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# Foresight and the Law of Servitudes

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# FORESIGHT AND THE LAW OF SERVITUDES

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There is much common ground in the debate about party autonomy in the law of servitudes. Professors Epstein,[1] French,[2] Berger,[3] Rose,[4] and I[5] agree that there would be little reason to restrict contractual freedom to impose servitudes if the transaction costs of removing servitudes were always low.[6] Landowners dissatisfied with the servitudes their predecessors have imposed are always free to negotiate for modification or elimination of the servitude. If transaction costs were low, survival of a previously imposed servitude would suggest strongly that current parties remain satisfied with the existing arrangement. So long as the servitude produced no negative externalities, the case for public intervention would be exceedingly weak.

There is also common agreement that the transaction costs of servitude removal are sometimes high. Even the assumption of high

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1 Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1366 (1982) (suggesting that the parties at the time of original imposition will negotiate to keep transaction costs low).

2 French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1316 (1982) (arguing that modification and termination procedures should not apply to servitude interests shared by a small number of parties).

3 Berger, *Some Reflections on a Unified Law of Servitudes*, 55 S. CAL. L. REV. 1323, 1330-31 (1982) (arguing that changed conditions is most appropriate where burdened or benefitted group is large).

4 Rose, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman*, 55 S. CAL. L. REV. 1403, 1411-12 (1982) (suggesting that hold out problems furnish the principal justification for changed conditions doctrine).

5 Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 634 (1985).

6 Professors Alexander and Reichman may dissent on this point. Alexander suggests that even when transaction costs are otherwise low, intervention might be appropriate to relieve parties of the constraints they feel in situations of bilateral monopoly. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 899-900 (1988). But one can, of course, recast his position as simply that strategic bargaining imposes transaction costs even when few parties are involved. *See generally* Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1 (1982) (discussing strategic bargaining that can impede efficient agreement even when two parties are involved).

Professor Reichman advocates continuation of the touch and concern requirement for running servitudes as a safeguard for individual liberty. Reichman, *Judicial Supervision of Servitudes*, 7 J. LEGAL STUD. 139, 144-50 (1978); Reichman, *Toward A Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1233 (1982). It is not clear to me whether Reichman would be concerned about the effect of servitudes on liberty if it were not for the transaction costs involved in removing them.

transaction costs, however, does not inevitably lead to the conclusion that public intervention is preferable to party autonomy. If contracting parties had perfect foresight, and if their actions were based on that foresight (applying an appropriate rate of discount to future costs and benefits), the transaction cost problem would be of no consequence. The parties would know precisely how long the benefits of the servitude would exceed its costs, and would draft accordingly. The servitude would terminate by its terms when it ceased to be efficient.

Of course no one believes that contracting parties are blessed with perfect foresight. But suppose one makes only the narrower assumption that contracting parties have at least enough foresight to recognize that circumstances might change in the future and that high transaction costs could prevent unanimous consent to the servitude removal. Suppose further that contracting parties act appropriately in light of that foresight. One might then conclude that freedom of contract should reign—that the removal mechanism (or lack of removal mechanism) the parties have chosen is better calculated to assure continued efficiency in land use than any doctrinal rule that permits occasional outside intervention. That is basically Professor Epstein's conclusion,[7] and it is a conclusion he supports by analogy to the process of constitution-making in which the participants explicitly account for the possibility of changed conditions and where their successors abide by the rules the constitution-makers have promulgated.[8]

If, as Professor Epstein suggests, contracting parties regnlarly can and do take adequate account of the possibility of future change, why do courts ever apply the changed conditions doctrine? The persistence of the doctrine constitutes some empirical confirmation of the thesis that contracting parties sometimes lack even the limited foresight required by the Epstein model. Where there is smoke, there is usually fire.

## I
## THE INADEQUACY OF FORESIGHT

Consider a developer who believes that prospective purchasers will find his residential subdivision more attractive if he provides recreational facilities for residents, with maintenance costs to be paid by annual assessments on individual residents. Why would the developer, whose only concern is assuring the best return on his own investment, care about the future impact of a covenant to pay

7 Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906, 921-23 (1988).
8 *Id.* at 922.

an annual maintenance charge? Presumably he would care because prospective purchasers would be willing to pay less for homes if they feared that the covenant would, at some time in the future, make ownership of the home less attractive. If the housing market takes adequate account of the future impact of the covenant, a developer concerned about maximizing his own return will consider the future impact of any covenant he imposes.

It is not clear, however, that the housing market does account for the future effect of continuing burdens adequately. Indeed, it is not clear what constitutes an "adequate" account of future effects. Suppose Ann has a future-is-now attitude that causes her to discount heavily the future effects of all of her present decisions. Barbara, by contrast, currently lives a miserly life in the hope of greater rewards later. Is Ann's account for the future effects of her decisions better than Barbara's, or is Barbara's better than Ann's? If the housing market were made up of Anns would its account for future effects of servitudes be better or worse than the account of a market made up of Barbaras? Is there a middle position that provides the "right" balance between the consideration given to present effects of current decisions and that given to future effects of those decisions?

One answer to these questions is that so long as Ann or Barbara know they will take the consequences of their decisions, there is no reason to question the discount they apply to their own decisions about the future. Each individual can determine the tradeoff between future and present welfare that best suits her better than can any external decision-maker. There are, however, two problems with this answer. The first is that the individual who today makes a decision with future impact may differ significantly from the individual who reaps the benefits or suffers the consequences of those decisions in the future.[9] It may be that a collective body that includes 70-year olds will be better able to weigh the present and future wants of a given 30-year old than will the 30-year old herself. The second problem is that the people whose decisions collectively make up today's market discount rate will frequently be different people, in body and outlook, from those who will ultimately suffer the consequences or reap the benefits of decisions that reflect today's prevailing discount rate.[10] If members of this subsequent generation

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9 *See generally* D. PARFIT, REASONS AND PERSONS 149-87, 219-27 (1984) (discussing the attitudes of people towards their own futures and the relationship of a present self to a future self).

10 Suppose, for example, a chemical plant offers a neighbor consideration for a servitude that would permit dumping of wastes on the neighhor's land. The neighhor may evaluate the offer by estimating the effect of the servitude on the market value of the land. If the current market discounts heavily the possibility of the harm caused hy

object to the discount rate applied a generation earlier, they are unlikely to be satisfied by an answer that says; in effect: your predecessors considered your interests, but decided to prefer their own.

Return now to the developer contemplating a servitude assessing residents for recreational facilities. If the developer responds to current market pressures, he will discount the servitude's future effect at the rate set by a market of current housing purchasers. That rate bears no necessary relationship to the preferences of future residents, who are not represented in the market that set the discount rate. Why, then, should the choice of the developer and his current customers bind future purchasers?

Professor Epstein responds that "it is never possible for unborn or minor children to have a full say today about their futures,"[11] and that someone must make the choices that have future impact. He further notes that if private contracting parties are not responsible decision-makers "then there is an argument not only for overriding private agreements on the problem of changed conditions, but also for socializing all other forms of investment."[12] He concludes that when the choice is between entrusting decisions with future impact to private contract on the one hand or to public control on the other, private contract is the clear choice.

Although Professor Epstein's arguments have force, matters are not as simple as he would make them. Although it is true that virtually all decisions have some future impact, some decisions have more impact than others. The more easily reversible a decision—the freer it leaves successors to make the opposite choice—the less reason there is to interfere with private contract. If those who would reverse them have enough resources, reversal of most transactions, including those that impose servitudes without provision for removal, can be bought.[13]

Moreover, if the many ways in which the state interferes in pri-

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the wastes, the neighbor might find the offer attractive. But ultimately, it will not be the neighbor, but one of his successors, who reaps the direct consequences of the dumping.

11 Epstein, *supra* note 7, at 926.

12 *Id.* at 925.

13 So, one might argue, rather than intervening in private contract decisions, we and our successors might be better off if the state embarked on a program of social saving designed to assure that our successors are well enough off to buy reversal of any unforunate decisions we make today. Indeed, Professor Epstein suggests such an argument. *Id.*

There are, however, two problems with this argument. This first is that the federal goverument has shown no proclivity for such a program. Perhaps occasional intervention in private contract is justified on the theory of the second best. The second problem is that if contract decisions are expensive enough to reverse, we might decide that the social cost to the present generation of providing future generations with the resources to reverse current decisions would be higher than the social cost of restricting freedom of contract.

vate contract decisions are any indication, neither legislators nor judges share Professor Epstein's unequivocal preference for private contract. Indeed, particularly in decisions with significant future impact, courts and legislatures increasingly have restricted freedom of contract. The growth of Social Security, Medicare, and other programs to benefit the elderly suggest a general lack of confidence in the theory that individuals can act as rational decision-makers even when only their own future interests are at stake. Otherwise, why not permit individuals to provide for their own future rather than mandating a particular level of current expenditures and future benefits?[14]

Mistrust of private future-oriented decision-making is not limited to benefit programs for the elderly. Contract doctrine is replete with escape valves that suggest mistrust of decisions with future impact.[15] Bankruptcy provides perhaps the most obvious examples, but a variety of common law doctrines also operate to alleviate the infirmities in the individual capacity to make long-term decisions. When a court excuses an individual from a contract on the ground that he lacked capacity to contract, the court explicitly recognizes a defect in that individual's decision-making process. Judicial refusal to order specific performance of personal service contracts reflects mistrust of the same decision-making process. Courts use the unconscionability doctrine, most often applied to consumer credit cases where the promisor's burdens are postponed into the future, and even the "ordinary" processes of construction and interpretation, to permit individuals to escape from their own future-oriented decisions.[16]

My goal here is neither to defend nor to attack the contract doctrines that limit personal autonomy. For present purposes, these doctrines serve to illustrate the pervasiveness of the belief that people are not so good at accounting for their own futures (let alone the

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14 One might justify benefit programs for the elderly as redistributional measures, even though the rich as well as the poor are eligible for benefits, on the ground that the benefit programs are politically marketable, both to the beneficiaries and to others, only if they avoid the stigma attached to "welfare" programs.

But if these programs to benefit the elderly are desirable as redistributional devices, another question arises: why are the elderly poorer as a group if not because they lacked the foresight to provide for their old age? To ask the question is not to condemn the elderly for the decisions they made, but to recognize that there may be empirical evidence to support the inadequacy of foresight.

15 *See generally* Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983); Sterk, *The Continuity of Legislatures: Of Contracts and the Contract Clause*, 88 COLUM. L. REV. 647, 688-96 (1988) (surveying contract doctrines that suggest mistrust of the ability of individuals to evaluate the future impact of their decisions).

16 As Llewellyn once wrote: "A court can 'construe' language into patently not meaning what the language is patently trying to say." Llewellyn, Book Review, 52 HARV. L. REV. 700, 702 (1939).

futures of others) that the law should accord them complete freedom to bind that future. In the absence of any test to determine whether individuals are in fact able to account for the future, the pervasiveness of the belief held by judges and other trusted decision-makers that a limited incapacity to account for the future exists stands itself as rough empirical evidence that the incapacity exists.

It is important to recognize, however, that even with all of the escape valves that pervade contract doctrine, contract law still leaves contracting parties broad freedom to plan their futures. In most commercial contexts, for example, the constraints imposed operate only where either the evidence of poor planning is apparent or the consequences of poor planning are dire.[17] But at least on some occasions, courts are willing to relieve contracting parties from the failures of their foresight. Unless one rejects these limitations on personal autonomy, incantations of freedom of contract are not enough to justify insulating servitudes from judicial revision.

## II
## COVENANTS AND CONSTITUTIONS

If our contract system belies the notion that individuals possess foresight adequate to plan their own futures, or if we believe that individuals do not act on the foresight they have, Professor Epstein raises an intrigning question: how then can we take seriously the notion of an enduring constitution? He notes that "[t]he central problem with [covenants] is to find a way to bind a large number of persons to a common plan for their mutual good extending over several generations."[18] That, of course, is also a central problem with constitutions. If, as the preceding section suggested, our legal system does not accord individuals complete freedom to control their destinies by contract because of doubts about the adequacy of their foresight, is there any greater reason to abide by the decisions of constitution-makers, especially when, as Epstein puts it, "[f]orming a public constitution is far trickier business, because unanimous front-end consent is never possible in the world of politics?"[19]

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17 Professor Alexander objects to the privileging of contract decisions by labelling restrictions on freedom of contract as marginal. I agree wholeheartedly with Alexander that "[i]f in social reality actors pervasively experience choicelessness in conditions of nominal freedom, then entitlement assignments justified by the principle of individual autonomy appear arbitrary." Alexander, *supra* note 6, at 889. But it seems to me that the very pervasiveness of freedom-of-contract ideology suggests that at least in our society, people generally do regard the availability of contract choices as freedom-enhancing, especially in most commercial contexts.

18 Epstein, *supra* note 7, at 926.

19 *Id.*

I offer two answers. The first is that the context in which constitution-makers operate and the view they take of their enterprise may assure that they act with a degree of foresight unlikely to arise in the context that surrounds servitude creation. The second is that constitutions do not endure, at least not on the terms the framers intended; constitutions, like covenants, are subject to modification by successive generations in ways other than through the amendment process contemplated by the framers.[20] Professor Epstein himself provides apt illustration in his discussion of the ratification of the Constitution in violation of the terms of the Articles of Confederation.[21]

Professor Epstein says of both covenants and constitutions that "the ultimate task is to protect individual rights to property without inviting excessive holdout problems."[22] Few covenants, and certainly few that affect many landowners, occur outside the context of a larger real estate transaction involving the subdivision of land, zoning approvals, and construction of homes. In the context of the larger transaction, the servitude is not likely to be the central focus of the developer, the purchasers, or the lawyers. In instances where one or more of these parties does pay close attention to the servitude's terms, and the servitude itself provides evidence that the parties have attended to the problem of removal, there is increased reason to eschew outside intervention. On this point, Professor Epstein and I are in basic agreement.[23] The harder cases are those in which there is no evidence that the parties have considered the difficulty of removal, or when the evidence suggests they have done so inadequately.

Those hard cases are less likely to arise when constitution-makers convene. Durability is at the very heart of framing a constitution. There would be little point in convening at all were it not for the need to plan for the long run. Constitution-makers are not likely to ignore the problem of change.

I do not believe, however, that the attempt to justify enduring covenants by analogy to enduring constitutions ultimately fails because of the distinctions between covenant-making and constitution-making. I believe the attempt fails because even the durability of constitutions is limited.

Consider the United States Constitution which has endured, in

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20 Indeed, Professor Epstein has himself suggested that the meaning the framers attached to the words they used need not bind constitutional interpreters. *See* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 26-29 (1985). For criticism, see Paul, *Searching for the Status Quo*, 7 CARDOZO L. REV. 743, 750-51 (1986).

21 Epstein, *supra* note 7, at 926 n.40.

22 *Id.* at 922.

23 *Id.* at 924.

some sense, for more than 200 years. As a formal matter, the Constitution has been changed only in the manner prescribed by the framers in the original document (with some latitude for irregularities in times of particular stress). As a practical matter, however, the Constitution's prescriptions and proscriptions have been transformed through an evolutionary process that, during times of particular stress—the Civil War and the Great Depression—one might better describe as a revolutionary process. The change in Supreme Court attitude toward social welfare legislation after President Roosevelt threatened to pack the Court effected a major change in the constitutional order, a change not foreseen by the framers, and not accomplished through use of the amendment process provided for in the document.

Indeed, Professor Epstein has himself complained, in his discussions of the taking and contract clauses, that the sanction the Supreme Court has given to redistributive legislation does violence to the intent of the framers.[24] And, of course, he is right. But whatever the intellectual merits of the arguments of the current constitutional debate over the primacy of original intent, the fact of the matter is that in countless cases, the Supreme Court has revised the constitutional order in ways that would have shocked the framers. Whether or not one thinks constitutions should be insulated from revision except by their own terms, the plain fact is that our Constitution has not been so insulated. And if the work of our Constitution's framers has been subject to revision with changes in circumstance, the intentions of covenanting parties would hardly seem to merit greater deference.

## III

## STABILITY AND CHANGE IN SERVITUDE LAW

Recognition of the fact that human imagination is limited—that people do not always anticipate and react "optimally" to future events—need not paralyze current decision-makers. Failure to decide is itself a decision, and one that often can have undesirable future impact. In light of imperfections in foresight, the central question of servitude law is what response legal doctrine should take toward contractual arrangements desigued to control land use over a long period.

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24 *See* R. EPSTEIN, *supra* note 20; Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 750 (1984) ("[W]e can be certain that the Supreme Court's present interpretation is both wrong and indefensible.").

A. The Alternatives

There are three obvious responses servitude doctrine can take toward contract: enforce no contractual arrangements, enforce all contractual arrangements, or enforce contractual arrangements, but subject to limitations. The first response—substitute legislative control for contractual arrangements by making all privately negotiated servitudes unenforceable—is a response virtually everyone rejects. The defects of this response are evident. Individuals have non-identical preferences, and a regime that would deny landowners all right to pursue their individual preferences would deny individuality itself.[25]

The second response is to enforce all private arrangements that impose servitudes. One need not ignore the limits of foresight to advocate this response; one might simply believe that the problem of inadequate foresight is less serious than the problems that attend public intervention. At times, this appears to be Professor Epstein's position.[26] There are two principal justifications for a freedom of contract regime. First, one might support freedom of contract as a system that enhances freedom, regardless of the particular disutilities that the extreme freedom of contract position might produce.[27] Second, one might support freedom of contract on utilitarian rather

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25 Michel Rosenfeld has made the point that the concept of contract and the particularity of individuals are interdependent:

> [I]f abstraction of the particular predominates to the point where particularity is barely present, and if individuals are viewed as equal, rational contracting egos, any individual member of society could be substituted for any other. As a consequence, each individual could presumably accurately assess another's conception of the good and thereby discover the institutional arrangements and distributive schemes that would best reconcile the many differing conceptions of the good. Under such circumstances the determination of the common good seems within every rational individual's grasp, and the whole contractarian edifice appears altogether superfluous.

Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 817 (1985).

Moreover, property scholars with widely disparate outlooks emphasize protection of individuality, of the right to be different, as a fundamental tenet of property law. *See* Epstein, *supra* note 1, at 1359 ("We may not understand why property owners want certain obligations to run with the land, but as it is *their* land, not ours, some very strong reason should be advanced before *our* intentions are allowed to control."); Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 968 (1982) ("[P]roperty may have an important relationship to certain character traits that partly constitute a person."); Rose, *supra* note 4, at 1412 ("The right to 'hold out,' for whatever idiotic reasons, is an aspect of the right to hold property.").

26 *See* Epstein, *supra* note 7, at 926. ("The system of private governance on balance works pretty well, if only because the only available alternative is highly discretionary public control, disciplined by neither the bequest motive nor the resale market.")

27 At times, Professor Epstein seems to embrace this justification for free disposition of property rights. *See* Epstein, *supra* note 1, at 1366-67. ("Ownership is meant to be a bulwark against the collective preferences of others; it allows one, rich or poor, to

than libertarian grounds. Professor Epstein argues, for instance, that because public officials do not have sufficient incentive to account for future gains and losses, private contract provides a superior mechanism for future-oriented decisions.[28]

The third response legal doctrine might take toward privately negotiated servitudes is to enforce private arrangements, but only within certain limits. The limits might be specified precisely—no public intervention for a set number of years after initial negotiation, or no public intervention if the servitude itself provides "acceptable" provisions for private termination[29]—or they might be more open-ended—permitting modification whenever a court believes circumstances have changed sufficiently to warrant termination—but the premise for imposing limits is the same in either event: the contracting parties have insufficient foresight to permit them to bind all parties for all time.

I support the third response—limited public intervention—because I question both the libertarian and the utilitarian premises that underlie support for a freedom-of-contract regime. The debate over the libertarian argument for freedom of contract in the servitude area has centered on whose freedom a freedom-of-contract regime promotes.[30] Professor Alexander has taken the debate a step further, arguing in more general terms that the choice between freedom of contract and public intervention is not always a choice between freedom and coercion—that contract enforcement can itself be coercive and intervention freedom-protecting.[31]

My argument here focuses on the utilitarian defense of freedom of contract—the contention that intervention by public authorities is inferior to freedom of contract because public authorities lack the incentive structure inherent in private decision-making. Although I share Professor Epstein's skepticism about the motivations of office holders, I believe his analysis inadequately accounts for an important point: all decision-making, public and private, is improved with the benefit of hindsight. If a system of servitude law is to provide stability, it cannot iguore the benefits of hindsight.

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stand alone against the world no matter how insistent or intense its collective preferences.")

28 Epstein, *supra* note 7, at 926.

29 For my own tentative suggestions along these lines, see Sterk, *supra* note 5, at 657-58.

30 *Compare*, for example, Epstein, *supra* note 1, at 1360 ("Insistence upon the touch and concern requirement denies the original parties their contractual freedom by subordinating their desires to the interests of future third parties, who by definition have no proprietary claim to the subject property.") *with* Sterk, *supra* note 5, at 634 ("Might not rules that safeguard the interests of future generations be appropriate precisely because they cannot have any proprietary claim and cannot influence the market?").

31 Alexander, *supra* note 6, at 900-01.

B. The Impossibility of Ignoring Hindsight

The relative competence of private parties and public officials (including judges) is not the issue that faces a court deciding whether to remove or modify a covenant because of a change in conditions. When the court faces a changed conditions case, it does so with the benefit of information not available to the private parties who originally imposed the covenant. It is implausible that the benefits of hindsight never outweigh the distortions inherent in a public decision-making process.[32] Accordingly, to argue that enforcement of all servitudes according to their terms would result in more efficient decision-making than a changed conditions doctrine, one would have to argne that a changed conditions doctrine would not be appropriately cabined, but would instead result in rent-seeking behavior by landowners.[33]

This argument—that freedom of contract is preferable to intervention because the pressures to intervene will ultimately distort any interventionist doctrine—is superficially plausible, but ultimately self-defeating. If the pressures to intervene, for good reasons or bad, would exist in a regime that permitted removal for changed conditions, there is little reason to believe that the pressures would simply disappear if we merely changed the legal rule to "require" enforcement of all contracts. Perhaps the pressures would result in other "distortions" of doctrine, or, if judges really did feel constrained by the newly embraced freedom-of-contract doctrine, in legislation. Although the doctrinal and legislative obstacles involved might discourage some rent-seeking behavior, those seeking to surmount the obstacles might simply devote more resources to rent-seeking. It is not at all clear that the equilibrium level of rent-seeking would vary much if freedom-of-contract were

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32 One might argue that rational contracting parties would recognize the advantages of hindsight, and would account for them by providing appropriate removal mechanisms in whatever servitudes they negotiate. *See* Epstein, *supra* note 7, at 921-22, 923. Professor Alexander's response to this extreme position—that in fact people do engage in irrational behavior—seems unassailable. *See* Alexander, *supra* note 6, at 894-95.

33 As Professor Epstein has put it, "a rent is the different between the highest and second best use to which any particular property can be put." Epstein, *An Outline of Takings*, 41 U. MIAMI L. REV. 3, 17 (1986). When the changed conditions doctrine operates to remove an inefficient servitude, application of the doctrine produces economic rent: land is now put to its highest use instead of to some less valuable use (presumably the "second best" use) to which it was previously devoted. This production of rent is a net social good.

When rent is produced by government action, however, parties frequently differ about who should reap the benefit of the rent. When parties lobby, or litigate, to secure for themselves all or part of the rent produced by government action, they engage in rent-seeking behavior. Because resources devoted to rent-seeking produce no wealth, the social losses created by rent-seeking offset whatever benefit might initially have been created by government action.

substituted for changed conditions, and even if there were some marginal change, it is not clear in what direction the change would lead.

Put another way, the anti-rent-seeking argument for freedom of contract rests upon inconsistent views of the significance of legal doctrine. It presumes that doctrine will prove an insignificant obstacle for judges who seek to expand a limited changed conditions doctrine into a more far-reaching wealth transfer system. Doctrine will, on this view, inevitably bend to the pressures placed upon it. At the same time, the solution proposed is simply a new doctrine—freedom of contract! But if doctrine is largely irrelevant—if judges and other decision-makers can bend it to address other concerns—then a change in doctrine is hardly likely to cabin the redistributive instincts of those decision-makers.

The truth is undoubtedly somewhere in between these two inconsistent conceptions of the effect of doctrine. Doctrine never provides an adequate explanation for the decision of a judge, but the doctrine itself may reflect social norms that lead the judge to decide the case one way or another.[34] Doctrine matters because the formal structure of doctrinal rules undoubtedly plays a role, along with countless other factors, in shaping the social norms that influence decision-makers.[35] So, for instance, in a legal system where freedom of contract, embodied in a variety of legal doctrines, is the prevailing ideology, both economic actors and decision-makers are likely to feel more comfortable leaving important decisions to contract than they would in a system that frequently subordinated contract to centralized planning. But it is simply unrealistic to expect the formal structure of a single legal rule—freedom of contract in imposing servitudes—to serve as a bulwark against widely accepted norms that will lead judges to limit the effect of contract.

Consider again the United States Constitution, a document designed to endure and noted for its endurance. The Constitution, not least among its many purposes, was desigued to assure continued protection of contract rights and private property. Despite the reverence the document still commands, including the recent insistence of many that judges should adhere to the original intent of its framers, the framers would barely recognize the existing protection of contract and property. As Professor Epstein himself has docu-

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34 *See generally* Yablon, *The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation*, 6 CARDOZO L. REV. 917, 929-36 (1985) (discussing view of Critical Theorists that doctrinal rules reflect underlying normative vision).

35 Empirical study, however, may reveal that the effect is small. *See* Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 685-86 (1986).

mented, the courts have, in response to changing economic, social, and ideological pressures, reformulated significantly the protection afforded by the contract clause, the takings clause, and other parts of the Constitution.[36] If the Constitution itself is not immune from change, can more be expected from a freedom-of-contract doctrine in servitude law?

In other words, if a freedom-of-contract system for imposition of servitudes is contrary to prevailing norms, the system is ultimately unrealizable. That judges and legislators believe neither in the perfection of foresight nor in the incapacity of public decision-makers to rescue individuals from their past decisions is amply demonstrated by the array of escape devices contract doctrine affords. Professor Epstein's consistency in attacking many of these devices does not change the fact that they exist and, in some cases, have persisted for centuries. If these devices do reflect strongly-held social norms, nominal adoption of a freedom-of-contract system for servitude imposition is not likely to prevent judicial intervention.

If judicial intervention in some form is inevitable, should landowners forego private planning through the imposition of servitudes? Of course not. Our legal system has enough respect for contract generally that, whatever the formal structure of servitude doctrine, judges are unlikely to displace lightly the contract arrangements of private parties. That does not mean, however, that the formal structure is irrelevant. The closer the formal structure is to the shared norms of decision-makers, the more likely decision-makers are to adhere to the structure rather than engage in uncertain and potentially disruptive efforts to escape from a structure that, in their view, appears unduly rigid. A doctrine that instructs decision-makers to ignore change, to resist taking advantage of 20-20 hindsight, is ultimately unstable because judges will never implement it. Stability over time can better be achieved by doctrine, whether clarified through a Restatement, or imposed by statute, that acknowledges defects in the private planning process, but limits intervention to those cases in which both the defects and the adverse consequences of non-intervention have become apparent.

That is not to say that even a limited intervention doctrine will be immune from judicial manipulation. No doctrine is sure to command universal respect or to account for all contingencies that might arise.[37] But a doctrine coincident with generally accepted

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36 R. EPSTEIN, *supra* note 20; Epstein, *supra* note 24.

37 Indeed, no doctrinal rule can protect against its own abolition or modification, since ultimately, members of each future generation will have the power to adopt rules for themselves.

norms is more likely to provide a firm foundation for planning and prediction than a doctrine that is not.

This point is not, of course, limited to servitude doctrine. Consider, for instance, Professor Epstein's sketch of our constitutional system to protect individual rights while keeping holdout problems in check. Epstein states that our system is a "mixed system of entrenched rights, compensation tests, and majority rule—all messy, and all necessary."[38] Suppose the framers of our Constitution, or of some other constitution, were not as farsighted and did not provide that messy balance. Suppose, for instance, they included no requirement of just compensation for takings for public use. Or suppose they took the opposite tack and prohibited takings altogether. Would courts be as likely to adhere to these two markedly different, but equally rigid, constitutional frameworks as they are with the existing, somewhat more flexible framework? I doubt it. Moreover, because these alternative constitutional frameworks do not include any internal mechanism for adapting to unanticipated exercises of majority or minority power, the path of departure from the framework would be less predictable, making planning more difficult. The same would be true with a freedom-of-contract doctrine in servitude law: because the doctrine provides courts with no ready internal formula for dealing with cases of inadequate foresight departure from the framework will be less predictable.

### C. The Advantages of Making Intervention Explicit

One who recognizes the deficiencies in a freedom-of-contract approach to servitude law need not support explicit judicial intervention to remove or modify the terms of a servitude. An intermediate alternative would be to sanction judicial intervention under the guise of judicial interpretation. Professor Epstein's suggestion that because of problems with foresight, "courts will have to engage in some 'interstitial legislation' in construing the terms of the basic agreement"[39] may indicate a less than wholehearted acceptance of the freedom-of-contract model he seems to espouse elsewhere.

The intervention-as-interpretation model certainly has a long and time-honored history in the American legal system. It pervades our constitutional law as well as our contract law. It has its attractions. First, casting intervention as interpretation permits judges to avoid legitimacy questions by pretending that courts are simply giving effect to the wishes of the parties rather than making substantive value choices. Second, requiring judges to tie their intervention to

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38 Epstein, *supra* note 7, at 922-23.

39 *Id.* at 923.

the terms of a private agreement may make it more difficult for judges to smuggle their own notions of distributive justice into their decisions.

Despite these attractions, I regard intervention-as-interpretation as an inadequate substitute for explicit recognition of the limits of contract. Fifty years ago, Karl Llewellyn criticized the "whole series of semi-covert techniques"[40] the common law has used as a substitute for explicit recognition of the limits of contract. In concluding that "covert tools are never reliable tools,"[41] Llewellyn objected that covert intervention "fail[s] to accumulate either experience or authority in the needed direction;"[42] when the real grounds for intervention are obscured, the common law process will not refine the principles that underlie intervention. Lawyers, parties, and even judges may fail to understand the basis for intervention, resulting in uncertainty and its attendant costs.

Underlying Llewellyn's objection is the notion that open discourse will lead to better resolution of difficult problems. Rejecting that notion would cast doubt on the entire academic enterprise. Why should not courts, as well as academics, acknowledge the concerns that propel them to question a regime of "free" contract? It may be, as Professor Alexander suggests, that open discourse will have a destabilizing effect on doctrine,[43] but I cannot imagine that true stability can be built upon an artificial doctrinal structure that publicly proclaims freedom-of-contract while its framers privately harbor doubts about the supremacy of contract.

40 Llewellyn, *supra* note 16, at 702.
41 *Id.* at 703.
42 *Id.*
43 Alexander, *supra* note 6, at 897.