temporal peculiarities as the other examples.

³⁴ ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 6 (1990)

1. The Death of the Rule Against Perpetuities

Ask any law student what their most unpleasant classroom experience was and chances are that a significant percentage will point to the Rule Against Perpetuities (“the rule”). With its awkward method of time measurement that simultaneously depends on concrete and abstract concepts, students generally don’t get it. Its focus on irrational possibilities - fertile octogenarians and unborn widows - rather than circumstances in real life has earned it the reputation as a trap for estate planners,³⁵ confounding the plans of those who wish to control their property well into the future. But peculiar as it may be it has been around for over 400 years and is one of the classic rules of the common law.

The “modern” rule is typically traced back to the *Duke of Norfolk’s Case*,³⁶ in which Lord Nottingham held an estate to be valid so long as it vested, if at all, during the lifetime of a person now alive. From there the rule eventually became “No interest is valid unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.”³⁷ On the assumption that those who know the rule need no further explanation and those who do not want no further explanation, I will not elaborate on the workings of the rule.³⁸

The rule was crafted to prevent landowners from controlling their property too far into the future.³⁹ While land was the primary focus of the rule, it came to encompass all interests, real or personal, legal or equitable.⁴⁰ The purpose of the rule is relatively settled: it limits “dead

³⁵ The Irish Law Reform Commission Report on the question of the abolition of the rule suggests that the Rule acts as a “legal nuisance.” Report on the Rule Against Perpetuities and Cognate Rules (LRC 62-2000) at 52. The difficulties associated with the RAP are captured in the title of Barton Leach’s article, *Perpetuities: Staying the Slaughter of the Innocents*, (1952) 68 LQR 35 (1952).

³⁶ (1685) 1 Vern 164.

³⁷ JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* 174 § 201 (3rd ed. 1915).

³⁸ For further discussion of the rule and its many trappings (literally) the classic text is GRAY, *supra*. note 37.

³⁹ *But see*, A.W.B. SIMPSON, *LANDOWNERSHIP AND ECONOMIC FREEDOM* 37 (1999)(arguing that the primary function of the rule was not to limit the interests of powerful landholders desiring to tie up their property for generations but rather to ensure a legal mechanism for doing so.)

⁴⁰ *See*, The Law Commission, *The Rules Against Perpetuities and Excessive Accumulations* §1.11. *The Duke of Norfolk’s* case was itself about a leasehold, an interest traditionally considered more personal than real property.

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hand” control of property. It affects a balance between the interests of current generations and future generations; it “strikes a balance between the wishes of the dead and the desires of the living with respect to the use of wealth.”⁴¹ The justifications for this limitation or balance are frequently voiced in economic terms. Along with a collection of other limiting rules, the rule against perpetuities came to embody the common law’s support of the free alienability of property or, in modern parlance, the free market. Judge Posner, for example, states:

Not only are arrangements for the distant future likely to result in an inefficient use of resources brought about by unforeseen contingencies; interests that do not vest till sometime in the distant future may be owned by persons as yet unascertained or even unborn making it difficult or impossible to obtain consent to a transfer.⁴²

More recently, Professor Michael Heller states, “the [rule] conclusively presumes a point after which the social cost of fragmentation exceeds private gains.”⁴³ While the marketability gains achieved through the rule may both justify and explain its resilience in the common law, many have observed that this fails to justify its application to trusts. Stewart Sterk states: “So long as the trustee has power to sell whatever land is held in trust (or whatever other assets the trust holds), concerns about marketability disappear.”⁴⁴

The balance achieved through the rule is also justified in non-efficiency terms. For example a recent UK Law Commission Report emphasized fairness to future generations rather than efficiency as the primary basis for retaining the rule, albeit in a reduced and reformed state.⁴⁵ This fairness justification is particularly relevant in the application

⁴¹ ROBERT J. LYNN, *THE MODERN RULE AGAINST PERPETUITIES* 10 (1966). See also T.P. Gallanis, *The Rule Against Perpetuities and the Law Commission’s Flawed Philosophy* 59(2) *CAMBRIDGE L.J.* 284, 284-285 (2000).

⁴² RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW*, 560 (5th ed. 1998); Lord Coke, writing in the late sixteenth century might have been the first to articulate an efficiency related justification for such limiting rules, emphasizing the need for property to be freely alienable. SEE WILLIAM S. HOLDSWORTH. III *A HISTORY OF ENGLISH LAW* 85 (2nd ed.)

⁴³ Heller, *supra*. note 2 at 1180.

⁴⁴ Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the RAP*, 24 *CARDOZO L.REV.* 2097, 2109 (2003).

⁴⁵ Law Commission Report 251, *The Rule Against Perpetuities and Excessive Accumulations* (1998).

of the rule to interests created in beneficiaries under a trust given that concerns about the free alienability of property are simply no longer relevant.⁴⁶

Despite its long and infamous career in the common law, it looks like the rule is finally on its way out. Legislative alterations to the operation of the rule have slowly worn down its sharp edges,⁴⁷ most significantly altering the peculiar way in which the rule turns on remote possibilities by initiating a “wait and see” approach⁴⁸ or simply changing the perpetuity term to a fixed eighty or ninety years.⁴⁹ The Uniform Statutory Rule Against Perpetuities, for example, provides that a non-vested property interest will remain valid so long as it *actually* either vests or terminates within ninety years.⁵⁰ Most of these changes soften the rule thus allowing more settlements to remain intact. But now many jurisdictions are abolishing it all together.⁵¹ In an essay entitled *The Death of the Rule Against Perpetuities, Or the RAP has no Friends*, Joel Dobris comments that “society does not seem to care anymore about

⁴⁶ HAROLD ARTHUR JOHN FORD AND WILLIAM ANTHONY LEE, PRINCIPLES OF THE LAW OF TRUSTS § 7270 (3rd 1996); *But see* Sterk, *supra*. note 44 at 2110 (arguing that even the fairness justification doesn’t work well when dealing with equitable interests held in trust but he goes on to argue that the RAP does function to prevent the creation of trusts that would “generate agency costs and externalities without generating commensurate benefits.” *Id.* 2111-17)

⁴⁷ Legislation in the State of Illinois provides a good example of the types of changes that have been enacted. Legislation in that jurisdiction has been enacted to deal with the problems of the “fertile octogenarian,” the “unborn widow,” and interests created in individuals who must comply with an age restriction beyond 21 and more generally has limited the harsh application of the rule by implementing a “wait and see” approach. 765 ILCS 305(4)(c).

⁴⁸ *See, e.g.*, Uniform Statutory Rule Against Perpetuities Act (1990) s. 1(a)(2). For a full list of the states that have adopted this approach, *see* Jesse Dukeminier & James Krier, *The Rise of the Perpetual Trust* 50 UCLA L.R. 1303, 1305-1307 (2003).

⁴⁹ *Id.* *See also* R..POWELL, REAL PROPERTY §§ 71.02[2]-[3].

⁵⁰ *Id.* The Uniform Rule Against Perpetuities Act is also incorporated in the Uniform Probate Code § 2-901(a)(2) (1990).

⁵¹ For example, the rule has been abolished or severely limited in its operation in Alaska, Arizona, Colorado, Delaware, D.C., Florida, Idaho, Illinois, Maine, Maryland, Missouri, Nebraska, New Jersey, Ohio, Rhode Island, South Dakota, Virginia, Washington, Wisconsin, Wyoming. For a full discussion of the legislative changes in these jurisdictions *see* Dukeminier and Krier, *supra*. note 48 at 1311-1316.

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perpetuities.”⁵² Whether out of disinterest in the regulation of perpetual trusts or perhaps even a desire for their existence, the primary rule constraining the time frame for the vesting of future interests has simply slipped out of fashion.

There are a variety of good reasons for abolishing the rule - it is antiquated,⁵³ complicated,⁵⁴ ineffective, harmful, and unfair.⁵⁵ Many of these arguments are not new. Strong opposition to the continuance of the rule was voiced at least fifty years ago.⁵⁶ And yet the movement to abolish it seems to have picked up steam in just the last few decades. Stewart Sterk argues that in the United States the sudden race between jurisdictions to abolish the rule, at least as it applies to trusts, stems from the generation-skipping transfer tax enacted by Congress in 1986, combined with other changes exposing lawyers to liability for failure to properly apply the rule. He states, “Lawyer self-interest joined tax avoidance as a reason to abolish the Rule.”⁵⁷ Even jurisdictions that have opted for retaining the rule, have nonetheless considerably limited its application. The consequence has been steep rise in the creation of perpetual trusts. The late Professor Jesse Dukeminier reports that the “number of perpetual trusts created nationwide now runs into the thousands per year.”⁵⁸

The recent history of the rule in the United Kingdom is instructive. Considering its “complexity and harshness” the rule underwent a first round of reforms in The Perpetuities and Accumulations Act 1964. The most significant reform arising out of that Act was the adoption of a “wait and see” approach.⁵⁹ More recently, the Law Commission has suggested another set of reforms, most significantly that the rule be limited to “successive estates and interests in property and to powers of appointment”

⁵² Joel C. Dobris, *The Death of the Rule Against Perpetuities, Or the RAP has No Friends – An Essay*, 35 REAL PROP. PROB. & TR. J. 601, 603-604 (2000).

⁵³ See Leach *supra*. note 35 at 39 (“The Rule persists in personifying itself to me as an elderly personage clothed in the dress of a bygone period ...”).

⁵⁴ See Dobris, *supra*. note 52 at 656.

⁵⁵ See The Irish Law Commission Report, *supra*. note 35. (Discussing all of these objections – and more).

⁵⁶ Leach *supra*. note 35. See also Dukeminier and Krier, *supra*. note 48 at 1304-1311 (discussing the extended campaign to abolish or reform the rule).

⁵⁷ Sterk, *supra*. note 44 at 2101.

⁵⁸ Dukeminier and Krier, *supra*. note 48 at 1316.

⁵⁹ For a summary of this and other changes see The Rules Against Perpetuities and Excessive Accumulations, Law Commission Report 251 §2.13 (1998). The UK Government accepted the report but has yet to pass legislation implementing its objectives. See The Law Commission Annual Report 2006-07 p.16 - <http://www.official-documents.gov.uk/document/hc0607/hc05/0552/0552.pdf> .

leaving such rights as options and rights of pre-emption untouched by the rule.⁶⁰ Additionally, the Law Commission has proposed that the perpetuity period be replaced with a fixed 125-year term.⁶¹ While it is plausible to argue that this and other fixed term amendments to the rule actually shorten the required time frame for the vesting of remote interests, it is equally plausible to argue that they are longer than a “life in being plus twenty-one years.” Furthermore, the fact that a “wait and see” provision typically accompanies a fixed term amendment leaves the final disposition of remote interests unsettled indefinitely.

It is worth noting that the “death” of the rule is only the latest in a long drawn out eradication of rules designed to limit or control the creation of non-vested future interests. In the introduction to his classic treatise on the rule, written in the latter part of the 19th century, John Chipman Gray remarked, “originally the common law subjected [the creation of future interests] to many restrictions, but that these restrictions have been gradually so far removed that the rule against perpetuities is now almost the only legal check upon the granting of future interests.”⁶² If the rule is indeed the last significant barrier against the remote vesting of future interests, one is left wondering why we are so unconcerned about its slow disappearance.

2. Servitudes in Perpetuity

One of the most dramatic shifts in property law in the past fifty years has been the influence of environmental or ecological concerns. Where development was once allowed to proceed regardless of the environmental impact, environmental regulations now heavily limit the extent and conditions of property development. One need look no further than the growing body of U.S. Supreme Court Cases on the question of what forms of regulation constitute “takings” of property for the purposes of the Constitution to see the impact of such regulations on land use. Many of the recent regulatory takings cases relate to some form of environmental regulation.⁶³

⁶⁰ Law Commission Report, *supra* at §§11.2.

⁶¹ *Id.* at § 11.7

⁶² Gray, *supra*. note 37 at 3 some of the other rules are the destructibility of contingent remainders and the merger rule.

⁶³ *See eg.* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886 (1992); Tahoe Sierra Preservation Council Inc v. Tahoe Regional Planning, 535 U.S. 302, 122 S.Ct. 1465 (2002).

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Given the constitutional tensions and difficulties created by environmental regulations it is no wonder that one of the most important and heralded developments has been the conservation easement.⁶⁴ Professor Julia Mahoney notes that the number of acres protected by conservation easements “increased from 450,000 in 1990 to 2.6 million in 2000.⁶⁵ By the end of 2005 that number had increased to more than 6.2 million acres.⁶⁶ As a private property⁶⁷ based mechanism for the preservation and conservation of property, many have sung the praises of this relative newcomer to the property scene.⁶⁸

While it has been around for almost a century the conservation easement has only recently become a significant tool in conservation and has developed largely outside of the common law.⁶⁹ The common law, in fact, jealously guarded against the adoption of new negative easements. The conservation easement, as a negative easement with the benefit typically held in gross, is particularly problematic.⁷⁰ The common law blocked the growth of such restrictions on the use of land because they are

⁶⁴ For a general definition of a conservation easement (or servitude) *see* Restatement of the Law Third – Property: Servitudes § 1.6 (1) (“A Conservation servitude is a servitude created for conservation or preservation purposes. Conservation purposes include retaining or protecting the natural, scenic, or open-space value of land, assuring the availability of land for agricultural, forest or recreational, or open-space use, protecting natural resources, including plant and wildlife habitats and ecosystems, and maintaining or enhancing air or water quality or supply.”)

⁶⁵ Julia D. Mahoney, *Perpetual Restrictions on law and the Problem of the Future*, 88 VA. L. R. 739, 742 (2002)

⁶⁶ *See* Land Trust Alliance, 2005 National Land Trust Census Report (2005) available at <http://www.lta.org/census/>. *See also* Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 ECOL. L.Q. 673, 675 n. 8 (2007)(noting that the number of acres covered by conservations easements is even higher once one factors in land trusts that operate on a national level, such as the nature conservancy.)

⁶⁷ Although some have questioned the extent to which it is really private given its dependence on public provided incentives. *See* Leigh Raymond and Sally K. Fairfax, *The “Shift to Privatization” in Land Conservation*, 42 NATURAL RESOURCES J. 599, 626-628 (2002)

⁶⁸ *See* Mahoney, *supra*. note 65 at 743 (noting that conservation easements have a significant list of supporters and very few critics).

⁶⁹ *But see* Bennett v. Commissioner of Food and Agriculture, 576 N.E.2d 1365 (Mass. 1991)(declaring validity of agricultural-preserve easement at common law on the basis that it is in furtherance of an important stated legislative goal)

⁷⁰ Andrew Dana and Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2, 12-17 (1989).

not readily apparent, unlike the typical affirmative easement with its clearly marked intrusion on the burdened property.⁷¹ While the law of equitable servitudes has ushered in an expansion in the permissible range of such restrictions, particularly in the U.S.,⁷² such servitudes are generally subject to a host of complicated requirements, making them not the most user-friendly form of property restriction.

Given the common law's suspicion of new non-possessory interests and dead hand control over property, conservationists turned to legislatures to establish the conservation easement. In 1981 the Uniform Conservation Easement Act was approved and since then over 40 states have passed legislation largely based on it, thus permitting the creation and subsequent enforcement of conservation easements.⁷³ Comparable interests usually under the name conservation covenants have also emerged in New Zealand,⁷⁴ Australia,⁷⁵ and Canada.⁷⁶

The merits of this approach to conservation are not the focus of this commentary. Rather what is of interest to me is the latitude granted to current property owners choosing to restrict their property through conservation easements. As with the disappearance of the rule against perpetuities and other related rules, these servitudes provide current owners

⁷¹ Early attempts by the U.S. Fish and Wildlife Service to obtain nonpossessory interests in land as a conservation tool were only marginally successful because subsequent property owners were able to claim under the common law that the restrictions were not binding beyond the contracting parties. Mahoney, *supra*. at 749; "The law has been very chary of creating any new negative easements" – Phipps v. Pears, [1965] 1 Q.B. 76 (Lord Denning)

⁷² The most important addition is the recognition of covenants or servitudes imposing positive obligations on the burdened property holder, such as monetary payments. See Rudden, *supra* note 2.

⁷³ Mahoney, *supra*. note 65 at 750.

⁷⁴ Queen Elizabeth the Second National Trust Act 1977, s.22 provides for the creation of "open space covenants" defined as a "legal agreement between the National Trust and a landowner, protecting privately owned open space... Covenants are registered against the title and are binding on all present and subsequent owners or leaseholders. *Most open space covenants are in perpetuity.*" (emphasis added) From the National trust web site, <http://www.nationaltrust.org.nz/covenants/index.html>

⁷⁵ See, eg. Victorian Conservation Trust Act 1972 s. 3A, providing for the creation of a "conservation covenant" to be held by the Trust; Soil and Land Conservation Act 1945 (WA) s. 30B; National Parks and Wildlife Act 1970 (Tasmania) s. 37B.

⁷⁶ Conservation Land Act, RSO c. C28; Land Title Act R.S.B.C. 1979 c. 219 s. 215.

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with unprecedented powers to affect the management of the burdened property indefinitely.

It is important to recognize that conservation easements are permanent by design and many of the statutes that facilitate their creation actually require that they be perpetual.⁷⁷ It is permanence, along with significant tax advantages,⁷⁸ that makes them both unique and highly desirable. And while the collection of common law remedies that are available to remove or terminate servitudes may still be available, the terms of the legislation as well as the nature of the easement itself render such remedies ineffective. For example, the doctrine of changed circumstances is designed to permit the termination of an easement should it no longer be suitable given changes in the surrounding neighborhood. The application of this doctrine to conservation easements is problematic because changes to the surrounding environment are themselves reasons for the existence of the easement. Professor Mahoney states: “changed conditions of the neighboring land renders enforcement of the servitude all the more important because the burdened parcel represents the final vestige of the old landscape.”⁷⁹ So we are left with a situation in which the servitude is explicitly defined as being permanent, the conditions for removal are very limited and the easement holder, typically a non-profit conservation organization or a government agency, has no real incentive to consent to termination.⁸⁰

The popularity of the conservation easement has emerged in tandem with a comparable development in the area of historic preservation. Here permanent easements, again granted to not-for-profit or government heritage organizations such as the Illinois Landmark Commission, are granted to ensure that the heritage aspects of privately owned property are preserved. The recent Restatement covering servitudes and the Uniform Conservation Easement Act include preservation or heritage based restrictions in their definitions. The Restatement defines preservation purposes as including “preserving the historical, architectural, archaeological, or cultural aspects of real property.”⁸¹ As with the

⁷⁷ See, e.g. CA Civil Code § 815.2(b).

⁷⁸ McLaughlin, *supra*. note 66 at 688.

⁷⁹ Mahoney, *supra*. note 65 at 778.

⁸⁰ See *Id.* for a spirited discussion of the permanence of conservation easements and the problems generated by this dead hand control. McLaughlin, *supra*. note 66 at 706-707 (arguing for a more cautious use of the perpetual conservation easement given the long term difficulties they pose).

⁸¹ Restatement of the Law Third – Property: Servitudes § 1.6 (1), See Bagley v. Foundation of Preservation of Historic Georgetown, 647 A.2d 1110 (D.C. 1994).

conservation easement, the historic preservation easement is intended to last in perpetuity or so long as its intended purpose can be met.

Of course the popularity of preservation and conservation easements is part of a larger trend embracing servitudes. As gated communities and condo developments continue to expand,⁸² the complex web of covenants and conditions controlling property thickens. These restrictions often have no definite end date and yet it is important to distinguish them from the conservation and heritage related easements precisely because the latter forms of restrictions are specifically designed to run in perpetuity with only marginal prospects of termination.

3. Perpetual Rights in Knowledge and Ideas

Perhaps the most interesting example of the temporal extension of property interests is the increasing time frame for intellectual property rights. Since World War II there has been a huge expansion in intellectual property rights leading to what John Braithwaite and Peter Drahos have labelled the “biogopolies” and “infogopolies” of the twenty-first century.⁸³ These sanctioned monopolies, with their lock on a vast array of knowledge, are at the forefront of the global economy, and they continue to expand through the international rules established under the Trade-Related Aspects of Intellectual Property Rights Agreement (“TRIPS”). While the expansion of patents and copyrights into new areas of knowledge⁸⁴ and information⁸⁵ has been central to the growing importance of intellectual property rights, the time expansion is no less remarkable.

The most significant and apparent changes to the temporal boundaries of intellectual property rights are in the area of copyright. The

⁸² According to the Community Association Institute, a sixth of the U.S. Population now live in gated communities. *The Economist* August 30, 2001.

⁸³ JOHN BRAITHWAITE AND PETER DRAHOS, INFORMATION FEUDALISM (2002.)

⁸⁴ In patent law, the steady shift from a focus on mechanical processes to biotechnology and more recently genetic engineering has fundamentally altered patent law and exponentially increased the number of existing patents. *See* BRAITHWAITE AND DRAHOS, *supra*. note 83 at 150-168.

⁸⁵ While the expansion in copyright is less dramatic, the extension of copyright to computer technology, particularly software has had a significant impact on the role of copyright in controlling information. *See* Braithwaite and Drahos, *supra*. at 169-186; Lawrence Lessig, *The Creative Commons*, 55 FLORIDA L.REV. 763 (2003)

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recent court battle in the United States over the Copyright Term Extension Act⁸⁶ (“CTEA”) put the question of the appropriate time frame for copyright directly before the U.S. Supreme Court.⁸⁷ While perpetual copyright protection would indeed violate the Constitutional requirement that exclusive rights be “for limited times”,⁸⁸ the majority found that the term established in the CTEA was not perpetual and the appropriate non-perpetual term was a matter for Congress to decide. Writing in dissent, Justice Breyer expressed concern that the most recent extension “make[s] the copyright term not limited, but virtually perpetual.”⁸⁹ Later in his opinion he suggests that the new copyright term would, if the vesting of property were in issue, “violate the traditional rule against perpetuities.”⁹⁰

Aside from the question of constitutionality, the trend here is obvious – in the past 30 years the copyright term has moved from a maximum of 56 years (28 years from the date of publication, renewable for another 28 years)⁹¹ to an average of 95 years⁹² creating what Professor

⁸⁶ Sonny Bono Copyright Term Extension Act 17 U.S.C. § 302 (1998) (“CTEA”). The CTEA was the fourth such extension in U.S. legislative history. The initial copyright term established in 1790 was 14 years from publication, renewable for another 14 years.

⁸⁷ *Eldred v. Ashcroft* 537 U.S. 186, 123 S.Ct. 769 (2003); (upholding the constitutionality of the CTEA, extending the duration of copyrights by another 20 years).

⁸⁸ Constitution, Art 1, § 8, cl.8: “Congress shall have Power ... To promote the Progress of Science and useful Art, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” While there was some debate in English law about the existence of common law perpetual copyright, this view did not appear to take root in the United States. The Continental Congress had no power to regulate in this area and most states simply embraced the English limitations set forth in the Statute of Anne: “No state was disposed to view copyright as creating a perpetual rights.” Edward C. Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. INTELLECTUAL PROPERTY L. 315, 349 (2000). And a little later, “What is clear is that both Pickney and Madison did not want a perpetual copyright term but rather wanted something along the lines set forth in the Statute of Anne, that is to say, a limited term.” *Id.* at 354.

⁸⁹ *Eldred*, 537 U.S. at 242; 123 S.Ct. at 801.

⁹⁰ *Eldred*, 537 U.S. at 257; 123 S.Ct. at 808.

⁹¹ This term was established in 1909: Act of Mar. 4, 1909, Ch. 320, §§ 23-24, 35 Stat. 1080-1081 and remained in place until 1976.

⁹² The new term established under the CTEA is from creation until 70 years after the author’s death, estimated to produce on average 95 year copyright terms. 17 U.S.C. § 302(a).

Peter Jaszi, refers to as perpetual copyright “on an instalment plan.”⁹³ And from an economic standpoint the current copyright term “has nearly the same present value as an infinite copyright term.”⁹⁴

In other areas of intellectual property the time extensions have not been dramatic. In the area of patents, changes in U.S. law have extended the patent term but only marginally. The original patent term was fourteen years⁹⁵ and today it reaches up to twenty years in keeping with TRIPS.⁹⁶ Because of TRIPS, the same twenty-year term is now standard in many jurisdictions. But large corporate patent holders, particularly pharmaceuticals, have engaged in a number of tactics designed to further lengthen patent rights.⁹⁷ Some of these have met with moderate success while others are typically prevented if caught. Most blatant of these is simply double patenting – successfully applying for another patent once the first term has expired.⁹⁸ In the U.S. this was dealt a decisive even if needlessly complex blow in the termination of Eli Lilly’s second Prozac patent.⁹⁹ The other more successful extension tactic is the “evergreening”

⁹³ Peter Jaszi, *Caught in the Net of Copyright*, 75 OR. L. REV. 299, 302 (1996) (quoting his own testimony in The Copyright Term Extension Act of 1995: Hearings on S. 483 Before the Senate Judiciary Committee, 104th Cong. (Sept. 24, 1995)).

⁹⁴ Brief of George A. Akerlof, et al, as Amici Curiae in Support of Petitioners, *Eldred v. Ahscroft*, no. 01-618, 8 (U.S. Sup. Ct. filed May 20, 2002)(available on Lexis at 2001 US Briefs 618)(arguing that extending the copyright term increases the social cost of monopoly). For an economic argument in favor of indefinitely renewable copyright, see William M. Landes and Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U.CHI. L.REV. 471 (2003). In two separate articles, Justin Hughes and Joseph Liu also argue that the length of the copyright term might not be problematic if fair use and other public access rights are strengthened over time. Justin Hughes, *Fair Use Across Time* 50 UCLA L. REV. 775 (2003); Joseph P.Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409 (2002).

⁹⁵ The fourteen-year term established in the 1790 Patent Act derived from the English Statute of Monopolies. This term lasted until the Patent act of 1861 when a seventeen-year term was adopted. It wasn’t until 1995 that this term was extended to twenty years to bring the law in line with TRIPS. Patent Code § 154(a)(2).

⁹⁶ TRIPS, Art. 33.

⁹⁷ See generally, Lara J. Glasgow, *Stretching the Limits of Intellectual Property Rights: Has the Pharmaceutical Industry Gone Too Far?*. 41(2) IDEA – THE J. OF L. AND TECH. 227 (2001). It should be noted that in some jurisdictions pharmaceuticals also have a five-year extension of the standard twenty-year term.

⁹⁸ BRAITHWAITE AND DRAHOS *supra*. note 83 at 161.

⁹⁹ *Eli Lilly and Co. v. Barr Laboratories Inc.*, 251 F.3d 955 (2001); For a comment on the complexities of this case see Hsin Pai, *Eli Lilly & Co. v. Barr Labs, inc.*:

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of patents, a technique whereby pharmaceutical companies succeed in patenting new formulations and applications of a drug.¹⁰⁰

Other intellectual property interests are typically less constrained by specific terms. Trademarks, for example, are infinitely renewable provided they remain in use - they are and have always been potentially perpetual.¹⁰¹ But again other changes within trademark law have made perpetual trademarks more of a reality. The emergence of the “dilution rationale” for trademarks and the passage of anti-dilution statutes have given expanded scope to the notion of use.¹⁰² The enforceability of a trademark now depends more on the proprietary interests of the mark holder, “the business reputation or ... the distinctive quality of a mark...” rather than the regulation of competition and the interests of consumers.¹⁰³ With the switch away from the interests of consumers to the property or authorship of the mark holder comes the distinct possibility of longer, more powerful and wide-reaching trademarks.¹⁰⁴

While these changes stop short of creating or endorsing perpetual intellectual property rights, there is a definite trend toward the lengthening of intellectual property rights, particularly in the area of copyright. Furthermore, unlike the prior examples where property interests are fragmented over time, intellectual property interests are monopolistic and thus enable long-term *exclusive* control. As a consequence the economic and societal effects of even a limited lengthening are likely to be significant.

B. Retreating to the Past

While the above examples indicate that with respect to some forms of property, property owners are increasingly able to control their property

The Muddling of Obviousness Type Double Patenting Doctrine, 42 JURIMETRICS 479 (2002).

¹⁰⁰ All Things Considered: Drug Patents (NPR radio broadcast Nov. 28, 2000) [hereinafter NPR, All Things Considered], available at 2000 WL 21472964. Glasgow, *supra*. note 97 at 234 (discussing the extension of the Augmentin patent). See also David Pilling & Richard Wolffe, *Drug Abuses*, FINANCIAL TIME (London), Apr. 20, 2000, at 20, referring to these as “submarine patents.”

¹⁰¹ See TRIPS art. 18 (“The registration of a trademark shall be renewable indefinitely.”)

¹⁰² Federal Trademark Dilution Act (1995) 15 USC 1125(c).

¹⁰³ ROSEMARY COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES*, 70-71 (1999).

¹⁰⁴ *Id.* at 71.

further into the future, so too can they reach further into the past to reclaim property. In the first example, the revival of customary rights, distinct groups have successfully retained rights to use privately held or otherwise inaccessible property based on usage for “time immemorial.” In the second example, prior owners are able to circumvent otherwise applicable limitation periods to claim important cultural objects.

1. “Usage for time immemorial” – Customary Rights

While the concept of “customary rights” has always held a cherished place in English law most commentators agree that, “until recently, one could fairly characterize the U.S. judicial reception to custom as a source of law as decidedly chilly.”¹⁰⁵ So among the many changes in property law that run contrary to the common law’s abhorrence of perpetuities,¹⁰⁶ the strangest must be the revitalization, albeit limited, of the doctrine of custom in establishing public access to private property.

Customary rights in common law jurisdictions have their origins, like so many other property doctrines, in England’s manorial and feudal system. Rights claimed by individual tenants of a manor were recognized so long as the tenants could prove that the custom in question ran as far back into time as anyone could remember and was reasonable.¹⁰⁷ What makes the doctrine of custom particularly interesting for the purposes of this paper is that it recognizes an inalienable, unending interest in affected properties, held by a specific, clearly identifiable segment of the public *and* that it justifies such interest based on usage for as long as the memory stretches. In this sense it depends on recognition running back in time and then enforces the rights in question indefinitely into the future. John Chipman Gray remarked, “it should be remembered that [customary rights] cannot be released, for no inhabitant, or body of inhabitants, is entitled to speak for future inhabitants. Such rights form perpetuities of the most objectionable character.”¹⁰⁸

Aside from a general aversion to perpetual interests, “customary

¹⁰⁵ David Callies, *Custom and Public trust: Background Principles of State Property Law?*, SE18 ALI-ABA 699, 703 (1999).

¹⁰⁶ [F]or courts of justice will not indulge even wills, so as to create a perpetuity, which the law abhors: because by perpetuities ... estates are made incapable of answering those ends, of social commerce, and providing for the sudden contingencies of private life, for which property was at first established ... 2 WILLIAM BLACKSTONE, COMMENTARIES, Ch. 11, 173-174.

¹⁰⁷ CAROL ROSE, PROPERTY AND PERSUASION 123 (1994).

¹⁰⁸ JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 586 (3rd ed. 1914).

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rights” were spurned in American law because of the factual requirement that the custom be traced back to time “immemorial.” Such a concept has little place in a nation where European colonization and the reception of the common law are well within recorded public/legal memory.¹⁰⁹ The inconvenience and uncertainty that customary rights create for settled common law private property interests provide yet additional reasons for rejecting them.¹¹⁰

Nonetheless some U.S. jurisdictions have recognized the existence of customary rights.¹¹¹ In 1969 an Oregon court relied on customary rights to recognize a public right of access to the dry sand area of private beachfront property. The court stated: “It seems particularly appropriate in the case at the bar to look to an ancient and accepted custom in this state as the source of a rule of law.”¹¹² To support the idea of usage for time immemorial, the court turned to evidence of Native American use of the dry sand area long before European colonization.

Some American courts have rejected the notion of custom as an “archaic judicial response” relying instead on the less “fixed or static” concept of “public trust.”¹¹³ Interests held under the public trust doctrine also may run indefinitely and thus can be seen as part of the rise of perpetual interests, although in a more limited way. Property interests held through the concept of public trust depend on proof of public need whereas the doctrine of custom primarily depends on continuity in the mere recognition of the rights in question, not usage or need.¹¹⁴ Property

¹⁰⁹ See, eg. *Ocean Beach Ass. V. Brinley*, 34 N.J. Eq. 438; *Harris v. Carson*, 7 Leigh, 632 (va.)

¹¹⁰ *Ackerman v. Shelp*, 8 N.J.L. 125, 130-131 (1825).

¹¹¹ *Knowles v. Dow*, 22 N.H. 387 (1859)

¹¹² *Thornton v. Hay*, 462 P. 2d 671, 671 (Or. 1969).

¹¹³ *Matthews v. Bay Head Improvement Association*, 471 A. 2d 355, 365 (N.J. 1984)(holding that the dry sand area of a beach owned by a quasi-public body was open to the public through the public trust doctrine). The public trust doctrine as it applies to beaches, tidal and submerged lands itself has a long history stretching back at least to the 17th century and Matthew Hale’s treatise, *De Jure Maris*. Within in the United States it has experienced surges of popularity since the early 19th c. See ROSE, PROPERTY AND PERSUASION, *supra*. note 107 at 115-116. The modern articulation and application of the doctrine is typically traced to Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L.REV. 471 (1970). A brief history of the legal recognition of public interest in tidal and submerged lands is also contained in *Matthews*, 471 A. 2d at 360-362.

¹¹⁴ See *Callies*, *supra*. note 105 at (around n. 26)(citing Blackstone for the proposition that it is the right of use, not the use itself, that must be proven.).

interests determined by public need are more changeable than those driven by mere public recognition. Nonetheless the key advantage of both of these approaches to the recognition of public access is that they steer clear of the Constitutional requirement of compensation for a “taking” of property because the public interest is presumed to have been there all along. Private property owners lose nothing – a right to exclude the public was never there to begin with.¹¹⁵

Perhaps because of their ancient status and their strange contradiction of common law property rights, customary rights have also caught on in Hawaii where native Hawaiians have used them as the basis for a variety of claims stemming from their traditional practices. For most of its history as a state, the customary rights of native Hawaiians were thought to be terminated by statute but in 1995 the Supreme Court of Hawaii made it clear that such rights do exist and may trump common law rights of exclusion.¹¹⁶

Australian Aborigines and the Maoris of New Zealand have also resorted to the notion of customary rights as a means of protecting their traditional practices and ensuring access to private lands.¹¹⁷ While this is a contested innovation of the original English doctrine, it fits well with the experiences of these indigenous populations. Unlike the European populations that colonized these nations, the indigenous populations can trace their usage back for “time immemorial.” Furthermore, the doctrine was intended to apply to only specific communities and discrete practices, making it peculiarly apposite to the situations of these peoples. So customary rights have been widely used outside of the United States as a

¹¹⁵ This is a particularly convenient method of avoiding the possibility of compensation in the wake of *Lucas v. South Carolina Coastal Council* given its stated exception for states’ “background principles of property law.” 505 U.S. 1003, 11020-32 (1992). However Justice Scalia, the author of the *Lucas* opinion, has rejected the notion that such “new-found” doctrines are part of the “background principles”. Stevens, 114 S.Ct. 1332, 1335 (1994)(denying cert., Scalia dissenting). For a discussion of whether customary rights are part of such “background principles” see Callies, *supra*. note 105.

¹¹⁶ *Public Access Shoreline Hawaii v. Hawaii County Planning Council*, 903 P.2d. 1246 (Hawaii 1995); *But see Hawaii v. Hanapi*, 970 P 2d. 485 (Haw. 1998)(doubting the applicability of customary rights to settled residential property)

¹¹⁷ The Australian case law is probably the most extensive on the issue of customary rights and “native title”: see *Mabo v. Queensland (No.2)* [1992] HCA 23. More recently the Australian High Court has begun to limit the rights associated with “native title”: see *Yorta Yorta v. Victoria*, [2002] HCA 58.

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tool for the recognition of aboriginal rights.¹¹⁸

There are a number of plausible explanations for why customary rights have reappeared in case law. In the context of beach access, customary rights can establish public access over a large area and against an entire category of property-owners without running afoul of the Constitutional requirement of compensation. In the area of aboriginal rights, the striking suitability of customary rights to the indigenous populations living within legal systems that offer very little else in the way of remedies, goes a long way to explain their popularity.¹¹⁹ But regardless of the explanation, it is evident that customary rights have arisen “phoenix-like”¹²⁰ from the remains of English property law providing yet another example of property interests running in perpetuity.

2. Stolen Cultural Objects and the Irrelevance of Limitation Periods

The restitution of personal property within the common law has always turned on the applicable limitation period. While neither a thief nor subsequent good faith purchaser can acquire good title to stolen objects, the passage of a statutory time period, typically anywhere from two to six years in U.S. jurisdictions, bars the original owner from claiming the property in question, at least as against a good faith purchaser.¹²¹ The consequence is that a good faith purchaser of personal property typically can feel secure about her title after the statutory time period for recovery has expired. This, however, is no longer the case when dealing with significant works of art or other cultural objects. Now it is possible for owners to reclaim such objects long after the passage of the relevant time period.¹²²

Changes in this area are related to two larger social/historical concerns. The first is the Nazi theft and illegal transfer of a significant

¹¹⁸ See Kent McNeil, *The Relevance of Traditional Laws and Customs to the Existence and Content of Native Title at Common Law in EMERGING JUSTICE? ESSAYS ON INDIGENOUS RIGHTS IN CANADA AND AUSTRALIA* 416 (Kent McNeil ed., 2001). Kent McNeil, *Self-Government and the Inalienability of Aboriginal Title*, 47 MCGILL L. J. 473 (2002).

¹¹⁹ Callies, *supra*. note 105 at (just after note 140 in conclusion).

¹²⁰ *Id.*

¹²¹ See Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119 (1988/89).

¹²² See Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the U.S.*, 75 B.U. L. REV. 559 (1995).

portion of Europe's artistic treasures.¹²³ Given the scale of Nazi looting and the broader context of the Holocaust, it is not surprising that the standard adverse possession approach was eventually found to be unsuitable.¹²⁴ The first such case to deal with the issue in the U.S., *Menzel v. List*, concerned the ownership of a Chagall painting left behind in Belgium as the owners fled from the advancing Nazis.¹²⁵ The relevant New York statutory time period had long since expired but the court permitted the plaintiff to sue for the return of the painting through applying what is now known as the "demand and refusal" rule. Under this rule the cause of action does not accrue, and thus the limitation period does not begin to run, until the original owner demands return and the defendant refuses.¹²⁶ While subsequent cases raised some doubts about the continued application of this rule, the New York Court of Appeals eventually affirmed it in *Guggenheim Foundation v. Lubell*,¹²⁷ a case involving another Chagall.

Other courts dealing with ownership disputes over stolen or missing art have followed New York's lead and developed similar approaches to the tolling of statutory limitation periods. Most significantly the New Jersey courts developed what is known as the "discovery rule" in *O'Keeffe v. Snyder*.¹²⁸ Under this approach, the cause of action does not accrue and thus the statute of limitation does not begin to run until the original owner has discovered the whereabouts of the stolen work, provided that she has used due diligence in her search. The discovery rule was also followed in a case involving Byzantine mosaics stolen from a Greek Orthodox church in Turkish occupied Cyprus.¹²⁹ The "discovery rule" was also the inspiration for a statutory provision in California dealing with the recovery of stolen art.¹³⁰

¹²³ See LYNN NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF THE EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1994).

¹²⁴ For a general discussion of the litigation surrounding Nazi looted art, see David Wissbroeker, *Six Klimts, a Picasso and a Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DEPAUL-LCA J. OF ART AND ENTERTAINMENT L. 39 (2004); Jennifer Anglim Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes*, 73 BROOK. L. REV. 155 (2007).

¹²⁵ *Menzel v. List*, 22 A.D. 2d 647; 253 N.Y.S. 2d 43 (N.Y. App. Div. 1964).

¹²⁶ *Id.*

¹²⁷ 77 N.Y. 2d 311 (1991).

¹²⁸ 416 A.2d 862 (1980).

¹²⁹ *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg*, 717 F.Supp. 1374 (1989).

¹³⁰ Ca. Code of Civ. Pro. § 338(c) (stipulating that the cause of action for the recovery of art and other related material does not accrue until the discovery of the whereabouts of the work in question).

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In addition to these various judicial innovations, museums and governments around the world have initiated policies and guidelines designed to encourage and in some cases dictate the return of looted art to its original owners.¹³¹ The American Association of Museums Guidelines are typical in that they encourage members to “waive legitimate legal defenses” to claims for recovery of once-looted art works in order to achieve an “equitable and appropriate resolution of claims.”¹³² Many of these efforts have occurred in just the past decade following a sensational standoff between the City of New York and an Austrian art foundation over two Egon Schiele works that were apparently stolen by the Nazis. As a result of these many efforts, an increasing number of looted works have been and continue to be returned to their pre-World War II owners.¹³³ While these developments are an important piece of a larger reconciliation process with Holocaust victims it is important to note that they do contradict settled law in both civil and common law jurisdictions.

The second major development concerns the return and protection of the cultural property of indigenous peoples. The motivations behind these repatriations are similar to those driving the return of Nazi-looted art, most notably concerns about fairness, a desire to compensate for past injustices, and collective guilt.¹³⁴ And the timing is also similar with the repatriation movement picking up steam throughout the world in just the past few decades. Australia, New Zealand and the United States all have substantial laws dealing specifically with the cultural property of their indigenous peoples. Canada has not relied on legislation but accomplishes

¹³¹ For a recent discussion of many of these initiatives See Paulina McCarter Collins *Has the “Lost Museum” Been Found? Declassification of Government Documents and Report on Holocaust Assets Offer Real Opportunity to “Do Justice” For Holocaust Victims on the Issue of Nazi-Looted Art*, 54 Me. L.Rev. 115, 140-150 (2002). For a look at all these various policies, see

http://www.comartrecovery.org/policies/established_list.htm

¹³² American Association of Museums (AAM) Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era, June 1998, sec. 4(f), available at http://www.comartrecovery.org/policies/established_list.htm.

¹³³ *But see* Jennifer Anglim Kreder, *U.S. Museums' Use of Declaratory Judgment Actions in Nazi-Looted Art Disputes*, ART, CULTURAL INSTITUTIONS AND HERITAGE LAW NEWSLETTER, International Bar Association Legal Practice 7-8 (October 2007) Available at SSRN: <http://ssrn.com/abstract=999666> (Discussing pre-emptive approaches by museums to secure title to disputed works of art).

¹³⁴ *See*, Sarah Harding, *Justifying the Repatriation of Native American Cultural Patrimony*, 71 INDIANA L.J. 723 (1997).

repatriation through informal and voluntary mechanisms not unlike those that are now encouraging the return of Nazi-looted art.¹³⁵

The primary American legislation dealing with repatriations is the Native American Graves Protection and Repatriation Act (“NAGPRA”),¹³⁶ which requires federally funded museums to return cultural objects to culturally-affiliated tribes. Given that most of the cultural objects in question have been in the possession of non-Native Americans for over a century, here again the return runs counter to the law of personal property in that it ignores the passage of the relevant statute of limitations. NAGPRA very specifically attempts to avoid the issues generated by the background common law and limitation periods by stipulating that museums do not need to return any objects for which they can prove a “right of possession,” but this “right of possession” is itself narrowly defined.¹³⁷ For this and other more politically motivated reasons museums, despite their lack of enthusiasm for NAGPRA, have been cautious about utilizing the “right of possession” defense.

Placing these changes in the context of the material above, we see again the possibility of ownership interests extending beyond the traditional temporal limitations imposed in property law. Changing circumstances and our general intuition that claims weaken over time¹³⁸ have provided adequate justification for extinguishing rights over time but these reasons no longer seem to hold sway, at least in the areas discussed above. While it might be tempting to marginalize this particular development as just another example of the growing influence of human rights in Western legal systems these changes are also appearing in cases that are removed from the troubling human rights contexts discussed above. The *O’Keeffe* case in which the discovery rule was crafted had nothing to do with Nazi atrocities or the misdeeds of colonialism. The same applies to the Byzantine mosaics case. The California law mentioned above applies to all stolen articles “of historical, interpretive, scientific or artistic significance,”¹³⁹ not simply those associated with a human rights violation.

Undoubtedly these changes are connected to problems unique to the art and cultural object market: the increasing importance of this market, the simultaneous emergence of a thriving black market, archaeological

¹³⁵ Tamara Kagan, *Recovering Aboriginal Cultural Property at Common Law: A Contextual Approach*, 63 U. OF TORONTO FAC. OF L. REV. 1, 12-14 (2005).

¹³⁶ 25 U.S.C. §§3001-3013 (1994).

¹³⁷ 25 U.S.C. § 3003(c); 3001(13). See Sarah Harding, *Justifying the Repatriation of Native American Cultural Patrimony*, 71 Indiana L.J. 723, 736-737 (1997).

¹³⁸ RUTI TEITEL *TRANSITIONAL JUSTICE* 138 (2000).

¹³⁹ Ca Code of Civ. Pro. § 338(c).

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looting, cultural misappropriation, and more generally the relative ease with which art objects can be concealed. But these peculiarities should not divert our attention from the temporal consequences - individuals or groups are able to reclaim property long after their interests would have been terminated under traditional common law and legislative rules.

C. Conclusion

The five examples discussed above may seem isolated and random but they generate a few key observations. First, they stretch across all formal categories of property law – real, personal, intellectual and cultural property. Customary rights and conservation easements are changes with respect to land; changes to the running of limitation periods in reclaiming art and cultural objects obviously fit within the law of personal or cultural property; and the intellectual property changes speak for themselves. The Rule Against Perpetuities applies to most forms of non-vested property interests. So while these examples might seem random or even in some cases peripheral, alternatively we might see them as distinct niches in each area of property where perpetual interests are permitted to thrive.

Second, the changes with respect to the conservation easement, the Rule Against Perpetuities and the copyright term are not in the least bit insignificant. The increasing number of acres subject to conservation easements is ample evidence of the significance of this new form of environmental protection. In former times the Rule Against Perpetuities loomed large in the law of property. Its long standing in the law has made it difficult to push aside; both its tenacity and the extensive discussion and debate around its removal indicate that its withering is anything but insignificant.

The changes to the copyright term along with the broader growth of intellectual property rights are indisputably significant giving rise to volumes of commentary and scholarship. Whether one bemoans or applauds the increasing propertization of knowledge and information through, among other mechanisms, term extensions, it is difficult to deny the significance of intellectual property rights in the global economy. As Saul Levmore remarked in a brief article on the future of property “of course it is ... ideas ... which we can expect to come into play and to dominate our economy – and interest group activity – in the future.”¹⁴⁰

Third and finally, the temporal changes highlighted above have occurred through both judicial and legislative innovation. The more

¹⁴⁰ Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 U. OF CHI. L. REV. 181, 194 (2003).

significant changes, those that have permitted property holders to extend their claims further into the future, have been achieved through legislation. But the innovative revival of customary rights, the development of the public trust doctrine and the inventive interpretations of the tolling of limitation periods in disputes over cultural objects indicate some openness on the part of the judiciary to tinker with temporal limitations.

III. TIME AND THE CHANGING CULTURAL LANDSCAPE OF PRIVATE PROPERTY

A. Everything but Time

It is possible to come up with entirely separate explanations for each of these changes, explanations that may in fact contradict rather than complement each other. But if we look at these various developments through the lens of time, we see a pattern that deserves some attention. The pattern or simple story that we could extract from all these examples might go like this. Within many discrete areas falling under the broad umbrella of property law, private (or even quasi-public) property holders are increasingly capable of maintaining interests in their property for longer periods of time. While perpetual interests have been a deep and abiding concern in property law for much of its history, we no longer seem to care that much about them. In short we seem less concerned about limiting one's control over or claim to property, to a specific and generally limited time frame.

In most, but not all of the examples above, the expanded time frame also introduces more complexity and uncertainty into private property through either permitting the long term fragmentation of title, as in the case of the conservation easement, or creating uncertainty about future and current holdings, as in the case of the changes to the rule against perpetuities and the recovery of stolen cultural property. While the lengthening of intellectual property rights do not present the same type of concerns, the long term monopolies created by such interests give rise to other well-documented efficiency problems.¹⁴¹

These changes are all quite remarkable given the common law's traditional abhorrence of perpetual interests, not to mention its general preference for rules that encourage efficient use of property. So why are we

¹⁴¹ Brief of George A. Akerlof, et al, as Amici Curiae in Support of Petitioners, *Eldred v. Ashcroft*, no 01-618, 8 (USSC filed May 20, 2002).

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suddenly more willing to accept perpetual and fragmented property interests?

1. Rent Seeking

One plausible explanation for this increasing temporal permissiveness can be found in a cynical or “skeptical”¹⁴² law and economics story. Such an approach might explain these changes as the products of classic rent seeking behavior, the sort that is ubiquitous in the evolution of property rights. Accordingly, temporal changes might be the result of individuals seeking profits or advantages associated with the use and control of property, advantages that tend to leave society worse off when it comes to net social wealth. After all individuals have always desired perpetual interests in property¹⁴³ and historically it was the courts and legislatures that limited such behavior through the establishment of various temporal and conceptual boundaries.¹⁴⁴ In the various examples discussed above, rent-seeking works through an official change in the rules, rather than working within established rules, as would be the case of a holdout.¹⁴⁵ So in addition to the rent seeking behavior this explanation also requires hypothesizing capture of the legislative or judicial process by the rent seeking individuals.¹⁴⁶

¹⁴² Levmore *supra*. note 140 at 182-183.

¹⁴³ For a wonderful look at the persistent rent seeking of copyright and patent holders attempting to secure perpetual rights, see Edward C. Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause* 7 J. INTELLECTUAL PROPERTY L. 315, 334-340; 368-371 (2000).

¹⁴⁴ Although early in the development of copyright Lord Mansfield suggested that there was a perpetual property right based on the common law, a right that, if it truly existed, was restrained by legislation, not the courts. See Walterscheid, *supra*. note 143 at 334- 346 (discussing this history of the development of the first English copyright statute, the Statute of Anne 1710, and subsequent debate over its interpretation and background rights).

¹⁴⁵ For a brief discussion of rent seeking both within the established rules and with the intent of changing rules see, Thomas Merrill, *Rent Seeking and the Compensation Principle*, 80 NORTHWESTERN U. L. REV. 1581, 1586-1587 (1986); for a more general discussion see G. Tullock, *Rent Seeking and Profit Seeking*, in TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (J. Buchanan, R. Tollison & G. Tullock eds. (1980).

¹⁴⁶ See Peter Drahos, *Regulating Property: Problems of Efficiency and Regulating Capture*, in REGULATING LAW 168 (Christine Parker, Colin Scott, Niki Lacey and John Braithwaite eds. 2004) (Merrill too.)

This may be a convincing explanation if we focus on the general trend – individuals seeking greater control of their property over time. But when we look closely at the examples it doesn't always fit. Certainly rent-seeking behavior is a plausible explanation for the changes to the RAP¹⁴⁷ and the lengthening terms in intellectual property rights. Peter Drahos and John Braithwaite convincingly argue that this is the most compelling explanation for the general expansion of intellectual property rights in international law.¹⁴⁸ But it is less persuasive when we turn to the other examples. Profit-driven or self-interested motives can certainly be read into any of the above examples but such motives don't always provide the most convincing explanation for the changes. The conservation easement, for example, presents the possibility of an interesting mix of selfish and selfless motivations with tax advantages weighing in on one side and long-term environmental concerns on the other. Thomas Merrill argues that this kind of legislation is “not easily placed under either the private-interest or the public-interest model, but rather reflect widely shared moral or cultural sentiments.”¹⁴⁹

The new rules regarding repatriation of cultural objects are equally complicated in that they can certainly be understood as the triumph of highly specified self-interested groups and yet the motivations here are best understood in human rights or corrective justice terms, not profits. In short not all of the changes have been driven by profit hungry individuals desiring to make the most of their property and unconcerned about the broader social impact.

2. Efficiency

The flip side of this “skeptical” rent-seeking story is the “optimistic” economic story, developed most prominently by Harold Demsetz in his immensely influential *Toward a Theory of Property*

¹⁴⁷ See Dobris, *supra*. note 52 at 639-641 (arguing that while the Rule was intended to benefit society over and above the preferences of individual landowners, its demise is part and parcel of our lack of interest in civil society and public life.)

¹⁴⁸ See DRAHOS AND BRAITHWAITE, INFORMATION FEUDALISM, *supra*. note 83.

¹⁴⁹ Merrill, *supra*. note 145 at 1587.

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Rights.¹⁵⁰ According to Demsetz, as the costs and benefits associated with a specific resource change, property rights develop or change to produce the most efficient outcomes (either in terms of incentive and production or reduction of transaction costs).¹⁵¹ This is one of the many stories that, for example, intellectual property rights holders rely on to justify their expanding rights, including term extensions: changes in technology and the growing cost of research require longer lasting intellectual property rights in order to maintain the optimal balance between incentives to create and public access.¹⁵² Indeed it can be used plausibly to justify any of the changes even, according to Carol Rose, the rise of customary rights. Customary rights fit within a group of resources cleverly labeled comedic rather than tragic commons that become more valuable when more people have access to them – “the more, the merrier.”¹⁵³

But if we are going to rely on this justification for changing temporal limitations then we need to know what has changed such that longer running property interests are more efficient, because in the past the assumption has been quite the opposite. Indeed as was pointed out in the above discussion of time and property, a recent wave of articles on the *numerus clausus* in property has pointed to a raft of efficiency related arguments for the existing temporal and conceptual limitations in property.¹⁵⁴ More than two decades ago Robert Ellickson provided detailed and convincing efficiency-based justifications for the rule against perpetuities, the rules allowing for the termination of servitudes and shorter, not longer, limitation periods for adverse possession claims (although he focuses on the adverse possession of land, not chattels).¹⁵⁵

The puzzle this poses should be obvious. If efficiency requires that property remain flexible to enable appropriate responses to inevitable but yet unidentifiable changes in market conditions, why are we witnessing the rise of temporally unlimited property interests? If anything, the pace of

¹⁵⁰ Harold Demsetz, *Toward a Theory of Property Rights*, 57 AMERICAN ECONOMIC REVIEW 354 (1967).

¹⁵¹ Levmore, *supra*. note 140 at 182.

¹⁵² Although many are unconvinced that, at least in the area of copyright, longer-lasting rights have any real impact on the incentive to create. See Brief of George A. Akerlof, et al., *supra*. note 94.

¹⁵³ Carol Rose, *The Comedy of the Commons: Custom, Commerce and Inherently Public Property in PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY AND RHETORIC OF OWNERSHIP* (1994). Economists also refer to this phenomenon as “network effects.”

¹⁵⁴ See *Supra*. at notes 26-30.

¹⁵⁵ Robert Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L.Q. 723 (1986).

change in our current social and economic conditions would seem to dictate shorter rather than longer running property interests. In short either the efficiency argument simply can't provide a compelling explanation for these temporal changes or at the very least we need a richer analysis of the effects of the quickening pace of change to provide the contextual framework for a convincing efficiency-related argument.

3. Neoliberalism

A more persuasive explanation might be found in the rise of neoliberalism. Given that most of the temporal changes, in particular those that allow the running of perpetual interests into the future, can be understood as expansions of property rights, we could think of these changes as part and parcel of the swing away from Keynesian economics and towards greater reliance on the market and private mechanisms of control. Under such a theory there is a presumption against any rules that interfere with ownership or create restraints on alienation, including temporal limitations. Richard Epstein is arguably one of the most well-known advocates of a neoliberal theory of property rights¹⁵⁶ and so it should come as no surprise that he has argued against some of the temporal limitations or constraints in property law.

In a now somewhat dated but nonetheless strikingly relevant article, Epstein argues that the only justification for interfering with "restraints of private alienation is to prevent the infliction of external harms." Since, according to Epstein, the rule against perpetuities "and its kindred rules" are not directed to such harms, they serve no useful legitimate function.¹⁵⁷ In short, Epstein argues for temporally unrestrained ownership rights, at least with respect to attempts to control property in the future.

Whatever one thinks of the normative argument here this explanation at least has the virtue of fitting in with other current trends in property law. In this sense we can understand the temporal changes as yet another aspect of our steady move away from a centralized, "command and control" model of the regulation of resources to rising confidence in a

¹⁵⁶ See, RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

¹⁵⁷ Richard Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 705 (1986).

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robust, unrestrained system of private property.¹⁵⁸ This trend is evident in everything from the general privatization of world economies to the rise of gated communities¹⁵⁹ and the emergence of market-based private property solutions to resources formally considered public goods, such as clean air.¹⁶⁰ This explanation, like the “optimistic” economic story, sees the decreasing significance of temporal limitations as an intentional and desirable development rather than just a case of the fox guarding the hen house. But unlike the efficiency justification, unfettered private ownership under this approach is presumed to be more than just productive. It is seen as inherently more desirable because it is a fundamental element of one’s *right* to property.

Despite the fact Epstein argues in favor of the rules of adverse possession, including a standard application of limitation periods, he does so on predominantly utilitarian terms, a theoretical shift for which he was roundly criticized.¹⁶¹ If we stick with the neoliberal approach the rights of an original property-holder arguably take priority over all subsequent illegitimate claims regardless of the concerns about efficiency or certainty that are addressed by limitation periods destroying a right of recovery.¹⁶²

But even if we settle on this explanation we are still left with the nagging question why have these absolutist tendencies with respect to

¹⁵⁸ Carol Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 130 (1998); See also ANTHONY GIDDENS THE CONSEQUENCES OF MODERNITY 164 (1990).

¹⁵⁹ See EVAN MCKENZIE, PRIVATOPIA: HOMEOWNERS ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT (1996). (Maybe add Shearing on “Mass Private Property”)

¹⁶⁰ Rose, *The Several Futures of Property*, *supra*. note 158.

¹⁶¹ See Ellickson, *supra*. note 155; (Radin critique too).

¹⁶² Indeed there is some movement in this direction with respect to the adverse possession of real property. In 2005 the European Court of Human Rights held that the law of adverse possession in the United Kingdom violated the protection of property found in the European Convention on Human Rights. The case involved a very simple case of adverse possession with the usual mix of common law elements and a statutory limitation period. The Court concluded that the transfer of property without compensation to the adverse possessor violated the plaintiff’s right to “peaceful enjoyment of his possessions.” *J.A. Pye (Oxford) Ltd. V. The United Kingdom*, no. 44302/02, ECHR 2005-II. Public outcry at the effects of adverse possession here in the United States have also led numerous states to propose changes to the law of adverse possession, in some cases prohibiting it all together. See Jay Romano, *Adverse Possession: Mind Your Property*, Real Estate, New York Times, November 11, 2007; Heath Urie, *Adverse Possession Bill Set for Senate Committee*, Boulder Daily Camera, March 4, 2008 (online edition).

property rights materialized or surfaced in the areas discussed? Furthermore arguably some of the changes are strikingly redistributive in nature and as such sit uncomfortably with Epstein's neoliberal approach.¹⁶³ This is most apparent in the re-emergence of customary rights, the public-trust doctrine and repatriation schemes.

4. Certainty, Fairness and the Changing Face of Property

There are a variety of other ideas we could explore. Perhaps the changes reflect the simple reality that people live longer, or maybe the general decline in the significance of tangible property in a global economy.¹⁶⁴ We live in an information society, dependent on intangible rather than tangible assets. If tangible property is unimportant, the rules that have been put in place to ensure socially beneficial uses will presumably also be of less importance. Setting aside the intellectual property material, some of the changes involve rather remote examples of tangible property that arguably have little to do with the economy and overall public welfare. Even the rule against perpetuities, with its roots in an era when land was the core of both social and economic life, is typically associated with land rather than the vast and diverse types of property interests to which it in fact applies.¹⁶⁵ But this doesn't explain why intellectual property rights are also getting longer. If all this turns on what is relevant to the growing global economy and we accept the economic arguments for temporal limitations, perhaps intellectual property rights should be getting shorter, or at least not expanding.

It may also be the case that all these changes are simply part of the cyclical movement in property between clear or "crystal" rules, devoted to creating certain and definitive property rights, and fuzzy or "mud" rules

¹⁶³ However Epstein has argued that long-standing public rights in property are equally worthy of defense against the onslaught of legislation that might alter them without compensation. So, for example, Epstein rejects the extension of the copyright term as a legislative intrusion on existing public rights. Richard Epstein, Congress' Copyright Giveaway, Monday Dec. 21 1998 Wall Street Journal A19; Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOYOLA L.A. L. REV. 123, 127-128 (2002)

¹⁶⁴ Gregory Alexander, *Time and Property in the American Republican Legal Culture*, 66 NYU L. REV. 273, 333-335 (1991)(discussing the rise of "imaginary property" or intangibles); DRAHOS AND BRAITHWAITE, INFORMATION FEUDALISM, *supra*. note 83 at 198-99 ("wealth comes from controlling abstract objects"); Heller, *supra*. note 2 at 1174 (tangible property at the core of property conceptions but the locus of economic value has shifted to intangibles).

¹⁶⁵ See, Dobris, *supra*. note 52 at 635-639.

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whose purpose is to inject an element of fairness.¹⁶⁶ Given that the temporal changes tend to create greater uncertainty, could it be said that these rules simply reflect the mud part of the cycle? If so can we expect these changes to be followed by a new set of doctrines that re-impose clarity and more precise time frames for control over property? While we may very well witness a swing back to the enforcement of temporal limitations, I am not sure the “mud” explanation is entirely adequate in this context. Not all the rule changes discussed above, particularly the changes to the rule against perpetuities and intellectual property rights, are fuzzy, mud kind of rules. To the contrary these changes simplify the rules of the game, arguably bringing more certainty to what counts as a viable property interest even if, as in the case of the rule against perpetuities, simultaneously encouraging greater fragmentation of those interests.

So far this paper has presented a rather eclectic selection of reasons, both normative and descriptive, for the slow disappearance of temporal boundaries. All of the ideas presented above are worthy of further discussion and are potential candidates for both exploring and critiquing temporal changes. Some combination of these explanations may be the most convincing and productive line of inquiry. But all of these approaches suffer from a significant shortcoming. Each and every one of them fails to deal directly with the temporal element. In each of the above justifications temporal limitations and their removal are secondary issues, simply by-products of larger normative theories or social expectations. In short, time wouldn't matter much if we were to pursue any of the above ideas. But if we take seriously the growing acceptance of perpetual property and Greenhouse's observations about the importance of time in legitimating law then curiosity compels a search for something that looks more seriously at the temporal element.

This doesn't mean that the above explanations are irrelevant or unpersuasive. To the contrary, temporal limitations appeared because of their tendency to encourage efficient and fair uses of property, not out of opposition to perpetuities per se. And so it may very well be the case that these same reasons have, in conjunction with changing cultural assumptions about property, prompted the removal of such limitations. But it is the changing cultural assumptions part of this - how we define fairness and expectations through time - that is worth exploring.

¹⁶⁶ Carol Rose, *Crystals and Mud in Property Law*, 40 STANFORD L. REV. 577 (1988). (arguing that both types of rules are present in property law and in fact tend to appear in cyclical fashion, reflecting two important yet not wholly compatible cultural tendencies in the maintenance of a system of private property – desire for certainty on the one hand and fairness on the other).

B. Time, Stability and the Subjective Element in Property

The new value placed on the transitory, the elusive and the ephemeral, the very celebration of dynamism, discloses a longing for an undefiled, immaculate and stable present.¹⁶⁷

The circumstances that created our current market-driven system of private property and the temporal boundaries that go along with it seem not to have changed dramatically. In particular the demands of social, commercial and private life shift so rapidly today that we would expect there to be even more limited temporal boundaries in the ownership of property. The prevailing conditions of society even a single generation into the future are likely to be so different from today that long-term control of property seems anachronistic. Professor Mahoney captures this in her discussion of the conservation easement: “there is a certain irony in the fact that the number of acres under conservation easement has been growing rapidly at a time when old conceptual models of natural and cultural stability have begun to give way to more dynamic ones.”¹⁶⁸ Why is it the case that at least in the limited areas discussed above, we strive for greater permanence and long-arm control over property when our current cultural conditions require greater flexibility? How is it that in an era of rapid technological change we are more willing to tolerate perpetual property interests?

If we put the notion of time front and centre what becomes most obvious is that the temporal expansion of interests in property has occurred under broader social conditions of what David Harvey has termed “time-space compression.” Harvey uses this concept to elaborate on changes in how we represent the world to ourselves. At its core it is simply an articulation of the rapid acceleration of the pace of life and the

¹⁶⁷ Jurgen Habermas, *Modernity: An Incomplete Project*, in POSTMODERN CULTURE, 1 at 5 (H. Foster ed., 1985).

¹⁶⁸ Mahoney, *supra*. note 65 at 753; see also Dan Tarlock, *Slouching Toward Eden: The Eco-Pragmatic Challenges of Ecosystem Revival*, 87 MINN. L. REV. 1173 (2003)(discussing the changing approaches to environmental protection, in particular the shift from a focus on preservation to revival); See also Alex Geisinger, *Rethinking Risk-Based Environmental Cleanup* 76 INDIANA L.J. 367 (2001)(critiquing the “new cleanup paradigm” that restricts property use by predicting and then entrenching future property uses).

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corresponding shrinking of space. Spatial barriers disappear as goods, information and people move rapidly from place to place. Revolutionary changes in transportation and communication technologies have radically reduced both spatial and temporal horizons.¹⁶⁹

These changes are most apparent in the flow of capital and the globalization of markets, but their effects are wide-ranging. Of these effects or consequences the most evident “has been to accentuate volatility and ephemerality”¹⁷⁰ in just about every aspect of life – the notion that “all that is solid melts into air has rarely been more pervasive.”¹⁷¹ Actual tangible things pass through our hands with amazing speed generating labels such as the “throwaway” or “disposable” society. These observations are hard to reconcile with the changes in property law discussed above but the transitory nature of current social conditions and all that surrounds us is only part of the story. Harvey goes on to state:

But as so often happens, the plunge into the maelstrom of ephemerality has provoked an explosion of opposed sentiments and tendencies. . . . The revival of interest in basic institutions (such as the family and community), and the search for historical roots are all signs of a search for more secure moorings and longer-lasting values in a shifting world.¹⁷²

It is here in this oppositional tendency that we might find fertile ground for exploring the temporal changes in property. Accordingly our increased tolerance for perpetual property interests might reflect our desire for stability, permanence, and historical continuity when such things are scarce in other aspects of our lives. As Susan Stewart notes, within cultures defined by an exchange economy, saturated with fungible commodities, the search for something authentic and unchanging seemingly becomes critical.¹⁷³

This explanation begins to look stronger when we take another look at the areas where the temporal changes have occurred. Each of the areas discussed concerns either institutions or actual objects to which we tend to attach added personal, cultural or communal significance. The clearest example of this is in the area of cultural property. The cases and

¹⁶⁹ DAVID HARVEY, *THE CONDITIONS OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* 240 (1990).

¹⁷⁰ *Id.* at 285.

¹⁷¹ *Id.* at 286.

¹⁷² *Id.* at 292.

¹⁷³ SUSAN STEWART, *ON LONGING: NARRATIVES OF THE MINIATURE, THE GIGANTIC, THE SOUVENIR, THE COLLECTION* 133 (1993).

occasionally statutes are full of comments about preserving the past and protecting sacred connections. As Harvey recognizes certain objects “become the focus of a contemplative memory, and hence a generator of a sense of self that lies outside the sensory overloading of consumerist culture and fashion.”¹⁷⁴ Thus we have the meteoric rise of the market in art and collectibles; this has been a reliable place to “store value effectively.”¹⁷⁵ Even the conservation easement can be seen as a reflection of our desire for permanence, an “undefiled, immaculate and stable present.”¹⁷⁶

The idea that our concerns about protecting the past and preserving our place into the future become more intense during times of technological change is not just a product of our current conditions. Stephen Kern writes about similar experiences in an earlier generation: “From 1880 to the outbreak of World War I a series of sweeping changes in technology and culture created distinctive new modes of thinking about and experiencing time and space.”¹⁷⁷ This was a generation that looked to the past for “stability in the face of rapid technological, cultural and social change.”¹⁷⁸ It was during this time that England, France and Germany all passed legislation creating organizations such as the National Trust “to look after places of historic interest or natural beauty.”¹⁷⁹

The temporal changes in the area of intellectual property can also be viewed in this light but admittedly only indirectly. On the one hand the changes to the copyright term seem most convincingly to be about profits, whether rent-seeking or efficient, and the need to harmonize U.S. law with the European copyright term (again for profit motivated reasons). And yet it was arguments and concerns about incentives, creativity, the sanctity of the creative product, the preservation of cultural heritage and the importance of protecting the expectations of heirs that tended to pave the way for expansion.¹⁸⁰ Disney was perhaps the most vocal special interest

¹⁷⁴ HARVEY, THE CONDITIONS OF POSTMODERNITY, *supra*. note 169 at 292.

¹⁷⁵ *Id.* at 298.

¹⁷⁶ Habermas, *supra*. note 167 at 5.

¹⁷⁷ STEPHEN KERN THE CULTURE OF TIME AND SPACE 1880-1918, 1 (1983).

¹⁷⁸ *Id.* at 36.

¹⁷⁹ *Id.* at 39.

¹⁸⁰ See testimony of Jack Valenti before the Senate Judiciary Committee: “A public domain work is an orphan. No one is responsible for its life. But everyone exploits its use, until that time certain when it becomes soiled and haggard, barren of its previous virtues.” Statement of Arthur R. Miller, *Commentary, Extending Copyrights Preserves U.S. Culture*, Billboard, 1/14/95 (included in the Congressional Record. A summary of all the Congressional testimony can be found at

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advocate of the CTEA and yet its prominence in the debate over such legislation did not focus on profits but rather concerns about defiling those quintessential American cultural icons, Mickey and Minnie.¹⁸¹

Despite the variety of situations governed by the rule against perpetuities, its primary association is with the passing patriarch, the testator who wants only to see that his lifelong efforts are not squandered and that those he loves are well-cared for. It is fundamentally about ties to family and community – those institutions, according to Harvey, that we are striving to reinvigorate. The whole idea of dead-hand control is to maintain some persistent presence among kin long after all physical traces have disappeared.

So while there are multiple plausible explanations for why temporal limitations are disappearing in some areas of property law, equally plausible is the idea that some areas are perceived as being more important to personal and cultural identity and as such are more susceptible to claims about the importance of permanence and preservation. Because of this perception, whether real or imaginary, we let our guard down and ignore the significance of boundaries and rules that have been put in place to protect broader social interests. We are quick and eager to buy into the story of the struggling self - the struggling creator, the patriarch who just wants to care for his family, the victims of ethnic and cultural genocide wanting to reclaim something of their own, the environmentalist or public advocate looking to preserve a little of the past for the generations of the future – because it resonates with our personal experiences and our own desire for stability.

In short if property law has been shaped by both subjective preferences and objective rules based on broader concerns about social utility, we might see the changes discussed as a leaning toward the

<http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/legmats/CTEALegislativeHistoryOutline.html>). See also Senate Judiciary Committee Report 104-315, 104th Congress, 2d Sessions, July 10, 1996 (detailing concerns about incentives for creativity and protecting claims for iconic works still popular and profitable).

¹⁸¹ Rarely is there a mention of the CTEA in the popular media without reference to the expiration of copyrights on Mickey Mouse and his friends. See, e.g. Linda Greenhouse, *Justices to Review Copyright Extension*, NEW YORK TIMES (February 20, 2002)(mentioning the concern about Mickey Mouse entering into the public domain). For more material see the documents and articles referenced at <http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/commentary.html> and <http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/legislative.html>.

subjective preference side of the equation. While it is plausible that this leaning stems from a growing acceptance of neoliberalism with its emphasis on absolute property rights, it is equally plausible that such changes simply reflect our yearning for enclaves of stability in the midst of ceaseless flux. Furthermore, this approach, unlike the neoliberal claims, helps explain the discrete nature of the temporal changes. While Epstein's approach would apply to all property interests, the arguments presented here help explain only the limited areas discussed above or other areas where we might recognize a significant cultural or personal element – areas where it makes sense to seek greater permanence and stability.

This isn't as far-fetched as it may sound. Emphasis on the subjective element of ownership, the importance of imagination and psychological attachments, has been a key element in property theory going back at least to Hume who stressed the importance of conventions in the construction of property rules.¹⁸² More recently Erving Goffman's work showing that even under conditions of the starkest deprivation, we strive to create property, enclaves of privacy and stable presence, often appears in discussions of property.¹⁸³ Margaret Jane Radin is probably the scholar most responsible for reinvigorating this aspect of property, drawing out the personality element in property and the importance of this element in the construction of legal rules relying predominantly on Hegel.¹⁸⁴ More recently, Peter Benson has argued for a subjective, "self-authenticating" element in principles of first occupancy.¹⁸⁵

Returning to Greenhouse's observation about time and law, we might say that the shift toward perpetual property reflects the "out of time" aspect of law – a desire for constancy rather than the excessive flux embedded in current conditions of the linear story. Surely the linear story is still the predominant story in property law. The notion of private property is fundamentally and intricately connected to our cultural obsession with progress, growth and economic development. But integral to the mythic status of law and property is the idea that there is always a permanent, unchanging and impenetrable entitlement.

¹⁸² Treatise on Human Nature, ("Of the origin and justice of property" and "Of the rules which determine property") Book 3, Part 2, Sections 2-3.

¹⁸³ Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates*, reprinted in *PERSPECTIVES ON PROPERTY LAW* (R. Ellickson, C. Rose and B. Ackerman eds. 1996).

¹⁸⁴ Margaret Jane Radin, *Property and Personhood*, 34 *STANFORD L. REV.* 957 (1982).

¹⁸⁵ Peter Benson, *Property* in *OXFORD HANDBOOK OF LEGAL STUDIES* (Peter Cane & Mark Tushnet eds., 2003).

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While a focus on the subjective element in property is not unusual I have used it primarily as a descriptive tool leaving the larger normative questions untouched. It is presented here as a plausible alternative to the other strong contender for understanding these temporal changes, the one suggested by Richard Epstein and actually argued for in temporal terms almost twenty years ago. While Epstein's approach would apply to all property interests, the arguments presented here help explain only the discrete areas discussed above. The recognition of a perpetual property category whose perceived function at least partially is to provide greater security in an ever-changing world, is arguably problematic not to mention easily co-opted by rent seekers. But as a reflection of the larger social and cultural responses to our current societal conditions it seems inevitable and as such worthy of further attention.

Conclusion

Legally cognizable property rights are culturally contingent. Both the scope and breadth of property rights has changed over time, driven by the shifting needs and desires of individuals within society as well as the erosion of some resources and the discovery of others. Ownership claims or rights to property have been temporally circumscribed because such limitations were necessary in agrarian/commercial societies but also because the temporal boundaries served to legitimate the institution of private property in terms that were socially cognizable. Such temporal boundaries reflected the limits of fairness and effective management of resources over time. In many ways these temporal limitations are more important than ever and they persist in important ways. But with changes in society, with the rapid pace and our constant state of flux, comes the possibility of changing temporal limitations in areas where we might logically seek refuge from the dizzy pace of life. Anthony Giddens remarks, "where tradition lapses, and lifestyle choice prevails, the self isn't exempt. Self identity has to be created and recreated on a more active basis than before."¹⁸⁶ It is in this desire to recreate something personal, meaningful and lasting that we can begin to see the cultural legitimation of perpetual property.

¹⁸⁶ ANTHONY GIDDENS, *RUNAWAY WORLD* 65 (2000).