

## Everything Old is New Again: Breathing New Life into the Fee Simple Absolute

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Lee Anne Fennell, *Fee Simple Obsolete*, 91 **N.Y.U. L. Rev.** 1457 (2016), available at [SSRN](#).

“And don’t throw the past away. You might need it some other rainy day.” These lyrics to Peter Allen’s song, *Everything Old is New Again*, sum up the fee simple absolute (“fee simple”) perfectly. This antiquated doctrine that is the backbone of our real property system, the most adored and alienable of the estates in land, receives new life, a new purpose even, in Lee Anne Fennel’s compelling article, *Fee Simple Obsolete*.

Fennel gives the reader just enough history about the development and context of the fee simple to lay the foundation for a discussion with the reader about the ways in which the old fee simple has become an anachronism in a largely urban society. With eighty percent of Americans living in urban centers, the need for flexibility in reconfiguring precious urban land is at a premium.

According to Fennel, the problem of the fee simple, as originally conceptualized, is that such “[s]patially rooted estates of endless duration deal poorly with the problem of optimizing urban land use because they scatter everlasting vetoes among individual landowners over the most critical source of value in a metropolitan environment.” (P. 1461.)

Flexibility in reconfiguring land uses is optimal, and Fennel offers a clear and compelling proposal for rethinking the most foundational of the present estates in land. And so, she argues for the emergence of alternative tenure forms that would pivot away from the temporal infinity and physical rootedness of the fee simple to more nimble forms of property ownership.

To make her case, Fennel offers two proposals for modernizing the fee simple – first, a callable fee and second, the floating fee. Fennel proposes an expressly callable fee, a possessory estate that would be subject to a call option if pre-set conditions are not met. Fennel notes that the present fee simple is, in fact, a callable fee because of eminent domain which allows government to convey the fee simple to itself (or even another private entity) upon payment of just compensation and the articulation of a public purpose. (P. 1482.)

But, political limitations on the use of eminent domain are tighter than the legal restriction Fennel envisions being imposed on the callable fee. Thus, the expressly callable fee could address impediments to value-optimizing reconfigurations while simultaneously reducing reliance on government’s use of eminent domain which is often viewed as unfair and over-reaching. (P. 1483.)

Under Fennel’s floating fee model, the possessory estate is not permanently attached, or moored, to a particular legal description. Rather, the estate would represent “a portable claim over equivalent property in other locations.” (P. 1490.)

As with the expressly callable fee, Fennel points to a variation of the floating fee as an exemplar that addresses the feasibility of her proposal. Land readjustment is an approach that has been used domestically, though more extensively in other countries, to develop and/or improve urban infrastructure while simultaneously increasing the value and utility of real property. It is a form of land consolidation rather than a method of land acquisition. And, while land readjustment could be pursued through legislative means, resort to the floating fee would permit individuals to affirmatively opt into a system of land tenure that is specifically designed to be subject to redevelopment in this type of way. (P. 1491.)

The benefit of both options is that they allow real property to be more readily adapted to achieve value-maximizing uses. Through the lens of these two alternatives, Fennel analyzes the comparative strengths and weaknesses of the design features of the fee simple.

She argues, convincingly, that the foundational structure of the fee simple limits its ability to adapt and align with the real property demands of an increasingly interdependent society where the ability to reconfigure property uses is critical.

Fennel also identifies two categories of external impacts that once were appropriately ignored by the fee simple but that have emerged as too important to put to the side. What was needed in the past is different from what is needed now. The first is the holdout situation and the attendant assembly costs associated with holding out. The second externality pertains to the costs of coordinating governance mechanisms that reach “positive spillovers” that flow from the beneficial and nonreciprocal contributions of proximate land users. (P.1473.)

So, let’s put an end to the endlessness is what Fennel says. Let’s end the “forever” estate with its prized holdout entitlements and make the old fee simple new again by shifting it in favor of time-limited estates that facilitate agglomeration, collective management, and “adaptive fluidity.” (P. 1504.)

Fennel is very realistic about what she is proposing to her reader. She knows that change can be difficult and that hers is a very bold proposal. After all, she is advocating the “retrofitting of property for modern conditions” and such ideas are not for everyone. (P. 1494.) As the saying goes, many people are most comfortable with the devil they know.

Fennel acknowledges the objections that attend the shift in tenure forms and entitlements of the majority of real property owners from the fee simple to a form of defeasible fee. (P. 1498.) She confronts the objections to her proposal in the same convincing and clear manner in which she lays out her ideas: (1) We already have some iterations of these ideas in place. (2) The nonexistence of these forms of property does not support the argument that they lack value. (3) The need for agglomeration and flexibility in urban spaces cannot be fully addressed with the current fee simple and ordinary market solutions do not help achieve the optimal amount of agglomeration and flexibility. (4) The uniqueness of the challenge – “repeatedly assembling *and reassembling*” valuable urban land uses requires a unique approach. (5) The ability to reconfigure and readapt urban spaces does not have to lead to displacement and dispossession; the system could be made flexible to offer long-term options for those who desire more tenure security.

Fennel’s article is a joy to read. It is a fresh look at the fee simple and proof (which I unashamedly share with my first year property students) that grappling with the fee simple remains a worthy and honorable task. Only by understanding the fee simple, what it is and why it was created, can we imagine the next iteration of the fee simple in our increasingly urban society.

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