PERPETUAL PROPERTY

Sarah Harding[*]

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* Associate Professor, Chicago-Kent College of Law. This Article was primarily written during a research fellowship at the Research School of Social Sciences, Australian National University. I am grateful for the comments of my colleagues and participants in workshops there and at Chicago-Kent—in particular Katharine Baker, John Braithwaite, Peter Cane, Peter Drahos, Kevin Gray, Steve Heyman, Imelda Maher, Colin Scott, Jane Stapleton, and Adrienne Stone.

I. INTRODUCTION

Property interests, unlike contracts, tend to adhere to a limited set of specific forms—the *numerus clausus* principle.[1] Much scholarship in the past decade has focused on this distinction in an attempt to understand both the nature of and the reasons for the limitation on property forms within the common law.[2] While these limitations on form are central to the common law, equally significant are the temporal limitations embedded in property law—property interests typically exist for a specific time period. Even the fee simple, a property interest of supposedly infinite duration, is limited in time by several 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 quirky rule against perpetuities. But recently, many of these limitations have begun to disappear. In several discrete but significant areas of property law, temporal limitations are expanding 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,[4] limitations on the duration of some property interests are disappearing, giving rise to a growing number of perpetual property interests.

This Article explores the emergence of longer-lasting property interests in a number of discrete areas of property law: the longevity of servitudes in historic and environmental protections, the ever-growing timespan of intellectual property rights, and the disappearance of the rules against perpetual interests. While the demise of these and other temporal limitations deserves recognition itself and will be the focus of a major part

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1. *See* Thomas W. Merrill & Henry E. 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* Bernard Rudden, *Economic Theory v. Property Law: The* Numerus Clausus *Problem, in* 3 OXFORD ESSAYS IN JURISPRUDENCE 239, 239 (John Eekelaar & John Bell eds., 1987); Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The* Numerus Clausus *Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373, 373–74 (2002); Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1166 (1999); Merrill & Smith, *supra* note 1, at 3.

3. JESSE DUKEMINIER ET AL., PROPERTY 240–74 (6th ed. 2006).

4. One exception to this, a relative newcomer to the law of property in the United States, is affirmative obligations attached to the ownership of land. Rudden, *supra* note 2, at 242–43.

of this Article, my primary interest is whether these changes tell us something about shifting cultural attitudes to our system of private property. If, as a number of prominent sociologists have argued, an exploration of social attitudes toward time is indispensable to an understanding of cultural conditions, then exploring temporal limitations in property law will presumably help us better understand what Margaret Radin has called "the Cultural Commitments of Property."[5] The emergence of potentially longer-running property interests, with their embedded expectations of stability and permanence, is particularly compelling, considering that it has occurred at a time when speed, flexibility, and impermanence are dominant features of our social conditions. In short, the emergence of perpetual property within the larger context of the twenty-first century and "time-space compression" is nothing short of paradoxical.

Part II of this Article 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 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 . . . ."[6] The primary contention in this Part is that the temporal realities in private property are essential to the inherent conditions and broader social expectations in a commercial or agrarian society.

Part III 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 Part will look 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 repatriation claims. Most of the changes discussed in this Article 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 some private property interests within common-law systems.

Part IV 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

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5. MARGARET J. RADIN, REINTERPRETING PROPERTY 168 (1993).
6. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 87 (1985).

Article—explanations that may have little to do with the temporal limitations themselves. For example, the disappearance of the rule against perpetuities is most likely a result of changes to the tax code, and the increasing length of copyrights is a consequence 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, considering these changes together might reveal important underlying shared characteristics justifying the proposition of an emerging category in which our collective yearnings for stability manifest themselves in a desire for longer-lasting interests. In the final analysis, I argue that this increasing collective desire for permanence—not the supposedly fundamental and absolute nature of property rights, as others have argued—may help explain a preference for perpetual interests.[7]

II. TIME AND PROPERTY

A. *General Conceptions of Time in Law*

At the most abstract level, the law operates within specific conceptions of time. Its temporal representations legitimate it as much as 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 is the law. 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.[8] On the one hand, it "reflects perfectly a logic of linear time."[9] The law depends on past articulations through the doctrine of precedent not merely as substantively persuasive legal ideas but as statements benefitting from time itself.[10] Common-law courts depend on a pervasive "traditionality"[11] in decision-making—the past is relevant "for

7. *See, e.g.*, Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 694–96 (1986) (exploring the common-law rule of absolute ownership).

8. *See* Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 YALE L.J. 1631, 1631–34 (1989).

9. *Id.* at 1635–40 (advancing the view that the reception of linear time in the West was the product of Christianity, but was subsequently secularized in medieval times).

10. *See id.* at 1640.

11. Martin Krygier, *Critical Legal Studies and Social Theory—A Response to Alan Hunt*, 7 OXFORD J. LEGAL STUD. 26, 36 (1987).

its own sake."[12] The circular reasoning is countered by the linear conception of reform. While constantly embedding itself in the past, law also expresses itself as an engine of progress. Law as reform, or as a constantly improving set of ideas, has been a pervasive view since the great reformers of the late eighteenth century—Jeremy Bentham and John Stuart Mill.[13] In this way, law and the legal resolution of disputes string together the past, present, and future, perfecting representations of linear time.

On the other hand, Greenhouse argues "the common law also involves larger claims beyond linear time."[14] While its linear representation and dependence on the possibility of change suggest incompleteness, at any given moment the common law "represents a totality."[15] 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).[16]

It is the representation of these two conceptions of time, Greenhouse argues, that generates the mythic dimension of law and sets it apart from other dispute-focused, norm-creating institutions.[17] By being both "in time" and "out of time," the law is capable of sustaining its mythical status and its connected claims to neutrality.[18]

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 and the importance of rationalizing legal opinions by resorting to past decisions,

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12. *See, e.g.*, Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1068 (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." *Id.*

13. This view is best captured in Bentham's critique of Blackstone's Commentaries: *A Fragment on Government: Being an Examination of What is Delivered on the Subject of Government in General in the Introduction of Sir William Blackstone's Commentaries* (1776).

14. Greenhouse, *supra* note 8, at 1640.

15. *Id.*

16. *Id.*

17. *See id.*

18. *Id.*

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.[19]

Greenhouse was writing broadly about the common law and its legitimation rather than specific substantive areas within the law.[20] But we can borrow her notion of the temporalities of the law to explore specific substantive areas.[21] If, as Greenhouse wrote, the law engages specific temporal logics to legitimate itself within the larger culture, do specific areas of law represent their subject matter within a conception of time?[22]

B. *Time and Property*

As a subset of the common law, property depends on these broad and competing conceptions of time. Additionally, property 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,"[23] 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."[24] In such accounts, property as an institution is explicable only through a series of events emerging over time—a "story" in Rose's terminology[25]—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, an assumption of progress over time is essential to a diachronic explanation of the institution

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19. *See* Richard H. S. Tur, *Time and Law*, 22 OXFORD J. LEGAL STUD. 463, 470–72 (2002).

20. *See* Greenhouse, *supra* note 8.

21. *See id.* at 1631.

22. *See id.*

23. *Id.* at 1650.

24. CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 26 (1994).

25. *Id.*

of private property. 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 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 effort,[26] and in this sense, property emerges like a moral from a cautionary tale. On the other hand, Margaret Radin notes that "the temporal dimension is irrelevant to the Lockean theory of property" because it concerns itself with only the precise moment of acquisition, ignoring the larger "temporal dimension of human affairs."[27] 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."[28] Thus, property theory can be seen as an instance of law's broader mythic dimension—both embedded in the constant flux of society, while simultaneously presenting itself as existing for all times.

If we move from the structure of property theories to the theories 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 has priority over all others.[29] Robert Sugden argues that "first come, first served" is a primary convention in both formal and informal justifications of private property.[30] To this we can add the intent of "lasting control"[31] 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 an intent to exercise "lasting control" in ways clearly recognizable to others is more likely to succeed in their property claim. As with the importance of diachronic explanations for the development of private property, the ubiquity of first-in-time theories reinforces the importance

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26. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 303–04 (P. Laslett rev. ed. 1960) (1690) (discussing the assumptions involved in ascertaining the derivation of man's original rights to property ownership).

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

28. *See* ROSE, *supra* note 24, at 26.

29. *See* Epstein, *supra* note 7, at 669–74 (detailing the importance of the first in possession or "first come, first served" principle in property law).

30. *See* ROBERT SUGDEN, THE ECONOMICS OF RIGHTS, CO-OPERATION AND WELFARE 87–97 (1986).

31. *See* Rose, *supra* note 6, at 87 ("[T]he common law of first possession . . . require[s] an unequivocal delineation of lasting control so that those objects can be managed and traded.").

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, ninety-nine years, a month, etc.[32] The fee simple, an interest of "potentially infinite duration,"[33] fits well with and 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 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 myth,[34] 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 be used to quash those very same interests. Arguably, this is the whole point of the various "rules furthering marketability."[35]

To maintain clarity in ownership and free alienability, various mechanisms in the common law limit property interests to a specified time period. The most infamous and direct temporal constraint is the rule against perpetuities, discussed below. Legislatures have also imposed time limitations, predominantly through statutes of limitations. Based on little more than the passage of time, these restraints effectively terminate some property interests while recognizing others.[36] They can be generic, like

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32. WILLIAM BLACKSTONE, 2 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, 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, months, or days: or, lastly, it is infinite and unlimited, being vested in him and his representatives forever.").

33. HERBERT HOVENKAMP & SHELDON F. KURTZ, THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY 94 (5th ed. 2001).

34. *See* Kevin Gray & Susan F. Gray, *Private Property and Public Propriety, in* PROPERTY AND THE CONSTITUTION 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."); LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 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.").

35. *See* Dukeminier, ET AL., *supra* note 3, at 240–74.

36. 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, 2471 (2001), which ultimately isolated the endowment effect or loss-aversion theory as the most plausible justification for adverse possession.

legislation regarding adverse possession, or specific, like marketable title acts terminating stale claims[37] or limitations on the duration of certain defeasible interests.[38]

C. *Time and Boundaries*

The temporal constraints in property law are consistent with the many other ways property depends on boundaries. The most significant "boundary" in property is the limited number of carefully defined interests that are cognizable and enforceable as property interests—the *numerus clausus* principle.[39] 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")[40] and anti-commons ("too many rights of exclusion").[41] Heller argues that although the various metaphors for conceptualizing property—particularly the physical thing and 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.[42] According to Heller, rules limiting "intertemporal fragmentation," such as the rule against perpetuities, are key examples of such efficiency-producing boundaries.[43]

While Michael Heller and others firmly ground their observations concerning the *numerus clausus* in an efficiency framework[44]—specifically the role of law in protecting and encouraging the productive use of resources—other accounts of private property recognize the relevance of boundaries in a broader social and cultural context. At a basic level, Carol Rose argues that physical boundaries, such as the dilapidated fence that graces the cover of her collection of essays,

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37. *See*, *e.g.*, UNIF. MARKETABLE TITLE ACT, prefatory note (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.").

38. *See, e.g.*, 765 ILL. COMP. STAT. ANN. 330/4 § 4 (West 2008) (limiting possibilities of reverter and rights of entry or re-entry to forty years).

39. *See* Merrill & Smith, *supra* note 1, at 3–4.

40. Heller, *supra* note 2, at 1194.

41. *Id.*

42. *Id.* at 1187–94.

43. *Id.* at 1176–82. *But see* Rudden, *supra* note 2, at 239 (questioning efficiency-based justifications for the standardization of property interests).

44. Heller focuses on antifragmentation as the key efficiency aspect of the *numerus clausus*. *See supra* notes 40–43 and accompanying text. Merrill and Smith on the other hand, focus on the standardization/efficiency function. *See generally* Merrill & Smith, *supra* note 1. Hansmann and Kraakman, also writing in this area, focus on the verification/efficiency function. *See generally* Hansmann & Kraakman, *supra* note 2.

are essential to the declaration, "This is *mine*."[45] 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 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 Rose argues, successful claims to ownership depend at least partially on actions evidencing an intention of long-term commitment rather than a temporary or itinerant interest, at least within the agrarian and commercial societies from which our system of private property evolved.[46]

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. Itinerant use might be the basis of a 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.[47] While claims that look too uncertain are shunned in the common law, so too are claims that appear to extend beyond the reasonable limitations of individual control. Built into our system of private property is the expectation that owners will be in control of and committed to their property, but not beyond that which is useful in a commercial society.

If we look at this 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 modern society.[48] It elevates rules that encourage flexibility and a quick response to changing circumstances. In short, given the pace of change, it would be irrational to allow individuals to retain property interests 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. If this is the case, then how should we understand the erosion of these temporal limitations? Does changing temporal limitations in property reflect changing assumptions

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45. *See* ROSE, *supra* note 24, at 1.

46. Rose, *supra* note 6, at 87.

47. Stuart Banner, in his discussion of property law and the colonization of Australia, notes that "[i]n the late eighteenth century, many 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 & HIST. REV. 95, 102 (2005).

48. ANTHONY GIDDENS, THE CONSEQUENCES OF MODERNITY 6 (1990).

about the role of property in our society? If these temporal logics are shifting in some areas, can we take this to be an indication of a larger cultural or societal shift in expectations about our relationship with some forms of property interests?

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

III. 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 while nonetheless sharing the same temporal peculiarities as the other examples.

1. The Death of the Rule Against Perpetuities

Ask any law student about their most unpleasant classroom experience and chances are she will point to the rule against perpetuities. With its awkward method of time measurement simultaneously depending 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,[49] confounding the plans of those who wish to control their property into the future.[50] But peculiar as it may be, the rule against

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49. The Irish Law Reform Commission Report on the question of the abolition of the rule suggests that the rule acts as a "legal nuisance." LAW REFORM COMM'N, REPORT ON THE RULE AGAINST PERPETUITIES AND COGNATE RULES (LRC 62-2000) §4.16, at 52 (2000), *available at* http://www.lawreform.ie/publications/data/lrc111/lrc_111.pdf [hereinafter LAW REFORM COMM'N REPORT]. The difficulties associated with the rule against perpetuities are captured in the title of Barton Leach's article, *Perpetuities: Staying the Slaughter of the Innocents*. *See* W. Barton Leach, 68 L.Q. REV. 35 (1952).

50. *But see* A.W.B. Simpson, *Land Ownership and Economic Freedom*, *in* THE STATE AND FREEDOM OF CONTRACT 13, 37 (Harry N. Scheiber ed., 1998) (arguing that the primary function

perpetuities has been around for more than 400 years and is one of the classic rules of the common law.

The "modern" rule traces back to the Duke of Norfolk's Case, 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.[51] From there the rule eventually became: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[52] 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.[53]

The rule was crafted to prevent landowners from controlling their property too far into the future,[54] thus limiting "dead hand" control of property.[55] While the rule primarily focused on land, it came to encompass all interests, real or personal, legal or equitable.[56] It "strike[s] a balance between the wishes of the dead and the desires of the living with respect to the use of wealth."[57] The justifications for this limitation are frequently voiced in economic terms.[58] Along with a collection of other limiting rules, the rule against perpetuities came to embody the common law's support of the free market. Judge Posner, for example, writes:

> 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.[59]

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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).

51. 22 Eng. Rep. 931 (Ch. 1681).

52. JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

53. For further discussion of the rule and its many trappings (literally), see generally *id.*, the classic text discussing the rule.

54. *But see* Simpson, *supra* note 50, at 13.

55. *See* LAW COMM'N, THE RULES AGAINST PERPETUITIES AND EXCESSIVE ACCUMULATIONS (HC 579, Rep. No. 251), §1.9, at 4 (1998), *available at* http://www.lawcom.gov.uk/docs/lc251.pdf [hereinafter LAW COMM'N REPORT].

56. *Id.* § 11.1, at 5. The *Duke of Norfolk's* Case was itself about a leasehold, an interest traditionally considered more personal than real property. *See supra* note 51 and accompanying text.

57. 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 (2000).

58. *E.g.*, Gallanis, *supra* note 57, at 284.

59. 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* 3 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 85 (5th ed. 1942).

More recently, Michael Heller states, "[T]he [rule] conclusively presumes a point after which the social cost of fragmentation exceeds private gains."[60] While the marketability gains achieved through the rule may both justify and explain its resilience in the common law, many have observed that this goal fails to justify its application to trusts.[61] Stewart Sterk writes that "[s]o 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."[62]

The balance between present and future, presumably achieved through the rule, is also justified in terms unrelated to efficiency. For example, a recent UK Law Commission Report emphasized fairness to future generations as the primary basis for retaining the rule—albeit in a reduced and reformed state.[63] This fairness justification is particularly relevant in the application of the rule to interests created in beneficiaries under a trust, given that concerns about the free alienability of property, in that context, are simply no longer relevant.[64]

Despite these justifications and its long and infamous career in common law, the rule looks like it is finally on its way out. Legislative alterations to the rule's operation have slowly worn down its sharp edges.[65] Most significantly, legislation in some states has altered the peculiar responses of the rule to remote possibilities by initiating a "wait and see" approach,[66] and simply changing the "perpetuity" term to a fixed eighty or ninety years.[67] The Uniform Statutory Rule Against Perpetuities, for example, provides that a non-vested property interest will remain valid so

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60. Heller, *supra* note 2, at 1180.

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

62. *Id.*

63. *See* LAW COMM'N REPORT, *supra* note 55, § 1.9, at 4–5.

64. HAROLD A. J. FORD & WILLIAM A. LEE, PRINCIPLES OF THE LAW OF TRUSTS 34 (3d ed. 1996). *But see* Sterk, *supra* note 61, at 2110–117 (arguing that the fairness justification does not work well when dealing with equitable interests held in trust, but going on to note that the rule against perpetuities does function to prevent the creation of trusts that would "generate agency costs and externalities without generating commensurate benefits.").

65. *See, e.g.*, 765 ILL. COMP. STAT. ANN. 305/4 § 4 (West 2008). Illinois legislation provides a good example of the types of changes that have been enacted. Legislation 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 twenty-one. More generally, it has limited the harsh application of the rule by implementing a "wait and see" approach. *Id.*

66. *See, e.g.*, UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(a)(2) (1990). 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.REV. 1303, 1306–07 (2003).

67. *Id.*; *see also* RICHARD R. POWELL, POWELL ON REAL PROPERTY § 71.02(2)–(3) (Michael Allan Wolf ed., rev. vol. 2008) (discussing the evolution of the rule).

long as it actually vests or terminates within ninety years.[68] Most of these changes soften the rule, thus allowing more settlements to remain intact. However, many jurisdictions now limit the rule, or even abolish it altogether.[69] In an article titled *The Death of the Rule Against Perpetuities, Or the RAP has no Friends—An Essay*, Joel Dobris comments that "society does not seem to care anymore about perpetuities . . . ."[70] 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 good reasons for abolishing the rule—it is antiquated,[71] complicated,[72] ineffective, harmful, and unfair.[73] Many of these arguments are not new. Strong opposition to continuance of the rule was voiced at least fifty years ago.[74] And yet the movement to abolish it seems to have picked up steam in just the last few decades. Stewart Sterk argues that the sudden race between U.S. 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.[75] Sterk states: "Lawyer self-interest joined tax avoidance as a reason to abolish the Rule."[76] Even jurisdictions retaining the rule have nonetheless considerably limited its application.[77] The consequence has been a steep rise in the creation of

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68. *Id.* The Uniform Statutory Rule Against Perpetuities Act is also incorporated in the Uniform Probate Code. *See* UNIF. PROBATE CODE § 2-901(a)(2) (1997).

69. For example, the rule has been abolished or severely limited in its operation in Alaska, Arizona, Delaware, the District of Columbia, Florida, Idaho, Illinois, Maine, Maryland, Missouri, Nebraska, New Jersey, Ohio, Rhode Island, South Dakota, Virginia, Wisconsin, and Wyoming. Dukeminier & Krier, *supra* note 66, at 1313–14. For a full discussion of the legislative changes in these jurisdictions see *id.* at 1311–16.

70. 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, 603–04 (2000).

71. *See* Leach, *supra* note 49, at 39 ("The Rule persists in personifying itself to me as an elderly female clothed in the dress of a bygone period . . . .").

72. *See* Dobris, *supra* note 70, at 656.

73. *See* LAW REFORM COMM'N REPORT, *supra* note 49, §§ 4.14–.19, at 51–53 (discussing all of these objections, and more).

74. Leach, *supra* note 49, at 35–59 (discussing problems inherent with the Rule as it existed in 1952 and suggesting solutions); *see also* Dukeminier & Krier, *supra* note 66, at 1304–11 (discussing the extended campaign to abolish or reform the rule).

75. Sterk, *supra* note 61, at 2097.

76. *Id.* at 2101; *see also* Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2478 (2006) (pointing to the passage of the generation skipping transfer tax as the primary catalyst for the rise of perpetual trusts and the liberalization of perpetuities rules: "Considerable evidence supports the view that the GST tax sparked demand for perpetual trusts by giving trust duration greater salience in estate planning").

77. Sterk, *supra* note 61, at 2102.

perpetual trusts. The late Jesse Dukeminier reported that the "number of perpetual trusts created nationwide now runs into the thousands per year."[78]

The rule's recent history in the United Kingdom is instructive. The rule's "complexity and harshness" prompted a first round of reforms in The Perpetuities and Accumulations Act of 1964.[79] The most significant reform from that Act was the adoption of a "wait and see" approach.[80] More recently, the Law Commission suggested another set of reforms, most significantly limiting the rule to "successive estates and interests in property . . . [and] to powers of appointment," leaving such rights as options and rights of pre-emption untouched by the rule.[81] Additionally, the Law Commission proposed that the perpetuity period be replaced with a fixed 125-year term.[82] While it is plausible to argue that this and other fixed-term amendments to the rule actually shorten the required time frame for remote vesting, it is equally plausible to argue that they are longer than a "life in being plus twenty-one years." Furthermore, a "wait and see" provision typically accompanies a fixed term amendment, leaving the final disposition of remote interests unsettled for a longer period of time.

It is worth noting that the rule's "death" is only the latest in a long drawn out eradication of rules designed to limit the creation of non-vested future interests. In the introduction to his classic treatise on the rule, 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."[83] If the rule is indeed the last significant barrier to the remote vesting of future interests, one must wonder why we aren't more concerned 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 concerns. Where development

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78. Dukeminier & Krier, *supra* note 66, at 1316.

79. *See* LAW COMM'N REPORT, *supra* note 55, § 2.8, at 14–15.

80. For a summary of this and other changes, see *id.* § 2.13, at 15.

81. *See id.* § 11.2, at 132. The UK Government accepted the report but has yet to pass legislation implementing its objectives. *See* LAW COMM'N, ANNUAL REPORT 2007–08 (HC 540, Rep. No. 310), §§ 3.32–.33, at 18 (2008), *available at* http://www.lawcom.gov.uk/docs/lc310_web.pdf.

82. *Id.* § 11.7, at 133.

83. GRAY, *supra* note 52, § 4. Some of the other rules are the destructibility of contingent remainders and the merger rule.

was once allowed to proceed regardless of 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 dealing with what forms of regulation constitute "takings" of property to see the impact of such regulations on land use. Many regulatory takings cases relate to some form of environmental regulation.[84]

Given the constitutional difficulties created by environmental regulation, it is no wonder that one of the most important developments has been the conservation easement.[85] Julia Mahoney notes that the number of acres protected by conservation easements "increased from 450,000 in 1990 to 2.6 million in 2000."[86] By the end of 2005 that number increased to more than 6.2 million acres.[87] As a private-property[88]-based mechanism for the conservation of property, many have sung the praises of this relative newcomer to the property scene.[89]

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 the common law.[90] The common law, in fact, jealously guarded against the adoption of new negative easements. The conservation easement was particularly problematic because the

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84. *See, e.g.*, Tahoe Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 306 (2002) (involving the Tahoe Regional Planning Agency Ordinances); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1006–07 (1992) (involving the South Carolina Beachfront Management Act).

85. For a general definition of a conservation easement (or servitude) see RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 (1) (2000) ("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, 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.").

86. Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 742 (2002).

87. *See* LAND TRUST ALLIANCE, 2005 NATIONAL LAND TRUST CENSUS REPORT 5 (2005), *available at* http://www.landtrustalliance.org/about-us/land-trust-census/2005-report.pdf; *see also* Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 ECOLOGY L.Q. 673, 675 n.8 (2007) (noting that the number of acres covered by conservation easements is even higher once one factors in land trusts that operate on a national level, such as the nature conservancy).

88. However, some have questioned the extent to which it is really private, given its dependence on public incentives. *See* Leigh Raymond & Sally K. Fairfax, *The "Shift to Privatization" in Land Conservation: A Cautionary Essay*, 42 NAT. RESOURCES J. 599, 626–28 (2002).

89. *See* Mahoney, *supra* note 86, at 742–43 (noting that conservation easements have a significant list of supporters and few critics).

90. *But see* Bennett v. Comm'r of Food & Agric., 576 N.E.2d 1365, 1367–68 (Mass. 1991) (declaring validity of an agricultural-preserve easement at common law on the basis that it is in furtherance of an important stated legislative goal).

benefit was typically held in gross.[91] The common law blocked the growth of negative easements because they are not readily apparent, unlike the typical affirmative easement, with its clearly marked intrusion on the burdened property.[92] While the law of equitable servitudes, particularly in the United States, has ushered in an expansion in the range of such restrictions,[93] such servitudes are generally subject to a host of complicated requirements, not making them 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. Since then, more than forty states have passed legislation largely based on it, thus permitting the creation and subsequent enforcement of conservation easements.[94] Comparable interests, usually under the name conservation covenants, have also emerged in New Zealand,[95] Australia,[96] and Canada.[97]

The merits of conservation easements are not the focus of this commentary. Rather, what interests me is the latitude granted to property owners choosing to restrict their property through conservation easements.

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91. Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2, 12–14 (1989).

92. *See* Mahoney, *supra* note 86, at 749 (noting that 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); *see also* Phipps v. Pears, [1964] 1 A.C. 76, 83 (Q.B.) (stating that "[t]he law has been very chary of creating any new negative easements").

93. The most important addition is the recognition of covenants or servitudes imposing affirmative obligations on the burdened property holder, such as monetary payments. *See* Rudden, *supra* note 2, at 242–43.

94. Mahoney, *supra* note 86, at 750.

95. The Queen Elizabeth the Second National Trust Act 1977 provides for the creation of "Open space covenants." *See* Queen Elizabeth the Second National Trust Act 1977, § 22, 1977 S.N.Z. No. 102 (N.Z.), *available at* http://www.legislation.govt.nz/act/public/1977/0102/latest/whole.html?search=sw_096be8ed8009c727_legal+agreement+between+the+National+Trust+and+a+landowner#DLM8803; *see also* QEII National Trust: Open Space New Zealand, Covenants, http://www.openspace.org.nz/Site/Covenants/default.aspx#60213-1 (last visited Feb. 22, 2009) (explaining that a covenant is defined as a legally binding protection agreement between the National Trust and a landowner, protecting privately owned open space, that covenants are registered against the title and are binding on all current and subsequent owners or leaseholders, and that "*[o]pen space covenants are generally in perpetuity*" (emphasis added)).

96. *See, e.g.*, Victorian Conservation Trust Act, 1972, § 3A (Austl.) (providing for the creation of a "conservation covenant" to be held by the Trust); Soil and Land Conservation Act, 1945 § 30B (W. Austl.); National Parks and Wildlife Act, 1970 § 37B (Tas.).

97. Conservation Land Act, R.S.O. ch. C 28 (1990); Land Title Act, R.S.B.C. ch. 219 § 215 (1979).

As with the disappearance of the rule against perpetuities, these servitudes provide current owners with unprecedented powers to affect the management of their property indefinitely.

While all servitudes have the potential to run in perpetuity, conservation easements are permanent by design and many statutes that facilitate their creation actually require that they be perpetual.[98] It is this permanence, along with significant tax advantages,[99] that makes them both unique and highly desirable. And while the collection of common-law remedies designed to remove or terminate servitudes are technically still 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. Applying this doctrine to conservation easements is problematic because changes to the surrounding environment are themselves reasons for the existence of the easement. Julia 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."[100] 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 beneficiary of the easement, typically a non-profit conservation organization or a government agency, has no real incentive to consent to termination.[101]

The conservation easement's popularity emerged in tandem with a comparable development in the area of historic preservation. Here, permanent easements, again granted to non-profit or government heritage organizations such as the Illinois Landmark Commission, are granted to ensure the preservation of privately owned property. 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."[102] As with the conservation easement, the historic preservation easement is intended to last in perpetuity or so long as its intended purpose

98. *See, e.g.*, CAL. CIVIL CODE § 815.2(b) (1990) (West 2008) (establishing conservation easements as perpetual in duration).

99. McLaughlin, *supra* note 87, at 688.

100. Mahoney, *supra* note 86, at 778.

101. For a spirited discussion of the permanence of conservation easements and the problems generated by this dead hand control, see *id.* at 777–79. *See also* McLaughlin, *supra* note 87, at 706–07 (arguing for a more cautious use of the perpetual conservation easement given the long-term difficulties it poses).

102. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 (2000); *see* Bagley v. Found. for Pres. of Historic Georgetown, 647 A.2d 1110, 1111 (D.C. Cir. 1994).

can be met.

The popularity of preservation and conservation easements is part of a larger trend embracing servitudes. As gated communities and condominium developments expand,[103] the complex web of covenants controlling property thickens. These restrictions often have no definite end date. Yet, it is important to distinguish them from 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.[104] 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.[105] While the expansion of patents and copyrights into new areas of knowledge[106] and information[107] has been central to the growing importance of intellectual property rights, the time expansion is no less remarkable.

The most significant changes to the temporal boundaries of intellectual property rights are in the area of copyright. The recent court battle in the United States over the Copyright Term Extension Act[108] put the question

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103. One-sixth of the U.S. population now lives in gated communities and condominiums. *America's New Utopias*, ECONOMIST, Sept. 1, 2001, at 25.

104. PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 150, 169 (New Press 2003) (2002).

105. *General Agreement on Tariffs and Trade: Multilateral Trade Negotiations (The Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, Apr. 15, 1993, at 83–84, *reprinted in* 33 INT'L LEGAL MATERIALS 81 (1994) [hereinafter TRIPS Agreement].

106. 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* DRAHOS & BRAITHWAITE, *supra* note 104, at 150–68.

107. 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 id.* at 169–86. *See generally* Lawrence Lessig, *The Creative Commons*, 55 FLA. L. REV. 763 (2003) (arguing that copyright controls unduly hinder the free transfer of information).

108. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. § 302 (2006)) [hereinafter CTEA]. The CTEA was the

of the appropriate time frame for copyright directly before the U.S. Supreme Court.[109] While perpetual copyright protection would indeed violate the Constitutional requirement that exclusive rights be "for limited [t]imes,"[110] the majority found that the term established in the CTEA was not perpetual, and that the appropriate non-perpetual term was a matter for Congress to decide.[111] Writing in dissent, Justice Breyer expressed concern that the most recent extension "make[s] the copyright term not limited, but virtually perpetual."[112] Later in his opinion he suggested that the new copyright term would, if the vesting of property were in issue, "violate the traditional rule against perpetuities."[113]

Aside from the question of constitutionality, the trend here is obvious—in the past thirty years, the copyright term has moved from a maximum of fifty-six years[114] to an average of ninety-five years,[115] creating what Peter Jaszi refers to as perpetual copyright "on the installment plan."[116] From an economic standpoint, the current copyright term "has nearly the same present value as an infinite copyright term."[117]

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fourth such extension in U.S. legislative history. The initial copyright term established in 1790 was fourteen years from publication, renewable for another fourteen years.

109. Eldred v. Ashcroft, 537 U.S. 186, 192–94 (2003) (upholding the constitutionality of the CTEA, which extended the duration of copyrights by another twenty years).

110. U.S. CONST. Art I, § 8, cl. 8. Congress shall have power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.* 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 property right." Edward C. Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. INTELL. PROP. L. 315, 349 (2000). And later stated, "[w]hat 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 353.

111. *Eldred*, 537 U.S. at 193–94.

112. *Id.* at 254 (Breyer, J. dissenting).

113. *See id.* at 256–57.

114. The term of twenty-eight years from the date of publication, renewable for another twenty-eight years was established in 1909 and remained in place until 1976. *See* Act of Mar. 4, 1909, ch. 320, §§ 23-24, 35 Stat. 1080–81.

115. The new term established under the CTEA begins at creation and runs until seventy years after the author's death, or ninety-five years after publication for a work of corporate authorship. 17 U.S.C. § 302(a) (2006).

116. Peter Jaszi, *Caught in the Net of Copyright*, 75 OR. L. REV. 299, 303 (1996) (quoting his own testimony in *The Copyright Term Extension Act of 1995: Hearings on S. 483 Before the S. Comm. on the Judiciary*, 104th Cong. 24 (1995)).

117. Brief for Eldred et al. as Amici Curiae Supporting Petitioners, *Eldred v. Ahscroft*, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041846 (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 & Richard A. Posner, *Indefinitely Renewable*

In other areas of intellectual property, time extensions have not been as 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 years[118] and today it reaches up to twenty years, consistent with TRIPS.[119] Because of TRIPS, the same twenty-year term is now standard in many jurisdictions. But large corporate patent holders, particularly pharmaceutical companies, engage in a number of tactics designed to further lengthen patent rights.[120] 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.[121] In the United States, this trick was dealt a decisive, albeit needlessly complex, blow in the termination of Eli Lilly's second Prozac patent.[122] The other more successful extension tactic is the "evergreening" of patents, a technique whereby pharmaceutical companies succeed in patenting new formulations and applications of a drug.[123]

Other intellectual property interests are typically less constrained by specific terms. Trademarks, for example, are infinitely renewable provided they remain in use—indeed, they have always been potentially

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Copyright, 70 U. CHI. L. REV. 471, 474–75 (2003). *See also* Justin Hughes, *Fair Use Across Time,* 50 UCLA L. REV. 775, 778 (2003) (also arguing that the length of the copyright term might not be problematic if fair use and other public access rights are strengthened over time); Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 410 (2002) (same).

118. The fourteen-year term established in the 1790 Patent Act derived from the English Statute of Monopolies. *See* Adam J. Sedia, *Storming the Last Bastion: The Patent Reform Act of 2007 and Its Assault on the Superior First-to-Invent Rule*, 18 DEPAUL J. ART, TECH., & INTELL. PROP. L. 79, 82 (2007). This term lasted until the Patent Act of 1861 when a seventeen-year term was adopted. *See* Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYRIGHT SOC'Y U.S.A. 19, 53 (2001). It wasn't until 1995 that this term was extended to twenty years to bring the law in line with TRIPS. 35 U.S.C. § 154(a)(2) (2006).

119. TRIPS Agreement, *supra* note 105, art. 33.

120. *See generally* Lara J. Glasgow, *Stretching the Limits of Intellectual Property Rights: Has the Pharmaceutical Industry Gone Too Far?*, 41 IDEA 227 (2001) (analyzing how pharmaceutical companies lengthen patent life to obtain an exclusive market share). In some jurisdictions, pharmaceuticals also have a five-year extension of the standard twenty-year term. *See* Patricia J. Carter, *Federal Regulation in the United States and Canada,* 21 LOY. L.A. INT'L & COMP. L. REV. 215, 243 (1999).

121. *See* DRAHOS & BRAITHWAITE, *supra* note 104 at 161.

122. *See* Eli Lilly & Co. v. Barr Labs., Inc., 251 F.3d 955, 971–72 (Fed. Cir. 2001). For a comment on the complexities of this case see Hsin Pai, Comment, Eli Lilly & Co. v. Barr Labs., Inc.*: The Muddling of Obviousness Type Double Patenting Doctrine*, 42 JURIMETRICS J. 479, 491 (2002).

123. *See* Glasgow, *supra* note 120, at 234 (discussing the extension of the Augmentin patent); *All Things Considered* (NPR radio broadcast Nov. 28, 2000); *see also* David Pilling & Richard Wolffe, *Drug Abuses*, FIN. TIMES (London), Apr. 20, 2000, at 20 (referring to these as "submarine patents").

perpetual.[124] But again other changes within trademark law have made perpetual trademarks more of a reality. The growing significance of a "dilution rationale" for trademarks and the passage of anti-dilution statutes have given expanded scope to the notion of use.[125] 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," than the regulation of competition and the interests of consumers.[126] With the switch away from consumers' interests to the mark holder's interest comes the possibility of longer, more powerful and wide-reaching trademarks.[127]

While these changes do not create perpetual intellectual property rights, they illustrate a trend toward the lengthening of intellectual property rights, particularly in the area of copyright. 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 in some discrete areas of property law property owners are increasingly able to control their property further into the future, they can also reach further into the past to reclaim property. In the first example below, dealing with the revival of customary rights, groups have retained rights to use privately held or otherwise inaccessible property based on usage for "time immemorial." In the second example below, 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,[128] most commentators agree that "[u]ntil recently, one could fairly characterize the United States judicial reception to custom as a source of law as decidedly chilly."[129] So among the many changes in

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124. *See* TRIPS Agreement, *supra* note 105, art. 18 ("The registration of a trademark shall be renewable indefinitely.").

125. 15 U.S.C.A. § 1125(c) (West 2008); Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, § 3, 109 Stat. 985, 985 (1995).

126. *See* ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES 70–71 (1998).

127. *See id.* at 71.

128. *See* David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?*, ALI-ABA 699, 705 (1999).

129. *See id.* at 703.

property law running contrary to the common law's abhorrence of perpetuities,[130] the strangest must be the limited revitalization 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 a manor's tenants 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.[131] What makes the doctrine of custom particularly interesting for the purposes of this Article 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, "[I]t 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."[132]

Aside from a general aversion to perpetual interests, customary rights were spurned in American law because of the factual requirement that the custom be traced back to time "immemorial." This concept has little place in a nation where European colonization and the reception of the common law are well within recorded public and legal memory.[133] The uncertainty that customary rights create for settled common-law private property interests provides yet an additional reason for rejecting them.[134]

Nonetheless, some U.S. jurisdictions have recognized customary rights.[135] 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.[136] 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."[137] To support the idea of usage for time

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130. "[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." WILLIAM BLACKSTONE, 2 COMMENTARIES *173–74.

131. *See* ROSE, *supra* note 24, at 123.

132. GRAY, *supra* note 52, § 586.

133. *See, e.g.*, Ocean Beach Ass. v. Brinley, 34 N.J. Eq. 438, *6 (N.J. Ch. 1881); Harris v. Carson, 34 Va. (7 Leigh) 632, *3 (1836).

134. Ackerman v. Shelp, 8 N.J.L. 125, 130–31 (N.J. 1825).

135. *See generally* Knowles v. Dow, 22 N.H. 387 (1859) (recognizing the existence of customary rights in New Hampshire).

136. State *ex rel.* Thornton v. Hay, 462 P.2d 671, 678 (Or. 1969).

137. *Id.* at 678.

immemorial, the court even alluded to Native American use of the dry sand area long before European colonization.[138]

Other American courts have rejected the notion of custom as an "[a]rchaic judicial response[,]" relying instead on the less "'fixed or static'" concept of "public trust."[139] Interests held under the public-trust doctrine may also 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.[140] Property interests determined by public need are more changeable than those driven by mere public recognition. Nonetheless, the key advantage of both these approaches 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.[141]

Perhaps because of their ancient status and their strange contradiction of common-law property rights, customary rights have also caught on in Hawaii. 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 may trump common-law rights of exclusion.[142]

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138. *Id.* at 673.

139. Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365, 369 (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 seventeenth century and Matthew Hale's treatise, *De Jure Maris*. Within the United States, it has experienced surges of popularity since the early nineteenth century. *See* ROSE, *supra* note 24, at 115–16. The modern articulation and application of the doctrine is typically traced to Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (examining the modern use of the public trust doctrine in various jurisdictions throughout the country). A brief history of the legal recognition of public interest in tidal and submerged lands is also contained in *Matthews*, 471 A.2d at 360–62.

140. *See* Callies, *supra* note 128, at 732 (citing Blackstone for the proposition that it is the right of use, not the use itself, that must be proven).

141. 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 the State's law of property." 505 U.S. 1003, 1020–32 (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 v. City of Cannon Beach, 835 P.2d 940, *cert. denied*, 114 S. Ct. 1332, 1334–35 (1994) (Scalia, J., dissenting). For a discussion of whether customary rights are part of such "background principles" see Callies, *supra* note 128, at 703–05.

142. Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n, 903 P.2d. 1246, 1263 (Haw. 1995). *But see* State v. Hanapi, 970 P.2d 485, 494–95 (Haw. 1998) (doubting the

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.[143] Unlike the European populations that colonized these nations, the indigenous populations can indeed trace their usage back to time "immemorial."[144] Furthermore, the doctrine was intended to apply to only specific communities and discrete practices, making it peculiarly apposite to the situations of indigenous peoples. Consequently, customary rights have been widely used outside the United States as a tool for recognizing aboriginal rights.[145]

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 just compensation.[146] In the area of aboriginal rights, the suitability of customary rights to the indigenous populations living within legal systems that offer them few other remedies goes a long way to explain their popularity.[147] But regardless of the explanation, it is evident that customary rights have arisen "phoenix-like"[148] 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 an applicable limitation period. While neither a thief nor a 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 against a good-faith purchaser.[149]

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applicability of customary rights to settled residential property).

143. The Australian case law is probably the most extensive on the issue of customary rights and "native title." *See generally* Mabo v. Queensland II (1992) 175 C.L.R. 1, 61–65. More recently the Australian High Court has begun to limit the rights associated with "native title." *See* Yorta Yorta Aboriginal Cmty. v. Victoria, (2002) 214 C.L.R 422, 422–23.

144. *Yorta Yorta*, 214 C.L.R at 492.

145. *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); see also, Kent McNeil, *Self-Government and the Inalienability of Aboriginal Title*, 47 MCGILL L.J. 473, 506–07 (2002).

146. Callies, *supra* note 128, at 736–37.

147. *Id.* at 730.

148. *Id.*

149. *See* Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV.

Consequently, a good-faith purchaser of personal property typically feels 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, owners can reclaim such objects long after the relevant time period passes.[150]

Changes in this area are related to two larger social and historical concerns. The first is the Nazi theft and illegal transfer of a significant portion of Europe's artistic treasures.[151] Given the scale of Nazi looting and the broader context of the Holocaust, it is not surprising that the standard adverse possession approach was unsuitable.[152] The first case to deal with this issue in the United States concerned the ownership of a Chagall painting left behind in Belgium as the owners fled from the advancing Nazis.[153] 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 by applying what is now known as the "demand and refusal" rule.[154] 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.[155] While subsequent cases raised doubts about the continued application of this rule, the New York Court of Appeals eventually affirmed it in *Solomon R. Guggenheim Foundation v. Lubell*,[156] a case involving another Chagall.[157]

Other courts dealing with ownership disputes over stolen or missing art followed New York's lead and developed similar approaches to the tolling of statutory limitation periods. Most significantly, the New Jersey courts developed the "discovery rule" in *O'Keeffe v. Snyder*.[158] Under this

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119, 121–23 & n.10 (1988–1989).

150. *See* Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the U.S.*, 75 B.U. L. REV. 559, 570–71 (1995).

151. *See* LYNN NICHOLAS, THE RAPE OF EUROPA: THE FATE OF THE EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR 333 (1994) (examining the transfer of an estimated four hundred tons of art and gold from Seigen mines during the Third Reich and Second World War).

152. For a general discussion of the litigation surrounding Nazi-looted art, see generally Jennifer Anglim Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes*, 73 BROOK. L. REV. 155 (2007), which concluded that an international tribune with compulsory jurisdiction to resolve Nazi-looted art disputes and clear title to the artwork was a just solution to the increasing litigation involving Nazi-looted art, and David Wissbroecker, *Six Klimts, a Picasso and a Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DEPAUL-LCA J. ART & ENT. L. & POL'Y 39 (2004).

153. Menzel v. List, 246 N.E.2d 742, 742–43 (N.Y. 1969).

154. Menzel v. List, 253 N.Y.S.2d 43, 44 (App. Div. 1964).

155. *Id.*

156. 569 N.E.2d 426 (N.Y. 1991).

157. *Id.* at 427.

158. 416 A.2d 862, 870 (N.J. 1980).

approach, the cause of action does not accrue, and thus the statute of limitations 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.[159] The discovery rule was also followed in a case involving Byzantine mosaics stolen from a Greek-Orthodox church in Turkish-occupied Cyprus.[160] The same rule inspired a statutory provision in California dealing with the recovery of stolen art.[161]

In addition to these various judicial innovations, museums and governments around the world have initiated policies to encourage—and in some cases dictate—the return of looted art to its original owners.[162] For example, the American Association of Museums guidelines encourage members to "waive certain available defenses" to claims for recovery of once-looted art works in order to achieve an "equitable and appropriate resolution of claims."[163] Many of these efforts occurred in the past decade following a sensational standoff between the City of New York and an Austrian art foundation over two Egon Schiele works stolen by the Nazis.[164] As a result of these efforts, an increasing number of looted works continue to be returned to their pre-World War II owners.[165] While these developments are an important part 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

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159. *Id.*

160. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1377–79, 1388 (S.D. Ind. 1989).

161. CAL. CIV. PROC. CODE § 338(c) (West 2008) (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).

162. For a recent discussion of many of these initiatives, see Paulina McCarter Collins, Comment, *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, 140–50 (2002). For a look at one of these initiatives, see Commission for Art Recovery, http://www.commartrecovery.org/ (last visited Feb. 22, 2009).

163. American Association of Museums, Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era, § 4(f) (amended Apr. 2001), *available at* http://www.aam-us.org/museumresources/ethics/nazi_guidelines.cfm.

164. *See* Martha Lufkin, *US Lawsuit to Confiscate Schiele's Portrait of Wally Suspended*, THE ART NEWSPAPER, No. 193, Dec. 29, 2008, *available at* www.theartnewspaper.com/article.asp?id=16693.

165. *But see* Jennifer Anglim Kreder, *U.S. Museums' Use of Declaratory Judgment Actions in Nazi-Looted Art Disputes*, ART, CULTURAL INSTITUTIONS AND HERITAGE LAW NEWSL. (Int'l Bar Ass'n Legal Practice, Vienna, Austria), Oct. 2007, at 7, 7–8 (discussing pre-emptive approaches by museums to secure title to disputed works of art).

art—most notably, concerns about fairness, a desire to compensate for past injustices, and collective guilt.[166] 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.[167] Canada has not relied on legislation, but accomplishes repatriation through informal and voluntary mechanisms similar to those that are now encouraging the return of Nazi-looted art.[168]

The primary U.S. legislation dealing with repatriations is the Native American Graves Protection and Repatriation Act (NAGPRA),[169] which requires federally funded museums to return cultural objects to culturally affiliated tribes.[170] Given that most cultural objects have been in the possession of non-Native Americans for more than a century, here again the idea of return runs counter to the law of personal property by ignoring the relevant statute of limitations. NAGPRA specifically attempts to avoid the issues generated by the background common law and limitations periods by stipulating that museums do not need to return any objects for which they can prove a "right of possession." However, this "right of possession" is itself narrowly defined.[171] For this and other more politically motivated reasons, museums have been cautious about utilizing the "right of possession" defense, despite their lack of enthusiasm for NAGPRA.

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 time[172] have provided adequate justification for extinguishing stale claims. However, these reasons no longer seem to hold sway, at least in the areas discussed above. While it might be tempting to marginalize this 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

166. *See* Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723, 738 (1997).

167. *See, e.g.*, 25 U.S.C. §§ 3005–3013 (2006) (providing for the return of cultural property for indigenous people in certain situations).

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

169. Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified as amended at 25 U.S.C. §§ 3001–3013 (2006)).

170. *Id.*

171. 25 U.S.C. §§ 3005(c), 3001(13); *see* Harding, *supra* note 166, at 736–37.

172. RUTI G. TEITEL, TRANSITIONAL JUSTICE 138 (2000).

nothing to do with Nazi atrocities or the misdeeds of colonialism.[173] The same point applies to the Byzantine mosaics case.[174] The California law mentioned above applies to all stolen articles "of historical, interpretive, scientific, or artistic significance,"[175] not simply those associated with human rights violations.

Undoubtedly, these changes are connected to problems unique to the art and cultural object market: the increasing importance of this market, the emergence of a thriving black market, archaeological looting, cultural misappropriation, and, more generally, the 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. Customary rights and conservation easements are changes with respect to land; changes to the running of limitation periods in reclaiming art and cultural objects squarely 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, we should view them as distinct niches in each area of property where long-term interests are permitted to thrive.

Second, the changes regarding the conservation easement, the rule against perpetuities, and the copyright term are significant. 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 dominated the law of property. Its long standing in the law has made it difficult to push aside; both its tenacity and the extensive 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

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173. *See* O'Keeffe v. Snyder, 416 A.2d 862, 864–65 (N.J. 1980) (explaining that O'Keeffe alleged her paintings were stolen from a New York art gallery).

174. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1379, 1388 (S.D. Ind. 1989) (stating that the mosaics went missing during the Turkish invasion).

175. CAL. CIV. PROC. CODE § 338(c) (West 2008).

volumes of commentary and scholarship. Whether one bemoans or applauds the increasing propertization of knowledge 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 an article on the future of property: "[O]f course it is . . . ideas . . . which we can expect to come into play and to dominate our economy—and interest group activity—in the future."[176]

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

IV. TIME AND THE CHANGING CULTURAL LANDSCAPE OF PRIVATE PROPERTY

A. *Everything but Time*

It is possible to come up with entirely separate, persuasive, and contradictory explanations for each of these changes. But if we look at these various developments through the lens of time, a pattern emerges that deserves some attention. 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 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 limited time frame.

In most 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 does not present the same concerns, the long-term monopolies created by such interests do create other well-

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

documented efficiency problems. [177]

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 suddenly more willing to accept perpetual and longer-running property interests?

1. Rent Seeking

One plausible explanation for increasing temporal permissiveness can be found in a "skeptical"[178] law and economics story. This approach might explain these changes as the products of classic rent-seeking behavior, the type ubiquitous in the evolution of property rights. Accordingly, temporal changes might result from individuals seeking profits or advantages associated with the use and control of property—advantages that tend to diminish society's net social wealth. After all, individuals have always desired perpetual interests in property,[179] and historically the courts and legislatures limited such behavior by establishing various temporal and conceptual boundaries.[180] 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.[181] 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.[182]

This explanation may be convincing 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 rule

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177. Brief for Eldred et al. as Amici Curiae Supporting Petitioners, *Eldred v. Ahscroft*, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041846, at *8.

178. Levmore, *supra* note 176, at 182–83.

179. For a look at the persistent rent seeking of copyright and patent holders attempting to secure perpetual rights, see Edward C. Walterscheid, *supra* note 110, at 334–40, 368–71.

180. 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 id.* at 334–46 (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).

181. For a brief discussion of rent seeking both within the established rules and with the intent of changing rules, see Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561, 1586–87 (1986); for a more general discussion, see James M. Buchanan, *Rent Seeking and Profit Seeking*, *in* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 3, 3–15 (James M. Buchanan et al. eds., 1980).

182. *See* Peter Drahos, *Regulating Property: Problems of Efficiency and Regulating Capture*, *in* REGULATING LAW 168, 168–69 (Christine Parker et al. eds., 2004).

against perpetuities[183] and the lengthening terms in intellectual property rights. Peter Drahos and John Braithwaite convincingly argue that this explanation is the most compelling for the general expansion of intellectual property rights in international law.[184] But it is less persuasive when we turn to the other examples where profit-driven or self-interested motives don't always provide the most convincing explanation. 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 reflects widely shared moral or cultural sentiments."[185]

The new rules regarding repatriation of cultural objects are equally complicated. While on the one hand they can be understood as the triumph of highly specified self-interested groups, on the other the motivations here are best understood in human rights or corrective justice terms, not profits. In short, not all changes have been driven by profit-hungry individuals desiring to make the most of their property without concern for 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 Rights*.[186] 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.[187] This story is one of many, for example, that intellectual property rights holders rely on to justify their expanding rights, including term extensions. According to these rights holders, changes in technology and the growing cost of research require longer-lasting intellectual property rights to maintain the optimal balance between creation incentives and public access.[188] Indeed, according to Carol Rose,

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183. *See* Dobris, *supra* note 70, at 639–41 (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).

184. *See* DRAHOS & BRAITHWAITE, *supra* note 104, at 73.

185. Merrill, *supra* note 181, at 1587.

186. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 354 (1967).

187. *Id.* at 350.

188. Many are unconvinced, however, that, at least in the area of copyright, longer-lasting rights have any real impact on the incentive to create. *See* Brief for Eldred et al. as Amici Curiae

it can be used plausibly to justify any of the changes, including 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.'"[189]

If we are going to rely on this justification for changing temporal limitations, then we need to know what has changed so that longer-running property interests are now more efficient because historically the assumption has been quite the opposite. Indeed, as discussed in the above section on time and property, a recent wave of articles on the *numerus clausus* principle has pointed to a raft of efficiency-related arguments for the existing temporal and conceptual limitations in property.[190] More than two decades ago, Robert Ellickson provided convincing efficiency-based justifications for the rule against perpetuities, and the rules allowing for the termination of servitudes, and shorter, not longer, limitation periods for adverse possession claims.[191]

If efficiency requires that property remain flexible to enable appropriate responses to inevitable but unidentifiable changes in market conditions, why are we witnessing the rise of temporally unlimited property interests? If anything, the pace of change in our current social and economic conditions would seem to dictate shorter-running property interests. In short, either the efficiency argument simply can't provide a compelling explanation for these temporal changes, or 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. Neo-liberalism

A more persuasive explanation might be found in the rise of neo-liberalism. Given that most of the temporal changes discussed, in particular those that allow perpetual interests to run into the future, can be understood as expansions of property rights, we could think of these changes as part of the swing away from Keynesian economics (until we hit the current economic crisis) and toward 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

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Supporting Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041846, at *8.

189. ROSE, *supra* note 24, at 141. Economists also refer to this phenomenon as "network effects."

190. *See supra* notes 39–44 and accompanying text.

191. However, Ellickson focuses on the adverse possession of land, not chattels. Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L.Q. 723, 734–36 (1986).

one of the best-known advocates of a neo-liberal theory of property rights,[192] and so it should come as no surprise that he has argued against some of the temporal limitations in property law.

In a now somewhat dated but strikingly relevant article, Epstein argues that the only justification for interfering with "restraints of private alienation is to prevent the infliction of external harms."[193] Since, according to Epstein, "[t]he rule against perpetuities and its kindred rules are not directed" to such harms, they serve no legitimate function.[194] In short, Epstein argues for temporally unrestrained ownership rights, at least with respect to attempts to control property into the future.

Whatever one thinks of the normative argument here, this explanation at least complements 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 resource regulation to rising confidence in an unrestrained system of private property.[195] This trend is evident in everything from the privatization of world economies to the rise of gated communities[196] and the emergence of market-based private property solutions to resources formally considered public goods, such as clean air.[197] 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. Private ownership is seen as inherently more desirable because it is a fundamental element of one's right to property.

This strong rights-based argument certainly is persuasive with respect to the first three changes discussed. But does it also work for the changes in the areas of adverse possession of cultural objects and the re-emergence of customary rights? Epstein argues in favor of the rule of adverse possession, including a standard application of limitation periods,[198] so if he is consistent, then the changes in this area don't seem to fit. But

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192. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (critiquing the expansion of the power of eminent domain).

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

194. *Id.*

195. Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 130 (1998); *see also* GIDDENS, *supra* note 48, at 164.

196. *See generally* EVAN MCKENZIE, PRIVATOPIA: HOMEOWNERS ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT (1996) (examining the political and social implications of the growth of homeowner associations).

197. Rose, *supra* note 195, at 130.

198. Epstein, *supra* note 193, at 679–82.

Epstein's arguments in this area are in predominantly utilitarian terms, a theoretical shift for which he was roundly criticized.[199] If we stick with the neo-liberal approach, the rights of an original property-holder arguably take priority over all subsequent claims regardless of the concerns about efficiency or certainty that are addressed by limitation periods destroying a right of recovery.[200] In other words, while these changes can, on the one hand, seem strikingly redistributive and, as such, sit uncomfortably with the neo-liberal justification, they can also be understood in terms of strong persistent property rights and thus more in keeping with the neo-liberal approach.[201]

But even if we settle on this explanation we are still left with the nagging question: Why have these absolutist tendencies with respect to property rights materialized in the areas discussed?

4. Certainty, Fairness, and the Changing Face of Property

There are several 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.[202] We live in an information society, dependent on intangible rather than tangible

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199. *See* Ellickson, *supra* note 191, at 725.

200. 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. J.A. Pye (Oxford) Ltd. v. United Kingdom, 02 Eur. Ct. H.R. (2005). The case involved a simple case of adverse possession with the usual mix of common-law elements and a statutory limitation period. *Id.* 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." *Id.* The decision was, however, overturned by the Grand Chamber of the European Court of Human Rights by a vote of ten to seven. J.A. Pye (Oxford) Ltd. v. United Kingdom, 44302/02 Eur. Ct. H.R. (2007). Public outcry at the effects of adverse possession 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*, N.Y. TIMES, Nov. 11, 2007, § 11, at 12; Heath Urie, *Adverse Possession Bill Set for Senate Committee*, BOULDER DAILY CAMERA, Mar. 4, 2008, *available at* http://www.dailycamera.com/news/2008/mar/04/adverse-possession-bill-set-senate-committee/.

201. 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. *See* Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123, 127–28 (2002); Richard A. Epstein, *Congress' Copyright Giveaway*, WALL ST. J., Dec. 21, 1998, at A19.

202. DRAHOS & BRAITHWAITE, *supra* note 104, at 198–99 ("[W]ealth . . . com[es] from controlling abstract objects . . . ."); Gregory S. Alexander, *Time and Property in the American Republican Legal Culture,* 66 N.Y.U. L. REV. 273, 333–35 (1991) (discussing the rise of "imaginary property" or intangibles); Heller, *supra* note 2, at 1174 (tangible property at the core of property conceptions but the locus of economic value has shifted to intangibles).

assets.[203] If tangible property is unimportant, the rules established to ensure socially beneficial uses will presumably also be less important. Setting aside the intellectual property material, some changes involve rather remote examples of tangible property that arguably have little to do with the economy and public welfare. Even the rule against perpetuities, with its roots in an era when land was the core of social and economic life,[204] is typically associated with land rather than the diverse types of property interests to which it actually applies.[205] But this doesn't explain why intellectual property rights are also getting longer. If everything 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.

Perhaps 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 whose purpose is to inject an element of fairness.[206] Since temporal changes tend to create greater uncertainty, could these rules simply reflect the mud or fairness part of the cycle? If so, can we expect these changes to encourage a new set of doctrines that re-impose clarity and more precise time frames for control over property? While we may 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 a viable property interest even if, as in the case of the rule against perpetuities, simultaneously encouraging greater fragmentation of those interests over time.

So far this Article has presented a rather eclectic selection of possible explanations, both normative and descriptive, for the slow disappearance of some temporal boundaries. All 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 line of inquiry. But each of these approaches

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203. R.T. Narayanan, *Intangibles are the Tangible Assets Now*, BUSINESS LINE (THE HINDU), Dec. 28, 2005, at 11, 11, *available at* http://www.thehindubusinessline.com/2005/12/28/stories/2005122800251100.htm.

204. George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities,* 126 U. PA. L. REV. 19, 20–22, 27 (1977).

205. *See* Dobris, *supra* note 70, at 635–39.

206. Carol Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577–80 (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).

suffers from at least one significant shortcoming. Each 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 legitimizing law,[207] then curiosity compels a search for an explanation that takes the temporal element seriously.

This doesn't mean that the above explanations are irrelevant. 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.[208] 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 indeed the changing cultural assumptions about some forms of property—how we define fairness and expectations through time—that is worth exploring.

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.[209]

The circumstances that created our current market-driven system of private property and the temporal boundaries accompanying it have not changed dramatically. In particular, the demands of social, commercial, and private life shift so rapidly today that we would expect 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. Julia Mahoney captures this point in her discussion of the conservation easement: "[T]here 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."[210] Why do we strive for greater

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207. Greenhouse, *supra* note 8, at 1642–43.

208. *See, e.g.*, Lewis M. Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 707–13 (1955).

209. Jurgen Habermas, *Modernity—An Incomplete Project, in* POSTMODERN CULTURE 3, 5 (Hal Foster ed., 1985).

210. Mahoney, *supra* note 86, at 753; *see also* Alex Geisinger, *Rethinking Risk-Based Environmental Cleanup*, 76 IND. L.J. 367, 368–69 (2001) (critiquing the "new cleanup paradigm"

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 interests?

If we put the notion of time front and center, what becomes obvious is that the temporal expansion of interests in property has occurred in the context of broader social conditions, which David Harvey has termed "'time space compression.'"[211] Harvey uses this concept to elaborate on changes in how we represent the world to ourselves.[212] At its core, time-space compression simply articulates the rapid acceleration of the pace of life and the corresponding shrinking of space. Spatial barriers disappear as goods, information, and people move rapidly from place to place.[213] Revolutionary changes in transportation and communication technologies have radically reduced both spatial and temporal horizons.[214]

These changes are most apparent in the flow of capital and the globalization of markets, but their effects are wide-ranging. The most evident consequence "has been to accentuate volatility and ephemerality"[215] in every aspect of life—the notion that "'all that is solid melts into air' has rarely been more pervasive."[216] Actual tangible things pass through our hands with amazing speed, generating labels such as the "throwaway" or "disposable" society.[217] These observations are hard to reconcile with the changes in property law discussed above, but the transitory nature of current social conditions 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.[218]

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that restricts property use by predicting and then entrenching future property uses); A. Dan Tarlock, *Slouching Toward Eden: The Eco-Pragmatic Challenges of Ecosystem Revival*, 87 MINN. L. REV. 1173, 1175–78 (2003) (discussing the changing approaches to environmental protection, in particular, the shift from a focus on preservation to revival).

211. DAVID HARVEY, THE CONDITIONS OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE 240 (1989).

212. *Id.*

213. *See id.*

214. *Id.*

215. *Id.* at 285.

216. *Id.* at 285–86.

217. *Id.* at 286.

218. *Id.* at 292.

We might find fertile ground in this oppositional tendency for exploring temporal changes in property. 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 becomes critical.[219]

This explanation is strengthened 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 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."[220] Thus we have the meteoric rise of the market in art and collectibles; this has been a reliable place to "store value effectively."[221] We can even consider the conservation easement as a reflection of our desire for permanence, an "undefiled, immaculate and stable present."[222]

The idea that our concerns about protecting the past and preserving our place in 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."[223] This generation looked to the past "for stability in the face of rapid technological, cultural, and social change."[224] During this time, England, France, and Germany all passed legislation creating organizations such as the National Trust "to look after places of historic interest or natural beauty." [225]

The temporal changes in intellectual property can also be viewed in this light—but admittedly only indirectly. On the one hand, the changes to the copyright term seem to be about profits, whether rent-seeking or efficient, and the need to harmonize U.S. law with the European copyright term for

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219. SUSAN STEWART, ON LONGING: NARRATIVES OF THE MINIATURE, THE GIGANTIC, THE SOUVENIR, THE COLLECTION 133 (1984).

220. HARVEY, *supra* note 211, at 292.

221. *Id.* at 298.

222. Habermas, *supra* note 209, at 5.

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

224. *Id.* at 36.

225. *Id.* at 39.

profit-motivated reasons.[226] And yet it was arguments about 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.[227] Disney was perhaps the most vocal special interest 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. [228]

Despite the many situations governed by the rule against perpetuities, its primary association is with the testator who wants only to see that his lifelong efforts are not squandered and that those he loves are well cared for.[229] It is fundamentally about ties to family and community—those institutions, according to Harvey, that we are striving to reinvigorate.[230] The purpose of dead hand control is to maintain some presence among kin long after all physical traces have disappeared.[231]

In short, a plausible explanation for the disappearance of time limitations is a shared desire for permanence and preservation in areas where property is perceived as being important to personal and cultural identity. Because of this perception we let our guard down and ignore the significance of boundaries implemented to protect broader social interests. We are eager to buy into the story of 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, and the environmentalist or public advocate looking to preserve the past for future generations—because they resonate with our personal experiences and our desire for stability.

If property law has been shaped by both subjective preferences and objective rules based on broader concerns about social utility, we might

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226. Arthur R. Miller, Commentary, *Extending Copyrights Preserves U.S. Culture*, BILLBOARD, Jan. 14, 1995, at 4.

227. *See* Copyright Term Extension Act of 1995: Hearing on S. 483 Before the S. Comm. On the Judiciary, 104th Cong. 42 (1995) (statement of Jack Valenti, President & CEO, Motion Picture Assoc.) ("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."); Miller, *supra* note 226; *see also* S. REP. NO. 104-315, § 3 (1996) (detailing concerns about incentives for creativity and protecting claims for iconic works still popular and profitable).

228. 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*, N.Y.TIMES, Feb. 20, 2002, at C1 (mentioning the concern about Mickey Mouse entering into the public domain). For more material see the documents and articles referenced at Commentary on Copyright Term Extension, http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/commentary.html and Legsliative Materials (105th Congress), http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/legislative.html.

229. Haskins, *supra* note 204, at 25.

230. *See* HARVEY, *supra* note 211, at 292.

231. *See id.*

see the changes discussed as leaning toward the subjective preference side of the equation. While it is plausible that this leaning stems from a belief in the sanctity and absolute nature of property rights,[232] it is equally likely that such changes simply reflect our yearning for enclaves of stability in the midst of ceaseless flux. Furthermore, this approach, unlike the neo-liberal claims, helps explain the discrete nature of the temporal changes. While Epstein's approach would apply to all property interests,[233] the arguments presented here 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.

There are two important points to clarify. First, I am not arguing that a desire for stability in these areas is a primary or first-order reason for the temporal changes discussed. As I have stated many times throughout this Article, there are other more direct and compelling reasons. But the subjective component here may be at least a partial influence, something that provides an additional justification for the changes, or a reason to minimize or limit our objections to otherwise obvious and blatant rent seeking.

Second, I am not arguing that these changes actually create stability. While they may be indirectly connected to a yearning or desire for stability in certain areas where a subjective element looms large, the changes do not necessarily achieve this desired result. In the cultural property context, other connections that are deemed less worthy are cut short, customary rights interfere with the stability of private landowners, and conservation easements fragment property interests over time. Certainly there are winners and losers in all property allocations and while the changes may reflect at some level the importance of subjective connections, they simultaneously minimize and destabilize other connections whether in the public or other private interests. Our collective consensus about how we allocate property rights is bound to privilege some connections over others. My argument here is that part of that collective consensus, part of what might explain the shifts in entitlements that are accomplished through adjustments to temporal limitations, might be reflected in what Harvey recognizes as a collective yearning for creating new pockets of stability.

Emphasis on the subjective element of ownership, the importance of imagination, and psychological attachments, have been key elements in property theory going back at least to Hume, who stressed the importance of conventions in the construction of property rules.[234] More recently,

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232. *See supra* Part III.A.3.

233. *Id.*

234. DAVID HUME, A TREATISE ON HUMAN NATURE 536–65 (Ernest C. Mossner ed., Penguin

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.[235] Margaret 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.[236] More recently, Peter Benson argues for a subjective, "self-authenticating" element in principles of first occupancy.[237]

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.[238] Surely the linear story is still predominant in property law. The notion of private property is fundamentally 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.

While a focus on the subjective element in property is common, 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 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 worthy of further attention.

V. CONCLUSION

Legally cognizable property rights are culturally contingent. Both the scope and breadth of property rights have changed over time, driven by the

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Books 1969) (1740).

235. Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates, reprinted in* PERSPECTIVES ON PROPERTY LAW, at 3, 5 (Robert C. Ellickson et al. eds., 2d ed. 1995).

236. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957–61, 986–88 (1982).

237. Peter Benson, *Philosophy of Property Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 752 (Jules Coleman & Scott Shapiro eds., 2002).

238. *See supra* Part I.A.

shifting needs and desires of individuals within society as well as the erosion of some resources and the discovery of others. Ownership claims to property have been temporally circumscribed because such limitations were necessary in agrarian and commercial societies, but also because the temporal boundaries legitimized the institution of private property in socially cognizable terms. Such temporal boundaries reflected the limits of fairness and effective management of resources over time. In many ways, these temporal limitations are more significant than ever, and they persist in important ways. But with the rapid pace of change and constant state of flux in our current social conditions 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."[239] It is in this desire to recreate something personal, meaningful, and lasting that we might find the cultural legitimation of perpetual property.

239. ANTHONY GIDDENS, RUNAWAY WORLD 65 (2000).