Property in the Twenty-First Century

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"While 'property rights' under American law enjoy a reputation for permanence they are in fact more highly relative and more sensitive to changing economic factors and social opinion than most other legal concepts."[1] This is a theme that I have been fond of repeating in a series of law review articles,[2] casebooks, and textbooks. A dictum, engraved in stone on one of the University of Illinois' buildings, proclaims: "The Past is Prologue." The facade does not enlighten the viewer by indicating to *what* the past is prologue, but presumably it is the future. To paraphrase Professor C. Vann Woodward, Sterling Professor Emeritus of American history at Yale: Law (he said history, of course) is an indispensable mediator "between man's daydream of the future and his nightmare of the past, or, for that matter, between his nightmare of the future and his daydream of the past."[3] There is some irony in this because Professor Woodward then recalled Paul Valery's melancholy dictum that, "The future, like everything else, is not what it used to be."

Property law has quite a prologue for the Anglo-American lawyer and most of its devotees are well-steeped in the feudal origins. Perhaps too well, since we tend to find ourselves locked in the interstices of ancient dogma. Whether our vision of the twenty-first century conjures up daydreams or nightmares will depend to considerable extent on our own natures. Are we basically pessimists or optimists? The nightmares of the former will inevitably mirror T. S. Eliot's poem, *The Rock*, in which the poet described the wind of the future blowing over a desolate wasteland. "And the wind shall say here were decent, godless people / their only monument the asphalt road and a thousand lost golf balls." The asphalt roads and the lost golf balls we shall surely have, but I am an optimist (most days) and my daydream, seen through a glass darkly, has its more cheerful side. I foresee a property law more nearly fashioned to serve the needs of a relatively free people, with less reification of the "thing" (land or chattel) and more emphasis on the rights of society as a whole. The winds of doctrine are not all blowing in that direction, but enough of the signs are emerging so that I, for one, do not despair.

Simplicity versus Complexity

Property law has always been balanced on the razor's edge of

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1. NETHERTON, CONTROL OF HIGHWAY ACCESS 80 (1963).

2. *E.g.*, Cribbet, *Condominium—Home Ownership for Megalopolis?*, 61 MICH. L. REV. 1207 (1963); Cribbet, *Changing Concepts of Land Use*, 50 IOWA L. REV. 245 (1965); and Cribbet, *Some Reflections on the Law of Land—A View From Scandinavia*, 62 NW. U.L. REV. 277 (1967).

3. Woodward, *The Uses of Adversity*, 8 HUMANITIES 1 (1978).

simplicity versus complexity, free alienability versus family, corporate, or governmental control. The dead hand that manipulates from beyond the grave is familiar to generations of law students; the bureaucratic red tape that entangles Blackacre in a myriad of land use and environmental controls is becoming equally so. What primogeniture, the entailed estate, and strict settlement were to common-law England, the comprehensive plan and the environmental impact statement are rapidly becoming to modern America. I do not wish to stretch the analogy too far, but there is evidence that the seeds of the past are being fertilized by too great a reliance on law as regulator of land use in the name of the greater social good.

The landed gentry, with aristocratic flair, tied up the English estates and kept the common man from owning his piece of turf, dooming him to the status of tenant with no real stake in the future of society. The leaders of the infant American republic set about abolishing those indicia of the ancient regime—primogeniture, fee tail, and others—thus enabling each man to purchase his own fee simple absolute.[4]

Today, the *res* is rather freely alienable, but the "kernel of enjoyments,"[5] covered by the shell of title, is shrinking. In this sense, the state has replaced the landed gentry and is creating a status for land ownership which contains echoes of the past. The bundle of rights that the individual owner receives may, in many cases, be little more than the non-freehold estate of our ancestors. The state is the landlord in a peculiar sense, and this has profound significance for the twenty-first century. This perspective is best understood when viewed from Scandinavia. Stockholm owns the land within the city limits, and beyond, and leases it to the individual.[6] Although the latter receives a long term lease it is not too different from the American fee simple, with the rent approximating taxes. This development in American law is either "good" or "bad," depending on your point of view, but it will clarify our thinking if we see it with the blinkers off.

Alienability—The Trend Toward Simplicity

While property law contains many strands, this short essay concentrates on two principal threads as it analyzes the future—alienability and land use. Herein lies a dichotomy. Land transfer is moving toward simplicity while land use heads toward ever greater complexity. I foresee, and view favorably, a much simpler system of land transfer in the next century. Land remains static—the great immovable—but people do not.

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4. For a vivid account of one statesman's efforts, see 1 N. SCHACHNER, THOMAS JEFFERSON 146 (1951). Incidentally, Schachner uses an interesting description of the fee tail estate when he writes: "The real title was in the biological family and not in the temporary individual." *Id.* at 146.

5. "Question any man, and he will yield the opinion that the sole reason for owning property is to use or (which is enjoyment in another form) to sell it. He will agree that title is only a shell that covers and protects a kernel of enjoyments." Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938).

6. *See* Cribbet, *Some Reflections on the Law of Land—A View from Scandinavia*, 62 NW. U.L. REV. 277 (1967).

Their very mobility, which will undoubtedly continue to increase under the impact of speedier and cheaper means of transportation and access to job markets, will cause them to demand a responsive mechanism for property transfer. The legal technicalities will become less like Professor McDougal's "aboriginal, ritualistic clambake"[7] and will resemble much more the sale of a chattel, such as an automobile or a boat. The lawyer's role will probably be less important, except in the major transactions, and much of our current learning will become another item for the museum. Even transfer on death will become a less cumbersome process with a reduction in both the time lag and the legal expense. Lawyers, of course, will not starve; they will simply turn their talents to other matters in the property field and outside it.

I have some confidence in this prediction because the trend is so clearly underway and the forces are so inexorable. I see no American revival for the Torrens system, unless we colonize the moon, Mars or some other planet and decide to utilize the best method of land transfer available to the English-speaking world, but I do foresee a simplification of our present methods and a universal use of computerized techniques which will give us instantaneous access to the needed data. This, coupled with various types of title insurance—lawyer cooperative, proprietary company, and others—will provide the consumer with a degree of title security hitherto unknown. The scope of that title may be another matter, however.

There may not be a federal law of land, the states are too entrenched for that even in the twenty-first century, but the state laws will become more uniform and the diversities in this area will tend to disappear. The National Conference of Commissioners on Uniform State Laws has already adopted several key acts—the Uniform Land Transactions Act, the Uniform Simplification of Land Transfers Act, and the Uniform Condominium Act—which contain the nucleus of this development. True, they have yet to be adopted by the states, but these, or similar statutes, will find their place beside the Uniform Commercial Code as the legal arbiters of the new simplicity. Merchantability of title acts and shortened and improved statutes of limitation, as long suggested by Professor Paul Bayse,[8] will end the laborious search for "fly specks" all the way back to the patent deed. The archaic defeasible fees will either be abolished as a matter of social policy (which England has already done) or be so truncated by short statutes of limitation that they will cause few title problems. Only the current, active claims against the land will survive, and they will be so easily discoverable by modern data retrieval methods that the key problem will be to see that they are satisfied before the title is transferred. As a teacher of real property, I shed a tear for the demise of

7. McDougal, *Title Registration and Land Reform: A Reply*, 8 U. CHI. L. REV. 63, 65 (1940).
8. P. BAYSE, CLEARING LAND TITLES (2d ed. 1970).

these and other hoary chestnuts, such as privity, the Rule in Dumpor's case,[9] and covenants running with the land at law, but then I shall not be around in the twenty-first century to ply my trade on each new generation of unsuspecting students.

What will be the fate of that capstone of property law, the Rule Against Perpetuities? Perhaps it will be around not only in the twenty-first century but in perpetuity. After all we can overdo simplification, and we need to retain some vestige of our learned profession in order to confuse the engineers. In any event, out of deference to Professors Casner and Powell, I think we should all wait and see!

Land Use Controls—The Trend Toward Complexity

Since many people tend to speak or write with the greatest assurance in areas where they have the greatest doubts,[10] I should proceed at this point with maximum conviction. I *am* certain that an old truth is at work in the area of land use regulation: the greater the demand for a scarcity, the more complex the rules which allocate its use. This is particularly demonstrable in water law. In the Eastern states, with ample rainfall, the riparian doctrine prevails and the law is relatively simple (or even non-existent); in the Western states, with arid conditions, prior appropriation reigns and the law is far more technical and complex. To the extent that water shortages and pollution problems increase in the East, it is inevitable that water law will become more complex. The principle at work here applies with full force in the regulation of land use, particularly in urban areas.

Will this trend toward complexity continue so that by the twenty-first century land use regulations will replace title problems as grist for the lawyer's mill? I suspect that it will and that the individual land owner will be treated more as a life tenant who holds his estate in trust for the benefit of future generations rather than as one seised of a free simple absolute in the current sense. Here again, a common-law analogy appears. The life tenant was answerable to the remainderman or reversioner for waste, and the courts policed his use of the land to see that the freehold was not impaired. Substitute the state for the holder of the future interest and the various police power controls for the remedy of waste and the picture is complete. This substitutes the social policy of the state for the relatively simple rules of the common law and allows the government, rather than the economics of the market place, to determine the uses which can be made of the land.[11]

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9. 4 Coke 1196, 75 Eng. Rep. 1110 (K. B. 1603).

10. The French poet Alain said: "Doubt follows certainty as closely as a shadow."

11. Of course, there are counter doctrines at work that argue for a return to the earlier approach. *See, e.g.*, B. SIEGAN, LAND USE WITHOUT ZONING (1972).

The issue of the content of a fee simple absolute lies at the heart of this development. It has long been assumed that land can be *regulated* under the police power of the state, without compensation, since the public welfare is involved. If, however, the land is *taken* for a public purpose or public use, fair market value must be paid due to constitutional guarantees. When the regulation becomes so extreme that the landowner is deprived of virtually all economic use and is left only with the duty to pay taxes, most courts have held that the police power controls were invalid. The border between regulation and taking is not a thin red line but a broad, gray area with the results always in doubt. Moreover, the decision has traditionally been an either/or proposition, and payment is made in full or not at all. Professor John J. Costonis has argued brilliantly for a new approach to this dilemma, which he calls the accommodation power.[12] His analysis of the problem is sound but his solution would be difficult for the courts to apply, and I suspect we will continue in the old mold, with some alleviation of the landowner's difficulties through the doctrine of inverse condemnation.[13]

If I am correct, the content of the fee simple absolute will remain a critical problem in the twenty-first century. The state will continue to believe that it must regulate for the benefit of present and future citizens, and I suspect that population growth, an ever-increasing technology, and a stable land supply will increase the pressures for state intervention. At the same time, fiscal problems will make it even more difficult for the state to pay for what it takes (regulates). Since, in the final analysis, property is what the law says it is,[14] and the state makes the law, it is likely that the fee simple will be gradually redefined to cut down on the private rights that previously constituted the principal portion of the bundle of sticks.

As long as the fee simple absolute is viewed as a cluster of essentially private rights, the state cannot interfere too much with these rights without providing substantive due process; that is, if the state "takes" an easement of access or, under the guise of regulation, reduces the private rights to the vanishing point, compensation must be paid. But if the law comes to view the owner as holding an interest more akin to a life estate, then society's rights may be seen as already in the public domain, and no taking will be

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12. Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975). Professor Costonis has done seminal thinking in this entire area, including work on transfer development rights. *See* Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L. J. 75 (1973). *See also* J. COSTONIS, SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKETPLACE (1974).

13. "Inverse condemnation is the popular description of an action brought against a governmental entity having the power of eminent domain to recover the value of property which has been appropriated in fact, but with no formal exercise of the power." Thornburg v. Port of Portland, 233 Or. 178, 180, 376 P.2d 100, 101 (1962).

14. "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases." J. BENTHAM, THEORY OF LEGISLATION 113 (1908).

involved. Thus, the principal requirement may come to be procedural due process, and if the proper procedure—for example, notice and public hearing—[15] is followed, the courts may be reluctant to interfere under the old rules. Already this trend seems to be in evidence, and it could be the wave of the future. By the twenty-first century, land may be viewed more as a social commodity with the state being relatively free to control land use to protect the environment, preserve the natural resources, or conserve the shore lines. This would be in accordance with the current English position in which the landowner must convince the planning authorities before any new development can proceed. This is a reversal of the historical view that starts with maximum private rights that must be taken from the individual. It leaves the "owner" in the position of having the burden of proof if he is to improve his acre in accordance with his personal whim. Of course, it also redefines the nature of ownership even if the term fee simple absolute remains the symbol of the highest quantum of rights which the law allows.

I find it difficult to be optimistic about this growing complexity and the corresponding diminution in private decision-making about land use. A beneficient, all-wise state may make better decisions about the social good than individuals can make, but there is little in human history to indicate that this is so. Bureaucratic decision-making has its own flaws, and they are readily apparent to those who have had experience with the process.[16] Nonetheless, I am predicting what property law will be like in the twenty-first century, not trying to fashion a system more to my own liking. If this is the direction we are moving, then the law schools have an even greater obligation to educate statesmen of property who can help fashion a reasonable legal process that will give the maximum possible protection to the individual while furthering the social goals implicit in a wise use of our greatest natural resource—land.

Disparate Threads in the Crystal Ball

Property law encompasses much more than the transfer of ownership and land use. I have concentrated on those two strands of the seamless web because this must be a short essay, not a major law review article, and the changes to be expected in those two areas are likely to be the most significant developments for the new century.

Personal property law seems relatively stable, now that the Uniform Commercial Code has swept the nation. Terrified foxes and lost and found articles will undoubtedly continue to plague first-year law students, but I doubt if the law will provide any more clear-cut answers then than

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15. For a good analysis of the requirements of procedural due process in the land use area, see Mr. Justice Stevens' dissent in City of Eastlake v. Forest City Enterprises, Inc. 42 U.S. 668 (1976).

16. The author spent six years on the Champaign Plan Commission. He was enlightened but not encouraged by the experience.

now. *Inter vivos* gifts of property interests will still rise or fall on the concept of delivery, but courts will probably continue to disagree whether there must be a manual tradition or only a clear manifestation of intent with some "delivery peg" on which the judge can hang his hat.

The doctrines of estates in land will be studied for their historical significance and their pre-eminent value as tools of legal analysis, but they will have even less effect on actual decisions. Concurrent estates will still be in vogue except that the tenancy by the entirety will vanish into well-deserved obscurity under the assault of women's rights. In fact, the last vestiges of property law discrimination against women and racial or religious minority groups will join curtesy and dower as unread footnotes in books on legal history. The Statute of Uses will survive as an introduction to trust doctrine, and that body of law will become more important than ever as individuals free themselves from the burden of managing their own wealth and rely increasingly on their privileged role as *cestuis que use*. The Statute of Wills shall always be with us, but the probate of an estate will join the *inter vivos* transfer as a simpler, cheaper, faster transaction in the bright new world.

The non-freehold estate will come into its own. Gone will be Mr. Justice Holmes' aphorism; "But the law as to leases is not a matter of logic *in vacuo*; it is a matter of history that has not forgotten Lord Coke."[17] Lord Coke and ancient property dogma *will* be forgotten as contract principles prevail and the tenant assumes a protected status as an equal to the landlord. The diminishing fee will be further eroded as the lease becomes more like "true" ownership and, at times, it will be difficult to say who has the greater bundle of sticks, the landlord or the tenant. Even today, the long-term leasehold is a major form of land holding with great advantages in terms of financing, land use control, and investment opportunities. Tenants are harder to evict, and courts are recognizing that the leaseholder has a stake in his non-freehold estate that may be as great as that of the lessor. Sophisticated drafting and negotiation are required for the protection of all parties to the transaction, and this phase of property law will assume ever greater importance for the practitioner.

The rights in the land of another (easements, profits, and equitable servitudes) and the so-called natural rights to the support of land, freedom from nuisance, air and water rights, and others, will assume increased importance as individuals attempt to control their own fate in a world more dominated by governmental paternalism. The "private law of the tract" that developed through the use of protective covenants will become more sophisticated but will continue to yield to the public conception of how land should be used. Water law, like land use regulations, will

17. Gardiner v. Butler & Co., 245 U. S. 603, 605 (1918).

become more complex, and the riparian doctrines will fade into permit systems modeled on prior appropriation doctrines. Mineral law, too, will become more a matter of public regulation as private rights play a lesser role in the decision-making process. Weather modification will probably become a scientific reality and complex rules will be needed to handle the resulting legal problems. Regional compacts will play a role similar to drainage districts since judge-made, ad hoc decisions will be inadequate to deal with so vast a problem. Such perennial favorites as the Statute of Frauds, covenants for title, and contract doctrines relating to vendor and purchaser will still provide some grist for the litigation mill, but they will have little consequence in the broader scheme of the law.

Conclusion

This short essay on property law in the twenty-first century has attempted the impossible. Law reflects society more than it molds it. Law is a principal ingredient in any civilized state, but many other elements are also involved and a successful seer would have to understand, and predict, the shape of those elements as well. An all-out atomic war could return society to the chaos of the Middle Ages and doctrines of feudalism with the obeisance of the weak to the strong and could make ancient doctrine more relevant than anything I have predicted. In that case, society would once again have to struggle up from the depths and fashion a law to provide *some* order so that the race could survive. But I am an optimist, as I said before, and I prefer my daydream of the future to some one else's nightmare of total holocaust.

Fortunately, in the crystal-gazing business an exact photograph is not required; this essay is more in the style of the French impressionists.[18] If these comments reflect, even in an obscure way, one man's vision of the future they may serve the purpose of the planners of this symposium. They may also encourage others, at least in their private thoughts, to dream of the new century and plot their own fears and hopes for the unknown future.

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18. I am reminded of John Ruskin's favorable criticism of the English impressionist, Turner, as opposed to more realistic artists: "A photograph is no more true than an echo."