Property Law, Law & Economics, and Means for Reaching Distributive Goals

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Date : November 23, 2015

Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, **Minn. L. Rev.** (forthcoming 2015), available at SSRN.

Lee Anne Fennell and Richard H. McAdams' *The Distributive Deficit* in Law and Economics is framed as a law and economics article but makes a significant contribution to property theory. *The Distributive Deficit* takes on the standard law and economics assertion "that tax is strictly superior to legal doctrine as a means of redistributing income," (p. 7) and the related assumption "that the distributive pattern in a society will be invariant to the political form of redistribution." (p. 14) As Fennell and McAdams note, the general acceptance of both tax superiority and the "invariance hypothesis" in law and economics can be credited largely to the work of Louis Kaplow and Steven Shavell (see here, here, and here). Fennell and McAdams' article is a devastating and wholly convincing critique of this line of reasoning, grounded in the failure of standard law and economics approaches to take into account political action costs. Tax superiority depends on rule and tax changes having zero transaction costs when it comes to establishing the new order. Yet, as Fennell and McAdams' argue, political action costs can vary depending on preferred mechanism. Put differently, the theoretical possibility of a tax-and-transfer solution does not necessarily mean a redistributive rule change should automatically be discarded: given political action costs, a rule change may still be more efficient than a tax-based approach.

Fennell and McAdams' contribution is particularly valuable at this point in property law scholarship. The appropriateness and power of law and economics approaches to property, especially the information-cost theories championed by Henry Smith and Thomas Merrill, have taken center stage in debates between progressive and conservative property scholars. Tellingly, in 2015 the AALS Property Section chose to dedicate the section's panel to "the place and scope of economic analysis." Those seeking to diminish the importance of law and economics in property law have argued that economic-approaches alone cannot capture all that property law seeks to accomplish and that economic values are only one of many pluralistic values of import. That is to say, recent criticism has been that of the "outsider," seeking to undermine the conservative tendency of law and economics-based property scholarship not by arguing that law and economics is a bad tool but that it should not be the only approach. Written by two University of Chicago professors, *The Distributive Deficit* is more of an "insider" attack. It does not question the core tenets of law and economics, it simply shows that on efficiency grounds the oft-repeated conclusion that tax-and-transfer is necessarily a superior means of redistribution compared to rule changes is incorrect. But it is an important intervention for property scholars because without it, the idea that property law should be based upon the notion of tax superiority—advanced by Yale Law professor Robert Ellickson in a recent article—might be uncritically accepted.

The Distributive Deficit begins by showing that the invariance hypothesis is false and then highlights the importance of political action costs. Fennell and McAdams define "political action costs" as "all the impediments parties encounter in achieving desired distributive outcomes through legal coercion, whether through legislation, litigation, or regulation." (p. 22) They convincingly argue that, because of offset problems (i.e., changes are not inevitably and perfectly offset), behavioral economics (i.e., people are more than rational robots), and preferences for fairness (in terms of political action costs, punishment, and bundling goals), the invariance hypothesis is false. They then explore in greater detail the significance of political action costs. In some respects, this point is akin to that made by Ronald Coase in his introduction to The Firm, the Market, and the Law (1987), namely that we live in a world of transaction costs and therefore academics should focus on the world we live in rather than on the artificially sterile "Coasian" world. In language that arguably is a powerful response to Kaplow, Shavell, and now Ellickson, *The Distributive Deficit* argues that "the individuals who would give categorical and counterintuitive advice—that, outside of tax, welfarists should ignore the welfare effects of distribution—bear the burden of proving the advice is well-founded." (p. 48) As I argue elsewhere, discussing the efficiency versus equity claims of Merrill and Smith, questions about the burden of proof and assumptions about whether property law generally works, or does not work, weigh heavily on property debates.

Ultimately, *The Distributive Deficit* is a great article, first, because it uses the tools of law and economics to question a core assertion—tax superiority—of most law and economics (and conservative property) literature and, second, because it is a grounded article. Though neither author would probably identify today as a critical legal scholar, the article in this way is reminiscent of a similar move by Duncan Kennedy to blunt the cold-hearted law and economics attack on the implied warranty of habitability. Similarly, *The Distributive Deficit* shows the power of working with economic tools as opposed to against them. Moreover, Fennell and McAdams are careful to not let their largely economic theory project escape the bounds of realism. They write, "tax superiority has traction as a normative prescription only as contrasted with some other actually available means of redistribution." (p. 29 (emphasis added)) Were Professor Fennell not already known for her extensive scholarly work in property law, there is some risk that this article (focused as it is more on law and economics than explicitly about property law) might not immediately capture the attention of property law scholars. But in the end, *The Distributive Deficit* not only provides "a reason why distributive goals might at times be better pursued through legal rules than through tax mechanisms," but, by doing so, it also provides more theoretical space and might for progressive property scholarship.

Cite as: Ezra Rosser, *Property Law, Law & Economics, and Means for Reaching Distributive Goals*, JOTWELL (November 23, 2015) (reviewing Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, **Minn. L. Rev.** (forthcoming 2015), available at SSRN), https://property.jotwell.com/property-law-law-economics-and-means-for-reaching-distributive-goals/.